No. 10-1293

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,
Petitioners,
v.
FOX TELEVISION STATIONS, INC., *ET AL.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Petitioners,
v.
ABC, INC., *ET AL.*,
Respondents.

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

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

JANE E. MAGO
JERIANNE TIMMERMAN
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, DC 20036
(202) 429-5430

PAUL M. SMITH
ELAINE J. GOLDENBERG
Counsel of Record
JESSICA RING AMUNSON
JENNER & BLOCK LLP
1099 New York Avenue, N.W.
Washington, DC 20001
(202) 639-6000
egoldenberg@jenner.com

Additional Counsel Listed On Inside Cover

KATHLEEN A. KIRBY
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-3360

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE COURT OF APPEALS WAS CORRECT IN HOLDING THE COMMISSION'S INDECENCY POLICY VOID FOR VAGUENESS. 4

II. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE COMMISSION'S POLICY CHILLS PROTECTED SPEECH. 20

III. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE COMMISSION'S AUTHORITY IS LIMITED. 28

CONCLUSION 37

TABLE OF AUTHORITIES

CASES

Baggett v. Bullitt, 377 U.S. 360 (1964) 20

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 29

Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729 (2011) 32, 34, 36, 37

CBS Corp. v. FCC, No. 06-3575, -- F.3d --, 2011 WL 5176139 (3d Cir. Nov. 2, 2011) 18

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 31, 37

Cohen v. California, 403 U.S. 15 (1971) 9, 37

Connally v. General Construction Co., 269 U.S. 385 (1926) 17

Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996) 32

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 3, 28, 29

FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009) 5

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) 31

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) 13, 19

Grayned v. City of Rockford, 408 U.S. 104 (1972) 18

Hill v. Colorado, 530 U.S. 703 (2000) 4

Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) 13, 17

Kolender v. Lawson, 461 U.S. 352 (1983) 13

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 17

Reno v. ACLU, 521 U.S. 844 (1997) 19, 20

Sable Communications of California, Inc. v. FCC, 493 U.S. 115 (1989) 29

Smith v. Goguen, 415 U.S. 566 (1974) 14

United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921)... 13

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 36, 37

United States v. Williams, 553 U.S. 285 (2008)... 4, 12, 18, 19

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)... 19

STATUTES

47 U.S.C. § 326 34

Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006)... 23

ADMINISTRATIVE RULINGS

In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 24 F.C.C.R. 542 (2009) 32

In re Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc., 26 F.C.C.R. 4238 (2011) 30

In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the 'Golden Globe Award' Program, 19 F.C.C.R. 4975 (2004) 5, 6, 7, 8, 18, 20, 23

In re Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue," 23 F.C.C.R. 1596 (2008) 12

In re Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue," 23 F.C.C.R. 3147 (2008) 12

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) 8, 9, 21

In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and March 8, 2005, 21 F.C.C.R. 13,299 (2006)..11, 15, 16

In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664 (2006), *vacated in part*, 21 F.C.C.R. 13,299 (2006).............................10, 11, 15, 16, 23

In re Industry Guidance on the Commissions Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7,999 (2001).....................................6, 7

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 (1976)..24, 25

In re Viacom, Inc., Consent Decree, 19 F.C.C.R. 23,100 (2004), *aff'd on recon.*, 21 F.C.C.R. 12,223 (2006)......................................27

OTHER AUTHORITIES

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 (2005) 26

Comments of Nat'l Ass'n of Broad., *In re Implementation of the Child Safe Viewing Act*, MB Docket No. 09-26 (FCC Apr. 16, 2009) 35, 36

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) 23

Letter from Norman Goldstein to David Molina, FCC File No. 97110028 (May 26, 1999) 14

Lili Levi, *First Amendment Center, The FCC's Regulation of Indecency* (Apr. 2008), *available at* http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FirstReport.Indecency.Levi_.final_.pdf 26

Lisa de Moraes, *The TV Column: News Stations Weigh Whether To Cover Gauguin's 'Tahitian Women,'* WASH. POST, April 11, 2011 26

Frank Mungeam, *Video: KGW Crew Harassed at Occupy Portland*, KGW.com (Nov. 8, 2011, 4:19 p.m.) *available at* http://www.kgw.com/news/local/Video-shows-KGW-crew-harassed-at-Occupy-Portland-133496118. html 25

George Orwell, ANIMAL FARM: A FAIRY STORY (1945) 29

PBS Statement, *available at* http://blogcritics.org/video/article/the-soldiers-heart/ 22

Allison Romano, *Reporting Live. Very Carefully*, BROADCASTING & CABLE, July 3, 2005, *available at* http://www.broadcastingcable.com/article/157682-Reporting_Live_Very_Carefully_.php 23, 24

Todd Shields, *Activists Dominate Indecency Complaints*, ALLBUSINESS, Dec. 6, 2004, *available at* http://www.allbusiness.com/services/motion-pictures/ 4459242-1.html 35

The Henry J. Kaiser Family Foundation, *Parents, Children, and Media* (June 2007), *available at* http://www.kff.org/entmedia/upload/7638.pdf 35

Edward Wyatt, *PBS Warns Stations of Risks from Profanity in War Film*, N.Y. TIMES, Feb. 18, 2005 22

INTEREST OF *AMICI CURIAE*[1]

The 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 before Congress, the Federal Communications Commission, and the courts on behalf of its members. The vast majority of NAB's members are not large entities; they are local, independent stations.

The Radio-Television Digital News Association ("RTDNA") is the world's largest professional organization devoted exclusively to electronic journalism. RTDNA represents local and network news directors and executives, news associates, educators, and students in broadcasting, cable, and other electronic media in over 30 countries. RTDNA is committed to encouraging excellence in electronic journalism and upholding First Amendment freedoms.

NAB, RTDNA, and their members have serious concerns about the Federal Communications Commission's altered indecency policy, which reversed years of a more considered and restrained approach that showed greater sensitivity to the free

---

[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, or 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.

speech interests of broadcasters and journalists around the country. In particular, NAB and RTDNA are concerned that lack of notice about and discriminatory enforcement of the Commission's indecency policy has had and will continue to have a dramatic nationwide chilling effect on broadcast content that is not actually indecent.

SUMMARY OF ARGUMENT

The Second Circuit correctly found that the Commission's indecency policy is void for vagueness. In the guise of performing "contextual" analyses, the Commission is actually making its own subjective judgments about what content it deems valuable, and what content valueless. Broadcasters are left to guess at how the policy will apply to them – and there is not just a risk but actual evidence that the policy is being applied in a discriminatory manner.

Exacerbating these problems is the Commission's refusal to act on petitions for reconsideration or oppositions to notices of apparent liability with respect to many indecency complaints, which forecloses these Commission decisions from judicial review. Indeed, the Commission's procedural maneuvering appears designed to ensure that its most vulnerable orders never leave the Commission and thus can never be reviewed by a court. Under this regime, broadcasters cannot be sure exactly what the law is and consequently steer far clear of anything that is even arguably indecent.

The chilling effect of the Commission's policy is palpable and broadly felt, particularly by local and independent broadcasters. These are the entities

least able to afford the types of delay and blocking technology on which the government places so much emphasis. These are also the entities that provide much of the nation's local live news coverage, which is particularly imperiled by the Commission's indecency policy. Fearing major fines as a result of live coverage of an event at which a passing expletive may be uttered or nudity fleetingly depicted, broadcasters are reluctantly choosing not to cover certain kinds of events or air certain types of stories or programs at all.

This Court's narrow holding in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), does not give the Commission authority to implement its vague and chilling indecency policy. And none of the rationales the government offers in defense of the Commission's policy is supportable. This Court has never cited scarcity of broadcast spectrum as a basis for regulating broadcast content. If anything, the government's position as licensor selectively allocating broadcast spectrum resources counsels against permitting content-based restrictions. As to the pervasiveness of broadcast media, even the government acknowledges that broadcasters face stiff competition from cable and other sources of news and entertainment that are not subject to the Commission's censorship. Although the government tries to suggest that the existence of more outlets for speech somehow translates into a greater justification for government restrictions on broadcasters, the opposite is true. Finally, as to the accessibility of the broadcast medium to children, parents already have and use tools to control their

children's consumption of broadcast programming, and there is no reason to believe that they are in need of the government's assistance in this regard. Moreover, this Court has found that other media that are at least as accessible to children – such as video games – may not be censored.

In sum, the Commission's indecency policy is not justified by *Pacifica* and cannot be squared with this Court's First Amendment jurisprudence. The Second Circuit's decision should therefore be affirmed.

ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT IN HOLDING THE COMMISSION'S INDECENCY POLICY VOID FOR VAGUENESS.

As the Court of Appeals recounted, the history of the Commission's decisionmaking demonstrates that the vagueness test is more than satisfied here. *See Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 321-24 (2d Cir. 2010) ("*Fox*"). Under that test, a statute or government policy is void for vagueness if it fails "to provide a person of ordinary intelligence fair notice of what is prohibited, *or* is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008) (emphasis added); *see also Hill v. Colorado*, 530 U.S. 703, 732 (2000) (explaining that law can be void for vagueness "for either of two independent reasons"). The Court of Appeals found that because the Commission's indecency "policy" was little more than a series of subjective judgments about what content it found

valuable, there was not just a possibility of discriminatory enforcement of the Commission's policy, but actual *evidence* of discriminatory enforcement. Moreover, the Commission's repeated changes in position, combined with its procedural maneuvering, meant that Respondents had no notice of how the Commission's policy might apply to them. Thus, the Court of Appeals was correct to hold the Commission's indecency policy void for vagueness.

1. In the years leading up to the *Remand Order* at issue, the Commission repeatedly changed position with respect to its indecency policy and applied new standards to broadcasters without even finalizing its decisions. *See Fox*, 613 F.3d at 321-24. A brief look at the recent history of the Commission's actions demonstrates these shifts and inconsistencies, including the Commission's refusal to apply the very standards on which it was purportedly relying.

As this Court previously found, the Commission's decision in *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the 'Golden Globe Awards' Program*, 19 F.C.C.R. 4975 (2004) ("*Golden Globe Awards Order*"), marked a significant departure from the Commission's prior policy regarding the use of "fleeting expletives." *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1807 (2009). In the *Golden Globe Awards Order*, the Commission addressed complaints about an unscripted remark made by the singer Bono in accepting an award: "This is really, really fucking brilliant." *Golden Globe Awards Order* ¶ 3 n.4. The

Commission found that this remark was indecent, despite the fact that the Commission had previously refused to take action against broadcasters for the use of fleeting expletives like this one – especially in live programming. *See id.* ¶ 9.

But the new "policy" promulgated in the *Golden Globe Awards Order* provided little information for broadcasters as to whether and when the Commission might find certain expletives to be indecent. Under that policy, "indecent" language is "language that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* ¶ 6. The critical words in that definition are "in context." The Commission expounded on its "contextual" inquiry by stating that it would consider three principal factors: (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value. *See id.* ¶ 7.[2] The Commission also stated that it

---

[2] These three factors, and the Commission's definition of "indecent" language, first appeared in "industry guidance" issued by the Commission in 2001. *See In re Industry Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7,999, ¶ 30 n.23 (2001) ("*Indecency Policy Statement*"). But the 2001 statement gave a number of "examples" in which

would "weigh and balance" these factors and "possibly, other factors" to reach a determination. *Id.*

The Commission then proceeded to completely ignore all of these factors in performing its analysis in the *Golden Globe Awards Order*. Instead, the Commission focused primarily on what it described as its "responsibility to safeguard the well-being of the nation's children from the most objectionable, most offensive language." *Id.* ¶ 9. The Commission also stressed that its finding of indecency was "based on the specific facts before [it]." *Id.* ¶ 2.

The Commission's decision thus left broadcasters to wonder exactly which of those "specific facts" would make a difference in their cases. Was it the use of the word "fucking" itself – which the Commission described as "one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language" – that dictated the indecency ruling? *Id.* ¶ 9. Or was it that the use of the expletive "on a nationally telecast awards ceremony[] was shocking and gratuitous," warranting sanction? *Id.* Was it that the network "could have" but did not "delay[] the broadcast for a period of time sufficient . . . to effectively bleep the offending word"? *Id.* ¶ 11. Or was it that there was, in the Commission's view, no "political, scientific, or other independent value of use of the word here"? *Id.* ¶ 9. The Commission itself suggested that this final fact was of limited relevance, observing that its decision

---

fleeting and isolated utterances of expletives, as well as various depictions of nudity, were *not* found to be indecent. *See id.* ¶¶ 12-23.

should not be read "to suggest that the fact that a broadcast had a social or political value would necessarily render use of the 'F-Word' permissible." *Id.* ¶ 9 n.25.

Unfortunately, further clarification from the Commission was not forthcoming. The broadcasters moved in 2004 for partial reconsideration of the *Golden Globe Awards Order*, but the Commission never acted on their petitions and thus never finalized the order for judicial review.[3] Yet the Commission nonetheless used the non-final *Golden Globe Awards Order* as license to begin making subjective and value-laden judgments about the use of expletives.

The next application of the Commission's policy came in *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*"). In that order, the Commission indicated that not every use of the word "fucking" would trigger an enforcement action. That word was used multiple times in "Saving Private Ryan," along with several other expletives. Yet the Commission refused to impose sanctions for the movie's broadcast, finding that "this case is distinguishable from that in which we previously found the use of the word 'fucking' during the

---

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

broadcast of the 2003 Golden Globe Awards ceremony to be indecent and profane." *Id.* ¶ 18.

The Commission focused on a single factor that purportedly distinguished the cases: whether there was "any political, scientific or other independent value" to the use of the expletives. *Id.* (quotation marks omitted). Of course, this is not one of the three factors the Commission had previously enumerated in attempting to explain the contextual test for identifying "patently offensive" broadcast material. Applying this new factor, however, the Commission found value in the use of multiple expletives during "Saving Private Ryan" but not in the use of a single expletive during the Golden Globe Awards. According to the Commission, in "Saving Private Ryan" the use of expletives was "integral to the film's objective of conveying the horrors of war through the eyes of these soldiers," *id.* ¶ 14, even though the "soldiers" were actors reading from a script. But the use of an expletive was not "integral" to a real singer's "objective of conveying" his surprise, joy, or appreciation at receiving a Golden Globe award, even though the expletive was, in context, used as an "intensifier" and did not have any sexual connotation whatever. *See Cohen v. California*, 403 U.S. 15, 25-26 (1971) (explaining that "words are often chosen as much for their emotive as their cognitive force" and that the "emotive function . . . may be the more important element of the overall message sought to be communicated").

Thus, following the *Saving Private Ryan Order*, broadcasters were still left to wonder which uses of

expletives the Commission would deem valuable and which valueless. In *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), the Commission purported to "provide substantial guidance to broadcasters and the public about the types of programming that are impermissible," *id.* ¶ 2, but actually just created more confusion. The Commission addressed the Fox broadcasts at issue in this case, along with a number of other broadcasts, and stated that "[o]verall, the decisions demonstrate repeatedly that we must always look to the context in which words or images occur to determine whether they are indecent." *Id.* In fact, overall, the decisions demonstrated that the Commission's "contextual" analysis was little more than a rote recitation of factors under which the Commission was making its own subjective judgments about whether or not certain language or images were "essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance." *Id.* ¶ 97; *see also* Br. of Respondent Fox Television Stations, Inc. 7-8 (describing inconsistencies in the rulings in the *Omnibus Order*); Br. of Respondent ABC, Inc. 17-21 (discussing numerous inconsistencies in Commission decisions regarding nudity).

No doubt recognizing the infirmity of its *Omnibus Order* and seeking to evade judicial review, the Commission responded to the broadcasters' appeal of the Order by requesting a voluntary remand and

then vacating much of the Order. *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 *Remand Order*, the Commission reversed some findings of indecency, reaffirmed some findings, and refused to address some findings.

Far from providing clarity, however, the *Remand Order* further confused broadcasters, as it marked yet another change in position by the Commission. Most egregious was the Commission's about-face with respect to an indecency complaint about the use of the word "bullshitter." In the *Omnibus Order*, the Commission had found that a single utterance of the word during CBS's "The Early Show" was indecent. "[M]ost important" to that analysis was the fact that the word had been used "during a morning news interview," which in the Commission's view made it "shocking and gratuitous." *Omnibus Order* ¶ 141. But in the *Remand Order*, the Commission completely reversed position, finding that it was the use of the word during "news programming" that made it *not* indecent. Thus, the *same exact reasoning* led to both a finding of indecency and a reversal of the indecency finding. *See Remand Order* ¶¶ 67-73.

The Commission's lack of coherent analysis also extends to the context of fleeting nudity. With respect to the ABC broadcast at issue here, when the Commission issued its Notice of Apparent Liability finding that a portion of "NYPD Blue" totaling seven seconds was indecent because a woman's buttocks

were shown, it did little more than recite its three-factor test and then simply assert in conclusory fashion that "although the broadcast of nudity is not necessarily indecent in all contexts, taking into account the three principal factors in our contextual analysis, we conclude that the broadcast of the material at issue here is apparently indecent." *In re Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue,"* 23 F.C.C.R. 1596, ¶ 16 (2008). And although the Commission later purported to address broadcasters' concerns about the standardless nature of its policy on nudity, its clarifications added little to the analysis. In its subsequent Forfeiture Order, the Commission found "easily distinguishable" other cases in which it had declared that nudity was not necessarily graphic or explicit, but did not explain what distinguished them. *In re Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue,"* 23 F.C.C.R. 3147, ¶ 14 & n.42 (2008). And while the Commission attempted to harmonize these kinds of inconsistencies by declaring that its analysis was "best viewed on a continuum rather than as a binary," it did not provide guidance that would allow broadcasters to place themselves on that "continuum." *Id.* ¶ 15.

2. As this history makes clear, the Commission's policy has more than just the potential for "seriously discriminatory enforcement." *Williams*, 553 U.S. at 304. Indeed, seriously discriminatory enforcement is the hallmark of the policy.

Despite the fact that this Court has described assessment of the risk of discriminatory enforcement as the "more important aspect of vagueness doctrine," *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), the government's brief remarkably says nothing at all about the Second Circuit's holding in that regard. Instead, the government faults the court for looking at the "policy's application to broadcasts not before the court and . . . perceived inconsistencies between those applications." Pet. Br. 18. But it was entirely proper for the court to look to whether the policy was *resulting* in discriminatory enforcement when assessing whether the policy had the *potential* for discriminatory enforcement. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991) ("[t]he question is not whether discriminatory enforcement occurred *here*, . . . but whether the [law] is so imprecise that discriminatory enforcement is a real possibility" (emphasis added)); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) ("conflicting results which have arisen from the painstaking attempts" to apply the new policy are an "abundant demonstration" of vagueness). There was no consideration of hypothetical applications of the Commission's policy to situations not before the court, *cf. Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) – rather, the Second Circuit examined only actual applications of the policy to actual broadcasters.

As the Second Circuit correctly found, there is hard evidence here of discriminatory enforcement, amounting to undeniable proof that the policy has a "standardless sweep" that permits the Commission

"to pursue [its] personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974). The Commission has deemed the fleeting use of certain expletives acceptable in one context but unacceptable in other contexts that are not meaningfully distinguishable. *See supra* p. 8. The same inconsistencies characterize the Commission's decisions with respect to brief moments of nudity. For example, why is a seven-second display of a woman's buttocks indecent when it occurs in the context of the acclaimed drama "NYPD Blue," the primary theme of which is the life of law-enforcement officers, while 40 seconds of nudity in a broadcast of the movie *Catch-22* is not indecent when it occurs "in [the] context of a full length drama, the primary theme of which was the horrors of war?" Letter from Norman Goldstein to David Molina, FCC File No. 97110028 (May 26, 1999); *see also* Br. of Respondent ABC, Inc. 17-21 (describing various inconsistencies in FCC decisions involving nudity). The only explanation that makes sense of all of these conflicting decisions is that the Commission is indulging its own views about which programming is sufficiently worthy of protection.

Such discriminatory enforcement is all the more troubling because the Commission has engaged in gamesmanship to shield its most vulnerable orders from judicial review. Most remarkably, as noted above, the Commission refused for years to rule on the petitions for 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.

Moreover, in the *Remand Order* itself, the Commission ensured that only the rulings it wanted to have judicially reviewed would reach the Court of Appeals. The Commission performed a complete, largely unexplained about-face with respect to 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. *Remand Order* ¶¶ 67-73. The Commission similarly played procedural games with its indecency determinations regarding language in 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 a dramatic effect that the Commission considered to be essential to the artistic work was held to justify the repeated use of expletives.[4] But in the *Remand*

---

[4] 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"? In the course of its analysis of profanity in "NYPD Blue," the Commission stated 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 – and

Order, the Commission vacated this holding on a technicality involving the location of the person submitting the complaint against "NYPD Blue" – suggesting that it will likely reach a similar holding in future cases, but without permitting timely review of its decision.

In one of the most egregious examples of such evasiveness, the Commission has still failed to act on oppositions to the Notice of Apparent Liability regarding the broadcast by a small non-commercial station of the Martin Scorsese-produced documentary "The Blues: Godfathers and Sons." That documentary contains interviews of blues performers, a record producer, and other individuals in which the interviewees use "fuck," "shit," and their derivatives. In its decision on "The Blues," the Commission stated that the use of expletives was not "essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance," *Omnibus Order* ¶ 82, and 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.* But the 2006 decision condemning "The Blues" as indecent is still not final, and thus not ripe for consideration by the courts, because the Commission has refused to act on the broadcasters' oppositions to its Notice of Apparent Liability. *See Remand Order* ¶ 30 n.86 (declining to address broadcasters' arguments and stating that it would

---

this is a textbook example of a standard with potential for discriminatory enforcement.

"address such issues in further proceedings in that case").

These delays leave the Commission's Notice of Apparent Liability decisions effectively precedential and compound the already significant problem of discriminatory enforcement, as those against whom the Commission's policy is enforced are denied the opportunity for timely judicial review. Thus, the Commission's actions and inactions have insulated its recent indecency holdings from judicial reversal, while forcing broadcasters to attempt to comply with a constantly shifting and discriminatory indecency policy.

3. In this case, the problem of discriminatory enforcement is closely linked to the problem of lack of notice – an independent basis for finding the Commission's policy unconstitutionally vague. *See, e.g.*, *Humanitarian Law Project*, 130 S. Ct. at 2720 (explaining that laws that call for "'wholly subjective judgments'" are vague for lack of notice). Because broadcasters "must necessarily guess at [the Commission's] meaning and differ as to [the] application" of its policy, *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), that policy cannot stand.

As an initial matter, there can be no dispute that the policy is not, on its face, "sufficiently explicit" to inform broadcasters as to "what conduct on their part will render them liable to [the Commission's] penalties." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Indeed, this Court has previously described the *very same standard* that the Commission claims to be enforcing as one that calls

for "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meaning." *Williams*, 553 U.S. at 307. The Commission's enumeration of various amorphous factors, coupled with its statement that it would "weigh and balance" these factors and "possibly, other factors" when deciding whether to impose penalties on broadcasters, *Golden Globe Awards Order* ¶ 7, is quintessentially vague.[5]

Under these circumstances, it is hard to see how the government is aided by its insistence that decisions made after the broadcasts at issue here aired are irrelevant to the analysis. Unless the Commission's application of its policy has clarified matters so as to cure the lack-of-notice problem inherent in the words of the policy itself, then the policy must necessarily fall. *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (in evaluating policy for vagueness, court looks not only to the "'words of the ordinance,'" but also to the "interpretation . . . given by those charged with

---

[5] In addition, at the time the broadcasts at issue here aired, the Commission's approach to fleeting expletives and fleeting nudity had not yet changed. The government's statement that imposition of penalties with respect to the Fox broadcasts would have been improper seems to be a tacit concession that the broadcasters had no notice that the Commission would alter its course and begin treating fleeting expletives as impermissible. *See* Pet. Br. 31; Br. of Respondents CBS Television Network Affiliates 13-17. Indeed, the Third Circuit recently explained that the Commission's March 2004 change of position as to fleeting "indecency" was sudden and could not have been anticipated. *CBS Corp. v. FCC*, No. 06-3575, -- F.3d --, 2011 WL 5176139, at *17-18, 26 (3d Cir. Nov. 2, 2011).

enforcing it" (internal quotation marks omitted)); *Gentile*, 501 U.S. at 1048-51.

Moreover, this Court has held only that plaintiffs who engage in conduct that is "clearly proscribed" are not permitted to complain of the vagueness of the law as applied to others, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982); *see also Humanitarian Law Project*, 130 S. Ct. at 2719 – and has "relaxed that requirement in the First Amendment context." *Williams*, 553 U.S. at 304; *see also Reno v. ACLU*, 521 U.S. 844, 870-74 (1997). The whole point of Respondents' vagueness challenge is that given the way in which the Commission has applied its indecency policy, they had no idea whether their conduct was "clearly proscribed."

The Court of Appeals therefore correctly looked to the Commission's actual application of its policy in assessing the issue of fair notice. In fact, as the court concluded, the Commission's enforcement actions have only compounded the lack-of-notice issues inherent in the definition of indecency. Each of the Commission's determinations of indecency has been simply a wholly subjective judgment about the worth of allegedly indecent material. Thus, four-letter words and depictions of nudity are sometimes artistically necessary and sometimes shocking and gratuitous – but broadcasters are left to guess in which "context" such content might be acceptable. Given the Commission's multiple changes in position, as well as procedural maneuvering that left certain decisions not final and not subject to judicial

review, it would have been nearly impossible for Respondents, or for any broadcaster, to predict how the Commission might apply its policy to them in the decisions at issue.

II. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE COMMISSION'S POLICY CHILLS PROTECTED SPEECH.

The Commission's about-faces and constantly shifting positions "raise[] special First Amendment concerns because of [their] obvious chilling effect on free speech." *Reno*, 521 U.S. at 871-72. With little or no idea what position the Commission may take in any particular case, broadcasters will "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

That is not just a hypothetical concern; there is ample evidence that the Commission's policy has in fact chilled a significant amount of protected speech. When the Commission first embarked upon its standardless indecency quest in the *Golden Globe Awards Order*, it blithely asserted in a footnote that it did "not envision that today's action will lead to licensees abandoning program material solely over uncertainty surrounding whether the isolated use of a particular word is indecent." *Golden Globe Awards Order* ¶ 11 n.30. But that is exactly what has happened. With no clarity from the Commission about how it will apply its indecency policy and the specter of enormous fines hanging over their heads, broadcasters have indeed abandoned program

material solely over uncertainty about how the Commission's policy will apply.

1. Notably absent from the government's brief is any discussion of the myriad examples discussed by the Court of Appeals of how broadcasters' protected speech has been chilled by the Commission's indecency policy. As the Second Circuit recounted, uncertainty about the Commission's policy has led to broadcasters' decisions not to air the Peabody Award-winning "9/11" documentary containing live footage in which expletives were uttered; not to go forward with a planned reading of acclaimed author Tom Wolfe's novel *I Am Charlotte Simmons* because of "adult" language; not to air a political debate because one of the local politicians involved had previously used expletives on air; and not to broadcast live coverage of a memorial service for Pat Tillman, the football star killed in Afghanistan, because of language used by his family members to express their grief. *See Fox*, 613 F.3d at 334-35.

But the examples cited by the Court of Appeals are just the tip of the iceberg. Despite the Commission's holding that it was acceptable for fake soldiers in a fictional movie to use repeated expletives "to convey to viewers the extraordinary conditions in which the soldiers conducted themselves with courage and skill," *Saving Private Ryan Order* ¶ 14, broadcasters still err on the side of caution in censoring expletives used by real soldiers describing their experience of a real war. Thus, PBS offered its affiliates only an edited version of the film "A Company of Soldiers," a Frontline documentary

that follows the Army's Eighth Cavalry Regiment stationed in Baghdad during the Iraq War. PBS required stations that wanted to broadcast the unedited version of the film to sign a waiver acknowledging that PBS would not indemnify them in the event the film was found to violate the Commission's policy on indecency. *See* Edward Wyatt, *PBS Warns Stations of Risks from Profanity in War Film*, N.Y. TIMES, Feb. 18, 2005, at C2.

Similarly, in offering its affiliates a Frontline documentary entitled "The Solider's Heart," an examination of the psychological impact of the Iraq war on soldiers, PBS "decided to offer PBS stations two versions – one edited which bleeps the expletives – based on legal counsel's assessment of the risk for possible FCC fines." PBS Statement, *available at* http://blogcritics.org/video/article/the-soldiers-heart/. PBS informed its affiliates that its decision was "based on current interpretation(s) of FCC guidelines, which provide no clear-cut or official rulings to guide our decisions." *Id.* Thus, "[r]egretfully, in this uncertain climate, [PBS was] compelled to err on the side of caution. Neither PBS nor its member stations has the financial means to wage a legal battle in the courts if subject to FCC sanctions regardless of the editorial merits of this program." *Id.*

2. As such examples illustrate, the chilling effects of the Commission's policy are often felt by small, local broadcasters, which are the majority of *amici*'s members. Such broadcasters are certainly not exempt from the Commission's indecency regime.

Indeed, the Commission imposed a $15,000 fine on the San Mateo County Community College District for its airing of the documentary "The Blues." *Omnibus Order* ¶¶ 72, 85. Stations like this one can ill afford to risk such fines. That is all the more true given the ten-fold increase in the maximum forfeiture for violating the Commission's indecency regulations, which in June 2007 went from $32,500 to $325,000 per violation.[6]

Small and independent broadcasters also produce much of the nation's live programming in the form of local news coverage. These broadcasters have reported that *all* live news coverage is at risk due to the Commission's indecency policy. As the CEO of Liberty Corporation, which owns 15 TV stations, has explained, "[l]ive TV as we know it could be imperiled . . . . We have no choice but to take necessary precautions." Allison Romano, *Reporting Live. Very Carefully*, BROADCASTING & CABLE, July 3, 2005, *available at* http://www.broadcastingcable.com/article/157682-Reporting_Live_Very_Carefully_.php.

Although the Commission has referred to the "ease" of blocking expletives on live programming due to "technological advances," *Golden Globe Awards Order* ¶ 11, that characterization is inaccurate. The costs of implementing delay systems

---

[6] *Increase of Forfeiture Maxima for Obscene, Indecent, and Profane Broadcasts to Implement the Broadcast Decency Enforcement Act of 2005*, 72 Fed. Reg. 33,914 (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).

are borne disproportionately by small and independent broadcasters, not the big networks. As just one example, a local broadcaster spent approximately $200,000 to outfit its twenty-four stations with delay technology, and also bore the significant cost of paying staff to function as in-house censors. Romano, *supra.* These “costs are prohibitive for small-market stations.” *Id.* In addition, even where delay technology can be feasibly implemented, it relies on split-second judgments that may well fail to capture material that the Commission later deems offensive – as in one of the Fox broadcasts at issue in this very case.[7]

As a result, broadcasters have been forced to rethink whether and how to 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.” *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) (quotation marks omitted). In those instances, the Commission stated, it would be “inequitable . . . to hold a licensee responsible for indecent language.” *Id.* Now, given

---

[7] Use of delay technology may also, of course, result in erroneous censorship of material that is not indecent under any conceivable standard.

the inherent ambiguity in the Commission's decisions and the specter of significant fines and other penalties, local broadcasters are hesitant to offer live coverage of events "likely to produce offensive speech." *Id.*

Thus, live reports from journalists embedded with U.S. troops have been suppressed, and broadcast footage from war zones has been withheld from broadcast. Broadcasters have expressed concerns about carrying live audio or video from arraignments and trials, emotionally charged demonstrations, and the scenes of breaking news such as disasters. Many broadcasters are also concerned about or have decided against carrying live high school or college sporting events or locker room interviews.

Most recently, broadcasters have reported that they will not cover the "Occupy Wall Street" protests live for fear that a microphone may pick up a stray expletive and subject the station to fines. Instead, in some instances, broadcast journalists have aired sanitized coverage of these protests and have deleted language that, in their sound editorial judgment, might otherwise have been included to present an accurate account and best inform the audience about the protest participants and their opinions. *See, e.g.,* Frank Mungeam, *Video: KGW Crew Harassed at Occupy Portland*, KWW.com (Nov. 8, 2011, 4:19 p.m.) *available at* http://www.kgw.com/news/local/Video-shows-KGW-crew-harassed-at-Occupy-Portland-133496118.html.

Broadcasters' concerns – and thus the chilling effect of the FCC's policy – also extend beyond the

possibility of fleeting expletives, as broadcasters struggle with how to deal with the shifting Commission policy on nudity. This is well illustrated by local news coverage of the April 2011 attack on the Paul Gauguin masterpiece "Two Tahitian Women" at the National Gallery. Local television stations reporting on this event either blurred out the nipples of the bare-breasted women in the painting or cropped the shots so as to show the women only from the shoulders up. *See* Lisa de Moraes, *The TV Column: News Stations Weigh Whether To Cover Gauguin's 'Tahitian Women,'* WASH. POST, Apr. 11, 2011. This kind of sanitization is, in itself, a form of censorship – and an entirely predictable result given the FCC's inconsistent decisions regarding depictions of nudity.

3. The chilling effect of the Commission's policy is further enhanced by the possibility that broadcasters will settle and enter consent decrees rather than risk an indecency finding and massive fines.[8] Settlements, of course, insulate the Commission's notices of apparent liability from

---

[8] *See, e.g.*, Lili Levi, First Amendment Center, *The FCC's Regulation of Indecency*, at 21 (Apr. 2008), *available at* http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FirstReport.Indecency.Levi_.final_.pdf (discussing 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).

judicial review while effectively dissuading other broadcasters from airing similar content.

Especially troubling are provisions the Commission has insisted on in certain settlements that impose harsh penalties not just on broadcasters but also on their individual employees, even when mere *allegations* of indecency arise. For example, to settle three allegations of indecency associated with broadcasts from Howard Stern and the Opie and Anthony show, Viacom agreed in a 2004 consent decree to pay $3.5 million and to subject all of its broadcast stations to the following condition imposed by the Commission:

> If a Viacom-owned station receives a Notice of Apparent Liability for a broadcast occurring after the Effective Date which relates to violation of the Indecency Laws, all employees airing and/or materially participating in the decision to air such material will be suspended and an investigation will immediately be undertaken by Viacom.

In re Viacom, Inc., Consent Decree, 19 F.C.C.R. 23,100, ¶ 8(f) (2004), *aff'd on recon.*, 21 F.C.C.R. 12,223 (2006). In other words, employees were to be immediately suspended even upon allegations of indecency.

In this way, the chilling effect of the Commission's indecency policy is being pushed down to the level of individual employees, whose livelihood is dependent on avoiding any risk of airing indecent content. The severe penalties associated with even *non-final* indecency allegations help ensure that

broadcasters' 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.

III. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE COMMISSION'S AUTHORITY IS LIMITED.

The Commission argues that its regulatory regime, which plainly results in the chilling of protected speech, is justified by this Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). But the holding in *Pacifica* was a narrow one, *see, e.g.*, *id.* at 751, and does not give the Commission the authority it seeks here. As demonstrated above, under the guise of performing a "contextual" analysis, the Commission is actually making wholly subjective judgments about what content it deems sufficiently authentic, artistic, or scientific enough to be broadcast over the airwaves. That does not fall within the scope of the *Pacifica* Court's reference to "context."

In *Pacifica*, this Court employed a "nuisance rationale" when it held that the Commission has the authority to regulate certain content in broadcasting even where such content is not obscene. In finding that the Commission had appropriately deemed George Carlin's "Filthy Words" monologue indecent, this Court stressed that "context is all-important,"

but qualified what it meant by "context" by referring back to the "nuisance rationale" animating its holding. As the Court phrased it, a nuisance is "merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." 438 U.S. at 750 (quotation marks omitted). Thus, the Court essentially equated context with the time and place the allegedly indecent material was broadcast. For more than a quarter century after *Pacifica*, the Commission heeded this Court's admonition about the "narrowness of [the *Pacifica*] holding," *id.*; *see also Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989) (*Pacifica* was "an emphatically narrow holding"); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (same), and limited its indecency enforcement actions to those in which the pig was simply in the parlor rather than the barnyard. Now, however, the Commission regularly engages in speculation about whether the pig is artistically necessary or authentic enough to warrant an appearance in the parlor. Thus, the Commission has gone from treating all pigs as equal to finding that some pigs are more equal than others. *See* George Orwell, ANIMAL FARM: A FAIRY STORY (1945).

The government offers three rationales for the vast expansion of the government's indecency policy beyond the "nuisance rationale" limits of *Pacifica*: "the scarcity of available broadcast frequencies, the pervasive presence of the broadcast media, and the unique accessibility of broadcast programming to children." Pet. Br. 42. None of these three reasons justifies the current policy.

1. As an initial matter, the *Pacifica* Court did not rely on a scarcity rationale in reaching its decision. Despite the conspicuous absence of scarcity arguments in *Pacifica*, Petitioner here insists that "[s]o long as the federal government must exercise selectivity in allocating limited spectrum among numerous licensees . . . it may constitutionally require licensees to accept content-based restrictions that could not be imposed on other communications media." Pet. Br. 43-44. Petitioner gets it exactly backwards. It is precisely *because* the government is exercising selectivity in allocating spectrum among numerous licensees that the threat of content-based restriction is so pernicious. The government's authority to use content-neutral means to select among potential licensees cannot be transformed into authority to give preference to the messages it likes.

Yet that appears to be exactly what is happening. In fact, the Commission is using its power as licensor to withhold licenses or renewals where indecency complaints are pending and *have not even been adjudicated yet*. In several instances involving *amici*'s members, the Commission has used the mere pendency of indecency complaints as a basis for declining to process stations' license renewal applications. *See, e.g., In re Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc.*, 26 F.C.C.R. 4238, ¶ 271 (2011) (noting that Commission action on 11 NBCU television station license renewal applications "has been stayed in part due to pending indecency complaints filed against the stations").

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. It inhibits license assignments, because license renewal is necessary before assignment to a purchaser. And even when a license is renewed by means of a tolling agreement on pending indecency complaints, the unresolved complaints have a negative impact on license valuation and can inhibit a license owner's refinancing and recapitalization. The impact when licenses are assigned is even more stark: in cases of license owners who are selling their license but no longer doing business, the Commission has required the previous license owner to place into escrow the maximum fine for a potential indecency forfeiture. That highly questionable practice constitutes, in essence, the imposition of a monetary penalty without any finding as to the validity of a complaint.

This Court has long held that the First Amendment bars the government from establishing a licensing scheme that provides the licensor with the ability to suppress speech and places no limits on its discretion. *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). The fact that the government is administering a licensing scheme for a supposedly scarce resource does not mean that such First Amendment requirements are relaxed. If anything, it means that First Amendment concerns are heightened.

2. Petitioner's second rationale is broadcast media's "pervasive presence." Pet. Br. 44-45. Petitioner acknowledges, of course, that things have changed dramatically since *Pacifica*, as people now turn to cable, satellite, and Internet sources for news, information, and entertainment. Yet somehow Petitioner sees the proliferation of non-broadcast outlets for speech as a justification for *more* content-based regulation of the speech aired by broadcast media. That rationale makes no sense. The government cannot censor books because readers could watch a movie instead; it cannot censor video games because their creators could convey a similar message in a comic book. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011). Likewise, it cannot censor broadcast media just because viewers and content-creators have other options available to them.

Further, the existence of more outlets for speech means that there is *less* justification for government restrictions only on broadcasters. Cable television is now itself a "pervasive presence in the lives of all Americans." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 745 (1996) (plurality opinion) (quotation marks omitted). Thus, broadcasters operate in a highly competitive environment, much more so than they did when *Pacifica* was decided. *See, e.g.*, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 F.C.C.R. 542, ¶ 8 (2009). Although Petitioner argues that almost nine out of every ten households in the United States subscribe to cable or satellite services,

Pet. Br. 44, Petitioner never acknowledges what these statistics mean for broadcasters who are forced to compete against cable and satellite providers that are not (and could not constitutionally be) subject to the Commission's indecency regulations. For example, as explained above, broadcasters airing live programming are forced to institute time-delay technology, find additional staff to work as censors, and even make difficult choices about whether to cover certain events at all. Cable and satellite providers face none of those burdens, and can carry live events *live* with no additional costs and nothing to fear from the Commission. *See, e.g.*, J.A. 288-89. And with respect to non-live programming, cable and satellite providers are able to offer their viewers content that broadcasters simply cannot.

There is thus no small irony in the government's position. The government repeatedly emphasizes the central importance of broadcast media, noting that some viewers do not subscribe to or employ cable or satellite and quoting NAB's own statements that "99% of the public relies on local television stations . . . for diverse programming services" and that "[n]o other information platform can match the reach and reliability of free, over-the-air broadcasting." Pet. Br. 45 (quotation marks omitted). But to the extent that broadcasters are hampered in competing against other outlets, and as a result lose audience to cable and other unregulated entities, broadcasters ultimately will be less able to fulfill their public interest obligations and offer the important national and local news, emergency

information, and other public affairs programming on which viewers rely.

The government's position is also without any obvious limit. If the government were right that the Commission can regulate the content of broadcast media as a condition of licensure, *but see* 47 U.S.C. § 326 (forbidding the Commission from imposing "censorship" as a condition of access to the airwaves), and if the growth of broadcast-media alternatives were only to *increase* the Commission's authority in this regard, then there would be nothing stopping the Commission from imposing virtually any content-based restriction it chose. Broadcasters fully accept that they have a responsibility to operate in the public interest and that the government may regulate limited aspects of the broadcast medium. But the government cannot be correct that the state of the marketplace gives it *carte blanche* to regulate content without any limits on its discretion.

3. Third, as to the supposedly "unique accessibility of broadcast programming to children," the government justifies the Commission's regulatory regime on the grounds that disturbing it would "upset parents' settled expectations." Pet. Br. 42, 52. That rationale is curious, given the relatively recent shift in Commission policy that gave rise to the case at hand. *See supra* p. 5. It also runs headlong into this Court's recent decision in *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), which expressed serious "doubts that punishing third parties for conveying protected speech to children just in case their parents

disapprove of that speech is a proper governmental means of aiding parental authority." *Id.* at 2740.

Here, as in *Brown*, there is no reason to believe that the parents the government says it is attempting to assist actually need or want the government's intervention. A study by the Kaiser Family Foundation found that "most parents seem pretty satisfied with the oversight [of media use] they're able to offer. Two-thirds (65%) say they 'closely' monitor their children's media use." The Henry J. Kaiser Family Foundation, *Parents, Children, and Media*, at 1 (June 2007), *available at* http://www.kff.org/entmedia/upload/7638.pdf. Advances such as the ratings system and parental control technologies like the V-Chip have given parents the tools they need to make their own choices about what type of speech they want to keep out of their homes. Thus, it is not parents who are the driving force behind the Commission's indecency policy. In fact, in past years, a single activist group has submitted the vast majority of indecency complaints to the Commission – 99.9% in one year. Todd Shields, *Activists Dominate Indecency Complaints*, ALLBUSINESS, Dec. 6, 2004, *available at* http://www.allbusiness.com/services/motion-pictures/4459242-1.html.

Nonetheless, the television industry has been doing its part to keep parents educated about the tools available to them to monitor media usage. In 2006 alone, the industry spent $340 million on an advertising campaign to help educate parents about their ability to monitor media usage with the TV

Parental Guidelines rating system and the V-chip and to encourage parents to take an even more active role in their children's television viewing. *See* Comments of Nat'l Ass'n of Broad. at 2, *In re Implementation of the Child Safe Viewing Act*, MB Docket No. 09-26 (FCC Apr. 16, 2009) ("*Parental Tech Comments*").

Although the government discusses "deficiencies" in the V-chip and deems it "inadequate as a substitute for broadcast indecency regulation," Pet. Br. 49, parents who use the V-chip find it valuable. *Parental Tech Comments* at 14. Moreover, a "narrow focus on V-chip use (or the use of any other single tool) misses the larger picture – that parents believe they are successfully managing their children's TV viewing with the tools and strategies they have on hand today." *Id.* at 3. Thus, the effectiveness of the Guidelines and V-chip must be viewed within the broader context of the wide variety of tools, including cable and satellite set-top boxes, available to parents to help manage their children's viewing. While parents may opt to use other available tools for a variety of reasons, that does not mean that the Guidelines or V-chip are ineffective.

Nor does it mean the Commission is permitted to step into the shoes of parents everywhere and make its own choices about what children should be permitted to see or hear. *See Brown*, 131 S. Ct. at 2741; *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 824 (2000) (stating that "[a] court should not assume a plausible, less restrictive alternative would be ineffective, and a court should

not presume parents, given full information, will fail to act"). Even assuming that the government had a compelling interest in helping parents block certain content from their children (which it does not), the V-chip is a "feasible and effective means of furthering" such an interest. 529 U.S. at 815. Thus, the government "cannot ban speech." *Id.*

* * *

In short, none of Petitioner's reasons for the vast expansion of its regulatory authority is tenable. *Pacifica* was a narrow holding, and does not provide the Commission with the license to punish speech using "*post hoc* rationalizations" and "shifting or illegitimate criteria." *City of Lakewood*, 486 U.S. at 758. And this Court has made abundantly clear that "esthetic and moral judgments about art and literature" are "for the individual to make, not for the Government to decree." *Playboy*, 529 U.S. at 818; *see also Brown*, 131 S. Ct. at 2741; *Cohen*, 403 U.S. at 25 (discussing "matters of taste and style" where "government officials cannot make principled distinctions"). The Commission's esthetic and moral judgments about whether or not allegedly "indecent" material is integral to a broadcast are forbidden by the First Amendment. "It is rare that a regulation restricting speech because of its content will ever be permissible," and this is not one of those instances. *Playboy*, 529 U.S. at 818.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the judgment of the Second Circuit should be affirmed.

Respectfully submitted,

PAUL M. SMITH
ELAINE J. GOLDENBERG
Counsel of Record
JESSICA RING AMUNSON
JENNER & BLOCK LLP
1099 New York Avenue, N.W.
Suite 900
Washington, DC 20001
(202) 639-6000
egoldenberg@jenner.com

Counsel for amici curiae

JANE E. MAGO
JERIANNE TIMMERMAN
NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, DC 200036
(202) 429-5430

KATHLEEN A. KIRBY
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-3360

November 10, 2011