

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

WDBJ Television, Inc.

License of Station WDBJ(DT)

Roanoke, Virginia

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File Nos.: EB-IHD-14-00016819
EB-12-IH-1363

NAL/Acct. No.: 201532080010
FRN: 0002061737
Facility ID No.: 71329

**COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE
RADIO TELEVISION DIGITAL NEWS ASSOCIATION**

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July 28, 2015

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I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (“NAB”)¹ and the Radio Television Digital News Association (“RTDNA”)² hereby submit these comments supporting WDBJ Television, Inc.’s (“WDBJ”) opposition to the Commission’s proposed imposition of a \$325,000 forfeiture (the “NAL”)—the maximum fine allowable—for airing during a news program a single image that the agency found apparently violated the prohibitions on

¹ NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the FCC and other federal agencies, and the courts.

² RTDNA is the world’s largest professional organization exclusively serving the electronic news profession. RTDNA members include local and network news executives, news directors, producers, reporters, digital news professionals, as well as educators and students. Founded as a grassroots organization in 1946, RTDNA works to protect the rights of electronic journalists in the courts and legislatures throughout the country, promotes ethical standards in the industry, provides members with training and education, and honors outstanding work in the profession.

the broadcast of indecent programming.³ Even though (1) the Commission's current indecency policies have *never* been approved by any reviewing court, and (2) the Commission has—*for over two years*—taken no action in a proceeding launched to examine its “broadcast indecency policies and enforcement to ensure that they are fully consistent with vital First Amendment principles,”⁴ the Commission here inexplicably exacerbated its constitutionally suspect regulatory approach by proposing the highest indecency fine ever against a single station, which had inadvertently aired a fleeting sexual image in a newscast. Levying the maximum possible fine under the law in a case where the broadcast station indisputably did not purposefully air the image at issue is tantamount to imposing a sentence of life imprisonment for petty theft.

While the proposed sanction on WDBJ cannot be squared with relevant legal standards, common sense, or fundamental fairness, NAB and RTDNA want to make abundantly clear that the ramifications of the Commission's action in this case reach far beyond penalizing a single station or a single broadcast group. From the broader industry perspective, the NAL is disquieting because it improperly intrudes into broadcasters' editorial discretion. In particular, the extraordinarily punitive nature of the fine and the accompanying discussion in the NAL raise the specter that the Commission's subjective view of the merit of WDBJ's underlying news story drove the unprecedented decision here. As such, the FCC's action is a direct affront to First Amendment values that undoubtedly will further chill broadcast speech.

³ *WDBJ Television, Inc.*, Notice of Apparent Liability for Forfeiture, 30 FCC Rcd 3024 (2015) (“*WDBJ NAL*”); Opposition of WDBJ Television, Inc. to Notice of Apparent Liability (June 30, 2015) (“*WDBJ NAL Opposition*”).

⁴ *FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy*, Public Notice, 28 FCC Rcd 4082 (2013) (“*Indecency Public Notice*”).

The *WDBJ NAL* also extends the FCC's arbitrary, unpredictable, and unconstitutional course in applying its indecency policies, which do not comport with applicable precedent. The Supreme Court premised its decision in *Pacifica* on the assumption that the FCC would exercise restraint and proceed cautiously in the indecency area, given the First Amendment implications of content-based speech regulation.⁵ However, the "wildly expansive"⁶ approach to indecency enforcement the Commission has taken (especially since 2004), improperly extended policies that are unacceptably vague, subjective, and inconsistently applied. The Commission's further insistence on creating indecency policy through multiple adjudications, many of which have never been concluded, let alone judicially approved, already has demonstrably chilled speech at broadcast stations and in newsrooms across the country.

The current NAL serves only to perpetuate these myriad problems. Indeed, the FCC's proposal to impose the statutory maximum for WDBJ's unintentional broadcast of a 2.7 second image, occupying only 1.7 percent of a television screen's total area, begs the question of what judgment the Commission might pass and what penalty it might impose for non-fleeting editorial content it finds objectionable. And in a move clearly imperiling all broadcasters and discouraging their coverage of live events, the Commission in this case utilizes a legally indefensible, if not unconstitutional, definition of "willfulness"—a definition so broad that it threatens to turn almost every human error, equipment failure, or unpredictable occurrence resulting in the airing of arguably

⁵ *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

⁶ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 544 n.5 (2009) (Stevens, J., dissenting) ("*Supreme Court Fox I*").

indecent material into a deliberate, intentional violation of federal criminal law and FCC regulation.

For these reasons, the Commission should rescind the *WDBJ NAL* and reform its indecency policies and enforcement practices to comply with the Constitution, the Administrative Procedure Act (“APA”), and the Communications Act.

II. THE *WDBJ NAL* CLEARLY RAISES THE CONSTITUTIONAL QUESTION OF WHETHER THE FCC IS SANCTIONING SPEECH BASED ON ITS SUBJECTIVE VIEW OF THE MERIT OF THAT SPEECH.

As an initial matter, the *WDBJ NAL* is particularly constitutionally suspect because it appears based, in substantial part, on the FCC’s displeasure with WDBJ’s editorial judgement and choice of news content. Specifically, its description of both the program segment at issue and the manner in which the station gathered material for the piece strongly suggests that the Commission proposed an unprecedented fine because it disapproved of the licensee’s decision to broadcast a story about a former female adult film star who subsequently became an Emergency Medical Technician volunteer. Indeed, the FCC begins its NAL by describing at length the focus of the news story, appearing to intentionally sensationalize the subject matter.⁷ The agency then goes on to criticize the station for gathering material from the website of the adult video distributor for whom the subject of the story worked.⁸ At the end of its analysis,

⁷ *WDBJ NAL*, 30 FCC Rcd at 3025-26 ¶¶ 4, 5. For example, the NAL discussed in some detail other “images of the former adult film star” that “the broadcast included,” even though those images are not at issue in this case and are not (and cannot) even be claimed to be indecent.

⁸ *Id.* at 3026 ¶ 6; see *id.* at 3029 ¶¶ 14, 16.

however, the Commission finds that “the sexually explicit image at issue here was *unrelated to the news story*.”⁹

As WDBJ explains, the news segment involved the subject of a legitimate public controversy, and the station exercised its editorial discretion to determine that debate was of sufficient public interest to warrant news treatment.¹⁰ Indeed, it had been covered by other news outlets, including national ones.¹¹ And the station’s editorial choices regarding what material to include in its story and where to obtain it were made to illustrate the controversy, rather than to pander or shock viewers.¹² But the entire exercise associated with this aspect of the *WDBJ NAL*, including the Commission’s extensive description of program content that it later found “unrelated” to the allegedly indecent material and the station’s expenditure of resources in an attempt to defend its editorial judgment, is constitutionally improper. In finding the FCC’s indecency policies unconstitutional in 2010, the Second Circuit Court of Appeals noted its concern that the Commission likely treated the same words in two programs in a “disparate” manner because “the FCC was simply more comfortable with the themes” in one program than it was in the other.¹³ Given the descriptions contained in the *WDBJ NAL*, it is “it is hard not to speculate that” the Commission’s subjective disapproval of the subject matter of the newscast involved here similarly influenced its decision.¹⁴

⁹ *Id.* at 3030 ¶ 17 (emphasis added).

¹⁰ WDBJ NAL Opposition at 7-8.

¹¹ *Id.*

¹² *Id.*

¹³ *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 333 (2d Cir. 2010) (“*Second Circuit Fox II*”).

¹⁴ *Id.*

Although the FCC states in the NAL that “WDBJ and all broadcasters are free to exercise their discretion to gather and present news, including news related to former adult film stars,”¹⁵ the FCC’s actual analysis and the practical import of its decision indicate that it would prefer licensees to avoid such topics. Particularly given the FCC’s “long history” of utilizing “a variety of *sub silentio* pressures and ‘raised eyebrow’ regulation of program content,”¹⁶ the FCC’s action here seems virtually designed to chill broadcast speech by second-guessing licensees’ editorial decisions. This type of speech regulation is not only an affront to journalistic freedom, but also offends the First Amendment in the same manner as would direct content regulation.¹⁷

As the Supreme Court has stressed, “editing is what editors are for, and editing is selection and choice of material.” While “editors—newspaper or broadcast—can and do abuse this power,” that “is no reason to deny” broadcasters the journalistic “discretion Congress provided.”¹⁸ The NAL in this case inappropriately inserts the Commission into broadcasters’ “selection and choice of material” and undermines their editorial “discretion.” The imposition of the maximum forfeiture allowed under the law further

¹⁵ *WDBJ NAL*, 30 FCC Rcd at 3030 ¶ 17.

¹⁶ *MD/DC/DE Broads. Ass’n v. FCC*, 236 F.3d 13, 19 (D.C. Cir. 2001), *quoting Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978) (en banc).

¹⁷ *See, e.g., Rutan v. Republican Party*, 497 U.S. 62, 77-78 (1990) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)) (“What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.”); *see also MD/DC/DE Broads. Ass’n*, 236 F.3d at 19 (concluding that a “raised eyebrow” regulation created sufficient “pressure” to trigger constitutional scrutiny).

¹⁸ *CBS, Inc. v. Democratic Nat’l Committee*, 412 U.S. 94, 124-25 (1973).

exacerbates the constitutional problems inherent in the FCC's editorially intrusive approach.¹⁹

III. THE ACTION TAKEN AGAINST WDBJ AGAIN DEMONSTRATES THAT CURRENT COMMISSION INDECENCY POLICIES DO NOT COMPORT WITH THE RESTRAINTS ARTICULATED IN *PACIFICA*.

Although the Commission attempts to defend its indecency policies and the WDBJ decision as consistent with almost four decades of precedent,²⁰ those policies, as NAB, RTDNA, and others have shown,²¹ have never been upheld by a reviewing court and are in fact wholly inconsistent with the Supreme Court's decision in *FCC v. Pacifica Foundation*.²² Indeed, Justice Stevens, the author of *Pacifica*, has observed that the FCC's indecency determinations have traveled down a "wildly expansive path," which bears no resemblance to the "restrained approach to indecency regulation" the Court narrowly approved in that case.²³ Rather than taking this observation into account by exercising appropriate restraint in the *WDBJ NAL*, the FCC's action

¹⁹ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 350 (1974) (recognizing that "punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press," and that "punitive damages unnecessarily exacerbate[] the danger of media self-censorship").

²⁰ *WDBJ NAL*, 30 FCC Rcd at 3032-33 ¶ 22.

²¹ See Reply Comments of the National Association of Broadcasters, GN Docket No. 13-86 (Aug. 2, 2013) ("NAB Indecency PN Reply Comments"); Comments of the National Association of Broadcasters, GN Docket No. 13-86 (June 19, 2013) ("NAB Indecency PN Comments"); Comments of the Radio Television Digital News Association, GN Docket No. 13-86 (June 19, 2013) ("RTDNA Indecency PN Comments").

²² 438 U.S. 726 (1978). While there is some doubt whether, in today's changed media marketplace, the rationale in *Pacifica* justifying broadcast-only indecency regulation remains valid, see, e.g., NAB Indecency PN Comments at 3-12, it is not necessary to consider that point here because the FCC's current approach fails even the *Pacifica* standard.

²³ *Supreme Court Fox I*, 556 U.S. at 544 n.5 (Stevens, J., dissenting).

inappropriately continues down the constitutionally suspect course the Commission began in 2004.

A. *Pacifica* Mandates a Restrained Approach to Indecency Enforcement.

In *Pacifica*, a plurality of the Supreme Court affirmed the Commission’s finding that George Carlin’s twelve-minute “Filthy Words” monologue, which involved a list of “words you couldn’t say on the . . . airwaves” repeated “over and over again,”²⁴ was indecent under the FCC’s definition of that term. Far from suggesting the Commission has unbounded discretion to regulate broadcast speech, the plurality expressly “emphasize[d] the narrowness” of its holding.²⁵ Indeed, in the concurrences that provided the critical votes needed to uphold the Commission, Justices Powell and Blackmun stated that they expected the FCC to “proceed cautiously” and to consider carefully the chilling effect that any standards it adopted would have on broadcast speech.²⁶ They also noted that the Court’s decision was “limited to the facts of this case,” and that its holding “certainly . . . does not speak to cases involving the *isolated* use of a potentially offensive word in the course of a radio broadcast.”²⁷ Subsequent Supreme Court decisions confirmed the “emphatically narrow” nature of the *Pacifica* decision.²⁸

²⁴ *Pacifica*, 438 U.S. at 729.

²⁵ *Id.* at 750.

²⁶ *Id.* at 761 (Powell, J., concurring; Blackmun, J., joining concurrence).

²⁷ *Id.* at 760-61 (emphasis added).

²⁸ *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983); *Reno v. ACLU*, 521 U.S. 844, 870 (1997); see *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2312 (2012) (“*Supreme Court Fox II*”).

At the time, the FCC itself recognized that *Pacifica* was confined to its facts, and stated its “intent[] strictly to observe the narrowness of the *Pacifica* holding.”²⁹ For some years, the Commission did so, generally declining to take action against programs that contained fleeting content that might otherwise be considered indecent out of recognition that the programs “differ[ed] dramatically from the *concentrated and repeated* assault involved in *Pacifica*.”³⁰ The FCC also generally deferred to broadcasters’ editorial discretion regarding presentation of news stories by, for example, showing “reluctan[ce] to intervene in the editorial judgments of broadcast[ers]” even in the context of a program containing variations of the word “fuck” ten times in seven sentences.³¹ Beginning in 2004, however, the Commission “abrupt[ly]”³² departed from its relatively restrained post-*Pacifica* practices, and adopted its current policies under which fleeting images and words can be and (sometimes) are found indecent regardless of whether they appear in news programs, as the *WDBJ NAL* demonstrates.³³

²⁹ *WGBH Educ. Found.*, 69 FCC 2d 1250, 1254 (1978); see *id.* (noting that the Court’s decision “affords this commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station”).

³⁰ *Id.* at 1254 n.6 (emphasis added); see NAB Indecency PN Comments at 15 (citing additional cases).

³¹ *Peter Branton*, 6 FCC Rcd 610 (1991) (subsequent history and citations omitted).

³² *Supreme Court Fox II*, 132 S. Ct. at 2318.

³³ *WDBJ NAL*, 30 FCC Rcd at 3028-30 ¶¶ 12-17; *Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broadcast of the Program “NYPD Blue”*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 1596 (2008) (subsequent history omitted) (broadcast of a woman’s buttocks for seven seconds and the side of her breast for a moment in an episode of “NYPD Blue” found to be actionably indecent); see also NAB Indecency PN Comments at 16 (citing additional cases).

B. More Restrictive Policies Adopted in 2004 Led to Inconsistent, Arbitrary – and Thus Unconstitutional – Enforcement, Particularly in the Context of News Programming.

Since the FCC departed from the restrained approach approved in *Pacifica*, it has charted an inconsistent and incoherent path. Its string of perplexing decisions, which the *WDBJ NAL* perpetuates, has left broadcasters in a state of confusion as to what content might run afoul of the Commission’s indecency restrictions, with no apparent end in sight. These decisions, however, are contrary to the APA, the Communications Act, and the First Amendment, which demand clarity, consistency, and predictability, especially in the news context.³⁴

After announcing for the first time that it would fine broadcasters for the fleeting use of expletives in its 2004 *Golden Globe Awards Order*,³⁵ the FCC released a series of decisions that applied this ruling inconsistently, sometimes to the *very same content*. For example, considering complaints related to use of the word “bullshitter” during CBS’s “The Early Show,” the FCC first held the material indecent, emphasizing the

³⁴ See, e.g., *Supreme Court Fox II*, 132 S. Ct. at 2317-18 (“The Commission’s lack of notice to Fox and ABC . . . ‘fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.’ This would be true with respect to a regulatory change this abrupt on any subject, but it is surely the case when applied to the regulations in question, regulations that touch upon ‘sensitive areas of basic First Amendment freedoms.’”) (citations omitted); *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 631 (D.C. Cir. 2000) (“Before an agency can sanction a company for its failure to comply with regulatory requirements, the agency ‘must have either put this language into [the regulation] itself, or at least referenced this language in [the regulation].’”) (alterations in original, citation omitted); *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987) (“Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”); see also 47 U.S.C. § 326 (FCC lacks “power of censorship” over broadcast communications, and cannot “interfere with the right of free speech” by broadcast communication).

³⁵ See *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 18 FCC Rcd 19859 (2003), review granted, 19 FCC Rcd 4975 (2004) (“*Golden Globe Awards Order*”).

“shocking and gratuitous” nature of its use “particularly during a morning news interview.”³⁶ After being challenged on appeal, the FCC reversed itself, finding that its previous decision “did not give appropriate weight” to the fact that the segment was part of a “*bona fide* news interview.”³⁷ The Second Circuit later cited these “diametrically opposite conclusions [the FCC reached] at different stages of the proceedings for the same reason” as one of the particular reasons for finding the Commission’s indecency formula unconstitutional.³⁸ Outside of the news context, the Commission has found even repeated expletives not to be indecent based on its perceived “value” of the programming.³⁹ In other cases, it has judged the repeated use of the *very same terms* to be indecent because, in the Commission’s subjective view, their use was not “essential” to conveying a particular communicative message.⁴⁰

The same inconsistent approach has plagued the FCC’s approach to nudity. For example, in the *Omnibus Indecency Order*, the Commission found a news segment about an attempted flood rescue within NBC’s “Today Show” that contained a brief

³⁶ *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664, 2699 ¶ 141 (2006) (“*Omnibus Indecency Order*”), *vacated in part*, 21 FCC Rcd 13299 (2006) (“*Omnibus Remand Order*”) (further subsequent history omitted).

³⁷ *Omnibus Remand Order*, 21 FCC Rcd at 13327-28 ¶ 72.

³⁸ *Second Circuit Fox II*, 613 F.3d at 332.

³⁹ *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network’s Presentation of the Film “Saving Private Ryan”*, Memorandum Opinion and Order, 20 FCC Rcd 4507 (2005).

⁴⁰ *Omnibus Indecency Order*, 21 FCC Rcd at 2683, 2686 ¶¶ 72, 82 (deciding that “The Blues: Godfathers and Sons,” which contained “the ‘F-Word,’ the ‘S-Word,’ and various derivatives” was indecent because the educational purpose “could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives”).

image of a man's penis not to be indecent.⁴¹ To be sure, in the *WDBJ NAL*, the Commission attempts to distinguish this decision, but the distinctions it draws fail to provide licensees with meaningful guidance.⁴²

Although the Commission previously pledged to “proceed[] with caution in [the agency’s] evaluation of complaints involving news programming,”⁴³ it has antithetically emphasized—as it does in the *WDBJ NAL*—that “there is no outright news exemption from [its] indecency rules.”⁴⁴ This internally inconsistent approach leaves broadcasters in the dark as to whether the news or public affairs context of a program segment matters or not.⁴⁵ With respect to language, they cannot possibly know whether the FCC will later deem the use of particular words essential to a story, or find that a station could have covered the story differently without using those particular terms. And with respect to images, is it more important that an image of a nude body part was “not shot

⁴¹ *Omnibus Indecency Order*, 21 FCC Rcd at 2716-17 ¶¶ 213-18.

⁴² See *WDBJ NAL*, 30 FCC Rcd at 3030 ¶ 18 n.57 (purporting to distinguish ruling regarding the “Today Show”). In the *WDBJ NAL*, the Commission also attempts to rely on a Notice of Apparent Liability that proposed an indecency forfeiture for a one-second display of a man’s penis during a pre-recorded segment in a news program to support its proposed action against WDBJ. *Id.* at 3031 ¶ 19 (discussing *Young Broadcasting of San Francisco, Inc.*, 19 FCC Rcd 1751 (2004)); see also *id.* at 3029 ¶ 14 n.43 (same). However, the Young Broadcasting NAL is not precedent, because the FCC never followed it with an order and the statute of limitations to do so has lapsed. See *WDBJ NAL Opposition* at 19-20.

⁴³ *Omnibus Remand Order*, 21 FCC Rcd at 13327 ¶ 71.

⁴⁴ *Id.*; see *WDBJ NAL*, 30 FCC Rcd at 3029 ¶ 20 (the Commission “has explicitly ruled that there is no news exemption from the indecency law or Rule”).

⁴⁵ See *Second Circuit Fox II*, 613 F.3d at 332-35 (observing, *inter alia*, that the “bona fide news’ exception[] allow[s] the FCC to decide, in each case, whether the First Amendment is implicated,” and that, although the exception “may maximize the amount of speech that the FCC can prohibit . . . it results in a standard that even the FCC cannot articulate or apply consistently”).

at close range,” that it was brief or fleeting,⁴⁶ or that a program segment involved a topic—such as a flood rescue—that the Commission deems worthy of news coverage (an exercise the First Amendment clearly prohibits, as discussed in Section II above)? The incomplete patchwork created by the agency’s decisions means that broadcasters cannot predict how the FCC will answer these questions in any given case.

The Commission, moreover, *has taken no action* to clarify its policies, despite the years of litigation and court losses stemming from its indecency enforcement actions. To date, it has merely opened a proceeding to consider whether and how to reform its indecency policies to comport with “vital First Amendment principles,” and has stated that in the meantime it will continue to apply its existing policies but focus on “egregious” indecency cases.⁴⁷ As NAB and RTDNA explained in their comments in that proceeding, adjectives such as “egregious” provide no clear standard because different people will understand them differently.⁴⁸ Indeed, given that the broadcast of the allegedly indecent image on WDBJ was inadvertent, fleeting, and confined to a very limited portion of the television screen, it is impossible to reconcile the *WDBJ NAL* with notions of “egregious” conduct, as that term is commonly understood.⁴⁹ As a result, more than five years after the Supreme Court’s *Fox II* decision and more than two years

⁴⁶ In the *WDBJ NAL*, the FCC goes so far as to suggest that the fleeting nature of a nude image can never be enough to render program material non-indecent, finding that if the image was visible long enough for a complainant to see it, it will not be found “so brief as to preclude an indecency finding.” *WDBJ NAL*, 30 FCC Rcd at 3029 ¶ 15.

⁴⁷ *Indecency Public Notice* at 1-2.

⁴⁸ NAB Indecency PN Comments at 28; RTDNA Indecency PN Comments at 10.

⁴⁹ See BLACK’S LAW DICTIONARY 593 (9th ed. 2009) (defining term as “extremely or remarkably bad; flagrant”); *Merriam Webster’s Online Dictionary*, Egregious, <http://www.merriam-webster.com/dictionary/egregious> (last visited July 22, 2015) (defining term as “conspicuously bad;” “flagrant”).

after the FCC opened its indecency proceeding, broadcasters today still have no adequate guidance for evaluating either the content they may wish to air or their potential financial exposure for broadcasting that content.

To make matters worse, the FCC routinely takes actions that preclude judicial review of its indecency decisions, ensuring that the lack of clarity those decisions create persists into the future. As evidenced by the current procedural status of the decision on which the FCC relies most heavily to justify its proposed action against WDBJ—*Young Broadcasting of San Francisco*⁵⁰—the Commission often refuses to act on oppositions to notices of apparent liability in indecency cases, but also does not rescind them. The *Golden Globe Awards Order* itself left open numerous questions, including which of the “specific facts” the Commission relied upon would make a difference in future cases, and prompted broadcasters to seek reconsideration. More than a decade later, the FCC *still* has not acted in either case. Nor has the agency acted on oppositions to the NALs issued with respect to “The Blues: Godfathers and Sons” or “Without a Trace,” which the FCC condemned as indecent in 2006.⁵¹ This means that the underlying decisions are not yet final, thereby foreclosing judicial review.⁵²

⁵⁰ See *WDBJ NAL*, 30 FCC Rcd at 3031-32 ¶¶ 19-20; see also *supra* p. 12 & n.42 (explaining that because the *Young Broadcasting* NAL was never paid or followed by a final forfeiture order, it cannot validly serve as precedent here); see also *WDBJ NAL Opposition* at 19-20 (same).

⁵¹ See *Omnibus Remand Order*, 21 FCC Rcd at 13311 ¶ 30 n.86 (declining to address broadcasters’ arguments regarding “The Blues” and stating that it would “address such issues in further proceedings in that case”); *Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program “Without a Trace”*, 21 FCC Rcd 2732 (2006) (Opposition to NAL pending).

⁵² At this point, the Commission can no longer collect a forfeiture based on the broadcasts at issue in these cases, because the five-year statute of limitations for a collection action has lapsed. See 28 U.S.C. § 2462.

The agency's practice of entering into consent decrees to resolve indecency matters similarly permits it to extract penalties without subjecting its decisions to judicial review or providing useful guidance to regulated entities.⁵³ And the Commission engages in other types of procedural legerdemain to avoid judicial review of decisions it doubts will survive scrutiny. For instance, the agency requested and obtained a voluntary remand from the Second Circuit in the *Fox* litigation, which it used to reverse its determinations of indecency regarding the utterance of "bullshitter" during an episode of "The Early Show" and (on procedural grounds) the use of "shit" during an episode of "NYPD Blue."⁵⁴ In addition, following *Supreme Court Fox II*, the Department of Justice avoided defending the FCC's decision that pixelated nudity in an episode of "Married by America" was actionably indecent by dismissing the district court actions it had filed to collect the fines imposed upon Fox-owned stations that aired the program.⁵⁵

The D.C. Circuit has previously criticized the FCC for engaging in similar "administrative law shell game[s]" to "avoid judicial review" of decisions that it fears

⁵³ See News Release: FCC Plans Maximum Fine Against WDBJ for Broadcasting Indecent Programming During Evening Newscast, https://apps.fcc.gov/edocs_public/attachmatch/DOC-332631A1.pdf (Mar. 23, 2015) ("*WDBJ News Release*") (noting that, in addition to the action taken in the *WDBJ NAL*, the FCC had taken two "action[s] . . . regarding the broadcast of indecent material since January 2014," citing two consent decrees). The only other indecency cases in which the FCC has acted since 2008 involved consent decrees as well. See *Lieberman Broadcasting, Inc.*, 28 FCC Rcd 15397 (2013); *BELA TV, LLC*, 25 FCC Rcd 400 (2010); *Beasley Broadcast Group, Inc.*, 23 FCC Rcd 15603 (2008).

⁵⁴ *Omnibus Remand Order*, 21 FCC Rcd at 13326-29 ¶¶ 67-77.

⁵⁵ John Eggerton, *DOJ, FCC Drop Pursuit of Fox 'Married by America' Indecency Fine*, *Broadcasting & Cable*, Sept. 21, 2012, <http://www.broadcastingcable.com/news/washington/doj-fcc-drop-pursuit-fox-married-america-indecency-fine/60633>.

“cannot withstand judicial scrutiny.”⁵⁶ In the indecency context, such actions are not just legally suspect in the abstract, but raise special First Amendment concerns because they prolong the uncertainty and inevitable chilling effects surrounding the regulation of speech, including news programming entitled to the greatest constitutional protection.

C. The *WDBJ NAL* Perpetuates the Commission’s Unconstitutional Indecency Regime by Ignoring the Need for Consistency, Predictability, and Clarity.

In the *WDBJ NAL*, the FCC brushed off long-standing concerns about its indecency policies, summarily contending that its actions are “[c]onsistent with almost forty years of precedent and the Supreme Court’s recent review of [its] indecency authority.”⁵⁷ As *WDBJ* explains, however, this misreads both *Pacifica* and the Supreme Court’s decision in *Fox II*.⁵⁸

Contrary to the FCC’s statement in the *WDBJ NAL*, *Pacifica* does not “remain[] valid and supporting authority for the Commission’s indecency enforcement” action taken in this case or others.⁵⁹ Instead, *Pacifica* upheld the application of the same *definition* of indecency that the FCC purports to apply today to find *specific broadcast content* indecent.⁶⁰ In *Supreme Court Fox II*, moreover, the Supreme Court did not

⁵⁶ *AT&T v. FCC*, 978 F.2d 727, 731-33 (D.C. Cir. 1992); see *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998) (characterizing FCC’s motion to remand as a “ploy [that] may well take the prize”).

⁵⁷ *WDBJ NAL*, 30 FCC Rcd at 3032 ¶ 22.

⁵⁸ *WDBJ NAL* Opposition at 22-45.

⁵⁹ *WDBJ NAL*, 30 FCC Rcd at 3032 ¶ 22.

⁶⁰ See *supra* Section III.A (explaining the narrowness of *Pacifica*’s holding and that it was limited to its facts). As Justice Stevens later observed, *Pacifica* cannot be read to support FCC enforcement action against “isolated” instances, and the Commission’s “changed view of its statutory mandate” to reach such instances “certainly would have been rejected if presented to the Court at the time” of *Pacifica*. *Supreme Court Fox I*, 556 U.S. at 539 (Stevens, J., dissenting).

reaffirm *Pacifica*, did not endorse the 2001 Indecency Policy Statement⁶¹ that the FCC purported to apply in this case, and did not approve of the FCC's approach to indecency enforcement adopted in the *Golden Globe Awards Order* and subsequent decisions.⁶² Rather, the Supreme Court held that the FCC's policies on momentary nudity and fleeting expletives were unconstitutionally vague as applied to the broadcasts before it, expressly leaving the question of the First Amendment validity of the Commission's policies for another day.⁶³

The FCC's inconsistent treatment of similar material, unpredictable decisions, and random reversals do not comport with either bedrock First Amendment principles or Section 326 of the Communications Act, both of which demand an exacting standard for regulating broadcast content. As both the Supreme Court and the Commission itself have recognized, the FCC "has no authority and, in fact, is barred by the First Amendment and [§ 326] from interfering with the free exercise of journalistic judgment."⁶⁴ These principles apply equally in the context of indecency regulation, "severely limit[ing] any role by the Commission and the courts in enforcing the proscription contained in 18 U.S.C. § 1464."⁶⁵

⁶¹ *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Concerning Broadcast Indecency*, 16 FCC Rcd 7999 (2001).

⁶² *Supreme Court Fox II*, 132 S. Ct. at 2320.

⁶³ *Id.* (declining to reach "the First Amendment implications of the Commission's indecency policy" because doing so was unnecessary in light of its holding that the orders at issue violated the due process clause).

⁶⁴ *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 650-51 (1994) (quoting *Hubbard Broadcasting, Inc.*, Memorandum Opinion and Order, 48 F.C.C.2d 517, 520 (1974)).

⁶⁵ *WGBH*, 69 F.C.C.2d at 1254.

The FCC is not free to ignore these concerns as it did in the *WDBJ NAL*.⁶⁶ Indeed, the Supreme Court in *Fox II* made clear that future indecency enforcement actions would be subject to “applicable legal requirements,” and that courts will be “free to review the current policy or any modified policy in light of its content and application” to subsequent cases.⁶⁷ The “applicable legal requirements” to which the Court referred necessarily include the First Amendment and Section 326.⁶⁸

The Commission also is not free to ignore its own precedent,⁶⁹ particularly the “caution” it previously recognized to be necessary “with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment’s free press guarantee.”⁷⁰ But rather than proceeding cautiously here, the Commission, most notably, distorts the legal, as well as the common sense, understanding of the term “willful” to try to justify a maximum record penalty against WDBJ for unintentionally

⁶⁶ See, e.g., *Meredith Corp. v. FCC*, 809 F.2d 863, 873 (D.C. Cir. 1987) (stating that the Commission “may not simply ignore a constitutional challenge in an enforcement proceeding”).

⁶⁷ *Supreme Court Fox II*, 132 S. Ct. at 2320.

⁶⁸ As WDBJ explains, a majority of the Supreme Court made this abundantly clear in the course of the *Fox* litigation. See *WDBJ NAL Opposition* at 23 & n.23 (citing opinions).

⁶⁹ See *WDBJ NAL Opposition* at 14-21 (explaining how the FCC misapplied its indecency standards and precedent).

⁷⁰ *Omnibus Indecency Order*, 21 FCC Rcd at 2668 ¶ 15. To be clear, NAB and RTDNA are not suggesting that WDBJ made an affirmative editorial decision to include in its newscast the fleeting image at issue. Regardless, as discussed in Section II, *supra*, the *WDBJ NAL* implicates the station’s newsgathering and editorial process. The *WDBJ NAL* also implies that if the FCC can levy the maximum penalty levied for content that was included inadvertently, it certainly could do so if a decision to include fleeting nudity was affirmatively made, whether or not in the context of news.

airing a sexual image for 2.7 seconds.⁷¹ The Commission’s erroneously expansive view of willfulness in this case potentially would result in virtually all human errors, equipment failures, and unpredictable occurrences being treated as deliberate, intentional violations of federal law and regulation.⁷² As the WDBJ NAL Opposition explains in detail, that result is legally indefensible and constitutionally unsupportable.⁷³ Certainly, the FCC’s approach is a far cry from the “restrained approach” that *Pacifica* mandates, and as a result, the *WDBJ NAL* cannot stand.

IV. THE COMMISSION’S CURRENT INDECENCY ENFORCEMENT POLICIES CREATE A CHILLING EFFECT THAT THE *WDBJ NAL* EXACERBATES.

A. Inconsistent and Arbitrary Indecency Enforcement Chills Protected Speech.

The Supreme Court has repeatedly recognized that vague enforcement standards—such as the ones the FCC applied in this case—“raise[] special First Amendment concerns because of [their] *obvious* chilling effect” on speech.⁷⁴ Indeed, in

⁷¹ Contrary to the FCC’s interpretation, Black’s Law Dictionary defines “willful” as “voluntary and intentional” and expressly distinguishes “willful” actions from “negligent” acts. BLACK’S LAW DICTIONARY 1599 (9th ed. 2009); see also *Merriam Webster’s Online Dictionary*, Willful, <http://www.merriam-webster.com/dictionary/willful> (last visited July 22, 2015) (defining “willful” as “done deliberately”).

⁷² For example, NAB and RTDNA have, in the past, received inquiries from broadcasters concerned about providing coverage of live events (including community events such as local fairs) because stations cannot control the actions of members of the public. If the Commission, consistent with its theory of willfulness in this case, believes that stations “should” know that members of the public might at any time act or speak inappropriately in the vicinity of a camera or microphone and must ensure that such behavior is not aired, then a station could potentially be liable for a “willful” violation of the indecency restrictions any time it risks live coverage of local events. See *WDBJ NAL*, 30 FCC Rcd at 3033-34 ¶ 24.

⁷³ *WDBJ NAL Opposition* at 45-51.

⁷⁴ *Supreme Court Fox II*, 132 S. Ct. at 2318 (quoting *Reno*, 521 U.S. at 871-72) (emphasis added); see also *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (if a “law interferes with the right of free speech or of

reviewing past indecency determinations, the Second Circuit observed that the uncertainty created by the FCC's indecency policies had caused broadcasters to forego airing a broad range of programming, including coverage of political debates and memorial services of fallen soldiers.⁷⁵ The record before the Second Circuit and the Supreme Court in the Fox litigation included multiple examples of self-censorship following the abrupt shift in the Commission's indecency policies in 2004.⁷⁶ And the Second Circuit found that the FCC's enforcement actions had in fact chilled speech "at the very heart of the First Amendment."⁷⁷ Because there was "little rhyme or reason" to the Commission's disparate enforcement decisions, broadcasters had "to guess whether an expletive will be deemed 'integral' to a program or whether the FCC will consider a particular broadcast a '*bona fide* news interview'" entitled to leniency in the agency's discretion.⁷⁸ Accordingly, the court expressed concern that leaving the agency's policy in place would create "countless other situations where broadcasters will use their editorial judgment and decline to pursue contentious people or subjects, or will eschew live programming altogether, in order to avoid the FCC's fines."⁷⁹

When the FCC sought subsequent to the Fox litigation to ensure that its indecency enforcement policies comport with the First Amendment, it did so presumably to avoid the very chilling effect that the Second Circuit recognized. In response to its

association, a more stringent vagueness test should apply"); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 683-84 (1968) (recognizing that the "vice of vagueness" produces chilling effect on creators and distributors of media products).

⁷⁵ *Second Circuit Fox II*, 613 F.3d at 334-35.

⁷⁶ See NAB Indecency PN Comments at 20 (citing briefs).

⁷⁷ *Second Circuit Fox II*, 613 F.3d at 335.

⁷⁸ *Id.* at 332.

⁷⁹ *Id.* at 335.

public notice seeking comment on how best to achieve that laudable goal, the FCC received extensive comments documenting the self-censorship created by its current policies.⁸⁰ But the Commission has taken no action in that proceeding and has not otherwise provided broadcasters with any guidance, necessarily leading to a “when in doubt, leave it out” mentality.

B. The *WDBJ NAL* Will Further Chill Speech in the Highly First Amendment Sensitive Area of News.

The *WDBJ NAL* perpetuates—indeed, exacerbates—the chilling effect that the Second Circuit recognized results from the FCC’s indecency policies, without clarifying in any way how the FCC will apply those policies in the future. The proposed imposition, for the first time ever, of the maximum indecency fine allowable by statute will clearly deter broadcast speech, whether news or other programming. And the chilling impact of the FCC’s decision is heightened by the fact that the display of the image at issue was inadvertent and caused by the inability of editing equipment then in the station’s possession to permit anyone at the station to see it.⁸¹ The decision to propose an unprecedented penalty under these circumstances does indeed, as the FCC stated, “send[] a clear signal” to broadcasters:⁸² air controversial content at your peril.

⁸⁰ See, e.g., NAB Indecency PN Comments at 20-22; RTDNA Indecency PN Comments at 11-13; NAB Indecency PN Reply Comments at 6-7 (citing additional comments with examples).

⁸¹ *WDBJ NAL* Opposition at 11-13.

⁸² FCC News Release, *FCC Plans Maximum Fine Against WDBJ for Broadcasting Indecent Programming Material During Evening Newscast* (Mar. 23, 2015).

This draconian result, tantamount to a strict liability standard,⁸³ will be felt in newsrooms across the country. The *WDBJ NAL* is particularly likely to make broadcasters wary of providing live programming including news—the very programming the Commission traditionally wants to promote. Stations most often rely on editing techniques, including so-called “dump” buttons or blurring of images, to avoid the transmission of offensive content during live reporting. The *WDBJ NAL* suggests that broadcasters will be held strictly liable not only for the actions of the employees or agents that operate such equipment, but for the effective operation of the equipment itself. In fact, the *NAL* could be read to suggest that stations should constantly upgrade editing and monitoring equipment to avoid the FCC later concluding that they “could have” prevented an inadvertent mistake if they had tried harder.

In sum, the Commission has set a standard of perfection that is virtually impossible to meet.⁸⁴ The chilling effects of the FCC’s action will be felt disproportionately by small, local broadcasters, which can ill afford to risk significant indecency fines and often cannot afford to install costly editing equipment or dedicate staff.⁸⁵ They will have little choice but to steer far clear of matters of potential controversy and to cut back on live programming that poses any degree of risk, thus depriving viewers and listeners of coverage of important local and national news events. This result is the exact opposite of what the Constitution demands.

⁸³ Strict liability is generally disfavored in criminal law, particularly with respect to cases that implicate the First Amendment.” *United States v. Sheehan*, 512 F.3d 621, 629 (D.C. Cir. 2008) (citing *Smith v. California*, 361 U.S. 147, 150-54 (1959)).

⁸⁴ As discussed above, coverage of live events is inherently unpredictable, *see supra* p. 19 & n.72, and even non-live news programming is often assembled under tight deadlines with little time for editing.

⁸⁵ *See, e.g.*, NAB Indecency PN Reply Comments at 13-14 & n.53.

V. CONCLUSION

As shown above, the *WDBJ NAL* offends the Constitution, the APA, and the Communications Act in myriad ways, and the FCC should rescind it. In addition, the Commission should conclude its pending proceeding concerning broadcast indecency in a manner that brings clarity and consistency to its indecency policies and enforcement processes and appropriately defers to broadcasters' editorial discretion.

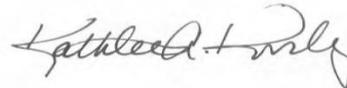
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July 28, 2015