NO. 10-1293

IN THE
SUPREME COURT OF THE UNITED STATES

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FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

*Petitioners*,

v.

FOX TELEVISION STATIONS, INC., ET AL.,

*Respondents*.

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FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

*Petitioners*,

v.

ABC, INC., ET AL.,

*Respondents*.

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

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# BRIEF OF *AMICI CURIAE* FOCUS ON THE FAMILY AND FAMILY RESEARCH COUNCIL IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICI CURIAE*[1]

FOCUS ON THE FAMILY is a non-profit religious corporation, headquartered in Colorado, committed to strengthening the family in the United States and abroad by providing help and resources that are grounded in biblical principles. The president of Focus on the Family, Jim Daly, hosts the flagship Focus on the Family radio broadcast about family issues carried daily on 2,000 radio outlets in the United States and heard daily by 1.5 million North America listeners. Among the resources Focus on the Family provides are *Thriving Family* magazine and *PluggedIn*, which helps parents make wise media discernment choices for their families. *PluggedIn* resources include a website, PluggedIn.com, which receives more than 1 million visits every month, a mobile phone app, and 1- to 2- minute radio features that reach more than 6 million listeners weekly. Focus on the Family is concerned about the widespread distribution of obscenity and profanity.

FAMILY RESEARCH COUNCIL ("FRC") is a non-profit organization located in Washington, D.C. It exists to develop and analyze governmental policies affecting the family. FRC is committed to strengthening traditional families in America and

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[1] The parties gave blanket consents to the filing of *amicus curiae* briefs. Pursuant to SUP. CT. R. 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, made a monetary contribution intended to fund the preparation of or submission of this brief.

advocates continuously on behalf of policies designed to accomplish that goal.

## SUMMARY OF ARGUMENT

"[I]t is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance." *Roth v. United States*, 354 U.S. 476, 483 (1957). *Amici* contend that society has a strong and abiding interest, firmly grounded in the First Amendment, in maintaining standards of decency. This interest extends especially to the preservation of standards of decency with respect to the materials broadcast into the sanctuary of our homes. This Honorable Court should not assume that the public clamors for more indecency, as Respondents and their supporters suggest. There is no evidence whatsoever that the Federal Communications Commission ("FCC") has been inundated with complaints of the lack of indecent programs on broadcast TV or radio. Rock singer Bono has no more right to shout "f***ing brilliant" in the homes of unsuspecting American families than we would have in his. Similarly, the indecent comments of singer/actress Cher and actress Nicole Richie are out of place in the homes of those families who thought that network television represented a safe haven for family viewing. Neither these personalities nor their network sponsors have rights under the U.S. Constitution greater than the rights of the homeowners they invaded over the public airwaves.

Over the past fifty years, some courts, in the name of expanding free speech rights, have ignored the interest in societal decency, the government's

interest in the protection of children from indecent content, and the right to be left alone, free from the constant barrage of indecent communications. This, coupled with lax enforcement on the part of the FCC of indecency law until the beginning of the previous decade, has enabled the purveyors of indecency to overrun the rights of decent Americans, who are now bombarded by degrading, indecent, coarse, and sexually charged content on an almost around-the-clock basis.

Emboldened by the success of their counterparts in other forms of media, broadcasters have been pushing the envelope by gradually imposing more and more indecent content on an unsuspecting public. Like the frog in the kettle, society is being coarsened while broadcasters have, in the words of the late Senator, Daniel Patrick Moynihan, "defined deviancy down." DANIEL PATRICK MOYNIHAN, *Defining Deviancy Down*, THE AMERICAN SCHOLAR 17 (Winter 1993), cited in ROBERT BORK, SLOUCHING TOWARD GOMORRAH 3 (New York: Regan Books 1997). The communications of broadcasters over the public airwaves have often radically diverged from the interests of the public itself that broadcasters are required to serve. Broadcasters now seek to invalidate all regulation of indecency on the public airwaves, leaving no safe haven whatsoever to the majority of Americans who desire decent programming.

*Amici* contend that it is critical to recognize the very real and vital societal interests in maintaining standards of decency, in conjunction with individual free speech rights. The FCC's revised guidance with respect to what constitutes indecency does exactly this and it does so well within the confines of the

First Amendment. Further, it logically follows the very type of context-based analysis endorsed by this Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

The unproven claims of broadcast media that the FCC's action is uneven, arbitrary and capricious, do not provide sufficient reason to cavalierly toss aside the protections historically afforded the viewing public consistent with constitutional precedent. *Amici* urge this Court to follow that precedent and find that the FCC's action is a constitutionally permitted application of 18 U.S.C. § 1464.

American broadcast TV and radio are meant to be available to all. If the court opens the floodgates to so-called "adult material" at all hours on broadcast TV and radio in the name of the First Amendment, then TV and radio will be open only to adults, not children, and, at that, adults who desire only more indecent material. Television viewers will be forced to listen to indecent material. Profanity and sex will dominate daytime radio. Nothing in the First Amendment requires this result.

## ARGUMENT

### I. THE *PACIFICA* COURT'S REASONS FOR UPHOLDING A BAN ON BROADCAST INDECENCY STILL HOLD TRUE TODAY.

The *Pacifica* Court relied on several important reasons in announcing its decision upholding the ban on broadcast indecency. The first of these reasons was a recognition that viewers who did not consent to view indecency have a "right to be left alone" in their own homes. 438 U.S. at 748, citing *Rowan v.*

*Post Office Dept.*, 397 U.S. 728 (1970). Second, the Court affirmed that the State has an important interest in protecting children from indecent material. Pacifica, 438 U.S. at 748. Third, the Court recognized that broadcast bandwidth is a scarce commodity that should be regulated in the public interest. Id. at 731, n.2 (citing *In re Citizens Complaint Against Pacifica Found. Station WBAI* (FM), New York, New York, 56 F.C.C.2d 94, 97, ¶ 9 (1975). Each of these reasons has only grown in force in the ensuing years since *Pacifica*.

### A. Non-Consenting Adults Still Have a Right to be Left in Peace in Their Homes.

*Pacifica* affirmed the rights of all Americans who did not wish to be bombarded with indecent speech while listening to the radio or watching television, and that the individual's "right to be left alone" in the privacy of his or her home outweighed the rights of an intruding broadcaster to disseminate indecent communications. *Pacifica*, 438 U.S. at 748, citing *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970).

This "right to be left alone" had previously been described by Justice Brandeis in his revered dissent in *Olmstead v. United States* as "the most comprehensive of rights and the right most valued by civilized men." 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Both the language and sentiment of Justice Brandeis' statement has continued to be a part of our jurisprudence to this day.

In *Rowan*, a case addressing the right of homeowners to opt out of unwanted advertisements sent through the mail, the Supreme Court held that "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." *Rowan*, 397 U.S. at 736.[2] Balancing the competing rights in that case, the Court acknowledged "we are inescapably captive audiences for many purposes," but that "a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail," and that the householder should be "the exclusive and final judge of what will cross his threshold" even if this has the effect of "impeding the flow of ideas." *Id*.

The Court continued: "[w]eighing the highly important right to communicate … against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id*. at 736-737. The Court concluded:

> We therefore categorically reject the argument that a vendor has a right under

[2] The Court has since opined that the common law "right to be left alone" is sometimes more accurately characterized as an "interest" that the States can choose to protect in certain situations. *See Hill v. Colorado*, 530 U.S. 703, 717, n.24 (2000), referencing *Katz v. United States*, 389 U.S. 347, 350-351 (1967). Whether the "right to be left alone" is defined as a "right" or an "interest" makes little difference in the argument as to whether it should be protected by the FCC in the circumstances of indecency flowing into one's own home. Whatever semantics are used, it has been consistently protected by our jurisprudence.

> the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.

*Id.* at 738 (citation omitted).

There are certainly differences between *Rowan* and *Pacifica*. The former dealt with printed material sent through the mail, whereas the latter dealt with broadcast media. The statute discussed in *Rowan*, admittedly, merely allowed individual homeowners to affirmatively "opt out" of receiving certain mailings, whereas the *Pacifica* case allowed the FCC to regulate all broadcasts during certain times of day, whether or not the recipients of these broadcasts would have been subjectively offended by the content. Nonetheless, because of the unique characteristics of broadcast media the Supreme Court relied on the principles enunciated in *Rowan* to uphold the constitutionality of FCC regulation of indecency. *Pacifica*, 438 U.S. at 748-749.

Since *Pacifica*, the Court has continued to uphold the "right to be left alone" in one's own home articulated by Justice Brandeis. More recently, the Court stated:

> The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader "right to be let alone" that one of our wisest Justices [Brandeis] characterized as "the most comprehensive of rights and the right most valued by civilized men." The right to avoid unwelcome speech has special force in the privacy of the home and its immediate surroundings….

*Hill v. Colorado*, 530 U.S. 703, 716-717 (2000) (internal citation omitted).

The Court in *Hill* balanced this right to be let alone with the First Amendment rights of others, stating that, "The right to free speech … may not be curtailed simply because the speaker's message may be offensive to his audience. But the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it." *Id.* at 716 (citing *Frisby v. Schultz*, 487 U.S. 474, 487 (1988)). Thus, the intrusive nature of some speech is to be considered. The *Hill* Court further said:

> It may not be the content of the speech, as much as the deliberate "verbal or visual assault," that justifies proscription. Even in a public forum, one of the reasons we tolerate a protester's right to wear a jacket expressing his opposition to government policy in vulgar language is because offended viewers can "effectively avoid further bombardment of their sensibilities simply by averting their eyes."

> The recognizable privacy interest in avoiding unwanted communication varies widely in different settings. *It is far less important when "strolling through Central Park" than when "in the confines of one's own home," or when persons are "powerless to avoid" it*.

*Hill*, 530 U.S. at 716, quoting *Cohen v. California*, 403 U.S. 15, 21-22 (1971) (emphasis supplied; internal citations omitted).

### B. Children Still Deserve Protection from Indecency.

As the second reason for the holding in *Pacifica,* the Court held that "broadcasting is uniquely accessible to children, even those too young to read," *Pacifica,* 438 U.S. at 749, and expounded as follows:

> *Pacifica*'s broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held [in *Ginsberg v. New York,* 390 U.S. 629 (1968)] that 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. The ease with which children may obtain access to

> broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.

*Id.* at 749-750 (internal citations omitted).

The Court thus held that since broadcasting was uniquely available to children merely by turning on the television or radio, it could be regulated to a greater extent than other forms of media. This is still true today. The choices parents make to limit indecency, such as keeping television out of the home or accepting only broadcast television, should be respected.[3]

Moreover, the constitutional rule accords with sound scientific reasons for protecting children from indecent broadcasts. According to the Center on Media and Child Health at Children's Hospital at Harvard, media's influence on children is "integral to their growing sense of themselves, of the world, and of how they should interact with it."[4] The Center notes that the influence of media has been linked to negative health outcomes, such as smoking, obesity, risky sexual behaviors, eating disorders, poor body image, anxiety, and violence. The Center concludes

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[3] The Court has long recognized a Constitutional right to bear and raise children in accordance with one's beliefs. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

[4] Center on Media and Child Health at Children's Hospital, Harvard Medical School, and Harvard School of Public Health, available at: www.cmch.tv/mentors_parents/messaging.asp (last accessed Sept. 5, 2009).

that "content matters—all media are educational." *Id.* Others observe the connection between media and early sexualization:

> The problem is that the sexualized childhood is harming young children at the time when the foundations for later sexual behavior and relationships are being laid.... They are forced to deal with sexual issues when they are too young, when the way they think leaves them vulnerable to soaking up the messages that surround them with few resources to resist.

DIANE E. LEVIN, PH.D. and JEAN KILBOURNE, ED.D, SO SEXY SO SOON: THE NEW SEXUALIZED CHILDHOOD AND WHAT PARENTS CAN DO TO PROTECT THEIR KIDS, 63-64 (Ballantine Books, N.Y. 2008).

Eileen Zurbriggen, the chair of the American Psychological Association's Task Force on the Sexualization of Girls, reports, "The consequences of the sexualization of girls in media today are very real and are likely to be a negative influence on girls' healthy development. We have ample evidence to conclude that sexualization has negative effects in a variety of domains, including cognitive functioning, physical and mental health, and healthy sexual development." EILEEN ZURBRIGGEN, REPORT OF THE APA TASK FORCE ON THE SEXUALIZATION OF GIRLS (Washington, D.C. 2007).

In addition to scientific studies, the Supreme Court has recently pointed out that common sense alone establishes that indecency is harmful to children:

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

*FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009).

### C. Broadcast Bandwidth Continues to Grow More Scarce.

It has been proposed that "technological advances have eviscerated the factual assumptions underlying" *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U. S. 367 (1969) and *Pacifica. Fox v. FCC*, 129 S. Ct. at 1821 (Thomas, J., concurring). In particular, the claim is made that "[b]roadcast spectrum is significantly less scarce than it was 40 years ago." *Id.* That statement is highly debatable.

While it is correct that scientific advances have made us more efficient users of electromagnetic spectrum, the demand for spectrum has grown exponentially in the past twenty years as the need for mobile, wireless Internet use has exploded. Spectrum that is most desirable is that with a frequency under 3 GHz. In particular, devices using these frequencies receive signals through an antenna, not a dish, which greatly assists mobility and convenience. The tremendous demand for spectrum is revealed by the enormous prices that have been raised in FCC auctions in the past decade. For example, spectrum in the 700 MHz bands brought in $19.6 billion dollars at an auction in March 2008. Brad Reed, "FCC Hauls in $19.6 Billion for 700 MHz Auction," *Network World* (Mar. 19, 2008).

Federal Communications Commission Chairman Julius Genachowski has argued recently that there is likely to be a "35X increase in mobile broadband traffic over the next 5 years." *Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, FCC Spectrum Summit*, "Unleashing America's Invisible Infrastructure," Washington, D.C. (Oct. 21, 2010) at 3. Chairman Genachowski estimates that "around 300 additional megahertz of spectrum [will be needed] by 2014 to accommodate this growing demand." *Id.* at 4. The FCC estimates that the value of that spectrum could be "as high as $120 billion." *Id.*

In fact, obtaining additional spectrum for wireless broadband is so critical to America's wireless economy that Chairman Genachowski has made a number of proposals. In one of them

"current spectrum licensees, such as TV broadcasters, could voluntarily relinquish spectrum; the FCC would then auction spectrum for flexible wireless broadband, and some portion of the proceeds would be shared with the old licensee." *Id.* at 6. *Amici* make no comment on the wisdom of this proposal, but we note that it undermines the factual basis for the proposition that spectrum is not a scarce resource. At present, spectrum is finite and costly, and it is so valuable that the FCC is willing to attempt to cannibalize the holdings of powerful groups like broadcasters to acquire more of it for wireless use.

## II. THE FCC'S CURRENT INDECENCY REGIME DOES NOT VIOLATE THE FIRST OR FIFTH AMENDMENTS BECAUSE IT IS NOT IMPERMISSIBLY VAGUE AND DOES NOT HAVE AN IMPERMISSIBLE CHILLING EFFECT.

A primary concern regarding speech restrictions that are vague or substantially overbroad is that the regulations will have a "chilling effect" on otherwise protected speech. *Amici* contend that the FCC's current indecency regime is neither impermissibly vague nor substantially overbroad and thus cannot be said to have a chilling effect on protected speech.

Nonetheless, Respondents contend that the current indecency regime has changed substantially, and exerts a chilling effect on protected speech. In looking at changes in the FCC's enforcement approach, we see that 1) the Commission now believes that even "fleeting expletives" can constitute indecency and be subject to regulation, and 2) that in

enforcing the ban on indecent expletives, it takes a context-based approach.

It is not the intent of *Amici* to take lightly the concerns over the potential for chilled expression caused by vague regulations or to minimize the importance of preventing substantially overbroad regulations from having a chilling effect on speech. The FCC's current regulatory regime offends neither doctrine because 1) it is no more vague than the previous regime that was upheld in *Pacifica*; 2) the potential "chilling effect" under the FCC's current enforcement regime is no greater than under the previous policy; 3) a context-based approach is necessary to determine indecency; 4) it provides a safe harbor; and 5) it poses no greater chill than the ban on obscenity.

### A. The FCC's Current Enforcement Policy is Not Unconstitutionally Vague Because It Provides Clear Notice to Broadcasters Regarding What Content is Indecent.

The FCC's indecency regime does not violate the Fifth Amendment because it is not impermissibly vague. In 2001, the FCC published a policy statement to provide guidance as to its enforcement policies with respect to broadcast indecency. It established two fundamental aspects for indecency findings. First, material "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." *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R.

7999, 8002 ¶ 7 (2001) ("2001 Industry Guidance"). Second, "the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at 8002, ¶ 8.

The policy statement further explained that the determination of whether a broadcast is "patently offensive" turns on the "full context" in which the material is broadcast and is "highly fact-specific." *Id.* at 8002-8003 ¶ 9 (emphasis omitted). It identifies three factors which guide the analysis of whether content is patently offensive:

> (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 description 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).

These factors are sufficiently precise to put broadcasters on notice as to what material is unacceptable for broadcasting between the hours of 6 a.m. and 10 p.m. Although the Commission had not regulated fleeting expletives prior to the issuance of the 2004 Guidance, it is reasonable to believe that the 2001 Guidance could apply to fleeting expletives. Certain words, such as the "f-word" and "s-word" have an inherently sexual or excretory connotation. Even when used as an intensifier, as the singer Bono did during the 2003 Golden Globe awards, the "f-word" and similar words are used as intensifiers

precisely because they connote sexual or excretory activity. *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes" Awards Program*, 16 F.C.C.R. 8003 ¶ 8 (2004) ("2004 Guidance").

Due to the inherently sexual or excretory nature of certain words, broadcasters are on notice that those words are presumptively patently offensive. *See Fox Television Stations, Inc., v. FCC*, 613 F.3d 317, 331–32 (2nd Cir. 2010). Instead of banning these words outright, however, the FCC examines the words in context, as required by the Court in *Pacifica*, 438 U.S. at 750.

The Second Circuit is misguided in holding that forbidding fleeting expletives "[bears] no rational connection to the Commission's actual policy," because the FCC "[has] not instituted a blanket ban on expletives," 613 F.3d at 324, *quoting Fox Television Stations, Inc.,* v. FCC, 489 F.3d 444, 458 (2nd Cir. 2007). The FCC allows broadcasters more leeway by using a context-based approach rather than banning all expletives. Broadcasters are on notice that these words are presumptively patently offensive. If the FCC were to ban all utterances of these words, regardless of context, broadcasters would likely complain that the policy made no exception for content with harsh language that was possessed of extraordinary merit. Short of eliminating all restrictions on broadcasting, it is difficult to see how the FCC can better balance broadcasters' interest in knowing what material is permissible and the public's interest in maintaining decency in broadcasting. And as this Court has noted, "perfect clarity and precise guidance have never been required even of regulations that restrict

expressive activity." *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2719 (2010), quoting *United States v. Williams*, 553 U.S. 285, 304 (2008) (quoting *Ward v Rock Against Racism*, 491 U.S. 781, 794 (1989)).

Likewise, the FCC's guidelines provide sufficient guidance to broadcasters regarding nudity that is considered patently offensive. The second factor in the FCC's 2001 Guidance is "whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities." *2001 Guidance* at 8003 ¶ 10. Despite respondents' attempts to argue otherwise, buttocks and breasts can be considered sexual or excretory organs, if only because the naked public display of these body parts is usually considered an affront to decency. Additionally, although respondents argue that the nudity is brief, even they do not argue that it can be characterized as "fleeting." Respondents admit that the camera repeatedly returns to the actress's naked buttocks and breasts. Response in Opposition to Petition for Writ of Certiorari at 8–9.

The character's nudity is the point of the entire scene. Were the point of the scene only to show the difficulties that ensue when a parent becomes involved with a new romantic partner, it would have been easy to do so by implying the character's nudity rather than dwelling on it. Alternatively, CBS could have shown the offending episode during the safe harbor period, away from the eyes of impressionable children.

The Court's decision in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) supports the FCC's enforcement policy. In declining to apply *Pacifica* to the Communications Decency Act, the

Court noted that there were significant differences between the two cases. In *Pacifica,* unlike in *Reno*, the medium at issue had long been subject to regulation. Additionally, the objectionable radio broadcast "represented a rather dramatic departure from traditional program content," and was not categorically prohibited, but restricted to certain airtimes. *Reno,* 521 U.S. at 867.

Like radio broadcasting, and unlike Internet content, television broadcasting has long been subject to regulation. Also like radio broadcasting, and unlike Internet content, television content can be confined to hours when children are unlikely to be in the audience.

Furthermore, like the Carlin broadcast, the objectionable content contained in the Golden Globes and NYPD Blue broadcasts represented a sharp departure from broadcasting norms. Were this not the case, surely respondents would have provided examples of the numerous other uses of the "f-word," "s-word," and sustained shots of nude buttocks and breasts. Such examples are conspicuous by their absence.

### B. The Potential "Chilling Effect" Under the FCC's Current Enforcement Regime is No Greater than that Under the Previous Policy, which has Already Passed Constitutional Muster in *Pacifica*.

In *Pacifica,* this Court upheld the FCC indecency regime then being used to enforce 18 U.S.C. § 1464 (1976 ed.) which prohibited "any obscene, indecent or profane language by means of radio

communications" and determined not only that the "Filthy Words" monologue of George Carlin was "indecent," but that the FCC's regulation of such speech on the airwaves was in no way unconstitutional. Following the Court's opinion in *Pacifica*, the FCC reported that it would not attempt to promote an expansive interpretation of the indecency concept. *See, e.g.*, *In re Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254 (1978) ("We intend strictly to observe the narrowness of the *Pacifica* holding.") In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the "indecent" words in question.

Much has been made of the fact that in *Pacifica* indecent words were used repeatedly, whereas in the broadcasts that are the subject of this action they were used once or twice. To support their argument that the *Pacifica* Court did not intend to institute a ban on "fleeting expletives," Respondents point to the following language:

> It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which *context is all-important. The concept requires consideration of a host of variables.*

*Pacifica,* 438 U.S. at 750 (emphasis added).

Respondents would have us believe the Court would have looked unfavorably on a ban of "fleeting expletives" and that the regulation was upheld only because Mr. Carlin's offense was so egregious. This could not be further from the truth, as shown by the further statement from the Court:

> To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

*Id*. at 749-749.

In fact, it was not the Court that approved "fleeting expletives." On the contrary, it was the FCC which, in the years immediately following *Pacifica*, merely wished not to pursue claims that didn't reach the levels it deemed sufficiently egregious. "Repetitious use of Carlin's 'seven dirty words' effectively became the FCC's yardstick for 'indecency.'" *Action for Children's Television v. FCC*, 852 F.2d. 1332, 1336 (D.C. Cir. 1988).

Permitting "fleeting expletives" is akin to giving broadcasters "one free bite" at indecency. However, for a young child viewing "family programming" in prime time, indecent language is still indecent, whether it is said once or repeated ad infinitum.

### C. A Context-based Approach to Determining Indecency Will Not Chill Constitutionally Protected Speech.

Respondents argue that the FCC's current indecency regime chills protected speech because it has evolved from the policy in place in the years immediately following *Pacifica*, and because the determination of indecency is based on the context in which words are uttered and whether it is offensive by contemporary community standards.

Far from rendering the current enforcement regime vague, and therefore causing a chilling effect on speech, the determination of context is absolutely necessary to determining indecency. *See Pacifica,* 438 U.S. at 750. As noted above, the FCC's policies are not new; in 2001, the FCC published a policy statement to provide guidance as to its enforcement policies with respect to broadcast indecency. As the FCC moved to a stricter regulation of indecency, no longer requiring repetitious use of the "seven filthy words," it realized that context was important, and gave adequate guidance to assist broadcasters in determining whether content was suitable or whether it would be considered indecent.

### D. The Potential "Chilling Effect" is Mitigated by a "Safe Harbor" for Broadcasts between 10:00 p.m. and 6:00 a.m.

This is not the first time the FCC has modified its enforcement standards. After a decade of refusing to take action unless material involved

repeated use, for shock value, of words similar to or identical to those satirized in the Carlin "Filthy Words" monologue, the FCC developed a generic definition of indecency which was addressed by the Court of Appeals for the D.C. Circuit in 1988. The court upheld the generic definition of indecency, which is not dissimilar to the definition currently in use, but noted the important position of the "safe harbor" in preventing the possibility of a chilling effect on speech:

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

*Action for Children's Television*, 852 F.2d at 1342-1343 (emphasis supplied).

Since that case, there has been a clearly delineated "safe harbor" between the hours of 10:00 p.m. and 6:00 a.m., when "indecent" broadcasting is allowed. It is reasoned that this allows sufficient time for adults to view indecent content, while simultaneously limiting its intake by young children.

If broadcasters are concerned that certain content may be considered indecent in the FCC's context-based approach, they are not prevented from airing it during the "safe harbor" time periods. This

mitigates any claim of a "chilling effect" on speech that would otherwise be protected.

### E. Any Potential "Chilling Effect" of the Indecency Regulations is No Greater than that Imposed by Regulation of Obscenity.

Unlike indecent speech, which is allowed between 10:00 p.m. and 6:00 a.m., when children are unlikely to hear or view it, obscene speech is never allowed in broadcast media and is not given First Amendment protection. While the federal obscenity statute does not expressly define obscenity, this Court has devised a three-part test to identify obscenity in *Miller v. California*:

> (a) Whether "the average person, applying contemporary community standards" would find the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state [or federal] law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. 15, 24 (1973) (internal citations omitted).

Since its inception the *Miller* test has been attacked as vague and ambiguous, and anti-obscenity laws have been targeted as having a "chilling effect" on protected speech. The *Miller* Court itself acknowledged "[t]hat there may be marginal cases in which it is difficult to determine

the side of the line on which a particular fact situation falls" but that this "is no sufficient reason to hold the language too ambiguous to define a criminal offense." *Id.* at 27, n.10 (quoting *United States v. Petrillo*, 332 U.S. 1, 7 (1947)). The Court further stated, "If the inability to define regulated materials with ultimate, god-like precision altogether removes the power of … Congress to regulate, then 'hard core' pornography may be exposed without limit to the juvenile…." *Id.*

This Court, and the lower courts, have repeatedly refused to strike down obscenity laws, even while acknowledging the potential chilling effect on protected speech. "While laws such as the one at issue indeed may chill the expression of protected speech in certain instances, such secondary effects seem unavoidable if the federal anti-obscenity statute is to be enforced." *Eckstein v. Melson*, 18 F.3d 1181, 1187 (4th Cir. 1994).

As in *Miller* and later cases relying on its standard, the Court in *Pacifica* did not strike down the FCC's regulation merely because of the possibility that it would chill protected speech. *Pacifica*, 438 U.S. at 743. As shown above, the FCC has done all in its power to avoid the possibility of chilling protected speech. Its current enforcement regime is no more vague than that regime addressed in *Pacifica*, and as required by that case, it takes a context-based approach in defining indecency. Furthermore, it provides a "safe harbor" between 10:00 p.m. and 6:00 a.m. Thus, Respondents cannot be heard to complain that the FCC's regulatory regime for indecency "chills" their legitimate expression.

## III. STRICT SCRUTINY IS INAPPLICABLE TO REVIEW OF INDECENCY RESTRICTIONS ON BROADCASTING.

Strict scrutiny is not applicable to the review of indecency restrictions on broadcasting for several reasons. First, as the Court noted in *Pacifica* (declining to apply strict scrutiny to the FCC's regulations), patently offensive language, while perhaps subject to First Amendment protection, "surely lies at the periphery of *First Amendment* concern" and "the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context." *Pacifica,* 438 U.S. at 743, 747 (emphasis supplied). There remain ample outlets for patently offensive sexual and excretory language, even within the broadcast context. Broadcasters are permitted to air such material during the "safe harbor" period from 10 p.m. to 6 a.m., for a total of fifty-six hours per week. *Amici* simply contend that the hours of 6 a.m. to 10 p.m., when children are likely to be in the audience, are not appropriate contexts for broadcasting patently offensive sexual and excretory language.

Secondly, strict scrutiny does not apply in the broadcast context. The Court recently applied strict scrutiny to a state statute prohibiting the sale or rental of violent video games to minors. *See Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011). However, there are significant differences between the sale or rental of video games and broadcasting. The most important difference pertains to the uniquely pervasive nature of broadcasting. *See Pacifica*, 438 U.S. at 748.

Broadcasting enters the home of every person with a television set. In contrast, a person must take affirmative steps to buy or rent a video game. The only way to prevent broadcast television from entering the home is not to have a television at all—and that, indeed, reduces adults to viewing what is only fit for children. The second difference lies in the likelihood of harm to children. The Court recognized in *Pacifica* that society has an interest in protecting children from exposure to indecent material. *Pacifica*, 438 U.S. at 749–50. Children's access to video games is limited by their ability to visit stores or afford the games. Parents have a greater ability to restrict their children's access to games by refusing to purchase gaming consoles or the games themselves. In contrast, a preschool child can easily turn on the television while a parent is in another room. For these reasons, the FCC's indecency regulations in no way resemble the restriction on speech at the source that was subjected to strict scrutiny in *Brown*.

## IV. THE LIMITATIONS ALLOWED ON BROADCAST SPEECH ARE GROUNDED IN CONSTITUTIONAL PRINCIPLES THAT HEARKEN BACK TO AMERICA'S FOUNDING.

We are cognizant of that fact that at least one member of this Court has argued that the more limited protections afforded broadcast speech for decades "lack[] any basis in the Constitution." *Fox v. FCC*, 129 S. Ct. at 1821 (Thomas, J., concurring). However, while *Amici* are similarly concerned about any possible deep intrusion into First Amendment rights, we believe that the more limited protections

afforded broadcast speech by *Pacifica* are well-grounded in original constitutional principles.

These principles recognized that government may legitimately take steps to reduce the likelihood that children will be exposed to harmful materials. As has been expressed recently, "[t]he Framers could not possibly have understood 'the freedom of speech' to include an unqualified right to speak to minors." *Brown v. Entertainment Merchants Assn.*, 131 S. Ct. at 2759 (Thomas, J., dissenting). Additionally, the Founders "would not have understood 'the freedom of speech' to include a right to speak to children without going through their parents." *Id.*

As this court observed in *Pacifica* "[w]e have long recognized that each medium of expression presents special First Amendment problems." *Pacifica*, 438 U.S. at 748 (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-503). The Court proceeded to remark that "broadcast media have established a uniquely pervasive presence in the lives of all Americans." *Id.* at 748. While some have claimed that the emergence of new media has undermined *Pacifica's* observation about broadcasting's penetration of the American home, in fact, Petitioners have demonstrated convincingly that broadcast TV and radio still maintain "a uniquely pervasive presence" in American life. Petitioners' Brief at 44-46.

That deep presence links to the second argument presented in *Pacifica* justifying the limits Congress has allowed for broadcast speech. That is, "broadcasting is uniquely accessible to children, even those too young to read." *Pacifica*, 438 U.S. at 749. Echoing the founding constitutional principles supporting parental protection of children, noted

above, the *Pacifica* court stated that bookstores and movie theaters "may be prohibited from making *indecent* material available to children." *Id*. at 749 (emphasis added). The Court pointed out that previously it had held "that 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." *Id*., citing *Ginsberg v. New York,* 390 U.S. at 640 and 639.

Therefore, the limitations allowed on broadcast speech are actually grounded in constitutional principles hearkening back to America's founding. They recognize that each communications media presents its own set of considerations as to how it may affect children. Some have virtually no impact; some, like broadcasting, may have a powerful effect on children. Accordingly, "legislature[s] [can] properly conclude that parents and others, teachers for example, who have… primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Brown*, 131 S. Ct. at 2760 (quoting *Ginsberg,* 390 U.S. at 639). Therefore, it is constitutionally permissible that regulations like those promulgated by the Commission in this instance should be able to restrict profanity and nudity during certain hours of the day when children are more likely to be listening or watching unattended by their parents.

## CONCLUSION

For the foregoing reasons, *Amici* pray that this Honorable Court reverse the judgment of the court

below and declare that the FCC's current broadcast indecency enforcement regime is constitutional.

Respectfully submitted,

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