No. 10-1293

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Petitioners,

v.

ABC, INC., ET AL.,
Respondents.

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

BRIEF FOR RESPONDENTS ABC, INC.; KTRK TELEVISION, INC.; AND WLS TELEVISION, INC.

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RULE 29.6 STATEMENT

ABC, Inc. is an indirect, wholly owned subsidiary of The Walt Disney Company, a publicly traded corporation.

KTRK Television, Inc. and WLS Television, Inc. are indirect, wholly owned subsidiaries of ABC, Inc.

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STATEMENT

1. Under 18 U.S.C. §1464, it is a criminal offense to broadcast any "indecent" language. The Federal

Communications Commission can impose civil forfeitures for violations of this provision. *See* 47 U.S.C. §503(b)(1). In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), this Court held that the Commission had the authority to enforce §1464's indecency prohibition against a midday radio broadcast of George Carlin's "Filthy Words" monologue, which consisted of seven expletives "repeated over and over as a sort of verbal shock treatment" for nearly twelve minutes. *Id.* at 757 (Powell, J., concurring in part and concurring in the judgment).

Section 1464's prohibition on indecent broadcasts implicates serious constitutional concerns, because "expression which is indecent but not obscene is protected by the First Amendment." *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). Recognizing this point, this Court, both in *Pacifica* itself and in later cases, has "emphasize[d] the narrowness of [*Pacifica*'s] holding." *Pacifica*, 438 U.S. at 750; *see Reno* v. *ACLU*, 521 U.S. 844, 870 (1997) (noting "our 'emphatically narrow holding' in *Pacifica*"). More specifically, the Court in *Pacifica* stated that the question before it was simply "whether the … Commission has *any* power to regulate a radio broadcast that is indecent but not obscene." 438 U.S. at 729 (emphasis added). And it stressed that its "review is limited to … whether the Commission has the authority to proscribe this particular broadcast." *Id.* at 742 (plurality opinion).

Justices Powell and Blackmun, whose votes were necessary to uphold the Commission's indecency finding in *Pacifica*, made clear that the Court was not giving the Commission "unrestricted license to decide what speech, protected in other media, may be banned from the airwaves." 438 U.S. at 759-760. They did not expect the Commission's indecency determination to

chill broadcasters' expression because "the Commission may be expected to proceed cautiously, as it has in the past." *Id.* at 762 n.4.

The Commission initially adhered to *Pacifica*'s message of restraint. *See, e.g.*, *In re WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254 (¶10) (1978) (stating—in declining to punish a station for broadcasting expletives and nudity—"[w]e intend strictly to observe the narrowness of the *Pacifica* holding"). It brought no indecency-enforcement actions between 1978 and 1987. *See Infinity Broad. Corp.*, 3 F.C.C.R. 930, 930 (¶4) (1987) (subsequent history omitted) (*Infinity*). And even when it expanded indecency enforcement beyond Carlin's seven "filthy words," *see Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 (¶12) (1987) (subsequent history omitted), the Commission stated that "the First Amendment dictate[s] a careful and restrained approach" to regulation of broadcast indecency, *Infinity Broad. Corp.*, 2 F.C.C.R. 2705, 2705 (¶6) (1987) (subsequent history omitted).

2. In recent years, however, the Commission has abandoned its restraint, adopting a far more aggressive approach to broadcast indecency. *See* Pet. App. 7a-8a & nn.2-3.

a. In 2008, the Commission issued a forfeiture order finding indecent an episode of *NYPD Blue* that showed a woman's buttocks for seven seconds. *See* Pet. App. 126a-214a. *NYPD Blue*, a one-hour serial drama that featured the lives of New York City police detectives, aired on the ABC Television Network from 1993 to 2005. *Id.* at 127a (¶2). The show was among the most acclaimed dramas in television history, garnering twenty Emmy awards, four Golden Globes, and two Peabodys, among other accolades. Key to the show's

success was its authentic portrayal of the dangers and difficulties faced by its characters in their professional and personal lives. One citation, for example, lauded the show for "provid[ing] gritty and realistic insight into the dilemmas and tragedies which daily confront those who spend their lives in law enforcement."[1]

To achieve this compelling realism, *NYPD Blue* employed coarse language, dramatic depictions of street violence, and mature themes, plotlines, and visual elements, including occasional partial nudity. To inform parents and others about the nature of the material being broadcast, ABC began almost every episode with a prominent visual and verbal advisory detailing the episode's mature content. After the TV Parental Guideline ratings were adopted in 1997, ABC also gave each episode a TV-14 rating, meaning "Parents Strongly Cautioned—This program contains some material that many parents would find unsuitable for children under 14 years of age." Episodes were subsequently given appropriate content descriptors as well (language, violence, etc.), and coded to allow blocking with the V-chip, a device that empowers viewers to block broadcasts based on their age rating, content descriptors, or both.[2] *See infra* pp.42-43.

b. The episode at issue here was broadcast in February 2003, during the last hour of primetime television—from 10 to 11 pm in the Eastern and Pacific time zones and from 9 to 10 pm in the Central and Mountain time zones. Like many episodes, it explored

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[1] Peabody Awards, http://www.peabody.uga.edu/winners/details.php?id=157 (visited Nov. 2, 2011).

[2] FCC V-Chip, http://fcc.gov/vchip (visited Nov. 2, 2011).

the personal life of a leading character, Detective Andy Sipowicz. As regular viewers knew, Sipowicz's wife had died several seasons earlier, leaving him alone to raise their young son Theo. Sipowicz later became romantically involved with another detective, Connie McDowell. As their relationship developed, the two often worried about its effect on Theo, a theme addressed in multiple episodes. Shortly before the episode at issue here, Sipowicz and Theo moved into McDowell's apartment.

The broadcast began with a full-screen, eight-second visual and audio advisory informing viewers that "THIS POLICE DRAMA CONTAINS ADULT LANGUAGE AND PARTIAL NUDITY. VIEWER DISCRETION IS ADVISED."[3] The advisory and the program's opening frames also displayed a TV-14(DLV) rating. The episode thus would have been blocked from any television with a V-chip set for broadcasts carrying either that age rating or any one of the content descriptions (intensely suggestive dialogue, strong coarse language, or intense violence). The advisory was followed by a 30-second recap of prior episodes and then immediately by the scene at issue.

The scene begins with McDowell entering her bathroom to take a shower. Like anyone preparing to shower, she turns on the water and disrobes. Moments later, Theo, first shown waking up and getting out of bed, opens the bathroom door, unaware that McDowell is inside. Both characters are startled and embarrassed. McDowell covers herself with her arms, and Theo quickly retreats, closing the door as he apologizes.

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[3] A DVD copy of the episode was submitted with the petition.

To convey vividly the embarrassment this encounter caused, the scene briefly depicts McDowell naked from behind and the side (hence the prominent advisory about partial nudity). In two shots before Theo opens the bathroom door, McDowell's buttocks are fully visible for five seconds and partially visible for two seconds. McDowell's pubic area is never shown, and her breasts are visible only from the side or otherwise obscured. At no point in the scene does either character engage in sexual or excretory activity, or display any sexual interest.[4]

3. Almost a year after the episode aired, FCC staff sent ABC a letter of inquiry stating that the episode had been the subject of indecency complaints. Pet. App. 127a (¶2). ABC submitted a tape and transcript of the episode, along with letters explaining why the episode contained no indecent material. *Id.*

Four years later, the Commission issued a notice of apparent liability, asserting that the broadcast was indecent. *See* Pet. App. 215a-262a. The Commission reaffirmed that determination in a forfeiture order and imposed the then-maximum fine of $27,500 on each of 45 stations—two owned by ABC, Inc. and 43 affiliated with the ABC network—that had broadcast the episode in the Central or Mountain time zone, for a total fine of

[4] During the scene's taping, the actress playing McDowell wore opaque fabric over her pubic area and parts of her breasts. In compliance with California law, both the mother of the actor who played Theo and a certified studio teacher/welfare worker were present during the rehearsal and filming of the scene.

nearly $1.24 million. *See id.* at 126a-214a.[5] (As noted, the episode aired at 10 pm in the Eastern and Pacific time zones, within the 10-pm-to-6-am "safe harbor." *See* 47 C.F.R. §73.3999(b).)

ABC paid the fine and sought review in the Second Circuit. While the case was pending, a different Second Circuit panel held in *Fox Television Stations, Inc.* v. *FCC*, 613 F.3d 317 (2d Cir. 2010), that the Commission's indecency-enforcement policy is unconstitutionally vague. *See* Pet. App. 1a-34a. The panel assigned to ABC's challenge directed the parties to file supplemental briefs addressing the impact of *Fox*. Petitioners responded that there were no material factual distinctions between *Fox* and this case, and thus under the *Fox* decision the forfeiture order was invalid. *See* Supp. Br. for FCC and United States 3, *ABC, Inc.* v. *FCC*, No. 08-0841-ag (2d Cir. Aug. 23, 2010) (Gov't CA2 Supp. Br.). The *ABC* panel agreed and set aside the forfeiture order. *See* Pet. App. 124a-125a.

SUMMARY OF ARGUMENT

I. The Commission's current indecency-enforcement policy violates due process because it is impermissibly vague, both as applied in this case and on its face.

A. This Court concluded in *Reno* v. *ACLU* that a statutory standard virtually identical to the Commission's generic indecency standard was unconstitutionally vague. *Reno* thus requires invalidation of the

[5] Congress increased the maximum fine more than tenfold in 2006. *See* Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, §2, 120 Stat. 491, 491 (2006).

Commission's generic standard unless it can be meaningfully distinguished from the one at issue in that case.

B. Petitioners claim such a distinction in the Commission's elaboration of the generic standard—both in the 2001 *Industry Guidance*[6] and in subsequent decisions applying the standard to particular broadcasts. Neither point remedies the vagueness problem. First, the *Industry Guidance* does not set forth specific criteria that must be satisfied for a broadcast to be found indecent. It simply enumerates three "factors" with no indication as to how they will be weighed against one another—or against other, unannounced factors. And the factors themselves are so capacious and subjective that they could not alone provide ABC with constitutionally sufficient notice that the seven-second, non-sexual display of buttocks at issue would be deemed indecent.

Commission precedent likewise failed to provide ABC with constitutionally adequate notice. Before the broadcast at issue, the Commission had declared that even full frontal nudity was not *per se* indecent, rejected indecency complaints against broadcasts that included lengthier displays of nudity, and emphasized the highly sexualized nature of the material it did find indecent. Petitioners cite no Commission decision deeming material like this scene to be indecent.

More generally, the Commission's application of its standard in recent years has been markedly inconsistent. From case to case the Commission reaches its de-

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[6] *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999 (2001).

sired result by giving more or less weight to each of the three patent-offensiveness factors, while also heavily weighting or instead ignoring other, sometimes unannounced factors. The result is that broadcasters have no way to know what material the Commission will deem indecent.

C. The Commission's vague standard has led to both arbitrary enforcement and a chill on protected expression. The Commission appears to base indecency determinations on its own artistic judgments, in derogation of fundamental constitutional principles. Broadcasters have thus refrained from engaging in constitutionally protected expression for fear of incurring multi-million dollar fines and license revocations.

D. Although petitioners fault the Second Circuit for examining the Commission's indecency-enforcement policy beyond this case, they themselves invoked Commission decisions regarding other broadcasts, and ABC was entitled to mount a facial vagueness challenge because its conduct was not clearly proscribed. Petitioners also cannot justify the Commission's inconsistent precedent by vaguely invoking "context." And forcing broadcasters to air questionable material during the safe harbor would severely curtail broadcasters' ability to engage in constitutionally protected expression. The fact that networks' internal standards call for careful review of powerful words and images, such as expletives and nudity, does not mean that the government can restrict or punish such use. Finally, the Second Circuit did not, as petitioners suggest, limit the Commission to prohibiting specific words and images.

II. The Commission's indecency-enforcement regime also violates the First Amendment.

A. Even under *Pacifica*, the government may not prohibit the brief non-sexual display of nudity at issue here. This Court has rarely permitted content-based restrictions on indecent material, and in evaluating such restrictions it has looked primarily to whether the material was sexualized, as well as to whether children would be exposed to it for an extended period. Neither factor is met here. Petitioners have failed even to articulate what harm children suffer from viewing the scene.

B. Unlike when *Pacifica* was decided, the government today can support parents' choices regarding what their children will see on television without resort to content-based restrictions. The V-chip and similar blocking technologies—which both Congress and the Commission have deemed effective—provide a less restrictive alternative. This Court has consistently held that where such an alternative is available, the government may not restrict constitutionally protected expression. Petitioners' criticisms of the V-chip, like criticisms this Court has rejected in the past as to other technologies, are insufficient to justify content-based restrictions.

C. Although the *ABC* forfeiture order is infirm even under current precedent, there is no basis today for reduced First Amendment scrutiny of broadcast indecency regulations.

Decades ago, this Court upheld some regulation of broadcasters under a theory of "spectrum scarcity." *See, e.g.*, *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 392-396 (1969). Petitioners invoke that theory, but neither the Court nor the Commission has ever relied on it to justify *indecency* restrictions. Doing so for the first time now would be particularly unwarranted. Techno-

logical developments have both vastly increased the available spectrum and provided other outlets for communication. If spectrum scarcity is now necessary to support the Commission's indecency-enforcement policy, *Red Lion* should be overruled.

Pacifica justified reduced First Amendment scrutiny of broadcast indecency regulation on the theory that broadcasting was uniquely pervasive and uniquely accessible to children. Neither predicate is true today. The vast majority of American households receive television through cable or satellite, and therefore receive numerous non-broadcast channels to the same extent, and with the same accessibility to children, as broadcast channels. The Internet also brings words and images (including broadcast television shows) into people's homes. And parents now have technological means to block broadcast channels and programs, which did not exist when *Pacifica* was decided. Petitioners' arguments—that a small percentage of households have only broadcast television, that some parents choose to allow their children to have broadcast-only televisions in their rooms, and that broadcasters could use other media for possibly indecent material—are too insubstantial to justify this restraint on constitutionally protected expression.

D. There is no merit to petitioners' argument that the supposed 80-year history of indecency regulation supports reversal. The Commission conducted virtually no enforcement for most of that time, including almost a decade after *Pacifica*, and hence the enforcement regime was not challenged. There is thus no basis for a "presumption" of constitutionality.

ARGUMENT

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

The Second Circuit correctly concluded that the Commission's current indecency-enforcement policy is impermissibly vague and powerfully chills broadcasters' constitutionally protected expression. The policy's vagueness is evident both in its application to the *NYPD Blue* episode at issue and more generally.

An elemental requirement of due process is that the government "provide a person of ordinary intelligence fair notice of what is prohibited." *United States* v. *Williams*, 553 U.S. 285, 304 (2008). Vague laws "trap the innocent by not providing fair warning" and foster "arbitrary and discriminatory enforcement." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). A "more stringent vagueness test" applies, moreover, when a regulation "interferes with the right of free speech." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). And vagueness here "is a matter of special concern" because §1464 "is a criminal statute" and "a content-based regulation of speech" with an "obvious chilling effect." *Reno*, 521 U.S. at 871, 872.

In *ABC*, the Commission found indecent a seven-second, non-sexual display of buttocks that was accompanied by a prominent viewer advisory and that constituted an element of a serious, non-sexual storyline in a properly rated episode of a highly acclaimed series. That finding violates due process because ABC lacked fair warning that such a display would be deemed indecent. And while that suffices to affirm the judgment in *ABC*, the broader point is that neither the Commission's generic definition of indecency, nor the factors

discussed in the *Industry Guidance* that supposedly give further content to that definition, nor the Commission's application of those factors, gave broadcasters the required notice about what the Commission would deem "indecent." The inevitable result has been that broadcasters have trimmed their sails and refrained from speaking rather than risk enormous penalties.

A. The Commission's Generic Definition Of Indecency Is Unconstitutionally Vague

The Commission's generic standard for broadcast indecency is essentially identical to the indecency standard for online material that this Court declared unconstitutionally vague in *Reno*. The Commission's standard defines broadcast material as indecent if it, "in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium." Pet. App. 45a (¶15). In *Reno*, this Court addressed a statute banning online distribution of material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," 47 U.S.C. §223(d)(1) (2003). In holding the statute unconstitutional, the Court explained that this standard "lacks the precision that the First Amendment requires when a statute regulates the content of speech," 521 U.S. at 874, expressing particular concern with "the vagueness inherent in the open-ended term 'patently offensive,'" *id.* at 873.

Despite *Reno*, petitioners argue that *Pacifica* forecloses a vagueness challenge to the Commission's indecency regime (or at least to the term "indecent"). But no vagueness claim was advanced in *Pacifica*; the broadcaster stipulated that the material was "patently

offensive" and argued instead that "indecency" necessarily entailed prurient appeal. *See* 438 U.S. at 739.[7]

In the orders under review, the Commission took a different but equally unpersuasive tack, dismissing *Reno* on the ground that it "expressly distinguished *Pacifica*." Pet. App. 77a (¶45), 173a (¶41). But as the Second Circuit explained, *Reno* distinguished *Pacifica* regarding "'the level of First Amendment scrutiny that should be applied to this medium,' not … whether the statute was unconstitutionally vague. Broadcasters are entitled to the same degree of clarity as other speakers, even if restrictions on their speech are subject to a lower level of scrutiny." *Id.* at 21a (quoting *Reno*, 521 U.S. at 870).

B. The Commission Has Failed To Give Meaningful And Consistent Content To Its Definition Of Indecency

Given that, under *Reno*, the Commission's generic broadcast indecency standard is unconstitutionally vague, petitioners have the burden to show that the Commission—either through further refining that standard or through its adjudications—has given it content sufficiently clear and consistent to place broadcasters on notice of what material will be deemed indecent. And indeed, petitioners have sought to distinguish *Reno* on the ground that the Commission has

[7] Any claim that the word "indecent" is in itself sufficiently clear is foreclosed by a phalanx of post-*Pacifica* precedent, including *Reno*. *See Williams*, 553 U.S. at 306 ("[W]e have struck down statutes that tied criminal culpability to whether the defendant's conduct was … 'indecent.'" (citing *Reno*, 521 U.S. at 870-871 & n.35)), *cited in Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2720 (2010).

elaborated on its generic standard for broadcast indecency, first in the *Industry Guidance* and second in its application of the standard to various broadcasts.

Neither supposed elaboration cures the vagueness problem, either regarding the *ABC* indecency finding or generally. If anything, the Commission's refinements have made matters worse. While the Commission has articulated several factors on which it assertedly bases its indecency decisions, the factors are themselves so capacious and subjective, and the Commission has applied them in such a conclusory and ad hoc fashion, that broadcasters cannot know with any degree of assurance whether the Commission will find a particular broadcast indecent.

1. *Threshold Test.* The Commission explained in 2001 that its standard includes a threshold test: To be indecent, "material *must* describe or depict sexual or excretory organs or activities." *Industry Guidance*, 16 F.C.C.R. at 8002 (¶7) (emphasis added). In *ABC*, the Commission found this requirement satisfied on the ground that buttocks are a sexual or excretory organ. But that is wrong. Buttocks are not such an organ—or, indeed, an organ at all. *See, e.g.*, *State* v. *Fly*, 501 S.E.2d 656, 659 (N.C. 1998).

The Commission acknowledged below that buttocks do not meet "a technical physiological definition" of the term organ, but asserted that it was "[in]appropriate" for the term to be limited in that fashion. Pet. App. at 136a (¶9). That is untenable. The Commission promulgated its threshold test to settle litigation challenging its indecency standard as vague. *See Industry Guidance*, 16 F.C.C.R. at 8016 n.23 (¶30). The Commission could have adopted a threshold test that plainly encompassed buttocks. But having instead

chosen a term ("sexual or excretory organ") with a clear meaning that does *not* include buttocks, the Commission may not assert that, for purposes of its test, the term actually has some other meaning. *See Service* v. *Dulles*, 354 U.S. 363, 388 (1957). Such an approach does not "provide a person of ordinary intelligence"—who surely assumes that a term has its normal meaning—"fair notice of what is prohibited." *Williams*, 553 U.S. at 304.[8]

2. *Patent-Offensiveness Factors.* The *Industry Guidance* also announced three "factors" that would inform the Commission's patent-offensiveness determinations. Those factors, however, are not a *definition* of indecency. Unlike the constitutionally-informed definition of obscenity, *see Miller* v. *California*, 413 U.S. 15, 24-25 (1973), the *Industry Guidance* does not set forth specific criteria that must be satisfied for a broadcast to be found "indecent." Rather, the Commission's three factors are just that—factors—and neither the *Indus-*

[8] Commission precedent likewise gave ABC no fair notice of the FCC's curious view that buttocks are an organ. The Commission below cited only one case predating the *NYPD Blue* broadcast. *See* Pet. App. 133a-134a & nn.28-29 (¶8). But that case involved radio dialogue describing "a sadistic act of simulated anal sodomy." *Rubber City Radio Group*, 17 F.C.C.R. 14745, 14747 (¶7) (2002). The "excretory organ" referred to there was the anus, not buttocks. The Commission's reliance (Pet. App. 133a & n.28 (¶8)) on a music video deemed indecent in *Complaints Regarding Various Television Broadcasts*, 21 F.C.C.R. 2664, 2681 (¶62) (2006), is also misplaced. That decision postdates the broadcast at issue here, and, in any event, the video "focused entirely on the repetition of simulated sexual activity with accompanying lyrics that describe such activity," *id.* at 2681 (¶63). It is thus categorically different from the brief, non-sexual display of nudity at issue in this case.

try Guidance nor subsequent precedent gives any indication as to how they ought to be weighed against one another (or other factors). To the contrary, the weighing process is opaque and unpredictable. *E.g.*, Pet. App. 46a (¶15) ("one or two of the factors may outweigh the others … rendering the broadcast … indecent"). Broadcasters are thus left to guess how the Commission will apply those factors in a particular case.

On their face, the factors themselves are so imprecise and subjective that they provide little meaningful notice. Terms like "*dwell[ed] on or repeat[ed] at length*," *Industry Guidance*, 16 F.C.C.R. at 8003 (¶10), may be stretched to suit almost any circumstance. Indeed, if two shots of partial nudity that total seven seconds constitute "dwell[ing]" or "repeat[ing] at length," then those terms have no meaningful content. Even more problematic are the words employed in another patent-offensiveness factor: whether material "*appears to pander[,] … titillate,* or … *shock*." *Id.* Given the range of human reaction, taste, and experience, those terms could apply to such a wide swath of protected expression that they cannot possibly "provide a person of ordinary intelligence fair notice of what is prohibited." *Williams*, 553 U.S. at 304; *see also Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2720 (2010) ("We have … 'struck down statutes that tied criminal culpability to … wholly subjective judgments.'") (*HLP*).

3. *Commission Precedent.* Perhaps the Commission might have found a way to apply these open-ended terms both consistently and with due regard for the First Amendment, so that broadcasters deciding whether to air a program would know whether such a program would be considered indecent. But again, the opposite has been true. The Commission's recent deci-

sions applying the indecency factors (and its standard more generally) are a wilderness of confusion for broadcasters, leading them to steer far clear of any material that might be deemed indecent rather than risk incurring multi-million dollar fines and license revocations. To the extent sense can be made of the Commission's precedent, nothing in it would have led ABC to suspect in 2003 that a non-sexualized, seven-second display of buttocks in the context of a serious drama would be considered indecent. Quite the contrary: all the Commission's decisions that were even remotely analogous pointed in the opposite direction.

a. On the question whether the material was "dwelled on" or "repeated at length," the Commission found that the display of buttocks here "provides some support" for an indecency finding. Pet. App. 142a (¶15). Yet prior to the broadcast in question, the Commission deemed 40 seconds of nudity in a broadcast of the movie *Catch-22* (including 10 seconds of full frontal nudity and 30 seconds in which buttocks are fully exposed) to be "very brief," and concluded that the nudity was not indecent "in [the] context of a full length drama, the primary theme of which was the horrors of war." Letter from Norman Goldstein to David Molina, FCC File No. 97110028 (May 26, 1999); *see Catch-22* (KCET television broadcast Oct. 25, 1997), at 23:41-24:08, 54:50-55:20; *see also* Letter from Edythe Wise to Susan Cavin, FCC File No. 91100738 (Aug. 13, 1992) (finding 31 seconds of female frontal nudity in the miniseries *Devices and Desires* "not actionably indecent"); *Devices and Desires: Episode 2* (WUNC television

broadcast Oct. 13, 1991), at 25:42-25:55, 28:58-29:22.[9] And subsequent to the broadcast here, in a case involving an eight-second depiction of buttocks, the Commission cited the depiction's "brevity" in deeming the material not indecent. J.A. 168 (¶226).

The Commission has not explained this inconsistency, instead attempting to justify the different ultimate outcomes in these cases on other grounds. *See* Cert. Reply 7. But the fact that the Commission can point to some *other* difference between broadcasts does not justify its inconsistent application of the factors that purportedly avoid the vagueness "inherent" in its indecency standard, *Reno*, 521 U.S. at 873. If the Commission is effectively ignoring the factors and simply making gestalt indecency determinations, then the factors are not a basis for distinguishing the Commission's standard from the one the Court invalidated in *Reno*.

b. As to whether the material "appears to pander[,] … titillate, or … shock," *Industry Guidance*, 16 F.C.C.R. at 8003 (¶10) (emphasis omitted), nothing in the Commission's precedent provided ABC with notice

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[9] The Commission argued below that ABC could not rely on unpublished decisions. There is, however, "no earthly reason why the mere fact of nonpublication should permit an agency to take a view of the law in one case that is flatly contrary to the view it set out in earlier (yet contemporary) cases." *Davila-Bardales* v. *INS*, 27 F.3d 1, 5-6 (1st Cir. 1994). In any event, even if agencies enjoy immunity against citation to unpublished decisions as a general matter, they can surely waive it, and the Commission has done so: Its rule regarding unpublished decisions allows their citation "against persons who have actual notice of the document in question *or by such persons against the Commission*." 47 C.F.R. §0.445(e) (emphasis added).

that the brief, non-sexualized appearance of buttocks in the context of a dramatic scene would meet this factor. Two years before the *NYPD Blue* broadcast in question, the Commission assured broadcasters that even "full frontal nudity is not *per se* indecent." *Industry Guidance*, 16 F.C.C.R. at 8012 (¶21). And before that, the Commission rejected indecency complaints concerning nudity, including full frontal nudity. *See* Molina Letter, *supra*; Cavin Letter, *supra* (female frontal nudity in a love scene and a beach scene); *WPBN/WTOM License Subsidiary, Inc.*, 15 F.C.C.R. 1838, 1841 (¶11) (2000) (rejecting complaint regarding a broadcast of *Schindler's List*).

By contrast, Commission decisions deeming broadcasts indecent issued before the *NYPD Blue* broadcast emphasized that material was "shocking, pandering, or titillating" because it was used in a highly sexualized (or excretory) fashion. *See Citadel Broad. Co.*, 16 F.C.C.R. 11839, 11840 (¶6) (2001) ("lyrics contain[ing] sexual references in conjunction with sexual expletives … appear intended to pander and shock"); *Industry Guidance*, 16 F.C.C.R. at 8010 (¶20) (citing *Rusk Corp. Radio Station KLOL(FM)*, 5 F.C.C.R. 6332 (1990), as deeming patently offensive an "[e]xplicit description … that focused on sexual activities in a lewd, vulgar, pandering and titillating manner"). These decisions provided no notice to ABC in 2003 that the Commission would deem this non-sexual scene "shocking, pandering, or titillating."

Indeed, numerous Commission decisions since the broadcast rejected indecency complaints where references to sexual or excretory organs or activities were *not* "eroticized," J.A. 130 (¶160), 131 (¶162), or distinctly excretory. For example, the Commission concluded that a scene from *Will & Grace* showing a man

and woman touching and adjusting another woman's clothed breasts as she prepared for a date was not shocking, pandering, or titillating because "the touching of the breasts is not portrayed in a sexualized manner." J.A. 129 (¶158). Similarly, the Commission found that the depiction of a baby's buttocks on *America's Funniest Home Videos* was not shocking, pandering, or titillating because it was "not sexualized in any manner." J.A. 168 (¶226); *see also* J.A. 138, 139 (¶¶175-176, 178) ("highly graphic and explicit" descriptions of "sexual practices," which "continue[d] at length" on an episode of Oprah Winfrey deemed not patently offensive because they were not done in a "vulgar" way); *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 F.C.C.R. 1931, 1932-1938 (¶¶3-8) (2005) (deeming not indecent explicit references to "testicles," "nipples," "penis," "breasts," and other body parts, including "I am this close to tugging on my testicles again").

c. Other Commission rulings since the *NYPD Blue* broadcast illustrate the inconsistent nature of recent FCC decisions. For example, the Commission has declared that every use of "shit" or its many variants (including "bullshit") "invariably invokes a coarse excretory image." J.A. 121 (¶138). Yet it has treated comparable words differently. It has made clear, for instance, that the phrase "a lot of crap" is less likely to be deemed indecent because it—purportedly unlike "bullshit"—is "fairly commonly used in a non-sexual, non-excretory manner." J.A. 110-111 n.180. And it has excused utterances of "ass" on the ground that that word (again supposedly unlike "bullshit") can be "used in a nonsexual sense to denigrate or insult the speaker or another character." J.A. 153 (¶197). These arbitrary distinctions

leave broadcasters with no way to know which other words three commissioners will decide "invariably" refer to excrement or sexuality or, rather, are "commonly used in a non-sexual, non-excretory manner."

Similarly, the Commission has declared that uses of "dick" or "dickhead" in earlier *NYPD Blue* episodes were not patently offensive because they were neither "sufficiently vulgar, explicit, or graphic," nor "sufficiently shocking." J.A. 115 (¶127). Yet in the next breath it declared that individual uses of "bullshit" in *NYPD Blue* episodes *were* patently offensive because each was "vulgar, graphic and explicit," and "shocking and gratuitous." J.A. 116, 117 (¶¶128, 130).[10] Petitioners assert (Br. 28-29) that "[i]n making that distinction, the Commission reasonably assessed the graphic nature and social acceptability of these words." But no "assessment" is evident; the Commission simply proclaimed that specific words were or were not sufficiently shocking, vulgar, and so on to warrant an indecency finding. That is decree, not analysis.

d. The Commission has also offered inconsistent assessments of the importance of viewer advisories and the V-chip. Prior to the *NYPD Blue* broadcast, the Commission rejected an indecency complaint regarding the airing of *Schindler's List* in part because "[parental advisory] warnings … accompanied the broadcast." *WPBN/WTOM*, 15 F.C.C.R. at 1842 (¶13). The Commission similarly emphasized in 2005 that ABC had included on-air viewer advisories and V-chip ratings in rejecting indecency complaints against a broadcast of

[10] The Commission later dismissed the indecency complaints regarding these *NYPD Blue* broadcasts, on procedural grounds. Pet. App. 10a & n.5.

the film *Saving Private Ryan*. *See Complaints Against Various Television Licensees Regarding "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4508 & nn.8-9 (¶3), 4513 (¶15) (2005) (*Saving Private Ryan*). Those warnings, the Commission said, alerted parents to the fact that the program was "not intended as family entertainment," thus enabling parents to "exercise their own judgment" about whether to allow their children to view it. *Id.* at 4513 (¶15).

The *NYPD Blue* broadcast at issue here also carried a clear viewer advisory and a V-chip rating, yet the Commission's only explanation for why those warnings did not render the brief nudity—which was far less extensive than the nudity in *Schindler's List* or the dozens of harsh expletives in *Saving Private Ryan*—not indecent was that "[i]n context and on balance," they were not enough. Pet. App. 148a (¶18). That marked inconsistency further demonstrates that ABC had no notice that this broadcast would be deemed indecent.

Moreover, as petitioners themselves point out, in *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1814 (2009), this Court observed that the Commission could reasonably conclude that the adult themes in *Saving Private Ryan* could "dissuade the most vulnerable from watching and … put parents on notice of potentially objectionable material." The same is true here. ABC expressly, with ratings and advisories, alerted parents that the *NYPD Blue* broadcast contained material that some parents might think was inappropriate for "the most vulnerable," *id.*, thereby empowering parental choice. Indeed, at the time of this broadcast, *NYPD Blue* was in its tenth season, and throughout the show's run there had been extensive media coverage about its mature content and occasional use of partial nudity. *See, e.g.*, Gates, *Sipowicz Cooks Meatloaf?*

This Sure Is A New Season, N.Y. Times, Jan. 11, 2000, at E5; Andrews, *Mild Slap At TV Violence*, N.Y. Times, July 1, 1993, at A1. Parents and other viewers thus had every reason to be aware by 2003 of the program's mature elements and intended audience.

In sum, there was nothing in the indecency standard itself or in past precedent that would lead ABC to conclude that the Commission would find the non-sexualized scene here—involving a woman preparing for the quotidian activity of her morning shower before work, followed by a momentary and embarrassing encounter with a child—to be indecent, particularly when presented as part of a serious and non-sexual storyline in a properly rated (and hence blockable) episode of a long-running and highly acclaimed dramatic series. And subsequent Commission decisions leave broadcasters without any adequate guidance as to what constitutes broadcast indecency.

4. *Petitioners' Fair-Notice Arguments.* Petitioners contend that ABC nonetheless had fair notice that the episode here would be deemed indecent because of an FCC decision from *1960*, in which the Commission observed that "while a nudist magazine may be within the protection of the First Amendment … the televising of nudes might well raise a serious question of" indecency. *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2307 (1960). That nebulous observation about the broadcast of material similar to that found in a "nudist magazine" does not provide fair notice in 2003 that the scene here—involving the brief non-sexualized display of partial nudity in a dramatic context—was prohibited. This is particularly true given the Commission's more recent and more concrete guidance regarding the indecency implications of broadcast nudity. *See supra* pp.18-21.

Petitioners notably make *no* argument that the Commission's standard itself, even as elaborated in the *Industry Guidance*, gave ABC fair notice. Instead, they quote the Commission's assertion below that the scene was shocking, pandering, or titillating because it supposedly "placed the audience in the 'voyeuristic position' of observing a naked woman preparing to shower, and [because] the manner in which the scene was shot 'highlights the salacious aspect of the scene.'" Pet Br. 16-17 (quoting Pet. App. 143a-144a). But adding adjectives ("voyeuristic" and "salacious") to shocking, pandering, or titillating does not ameliorate the vagueness problem. What is critical is that the Commission has never pointed to anything in the scene with a sexual or excretory aspect—because there is nothing. To the contrary, the Commission acknowledged in the forfeiture order that "the scene does not depict any sexual response in the child." Pet. App. 144a (¶16).[11]

Finally, petitioners assert that ABC's fair-notice argument rests on only a single published decision (involving *Schindler's List*) in which the Commission had rejected indecency complaints involving longer displays

[11] The Commission is thus driven to contend that the scene was shocking, pandering, or titillating because some viewers might find the images sexually appealing. *See, e.g.*, Pet. App. 143a (¶16) ("The viewer [watches] an attractive woman disrobing[.]"). Given the near-infinite variety of sexual tastes and preferences, that subjective approach does not provide constitutionally sufficient notice. As this Court has observed, government reliance on viewers' subjective sexual reaction to images "strikingly illustrate[s]" "[t]he dangers inherent in vagueness." *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 685 (1968). Those dangers are fully realized here.

of nudity.[12] That assertion ignores the Commission's other pre-2003 decisions that rejected indecency complaints involving nudity. *See supra* pp.18-21. Petitioners' argument also improperly limits the universe of relevant decisions to ones involving nudity. Those are obviously pertinent, but so are other Commission decisions, because at the time of the broadcast at issue here the Commission had never suggested that images and words are treated differently for indecency purposes. *See CBS Corp.* v. *FCC*, No. 06-3575, 2011 WL 5176139, at *22 (3d Cir. Nov. 2, 2011).

More fundamentally, petitioners' argument inappropriately puts the onus on ABC to cite precedent demonstrating that the episode here would not be deemed indecent. But given that petitioners do not even venture to argue that the text of the Commission's indecency test provided adequate notice, it is they who must show that FCC precedent affirmatively did so, because otherwise *nothing* provided such notice. Petitioners cannot make that showing—and that is the dispositive point: Petitioners have failed to cite *any* Commission decision deeming material remotely like the scene here to be indecent.

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[12] Contrary to petitioners' suggestion (Br. 19), ABC does not contend that the *Schindler's List* and *NYPD Blue* scenes are equivalent at some general level. Rather, the two cases are similar *in terms of the indecency factors on which the Commission relied*. Specifically, each appeared in a serious award-winning dramatic series or film and was accompanied by a viewer advisory; neither involved anything sexual or excretory; and the nudity in *Schindler's List* was more extensive (full frontal compared to buttocks), no less graphic and explicit, significantly lengthier, and much more shocking.

C. The Commission's Indecency Policy Appears Driven By Content Preferences And Has A Serious Chilling Effect

The Commission's vague indecency standard has produced two of the effects that the prohibition on vague laws is designed to avoid: arbitrary enforcement and chilling of protected expression. *See Grayned*, 408 U.S. at 108-109; *Reno*, 521 U.S. at 871-872. Its inconsistent decisionmaking appears driven by the commissioners' personal views about the merits of particular programming. And as the Second Circuit explained, broadcasters' constitutionally protected expression has been severely chilled as a result.

1. The Commission purports to base its determinations of whether material is "patently offensive" on "contemporary community standards for the broadcast medium." *E.g.*, Pet. App. 45a (¶15). But while the Commission has said that this standard reflects that "'of an average broadcast viewer or listener,'" *Industry Guidance*, 16 F.C.C.R. at 8002 (¶8); *see also id.* at n.15, it has never identified any objective criteria upon which it bases its assessments. To the contrary, the Commission has repeatedly stated that "our collective experience and knowledge" is "developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens." *Infinity Radio License, Inc.*, 19 F.C.C.R. 5022, 5026 (¶12) (2004). But this amounts to an acknowledgement that indecency determinations are driven by shifting outside political pressures and essentially left to the commissioners' own subjective tastes and judgments.[13]

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[13] As the ABC Affiliates explain (Br. 8), this entire proceeding originated with interest-group pressure. Virtually all of the

This supposed reliance on "community standards" is nothing more than the impermissible practice of the Commission resting indecency determinations on its own evaluation of a work's artistic merit. For example, the Commission declared that *Saving Private Ryan* was not indecent partly because the pervasive uses of "fuck," "shit," and other expletives were "integral to the film[]" and "[e]ssential to the ability of the filmmaker to convey" his message, and hence omitting them "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers." 20 F.C.C.R. at 4512, 4513 (¶14). Yet the Commission held that much-more-limited expletives in *The Blues*, a PBS documentary about jazz musicians, were indecent because the documentary's educational purposes "could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives." J.A. 91 (¶82). Similarly, the Commission held that a single "bullshit" in each of several earlier *NYPD Blue* episodes was indecent—even though "the expletives may have made some contribution to the authentic feel of the program"—because "we believe that purpose could have been fulfilled and all viewpoints expressed without the … expletives." J.A. 119 (¶134).

The Commission's use of such artistic judgments in making indecency determinations is thoroughly anti-

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approximately one hundred complaints the Commission received were mass-generated from a single advocacy group. Given that this episode of *NYPD Blue* reached 11.6 million viewers in its initial broadcast and 5.7 million in its rebroadcast five months later, *see* ABC Response to FCC Letter of Inquiry 9 n.7 (Feb. 17, 2004) (C.A.J.A. 51), the views of that tiny minority can hardly be considered representative "of an average broadcast viewer."

thetical to the First Amendment. As this Court has repeatedly explained, "[u]nder our Constitution, 'esthetic and moral judgments about art … are for the individual to make, not for the Government to decree.'" *Brown* v. *Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (quoting *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000)). Hence, "the Commission may not impose upon [broadcasters] its private notions of what the public ought to hear." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 650 (1994) (internal quotation marks omitted); *see also Pacifica*, 438 U.S. at 761 (Powell, J., concurring in part and concurring in the judgment). Government judgments about artistic merit or necessity also exacerbate the vagueness problem, as broadcasters cannot possibly predict which allegedly indecent material three commissioners will (often years later) deem artistically "essential" or "integral" to a particular broadcast, and hence not indecent.

In seeking review in this Court, petitioners asserted that the Commission already gives weight to broadcasters' reasonable artistic judgments when deciding whether to impose sanctions. *See* Pet. 22. However, the Commission has repeatedly stated that material it considers otherwise indecent may be deemed not indecent "where it is demonstrably *essential* to the nature of an artistic or educational work." *E.g.*, J.A. 90 (¶82) (emphasis added). What the Commission deems artistically "essential" is a far cry from deference to a licensee's "reasonable" judgment.

Petitioners respond (Br. 29) that "[a]ny perceived inconsistency in application of … an 'artistic necessity' exception … has no relevance to any as-applied vagueness challenge that Fox could plausibly assert here." That says nothing about the vagueness challenge

brought by ABC, which has argued throughout this case that the brief use of nudity in the relevant scene was an appropriate artistic judgment. Nor does it address the Second Circuit's analysis of the indecency policy generally.

In sum, the Commission's current approach to indecency enforcement appears driven by its own regard for the merits of the particular broadcast at issue, in each case reaching its desired result by adjusting the weight it gives to the three patent-offensiveness factors and other, often undefined "contextual considerations." *See* Pet. App. 24a. In the end, broadcasters know only that material will be deemed "indecent" when at least three commissioners find it "patently offensive." That presents all the dangers of vagueness: it deprives broadcasters of fair notice and impermissibly leaves enforcement susceptible to the subjective tastes of individual officials and to the pressures of advocacy group campaigns. *See, e.g.*, *Gooding* v. *Wilson*, 405 U.S. 518, 528 (1972); *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988); *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 685-686 (1968). The result is that broadcasters steer far clear of the prohibited zone, notwithstanding that the Constitution requires that the benefit of the doubt be given to speech, not censorship.

2. Petitioners predict (Br. 36) that the vagueness inherent in the Commission's indecency-enforcement regime "is unlikely to foreclose a substantial amount of broadcast speech." Notably, petitioners ignore the Second Circuit's discussion of record evidence documenting the chilling effect the regime has already had. *See* Pet. App. 31a-34a. As the court of appeals explained, broadcasters have declined to air programs precisely because they could not predict with any confidence how the

Commission—perhaps years later—would apply its indecency test to those particular programs.

Indeed, "the absence of reliable guidance in the FCC's standards chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature." Pet. App. 34a. For example, "several CBS affiliates declined to air the Peabody Award-winning '9/11' documentary, which contains real audio footage—including occasional expletives—of firefighters in the World Trade Center on September 11th." *Id.* at 31a. Similarly, "a radio station cancelled a planned reading of Tom Wolfe's novel *I am Charlotte Simmons*, based on a single complaint it received about the 'adult' language in the book, because the station feared FCC action." *Id.* Many ABC affiliates declined to air *Saving Private Ryan* precisely because of fears that the Commission might deem the broadcast indecent. *See, e.g.*, *Some Stations Won't Show 'Private Ryan,'* N.Y. Times, Nov. 11, 2004, at C6. And "Fox decided not to re-broadcast an episode of 'That 70s Show' that … subsequently won an award from the Kaiser Family Foundation for its honest and accurate depiction of a sexual health issue." Pet. App. 33a-34a; *see also id.* at 32a-33a (news programming similarly chilled).

The chilling effect is magnified by the Commission's use of its draconian forfeiture authority. Under 47 U.S.C. §503(b)(2)(C)(ii), the Commission may now impose a fine of up to $325,000 for each violation of §1464. As part of its aggressive approach to indecency enforcement, the Commission, which previously construed this to be a per-broadcast limit, has reinterpreted it as a *per-station* limit. *See* Pet. App. 8a. Because network programs are frequently aired by scores of stations, forfeitures for a single broadcast

could easily run into the tens of millions of dollars. *Id.* These circumstances inevitably cause broadcasters to "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964) (citation omitted).

Petitioners contend (Br. 31) that any vagueness concerns are ameliorated because the Commission has "declin[ed] to sanction broadcasters in cases," including *Fox*, "where it was not clear at the time of the broadcast that the FCC would regard the pertinent material as indecent." But *ABC* involves an inconsistent application of the indecency standard that (unlike in *Fox*) the Commission did *not* acknowledge. In *ABC*, the Commission imposed the maximum forfeiture despite the brevity of the nudity; the scene's lack of any sexual or excretory activity, or of any display of sexual interest by either character; ABC's use of a prominent advisory and V-chip ratings; and the fact that the scene was part of a serious, non-sexual storyline in a long-running, highly acclaimed, award-winning program. The only one of these mitigating factors the Commission even acknowledged in the forfeiture order was the advisory, which it brushed aside without explanation. *See* Pet. App. 183a (¶52).

Furthermore, as justification for imposing the maximum sanction, the Commission pointed to nothing more than the factors constituting the patent-offensiveness test and that the show was prerecorded. *See* Pet. App. 183a (¶52). Under this reasoning, the maximum forfeiture would be appropriate for *every* prerecorded show the Commission deemed to satisfy its indecency standard. That approach cannot reasonably be labeled "restrained." Indeed, it simply underscores the chilling effect of the Commission's vague indecency-

enforcement regime. *See NAACP* v. *Button*, 371 U.S. 415, 433 (1963) ("The threat of sanctions may deter the[] exercise [of First Amendment rights] almost as potently as the actual application of sanctions.").

D. Petitioners' Remaining Vagueness Arguments Fail

1. Citing *HLP*, petitioners complain that because the court of appeals considered Commission decisions regarding broadcasts other than those at issue here, the court improperly converted an as-applied vagueness challenge into a facial one. But petitioners themselves invoked those decisions below in an effort to escape the force of *Reno*, arguing that the decisions provided guidance to broadcasters regarding what is indecent. *See* Pet. App. 23a. Indeed, petitioners invoke those decisions in this Court. *See* Pet. Br. 19, 33. Hence, if the Second Circuit had erred in considering other decisions, the error would have been an invited one.[14]

In any event, the Second Circuit properly considered those decisions. ABC is pursuing both an as-applied and a facial challenge, and in this context—

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[14] Petitioners are poorly situated to attack the *ABC* panel for "not consider[ing] the particular broadcast at issue but rel[ying] solely on the prior decision in *Fox*." Pet. Br. 18. Following the Second Circuit's decision in *Fox*, the *ABC* panel directed the parties to file supplemental briefs addressing *Fox*. Though stating that *Fox* and *ABC* involved "very different facts," petitioners asserted that *Fox* required invalidating the *ABC* forfeiture order. Gov't CA2 Supp. Br. 3. Petitioners asked only that the *ABC* panel withhold decision until after the disposition of any rehearing petition in *Fox*. *See id.* at 4. The panel proceeded exactly as petitioners suggested.

where ABC's own conduct is presumptively entitled to constitutional protection—the two kinds of challenges are not dramatically different. ABC can argue, and has argued, both that the Commission's policy failed to give it fair warning that its broadcast would be deemed indecent, and that it failed to give any broadcaster in its position fair notice of what would be considered indecent. The Commission's full corpus of decisions is relevant to both arguments. Contrary to petitioners' suggestion, this Court has not prohibited facial vagueness challenges; it has simply required that they be made by parties whose conduct was not "clearly proscribed." *Hoffman Estates*, 455 U.S. at 495. Because ABC's conduct was not clearly proscribed, the *ABC* panel appropriately relied on the *Fox* panel's analysis, including its examination of other Commission decisions.

In addition, *HLP* rested in significant part on the fact that the challenged statute implicated national-security concerns. "Congress and the Executive," this Court stated, "are uniquely positioned to make principled distinctions" in that area. 130 S. Ct. at 2728. This was different, the Court elaborated, from cases like *Cohen* v. *California*, 403 U.S. 15 (1971), in which "the application of the statute turned on the offensiveness of the speech at issue," *HLP*, 130 S. Ct. at 2728. That is precisely the context here. And in that context, the Court reiterated, "'governmental officials *cannot* make principled distinctions.'" *Id.* (emphasis added) (quoting *Cohen*, 403 U.S. at 25). *HLP* thus reaffirmed that the Constitution normally does not tolerate subjective government choices about what speech can be punished as offensive.

2. Petitioners also contend that ABC's argument regarding inconsistent and contradictory Commission precedent evinces a "hostility to the FCC's longstand-

ing context-based approach." Cert. Reply 7. This is incorrect. The contextual approach approved in *Pacifica* allows the Commission to treat broadcasts differently when they *are* different in regard to specific factors that the Commission has previously announced to be relevant. But what *Pacifica* did not authorize—and the Constitution does not permit—is a regime in which (1) the Commission declares that certain factors are relevant, but then (2) applies *those factors* inconsistently from broadcast to broadcast, and (3) simultaneously makes indecency findings that depend both on other (unannounced) factors, *see* Pet. App. 46a & n.35 (¶15), and on an opaque "balancing" of factors in a highly conclusory fashion, *see id.* at 138a-139a (¶12).

3. Petitioners point to the fact that the Commission's indecency policy applies only to broadcast licensees, and also argue that broadcasters can address any vagueness by airing possibly indecent material only during the late-night safe harbor. *See* Pet. Br. 34-36. This Court long ago rejected the former point, stating that "[t]he vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing." *Interstate Circuit*, 390 U.S. at 683.

As to the latter argument, petitioners cite no authority holding that the "channeling" of protected expression is relevant to a vagueness challenge, *i.e.*, that government can engage in vague regulation of speech so long as the vague regulation applies only some of the time. Petitioners also vastly understate the extent to which their safe-harbor suggestion would limit broadcasters' speech. The safe harbor runs from 10 pm to 6 am. Most people are asleep during those hours, and many of those who are awake are not watching television. The safe harbor also excludes most of "prime-time"—indeed, in the Central and Mountain Time zones

it excludes *all* of that highly desirable broadcast period. The channeling petitioners suggest would thus drastically curtail broadcasters' ability to communicate lawfully both with adults and with minors whose parents do not object to their children viewing the relevant material. It is therefore an insufficient response to the policy's vagueness. *See Interstate Circuit*, 390 U.S. at 688-689.[15]

4. Petitioners also repeatedly invoke (Br. 18, 28, 34) the networks' internal standards and practices regarding the airing of expletives. But expletives (and nudity) are only two among many categories of material the networks carefully review before airing. Depictions of violence and substance abuse, and of sensitive or controversial issues, are all reviewed to determine whether, given the material's content, context, and the time and manner of its presentation, it is appropriate for broadcast. *See* ABC Response to FCC Notice of Apparent Liability 4-5 (Feb. 11, 2008) (C.A.J.A. 186-187). The fact that certain materials are reviewed, and presented with particular ratings and advisories, by no means establishes that the material is "generally offensive to the viewing audience," Pet. App. 61a (¶30), or "not consistent with contemporary community standards," *id.*, *quoted in part in* Pet. Br. 28. To the contrary, broadcasters' internal standards and practices demonstrate the degree to which broadcasters seek to be responsive to their audience's tastes and sensitivities. More generally, petitioners provide no authority for the notion that a person's or entity's voluntary

[15] *Interstate Circuit* also makes clear that indecency regulation's purpose of protecting minors is irrelevant to the vagueness analysis. *See* 390 U.S. at 689.

choice not to engage in particular constitutionally protected conduct authorizes government prohibition. That logic would, for example, allow the government to bar many newspapers from printing expletives simply because as a matter of editorial judgment they generally refrain from doing so.

5. Finally, petitioners' discussion (Br. 35) of an alternate indecency regime involving "an exhaustive list of words or images that are prohibited regardless of context" is a red herring. Petitioners' unstated premise is that such a regime is the *only* permissible alternative under the Second Circuit's vagueness holding. But the court did not foreclose the use of context. Rather, it merely prohibited the Commission from invoking "context" as an empty mantra in case after case to justify starkly inconsistent decisions. *See* Pet. App. 30a. The Second Circuit decision in no way prevented the Commission from articulating and applying, in a consistent and restrained fashion, rules and policies that not only provide broadcasters with constitutionally adequate guidance but also comport—as we now explain—with First Amendment requirements regarding the availability of less-restrictive alternatives and broad deference to broadcasters' editorial and artistic decisions.

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

In recent Terms, and in a variety of contexts, this Court has reaffirmed the importance and robustness of First Amendment rights, rejecting an array of government efforts to restrict the freedom of expression. *See Brown*, 131 S. Ct. at 2741-2742; *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1220 (2011); *United States* v. *Stevens*, 130 S. Ct. 1577, 1592 (2010); *Citizens United* v. *FEC*, 130 S. Ct. 876, 898-899 (2010). The Court should do so

again here. The Commission's indecency finding against ABC, and its current indecency regime generally, are inconsistent with core First Amendment principles.

A. *Pacifica* Does Not Allow The Government To Prohibit The Scene At Issue Here

Even as construed in *Pacifica*, the First Amendment does not allow the government to proscribe the seven-second non-sexual display of buttocks at issue here.

1. Speech may constitutionally be regulated as indecent only if it genuinely has the capacity to threaten the "physical and psychological well-being of minors." *Sable*, 492 U.S. at 126. This Court has found that test met in very limited circumstances, primarily where the material was highly sexualized. For example, the Court allowed regulation of the sale to minors of certain pornographic magazines. *See Ginsberg* v. *New York*, 390 U.S. 629, 641-643 (1968). But it struck down an ordinance that banned films containing nudity from outdoor theaters—rejecting a protection-of-children rationale—partly because "[t]he ordinance is not directed against sexually explicit nudity." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 213 (1975).

A second factor the Court has considered in deciding whether indecent material may be regulated is the material's duration, *i.e.*, how long children could be exposed to it. In *Erznoznik*, for example, a second reason the Court gave for striking down the ordinance was that it "sweepingly forbids … films containing any uncovered buttocks …, irrespective of … pervasiveness." 422 U.S. at 213. Similarly, in *Playboy* the Court struck down a statute regulating highly sexual cable-television programs after noting that the law reached material

"as fleeting as an image appearing on a screen for just a few seconds." 529 U.S. at 819.

Both of these factors were considered in *Pacifica*, where the Court upheld the application of §1464 to a lengthy broadcast in which expletives infused with sexuality were "repeated over and over" for almost twelve minutes. 438 U.S. at 757 (Powell, J., concurring in part and concurring in the judgment). And the concurrence stressed that "certainly the Court's holding today[] does not speak to cases involving the isolated use of a potentially offensive word." *Id.* at 760-761. *Pacifica* thus does not justify the Commission's ruling that the brief and non-sexual nudity here could be punished as indecent. Indeed, this case raises all the constitutional concerns that the Court, and Justice Powell's concurrence, expressed about extending indecency regulation beyond narrow bounds.

Nor has the Commission explained how viewing the scene in question could harm children. The Court in *Pacifica* suggested that hearing the Carlin monologue could "enlarge[] a child's vocabulary." 438 U.S. at 749. But even if that is true, there is no analogous consequence here. Every child has seen buttocks (presumably for longer than seven seconds), and children could learn nothing about sex or excretion from the scene because it contains nothing on those topics. The scene is neither sexual nor vulgar; it instead depicts the embarrassment visited on both characters by this unanticipated event. The First Amendment does not allow governmental proscription of material when the Commission itself cannot articulate how its viewing could harm children. *See Denver Area Educ. Telecomms. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 766 (1996) (plurality opinion) ("[Absent] a factual basis substantiating the harm[,] … we cannot assume that the harm exists.").

2. Petitioners respond (Br. 38) that in *Pacifica* this Court held that "prurient appeal" was not an element of indecency, and upheld the indecency finding against the Carlin monologue. But the Carlin monologue had an undeniable sexual element. "Fuck" was used pervasively in the monologue, and specifically in the sexual sense. *See Pacifica*, 438 U.S. at 754 ("We're going to make love, yeh, we're going to fuck …."). Other portions of the monologue were similarly infused with sexual connotations. *See, e.g.*, *id.* at 755. Under the Commission's own precedent, which views every use of "fuck" and its variants as inherently sexual, *see* J.A. 121 (¶138), there is no serious argument that the monologue was not sexualized.

In any event, because the monologue was over 100 times longer than the nudity here, petitioners' argument does nothing to justify the prohibition of a broadcast that meets *neither* of the factors this Court has deemed relevant, *i.e.*, that was neither sexualized nor contained prolonged mature material. Such a broadcast cannot constitutionally be prohibited—certainly not when the broadcaster takes concrete steps to empower parental control and when the relevant material is part of a serious, non-sexual storyline in a highly acclaimed dramatic series.[16]

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[16] Petitioners claim (Br. 38) that this argument "logically suggests" that broadcasters could air "gratuitous full frontal nudity, provided that they do so in intermittent bursts of fewer than seven seconds." But whether any broadcast is indecent is evaluated in light of the broadcast as a whole and its overall context. *See Industry Guidance*, 16 F.C.C.R. at 8002-8003 (¶9). A program containing extended nudity, whether in one long shot or many "intermittent bursts," is (though not necessarily indecent) a far cry from

Petitioners argue that they are not required to offer "'scientific' proof" (Br. 38) that this broadcast could have harmed children. But this Court has required the government at least to explain why the broadcast is harmful. Indeed, this Court has repeatedly stated that even when restricting commercial speech (where strict scrutiny is not currently applied), the government "must demonstrate that the harms it recites are real." *E.g.*, *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 188 (1999) (internal quotation marks omitted). Perhaps one could articulate that exposure to images of sexual behavior (or of body parts unique to one gender) could teach a child about a subject for which the child is not developmentally prepared. But petitioners have never explained what harm children might suffer from seeing a woman's buttocks for seven seconds in a non-sexual context. Even applying the reduced scrutiny applicable under *Pacifica*, that total failure confirms the constitutional infirmity of the Commission's indecency finding.

B. The V-Chip Precludes Indecency Regulation Of Rated Programs

When *Pacifica* was decided, parents had no way to block particular programs from being viewed on their television sets. Today, the V-chip and similar blocking technologies provide parents with powerful tools to block broadcasts they deem objectionable for their children's viewing. The advent of this technology significantly alters the constitutional calculus, for the First Amendment prohibits content-based restrictions on

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one that contains seven seconds of nudity *in total* (out of an hour-long program).

protected expression if a reasonably effective, less-restrictive means of achieving the government's objective is available. That is the situation as to broadcasts like the *NYPD Blue* episode at issue here. In light of the nearly universal adoption of blocking technology, the regulation of indecency upheld in *Pacifica* must, at a minimum, be reconsidered as to blockable programs.

1. The Commission explained long ago that the government interest underlying its broadcast-indecency regulation is supporting the decisions of parents who do not want their children to see or hear indecent material. *See, e.g.*, *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1343-1344 (D.C. Cir. 1988).[17] But the V-chip and similar technologies are an effective way to further that interest that is far less restrictive, and far less overinclusive, than the Commission's proscription of broadcast material it deems "indecent."

The V-chip allows viewers to block television programs based on their rating, which specifies both a program's overall age-appropriateness, from "TV-Y" for children's shows to "TV-MA" for adult programming, and its particular content, such as "intense vio-

[17] Any asserted government interest in overriding parents' decisions that their children need not be shielded from material the Commission deems indecent (*e.g.*, Pet. Br. 23) is constitutionally illegitimate. *See, e.g.*, *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (labeling "the interest of parents in the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests recognized by this Court"); *cf. Brown*, 131 S. Ct. at 2741 (suggesting government may not restrict sales of violent videogames to children whose "parents [do not] *care* whether they purchase" those games, because such a restriction "is only in support of what the State thinks parents *ought* to want").

lence (V)" or "strong coarse language (L)." FCC V-Chip, *supra* n.2. The Commission itself has stated that this technology "will give parents the tools they need to limit the exposure of their children to video programming that they believe is inappropriate." *Implementation of Section 551 of the Telecommunications Act of 1996*, 13 F.C.C.R. 8232, 8243 (¶24) (1998). Congress has likewise labeled the V-chip "a nonintrusive and narrowly tailored means of achieving th[e] compelling governmental interest [in promoting parental authority]." Telecommunications Act of 1996, Pub. L. No. 104-104, §551(a)(9), 110 Stat. 56, 140.[18] Furthermore, with the 2009 switch to all-digital transmission of television signals, virtually every functioning television in America has a V-chip or equivalent blocking technology. *See, e.g.*, *Implementation of the Child Safe Viewing Act*, 24 F.C.C.R. 11413, 11418-11419 & n.20 (¶11) (2009) (*CSVA*).

Under these circumstances, content-based restrictions on blockable programs are impermissible. As the Court has explained, "if a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Playboy*, 529 U.S. at 815. Consistent with that mandate, the Court has repeatedly struck down content-based speech restrictions where a less-restrictive blocking or filtering alternative was (or even might have been) available. *See id.* ("[T]argeted blocking … support[s] parental authority without affecting the First Amendment interests of speakers and willing listeners."); *Ashcroft* v. *ACLU*,

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[18] This legislative judgment, in particular, "gravely weaken[s]" the Commission's rationale for indecency regulation of blockable broadcasts. *Boos* v. *Barry*, 485 U.S. 312, 329 (1988).

542 U.S. 656, 666-668 (2004); *Reno*, 521 U.S. at 876-879; *Denver Area*, 518 U.S. at 756, 758; *Sable*, 492 U.S. at 128-131. The same result is warranted here.

That these cases did not involve broadcasting, which under *Pacifica* receives reduced First Amendment protection, is immaterial. This Court has made clear that content-based restrictions on broadcasters' expression must be narrowly tailored. *See FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 380 (1984) (citing cases). That requirement is not met here. The V-chip—which is much more effective and more widely available than the technologies in the cases just cited—restricts far less expression than indecency regulation, and substantially accomplishes the government's goal of helping parents control what their children watch on television. Because "targeted blocking is a feasible and effective means of furthering its compelling interests," the government "cannot ban speech." *Playboy*, 529 U.S. at 815.

The Commission's regime is also "vastly overinclusive," *Brown*, 131 S. Ct. at 2741. It prohibits constitutionally protected expression from reaching minors whose parents do not believe their children need to be shielded from material the Commission deems indecent. *See id.* And it applies to all adults, even though roughly *two-thirds* of the 115 million television households in America do not include any children under age 18 and nearly three-quarters (more than 83 million homes) have no children under age 12. *See Nielsen National Universe Estimates* (data effective as of Aug. 29, 2011).[19] Although overinclusiveness existed when

[19] The Nielsen database that generated this figure and the database that generated the figures that follow, *see infra* pp.52-53,

Pacifica was decided, there was no viable alternative. Now there is.

2. Like the Commission below, *see* Pet. App. 177a-179a (¶47), petitioners stress (Br. 49-51) supposed limitations of the V-chip. None of those points has merit.

a. First, petitioners contend (Br. 51) that "only between 5% and 16% of all parents use the V-Chip," and attribute that ("perhaps") to findings that 57% of parents said they were "'not aware that they have a V-chip'" or that "'many'" parents found the process of using the V-chip complicated. This Court has rejected similar arguments regarding other blocking technologies, holding that those technologies were constitutionally preferred alternatives even though relatively few people knew about or chose to use them. As the Court explained in *Denver Area*, for example, when customers do not know of a device or how to use it, the proper remedy is to better inform them. *See* 518 U.S. at 758-759. And in *Playboy*, the Court held that the government cannot rely simply on lack of awareness, but must prove that a less-restrictive alternative would not be effective *even if* people knew about it and how to use it. *See* 529 U.S. at 816; *see also id.* at 816-826. No such showing has even been attempted here.

b. Petitioners next assert (Br. 51) that "most of the televisions in use at the time of the broadcasts at issue did not have" a V-chip. But this Court has made clear that market saturation is not a prerequisite of a less-restrictive alternative. In *Reno*, for instance, the

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are available for purchase. Pursuant to Rule 32.3, a letter seeking leave to lodge the relevant analyses was submitted to the Clerk on November 3, 2011.

Court pointed to filtering software that was not yet widely available. *See* 521 U.S. at 877. And in *Sable*, the Court relied on the *untested possibility* that companies would be able to successfully verify callers' ages using technologies such as access codes and scramblers. *See* 492 U.S. at 128-131. Any limits on the availability of the V-chip in 2003 thus do not justify the content-based restriction applied in the forfeiture order.

c. Petitioners also note (Br. 51) that because some categories of programs are not rated, not all programs can be blocked by V-chips. *See also* Pet. App. 178a (¶47) (news and sports programs are not rated). That provides no basis to allow content-based restrictions of television programs that *are* rated—such as the *NYPD Blue* episode here.

d. Finally, petitioners assert (Br. 50) that many programs are "inaccurately rated." But petitioners' most recent supporting authority is years old, *cf. Playboy*, 529 U.S. at 820-821, and in any event the possibility of ratings that some may deem inaccurate cannot justify an indecency finding where, as here, the broadcaster rated the show accurately. Indeed, petitioners do not contend otherwise, instead shifting to the argument (Br. 51) that the episode's rating "would not have apprised viewers employing the V-Chip system that nudity would be aired."[20] That argument fails for several reasons.

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[20] The Commission did argue below that the episode was misrated, in that ABC did not include an "S" descriptor. *See* Pet. App. 178a-179a (¶47). But for TV-14-rated programs, "S" denotes "intense sexual situations." *See* FCC V-Chip, *supra* n.2. Because the episode contained no sexual situations, let alone intense ones, including that descriptor would have misrated the show.

As an initial matter, ABC's prominent viewer advisory—which appeared roughly *30 seconds* before the scene at issue—explicitly noted the episode included nudity. The episode was also rated TV-14, which both strongly cautioned parents about the program's material and allowed them to block the episode using just that rating, without regard to content descriptors. And the reason there was no specific nudity descriptor for the show is the Guidelines—which were expressly approved by the Commission—do not include such a descriptor. Indeed, the Commission *rejected* calls that it include more detailed descriptors, concluding that the Guidelines were "sufficient to advise parents" about potentially objectionable material. *Implementation of Section 551*, 13 F.C.C.R. at 8242 (¶20). Perhaps the rating system could be revised, but petitioners cannot complain about broadcasters' adherence to a ratings system that the Commission expressly approved as "meet[ing] the goal[]" of "provid[ing] parents with information necessary to make informed decisions." *Id.*

More generally, petitioners' argument that the V-chip is an inadequate alternative because some programs may be inappropriately rated has no basis in this Court's precedent. To the contrary, in holding just last Term that a voluntary rating system for violent videogames provided a less restrictive alternative to government regulation, this Court recognized that there would be some "gap" in keeping objectionable material out of the hands of minors, but held that "[f]illing the remaining modest gap in concerned-parents' control" could not justify a government ban. *Brown*, 131 S. Ct. at 2741. Similarly, in *Playboy* the Court rejected restrictions on much more explicit sexual programming despite acknowledging that "under a voluntary blocking regime, even with adequate notice, some children

will be exposed to signal bleed," *i.e.*, to explicit sexual images. 529 U.S. at 826. In short, this Court has never held that less-restrictive alternatives must achieve the perfection petitioners demand in order to foreclose government censorship.[21]

C. Broadcast-Indecency Regulation Should Be Subject To Strict Scrutiny

The foregoing arguments explain why the Second Circuit's judgment should be affirmed even assuming that broadcast-indecency regulations are subject to the reduced scrutiny approved in *Pacifica*. That case, however, should be overruled, because time and technology have rendered its factual predicates obsolete. *See Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 855 (1992) (overruling precedent is appropriate if its "premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable"). Content-based restrictions on broadcasters' expression are thus properly subject to the strict scrutiny that applies to every other medium, including cable, satellite, and the Internet. *See generally Fox*, 129 S. Ct. at 1819-1822 (Thomas, J., concurring). Petitioners do not even argue that the indecency findings here would survive such scrutiny.

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[21] Notably, the Court in *Playboy* also pointed out that "[t]ime channeling, unlike blocking, does not eliminate signal bleed around the clock," 529 U.S. at 826, and hence that channeling would leave open the possibility of children being exposed to signal bleed during the unregulated times of day, *see id.* The Court recognized, in other words, that in terms of supporting parental control over what their children see and hear, blocking technology is in some ways superior to the channeling that petitioners espouse here.

1. Petitioners first defend (Br. 42) relaxed scrutiny of indecency regulation on the theory of "spectrum scarcity," *i.e.*, that there are "more would-be broadcasters than frequencies available in the electromagnetic spectrum." That argument lacks merit.

Although this Court relied (more than three decades ago) on spectrum scarcity to justify reduced First Amendment scrutiny of certain broadcast regulations, *see Red Lion*, 395 U.S. at 386-396, it has never suggested that spectrum scarcity justified *indecency* regulations. To the contrary, the Court expressly stated in *Pacifica* that of the various possible reasons for reduced First Amendment scrutiny in the broadcast context, only "two have relevance to the present case," 438 U.S. at 748—and those two were broadcasting's posited unique pervasiveness and unique accessibility to children, *see id.* at 748-750; *see also id.* at 770 n.4 (Brennan, J., dissenting) ("The opinions of my Brothers POWELL and STEVENS rightly refrain from relying on the notion of 'spectrum scarcity[.]'").[22] The Commission itself has repeatedly recognized this limitation in *Pacifica*, *see, e.g.*, Pet. App. 78a (¶47), and has itself "expressly rejected" scarcity as a rationale for indecency enforcement, *Infinity*, 3 F.C.C.R. at 930 n.11 (¶3); *see also Pacifica Found.*, 2 F.C.C.R. at 2699 (¶15). Unsurprisingly, the Commission's orders here made no effort to justify its regulation on spectrum-scarcity grounds.

The Court's and the Commission's longstanding decision not to rely on spectrum scarcity in this context makes sense. Whatever its merits, the scarcity ration-

[22] Petitioners assert (Br. 4) that *Pacifica* referred to these two factors as having "particular" relevance, implying that others had some relevance. That qualifier appears nowhere in *Pacifica*.

ale is based on the theory that scarcity might prevent the public from receiving speech on a sufficiently wide variety of subjects or viewpoints, and that in certain contexts the public has an interest in access to such diversity. *See Red Lion*, 395 U.S. at 389-392. But that public interest provides no basis for indecency restrictions because prohibiting the airing of indecent material does nothing to ensure that the public receives diversity in any sort of programming.[23] Indeed, in *Red Lion* the Court stressed that "[t]here is no question here of the Commission's refusal to permit the broadcaster to carry a particular program." *Id.* at 396.[24]

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[23] Petitioners also argue (Br. 44) that in exchange for access to a scarce public resource broadcasters must accept "content-based restrictions that could not be imposed on other communications media." *Red Lion*, however, upheld only the Commission's power to make room for speech on a broader range of topics, not to prohibit speech, *see* 395 U.S. at 386-401—a distinction underscored by Congress's judgment to bar the Commission from censoring broadcasters, 47 U.S.C. §326.

[24] Invoking the scarcity rationale now would be particularly unwarranted because developments in recent decades have rendered it untenable. *See Fox*, 129 S. Ct. at 1821 (Thomas, J., concurring). Six years ago a detailed FCC staff analysis explained that in light of the explosion in the number of cable, Internet, and other media outlets, "[b]y no rational, objective standard can it still be said that … channels for broadcasting are scarce." Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting* 18 (Mar. 2005), *available at* http://www.fcc.gov/ownership/materials/already-released/scarcity030005.pdf (visited Nov. 2, 2011). In 1984, this Court indicated a willingness to reconsider the spectrum scarcity rationale upon receiving "some signal from … the FCC that technological developments" make such reconsideration appropriate. *League of Women Voters*, 468 U.S. at 377 n.11. The Commission has since provided such a signal: In addition to issuing the staff report just cited, it has stated that "we no longer believe that there is scarcity in the number of broadcast

2. Petitioners also invoke (Br. 44-47) *Pacifica*'s assertion that reduced First Amendment scrutiny of indecency regulation is appropriate because broadcasting is "uniquely pervasive" and "uniquely accessible to children," 438 U.S. at 748, 749. Whatever force that justification had 33 years ago, broadcast television is now neither uniquely pervasive nor uniquely accessible to children. Approximately 87 percent of American households currently subscribe to cable, satellite, or telephone-company-provided television services. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 F.C.C.R. 542, 546 (¶8) (2009); Nielsen, *State of the Media: The Cross-Platform Report, Quarter 1, 2011*, at 8.[25] These services bring dozens (often hundreds) of non-broadcast television channels into people's homes to the same extent—and with the same accessibility to children—as broadcast television. *See Denver Area*, 518 U.S. at 744-745 (plurality opinion). Indeed, with many such services there is no obvious difference to viewers between broadcast and non-broadcast channels: Broadcast channels are interspersed among non-

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outlets available to the public." *Complaint of Syracuse Peace Council*, 2 F.C.C.R. 5043, 5054 (¶74) (1987) (subsequent history omitted), *abrogated on other grounds*, *Repeal or Modification of the Personal Attack and Political Editorial Rules*, 15 F.C.C.R. 19973, 19979-19980 (¶¶16-18) (2000). In the years since that pronouncement, moreover, the number of broadcast television channels available to the public has continued to increase, particularly with the recent change to digital broadcasting. *See Fox*, 129 S. Ct. at 1821 (Thomas, J., concurring). If spectrum scarcity is now necessary to support the Commission's indecency-enforcement policy, reliance on it should be rejected and *Red Lion* overruled.

[25] *Available at* http://www.slideshare.net/sumitkroy/nielsen-crossplatformreport-for-us-2011-data (visited Nov. 2, 2011).

broadcast channels and nothing about the way the consumer engages with the televised media makes those channels uniquely pervasive. Similarly, "[t]he internet … has become omnipresent, offering access to everything from viral videos to feature films and, yes, even broadcast television programs." Pet. App. 15a (citing *CSVA*, 24 F.C.C.R. at 11468 (¶126)).

Petitioners' responses (Br. 44-45) are unpersuasive. They first focus on the small percentage of households that receive television only through broadcast signals. Some of these homes, however, undoubtedly have Internet service, which as just explained provides access to television programs. More fundamentally, the vanishingly remote difference that now exists between the pervasiveness of broadcast television and that of other forms of video programming does not justify curtailment of one of Americans' most fundamental and important constitutional rights. *Cf. Brown*, 131 S. Ct. at 2741 n.9 ("[T]he government does not have a compelling interest in each marginal percentage point by which its goals are advanced.").

Petitioners also note that many households with cable or satellite service still watch broadcast programs, and that those programs are among the most popular on television. But saying that broadcast programs are popular is not the same as saying that broadcast channels are *by their nature* uniquely pervasive. And there is no basis to argue that under the First Amendment, the more popular a media outlet is the more amenable it is to government regulation. In any event, total primetime viewership for cable-originated programming (*i.e.*, cable television programming excluding cable-carried broadcast signals) now exceeds total primetime viewership of broadcast-originated programming (including broadcast signals delivered by

cable), particularly among minors. *See Nielsen Media Research—Galaxy Explorer & Npower—Live+7 Data Stream*, *supra* n.19. In the 2010-2011 television season, on average, more than twice as many viewers aged 2-17 watched cable-originated programming as watched broadcast-originated programming during primetime. *Id.*

Finally, petitioners' arguments are unmoored from *Pacifica*'s rationale. The Court's focus there was on the fact that broadcasts "confront[] the citizen … in the privacy of the home." 438 U.S. at 748; *see also id.* at 749 n.27. The same is true of the other media outlets discussed above.

As for unique accessibility to children, petitioners argue (Br. 46-47) that this factor endures because the "availability [of broadcast programming] … does not depend on any affirmative conduct by … parents beyond the initial acquisition of a television or radio." In fact, the steps that must be taken to acquire broadcast television versus other forms of television are essentially identical. For television signals to be accessible to their children, parents must (1) buy a television, (2) bring it home, and (3) *either* install cable, satellite, or similar television services, *or* set up an antenna or some other means of making receipt of broadcast signals feasible. Here, too, *Pacifica* confirms the infirmity of petitioners' argument: It distinguished broadcasting from media inaccessible to children "too young to read" and from media that "may be withheld from the young without restricting the expression at its source." 438 U.S. at 749. Applying these criteria confirms that broadcasting is not uniquely accessible to children compared to many other media, particularly other television services.

Petitioners also point out that some children have a television set in their rooms and that some of those televisions do not have cable or satellite connections. But the fact that some parents *choose to allow* their children to have televisions in their bedrooms cannot justify government regulation barring protected speech from televisions across many millions of homes, including homes in which parents exercise greater parental control, and homes with no children at all.

Petitioners' focus on "unique accessibility" suffers from an even more fundamental infirmity. For much of television history—including at the time of *Pacifica*—parents possessed no effective way to block broadcast programs or channels. *Playboy*, 529 U.S. at 815 (recognizing this as a "key difference between cable television and the broadcasting media"). The advent of the V-chip and similar technologies, however, has rendered that fact obsolete, and with it any argument that "the ease with which children may obtain access to broadcasts … justifie[s] [the] special treatment of indecent broadcasting," *Reno*, 521 U.S. at 866-867 (discussing *Pacifica*).[26]

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[26] Petitioners also quote *Pacifica*'s statement that "each medium of expression presents special First Amendment problems," 438 U.S. at 748. In support of that statement, *Pacifica* cited *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952). What the Court said in *Joseph Burstyn*, however (and what it repeated just last Term), was that "[e]ach method [of expression] tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, *do not vary*. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule." *Id.* at 503 (emphasis added), *quoted in part in Brown*, 131 S. Ct. at 2733.

Put simply, then, "[t]he extant facts that drove this Court to subject broadcasters to unique disfavor under the First Amendment … do not exist today." *Fox*, 129 S. Ct. at 1822 (Thomas, J., concurring). That provides the "special justification" (Pet. Br. 41) required to overrule a constitutional decision like *Pacifica* (and, if necessary, *Red Lion*). Indeed, as this Court recently recounted, it has previously overruled decades-old precedent that had approved reduced First Amendment scrutiny of content-based restrictions—justified by a harm theory—for a particular medium of expression. *See Brown*, 131 S. Ct. at 2737 ("For a time, our Court did permit broad censorship of movies because of their capacity to be 'used for evil,' *see Mutual Film Corp.* v. *Industrial Comm'n of Ohio*, 236 U.S. 230, 242 (1915), but we eventually reversed course, *Joseph Burstyn, Inc.*, 343 U.S., at 502."). No less is required here.

3. Petitioners assert (Br. 47-49) that the rise of other media actually supports continued unique disfavoring of broadcasters. They contend in particular that these media offer broadcasters other outlets for expression and that technological advances further reduce the burden by allowing expletives to be "bleeped" without "adulterating the content of a broadcast." The First Amendment, however, does not tolerate government censorship of one medium of expression because the speaker may be able to rely on another. Relegating broadcasters to other media significantly limits the extent of their ability to communicate with others. As for "bleeping," the Commission has recognized that the bowdlerization of artistic works can "alter[] the nature of the artistic work and diminish[] the power, realism and immediacy of the … experience for viewers." *Saving Private Ryan*, 20 F.C.C.R. at 4513 (¶14). That is no less true if non-sexual nudity is blurred in a properly

rated episode of a dramatic series prized for its realistic portrayal of serious storylines.

Petitioners also quote (Br. 49, 52) this Court's statement in *Fox* that the growth of other media could justify the Commission's decision to regulate broadcasters more strictly "so as to give conscientious parents a relatively safe haven for their children." 129 S. Ct. at 1819. That statement was made in a discussion of administrative law. It is not reasoning this Court has ever embraced as a principle of the First Amendment, which cannot possibly countenance the government singling out one group of speakers because of the content or quantity of others' expression. *Cf. Citizens United*, 130 S. Ct. at 898-899; *Brown*, 131 S. Ct. at 2740 (government regulation of videogames, absent similar regulation of other media accessible to children, "is wildly underinclusive …, which in our view is alone enough to defeat it").

D. Petitioners' Historical Argument Lacks Merit

Petitioners conclude by arguing (Br. 51-53) that the long history of indecency regulation supports reversal. That argument also fails.

First, in making this argument petitioners offer various assertions (Br. 52-53) about "parents' settled expectations" and about what parents, broadcasters, and indeed, "millions of Americans" have "understood" about indecency regulation—all of which are supported by no evidence whatsoever. Such bald claims are wholly insufficient to justify content-based restrictions on constitutionally protected expression. Petitioners also wrongly imply (Br. 51) that affirmance would require this Court to hold "all broadcast indecency regulation … to be prohibited by the First Amendment."

Although such a holding is one possible outcome, it is unnecessary for affirmance. Likewise flawed is petitioners' related prediction that a ffirmance would cause the broadcast airwaves to be overrun with "extremely graphic descriptions and images." *Id.* No such overrunning exists, or has ever existed, during the late-night "safe harbor," when indecency regulation unquestionably does not apply. *See* Pet. App. 60a-61a (¶29). That is partly because, as petitioners repeatedly note, the networks' own standards ensure that material that may have a powerful effect on viewers is carefully reviewed prior to being aired. There is no basis to expect that broadcasters would suddenly abandon those standards in the wake of any change in the extent of FCC regulation.

More to the point, petitioners are quite wrong to suggest (Br. 53) that the current indecency regime has an "80-plus-year" pedigree. Although indecency regulation was first authorized in the 1920s, there was almost no actual regulation for decades thereafter. *See* Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. Rev. L. & Soc. Change 49, 86-87 (1992). The Commission did not even issue its first indecency fine until 1970. *See In re WUHY-FM*, 24 F.C.C.2d 408, 416 (¶20) (1970). Even after *Pacifica*, there were no indecency-enforcement actions for almost a decade. *See Infinity*, 3 F.C.C.R. at 930 (¶4). Not until roughly ten years ago did the aggressive (and often inconsistent) form of indecency regulation under review in this case manifest itself. This history of restraint—and the resulting lack of thorough legal challenges to an aggressive enforcement regime—belies any claim that the current regime enjoys a "'presumption'" of constitutionality (Pet. Br. 53), let alone that it has become part of our "'national culture'" (*id.* at 52).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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