No. 10-1293

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

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

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

BRIEF OF RESPONDENTS FOX TELEVISION STATIONS, INC.; NBCUNIVERSAL MEDIA, LLC; CBS BROADCASTING INC.; & FBC TELEVISION AFFILIATES ASSOCIATION

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QUESTION PRESENTED

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

RULE 29.6 CORPORATE DISCLOSURE STATEMENTS

Pursuant to Supreme Court Rule 29.6, Respondents make the following disclosures:

Fox Television Stations, Inc. is a wholly-owned indirect subsidiary of News Corporation, a publicly held company.

NBCUniversal Media, LLC was formerly known as NBC Universal, Inc. and is the indirect parent of NBC Telemundo License LLC, which itself was formerly known as NBC Telemundo License Co. NBCUniversal Media, LLC is a Delaware limited liability company and is indirectly owned 51% by Comcast Corporation and 49% by General Electric Company.

CBS Broadcasting Inc. states that it is a wholly owned indirect subsidiary of CBS Corporation, which is a publicly traded corporation. CBS Corporation is aware that GAMCO Investors, Inc., a publicly-traded corporation, along with certain entities and persons affiliated therewith, filed a Schedule 13D with the Securities and Exchange Commission on March 15, 2011, which asserts ownership of 10.1% of CBS Corporation's Class A voting stock.

FBC Television Affiliates Association is a Delaware non-stock corporation operating as a non-profit entity. No publicly held company owns 10% or more of its stock.

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INTRODUCTION

For more than 30 years, broadcasting alone among all mass media has been a second-class citizen. Only broadcasting is subject to content-based censorship by the federal government, simply because this Court in *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 729 (1978), believed that broadcasting was at the time unique, and thus uniquely without full First Amendment protection. Over the past three decades, however, the media marketplace has changed dramatically, thoroughly undermining *Pacifica*'s rationale for its unequal treatment of broadcast speech under the First Amendment. Today, broadcasting is neither uniquely pervasive nor uniquely accessible to children, yet broadcasters are still denied the same basic First Amendment freedoms as other media. This Court's pronouncements from 1978 continue to bind the lower courts as they attempt to reconcile the FCC's increasingly aggressive suppression of broadcast speech with the fundamental notion that government censorship of speech—all speech—is the core of what the First Amendment was intended to prevent.

The Court should reject petitioners' request to ignore this broader reality and to uphold the FCC's authority to continue to censor speech as if nothing has changed. Instead, the Court should announce firmly and finally that the time for treating broadcast speech differently than all other communications is over. To the average American viewer, broadcasting is just one source among hundreds in a media-saturated environment, a mere press of a button on the remote control away from other, fully protected sources. The day has come for the FCC's indecency regime to be subjected to the same strict standards

that apply to all government attempts to abridge freedom of speech. The FCC's indecency regime is the antithesis of what the First Amendment permits and should be declared unconstitutional.

If the Court is not prepared to revisit *Pacifica* for reasons of stare decisis, it still should recognize that its holding cannot be expanded. If the media environment of the 1970s barely justified restrictions on "shocking" and "repeated" uses of expletives in broadcasts, then the media environment of the 2010s, *a fortiori*, prohibits the FCC's attempt to sweep ever more speech within its censorship net. Even under *Pacifica*, there is no basis for the FCC to regulate fleeting expletives on live television or images of partial nudity on scripted programs. The broadcasts at issue in no way resemble the Carlin monologue, and the FCC's attempt to penalize them would have been rejected by this Court over 30 years ago. Further, the FCC's new enforcement regime is not narrowly tailored, which has caused broadcasters to self-censor to avoid enormous FCC fines. Strict fidelity to the exceedingly narrow holding of *Pacifica* requires the Court to strike down the orders in this case.

Apart from these First Amendment problems, the FCC's indecency-enforcement regime is impermissibly vague. The FCC has erected a purely subjective regime that permits Commissioners to pursue their personal predilections. Broadcasters have no fair notice of what these Commissioners may deem indecent, resulting in an intolerable chill on broadcast speech.

COUNTERSTATEMENT OF THE CASE

A. The FCC's Initial Indecency-Enforcement Policy.

Originally enacted as part of the Radio Act of 1927, § 1464 of the federal criminal code provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C. § 1464; Radio Act of 1927, ch. 169, § 29, 44 Stat. 1162, 1172-73. In the same enactment, however, Congress also provided that "[n]othing" in the Act gives "the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station," and no regulation or condition could "interfere with the right of free speech by means of radio communications." Radio Act of 1927, ch. 169, § 29, 44 Stat. at 1172-73; 47 U.S.C. § 326. Congress later gave the FCC authority to enforce § 1464 through civil forfeitures against either broadcast licensees or the public at large. 47 U.S.C. § 503(b).

The FCC did not interpret § 1464 to ban "indecent" language as distinct from "obscene" language until 1970. *WUHY-FM, E. Educ. Radio*, 24 F.C.C.2d 408, 412-14, ¶¶ 10-14 (1970). Recognizing that it was regulating speech and not widgets, the FCC emphasized that for indecency it could "act only in clear-cut, flagrant cases; doubtful or close cases are clearly to be resolved in the licensee's favor." *Id.* at 414, ¶ 14. While believing its approach was consistent with the First Amendment, the FCC "welcome[d]" review by the courts. *Id.* at 415, ¶ 16.

That opportunity came in 1975. The FCC addressed a complaint involving an afternoon radio broadcast of George Carlin's "Filthy Words" mono-

logue. *Citizens Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y.*, 56 F.C.C.2d 94, 95, ¶ 4 (1975) ("*Pacifica Order*"). During the monologue, Carlin used the words "fuck" and "shit," "repeat[ing] them over and over again in a variety of colloquialisms," many of which vividly evoked sexual or excretory images. *Pacifica*, 438 U.S. at 729. The FCC defined indecent speech as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs" and is broadcast "at times of the day when there is a reasonable risk that children may be in the audience." *Pacifica Order*, 56 F.C.C.2d at 98, ¶ 11. The FCC found that the Carlin broadcast, involving offensive "words repeated over and over" in a "pre-recorded" broadcast, was "indecent" and "could have been"—but ultimately was not—"the subject of administrative sanctions." *Id.* at 99, ¶ 14.

The FCC's decision survived judicial review by only the slimmest of margins. This Court agreed that the FCC could prohibit "indecent" speech and that "the repetitive, deliberate use of" certain "words that referred to excretory or sexual activities or organs . . . in an afternoon broadcast when children are in the audience" was "indecent within the meaning of § 1464." *Pacifica*, 438 U.S. at 739-41. The Court determined that the FCC's decision was constitutional because "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," and "broadcasting is uniquely accessible to children." *Id.* at 748-49.

In supplying the crucial votes for *Pacifica*'s 5-4 majority, however, Justices Powell and Blackmun emphasized that the decision addressed only the "verbal shock treatment" caused by broadcasting

Carlin's repeated expletives. *Id.* at 757 (Powell, J., concurring). They explained that the FCC's "holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word." *Id.* at 760-61 (Powell, J., concurring); *accord*, *id.* at 750 (opinion of the Court). The FCC does not have "unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes." *Id.* at 759-60 (Powell, J., concurring). Both Justices voted to uphold the FCC's order only because the FCC "may be expected to proceed cautiously, as it has in the past." *Id.* at 762 n.4.

For roughly 25 years following *Pacifica*, the FCC interpreted the term "indecent" to prohibit only broadcasts as egregiously shocking as Carlin's monologue. See, *e.g.*, *Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1252-53, 1254, ¶¶ 5-7, 10 (1978) ("We intend strictly to observe the narrowness of the *Pacifica* holding."). In 1987, the FCC reiterated that it viewed "the Court's holding in *Pacifica* as setting forth the legal test for indecency." *Pacifica Found., Inc.*, 2 FCC Rcd. 2698, 2699, ¶¶ 11-13, *aff'd on recon.* 3 FCC Rcd. 930 (1987). Consistent with *Pacifica*, the FCC stated that "speech that is indecent must involve more than an isolated use of an offensive word." *Id.* at 2699, ¶ 13. For expletives, the "deliberate and repetitive use" of certain language "in a patently offensive manner" remained "a requisite to a finding of indecency." *Id.*

In 2001, the FCC issued a policy statement intended to provide guidance and clarification of its indecency-enforcement policies under § 1464. *Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding*

Broad. Indecency, 16 FCC Rcd. 7999, 8016, ¶ 30 n.23 (2001) ("*Indecency Policy Statement*"). The FCC reiterated that "indecent" material must (1) depict or describe sexual or excretory organs or activities, and (2) be "patently offensive" as measured by contemporary community standards for the broadcast medium. *Id.* at 8002, ¶¶ 7-8 (emphasis omitted). The FCC also distilled from its decisions three principal factors that it said guide its "patently offensive" determination: (a) the explicitness or graphic nature of the material; (b) the extent to which the broadcast dwells on or repeats the offensive material; and (c) the extent to which the material appears to pander or is used to titillate or shock. *Id.* at 8003, ¶ 10. To illustrate the application of these factors, the FCC provided examples from its existing caselaw, see *id.* at 8003-15, ¶¶ 11-23, noting several instances in which the fleeting use of an offensive word was not found indecent, *id.* at 8009, ¶ 18.

B. The FCC's New Indecency-Enforcement Policy.

1. In 2004, the FCC abandoned its previously restrained approach to indecency enforcement, beginning with its stance on isolated expletives. Pet. App. 7a-8a; *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975, 4980, ¶ 12 (2004) ("*Golden Globe Order*"). The FCC considered a live awards show broadcast in which the singer Bono accepted an award stating that it was "'really, really fucking brilliant.'" *Id.* at 4976, ¶ 3 n.4. The FCC changed its policy, holding that the broadcast was indecent even though the expletive was not repeated and was used only as an intensifier, not a literal description of sexual activities. *Id.* at 4978, ¶ 8. The statement was patently offensive in the FCC's view

because it used one of the "most vulgar, graphic and explicit descriptions of sexual activity," and there was no "political, scientific or other independent value of use of the word here." *Id.* at 4979, ¶ 9.

The FCC also began imposing unprecedented fines for indecency violations. Pet. App. 8a. Under its current approach, the FCC issues a separate forfeiture to each network affiliate for the broadcast of the same program.[1] With the increase in the maximum fine from $32,500 to $325,000,[2] the FCC now claims the right to impose aggregate penalties that could exceed $65 million.

2. In response to the confusion and uncertainty created by its sudden change in course, the FCC adopted the *Omnibus Order* in February 2006, expressly to provide guidance and clarification of its new indecency policy. J.A. 41-43. In that order, the FCC held that Fox's live broadcasts of the 2002 and 2003 "Billboard Music Awards" violated § 1464. In the 2002 broadcast, Cher accepted an award and exulted that "'People have been telling me I'm on the way out every year, right? So fuck 'em.'" *Id.* at 101; Pet App. 88a. In the 2003 broadcast, presenter Nicole Richie ad-libbed: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." J.A. 106 & n.164; see also Pet. App. 9a, 44a. Citing the change in policy wrought in the *Golden*

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[1] *See, e.g.*, Br. in Opp'n of Fox Television Stations, Inc. et al. at 9 n.6, No. 10-1293 (filed May 23, 2011) (collecting examples); Pet. App. 8a n.3 (noting fines for 2003 of $440,000 and fines for 2004 of $8 million).

[2] *See* Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, sec. 2, § 503(b)(2), 120 Stat. 491, 491 (2006) (codified at 47 U.S.C. § 503(b)(2)(C)(ii)).

Globe Order, the FCC discounted the fact "'that specific words or phrases are not sustained or repeated'" and found both broadcasts actionably indecent, even though the expletives were unscripted. J.A. 104, 108, 109. However, it "recognize[d] that [its] precedent at the time of the broadcast indicated that the Commission would not take enforcement action against isolated use of expletives." *Id.* at 105, 113.

The FCC decided numerous other indecency complaints in the *Omnibus Order* in an attempt to illustrate how the new policy would operate. The *Omnibus Order*, however, was a tableau of arbitrary and almost random outcomes. For example, the FCC found that the isolated use of the word "bullshit" in episodes of ABC's "NYPD Blue" was indecent, but the use of the words "dick" and "dickhead" were not. J.A. 113-18; see *id.* at 114 n.187. It found that uses of the words "fuck" and "shit" by the subjects of the Martin Scorsese documentary "The Blues: Godfathers and Sons" were indecent, even though similar uses of the same words in the film "Saving Private Ryan" were not. *Id.* at 90-91; see also *id.* at 188 (Adelstein, dissenting) ("common sense" dictates that the coarse language in "The Blues" was just as necessary to the realism of the documentary as it was in "Saving Private Ryan"). The FCC also found the utterance of "bullshitter" on the "Early Show" indecent, principally because it occurred during a news interview. *Id.* at 120-22.

3. Fox and the other broadcast networks challenged the *Omnibus Order* in the Second Circuit, and the FCC immediately sought voluntary remand to address the broadcasters' arguments. Pet. App. 10a, 41a. On remand, the FCC "vacate[d] Section III.B of the *Omnibus Order* in its entirety"—which dealt with

the two Fox broadcasts and episodes of "NYPD Blue" and "The Early Show"—"and replace[d] it" with a new decision on those broadcasts. *Id.* at 42a. In this *Remand Order*, the FCC reaffirmed the three principal factors that guide its patent offensiveness inquiry but explained that the FCC must "weigh and balance" the factors "because '[e]ach indecency case presents its own particular mix of these, and possibly other, factors.'" *Id.* at 46a (quoting *Indecency Policy Statement*, 16 FCC Rcd. at 8003, ¶ 10). The FCC added that in some cases "one or two of the factors may outweigh the others," thereby "rendering the broadcast material patently offensive and consequently indecent." *Id.*

The FCC also rejected various constitutional and statutory challenges to its new indecency policy. Pet. App. 59a, 76a-77a. The FCC concluded that basing patent offensiveness on "contemporary community standards" was not problematic because "in evaluating material, [it] rel[ies] on the Commission's 'collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens.'" *Id.* at 59a (quoting *Infinity Radio License, Inc.*, 19 FCC Rcd. 5022, 5026, ¶ 12 (2004)). The FCC concluded that its indecency definition was not impermissibly vague, *id.* at 76a-77a, and that, as in *Pacifica*, broadcast television remained "'uniquely pervasive'" and "'uniquely accessible to children.'" *Id.* at 78a-85a.

The *Remand Order* reaffirmed that the two "Billboard Music Awards" broadcasts were indecent. Pet. App. 46a-59a, 91a-95a. The FCC reversed its finding, however, that "The Early Show" was indecent. *Id.* at 98a-101a. Contrary to its view in the *Omnibus Order* that use of a potentially offensive

word during a news interview was the most important factor that made it indecent, J.A. 122, the FCC did an about-face, holding that use of the word during a news interview *saved* it from a finding of indecency. Pet. App. 100a-101a. But the FCC offered no comfort to broadcasters with this ruling: "there is no outright news exemption from [its] indecency rules." *Id.* at 100a.

C. The Preceding Decisions.

The broadcast networks sought review of both the *Omnibus* and *Remand Orders*, raising Administrative Procedure Act, statutory, and constitutional challenges. Pet. App. 11a. A divided panel of the Second Circuit initially vacated the orders on APA grounds, concluding that the FCC had not adequately justified its change in policy. *Fox Television Stations, Inc.* v. *FCC*, 489 F.3d 444, 446-47 (2d Cir. 2007). In dicta, the court questioned whether any explanation for the FCC's change in policy "would pass constitutional muster." *Id.* at 462.

This Court reversed the APA determination. *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) ("*Fox*"). Emphasizing that the First Amendment is irrelevant to the question of arbitrariness (*id.* at 1811-12; *id.* at 1818 n.7 (plurality opinion)), the Court held that the FCC's "new enforcement policy and its order finding the broadcasts actionably indecent were neither arbitrary nor capricious." *Id.* at 1812. The majority expressly "decline[d] to address the constitutional questions" raised and remanded. *Id.* at 1819.[3]

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[3] Several members of the Court nonetheless noted "the long shadow the First Amendment casts over what the [FCC] has done." *Fox*, 129 S. Ct. at 1828 (Ginsburg, J., dissenting). Justice Thomas noted the "questionable viability of the two

On remand, the Second Circuit unanimously ruled that the FCC's current enforcement policy is unconstitutional. At the outset, the court agreed with the networks that the media landscape had changed so dramatically that the factual underpinnings of this Court's decisions in *Pacifica* and *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), which permitted heightened regulation of broadcast media, no longer appeared valid. Pet. App. 15a-17a. But "bound by Supreme Court precedent," the court of appeals evaluated the FCC's new indecency policy under *Pacifica*'s framework. *Id.* at 17a. The court concluded nonetheless that it need not resolve "the outer limit of the FCC's authority" under *Pacifica* as "the FCC's indecency policy is unconstitutional because it is impermissibly vague." *Id.* at 17a-18a.

The court of appeals explained that in *Reno* v. *ACLU*, 521 U.S. 844 (1997), this Court struck down a "definition of indecency [that] was almost identical to the [FCC's]." Pet. App. 21a. Recognizing that the FCC had "further elaborated" on its indecency standard in various enforcement orders, the Second

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precedents that support the FCC's assertion of constitutional authority to regulate the programming at issue in this case" and indicated that he would be "open to reconsideration of *Red Lion* and *Pacifica*." *Id.* at 1819-20, 1822 (Thomas, J., concurring). Justice Stevens, the author of the *Pacifica* decision, highlighted the narrowness of *Pacifica* and explained that the Court "did not decide whether an *isolated* expletive could qualify as indecent" and "certainly did not hold that any word with a sexual or scatological origin, however used, was indecent." *Id.* at 1827 (Stevens, J., dissenting). Justice Ginsburg similarly explained that the "*Pacifica* decision . . . was tightly cabined, and for good reason. . . . [W]ords unpalatable to some may be 'commonplace' for others, 'the stuff of everyday conversations.'" *Id.* at 1829 (Ginsburg, J., dissenting) (quoting *Pacifica*, 438 U.S. at 776 (Brennan, J., dissenting)).

Circuit concluded that whether the FCC's current indecency policy was impermissibly vague depended on whether "[t]his additional guidance [is] sufficient to survive a vagueness challenge." *Id.* The court found that it was not.

According to the court, the FCC's application of its patent offensiveness test "hardly gives broadcasters notice of how the [FCC] will apply the factors in the future," Pet. App. 24a, and its policy "results in a standard that even the FCC cannot articulate or apply consistently," *id.* at 27a. "With the FCC's indiscernible standards," the court explained, "come the risk that such standards will be enforced in a discriminatory manner." *Id.* at 28a. The Second Circuit also showed that the chilling effect of the FCC's policy was not theoretical: "there is ample evidence in the record that the FCC's indecency policy has chilled protected speech," including "news and public affairs programming" and "protected speech dealing with some of the most important and universal themes in art and literature." *Id.* at 31a-32a, 34a.

Shortly after the Second Circuit denied rehearing en banc in *Fox* v. *FCC*, the court applied that holding in another case involving a 2003 ABC broadcast of an episode of "NYPD Blue." Pet. App. 120a. In that episode, "an adult woman's nude buttocks" were depicted "for slightly less than seven seconds" in a scene that was intended to portray the awkwardness of new family situations. *Id.* at 120a-21a. The FCC found the "depiction of the buttocks was indecent" and fined "each of forty-four ABC-affiliated stations" for airing the episode. *Id.* at 122a. Before the Second Circuit, however, the FCC and United States "concede[d]" that *Fox* v. *FCC* controlled that case, and the court therefore held that "*Fox*'s determination

that the FCC's indecency policy is unconstitutionally vague binds this panel." *Id.* at 124a.

SUMMARY OF ARGUMENT

1. The time has come to overrule *Pacifica* and recognize that broadcasters have the same First Amendment protections as other media. Petitioners' principal defense of the FCC's indecency regime rests on the dual rationales identified by the Court in *Pacifica*, but those antiquated beliefs about the uniqueness of broadcasting are unquestionably no longer true. Broadcasting is not *uniquely* pervasive because Americans today spend more time engaged with cable and satellite television, the Internet, video games, and other media than they do with broadcast media. Nor is broadcasting *uniquely* accessible to children because other media are no less accessible than broadcasting. Moreover, the FCC is constitutionally required to rely on the myriad technological tools available today for parents to control or block a child's access to indecent material. The media upheaval since 1978 eviscerates *Pacifica*'s rationales, and principles of stare decisis must yield to these changed circumstances.

Even if stare decisis concerns are sufficient to preserve *Pacifica*, that "emphatically narrow" decision marks the outer limits of the FCC's constitutional authority to censor broadcast speech. Under any level of First Amendment scrutiny, the FCC's recent expansion of its indecency-enforcement regime beyond the kind of shocking material at issue in *Pacifica* cannot survive. The FCC has no substantial interest in protecting children from momentary exposure to offensive words or images solely in the broadcast medium. Nor is the FCC's newly expanded indecency policy narrowly tailored, as it is both

under- and over-inclusive and fails to rely on less restrictive alternatives to a crude ban on speech.

Petitioners cannot fall back on *Red Lion*'s scarcity doctrine to justify the FCC's new indecency-enforcement policy. Scarcity has never been the basis for punishing indecency—the Court in *Pacifica* did not rely on it, and the FCC in 1987 expressly disavowed it as a rationale—and 40 years of dramatic technological advances have now fatally undermined the basic assumptions on which the scarcity doctrine rests.

2. In any event, the Second Circuit correctly held that the FCC's new indecency-enforcement policy is unconstitutionally vague. Because this Court struck down an indecency definition materially indistinguishable from the FCC's as impermissibly vague, the Second Circuit correctly recognized that the FCC's new policy can survive a vagueness challenge only if the agency provided sufficient clarity through its "further elaborat[ion]" of that policy in other enforcement orders. Pet. App. 21a. As the court correctly held, the FCC's new policy as reflected in those orders is unconstitutionally vague for two independent reasons: it authorizes arbitrary and discriminatory enforcement, and it fails to provide fair notice of what is prohibited.

The Court should affirm the Second Circuit's judgment that the FCC's new policy permits arbitrary and discriminatory enforcement—a determination petitioners do not challenge. The "community standard" that the FCC uses to judge the patent offensiveness of material allows the FCC to pursue its own predilections because it rests entirely on the FCC's internal and oscillating experience. Similarly, the FCC's "patent offensiveness" inquiry is so

standardless that it permits the FCC to justify conflicting decisions at its whim.

The Second Circuit also correctly held that the FCC's new indecency policy, which rests on inherently subjective judgments about particular broadcasts, fails to provide fair notice to broadcasters of what will be found impermissible. And the FCC's failure to provide any objective standard, coupled with massive fines, has already chilled much broadcast speech.

Petitioners principally attack the Second Circuit's vagueness holding on procedural grounds, but those arguments fail. The lower court's decision is consistent with this Court's long-standing precedents holding that a law proscribing no specific standard of conduct—like the FCC's new indecency policy—is vague as applied to its challengers and cannot be applied to any set of facts. And the court necessarily looked to previously decided cases to discern what the FCC's current indecency policy actually is. On the merits, petitioners do not argue that the FCC's current indecency policy is sufficiently clear. Rather, they erroneously rely on FCC decisions predating the change in policy, but those decisions cannot give notice of when the FCC will find a fleeting expletive indecent, much less clarify the new policy.

ARGUMENT

I. THE FCC'S INDECENCY-ENFORCEMENT POLICY VIOLATES THE FIRST AMENDMENT.

Content-based restrictions on speech are presumptively unconstitutional, including restrictions on indecent material that comes into the home. *United States* v. *Playboy Entm't Grp.*, 529 U.S. 803, 814

(2000); *Reno*, 521 U.S. at 885; *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). These principles generally apply regardless of the specific medium of communication. *Playboy*, 529 U.S. at 814 (cable television); *Reno*, 521 U.S. at 874 (internet); *Sable*, 492 U.S. at 126 (telephone); *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) (mails); *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) (print); *United States* v. *12,200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 130 n.7 (1973) (film). Indeed, this Court reiterated just last Term that "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears." *Brown* v. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (quotation omitted). The "most basic of these principles" is that "[a]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* (quotation omitted) (omission in original).

For the last several decades, however, broadcast media have been treated as second-class citizens—the one glaring exception to these otherwise uniform protections. The *Pacifica* Court permitted the FCC to censor broadcast speech falling within the constitutionally nebulous category of "indecency" based entirely on what the Court perceived at the time to be "unique" characteristics of the broadcast medium. The supposed uniqueness of broadcasting, however, was "dubious from [its] infancy," *Denver Area Educ. Telecomms. Constortium, Inc.* v. *FCC*, 518 U.S. 727, 813 (1996) (Thomas, J., concurring and dissenting in part), and is simply not true today. *Pacifica* should

be overruled, and broadcasters should enjoy the same First Amendment protection enjoyed by every other medium of communication. But even if the Court does not overrule *Pacifica*, the FCC's current, *expanded* indecency policy violates the First Amendment under any standard. *Pacifica*'s outdated assumptions cannot support an expansion of the FCC's indecency-enforcement regime beyond the limits that served the nation for three decades until the FCC's recent change in policy. Finally, the scarcity doctrine of *Red Lion* cannot justify the FCC's indecency authority because that doctrine has never been the constitutional basis for censoring broadcast indecency, and the long-invalid assumptions on which it rests cannot validate the FCC's expanded policy.

A. This Court Should Overrule *Pacifica*.

Pacifica's foundations were built on sand. This Court upheld the FCC's indecency regime based on its perception, as of 1978, that broadcasting had "a uniquely pervasive presence in the lives of all Americans" and that it was "uniquely accessible to children." 438 U.S. at 748-49. Petitioners claim that nothing has changed in the ensuing decades—that broadcasting is still unique and that "broadcast speech [thus] may be subject to greater content-based restrictions (with respect to indecency and otherwise) than other forms of communication." Pet. Br. 42.

This simply defies reality. Obviously, the media marketplace has changed radically in ways that render both of *Pacifica*'s assumptions invalid. For every other medium, this Court has consistently struck down attempts to regulate indecency, see, *e.g.*, *Sable*, 492 U.S. at 131 (sex chat lines); *Reno*, 521 U.S. at 885 (Internet); *Playboy*, 529 U.S. at 826-27 (cable signal bleed), and there is simply nothing "'unique[]'" or special about broadcasting today that would justify

a different result here. *Fox*, 129 S. Ct. at 1820-22 (Thomas, J., concurring). This Court should now overrule *Pacifica*, and with it the FCC's authority to punish broadcast speech. See *id.* at 1821-22.

1. Broadcasting Is Not Uniquely Pervasive.

Petitioners argue that broadcasting is still "a pervasive medium of communications." Pet. Br. 44. That careful phrasing implicitly concedes, however, that broadcasting is no longer *uniquely* pervasive. Americans today, including children, spend more time engaged with cable and satellite television, the Internet, video games, and other media than they do with broadcast media. "Pervasiveness" no longer justifies subjecting broadcasting to greater suppression of indecency than other media.

At the outset, petitioners are forced to concede an inconvenient fact for their position: 87% of American households today subscribe to cable or satellite services,[4] and only a small percentage of Americans relies on the airwaves to receive television directly. Pet. Br. 44. As a result, the vast majority of Americans watch broadcast stations side by side with hundreds of non-broadcast channels that are not (and could not constitutionally be) bound by the FCC's indecency rules. This Court has already noted correctly that cable is just as "'pervasive . . . in the lives of all Americans'" as broadcasting. *Denver Area*, 518 U.S. at 745 (plurality opinion) (citation omitted). According to Nielsen data, the percentage of U.S. television households viewing primetime broadcast

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[4] That percentage has since risen to 89%. *Implementation of the Child Safe Viewing Act*, 24 FCC Rcd. 11,413, 11,418-19, ¶ 11 (2009).

network programming in 2008-09 was 25.6%, versus 36.3% for basic cable,[5] with most households receiving their broadcast programming via cable or satellite. Teenagers between the ages of 12 and 17 watched an average of approximately 2 hours (1:58:23) of cable a day (14 hours a week) compared to just 38 minutes (37:51) of broadcast programming (4.4 hours a week).[6]

The Internet—just an obscure Defense Department project in 1978—is now another extraordinarily pervasive medium of communication. Approximately 69% of U.S. households had an Internet connection in 2009, up 7% from 2007.[7] Internet users spend an average of 13 hours a week online[8]—a revolution in media usage since *Pacifica*. Consumers have many options today for watching video programming, (including broadcast programs) over the Internet, and that trend is accelerating rapidly.[9] Here again,

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[5] Bill Gorman, *Where Did The Primetime Broadcast TV Audience Go?*, TV by the Numbers (Apr. 12, 2010), http://tvbythenumbers.zap2it.com/2010/04/12/where-did-the-primetime-broadcast-tv-audience-go/47976/.

[6] *How Teens Use Media*, Nielsen, 3 (June 2009), *available at* http://blog.nielsen.com/nielsenwire/reports/nielsen_howteensusemedia_june09.pdf.

[7] U.S. Census Bureau, *Computer and Internet Use* (last revised June 7, 2011), http://www.census.gov/hhes/computer/. This data excludes those who access the Internet at work, school, or other public locations.

[8] *Internet Users Now Spending an Average of 13 Hours a Week Online*, Harris Interactive, Inc. (Dec. 23, 2009), *available at* http://www.harrisinteractive.com/vault/HI-Harris-Poll-Time-Spent-Online-2009-12-23.pdf.

[9] *The Cross-Platform Report, Quarter 1, 2011*, Nielsen, 3 (2011), *available at* http://nielsen.com/content/dam/corporate/us/

consumers can find broadcast programming on these Internet services one click away from a vast array of material that could not be subjected to the FCC's indecency policy. Video games were also largely nonexistent in 1978, but today millions of users immerse themselves in them for hours on end. *Brown*, 131 S. Ct. at 2748-49 (Alito, J., concurring). Given the "pervasiveness" of these alternative media, petitioners' claim (at 44) that broadcasting has "retained a dominant position in the media universe" has no credibility.

The Court's conception of "pervasiveness" was focused on the fact that a broadcast signal "confronts the citizen . . . in the privacy of the home." *Pacifica*, 438 U.S. at 748; see also *id.* at 759 (Powell, J., concurring). This notion at the heart of *Pacifica*—that broadcasting barges into the home uninvited like the unavoidable noise of a sound truck, cf. *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (plurality opinion)—was never accurate. Cf. *Pacifica*, 438 U.S. at 748-49. Broadcast television cannot be viewed inside the home unless consumers take affirmative steps to receive those signals by setting up antennas and (if necessary) digital converter boxes and by purchasing televisions to view them. In this respect, there is no constitutionally relevant distinction between broadcasting and cable, satellite, or Internet services to which the public must subscribe. And it is especially unrealistic to argue today that the broadcast medium is *uniquely* pervasive in American homes—in the sense that the *Pacifica* Court used that term—when most American homes do not even operate an

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en/reports-downloads/2011-Reports/Nielsen-cross-platform-report-Q1-2011-reissued.pdf.

antenna that can receive over-the-air broadcast television.

Although events have rendered the Court's original finding of pervasiveness untenable, petitioners cling to the fact that there are still millions of people that watch programming that originates on a broadcast channel. Pet. Br. 44-46. But the popularity of that content does not make the broadcast *medium* unique. Mere marketplace acceptance of specific content cannot justify diminished First Amendment protecttion. Yet petitioners rely entirely on assertions about the continued popularity of broadcast content to advance precisely that frivolous argument.[10]

2. Broadcasting Is Not Uniquely Accessible To Children.

Petitioners' contention that broadcasting remains "'uniquely accessible to children'" is also incorrect. Pet. Br. 46 (quoting *Pacifica*, 438 U.S. at 749). Other forms of media today—including cable and satellite

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[10] Petitioners also cherry-pick their statistics. Their claim of 19.6 million over-the-air households, Pet. Br. 44, is in fact the highest, outlier estimate given in the *Video Competition Report*. *Annual Assessment of the Status of Competition in the Mkt. for the Delivery of Video Programming*, 24 FCC Rcd. 542, 595, ¶ 108 (2009) ("*Video Competition Report*"). Nielsen estimated that in 2007 only 14% of households depended exclusively on broadcast, and the FCC's own Media Bureau arrived at an estimate in 2005 close to Nielsen's. *Id.* More recent estimates are even lower. *See supra*, n.4 (11% of television households rely exclusively on broadcasting). Petitioners' other statistics are also outdated: for example, they claim (relying on the 2005 Media Bureau Report, Pet. App. 80a) that half of satellite subscribers access broadcast channels over the air, Pet. Br. 45, but as of 2009, markets representing 97% of television households had local broadcast stations available via satellite. *Video Competition Report*, 24 FCC Rcd. at 584-85, ¶ 84.

television and the Internet—are equally accessible to children. See *supra*, 18-20.

In particular, it is no longer true that broadcasting cannot be "withheld from the young without restricting expression at its source." *Pacifica*, 438 U.S. at 749. Since 1978, "technology has provided innovative solutions to assist adults in screening their children from unsuitable programming—even when that programming appears on broadcast channels." *Fox*, 129 S. Ct. at 1822 n* (Thomas, J., concurring). Today, the V-Chip enables television viewers to block objectionable or "indecent" programming from entering their homes. FCC, *V-Chip: Viewing Television Responsibly*, http://transition.fcc.gov/vchip/ (updated July 8, 2003). As a result of congressional mandates and the nationwide conversion in 2009 to all-digital broadcasts, virtually every television in the nation receiving broadcast signals has access to a V-Chip. Pet. App. 16a.

Now that broadcasting routinely incorporates blocking technologies analogous to those in the cable and Internet contexts, broadcasting is no longer *uniquely* accessible to children. This Court has repeatedly invalidated bans on indecency when such blocking technologies are available, *Sable*, 492 U.S. 115; *Playboy*, 529 U.S. at 815; *Ashcroft* v. *ACLU*, 542 U.S. 656, 666-67 (2004), and the ubiquity of the V-Chip requires the same outcome here. Indeed, this Court has already held that restrictions on indecent speech on cable systems are unconstitutional where there are blocking technologies similar to the V-Chip. *Denver Area*, 518 U.S. at 755-56.

But the V-Chip is only the beginning; parents today have many other new technologies that allow them to control the programming to which their children are exposed. Since 1978, the widespread availability of

video-cassette recorders, DVD players, digital video recorders (DVRs), and video-on-demand services now gives parents far greater flexibility to record and prescreen material their children watch.[11] Parents have recently gained even more options with the proliferation of Internet services that deliver programming. These tools allow parents to create personal libraries of content they deem fit for their children, thereby allowing today's parents to act as a much more effective gatekeeper between their children and broadcast media than was even imaginable in 1978. The mere fact that these, either singly or together, are not 100 percent foolproof is of no constitutional relevance (cf. Pet. Br. 50), because this Court has made clear that blocking mechanisms need not be perfect to be a required substitute for a direct ban on content. See *Ashcroft*, 542 U.S. at 668.

Petitioners contend that broadcasting remains uniquely accessible to children because a significant percentage of children allegedly have a television set in their bedrooms. Pet. Br. 46-47. As petitioners concede, however, most American households do not operate an antenna for the reception of broadcast television, and television sets in children's bedrooms reflect *parental* choices about which media to make available to their families. Indeed, studies show that most parents impose household rules to govern children's access to broadcast television, just as they do for children's access to cable, the Internet, video

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[11] For example, 38.1% of television households have DVRs. *DVR Use in the U.S.*, Nielsen, 1 (Dec. 2010), *available at* http://blog.nielsen.com/nielsenwire/wp-content/uploads/2010/12/DVR-State-of-the-Media-Report.pdf.

games, and much more.[12] Given that parents now have numerous technological means to manage and supervise their children's exposure to broadcasting, the First Amendment requires this Court to trust that parents will use those tools to exercise their supervisory authority. *Playboy*, 529 U.S. at 824 ("a court should not presume parents, given full information, will fail to act"). The FCC's content-based ban backed up by draconian fines "just in case" all of these parental controls fail is unconstitutional, just as the Court has found in all other contexts. *Brown*, 131 S. Ct. at 2741 ("Filling the remaining modest gap in concerned-parents' control can hardly be a compelling state interest.").

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Stare decisis is "not an inexorable command," *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991), especially in constitutional cases, see *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997). "[C]hanges in society"—like the technological upheaval in the media marketplace over the past 30 years—"dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez* v. *Hillary*, 474 U.S. 254, 266 (1986).

Petitioners invoke an alleged reliance on *Pacifica* as reason to keep it on life support, Pet. Br. 51-53, but this is not a case "involving property and contract rights, where reliance interests are involved," *Payne*, 501 U.S. at 828. Far from being embedded in "our national culture," Pet. Br. 52, *Pacifica* has become an

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[12] *See, e.g.*, Victoria Rideout & Elizabeth Hamel, *The Media Family: Electronic Media in the Lives of Infants, Toddlers, Preschoolers and Their Parents*, Kaiser Family Foundation, 20 (May 24, 2006), http://www.kff.org/entmedia/7500.cfm.

embarrassing outlier that confuses the public.[13] This Court has repeatedly declined to extend *Pacifica* to other contexts, see, *e.g.*, *Reno*, 521 U.S. at 867, leaving *Pacifica* "a positive detriment to coherence and consistency in the law," *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989). Overruling *Pacifica* would not fundamentally change constitutional law; it would *restore* long-accepted First Amendment principles to a medium in which the allegedly unique reasons for an atextual exception no longer apply.

Petitioners worry that, freed of *Pacifica*, broadcasters would flood the airwaves with material just short of obscenity, Pet. Br. 51-52, but there is no evidence for this alarmist prediction, and no reason to believe market forces would allow it. Even during the late-night safe harbor—when the FCC's indecency rules do not apply—broadcasters have not aired potentially offensive words, much less material that is nearly obscene. Cf. *id.* at 34, 51-52. In any event, the First Amendment does not permit the possibility of offensive content to rationalize censorship of any other medium; broadcasting should be no different.

Accordingly, *Pacifica* should be overruled. Because the facts upon which *Pacifica* was predicated—the unique pervasiveness and unique accessibility of

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[13] The FCC's own statistics show that the public does not seem to understand *Pacifica*'s basic distinction between cable and broadcasting. *See* FCC, *Indecency Complaints and NALs: 1993-2006*, http://transition.fcc.gov/eb/oip/ComplStatChart.pdf (roughly one-quarter of all indecency complaints lodged in two most recent periods reported were against cable programs); *see also Various Complaints Against the Cable/Satellite Television Program "Nip/Tuck,"* 20 FCC Rcd. 4255 (Enforcement Bureau 2005) (rejecting indecency complaints against cable program).

broadcasting—have evaporated, that decision cannot stand. And without *Pacifica*'s "emphatically narrow" ruling based on those vanished facts, there is no constitutional defense for the FCC's indecency-enforcement regime.

B. Even Under *Pacifica*, The FCC's Expanded Indecency Regime Is Unconstitutional.

Even if the Court does not overrule *Pacifica*, it should recognize that *Pacifica*'s outdated assumptions cannot support the FCC's *expansion* of its indecency regime beyond the narrow confines of *Pacifica* itself. See, *e.g.*, *Fox*, 129 S. Ct. at 1828 n.5 (Stevens, J., dissenting) ("the changes in technology . . . certainly counsel a restrained approach to indecency regulation, not the wildly expansive path the FCC has chosen"). While this Court has not explicitly "held that *Pacifica* represented the outer limits of permissible regulation," *id.* at 1815, in light of today's media marketplace, it must do so now.[14]

The FCC's current enforcement policy, which subjects even isolated expletives or brief, scripted images to multi-million-dollar fines, cannot survive First Amendment scrutiny under any standard. The government's restriction of broadcast speech must at least be narrowly tailored to serve a substantial governmental interest. See *FCC* v. *League of Women Voters*, 468 U.S. 364, 380 (1984); Pet. App. 14a. The FCC's new indecency policy fails both requirements:

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[14] Contrary to petitioners' implication, Pet. Br. 37, this Court emphasized in *Fox* that its decision upholding the orders at issue on APA grounds "says nothing about constitutionality" or whether *Pacifica* "'endorsed'" the FCC's current policy, *Fox*, 129 S. Ct. at 1818 n.7 (plurality opinion).

(1) There is no substantial governmental interest in shielding children from momentary exposure to isolated words or images as opposed to content equivalent to the Carlin monologue; and even if there were, (2) the FCC's new policy is in no way tailored to advance that interest because it is wildly under- and over-inclusive.

1. The FCC's Interest Is Not Substantial.

The FCC has a governmental interest in protecting children from "indecency" only where the material at issue is egregiously offensive and can plausibly threaten the "physical and psychological well-being of minors." *Sable*, 492 U.S. at 126. In *Pacifica*, Justice Powell stressed in his concurrence that the government's interest stems from a child's inability to protect himself from material that would be "shocking to most adults" and that "may have a deeper and more lasting negative effect on a child." *Pacifica*, 438 U.S. at 757-58 (Powell, J., concurring). Similarly, this Court's other cases involving restrictions on "indecency" focused on graphic sexual material that was overtly pornographic. See *Sable*, 492 U.S. at 117-18 (dial-a-porn); *Denver Area*, 518 U.S. at 752 (plurality opinion) (statute aiming at "pictures of oral sex, bestiality, and rape"); *Playboy*, 529 U.S. at 811 ("'sexually explicit adult programming'" that "many adults themselves would find . . . highly offensive").

Petitioners nonetheless assert a general interest in protecting children from offensive speech, Pet. Br. 41, ignoring the fundamental difference between protecting children from graphically indecent content and protecting children from *any* merely momentary

exposure to a word or image.[15] In declining to decide that "an occasional expletive . . . would justify any sanction," *id.* at 750, *Pacifica* specifically recognized the distinction between such momentary exposures and Carlin's language, which had been chosen for its offensive quality and "repeated over and over as a sort of verbal shock treatment." *Id.* at 757 (Powell, J., concurring)). Even though "Congress has made the determination that indecent material is harmful to children," *Fox*, 129 S. Ct. at 1813, this Court has always understood the government's interest under the First Amendment to be limited to protecting children from shocking material like the Carlin routine or content that is obscene as to minors. *Ginsberg* v. *New York*, 390 U.S. 629, 634-35 (1968). The *only* case that petitioners cite (at 41) to support some broader governmental interest in shielding children from offensive language is *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986), but that turned on the "'special characteristics of the school environment,'" *Morse* v. *Frederick*, 551 U.S. 393, 405 (2007). If the *child* in that case had given the same vulgar speech "outside the school context, it would have been protected." *Id.* (citing *Cohen* v. *California*, 403 U.S. 15 (1975)).

Contrary to petitioners' unsupported assertion (Pet. Br. 37), therefore, this Court has never found a governmental interest in restricting speech among adults merely because a child might be momentarily

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[15] This distinction turns not on empirical evidence but on the qualitative difference in the nature of the material and its corresponding effects on children. *Cf. Fox*, 129 S. Ct. at 1813.

exposed to a potentially offensive *word*.[16] Even if "mimic[king]" an adult's use of an offensive word might "suffice[]" as a justification for the FCC's change in policy under the APA, *Fox*, 129 S. Ct. at 1813, the mere fact that children may repeat an offensive word they hear an adult say is not a "harm" that could justify restrictions on protected speech under the First Amendment. See, *e.g.*, *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 213-14 (1975). Preventing such "miniscule real-world effects" that are "indistinguishable from effects produced by other media" is not a significant governmental interest. *Brown*, 131 S. Ct. at 2739 & n.7.

This Court held in *Cohen* v. *California* that "[s]urely the state has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." 403 U.S. at 25. Indeed, "while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another man's lyric." *Id.* Accordingly, use of such words must be governed by "the usual rule that governmental bodies may not prescribe the form or content of individual expression." *Id.* at 24.

The same is true of momentary exposure to nudity that is not graphically sexual. In ruling on an ordinance banning a drive-in movie theater from showing films containing nudity when the screen was visible from a public street or place, the Court distinguished between films containing "sexually explicit nudity" and a more "sweeping[]" ban on films

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[16] *Cf. Golden Globes Order*, 19 FCC Rcd. at 4979, ¶ 9 (citing the need to avoid "exposing children to indecent language").

"containing *any* uncovered buttocks or breasts, irrespective of context or pervasiveness." *Erznoznik*, 422 U.S. at 213. Indeed, this Court addressed that distinction expressly in terms of the impact on children, holding that such a "broad restriction" on nudity could not "be justified by any . . . governmental interest pertaining to minors." *Id.*

The FCC's current enforcement regime is not limited to material equivalent to the "verbal shock treatment" in *Pacifica* but instead punishes protected speech based solely on the FCC's impressions of artistic necessity. This Court has expressly held, however, that the government has no legitimate interest in regulating "matters of taste and style" precisely because "government officials *cannot* make principled distinctions in this area." *Cohen*, 403 U.S. at 25 (emphasis added). Permitting the FCC to punish speech purely on grounds of vulgarity or bad taste would inevitably restrict substantive debate in the guise of maintaining decorum. *Id*. at 26 (refusing to "indulge the facile assumption that one can forbid particular words without . . . suppressing ideas in the process"). A healthy freedom of speech, by its nature, will periodically bring forth "verbal tumult, discord, and even offensive utterance" that may offend our "esthetic, if not our political and moral, sensibilities." *Id.* at 24-25; *Erznoznik*, 422 U.S. at 210; see also *Playboy*, 529 U.S. at 818, 826. The government cannot, however, assert an interest in protecting those *sensibilities*, or in protecting children from even momentary exposure to that "verbal cacophony" (*Cohen*, 403 U.S. at 25), without compromising the guarantees that are at the core of the First Amendment. See *Pacifica*, 438 U.S. at 759-60 (Powell, J., concurring).

This difficulty is inherent in the FCC's current, expanded policy, which assesses individual programs based on explicitly content-related considerations such as whether the expletive or image was necessary to the story or for the understanding of a socially valuable viewpoint.[17] In effect, the FCC has set itself up as a kind of "super-editor" of broadcast programming content—wielding not only a red pen but multi-million-dollar fines if a broadcaster has guessed incorrectly about the social value or artistic necessity of a particular expletive or image. The FCC has no legitimate interest, however, in making assessments about whether offensive words or images are necessary to the "power and immediacy" of an artistic work. *Cohen*, 403 U.S. at 25; *Playboy*, 529 U.S. at 818 ("esthetic and moral judgments about art and literature" are "for the individual to make, not for the Government to decree, even with the mandate or approval of a majority"). Similarly, the FCC has no constitutional expertise or legitimate interest in distinguishing what is "news" from what is not;

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[17] *Compare Complaints Against Various Television Licensees Regarding Their Broad. On Nov. 11, 2004 of the ABC's Television Networks Presentation of the Film Saving Private Ryan*, 20 FCC Rcd. 4507, 4512-13, ¶ 14 (2005) ("*Saving Private Ryan*") (deleting or altering language "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film"), *with Golden Globe Order*, 19 FCC Rcd. at 4979, ¶ 9, *and* J.A. 118 (not "essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance"); *compare also id. at* 90 ("substitution of other language would [not] have materially altered the nature of the work"), *with id.* at 188 (Adelstein, concurring and dissenting in part) (expletives in "The Blues" necessary "[t]o accurately reflect their viewpoint and emotions about blues music [and] if prohibited, would undercut . . . the subject of the documentary").

indeed, this Court has "long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try." *Brown*, 131 S. Ct. at 2733. Such judgments are especially damaging for live coverage of newsworthy events—like the awards shows at issue here—where "'there is no opportunity for journalistic editing.'" *Petition for Clarification or Reconsideration of a Citizens' Complaint Against Pacifica Found.*, 59 F.C.C.2d 892, 893, ¶ 4 n.1 (1976); cf. Pet. Br. 37.

In short, the FCC's current enforcement policy does not further any legitimate governmental interest. See *Pacifica*, 438 U.S. at 761 (Powell, J., concurring) (courts cannot assess "which speech protected by the First Amendment is most 'valuable'"); *E. Educ. Radio*, 24 F.C.C.2d at 413, ¶ 13. The FCC's authority extends no further than censoring the kind of repetitive "shock treatment" typified by the Carlin monologue, and any attempt to expand its policy beyond the limits of *Pacifica* is unconstitutional. See also *Fox*, 129 S. Ct. at 1825, 1826-28 & n.5 (Stevens, J., dissenting).

2. The FCC's Current Enforcement Policy Is Not Narrowly Tailored.

Even if the FCC's interest here were substantial, its current enforcement policy does not meaningfully advance that interest, and it is certainly not narrowly tailored to do so. When the government acts to restrict speech, the First Amendment requires that the measures at issue "in fact alleviate [the identified] harms in a direct and material way." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 664 (1994) (plurality opinion); *CBS, Inc.* v. *DNC*, 412 U.S. 94, 127 (1973). Moreover, "[i]f a statute regulates speech based on its content, it must be narrowly tailored to promote" the governmental interest.

Playboy, 529 U.S. at 813; *League of Women Voters*, 468 U.S. at 380.

The FCC's current policy is fatally under-inclusive. Singling out broadcasters for indecency enforcement in an attempt to shield children from momentary exposure to indecent words or images is not just ill-tailored to achieve that asserted interest; it is quixotic. Children today are exposed to potentially offensive words and images from a vast array of sources other than broadcast television. They can encounter such words or images on non-broadcast channels; in books and magazines; on the Internet, DVDs, or video games; on playgrounds, at sporting events, or simply upon overhearing an adult conversation. Indeed, this Court has already acknowledged that there is essentially no difference between cable and broadcast television when it comes to the effects of television on children. See *Denver Area*, 518 U.S. at 748 (plurality opinion). Moreover, the FCC's policy is under-inclusive even as to broadcasting, because it allows certain offensive words when, in the FCC's view, they are artistically necessary or are in an FCC-defined "news" show.

The FCC's current enforcement policy thus leaves children susceptible to momentary exposure to potentially offensive content from a multitude of sources. The FCC's current policy is "wildly under-inclusive," and such underinclusiveness "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 131 S. Ct. at 2740. In the current media environment, it is fanciful to believe that aggressive indecency enforcement solely against broadcasters will be effective in preventing children from exposure to potentially offensive words or images, and that

"alone [is] enough to defeat it." *Id.*; see also *CBS, Inc.*, 412 U.S. at 127 ("sacrifice [of] First Amendment protections for so speculative a gain is not warranted").

The policy is also grossly overinclusive. Fewer than one-third of American television households have children under 18 years old.[18] Even in the minority of households with children, not all children who hear an offensive word "have parents who *care* whether" they hear those words. *Brown*, 131 S. Ct. at 2741. Thus, although the FCC's current policy "may indeed be in support of what some parents . . . actually want, its entire effect is only in support of what [the FCC] thinks parents *ought* to want." *Id.* Children will inevitably be exposed to potentially offensive words before they reach adulthood, and the First Amendment requires the government to trust parents to teach their children about those words. The FCC's content ban is "not the narrow tailoring to 'assisting parents' that restriction of First Amendment rights requires." *Id.*

Moreover, as explained above, there exist today numerous parental controls and guidance that did not exist in 1978, see *supra*, 22-24, and the First Amendment requires the FCC to rely on those parental controls. "[E]ven where speech is indecent and enters the home, the objective of shielding

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[18] *Compare 114.9 Million U.S. Television Homes Estimated for 2009-2010 Season*, Nielsenwire (Aug. 28, 2009), http://blog.nielsen.com/nielsenwire/media_entertainment/1149-million-us-television-homes-estimated-for-2009-2010-season/, *with* U.S. Census Bureau, *America's Families and Living Arrangements: 2010*, tbl.F1 (Nov. 2011), *available at* http://www.census.gov/population/www/socdemo/hh-am/cps2010.html (35.2 million family households with children under age 18).

children does not suffice to support a blanket ban if the protection[s] can be accomplished by a less restrictive alternative." *Playboy*, 529 U.S. at 814. "[I]f a less restrictive means is available for the Government to achieve its goals, the Government *must* use it." *Id.* at 815 (emphasis added); see *Turner*, 512 U.S. at 641-42; *Pacifica*, 438 U.S. at 748; see also *League of Women Voters*, 468 U.S. at 395, 398-99. Blocking technologies allow the government "to support parental authority without affecting the First Amendment interests of speakers and willing listeners." *Playboy*, 529 U.S. at 815. Therefore, the V-Chip and other technological tools for controlling children's access to broadcasting render the FCC's content-based enforcement unconstitutional. *Id.*

C. Petitioners' Reliance On The Scarcity Doctrine Is Misplaced.

In what amounts to a hail-Mary attempt to salvage its indecency-enforcement regime, petitioners now try to re-conceptualize the FCC's regulatory authority over indecency as stemming from the scarcity doctrine. Pet. Br. 42-44, 47-49, 51-53. They contend that broadcasters receive valuable benefits from the use of scarce spectrum and, therefore, that the FCC may "constitutionally require licensees to accept content-based restrictions that could not be imposed on other communications media." *Id.* at 44, 53. Essentially, petitioners now believe that the FCC's control of the licensing regime represents a kind of "grand bargain" with broadcasters with an unconstitutional condition at its core—a near-blank check for the FCC to pursue a broad variety of content-related goals that it concedes would blatantly violate the First Amendment in any other context. This cannot be. See *Perry* v. *Sindermann*, 408 U.S. 593, 597

(1972). But these contentions are also meritless on their own terms.

First, the scarcity doctrine has never been the basis for indecency enforcement. In *Pacifica*, this Court specifically stated that "two" factors "have relevance" to indecency restrictions: unique pervasiveness and accessibility to children, not the scarcity doctrine. *Pacifica*, 438 U.S. at 748-49; see *id.* at 770 n.4 (Brennan, J., dissenting). The FCC itself expressly disavowed the scarcity doctrine as a basis for indecency restrictions more than 20 years ago,[19] and it has only belatedly rediscovered this rationale in the current litigation. Moreover, the scarcity doctrine has historically been used to justify regulatory measures (like the Fairness Doctrine) that forced broadcasters to air *additional* speech, in an attempt to compensate for the perceived scarcity of broadcast licenses. This Court has never regarded the scarcity doctrine as a ground for *restricting* broadcasters' own programming or views. See *Red Lion*, 395 U.S. at 396 ("refusal to permit the broadcaster to carry a particular program or to publish his own views" or "government censorship of a particular program" would "raise more serious First Amendment issues"); *League of Women Voters*, 468 U.S. at 379.

Second, the scarcity doctrine has no continuing validity, if it ever did. Over the past three decades, the doctrine has been subjected to withering criticism

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[19] *Infinity Broad. Corp. of Pa.*, 2 FCC Rcd. 2705, 2707, ¶ 7 n.7 ("[W]e no longer consider the argument of spectrum scarcity to provide a sufficient basis for [indecency] regulation."), *aff'd on recon.* 3 FCC Rcd. 930, 936 ¶ 3 n.11 (1987) (acknowledging express rejection of scarcity rationale).

from all quarters.[20] As Justice Thomas noted in *Fox*, 129 S. Ct. at 1821, the scarcity doctrine has always been conceptually nonsensical. "[A]ll economic goods are scarce," and "[s]ince scarcity is a universal fact, it can hardly explain regulation in one context and not another." *Telecomms. Research & Action Ctr.* v. *FCC*, 801 F.2d 501, 506-09 (D.C. Cir. 1986). Moreover, since *Red Lion* was decided in 1969, "dramatic technological advances have eviscerated the factual assumptions underlying" that decision. *Fox*, 129 S. Ct. at 1821 (Thomas, J., concurring). There are more than twice as many over-the-air broadcast stations than there were 40 years ago, *id.*, and as explained above, the number of additional media outlets has exploded during that time with the development of cable and satellite television and the Internet. This Court recognized as early as 1973 that the scarcity doctrine had a limited shelf life. *CBS, Inc.*, 412 U.S. at 158 n.8 (Douglas, J., concurring); see also *League of Women Voters*, 468 U.S. at 376 n.11. If anything, this Court should inter the scarcity doctrine once and for all, but the doctrine certainly cannot be the basis for *expanding* the FCC's authority to censor broadcast speech.

Third, petitioners' suggestion that sweeping restrictions on broadcasters' content is part of an age-old

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[20] *Turner*, 512 U.S. at 638 & n.5; *Denver Area*, 518 U.S. at 813 (Thomas, J., concurring and dissenting in part); *Time Warner Entm't Co.* v. *FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (en banc) (per curiam) (Williams, J., joined by Edwards, C.J., Silberman, Ginsburg, and Sentelle, JJ., dissenting from denial of rehearing *en banc*); *ACT* v. *FCC*, 58 F.3d 654, 674-75 (D.C. Cir. 1995) (en banc) (Edwards, C.J., dissenting); *Ark. AFL-CIO* v. *FCC*, 11 F.3d 1430, 1442-43 (8th Cir. 1993) (Arnold, R., C.J., concurring).

"bargain" inherent in a broadcast license is incorrect. Section 1464 has always been a criminal prohibition that applies generally to every member of the public—not just licensees. 18 U.S.C. § 1464; see Radio Act of 1927, ch. 169, § 29, 44 Stat. at 1172-73. Even the FCC's civil enforcement power extends to non-licensees. 47 U.S.C. § 503(b)(5) (authorizing forfeitures against non-licensees). Moreover, neither broadcasters nor the public has any vested "understanding" or "expectations" concerning the FCC's *current*, expanded enforcement policy, which represents a sharp departure from the FCC's longstanding practice of restraint and has no history prior to the orders at issue here. Cf. Pet. Br. 51-53.

Petitioners' remaining arguments demonstrate just how dangerous and illogical their defense of content bans based on the scarcity doctrine has become. They paradoxically contend that the very explosion of alternative speech platforms makes the FCC's expanded suppression of content *more* acceptable, because this proliferation of outlets allegedly reduces the "burden" on speech and justifies treating broadcasting as a "safe haven" for parents. Pet. Br. 47-49. This argument would be untenable if advanced in any other First Amendment context; surely the government cannot regulate foul language in books simply because would-be writers and readers have alternative options in other media. And the supposed "scarcity" of broadcasting cannot logically justify measures that are concededly intended to *single out* broadcasters as a "safe haven" from among an abundance of substitutes, because the very

existence of those substitutes negates the assumption of scarcity.[21]

If the federal government wants to maintain a "safe haven" of broadcast material, then it should create a state-sponsored broadcast station and broadcast only those messages and images that it believes are "safe." The First Amendment does not limit government speech, but it certainly limits what the government can compel a private speaker to say or not to say.

II. THE FCC'S NEW INDECENCY-ENFORCEMENT POLICY IS UNCONSTITUTIONALLY VAGUE.

The Second Circuit correctly held that the FCC's new indecency-enforcement policy is unconstitutionally vague. A law whose "prohibitions are not clearly defined" offends "basic principle[s] of due process" and is "void for vagueness." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). Moreover, "stricter standards" of clarity apply to laws that have a "potentially inhibiting effect on speech" protected by the First Amendment, *Smith* v. *California*, 361 U.S. 147, 151 (1959); see *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974), because such a law "operates to inhibit the exercise of [those] freedoms," which "inevitably lead[s] citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked," *Grayned*, 408 U.S. at 109 (internal quotation marks omitted) (first alteration and omission in original).

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[21] Petitioners claim (at 48 & n.6) that broadcast-indecency regulation does not burden the broadcast networks because they are all affiliated with cable channels. Even if that were relevant, most broadcast licensees are not affiliated with non-broadcast channels.

Here, neither the statute nor the FCC's definition can provide the necessary clarity. Section 1464 itself merely prohibits the utterance of "indecent" language by means of radio communication. 18 U.S.C. § 1464. This Court has held that a bare prohibition against "indecency" without more is the archetype of an impermissibly vague standard because it calls for "'wholly subjective judgments.'" *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2720 (2010) ("*HLP*") (quoting *United States* v. *Williams*, 553 U.S. 285, 306 (2008)).

Similarly, the FCC's policy defines "indecency" as language that "describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium," Pet. App. 45a, but this Court struck down as unconstitutionally vague a "definition of indecency [that] was almost identical to the Commission's" definition in *Reno*.[22] *Id.* at 21a; *Reno*, 521 U.S. at 870-74 (definition was vague because it did not provide any discernible line between permissible and impermissible conduct). As the Second Circuit correctly observed, "language that is unconstitutionally vague in one context cannot suddenly become the model of clarity in another." Pet. App. 21a. *Reno*'s holding controls here, and *Pacifica* is not to the contrary. Cf. Pet. Br. 33. In *Pacifica*, the Court did not address a vagueness challenge, as the principal case upon which petitioners rely concedes. *ACT* v. *FCC*, 852 F.2d 1332, 1338 (D.C. Cir. 1988) (Ginsburg,

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[22] The statute at issue in *Reno* defined indecency as any "'communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.'" 521 U.S. at 860 (quoting 47 U.S.C. § 223(d)).

J.) ("Court did not address, specifically, whether the FCC's definition was on its face unconstitutionally vague").[23]

Because neither § 1464 nor the FCC's generic definition of "indecency" can provide the clarity required by the Fifth Amendment, the Second Circuit correctly recognized that the FCC's new indecency enforcement policy can survive a vagueness challenge only if the agency provided sufficient clarity through its "further elaborat[ion]" in other enforcement orders. Pet. App. 21a. The court rightly concluded that it has not.

A law can be unconstitutionally vague "for either of two independent reasons." *Hill* v. *Colorado*, 530 U.S. 703, 732 (2000). A law is impermissibly vague "if it authorizes or even encourages arbitrary and discriminatory enforcement," *id.*; *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983), *or* if it "'fails to give a person of ordinary intelligence fair notice'" of what is prohibited, *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *United States* v. *Hariss*, 347 U.S. 612, 617 (1954)). The Second Circuit correctly held that the current policy fails on both counts.

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[23] Petitioners have previously argued that *Reno* expressly distinguished *Pacifica*. As the Second Circuit correctly recognized, however, *Reno* distinguished *Pacifica* only "with respect to 'the level of First Amendment scrutiny that should be applied to this medium,' not to its analysis of whether the statute was unconstitutionally vague." Pet. App. 21a (quoting *Reno*, 521 U.S. at 870).

A. The FCC's New Indecency Policy Authorizes Arbitrary And Discriminatory Enforcement.

First, the Second Circuit held that the current policy is unconstitutionally vague because the "FCC's indiscernible standards" permit "discriminatory" enforcement. Pet. App. 28a. Although petitioners challenge the Second Circuit's determination that the FCC's new policy fails to provide fair notice to broadcasters, they never address the court's discriminatory-enforcement holding. This Court can affirm the judgment below solely on this basis.

A law is impermissibly vague if it authorizes or encourages arbitrary and discriminatory enforcement. *Williams*, 553 U.S. at 304; *Hill*, 530 U.S. at 732; *Lawson*, 461 U.S. at 357-58; *City of Chi.* v. *Morales*, 527 U.S. 41, 60 (1999). Under this "more important aspect of the vagueness doctrine," a law is impermissible if it fails to establish minimal guidelines to govern enforcement of the law. *Lawson*, 461 U.S. at 357-58 (citing *Goguen*, 415 U.S. at 574). Without minimal guidelines, the law "may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Id.* at 358 (alteration in original) (quoting *Goguen*, 415 U.S. at 575); *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402-03 (1966). Importantly, "[t]he question is not whether discriminatory enforcement occurred *here*, . . . but whether the [law] is so imprecise that discriminatory enforcement is a real possibility." *Gentile* v. *State Bar*, 501 U.S. 1030, 1051 (1991) (emphasis added).

1. The Second Circuit correctly concluded that the FCC's new enforcement policy creates precisely this real possibility by failing to impose any minimal guidelines that limit the FCC's ability to pursue its

own "'predilections'" in each case. *Lawson*, 461 U.S. at 358. The FCC has at its disposal many thousands of viewer complaints—the vast majority of which are computer generated by advocacy groups and then forwarded to the FCC by individuals—from which to target broadcasts of its choice. See, *e.g.*, J.A. 298-417. Nothing guides the FCC's selection of which complaints to pursue.

Even worse, the FCC's elaboration of its new policy does not limit its ability to reach any outcome it pleases. According to the FCC, the "'patent offensiveness'" of broadcast material is judged according to "contemporary community standards for the broadcast medium." Pet. App. 54a, 60a. In making this assessment, the FCC insists that it will "rely on the Commission's 'collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens." *Id.* at 59a (quoting *Infinity Radio License*, 19 FCC Rcd. at 5026, ¶ 12). But because the supposed standard rests on the FCC's internal "experience and knowledge," *id.*, it means whatever a majority of the FCC says it means. Moreover, because these mercurial "standards" vary based on the FCC's "constant interaction" with others, the FCC can distinguish inconsistent results using allegedly changed circumstances. The FCC's discretion in applying these standards is unbounded and thus unconstitutional. See *Giaccio*, 382 U.S. at 403.

2. The same is true of the FCC's "patent offensiveness" inquiry, which the FCC previously said relies on three principal factors: (i) the material's explicitness or graphic nature, (ii) the extent to which it is repeated or dwelled upon, and (iii) the extent to which it panders, titillates, or shocks. Pet. App. 46a.

Under the FCC's prior indecency policy, this inquiry had at least one minimal guideline—the offensive word or depiction had to be dwelled upon or repeated. Under the new policy, however, that guideline can be dispensed with at the FCC's discretion. Now, the FCC has said, "one or two of the factors may outweigh the others" to "render[] the broadcast material patently offensive." *Id.* Moreover, the FCC will "weigh and balance" the factors for each broadcast "because '[e]ach indecency case presents its own particular mix of these, and *possibly other*, factors.'" *Id.* (quoting *Indecency Policy Statement*, 16 FCC Rcd. at 8003, ¶ 10) (emphasis added).

In other words, the FCC may now decide indecency complaints based on one, some, or all of the factors it has previously announced, or it can decide cases on "other" factors it chooses to invoke at its whim. Pet. App. 46a. And the factors it has emphasized (the explicitness or graphic nature of the material and whether it panders, titillates, or shocks) are entirely subjective judgments that the agency has never defined or clarified. *Id.* at 24a; see, *e.g.*, *Complaints by Parents Television Council Against Various Broad. Licensees Regarding their Airing of Allegedly Indecent Material*, 20 FCC Rcd. 1931, 1938, ¶ 8 (2005) (merely stating that the factors have not been met). Moreover, the FCC claims even greater discretion because it will judge not only the presence but the relative "weigh[t] and balance" of these subjective factors in each individual case. Pet. App. 46a. Ultimately, the FCC's patent offensiveness framework gives the FCC unlimited license to justify any result. See *Lawson*, 461 U.S. at 358 (unconstitutional law "vests virtually complete discretion in the hands of the police"). The Due Process Clause and First

Amendment forbid that unbridled discretion to censor speech.

3. The FCC's decisions confirm the unbounded nature of its discretion. As the Second Circuit explained, the FCC's "disparate treatment of [the film] 'Saving Private Ryan' and the documentary, 'the Blues,'" provides one example of the "risk" that the FCC is engaged in "subjective, content-based decision-making." Pet. App. 29a. In "Saving Private Ryan," the FCC concluded that "the words 'fuck' and 'shit' were integral to the 'realism and immediacy of the film experience for viewers,'" *id.*, and, therefore, were not "shock[ing]," *Saving Private Ryan*, 20 FCC Rcd. at 4512, ¶ 13. But the FCC found these same words indecent in "The Blues," a documentary by Martin Scorsese "'containing interviews of blues performers and a record producer'" intended "'to provide a window into [the world of the individuals being interviewed] with their own words.'" J.A. 85-86 (alteration in original). The FCC found these words in "The Blues" "shocking," expressly "disagree[ing] that the use of such language was necessary to express any particular viewpoint." *Id.* at 88. Commissioner Adelstein dissented on this ground, remarking that "[i]t is clear from a common sense viewing of the program that coarse language is part of the culture of the individuals being portrayed." *Id.* at 188. These conflicting views highlight the purely subjective nature of the FCC's new indecency policy, and the FCC's use of the same factors to reach conflicting results demonstrates how malleable that policy truly is.

The FCC's amorphous "artistic necessity" and "*bona fide* news" exceptions also provide unlimited discretion in practice. For the artistic necessity exception, the FCC has said that it will exempt "material

[that] has any social, scientific or artistic value" or is integral to the broadcast. *Saving Private Ryan*, 20 FCC Rcd. at 4511-12, ¶ 11. But nowhere has the FCC provided any indication of when or how this exception applies other than at the FCC's caprice. In *Saving Private Ryan*, the FCC concluded that the repeated use of potentially offensive words was integral to that fictional war movie. Yet, the FCC deemed the repeated use of similar language not necessary to the movie "The Pursuit of D.B. Cooper," a fictional account of an infamous 1971 skyjacker. Compare *id.* at 4512-13, ¶ 14, with J.A. 94-97 & 97 n.142. In the latter ruling, the FCC perfunctorily explained that "[u]nlike *Saving Private Ryan*, we find that the vulgar material here could have been edited without materially altering the broadcast." J.A. at 97 n.142. The only apparent basis for these different results is the FCC's subjective *ipse dixit*.

Similarly, the FCC professes that it will act cautiously in evaluating news programming, but it has also denied that there is an "outright news exemption." Pet. App. 100a. As the Second Circuit noted, the FCC first found the use of the word "bullshitter" during an interview on "The Early Show" to be indecent because the program was a news interview; it then reversed itself and found that it was not indecent because it was a news interview. Compare J.A. 120-22, with Pet App. 100a-101a. Using this rationale, the FCC is free to exempt or penalize public affairs programs as it sees fit. The FCC's "commitment" to news programming, devoid of any objective standard, permits the FCC to accomplish any end it chooses.

Nor is the FCC's ability to manipulate the patent offensiveness factors limited to language. The FCC has determined that a broadcast of the film

"Schindler's List," including the depiction of full frontal male nudity, was disturbing but not "shocking," and thus not patently offensive. *WPBN/ WTOM License Subsidiary, Inc.*, 15 FCC Rcd. 1838, 1840, 1842, ¶¶ 6, 13 (2000); Pet. App. 145a. In contrast, the FCC concluded that the "NYPD Blue" episode at issue—which contained the brief, non-sexualized shot of an actress's naked buttocks—was "shocking" and thus patently offensive. Pet. App. 143a-144a. Once again, nothing cabins the FCC's discretion except its subjective opinion of what is shocking.

Petitioners do not even attempt to rebut the Second Circuit's holding that the FCC's new indecency policy creates an arbitrary and discriminatory enforcement regime, and this Court can and should affirm on that ground alone.

B. The FCC's New Indecency Policy Fails To Provide Fair Notice Of What Is Prohibited.

On the independent question whether the FCC's policy provides fair notice, the Second Circuit correctly concluded that the policy is unconstitutional. A law provides the required "'fair notice,'" *Papachristou*, 405 U.S. at 162, only when it is "sufficiently explicit to inform those who are subject to it what conduct on their part" is proscribed, *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Thus, a law is impermissibly vague when people cannot reasonably predict "the line between the allowable and the forbidden." *Winters* v. *New York*, 333 U.S. 507, 519 (1948); *Goguen*, 415 U.S. at 574. And laws that ultimately call for "'wholly subjective judgments'" are quintessentially vague. *HLP*, 130 S. Ct. at 2720 (quoting *Williams*, 553 U.S. at 306).

The FCC's new, expanded indecency-enforcement policy does not give broadcasters fair notice of which broadcasts will be found indecent because that policy lacks any objective, discernible standards. Rather than add clarity, the FCC's further elaboration on "contemporary standards" and its new framework for deciding what is "patently offensive" have made these standards even vaguer.

In *Reno*, this Court explained that contemporary community standards can cure the vagueness inherent in an indecency regime only when they are based on objective criteria, such as specifically defined state laws (as used in the *Miller* obscenity standard). *Reno*, 521 U.S. at 873. The FCC's contemporary community standards are not based on such objective criteria. Rather, they "rely on the Commission's 'collective experience and knowledge.'" Pet. App. 59a (quoting *Infinity Radio License*, 19 FCC Rcd. at 5026, ¶ 12). The FCC has not explained what this inherently subjective standard means nor defined it according to any ascertainable or objective legal standard. Broadcasters must somehow get inside the heads of ever-changing FCC Commissioners and personnel; to paraphrase Justice Stewart, broadcasters must know it when the FCC sees it. No amount of sophistication or familiarity with industry regulations, Pet. Br. 34, enables broadcasters to predict in advance the FCC's post hoc divination of whether the "community" was offended.

Similarly, the FCC's elaboration of the "patent offensiveness" standard adds to the vagueness of the FCC's new indecency-enforcement policy. Broadcasters cannot know whether one, some, or all of the FCC's articulated factors, or some "other" unstated factor, will result in an indecency finding, or how the FCC will weigh these factors. Pet. App. 46a.

Whether particular material is explicit or graphic, and whether it panders, titillates, or shocks, also calls for an inherently subjective judgment or opinion; there is no way for broadcasters to anticipate how any two people, much less the FCC, will judge these factors. *Cohen*, 403 U.S. at 25 ("one man's vulgarity is another's lyric"); *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971) ("Conduct that annoys some people does not annoy others."). Moreover, the FCC's "artistic necessity" and "'*bona fide* news'" exceptions make the indecency analysis even more indeterminate. See Pet. App. 25a-26a. Because these factors call for "wholly subjective judgments," they are quintessentially vague and thus do not provide fair notice. *Williams*, 553 U.S. at 306.[24]

As the Second Circuit found, the current policy's combination of unpredictable standards and eight-figure fines is chilling speech by forcing broadcasters to "steer far wider of the unlawful zone." *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958); see Pet. App. 31a (the vagueness of the FCC's policy combined with the "massive fines or possibl[e] . . . loss of [a] license[]" have "chilled protected speech"). Among many programs, broadcasters have declined to air award-winning documentaries about September 11th and live coverage of memorials for soldiers killed in Afghanistan because of the adult language that may

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[24] A "scienter requirement may mitigate a law's vagueness," *Vill. of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982), but petitioners have consistently maintained over broadcasters' objections that enforcement of § 1464 requires something less than scienter. If the Court does not affirm the Second Circuit's judgment, a remand is necessary to address Fox's independent scienter arguments, which the Second Circuit did not reach.

be used and the lack of clarity in the FCC's policy. Pet. App. 31a, 33a; J.A. 278. The vagaries of the FCC's enforcement regime have also led broadcasters to decline to air certain political speech, Pet. App. 33a, as well as literature readings and programs dealing with sexual health, *id.* at 31a, 33a-34a. As the Second Circuit observed, many of these chilled programs deal "with some of the most important and universal themes in art and literature." *Id.* at 34a.[25]

The vagueness of the FCC's new indecency regime is particularly problematic for live broadcasts because unscripted news, entertainment, or sports programs may unexpectedly include potentially offensive words. See Pet. App. 33a n.12 (describing FCC investigation into live coverage of sporting event). In response to the problems created by the FCC's policy, "local broadcasters are responding by altering—or halting altogether—the one asset that makes local stations so valuable to their communities: live TV." Allison Romano, *Reporting Live, Very Carefully*, Broadcasting & Cable (Jul. 3, 2005), http://www.broadcastingcable.com/article/CA623019.html; J.A. 288-89.

One alternative available to broadcasters is delay technology. But this compromises the primary reason many viewers watch live programming—to view live events. This is especially challenging for broadcasters that must compete for viewers who desire live programming (like sporting events) with

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[25] The breadth of the chill caused by the FCC's policy refutes petitioners' dismissive claim that the vagueness of this policy is permissible because it will only affect broadcasts "close to the indecency line" and "far removed from typical broadcast fare." Pet. Br. 35.

other outlets not subject to the FCC's vague indecency policy (*e.g.*, cable and the Internet). See, *e.g.*, J.A. 288-89. And the burdens of delay technology are heaviest for smaller, local broadcasters that have "special importance." *Fox*, 129 S. Ct. at 1835-37 (Breyer, J., dissenting) (describing effects on local broadcasters). Further, delay technology relies on split-second human judgments made in real time and is thus inevitably both over- and under-inclusive—over-editing some programs (chilling too much speech) and inadvertently failing to capture offensive material in other instances (risking massive sanctions). J.A. 285-86, 291, 295-96. Even when delay technology is used, a broadcaster may still face enormous fines if the FCC deems the broadcaster's efforts insufficiently diligent. See Pet. App. 66a-67a.

C. Petitioners' Attempts To Salvage The FCC's Vague Policy Are Unavailing.

1. Petitioners' procedural arguments are meritless. Petitioners principally rely on the assertion that to maintain a vagueness challenge a party must show that the challenged law is vague as to the conduct at issue. Pet. Br. 24-25 (quoting *HLP*, 130 S. Ct. 2718-19). Petitioners' arguments falter on a misconception of the vagueness inquiry.

As explained above, petitioners do not contest the Second Circuit's holding that the FCC's new indecency policy permits discriminatory enforcement, and petitioners' arguments centered on *HLP* are irrelevant to that holding.[26] This Court has explicitly

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[26] In *HLP*, the plaintiffs did "not argue that the . . . statute grants too much enforcement discretion," and, accordingly, the Court "address[ed] only" the issue of fair notice. 130 S. Ct. at 2719-20.

stated that, in such an inquiry, the "question is not whether discriminatory enforcement occurred *here*," and in evaluating a challenge under this prong of the vagueness doctrine, a court can "assume it did not." *Gentile*, 501 U.S. at 1051 (emphasis added). Rather, the fundamental concern is the "real possibility" of discriminatory enforcement that an indeterminate law creates. *Id.*; see also *Lawson*, 461 U.S. at 358 & n.8.

Even as to the Second Circuit's fair-notice holding, the decision below is entirely consistent with this Court's precedents. The court first determined the scope of the FCC's new indecency policy "'on its face,'" *United States* v. *Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963) (law "attacked as vague must initially be examined 'on its face'"), by examining the FCC's "further elaborat[ion]" of that policy in agency guidance and orders, Pet. App. 21a, 22a-24a; see *Grayned*, 408 U.S. at 110 (court "'relegated . . . to the words of the ordinance,'" the "interpretations [of] the court below," and the "interpretation . . . given by those charged with enforcing it" (first omission in original)); see also *Gentile*, 501 U.S. at 1048-51; *Giaccio*, 382 U.S. at 403; *Winter*, 333 U.S. at 512, 514, 518-19; Pet. Br. 34. Contrary to petitioners' claims (at 25), the court did not commit the same error that the lower court did in *HLP* by deciding "how the statute applied in hypothetical circumstances," 130 S. Ct. at 2719. Rather, the court examined *already decided* cases because the FCC has articulated its new policy through these adjudications, and the "guidance" provided by those cases is the only way the FCC can avoid a finding that its generic definition of indecency is vague. See *supra*, 40-41. The "conflicting results which have arisen from the painstaking attempts" to apply the new policy are

simply an "abundant demonstration" that the new policy is impermissibly vague. *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921).

Further, the Second Circuit's determination that the FCC's new indecency policy relies on the FCC's subjective and unknowable judgments demonstrates that the policy is vague "as applied" to the Fox and ABC programs at issue. *Goguen*, 415 U.S. at 578. When a law is vague because "'no standard of conduct is specified at all,'" that law "affects all who are prosecuted under [it]." *Id.* Consequently, this Court in *Goguen* concluded that such a law must be construed as "void for vagueness as *applied to*" the challenger. *Id.* (emphasis added). Because the Second Circuit correctly concluded that the FCC's new indecency policy is so vague that "'no standard of conduct is specified at all,'" it properly struck down the new policy. *Id.* "It is well settled" that a law proscribing "no comprehensible course of conduct at all. . . . may not constitutionally be applied to any set of facts." *United States* v. *Powell*, 423 U.S. 87, 92 (1975).[27]

Petitioners invoke a bogeyman in claiming that by striking down the FCC's indecency policy "in its entirety," the Second Circuit foreclosed any indecency enforcement. Pet. Br. 25-26. The Second Circuit made clear that it was holding only that "the FCC's current policy fails constitutional scrutiny," and it did "not suggest that the FCC could not create a constitutional policy." Pet. App. 34a. All that is required is that the FCC regulate indecency in a way

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[27] Petitioners' claim (at 29-31) that the artistic necessity and *bona fide* news exceptions are irrelevant to the challenges here is wrong for the same reason.

that is "consistent with First Amendment principles," *Playboy*, 529 U.S. at 826-27, avoiding indeterminate standards and arbitrary enforcement.

2. Petitioners' other defenses are similarly meritless. Petitioners contend that the FCC's "enforcement practices would have given" Fox "fair warning" that the programs at issue "could be considered indecent." Pet. Br. 27. They are wrong.

Petitioners argue that the FCC "has long imposed sanctions on the broadcast of precisely such language," Pet. Br. 27, but they rely on inapposite decisions. *Eastern Education Radio* concerned a 50 minute interview in which the interviewee repeatedly—not fleetingly—used offensive words (like those in Carlin's routine). 24 F.C.C.2d at 409, 410, ¶¶ 3, 8. That decision also emphasized that the FCC "can appropriately act only in clear-cut, flagrant cases." *Id.* at 414, ¶ 14. *Pacifica* was limited to the "verbal shock treatment" of the Carlin routine. 438 U.S. at 757 (Powell, J., concurring); *id.* at 739, 741. It expressly did not "speak to cases involving the isolated use of a potentially offensive word." *Id.* at 760-61 (Powell, J., concurring); *accord*, *id.* at 750 (same). These decisions are from the prior, restrained enforcement regime in which it was clear that the FCC would *not* punish the sort of speech at issue in the Fox broadcasts. See *supra*, 4-6.

The "networks' internal standards," which generally do not permit "fuck" and "shit" to be aired, are irrelevant to the vagueness analysis. Pet. Br. 28. The networks have adopted these internal policies for myriad reasons, balancing viewers' and advertisers' wants and needs in ways that have no necessary relationship to what is "patently offensive." The First Amendment does not permit the government to use an individual speaker's own editorial standards as

the legal boundary on what she may say; the mere fact that the *Washington Post* does not typically publish the word "fuck" does not mean that the government could constitutionally punish it if it did.

Petitioners fault the Second Circuit's examination of how the FCC has treated other potentially offensive words that arguably fit within the definition of "sexual or excretory activities or organs" and argue that the FCC "reasonably assessed the graphic nature and social acceptability of these words." Pet. Br. 28-29. But the issue is not social acceptability; it is whether the FCC has provided any objective standard for applying the "patent offensiveness" factors. The Second Circuit correctly explained that "in each of these cases, the Commission's reasoning consisted of repetition of one or more of the factors without any discussion of how it applied them. . . . This hardly gives broadcasters notice." Pet. App. 24a.

Petitioners similarly confuse what is at issue when they rely on this Court's decision in *Fox* to try to explain away the inconsistency between the FCC's indecency finding for the fleeting expletives at issue here and its failure to find "Saving Private Ryan" indecent. Pet. Br. 29-30. In *Fox*, this Court offered a possible rationalization for the FCC's different outcomes in those two particular orders, 129 S. Ct. at 1814 (suggesting that "Saving Private Ryan" had enough "frightening suspense" and "graphic violence" to drive most children out of the audience), but that after-the-fact rationalization has no grounding in the FCC's stated factors and in any event could not serve as the rigorous and predictable standard required by the First and Fifth Amendments.

Finally, petitioners argue that the vagueness of the indecency regime is ameliorated by the FCC's decisions to refrain from sanctioning broadcasters "in

cases where it was not clear at the time of the broadcast that the FCC would regard the pertinent material as indecent." Pet. Br. 31. But under FCC policy, the facts underlying a mere notice of apparent liability (which is functionally like a complaint, see 47 U.S.C. § 503(b)(5)), can be used against a broadcaster in licensing renewals.[28] The FCC's regulatory grace in this case was merely an acknowledgement of its change in policy; now that the FCC believes its new policy is "clear," it plainly intends to impose massive fines in future cases.

The FCC's new indecency policy relies on subjective judgments and gives the FCC unbounded discretion, thereby chilling substantial broadcast speech. Such an indeterminate policy is unconstitutional.

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[28] *Comm'n's Forfeiture Policy Statement & Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 15 FCC Rcd. 303 (1999).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Second Circuit.

Respectfully yours,

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