No. 07-582

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,
Petitioners,

v.

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

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

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BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF BROADCASTERS AND RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

ADMINISTRATIVE RULINGS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

National Association of Broadcasters ("NAB") is a non-profit, incorporated association of radio and television stations and broadcasting networks. NAB serves and represents the American broadcasting industry, advocating on behalf of more than 8,300 local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission, and the courts. NAB and its members have serious concerns about the Federal Communications Commission's broad new indecency policy, including its policy on "fleeting expletives," which reverses years of a more considered and restrained approach that showed greater sensitivity to the free speech interests of broadcasters around the country. In particular, NAB is concerned that the arbitrary and standardless application of the Commissions' new policy on fleeting expletives has had and will continue to have a dramatic nationwide chilling effect on broadcast content that is not actually indecent.

The Radio-Television News Directors Association ("RTNDA"), based in Washington, D.C., is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, nor did any party, any counsel for a party, nor any person other than *amici*, their non-party members, or their counsel make a monetary contribution intending to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

and network news directors and executives, news associates, educators and students in broadcasting, cable and other electronic media in over 30 countries. RTNDA is committed to encouraging excellence in electronic journalism, and upholding First Amendment freedoms.

SUMMARY OF ARGUMENT

NAB and RTNDA submit this brief to bring to the Court's attention the fact that the Federal Communications Commission's reversal of its indecency policy on fleeting expletives has resulted in the arbitrary, inconsistent, and standardless censorship of broadcast programming based on the Commission's content-based view of its merit. This stark departure from the Commission's prior, more restrained approach has had a palpable chilling effect on broadcasting around the country.

As demonstrated in this brief, the Commission's decisions in several recent cases finding even single utterances of certain words actionably indecent have resulted in the arbitrary suppression of broadcast content. The Commission purports to rely on "context" in making its indecency determinations, but in reality the way that the Commission considers "context" amounts to a standardless – and unpredictable – assessment of what programming it favors and disfavors.

The Commission's own actions have compounded the harmful effects of its new indecency policy. The Commission has delayed adjudication or reconsideration of several prominent indecency orders for years on end, and has already reversed

itself in one key indecency decision applying the new policy. Indeed, as noted by the Second Circuit in this case, the Commission declined to act on petitions for reconsideration of the very order that adopted the indecency policy. The Commission's actions not only suggest that the agency is attempting to shield its new indecency determinations from judicial review, but also belie the Commission's argument that it is applying anything approaching clear standards in its indecency decisions.

Moreover, while the Commission manipulates its litigation position, the effect of the arbitrary enforcement on the actual content produced and broadcast is immense. Local broadcasters have repeatedly erred on the side of self-censorship when making decisions to broadcast certain content – even in one case when the content was found not to be indecent by the Commission. The chilling effect falls substantially on local broadcasters without the financial resources to cope either with potential indecency fines or with the practical costs of the Commission's *ad hoc* indecency policy. Certain broadcasters have been strong-armed into consent decrees that mandate substantial self-censorship even when there is only a *preliminary* suggestion that indecent material may have been broadcast. And the Commission has used its self-created backlog of indecency complaints to place substantial burdens on broadcasters in the Commission's license renewal and assignment processes.

The Commission's inconsistent, arbitrary, and standardless enforcement of its new indecency policy

is contrary to the First Amendment. The Commission has failed to follow any clear and predictable standards that would limit its discretion, and appears to be acting arbitrarily to encourage some content or views and discourage others in enforcing its indecency regulations. The case before the Court is but the tip of the iceberg. Even putting aside the Commission's efforts to crack down on certain images that have landed it back before the Second Circuit in another case,[2] the Commission's new indecency policy on fleeting expletives is trampling on substantial free speech interests.

ARGUMENT

I. THE COMMISSION IS WIELDING ITS NARROW POWER TO REGULATE BROADCAST INDECENCY TO CENSOR PROGRAMMING ARBITRARILY BASED ON SUBJECT MATTER.

The Commission has thrown open the door to arbitrary application of its indecency regulations by reversing its previous policy on expletives enforced for over two decades. In the wake of this Court's decision in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), the Commission hewed to a relatively narrow indecency enforcement policy that, while purporting to consider the "context" of potentially indecent content, recognized in its enforcement actions the narrowness of the Court's *Pacifica* holding that the

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[2] *See In re Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broadcast of the Program "NYPD Blue,"* 23 F.C.C.R. 3147 (2008).

"verbal shock treatment" of George Carlin's monologue was indecent. *Id.* at 757 (Powell, J., concurring). But in its order regarding the 2003 broadcast of the Golden Globe Awards, the Commission, reversing the holding of its own Enforcement Bureau, abandoned any such self-restraint by making two complementary findings: that the word "fuck" always has a sexual meaning that places it within the ambit of the Commission's indecency regulations, and that even "fleeting expletives" that are not repeated may be found to be actionably indecent. *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the 'Golden Globes Award' Program*, 19 F.C.C.R. 4975, ¶¶ 8, 12 (2004) ("*Golden Globe Awards Order*").

While the *Golden Globe Awards Order* might have been read as creating a *per se* rule that any broadcast use of the word "fuck" (or any other word viewed by the Commission "as highly offensive," *id.* ¶ 14) outside the Commission's "safe harbor" period was actionably indecent, in practice it has served to dramatically enlarge the Commission's discretion to decide when to apply its indecency policy. And the Commission has already abused that discretion to apply its policy in a standardless and arbitrary way.[3]

1. The facts surrounding the 2003 broadcast of the Golden Globe Awards illustrate the extent to

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[3] In the *Golden Globes Award Order*, the Commission also adopted a new policy on "profane" language that so far has paralleled the enforcement of its policy on "indecent" language. For purposes of this brief, the references to the Commission's indecency policy include the new policy regarding profanity.

which the Commission has dramatically expanded the range of content that it may consider to be actionably indecent. In that case, the singer Bono said, in unscripted remarks, "This is really, really fucking brilliant." *Golden Globe Awards Order* ¶ 3, n.4. In reversing the Enforcement Bureau decision and finding the broadcast actionably indecent, the Commission acknowledged that the single utterance of the word "fucking" did not have a literal meaning – as the Commission recognized, it was used as an "intensifier" – although the Commission concluded that the word "inherently has a sexual connotation." *Id.* ¶ 8; *but cf. Cohen v. California*, 403 U.S. 15, 20 (1971) (noting use of same word in that case "cannot plausibly" be characterized as erotic). Nor did the Commission place weight on whether the use of the word was scripted or took place on live television: "[t]he fact that the use of this word may have been unintentional is irrelevant." *Golden Globe Awards Order* ¶ 9. Besides, the Commission noted, the broadcasters were on notice that a different performer (Cher) had used an expletive on a live broadcast of a different show the year before, and Bono had allegedly used the word on a live broadcast of yet another awards show nine years before. *Id.* ¶ 10. The Commission also pointed to "technological advances" that would have allowed blocking of single words during the broadcast. *Id.* ¶ 11.

The fact that a single, unscripted, non-literal utterance of the word "fucking" on live television could be considered indecent meant either (1) that the Commission would enforce a broad *per se* rule that broadcast of even fleeting uses of that word or

its derivations would be considered indecent, or (2) that the Commission was prepared to embark on a case-by-case evaluation of any utterance of that word or other expletives outside the safe-harbor period.[4] As NBC noted in its still-pending motion for partial reconsideration, the holding would necessarily have a chilling effect on broadcasters who must "play it safe" if such fleeting words could be considered actionably indecent. *See* NBC Petition for Partial Reconsideration, No. EB-03-IH-0110, at 3-5 (FCC filed Apr. 19, 2004)[5] But for years after that Petition was filed, the Commission never ruled on it, even as the Commission moved on to apply and even expand its policy change announced in the *Golden Globe Awards Order* on a case-by-case basis.

In the *Golden Globe Awards Order* itself, the Commission provided scant "contextual" guidance as to when the Commission would or would not consider utterance of the word "fucking" (or other "highly offensive" words) to be actionably indecent. The agency stated in a conclusory fashion that the use of the word "here, on a nationally telecast awards ceremony, was shocking and gratuitous," and noted

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[4] The Commission provides a "safe harbor" between 10 p.m. and 6 a.m. in which its regulations do not forbid the broadcast of indecent material. 47 C.F.R. § 73.3999(b); *see Action for Children's Television v. FCC*, 58 F.3d 654, 669-70 (D.C. Cir. 1995) (en banc) (holding that Commission is required to limit its restrictions on the broadcast of indecent programming to the period from 6:00 a.m. to 10:00 p.m.).

[5] This and other briefs regarding reconsideration of the *Golden Globe Awards Order* are *available at* http://www.fcc.gov/eb/broadcast/Plead.html.

that NBC had not claimed any "independent value of use of the word here, or any other factors to mitigate its offensiveness." *Golden Globe Awards Order* ¶ 9. But what context would render not indecent the use of a word that the Commission determined to be "one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language"? *Id.*. Is it more shocking and gratuitous that the language is used on an awards show rather than a program designed for political discussion? What if a public figure is making a political argument on an awards show or other live programming? How does a broadcaster determine if an expletive adds "independent value" or is not "gratuitous" even if uttered in what the Commission considers to be an approved context?

2. The Commission's subsequent decisions in the years following the *Golden Globe Awards Order* have charted an arbitrary and unpredictable course in haltingly attempting to answer such questions, leaving broadcasters all the more uncertain about what is permissible. The Commission has determined that expletives uttered by actors depicting soldiers in the heat of battle are not indecent, but expletives uttered by actual blues producers and hip-hop artists in a documentary are indecent. It has also ruled that expletives uttered by entertainers at live awards shows are indecent, but expletives uttered by entertainers on programs that feature news content are not indecent. Though couched in application of vague contextual standards, the Commission's terse analyses have been nothing more than a fig leaf for arbitrarily

suppressing certain programming based on its approval or disapproval of the broadcast content itself.

A clear example of the Commission's preference for certain programming is its finding that an unedited broadcast of the film "Saving Private Ryan" containing repeated expletives is not actionably indecent. *In re Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 F.C.C.R. 4507 (2005) ("*Saving Private Ryan Order*").

"Saving Private Ryan" contains numerous utterances of derivations of "fuck" and "shit." *Id.* ¶ 4. However, the Commission did not find the broadcast actionably indecent for a number of reasons – most of them centered on approval of the content in the film itself or of the speakers portrayed in the film. In its Order, the Commission noted that it has found "similar material depicting an historical view of World War II and wartime atrocities [*Schindler's List*] to be not patently offensive, and thus not actionably indecent." *Id.* ¶ 16. And it approved of the expletives as "reflect[ing] the soldiers' strong human reactions to, and, often, revulsion at, those unspeakable conditions and the peril in which they find themselves." *Id.* ¶ 14. It found that depictions of these expletive-filled "reactions" to be "[e]ssential to the ability of the filmmaker to convey to viewers the extraordinary conditions in which the soldiers conducted themselves with courage and skill," and "integral to the film's objective of conveying the

horrors of war through the eyes of these soldiers, ordinary Americans placed in extraordinary situations." *Id.* Blocking the expletives in the broadcast would only "alter the nature of the artistic work and diminish the power, realism and immediacy of the film experience for viewers." *Id.*

These reasons boil down to little more than an *ad hoc* determination that the Commission approves of the subject matter of the broadcast and the speakers portrayed in it. The Commission believes that depicting "an historical view of World War II," at least where the "courage and skill" of American soldiers is conveyed, justifies broadcasting expletives, and that expletives are warranted when uttered by "soldiers, ordinary Americans placed in extraordinary situations." But these are not predictable, standard-driven determinations – these are subjective and outcome-driven conclusions.

The holding in the *Saving Private Ryan Order* is in stark contrast to the Commission's finding that expletives spoken by interviewees in a documentary by an Academy Award-winning director are actionably indecent. *In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664, ¶¶ 72-86 (2006) ("*Omnibus Order*"), *vacated in part on other grounds*, 21 F.C.C.R. 13,299 (2006). In the portion of the *Omnibus Order* not later vacated by the Commission, the Commission held that San Mateo County Community College District's broadcast of the documentary "The Blues: Godfathers and Sons" on its noncommercial educational station was

actionably indecent and issued a Notice of Apparent Liability for Forfeiture. That documentary contains interviews of blues performers, a record producer, and other individuals in which the interviewees use "fuck," "shit," and their derivatives. Over two years later, the Commission has yet to rule on the opposition to the Notice of Apparent Liability – insulating the decision from judicial review while broadcasters must attempt to deal with its precedential effect.

In its decision on "The Blues," the Commission dismissed the broadcaster's argument that the expletives were left in "so that the viewpoints of those being interviewed would be accurately reflected." *Id.* ¶ 77. While conceding that the expletives "may have had some communicative purpose," the Commission believed that the broadcaster could not show that they were "essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance, or that the substitution of other language would have materially altered the nature of the work." *Id.* ¶ 82. The Commission contrasted this with "Saving Private Ryan," where, it determined, the "nature of the artistic work" would have been altered by substituting other language for expletives. *Id.* In short, the "[educational] purpose could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives." *Id.*

Not only was the "nature of the artistic work" considered in determining whether use of the expletives was justified, but the Commission also

explicitly pointed to the relevance of the identity of the speaker. The agency noted that "many of the expletives in the broadcast are not used by blues performers," but rather by "a former label owner and record producer" and "hip-hop artists" – suggesting that expletives by some speakers but not others in the *same program* may be acceptable. *Id.* ¶ 77.

These sorts of fine-toothed editorial judgments by a government agency pose no end of problems. The general rule outside the broadcasting context, of course, is that the government may not prohibit individuals from publicly uttering expletives in an effort to "excise, as 'offensive conduct,' one particular scurrilous epithet from the public discourse." *Cohen*, 403 U.S. at 22. Putting aside whether or not the agency has the requisite competence to make these sorts of editorial determinations in any context, the Commission's approach is fundamentally unpredictable. How do broadcasters determine in advance what is essential to the "nature of the artistic work"? Do some works have a "nature" or "purpose" to which expletives are essential – such as depictions of war? How can a broadcaster determine whether certain speakers are sufficiently central to the work that their expletives are not indecent?

In the same *Omnibus Order*, the Commission created even more uncertainty in its indecency policy in its treatment of a fleeting expletive – a single usage of the word "bullshitter" – uttered by a "Survivor:Vanuatu" contestant on the CBS program "The Early Show," finding a violation of its indecency regulations without even allowing CBS to present its

position. *See In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and March 8, 2005*, 21 F.C.C.R. 13,299, ¶ 9 (2006) ("*Remand Order*"). In the portion of the *Omnibus Order* addressing "The Early Show," after reiterating that the word "shit" always has an excretory connotation and that even fleeting expletives may be actionably indecent, the Commission reasoned that what was "most important to [its] analysis in this specific context" was that "use of the 'S-Word,' particularly during a morning news interview, is shocking and gratuitous." *Omnibus Order* ¶ 141.

Only after CBS appealed to the Second Circuit did the Commission reverse course – suddenly agreeing that CBS should be heard before a new "final" decision would be issued by the Commission and asking for a voluntary remand from the Second Circuit. *Remand Order* ¶ 9. On this limited remand, the Commission concluded that what had been the "most important" factor in making its indecency determination was in fact exculpatory. Rather than the expletive being *more* shocking because it was on a news show, the expletive was *less* offensive for this reason. Saying it was loathe to question the "editorial judgment" in "news programming" or "public affairs programming," the Commission now found the expletive not to be actionably indecent for the *sole reason* that it took place during "news programming." *Id.* ¶¶ 70-71, 73.

While seemingly intended to acknowledge the particular constitutional sensitivities raised in the context of news programming, the Commission's

reversal only creates more uncertainty and further dramatizes the arbitrary approach to enforcement that the Commission has taken. As the Commission itself noted, the interview of a reality show contestant was a separate segment arguably designed to promote CBS's own entertainment programming, though other segments of the same "Early Show" program dealt with political and foreign affairs topics. *Id.* ¶ 72. But rather than scrutinize this point itself, the Commission decided "in these circumstances to defer to CBS's plausible characterization of its own programming." *Id.* Thus again, the scope of the Commission's holding remains unclear. Are expletives spoken by entertainment figures on a news program always not indecent? Would the Commission defer to a broadcaster's characterization about a public affairs program? How about an entertainment news program? Does sports programming fall under the news umbrella? Where broadcasters have reason to believe that there is some risk that expletives may be broadcast, such as during live news coverage of a volatile situation, will the Commission find them strictly liable, regardless of the "news" context? And beyond muddying the indecency waters further, the Commission's "Early Show" reversal implies that it is necessary and appropriate for the Commission to make determinations as to what is or is not "news," a role that runs counter to the First Amendment.

Moreover, the reversal makes clear that there is no coherent rationale for the Commission's decisionmaking. The Commission was hardly unaware that "The Early Show" was a news program

when it released the *Omnibus Order* – indeed, it found the use of an expletive by a show contestant "particularly during a morning news interview" to be critical to its indecency determination. *Omnibus Order* ¶ 141. The Commission simply turned on a dime.

Finally, the portions of the *Remand Order* dealing with the 2002 and 2003 Billboard Music Awards, discussed at greater length by respondents, apply the same sort of arbitrary and standardless analysis. The original *Omnibus Order* contained little more than conclusory analysis that the use of the word "fuck" in the context of an awards program was indecent because it was shocking and gratuitous. *Omnibus Order* ¶¶ 105-106, 117, 120. Only when the cases went to the Second Circuit did the Commission decide that it should consider the broadcasters' objections and attempt to provide a more detailed explanation of its "contextual" analysis. But the added legal arguments pitched to the Second Circuit in the *Remand Order* provide no more guidance about the contexts in which use of expletives will or will not be punished, other than when uttered by entertainers on award shows. The Commission in its *Remand Order* only confirms that the "contemporary community standards" it is employing are based on the Commission's "collective experience and knowledge." *Remand Order* ¶ 28 (quoting *Infinity Radio License, Inc.*, 19 F.C.C.R. 5022, ¶ 12 (2004)). That is the opposite of a transparent and predictable standard.

3. The Commission has compounded the uncertainty created by its arbitrary and standardless policy by continuing to shield its orders from meaningful judicial review by refusing to make them final. This strategy imposes a substantial cost on broadcasters, who have been left with considerable uncertainty about what speech is indecent for years on end without an effective means of challenging the Commission's decisions.

Most remarkably, as noted above, the Commission refused for years to rule on the petition for partial reconsideration submitted in response to the *Golden Globe Awards Order*, even as the Commission *continued to apply and even expand the policy announced in that Order in subsequent cases*. But while delaying final resolution of the *Golden Globe Awards Order*, the Commission proceeded apace with the Billboard Music Awards decisions in the *Remand Order* – which it evidently believes to have better facts and to raise narrower issues than the *Golden Globe Awards Order*. *E.g.*, *Remand Order* ¶ 27 (regarding Nicole Ritchie's language: "This is not a case involving a single, spontaneously uttered expletive."); *id.* ¶ 62 (suggesting in the case of the 2002 awards that the offensiveness was "compounded" by what the Commission considered to be "inadequate and misleading" warnings).

Moreover, in the *Remand Order* itself, the Commission engaged in obvious manipulation to get its favored holdings before the Second Circuit. As explained above, the Commission performed a complete, largely unexplained about-face on a

fleeting expletive on "The Early Show," first holding that its placement in a morning news program made it particularly shocking, then reversing course and holding that its placement within a news program exculpated it from an indecency finding. *Supra* at 12-15.

The Commission similarly played procedural games with its indecency determinations regarding various episodes of the dramatic program "NYPD Blue." In the *Omnibus Order*, the Commission found various uses of the word "bullshit" to be actionably indecent, dismissing the broadcasters' argument that use of the word "was necessary for dramatic effect." *Omnibus Order* ¶ 130. That holding is in tension, to say the least, with the *Saving Private Ryan Order*, where dramatic effect that the Commission considered to be essential to the artistic work was held to justify the repeated use of expletives.[6] But in

[6] For example, why is use of expletives in depicting life-and-death police activities considered indecent when the same expletives are not considered indecent in "Saving Private Ryan"? How does the Commission decide what situations are sufficiently violent that the use of expletives in response is justified? In the course of its profanity analysis of "NYPD Blue," the Commission provided its view that while "the expletives may have made some contribution to the authentic feel of the program, we believe that purpose could have been fulfilled and all viewpoints expressed without the broadcast of expletives." *Omnibus Order* ¶ 134. Again, how the Commission determines the "authentic feel" of the program is left unexplained – indeed, it is a textbook example of a subjective standard that can only be arbitrarily applied, even assuming a government agency can ever make such artistic and editorial judgments consistent with the First Amendment.

the *Remand Order*, the Commission vacated this holding on a technicality involving the location of the person submitting the complaint – suggesting that it will likely reach a similar holding in future cases, but without permitting timely review of its decision by the Second Circuit or this Court.

Further, as noted above, the Commission has still failed to act on oppositions to the Notice of Apparent Liability regarding the broadcast of "The Blues," though its decision is more than two years old, and the Commission has subsequently acted on other portions of the *Omnibus Order* – those that it was forced to defend on appeal. Nor is this pattern of delay limited to the expletive context – the Commission has failed to act on oppositions to a contested Notice of Apparent Liability for broadcast of an episode of "Without a Trace" containing depictions of teenage sexual conduct but no nudity. *See In re Complaints Against Various Television Licensees Concerning Their Dec. 31, 2004 Broadcast of the Program "Without a Trace,"* 21 F.C.C.R. 2732, ¶ 15 (2006) (suggesting that depictions "[went] well beyond what the story line could reasonably be said to require"), *cancelled in part*, 21 F.C.C.R. 3110 (2006). These delays leave the NAL decisions effectively precedential, creating more uncertainty in the standards the Commission is applying, without permitting timely review.

It is also noteworthy that the Commission's evasion tactics in the "fleeting expletives" cases mirror those in its recent "fleeting images" cases. As the Third Circuit has noted, the question of whether

"fleeting images" are actionably indecent has historically been analyzed under the general rubric of the Commission's policy on "fleeting material." *CBS Corp. v. FCC*, No. 06-3575, __ F.3d __, 2008 WL 2789307, at *13 (3d Cir. July 21, 2008). But in the Commission's haste to act on the split-second "wardrobe malfunction" during the Super Bowl XXXVIII Halftime Show, it arbitrarily and capriciously reversed course on its prior "fleeting material" policy – creating the same kind of uncertainty as to what programming would be actionably indecent. *Id.* at *16. The Commission then compounded the problem by taking the implausible litigation position that there had been no policy change regarding "fleeting images" at all – a "strained argument[]" contrary to "extensive precedent over thirty years of indecency enforcement." *Id.* at *15-*16. Here again, the Commission has brushed aside clarity and predictability in its indecency policy in a way that substantially prejudices broadcasters.

Thus, the Commission's actions and inactions have insulated its recent indecency holdings from meaningful judicial review, while forcing broadcasters to attempt to comply with a constantly shifting indecency policy. Broadcasters have been left without any recourse to respond to the multitude of issues raised by the Commission's essentially standardless application of its new indecency policy.

II. THE ARBITRARY ENFORCEMENT OF THE COMMISSION'S NEW INDECENCY POLICY HAS A SUBSTANTIAL CHILLING EFFECT ON BROADCASTERS.

The Commission's arbitrary application of its indecency policy, and its apparent strategy of shielding decisions from judicial review, have had and will continue to have substantial chilling effects on broadcasters nationwide. Broadcasters have nothing approaching clear guidance as to what content the Commission will deem to be indecent. Particularly in the case of live broadcasts, they face potential liability for utterances likely beyond their control, though without clear standards as to when they will be penalized. The result of this is unfortunately predictable: broadcasters have resorted to self-censorship of non-indecent content and will continue to do so.

1. There is clear evidence that the ambiguity of the Commission's new enforcement regime has resulted directly in excessive self-censorship. Most strikingly, on the heels of the release of the *Golden Globe Awards Order*, approximately 66 out of a total of 225 ABC affiliate stations declined to air the November 11, 2004 network broadcast of "Saving Private Ryan" due to uncertainty about whether it would be found indecent under the Commission's revised indecency policy – notwithstanding prior Enforcement Bureau rulings under the old policy that previous broadcasts of unedited version of the film did not violate indecency regulations. *Saving Private Ryan Order* ¶ 4. There could hardly be a

clearer example of self-censorship of non-indecent content directly attributable to the Commission's abrupt change in policy. The Commission did not help matters, reportedly refusing to provide much-needed advance guidance as to whether the broadcast would be considered indecent – no doubt to avoid the appearance of prior restraint as a government agency screening certain content in advance of its broadcast.[7] *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (prior restraints bear "heavy presumption" against constitutionality).

Other examples of self-censorship abound. Broadcasters have refused to air or delayed broadcast of a Peabody Award-winning documentary on the September 11 attacks.[8] More than 80 percent of PBS affiliates decided to air only a censored version of a documentary on the Iraq War.[9] A

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[7] *See* Allison Romano, *Reporting Live. Very Carefully*, Broadcasting & Cable, July 4, 2005. As an ABC affiliate president in Des Moines, Iowa noted, "We regret that we are not able to broadcast a patriotic, artistic tribute to our fighting forces like 'Saving Private Ryan.' . . . Can a movie with an 'M' rating, however prestigious the production or poignant the subject matter, be shown before 10 p.m.? . . . With the current FCC, we just don't know." Richard Huff, *Fear Over "Private" Parts*, N.Y. Daily News, Nov. 11, 2004, at 111.

[8] Lili Levi, First Amendment Center, *The FCC's Regulation of Indecency*, at 32 (Apr. 2008); J.A. 251.

[9] Levi, *The FCC's Regulation of Indecency,* at 33; Louis Wiley, *Why 'Frontline' Used Bad Language*, Broadcasting & Cable, Feb. 28, 2005, *available at* www.broadcastingcable.com/article/CA506958.html; J.A. 252.

number of broadcasters censored or delayed showing the Ken Burns World War II documentary "The War" due to concerns about four expletives in a fourteen-hour film series.[10] And in 2006, a Vermont public-radio station forbade a legislative candidate from participating in a broadcast debate because he had previously referred to two students as "shits" and it wanted to avoid exposure to a fine.[11]

The censorial effects of the Commission's actions have also reached broadcast newsrooms. Broadcast journalists historically have exercised reasonable judgment, acting with responsibility and sensitivity to the public's needs and tastes in their newscasts. In those instances where it has been the broadcaster's judgment that depicting epithets or including vulgar or coarse language is integral to a story, the Commission's long-standing policy has been to defer to that editorial discretion.[12] Under established Commission precedent, broadcast journalists were free to exercise independent

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[10] Dick Kreck, *KRMA Cautious About Time Slot for Burns' WWII Epic*, Denver Post, Nov. 10, 2006, at FF-17; Joe Garofoli, *"Howl" Too Hot to Hear*, San Francisco Chron., Oct. 3, 2007, at A1.

[11] Levi, *The FCC's Regulation of Indecency,* at 33.

[12] *Letter to Peter Branton*, 6 F.C.C.R. 610 (1991) (subsequent history omitted) (Complaint filed against National Public Radio for broadcast in which organized crime figure John Gotti used the work "fuck" ten times in seven sentences dismissed because of FCC's reluctance to intervene in the editorial judgments of broadcast licensees); *see also In re Jack Straw Memorial Found. for Renewal of License of Station KRAB-FM, Seattle, Washington*, 29 F.C.C.2d 334 (1971).

judgment about how stories could be told most effectively. Now they are forced to wrestle with additional and constitutionally suspect constraints in relating certain newsworthy events to the public.

As a result, broadcasters have been forced to rethink how they present local and national news and sports. The "play it safe" attitude engendered by the *Golden Globe Awards Order* strikes at the heart of broadcast news, which, by its very nature, is live and uncensored. In the past, the Commission wisely recognized that "in some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing."[13] In those instances, the Commission stated that it would be "inequitable . . . to hold a licensee responsible for indecent language."[14] Now, given the inherent ambiguity in the Commission's decisions and the specter of significant fines and other penalties, broadcasters are hesitant to use audio and video of angry political demonstrations, or even structured political debate, interviews and conversations.

The Commission's new indecency policy, as a practical matter, threatens to make broadcast journalism less authentic, less insightful, and less thought-provoking. Television stations in Phoenix, Arizona, for example, cut away from live coverage of the funeral of former NFL star and Army Ranger Pat

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[13] *In re Petition for Clarification or Reconsideration of a Citizen's Complaint against Pacifica Foundation Station WBAI(FM), New York, NY*, 59 F.C.C.2d 892, ¶ 4 n.1 (1976).

[14] *Id.*

Tillman when his brother twice stated that he was "fucking dead" – though the story of Mr. Tillman's death in combat operations in Afghanistan was major national news.[15] News organizations faced new questions in deciding how to report on incidents such as the heated exchange between Vice President Dick Cheney and Senator Patrick Leahy on the Senate floor in which Cheney said "go fuck yourself," and President Bush's open-mike comment to former British Prime Minister Tony Blair in which he remarked that Hezbollah must stop doing this "shit."

Live reporting often carries the risk that a speaker will blurt out a fleeting expletive without warning. In one notable example – for which the complaint is pending at the Commission – University of Pittsburgh quarterback Tyler Palko spontaneously used the word "fucking" in a postgame interview after his team defeated Notre Dame.[16] Of course, broadcast news, by its very nature, relies heavily on live reporting. And news organizations cannot control what is being said on the air all the time. The Commission's actions have diluted the first-hand, eyewitness images, sounds, and accounts unique to broadcast journalism. Live reports from journalists embedded with U.S. troops have been quelled, and broadcast footage from war zones has

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[15] *See* Romano, *Reporting Live. Very Carefully*.

[16] Associated Press, *Pitt QB Uses Expletive in Postgame Interview*, Nov. 23, 2004, *available at* http://nbcsports.msnbc.com/id/6478769/site/ 21683474.

been withheld from broadcast.[17] Broadcasters have expressed concerns about carrying live audio or video from coverage of arraignments and trials, emotionally charged demonstrations, locker room interviews, and the scenes of breaking news such as disasters. Many are concerned about or have decided against carrying live high school or college sporting events. The resulting sanitization is, in itself, a form of censorship.

It is often local and independent broadcasters that make the decision to self-censor rather than face substantial fines. Indeed, the Commission has been more than willing to fine small and independent broadcasters, including the $15,000 fine imposed on the San Mateo County Community College District for "The Blues," and the $220,000 fine imposed on independent Aerco Broadcasting Company largely for showing racy Spanish-language music videos. *Omnibus Order* ¶¶ 71, 85. This chilling effect will likely be compounded by the recent ten-fold increase in the maximum forfeiture allowable for violating the Commission's indecency regulations – which in June 2007 went from $32,500 to $325,000 per violation.[18]

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[17] *See* J.A. 253 (noting that PBS affiliates rejected broadcast footage from Iraq due to soldiers' explicit language).

[18] *Increase of Forfeiture Maxima for Obscene, Indecent and Profane Broadcasts to Implement the Broadcast Decency Enforcement Act of 2005*, 72 Fed. Reg. 33914 (June 20, 2007) (codified at 47 C.F.R. § 1.80). The maximum forfeiture was raised pursuant to the Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006).

Likewise, small and independent broadcasters disproportionately bear the costs of "delay" technologies to censor live programming. In the context of its decisions on network-wide award shows, the Commission has referred to the "ease" of blocking expletives on live programming due to "technological advances," *e.g., Golden Globe Awards Order* ¶ 11, even as it has disputed the adequacy of delay systems in certain cases. *See Remand Order* ¶ 34 (noting that delay and editing systems are hardly foolproof in blocking words on live television, yet blaming broadcaster for their failure); *CBS*, 2008 WL 2789307, at *32 (noting dispute between CBS and Commission over what level of delay technology was technologically feasible or sufficient to avoid liability). But much live programming is produced by local broadcasters, not the networks, and the costs of implementing delay systems are substantial. One broadcaster spent approximately $200,000 to outfit its twenty-four stations with delay technology, for example, and broadcasters also bear the cost of paying staff to function as in-house censors.[19]

To be sure, the evidence of the direct chilling effect on broadcasters is necessarily anecdotal, but it highlights the serious structural problems with the

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[19] *See* Romano, *Reporting Live. Very Carefully*; *Indecency Concerns Tar Programs, Hike Costs, Officials Say*, Pub. Broadcasting Rep., June 23, 2006 (discussing increased wage costs at television stations that usually employ part-time workers). The amicus brief submitted by various state broadcasters associations discusses the technical and other challenges of providing tape delays of live television programming. *See* Cal. Broad. Ass'n *Amicus* Br. at 17-19.

Commission's approach to its new indecency policy. The effectively standardless and inconsistent application of the Commission's policy in a few divergent cases provides almost no guidance for broadcasters. At the same time, many of the costs in new technology and actual or potential fines are borne by small and independent broadcasters. The result is outright self-censorship of programming – including serious news and public affairs programming – that is not indecent.

2. The chilling effect of the Commission's new indecency policy is enhanced by the possibility that broadcasters will settle and enter consent decrees rather than risk an indecency finding and massive fines.[20] Settlements, of course, insulate the Commission's notices of apparent liability from judicial review while effectively dissuading other broadcasters from broadcasting similar content. Even more dangerously, the Commission has decided to include in recent major consent decrees concessions from broadcasters imposing harsh penalties when mere *allegations* of indecency arise.

For example, as part of a 2004 consent decree, one broadcaster was required to take certain steps to discipline employees "materially participating" in the

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[20] *See* Levi, *The FCC's Regulation of Indecency*, at 21 (discussing recent large settlement agreements to resolve indecency complaints); Clay Calvert, *The First Amendment, the Media, and the Culture Wars: Eight Important Lessons from 2004 About Speech, Censorship, Science, and Public Policy*, 41 Cal. W. L. Rev. 325, 352-53 (2005) (noting pressure on Viacom to reach global settlement from multiple indecency complaints).

broadcasting of allegedly indecent content if it receives a preliminary indecency finding such as a Notice of Apparent Liability:

> (a) The employees accused of airing, or materially participating in the decision to air obscene or indecent conduct will be suspended and an investigation will immediately be undertaken;
>
> (b) Such employees will be required to undergo remedial training on the FCC's obscenity and indecency regulations and policies and satisfy station management that they understand where the line between acceptable and unacceptable programming falls before resuming their duties; and
>
> (c) If any such employee who is on-air talent is permitted to return . . . following remedial training, his or her broadcasts will be subjected to a significant time delay – up to five *minutes* – so that a program monitor will have the ability to interrupt a broadcast if its content crosses the line.

In re Clear Channel Commc'ns Inc., 19 F.C.C.R. 10,880, 10,886 (2004). Additionally, the consent decree requires that the employee *be fired* if the content is ultimately ruled indecent. *Id.* Another broadcast company also agreed to a consent decree in 2004 with only slightly less imposing conditions similarly requiring suspension, training, and a delay upon mere allegations of broadcasting indecent material. This decree required that employees responsible for indecent material be "subject to

further disciplinary action up to and including termination." *In re Viacom, Inc.*, 19 F.C.C.R. 23,100, ¶ 8(f) (2004), *aff'd on recon.*, 21 F.C.C.R. 12,223 (2006).

In this way, the chilling effect of the Commission's regulations is being pushed down to the level of individual employees whose livelihood is dependent on avoiding any risk of producing indecent content. Indeed, in one case, the Commission went so far as to commence a separate investigation into whether CBS violated a consent decree by failing to suspend certain employees following the Notice of Apparent Liability for the broadcast of an episode of "Without a Trace" – which culminated in a settlement of the investigation and alleged consent decree violation that included a "voluntary" payment of $300,000 by CBS. *See In re CBS Corp.*, Consent Decree, 22 F.C.C.R. 20,035, ¶¶ 4, 11, 13 (2007); *Letter to Howard F. Jaeckel, Esq.*, 22 F.C.C.R. 11,531 (2007). In the meantime, the Commission has yet to resolve the opposition to the "Without a Trace" NAL itself. The severe penalties for even receiving *non-final* indecency allegations guarantee that employees will steer far afield of any content that is arguably indecent, and self-censor even non-indecent content. And given that the Commission has dramatically expanded the scope of what content is even *arguably* indecent while avoiding finally resolving its indecency cases, the chilling effect of the Commission's policy will be broadly felt.

3. Finally, the Commission has further compounded the prejudicial effect of its new indecency policy by delaying resolution of pending complaints while manipulating the license renewal and license assignment approval processes. In particular, the Commission has used the pendency of indecency complaints as a basis for declining to process stations' license renewal applications – while at the same time, the Commission has effectively ceased resolving any indecency complaints at all. The Commission has further strong-armed licensees into agreeing to toll the statute of limitations on these pending indecency complaints – in some cases indefinitely – as a condition for license renewal and assignment. In the case of some license assignments, the Commission has even gone so far as to require an escrow of the potential forfeiture amount for the unadjudicated complaints. Thus, having invited more indecency complaints by greatly expanding the universe of potential content it considers indecent, the Commission has implemented what appears to be an unannounced policy decision to make those complaints even more burdensome on broadcasters.[21]

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[21] The Commission does not appear to have discussed this policy explicitly, though it is well-known in the industry. The existence of some of the tolling and escrow agreements is documented in public filings. *See, e.g., Letter to Dorann Bunkin, Esq.,* 22 F.C.C.R. 19,772, 19,773 (2007) (noting that Commission had entered into agreement to toll statute of limitations under § 503(b)(6) on pending indecency complaint as part of license renewal); *Letter to David D. Burns, Esq.,* 22 F.C.C.R. 19,218, 19,220 (2007) (noting that license assignment

By itself, the Commission's ongoing delay in resolving indecency complaints is troublesome. The Commission's statutory authority contemplates resolution of indecency complaints within a fixed period of time. Under 47 U.S.C. § 503(b)(6), the Commission must act on a pending indecency complaint within a year of license renewal to impose a forfeiture against the licensee.[22] And without a tolling arrangement, the statute of limitations for bringing forfeiture proceedings is five years from accrual. 28 U.S.C. § 2462. But in recent years, following the release of the *Golden Globe Awards Order* and other indecency orders, the Commission's resolution of indecency complaints has ground to a halt – quite possibly because the Commission is waiting for the small number of final orders it has issued to work their way through the courts.

The Commission's leveraging of its power over licensing and assignment decisions as part of its indecency policy has a direct financial impact on broadcasters. The Commission's refusal to process license renewals when indecency complaints are pending complicates and inhibits license

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was subject to establishment and full funding of an escrow account pursuant to separate agreement).

[22] "No forfeiture penalty shall be determined or imposed against any person under this subsection if-- (a) such person holds a broadcast station license issued under subchapter III of the chapter and the violation charged occurred-- (1) more than one year prior to the date of issuance of the required notice or notice of apparent liability; or (ii) prior to the date of commencement of the current term of the license, whichever is earlier . . . ." 47 U.S.C. § 503(b)(6).

assignments because license renewal is necessary before assignment to a purchaser. Moreover, even when a license is renewed by means of a tolling agreement, the unresolved complaints have a negative impact on license valuation and can inhibit a license owner's refinancing and recapitalization. The tolling agreements only extend the prejudice: while the Commission originally demanded a two-year tolling period, it appears to now be demanding a five-year, or even indefinite tolling period, and it has requested that previous tolling agreements be "voluntarily" extended. And the impact when licenses are assigned is even more stark: in the case of license owners who are selling the license but no longer doing business, the Commission requires the previous license owner place into escrow the maximum fine for a potential indecency forfeiture. This highly questionable practice constitutes, in essence, the imposition of a monetary penalty without any finding as to the validity of a complaint, and would appear to be beyond the Commission's authority.

At the very least, the Commission's practices give undue weight to unreviewed and unadjudicated indecency complaints made by members of the public. The policy thus contravenes the statutory directive of Section 504(c) of the Communications Act, which expressly provides that when a notice of apparent liability for forfeiture has been issued by the Commission, that fact "shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued" unless the fine has been paid or payment has

been finally ordered. 47 U.S.C. § 504(c). But here, broadcasters are prejudiced even by the existence of an unscrutinized indecency complaint, without even anything approaching a notice of apparent liability. The inevitable result is a chilling effect on broadcasters who face stiff penalties for broadcasting content that is not actually indecent but may be perceived by some small subset of viewers or listeners as coming too close to the line.[23]

III. THE COMMISSION'S APPLICATION OF ITS NEW INDECENCY POLICY IS CONTRARY TO THE FIRST AMENDMENT.

As should be apparent, the Commission's application of its new indecency policy runs contrary to the most basic First Amendment principles. Under the pretext of regulating indecency, the Commission has been exercising its standardless discretion to broadly regulate broadcasting content. This Court has long recognized that even when government agencies may regulate speech in furtherance of a legitimate goal, agencies may not use their power to engage in content-based restrictions. But the Commission has in fact strayed into outright content-based censorship by drawing

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[23] And only a very small number of viewers and listeners have complained to the Commission about broadcast content. According to one report, for example, 99.8% of all indecency complaints filed with the Commission during 2003 were submitted by a single activist group, the Parents Television Council. *See* Todd Shields, *Activists Dominate Indecency Complaints*, Mediaweek.com (Dec. 6, 2004), *available at* http://www.allbusiness.com/services/motion-pictures/4459242-1.html.

distinctions among programs based on its view of the value of the content or the identity of the speaker. Such arbitrary actions go well beyond the narrow regulation of indecency this Court approved in *Pacifica*.

1. This Court has repeatedly held that licensing schemes that provide a regulator with power to suppress speech, without meaningful standards limiting the regulator's discretion, are unconstitutional. *See, e.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988). As the Court stated when striking down an ordinance imposing a public speaking fee determined by a government official, "[n]othing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official." *Forsyth County*, 505 U.S. at 133 (footnote omitted). The Commission's application of its indecency policy is no different – indeed, it perfectly illustrates the danger of arbitrary enforcement when an agency lacks meaningful standards to check its discretion.

Here, the Commission has sought to regulate broadcast indecency – a legitimate goal under *Pacifica* – just as the government is permitted to place certain content-neutral restrictions on speech. But having decided that a single utterance of certain expletives is sufficient to trigger the Commission's indecency regulations, the Commission has altered

the role of "context" when it determines whether that content violates the Commission's indecency regulations. As a result, the Commission is enmeshed in determinations over "the nature of the artistic work," the "power, realism and immediacy of the film experience," the "authentic feel" of the work, whether the "purpose" of the work was "fulfilled" or "all viewpoints expressed" without expletives, and whether they were uttered in the middle of appropriate programming or by the appropriate speaker.

These considerations are the antithesis of clear and predictable standards that cabin the agency's discretion. The clear risk is that the Commission may act arbitrarily to encourage some content or views and discourage others in the furtherance of its indecency regulations. That is not permitted under the First Amendment:

> Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

City of Lakewood, 486 U.S. at 758.

Nor does the possibility of judicial review – review that the Commission has done its best to avoid – help the Commission's position, for "[judicial]

review cannot substitute for concrete standards to guide the decision-maker's discretion." *Id.* at 770. Indeed, the broadcaster may suffer substantial costs in the form of litigation fees and license hang-ups long before obtaining judicial review. And as well-illustrated by the examples above, the chilling effect on speech is posed "not merely [by] the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence." *Forsyth County*, 505 U.S. at 133 n.10 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)).

2. Even the considerations that the Commission has provided in support of its indecency decisions demonstrate that it is already suppressing speech based on content unrelated to the expletives themselves. In addition to attempting to divine the purposes of the programming in which the expletives appear, the Commission has suggested that other content of the program in which the expletive appears (such as with "The Early Show") or the identity of the speaker (such as the soldiers portrayed in "Saving Private Ryan") may bear on whether the Commission finds the program indecent – in the judgment of the Commission itself. However, as this Court has emphasized, "esthetic and moral judgments about art and literature . . . . are for the individual to make, not for the Government to decree." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000). Such content-based determinations of whether speech is acceptable should be presumptively unreasonable, for "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Id.*

Finally, it is no answer to say that *Pacifica* permits the Commission to make content-based distinctions in the guise of regulating indecency. In *Pacifica*, the radio station did not contest whether or not Carlin's monologue was "patently offensive." 438 U.S. at 739. The Court emphasized "context" when discussing the availability of the broadcast within the home and to children – the "[n]uisance rationale under which context is all-important." *Id.* at 750. Nowhere in *Pacifica* did the Court suggest that the Commission could draw distinctions about whether programming was indecent based on the merits of the surrounding content or the identity of the speaker. And certainly nothing in *Pacifica* sanctions the Commission's practice of arbitrary evaluation of programming content in making its indecency determinations.

The Commission's abrupt departure from the narrow indecency policy developed following *Pacifica* deviates from the balance of First Amendment interests approved in that decision. The Commission's arbitrary and standardless application of its new indecency policy runs contrary to core First Amendment policies and must be rejected by this Court.

CONCLUSION

The judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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