No. 10-1293

In the Morris Tyler Moot Court of Appeals at Yale

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 THE RESPONDENTS

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QUESTIONS PRESENTED

The FCC forbids the broadcasting of indecent speech, defined "as material 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." J.A. 49. The questions presented are:

1. Whether the FCC's definition of indecency violates the Fifth Amendment because it is impermissibly vague.
2. Whether the FCC's ban on indecency violates the First Amendment because it is not narrowly tailored and because it does not require scienter for liability.

PARTIES TO THE PROCEEDINGS

Petitioners are the Federal Communications Commission and the United States of America.

Respondents who were petitioners in the court of appeals in *Fox Television Stations, Inc. v. FCC* are: Fox Television Stations, Inc., CBS Broadcasting Inc., WLS Television, Inc., KTRK Television, Inc., KMBC Hearst-Argyle Television, Inc., and ABC Inc.

Respondents who were intervenors in the court of appeals in *Fox Television Stations, Inc. v. FCC* are: NBC Universal, Inc., NBC Telemundo License Co., NBC Television Affiliates, FBC Television Affiliates Association, CBS Television Network Affiliates, Center for the Creative Community, Inc., doing business as Center for Creative Voices in Media, Inc., and ABC Television Affiliates Association.

Respondents who were petitioners in the court of appeals in *ABC, Inc. v. FCC* are: ABC Inc., KTRK Television, Inc., WLS Television, Inc., Citadel Communications, LLC, WKRN, G.P., Young Broadcasting of Green Bay, Inc., WKOW Television Inc., WSIL-TV, Inc., ABC Television Affiliates Association, Cedar Rapids Television Company, Centex Television Limited Partnership, Channel 12 of Beaumont Incorporated, Duhamel Broadcasting Enterprises, Gray Television License, Incorporated, KATC Communications, Incorporated, KATV LLC, KDNL Licensee LLC, KETV Hearst-Argyle Television Incorporated, KLTV/KTRE License Subsidiary LLC, KSTP-TV LLC, KSWO Television Company Incorporated, KTBS Incorporated, KTUL LLC, KVUE Television Incorporated, McGraw-Hill Broadcasting Company Incorporated, Media General Communications Holdings LLC, Mission Broadcasting Incorporated, Mississippi Broadcasting Partners, New York Times Management Services, Nexstar Broadcasting Incorporated, NPG of Texas, L.P., Ohio/Oklahoma Hearst-Argyle Television Inc., Piedmont

Television of Huntsville License LLC, Piedmont Television of Springfield License LLC, Pollack/Belz Communication Company, Inc., Post-Newsweek Stations San Antonio Inc., Scripps Howard Broadcasting Co., Southern Broadcasting Inc., Tennessee Broadcasting Partners, Tribune Television New Orleans Inc., WAPT Hearst-Argyle Television Inc., WDIO-TV LLC, WEAR Licensee LLC, WFAA-TV Inc., and WISN Hearst-Argyle Television Inc.

Respondents who were intervenors in the court of appeals in *ABC, Inc. v. FCC* are: Fox Television Stations, Inc., NBC Universal, Inc., NBC Telemundo License Co., and CBS Broadcasting, Inc.

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The opinion of the Second Circuit in the *Fox* case is reported at 613 F.3d 317. The opinion of the Second Circuit in the *ABC* case is available at 404 F. App'x 530. The order of the Federal Communications Commission is reported at 21 FCC Rcd. 13299.

JURISDICTION

The judgment of the Second Circuit was entered on July 13, 2010. A petition for certiorari was filed on April 21, 2011 and was granted on June 27, 2011. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

1. The First Amendment of the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The Fifth Amendment of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Section 1464 of Title 18 of the United States Codes provides:

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined . . . or imprisoned not more than two years, or both.

STATEMENT

A. The FCC's Indecency Regime

On October 30, 1973, George Carlin delivered the "filthy words monologue," a 12-minute harangue "almost wholly devoted to the use of such words as 'shit' and 'fuck,' as well as 'cocksucker,' 'motherfucker,' 'piss,' and 'cunt'" broadcast on the radio at 2 o'clock in the afternoon. *Citizen's Complaint Against Pacifica Found. Station WBAI (FM)*, 56 FCC Rcd. 94, 94 (1975). In response, the FCC brought a forfeiture proceeding—its first attempt to regulate speech it considered indecent, but not obscene, under Section 1464 of Title 18 of the United States Code, a statute passed twenty-seven years earlier. *Id*. at 97.

In finding the "filthy words monologue" indecent, the FCC emphasized that Carlin's expletives were "repeated over and over" in a pre-recorded, mid-afternoon broadcast. *Id.* at 99. The Commission defined "indecent" speech as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *Id*. at 98. But the FCC noted, "[T]he number of words which fall within the definition of indecent is clearly limited." *Id.* at 99-100.

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), a plurality of this Court upheld that narrow policy. Limiting its review to the "filthy words monologue," the Court concluded that "if the government has any such power [to regulate indecent speech], this was an appropriate occasion for its exercise." *Id*. at 744. But the Court specifically declined to consider Pacifica's overbreadth and vagueness challenges. *Id*. at 742. Instead, the Court "emphasize[d] the

narrowness of [its] holding": the FCC may regulate a pre-scripted 12-minute string of repeated expletives. *Id*. at 750. The Court emphasized, "We have not decided that an occasional expletive . . . would justify any sanction . . . ." *Id*.

Justices Powell and Blackmun, in concurrence, stressed that the Court's opinion affirmed "only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion." *Id*. at 755-56. They noted that the decision relied in part on the FCC's pledge to "proceed cautiously, as it has in the past." *Id*. at 761 n.4. They also emphasized that "the Court's holding today does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here." *Id*. at 760-61.

For the next twelve years, the FCC enforced a "highly restricted enforcement standard." *Infinity Broad. Corp*., 3 FCC Rcd. 930, 930 (1987). The FCC noted that it "intend[ed] strictly to observe the narrowness of the *Pacifica* holding." *WGBH Educ. Found.*, 69 FCC Rcd. 1250, 1254 (1978). The FCC also took the position that *Pacifica* limited its enforcement powers to the seven specific words in the Carlin monologue. *Infinity Broad. Corp.*, 3 FCC Rcd. at 930.

Even after the FCC adopted a more expansive indecency policy in 1987, it consistently held that fleeting expletives were not actionably indecent, especially during live broadcasts. *See, e.g.*, *Regents of the Univ. of Cal.*, 2 FCC Rcd. 2703, 2703 (1987) ("Speech that is indecent must involve more than an isolated use of an offensive word."); *Lincoln Deller, Renewal of Licenses for Stations KPRL(AM) and KDDB(FM)*, 8 FCC Rcd. 2582, 2585 (1993) (A "news announcer's use of a single expletive, [fuck]," was not indecent because "of the isolated and accidental nature of the broadcast."); *L.M. Commc'ns of S.C., Inc.*, 7 FCC Rcd 1595, 1595 (1992) (A "fleeting and

isolated utterance . . . within the context of live and spontaneous programming, does not warrant a Commission sanction.").

In 2001, the FCC issued a policy statement intended to clarify its indecency standards. *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464*, 16 FCC Rcd. 7999 (2001). This statement explained that to support a finding of indecency, (1) "the material must describe or depict sexual or excretory organs or activities," and (2) "the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at 8002. To determine if this second prong is met, the FCC may consider three "principal factors that have proved significant in our decisions to date." *Id*. at 8003. These are: "(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*." *Id*. But the FCC emphasized that none of these factors are dispositive, and noted that "other factors" may be the basis for a finding of indecency. *Id*. The *Industry Guidance* also reiterated that "fleeting and isolated" expletives are not actionably indecent. *Id*. at 8008.

B. The Speech At Issue

At the 2004 Super Bowl Halftime Show, Justin Timberlake briefly exposed Janet Jackson's breast. This incident generated more than 542,000 complaints to the FCC. *CBS Corp. v. FCC*, 535 F.3d 167, 172 n.2 (3d Cir. 2008). FCC Chairman Michael Powell told the media he was "outraged" by the "classless, crass and deplorable stunt" and promised quick enforcement action.[1] At the same time, Congress held hearings to pressure the FCC to step up its enforcement

[1] News Release, FCC, FCC Chairman Powell Calls Super Bowl Halftime Show a "Classless, Crass, Deplorable Stunt." Opens Investigation (Feb. 2, 2004), 2004 WL 187406.

activities.[2] Ten days after the Super Bowl, all five FCC Commissioners testified at hearings before the House and Senate in support of tougher penalties for indecency.[3]

A month later, the FCC announced a new indecency and profanity policy. *Complaints Against Various Broad. Licenses Regarding the Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975 (2004) ("*Golden Globes*"). The FCC declared for the first time that a fleeting expletive could be actionably indecent. *Id*. at 4980. The fleeting expletive at issue was the singer Bono's exclamation, upon receiving an award at the 2003 Golden Globes Awards, that winning the award was "really, really, fucking brilliant. Really, really, great." *Id*. at 4976 n.4. In 2003, the FCC Enforcement Bureau had found this unscripted exclamation not actionably indecent because "[t]he word 'fucking' may be crude and offensive, but, in the context presented here, did not describe sexual or excretory organs or activities." *Complaints Against Various Broad. Licensees*, 18 FCC Rcd. 19859, 19860 (2003). But in 2004, the FCC Commissioners disagreed, determining that "given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation." *Golden Globes*, 19 FCC Rcd. at 4979. The Commissioners therefore overruled twenty-nine years of decisions holding that fleeting expletives were per se not indecent. *Id*. at 4980.[4]

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[2] A Subcommittee of the FCC's House Oversight Committee held hearings on the FCC's broadcast indecency enforcement on January 28, 2004. *"Can You Say That on TV?": An Examination of the FCC's Enforcement with respect to Broadcast Indecency, Hearing Before the Subcomm. on Telecommc'ns & the Internet of the H. Comm. on Energy & Commerce*, 108th Cong. (2004). Members of the Subcommittee repeatedly expressed disapproval of the FCC's enforcement policies. *See, e.g.*, *id.* at 3 (statement of Rep. Upton) ("At some point we have to ask the FCC: How much is enough? When will it revoke a license?"); *id.* at 4 (statement of Rep. Markey) ("Today's hearing will allow us to explore the FCC's lackluster enforcement record with respect to these violations").

[3] *See The Broad. Decency Enforcement Act of 2004: Hearing on H.R. 3717 Before the Subcomm. on Telecommc'ns & the Internet of the H. Comm. on Energy & Commerce*, 108th Cong. (2004); *Protecting Children from Violent & Indecent Programming: Hearing Before the S. Comm. on Commerce, Science, & Transp.*, 108th Cong. (2004).

[4] The FCC also found Bono's statement profane, overruling a half-century of FCC precedent that only blasphemy can be profane. *Golden Globes*, 19 FCC Rcd. at 4981. The FCC has abandoned that finding for the purposes of this appeal and has relied solely on its finding of indecency. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 327 (2d Cir. 2010).

At the same time that the FCC expanded its definition of indecency, it began levying significantly larger fines for indecency violations. Previously, the FCC had interpreted the maximum fines in the statute as applying on a per-program basis. *Fox Television Stations, Inc. v. FCC* (*Fox III*), 613 F.3d 317, 322 (2d Cir. 2010). Now, the FCC began treating each licensee's broadcast of the same program as a separate violation, thereby multiplying the maximum fine the FCC could levy—sometimes several hundredfold. *Id*. Thus, while the FCC had imposed $440,000 in fines in 2003, it imposed $8 million in fines in 2004. *Id*. at 322 n.3. Two years later, Congress added to the cost of an FCC sanction by increasing the maximum fine for a finding of indecency by a factor of ten—from $32,500 to $325,000. *See* 47 U.S.C. § 503(b)(2)(c)(iii) (2006). Broadcasters can now be fined tens of millions of dollars for a single fleeting expletive.

The FCC then began applying its new indeceny policy retroactively. At the *2002 Billboard Music Awards*, the musician Cher, on stage to accept an award, had stated: "People have been telling me I'm on the way out every year, right? So fuck 'em." J.A. 101. In an unpublished opinion two weeks later, the FCC enforcement bureau had found Cher's unscripted statement was not actionably indecent because it was fleeting. *Golden Globes*, 19 FCC Rcd. at 4980 n.32. But, nine months later, the Parents Television Council filed another complaint with the FCC over Cher's statement. J.A. 101 n.150. Acting on this complaint, the FCC in 2006 determined that Cher's statement was actionably indecent. J.A. 103.

In the same order, the FCC found three other programs indecent solely on the basis of fleeting expletives: the exclamations of "bullshit" by detectives in multiple *NYPD Blue* episodes, J.A. 120 n.199; the impromptu joke of Nicole Richie at the *2003 Billboard Music Awards*, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple," J.A. 106 n.164; and an interviewee's description of a fellow reality show contestant as "a bullshitter" during a

live interview on *The Early Show*, J.A. 120 n.199. Except for the use of "bullshit" in *NYPB Blue*, all of the expletives were unscripted and occurred during live broadcasts.

The FCC applied its new presumption that "fuck" and "shit" are indecent to each of the broadcasts. J.A. 102-03. The FCC thus found that *NYPD Blue*'s use of "bullshitter" was indecent, while its use of "dickhead" was not. J.A. 114 n.187. The FCC similarly found that the *2003 Billboard Music Awards*' inclusion of "shit" and "fuck" was indecent. J.A. 110. But an exchange during the same program involving the phrases "my ass," "a lot of crap," "poop," "singers that suck," and "sex with a dog" was not indecent. J.A. 110 n.180.

The FCC initially regulated news programs equally with other programs. The FCC found *The Early Show* in violation because "the use of the 'S-Word,' particularly during a morning news interview, is shocking and gratuitous." J.A. 122. On remand, however, the FCC reversed its finding about *The Early Show*, concluding that in the context of a news interview the word "bullshitter" is "neither actionably indecent nor profane." *Complaints Regarding Various Television Broad. Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd. 13299, 13328 (2006) ("*Remand Order*"). The FCC stressed, however, "there is no outright news exception from our indecency rules." *Id*. at 13327.

The FCC also reversed its finding on *NYPD Blue* because complaints about the program had all been filed by one person, who lived in Virginia, where the programs were screened in the "safe harbor" period after 10 p.m. *Id*. at 13328-29. But the FCC reiterated its findings that the *2002* and *2003 Billboard Music Awards* were actionably indecent. *Id*. at 13314, 13325.

C. Proceedings Below

The networks sought review of the FCC's order on administrative, statutory, and constitutional grounds. *Fox Television Stations, Inc. v. FCC* (*Fox I*), 489 F.3d 444, 446 (2d Cir.

2007). The Second Circuit held that the FCC's actions were arbitrary and capricious under the Administrative Procedure Act and vacated the FCC's order. *Id.* The panel did not reach the statutory and constitutional issues. *Id.*

On appeal, this Court reversed. *FCC v. Fox Television Stations, Inc.* (*Fox II*), 129 S. Ct. 1800, 1819 (2009). The Court held that the FCC had not acted arbitrarily and capriciously in changing its policy, but reserved the constitutional issues for a later case. *Id.* Justice Thomas, who provided a fifth vote for the majority, concurred on the administrative law issues but expressed doubt that the FCC's policy was permissible under the First Amendment. *Id.* at 1819-22 (Thomas, J., concurring).

On remand, the Second Circuit held that the FCC's policy was unconstitutionally vague, and again vacated the FCC's order. *Fox III*, 613 F.3d at 319. The panel held that the FCC's policy did not provide any discernable standard by which broadcasters could determine what speech is prohibited and that the policy's vagueness had impermissibly chilled speech. *Id.* at 330-35. While the opinion stated that the FCC's broadcast restriction would likely not survive First Amendment scrutiny, the court again declined to reach those issues. *Id.* at 325-27.

The FCC petitioned for review and this Court granted certiorari to consider both Fifth and First Amendment challenges to the FCC's indecency policy. *FCC v. Fox Television Stations, Inc.*, 131 S. Ct. 3065 (2011) (mem.).

SUMMARY OF ARGUMENT

I. The FCC's indecency policy violates the Fifth Amendment because it is impermissibly vague. The policy's definitions of "indecency" and "patently offensive" are too imprecise to provide a person of ordinary intelligence fair notice of what is prohibited. The FCC's arbitrary enforcement of this vague policy has chilled substantial amounts of protected speech.

A. This Court's decision in *Reno v. ACLU*, 521 U.S. 844 (1997), is controlling. In *Reno*, this Court found statutory definitions of "indecency" and "patently offensive" almost identical to the FCC's definitions were unconstitutionally vague. *Id*. at 871. The FCC's elaborations on those definitions—a three-factor offensiveness test that is followed more often in the breach, and a presumptive ban on "fuck" and "shit" riddled with exceptions—only make the indecency policy more vague.

B. The FCC's indecency policy is inherently vague. The FCC relies on "community standards," but does not define those standards. It focuses on "context," but wavers over what context matters. It declares all "patently offensive" words off limits, and then sanctions "bullshit" but not "a lot of crap," "my ass," or "six foot blow job machine." As such, the FCC's policy deprives broadcasters of fair notice.

C. The FCC's arbitrary enforcement policy has chilled protected speech. The threat of $325,000 fines wielded by bureaucrats with vast discretion has forced broadcasters to drop programming—from a Peabody Award-winning 9/11 documentary to a radio reading service for the blind. Live broadcasts have been hardest hit, with one Vermont television station cancelling an entire political debate. Indeed, because the FCC policy has "no outright news exception," it threatens the end of live news broadcasts.

The FCC's indecency policy is so standardless that it deprives broadcasters of fair notice and encourages arbitrary enforcement. This Court should therefore uphold the Second Circuit's determination that it is unconstitutionally vague.

II.A. The regulations also violate the First Amendment and are facially invalid. The FCC's regulations are content-based restrictions of protected speech and are thus presumptively unconstitutional. To be valid, even under the lesser scrutiny given to broadcasting restrictions,

content-based regulations must be narrowly tailored and must be the least restrictive means available. The FCC's policy fails this requirement.

B.1. Under the least restrictive means requirement, the government must, if possible, distinguish between those it seeks to protect and everyone else. Broadcasting regulations were upheld in *Pacifica* because there was no way to filter out indecent material. The only way to protect anyone was to restrict the content at its source. Because *Pacifica*'s reasoning was based on technology, however, the result would be different if technology changed.

2. Modern technology, particularly the V-Chip, allows for the filtering that was impossible in the past. All television programs now have ratings to indicate if they include indecency or other offensive content. Parents and offended adults can set their V-Chips to block out ratings and channels that they wish to avoid. This is a less restrictive means to meet the FCC's asserted interests to protect children and offended adults, because it minimally restricts both broadcasters' speech and audiences' listening rights.

3. Once a less restrictive alternative has been proposed, the government bears the burden of showing that the alternative would be ineffective. The FCC cannot meet that burden here. Evidence shows that V-Chips are commonly available and well understood. The V-Chip moves the burden to block indecent speech to parents and offended adults, but inconvenience alone is not enough to make an alternative ineffective. Some unplanned indecency might slip through the V-Chip's blocking, but there is no requirement that the alternative be perfect.

C. Narrow tailoring also requires that the regulations not be underinclusive. The FCC claims that its goals are to protect children and offended adults who may be harmed by even fleeting expletives. But the FCC's regulations allow for indecent language on news programs and other programs where the context requires it. Those exemptions are incompatible with the FCC's

stated interests: if children can be harmed by a single word, then they can be harmed by that single word no matter what the subject matter of the program. The underinclusiveness cannot be excused on the grounds that the press needs special protection. The First Amendment does not allow any speakers, even the press, to have preferred treatment.

III. Even if the FCC's regulations are not facially invalid, they are invalid as applied to unscripted expletives during live broadcasts. As the Court recognized with obscenity prosecutions, punishing speech without requiring scienter chills free expression. Under the FCC's current rules, broadcasters will be unwilling to risk live broadcasts and will avoid controversial content and speakers. To avoid unduly restricting protected, non-indecent speech, the Court should require that the FCC show in all forfeiture actions that the broadcasters knew of the content in advance.

ARGUMENT

I. THE FCC'S INDECENY POLICY VIOLATES THE FIFTH AMENDMENT BECAUSE IT IS IMPERMISSIBLY VAGUE

The Second Circuit correctly held that the FCC's indecency policy is void for vagueness. *Fox III*, 613 F.3d at 330. A regulation is void for vagueness under the Fifth Amendment 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). For regulations that restrict speech, "a more stringent vagueness test" applies. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

The FCC's Policy fails the vagueness test. The FCC's definitions of "indecency" and "profanely offensive" are almost identical to statutory language that this Court held impermissibly vague in *Reno v. ACLU*, 521 U.S. at 880. The FCC's arbitrary enforcement of this

imprecise standard has only made its contours more vague, while chilling a large amount of protected speech. As such, this Court should affirm the Second Circuit's ruling that the FCC's indecency policy is void for vagueness.

A. This Court's Decision In *Reno* Is Controlling

In *Reno v. ACLU*, this Court held that statutory language almost identical to the FCC's current indecency policy was unconstitutionally vague. *Reno*, 521 U.S. at 871. The Communications Decency Act (CDA) of 1996 criminalized the transmission or display of material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." *Id*. at 860. This Court found "vagueness inherent in the open-ended term 'patently offensive' as used in the CDA," *id*. at 873, and in the statute's use of the "general, undefined terms 'indecent' and 'patently offensive.'" *Id*. at 877. The Court concluded that "the vague contours of the coverage of the statute . . . unquestionably silences some speakers whose messages would be entitled to Constitutional protection." *Id*. at 874. As such, the Court held that "the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech." *Id*.

The FCC's indecency policy is equally imprecise. The FCC makes "two fundamental determinations" to assess indecency: (1) "the material must describe or depict sexual or excretory organs or activities," and (2) "the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium." *Industry Guidance*, 16 FCC Rcd. at 8002. Except for the addition of the modifier "broadcast medium," this language is identical to the CDA's language that this Court found unconstitutionally vague in *Reno*.

The Second Circuit acknowledged this similarity, but distinguished *Reno* because "the FCC has further elaborated on the definition of indecency in the broadcast context." *Fox III*, 613

F.3d at 329. The court cited two such elaborations: the FCC has outlined three factors that it purportedly uses to determined whether a broadcast is patently offensive, and it is has declared "fuck" and "shit" presumptively indecent. *Id*. Neither elaboration saves the FCC's policy from vagueness. Nor is *Reno* distinguishable on other grounds.

1. The FCC's offensiveness factors do not clarify its indecency policy

The FCC's three-factor offensiveness test does not meaningfully narrow the FCC's indecency standard. Under this test, the FCC considers: "(1) the explicitness or graphic nature of the description 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." *Industry Guidance*, 16 FCC Rcd. at 8003. But these factors are not determinative. The FCC cautions that "[n]o single factor generally provides the basis for an indecency finding," *id*., and the FCC's enforcement record bears this out. For example, the FCC fined the *2002* and *2003 Billboard Music Awards* despite acknowledging that neither involved repeated expletives as required by the second factor. J.A. 102, 108.

Nor are the factors even exhaustive. The FCC states that these "factors . . . have proved significant in our decisions to date," but does not promise to follow these factors in future decisions. *Industry Guidance*, 16 FCC Rcd. at 8003. Indeed, it states that "other factors" entirely might be the basis for an indecency determination. *Id*. In other words, the FCC may find a program that does not meet any of the three factors is still indecent. Broadcasters cannot be expected to risk millions of dollars in reliance on a test that the FCC may decide not to follow.

This lack of notice is compounded by the FCC's failure to explain the factors. The FCC's orders typically recite the factors verbatim, without discussing how they apply to a particular

show. Thus the FCC found *NYPD Blue*'s use of the word "bullshit" indecent because it is "vulgar, graphic, and explicit." But the same show's use of the word "dickhead" was *not* indecent because it is "*not* sufficiently vulgar, explicit, or graphic." J.A. 115-16 (emphasis added). Similarly, the exclamation "shit" during the *2003 Billboard Music Awards* was patently offensive because it was "vulgar, graphic, and explicit." J.A. 108. But "a lot of crap" and "poop" spoken during the same show were "not patently offensive for the broadcast medium." J.A. 110 n.180. Such conclusory explanations hardly give broadcasters notice of how the FCC will apply the factors in future. The three-factor offensiveness test thus fails to clarify the FCC's indecency policy.

2. The FCC's presumptions do not clarify its indecency policy

The FCC's presumptive ban on "fuck" and "shit" also fails to save its policy from vagueness. Under the FCC's current policy, all variants of these two words are indecent unless the "artistic necessity" or "*bona fide* news" exceptions apply. These exceptions are so hazily defined that they render this presumption itself vague.

Under the artistic necessity exception, the FCC may allow fleeting expletives if they are "demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance." J.A. 90. The FCC decides artistic necessity by "consider[ing] whether the material has any social, scientific or artistic value." *Complaints Against Various Television Licensee Regarding Their Broad. on Nov. 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 FCC Rcd. 4507, 4512 (2005) ("*Private Ryan*"). This standard is confusing enough on paper: "demonstrably *essential*" is a very different standard from "*any* . . . artistic value." And the FCC has provided no definition of "art," despite this Court admonition that "what is contemptuous to one man may be a work of

art to another." *Smith v. Goguen*, 415 U.S. 566, 573 (1974) (invalidating a law barring "contemptuous" treatment of the flag on vagueness grounds).

In practice, it is even messier. The FCC allowed the repeated use of "fuck" and "shit" in *Saving Private Ryan* because it found the expletives integral to "the power, realism and immediacy" of this fictional movie. *Private Ryan*, 20 FCC Rcd. at 4513. But it found similar expletives in a PBS documentary, *The Blues*, spoken by real musicians about a real music genre to not be integral to the show's realism. J.A. 91-92. Indeed, the FCC fined a community television station $15,000 for airing *The Blues*, despite recognizing that the "profane language may have had some communicative purpose." J.A. 90, 93.

The "*bona fide* news" exception is even hazier. The FCC has not defined this exception at all, other than to caution that "there is no outright news exception." *Remand Order*, 21 FCC Rcd. at 13327. Nor have the FCC's decisions clarified the exception's scope. The FCC first found that the word "bullshitter" on *The Early Show* was indecent "particularly during a morning news interview." J.A. 122. The FCC then reversed, finding that "bullshitter" was not indecent because it was spoken during a "*bona fide* news interview." *Remand Order*, 21 FCC Rcd. at 13328. The FCC thus found the same word impermissible and then permissible for exactly the same reason: because it occurred during a morning news interview. A presumption with such vague exceptions cannot save the FCC's indecency policy from the fate of the equally imprecise statutory language this Court found vague in *Reno*.

3. Reno *is not distinguishable on other grounds*

At the Second Circuit, the FCC made two further arguments to distinguish *Reno*. First, the FCC argued that its indecency regulations were different in kind from the CDA's regulation of speech. Specifically, the FCC noted that it is an expert agency, its indecency regulations

channel rather than prohibit speech, and the broadcast medium has traditionally received limited First Amendment protection. *Fox III*, 613 F.3d at 329. Yet all of these arguments go to the level of First Amendment scrutiny to be accorded the FCC's regulations, not their vagueness. As the Second Circuit noted, "Broadcasters are entitled to the same degree of clarity as other speakers, even if restrictions on their speech are subject to a lower level of scrutiny." *Id*.

Second, the FCC argued that the civil penalties it imposes for indecency are less severe than the CDA's criminal penalties. *Id*. But the FCC's authority to regulate indecent language is drawn from 18 U.S.C. § 1464, a criminal statute. *See* 18 U.S.C. § 1464 (2006). And large civil liabilities can chill speech just as thoroughly as criminal sanctions. *See, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). The FCC can now impose fines of $325,000 per licensee for a single indecency violation. In 2004, the FCC fined broadcasters $1.2 million for just one television show. *Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married By America" on April 7, 2003*, 19 FCC Rcd. 20191, 20191 (2004) ("*Married by America*"). And that was before Congress increased the FCC's fines tenfold. Broadcasters could now be fined tens of millions of dollars for a single fleeting expletive. These fines rival criminal sanctions in their chilling effect.

Furthermore, this case is actually easier than *Reno* in two respects. First, the CDA contained a knowledge requirement, whereas the FCC's indecency policy does not. *Reno*, 521 U.S. at 859-60. A statute not requiring knowledge for punishment is more vulnerable on vagueness grounds because the risk of punishment without fair notice is greater. *Cf. Hill v. Colorado*, 530 U.S. 703, 732 (2000) (A vagueness "concern is ameliorated by the fact that [the statute] contains a scienter requirement."). Second, the CDA provided an affirmative defense for defendants who took "good faith, reasonable, effective, and appropriate actions" to restrict

access by minors to prohibited communications. *Reno*, 521 U.S. at 860. But the FCC indecency policy provides no such affirmative defense. The FCC thus found the *2003 Billboard Music Awards* actionably indecent despite acknowledging that Fox made a good faith attempt to cut indecency by running the show on a five second delay with an employee assigned to bleep out expletives (the employee bleeped one expletive but missed another). *Remand Order*, 21 FCC Rcd. at 13310. Given that this Court found the CDA vague despite its narrowing requirements, it should certainly find the FCC's indecency policy—which lacks narrowing requirements—to be vague.

B. The FCC's Indecency Policy Is Inherently Vague

Even if this Court finds that *Reno* is not controlling, the FCC's indecency policy is unconstitutionally vague. The vagueness doctrine serves two important aims. The first is to provide fair notice because "[v]ague laws may trap the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The second is "to eliminate the impermissible risk of discriminatory enforcement." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991). The FCC's policy fails both aims. It relies on undefined "community standards," inconsistently applied "context," and an ever-changing set of "patently offensive" words. As such, the policy offers neither fair notice nor standards to prevent arbitrary enforcement. Furthermore, this Court's decision in *Pacifica* does not foreclose a vagueness challenge.

1. The FCC's policy does not give broadcasters fair notice

The FCC's policy is vague in three crucial respects. First, the FCC relies on "contemporary community standards for the broadcast medium." *Industry Guidance*, 16 FCC Rcd at 8002. The FCC has not defined these community standards, other than to say they are national, despite this Court's admonition that "our Nation is simply too big and too diverse for

this Court to reasonably expect that such standards [as 'patently offensive'] could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists." *Miller v. California*, 413 U.S. 15, 30 (1973). Without further guidance, national broadcasters are forced to cater every show to the most conservative community in the country—exerting a huge chilling effect on speech. *See Reno*, 521 U.S. at 877-78 ("[T]he 'community standards' criterion as applied to the Internet means that any communication available to a nation wide audience will be judged by the standards of the community most likely to be offended by the message.").

This lack of clarity is worsened by the FCC's geographically inconsistent enforcement of its national standard. In 2004, the FCC fined all stations that aired *Married By America* nationally based on complaints in a few localities. *Married By America,* 19 FCC Rcd. at 20191. Two years later, the FCC fined only Viacom-owned stations—and not other stations that screened the same material—over the Super Bowl Halftime Show. *Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004, Broad. of the Super Bowl XXXVIII Halftime Show*, 19 FCC Rcd. 19230, 19240 (2004). Then, later the same year, in the *Omnibus Order*, the FCC fined only those stations whose viewers complained—excusing stations that screened the same material at the same time but had less quarrelous viewers. J.A. 61. Broadcasters are left guessing not only how every local community will view a broadcast, but also which FCC enforcement approach governs.

Moreover, broadcasters are left to guess the content of the community standards. In *Miller v. California*, this Court held that community standards are a question of fact that only local juries can decide. 413 U.S. at 30. The FCC, however, divines community standards from its "collective experience and knowledge" applied to viewer complaints. *Infinity Radio License, Inc.*, 19 FCC Rcd. 5022, 5026 (2004). But this collective experience is malleable to current

events: the *2002 Billboard Music Awards* did not violate community standards when screened in 2002, *Golden Globes*, 19 FCC Rcd. at 4980 n.32, but did when the FCC reconsidered the same awards ceremony one month after the 2004 Super Bowl, J.A. 101. And consumer complaints give little extra insight into community standards: most were identically worded, *see* J.A. 298-417, and fully 99.8% were generated by one organization, the Parents Television Council.[5]

Second, the FCC's focus on context confuses the standard. The FCC has emphasized that "the full context in which the material appeared is critically important." *Industry Guidance*, 16 FCC Rcd at 8002. The FCC has wavered, however, over what context is relevant. In *Saving Private Ryan*, a general parental advisory at the start of the movie contributed to a finding it was not indecent. *Private Ryan*, 20 FCC Rcd. at 4513. But in *Con El Corazón En La Mano*, another fictional movie, a specific parental advisory at the start of the objectionable scene was irrelevant. J.A. 66. Similarly, in *Saving Private Ryan*, "the film's objective" to inform viewers about World War II was crucial. *Private Ryan*, 20 FCC Rcd. at 4512. But in *The Blues*, the station's "good faith belief that the use of these expletives served a legitimate informational purpose" of informing viewers about a music genre was irrelevant. J.A. 92.

Third, the FCC has articulated no coherent principle to determine which words are patently offensive. After *Pacifica*, the FCC focused its enforcement on the seven words in the Carlin monologue. *Infinity Broad. Corp*., 3 FCC Rcd. at 930. During the twelve years the FCC followed this "highly restricted enforcement standard," it brought no enforcement actions—broadcasters willingly complied with the clear standard. *Id*. The FCC now rejects this standard

[5] In 2003, 99.8% of complaints were sent directly by the Parents Television Council or through its websites; in 2004, the figure was 99.9%. Tim Goodman, *Couch Potatoes, It's Time To Drop the Remote. E-mail the FCC. Stop the Parents Television Council Before It Gets Beyond the TV*, S.F. Chron., Dec. 13, 2004, http://articles.sfgate.com/2004-12-13/entertainment/17458127_1_fcc-parents-television-council-fcc-chairman-michael-powell-moral-values.

because it claims it cannot anticipate what indecent language broadcasters will use next. *Id*. But as the Second Circuit noted, "If the FCC cannot anticipate what will be considered indecent under its policy, then it can hardly expect broadcasters to do so." *Fox III*, 613 F.3d at 331.

The FCC's enforcement record bears out this warning. The FCC found that a rapper's description of a woman as a "six foot blow job machine" was "not sufficiently graphic." *KBOO Found.*, 18 FCC Rcd. 2472, 2474 (2003). But a detective's exclamation "alright, this is bullshit" was sufficiently graphic. J.A. 114 n.187. Similarly, the line "it's not so fucking simple" uttered during the *2003 Billboard Music Awards* "inherently has a sexual connotation," J.A. 107, but the phrase "sex with a dog" uttered during the same awards ceremony did not. J.A. 110 n.180. And while "cow shit out of a Prada purse" was patently offensive because it described excretory activities, J.A. 107-08, "a lot of crap," "my ass," and a discussion of "poop" were not. J.A. 110 n.180. Such rulings do not give broadcasters fair notice of what the FCC considers indecent.

2. Pacifica *does not foreclose this vagueness challenge*

The Second Circuit rightly rejected the FCC's argument that *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), forecloses this vagueness challenge. *Fox III*, 613 F.3d at 329. This Court's narrow holding in *Pacifica* did not address whether the FCC's policy was facially vague. *Pacifica*, 438 U.S. at 742. Instead, the Court's "review [was] limited to the question whether the Commission has the authority to proscribe this particular broadcast"—a 12 minute string of seven expletives broadcast at 2 o'clock in the afternoon. *Id*. In concurrence, Justice Powell emphasized that the decision relied on the FCC's history of "proceed[ing] cautiously" in enforcement. *Id*. at 761 n.4 (Powell, J., concurring). The FCC no longer proceeds cautiously, and now pursues alleged indecency far beyond "the verbal shock treatment" involved in *Pacifica*. *Id*. at 761. As such, *Pacifica* is not controlling.

C. The FCC's Arbitrary Enforcement Has Chilled Protected Speech

Vague content-based speech regulations are particularly suspect "because of [their] obvious chilling effect on free speech." *Reno*, 521 U.S. at 845. Vague regulations "inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). Since indecent speech is fully protected by the First Amendment, *Reno*, 521 U.S. at 874-75, the chilling effect of the FCC's indecency policy renders it unconstitutional.

The Second Circuit correctly found that "there is ample evidence in the record that the FCC's indecency policy has chilled protected speech." *Fox III*, 613 F.3d at 334. For example, several CBS affiliates refused to air a Peabody Award-winning 9/11 documentary because of the FCC's policy. J.A. 277. The affiliates feared the FCC might object to the documentary's real audio footage of firefighters in the World Trade Center on September 11 because it included occasional expletives. *Id*. Similarly, 80% of PBS affiliates declined to air an unedited version of the *Frontline* documentary "A Company of Soldiers," which follows the U.S. Army's 1-8 Cavalry Regiment in South Baghdad, because they feared FCC action over the soldiers' occasional expletives. J.A. 278.

The FCC's policy has achieved this chilling effect both directly and indirectly. Most obviously, the threat of $325,000 fines for every licensee that broadcasts a show is a significant deterrent to airing controversial content. But the fines have also fostered an internal culture of self-censorship. Thus in Buffalo, New York, a broadcaster cancelled a radio reading service for the blind after it received a single complaint about a reading of Tom Wolfe's novel *I Am Charlotte Simmons*. J.A. 268. The broadcaster had aired the reading service for the blind for fourteen years, but now feared heavy FCC fines. *Id*. Following public uproar, the broadcaster

restored the reading service, but with strict limits on the timing and content of its broadcasts. J.A. 269.

The FCC's application of its policies to live broadcasts has had a particularly strong chilling effect. News broadcasts rely on live crowd coverage and interviews with citizens to cover time-sensitive events. Yet such coverage generates unique risks that citizens will utter expletives, especially in the heated atmosphere of a political event or natural disaster. Because the FCC has "no outright news exception," *Remand Order*, 21 FCC Rcd. at 13327, many broadcasters have opted not to take this risk at all. For example, several Phoenix television stations dropped coverage of a live memorial for army ranger Pat Tillman because of language used by mournful family members. J.A. 278.

Other broadcasters have gone further, cancelling live events altogether. One Pennsylvania news program has stopped all live coverage of news events involving crowds "unless they affect matters of public safety and convenience." J.A. 263. And a Vermont television station refused to air a political debate because one of the politicians involved had previously used expletives on the air. *Fox III*, 613 F.3d at 334-35. Coverage of such events—including political rallies, debates, and protests—cuts to the core of First Amendment protection.

The FCC's response to these concerns has only chilled speech further. The FCC tells broadcasters to delay live broadcasts or use "bleeping" technology. J.A. 110. But the power of live broadcasting is its spontaneity—delayed and edited coverage of a political rally cannot convey its urgency, or indeed purport to be "live" at all. J.A. 295. And bleeping technology—for stations large enough to afford the installation costs[6]—exerts its own chilling influence. Because technicians charged with bleeping must make spur of the moment decisions—under the threat of

[6] Fox estimates that installing an audio delay system for all live programming would cost an estimated $16 million a year. *Fox III*, 613 F.3d at 334 n.10. Small stations unable to afford this technology must choose between risking $325,000 fines per violation and foregoing live broadcasting altogether.

huge fines and with only the FCC's vague standards to guide them—they err toward over-censorship. J.A. 291. For example, at the 2007 Emmy's Awards, technicians cut off Sally Field's anti-war comments in mid-sentence after she used the word "goddamn" because they feared the FCC might object.[7]

The policy has also chilled speech with social and artistic value. The FCC's indecency policy has an "artistic necessity" exception. But the exception is not absolute—indeed, the FCC found the exception did not apply to a PBS documentary on the blues music genre. J.A. 93. As such, broadcasters feel they must self-censor even works with social value. J.A. 220. For example, Fox shelved an episode of *That 70's Show* about masturbation—an episode which subsequently won an award from the Kaiser Family Foundation for its honest depiction of a sexual health issue, J.A. 283; Garrison Keillor now self-censors his beloved public radio program *A Prairie Home Companion*, J.A. 225-27; and radio stations truncated a poem by a survivor of the World Trade Center attacks because it included the word "bullshit," J.A. 214-16.

Nor is delayed coverage of news events immune. 80% of PBS affiliates refused to screen footage of the Iraqi elections and the battle for Fallujah because of explicit language used by American soldiers. J.A. 279. A public radio station in California refused to air an interview with a seventeen year-old survivor of the Dawson College shooting because he used the words "fuck" and "bullshit" to express his grief at the loss of two friends. J.A. 217. And NPR affiliates faced a dilemma over whether to air President Bush's comment to British Prime Minister Tony Blair at the G8 leaders summit: "get Syria to get Hezbollah to stop doing this *shit* and it's over." *Id*. (emphasis added). Ultimately affiliates aired the comment and no one complained. *Id*. But they each risked a $325,000 fine simply to air the comments of the nation's President. J.A. 218.

[7] "If mothers ruled the world, there wouldn't be any god-" Sally Field began, when the sound went dead. Chopped off were the words "goddamn wars in the first place." Edward Wyatt, *Fox Explains Censorship of Actors at Emmys*, N.Y. Times, Sept. 18, 2007, http://www.nytimes.com/2007/09/18/arts/television/18emmy.html?ref=sallyfield.

* * *

The FCC policy's definitions of "indecency" and "patently offensive" are too imprecise to provide a person of ordinary intelligence fair notice of what is prohibited. This Court held statutory language almost identical to the FCC's indecency definitions impermissibly vague in *Reno*. Because the FCC's tests and presumptions do not clarify its definitions, this Court should find *Reno* is controlling. But even if it is not, the FCC's policy is vague because it relies on undefined "community standards," inconsistently applied "context," and an ever-changing set of "patently offensive" words. Moreover, the FCC's arbitrary enforcement of its policy has chilled protected speech. As such, this Court should hold that the FCC's indecency policy is void for vagueness under the Fifth Amendment.

II. THE FCC'S INDECENCY REGULATIONS ARE FACIALLY INVALID UNDER THE FIRST AMENDMENT BECAUSE THEY ARE NOT NARROWLY TAILORED

Should the Court hold that the FCC's regulations are not unconstitutionally vague, the regulations should be invalidated because they violate the First Amendment. The indecency regulations are restrictions on pure speech and may only be permitted if they are narrowly tailored. Because of changes in technology, the broadcast regulations are now both over and underinclusive and should be struck down.

A. To Be Constitutional, The Regulations Must Be Narrowly Tailored

The FCC's indecency restrictions are content-based regulations—the FCC's policy forbids only messages containing indecent content. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811 (2000) ("'[F]ocus[ing] *only* on the content of the speech and the direct impact that speech has on its listeners' . . . is the essence of content-based regulation." (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988) (opinion of O'Connor, J.))). The FCC cannot argue that the

regulations affect only the form, and not the content, of the communication. The Court has recognized that the words used to express a message cannot be separated from the content of that message, *Cohen v. California*, 403 U.S. 15, 25-26 (1971); regulating the form of communication *is* regulating the content, *see Texas v. Johnson*, 491 U.S. 397, 410-11 (1989). Moreover, as the FCC has acknowledged, the content being restricted is protected speech under the First Amendment. *Golden Globes*, 19 FCC Rcd. at 4977; *see also Sable Communc'n of Cal. v. FCC*, 492 U.S 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment . . . .").

Such "content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Content-based broadcasting regulations are only permissible if the "restriction[s] [are] narrowly tailored to further a substantial governmental interest." *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984). The narrow tailoring requirement is identical to that of strict scrutiny—both require that the restrictions are the least restrictive means. *Compare Playboy*, 529 U.S. at 813 (For strict scrutiny, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."), *with League of Women Voters*, 468 U.S. at 395 (finding a broadcasting restriction to be invalid because the government's "interest can be fully satisfied by less restrictive means").

Since they are content-based, the FCC's regulations cannot be evaluated under the more permissive standards reserved for time, place, and manner restrictions. *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536 (1980) ("[A] constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech."). It is true that the FCC's regulations limit indecent speech to certain hours of the day instead of banning it outright. *See Sable*, 492 U.S. at 127. But, as this Court held in *Playboy*,

channeling indecent speech to limited hours of the day is still a burden on speech and does not receive any lower scrutiny: "It is of no moment that the statute [restricting indecent cable programming to 10 p.m. to 6 a.m.] does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Playboy*, 529 U.S. at 812.

There are thus two essential questions for the regulations' constitutionality: (1) whether less restrictive alternatives exist to accomplish the government's asserted goals; and (2) whether the regulations are too underinclusive to meet the government's asserted goals. If the regulations go either too far or not far enough, they are not narrowly tailored and are unconstitutional. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741-42 (2011).

B. The Regulations Are Not Narrowly Tailored Because They Are Not The Least Restrictive Means To Meet The FCC's Asserted Interests

1. *Broadcasting indecency restrictions were appropriate when first developed*

The government asserts two goals to justify its regulations—the protection of children from indecency and the protection of adults who wish to exclude indecency from their homes. These two goals are similar in that they aim to protect subgroups of the population. Under the least restrictive means requirement, the government must, where possible, protect *only* those particular subgroups; everyone else should be allowed to choose what to watch for herself. That is why laws forbidding the sale of indecent books to minors have been upheld, *Ginsberg v. New York*, 390 U.S. 629, 634, 639 (1968), but laws banning indecent books altogether have been struck down, *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (The government may not "reduce the adult population . . . to reading only what is fit for children."). Similarly, laws entirely

banning lewd (but not obscene) mailings are forbidden, *see Miller*, 413 U.S. at 27, but laws that allow adults to choose to forbid lewd mailings to their own home have been upheld, *Rowan v. U.S. Post Dep't*, 397 U.S. 728, 737-38 (1970).

Indeed, the Court has struck down general indecency restrictions in every other form of media where they have been attempted. *See Playboy*, 529 U.S. 803 (invalidating cable indecency restrictions); *Reno*, 521 U.S. 844 (invalidating internet indecency restrictions); *Sable*, 492 U.S. 115 (invalidating telephone indecency restrictions). *Sable*, for instance, held that a ban on "dial-a-porn" services was not narrowly tailored because the government could instead require the services to use credit cards, access codes, and message scrambling to weed out children. *Sable*, 492 U.S. at 122, 130-31. And in *Playboy*, the Court struck down restrictions on cable indecency because it was possible for parents or offended viewers to exclude the content on a "household-by-household basis" by using blocking technology. *Playboy*, 529 U.S. at 815. The basic rule is that where filtering by the viewer or listener is possible, bans at the source are unconstitutional.

In the past, broadcasting indecency regulations have been upheld. But those regulations were entirely consisted with the least-restrictive-means approach. The restrictions were not justified on the grounds that it was especially important to have wholesome broadcasting or because television was uniquely popular. Instead, the regulations were justified by the nature of the technology—for most of broadcasting history, no filtering existed. *See Playboy*, 529 U.S. at 815 (explaining that cable and broadcasting are treated differently only because of the lack of blocking technology for broadcasting). Once content was broadcast, it went to every home within range. *Pacifica*, 438 U.S. at 748 (focusing on broadcasting's "pervasive[ness]"). There was no way to distinguish between children and adults or the offended and the unoffended. Any person who turned on a television or radio ran the risk of encountering indecent material.

"Because the broadcast audience [was] constantly tuning in and out, prior warnings [could not] completely protect the listener or viewer from unexpected program content." *Id; see also Reno*, 521 U.S. at 867 (justifying *Pacifica* on the grounds that there was no way to "protect the listener from unexpected program content"). Under those circumstances, the only way to limit anyone's exposure to indecency was to "restrict[] the expression at its source." *Pacifica*, 438 U.S. at 749. In their time, the regulations upheld in *Pacifica* were the least restrictive means available.

The least restrictive means, however, is not a static concept. Especially where technology is involved, the options available can change. And that is exactly what has happened with broadcasting. The FCC's regulations may have been appropriate in an age where broadcasting could not be filtered by viewers. But modern technology allows for less restrictive options. *See Fox II*, 129 S. Ct. at 1822 (Thomas, J., concurring).

2. Modern technology, especially the V-Chip, allows for a less restrictive alternative

Virtually every functioning television in America now includes a V-Chip, a device used to selectively block television programs based on the programs' content. Since January 1, 2000, V-Chips have been required in all new television sets thirteen inches or larger. *Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, 24 FCC Rcd. 11413, 11418 n.20 (2009) ("*Parental Control*"). For older televisions, those connected to a pay television service, like cable or satellite, can access V-Chip technology through their service provider. *V-Chip - Putting Restrictions on What Your Children Watch* (*V-Chip*), FCC, http://www.fcc.gov/guides/v-chip-putting-restrictions-what-your-children-watch (last visited on Nov. 10, 2011). Older televisions relying on broadcast also have access to V-Chips because of the transition to digital broadcasting—older televisions must use a digital-to-analog convertor box, which must include V-Chip technology. *Id.*

All television programs now include a rating ranging from TV-G (for general audiences) to TV-MA (for mature audiences only). *Parental Control*, 24 FCC Rcd. at 11419; *see* Telecommunications Act of 1996, Pub. L. No. 104-104, § 551, 110 Stat. 56, 139-42. The rating is displayed in the upper-left hand corner of the television's display for the first fifteen seconds of the program and is encoded into the broadcast or cable signal. *Parental Control*, 24 FCC Rcd. at 11425 n.68; *V-Chip*, *supra*. Using the V-Chip, viewers and parents can program their television to block out certain channels or ratings. *V-Chip*, *supra*. If they so choose, parents can also password protect channels or programs with certain ratings so that they, but not their children, can watch them. *Id.*

The V-Chip provides the less restrictive alternative that was missing in *Pacifica*. Any parent who so wishes may now restrict her children's viewing to certain channels and may block programs she deems inappropriate. Adults who are themselves offended by indecency can check the ratings of programs in advance or may choose to block programs on certain topics to avoid accidentally seeing them.[8] The V-Chip addresses the interests the government asserts without restricting speakers or preventing unoffended viewers from watching the programs of their choice. *See Playboy*, 529 U.S. at 818 ("What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority."). With the availability of the V-Chip, the FCC's current restrictions are neither appropriate nor constitutional.

3. The FCC cannot meet its burden of showing that the V-Chip is an ineffective alternative

Importantly, while we argue that the V-Chip is an effective alternative, there is no requirement that we do so. Once a less restrictive alternative has been proposed, the government

[8] The V-Chip allows for fine-grained restrictions. A user could, if she so chose, block sex (TV-S), violence (TV-V), and strong language (TV-L), but allow suggestive dialogue (TV-D). *Parental Control*, 24 FCC Rcd. at 11419.

bears the burden of showing that it is inadequate. *Playboy*, 529 U.S. at 816. The government cannot meet that burden. The government relies on hazy predictions and conclusory statements, exactly the kind of argument this Court has previously rejected. *See Sable*, 492 U.S. at 129-20. Until the government can show evidence that the less restrictive alternative will fail, the alternative must be attempted. *See id.* at 130-131.

The FCC's arguments against reliance on the V-Chip can be broken down into three basic claims: (1) the V-Chip puts the burden on parents, when parents should be able to rely on broadcasters, *Parental Control*, 24 FCC Rcd. at 11420; (2) too many parents do not know about or understand the television ratings and the V-Chip, *id.*; and (3) the V-Chip cannot filter out indecency that inadvertently occurs during programs not rated for strong language or nudity, *Remand Order*, 21 FCC Rcd. at 13306. All of these arguments are undermined by Court precedent and by actual facts.

First, in most First Amendment contexts, the viewer or listener bears the burden of avoiding speech that she finds offensive. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975). *Pacifica* made an exception to this rule for broadcasting because viewers in their own homes should not have to experience the "first blow" of indecency. *Pacifica*, 438 U.S. at 748-49. But the issue was not that it would be inconvenient or difficult to avoid indecency in the home; the issue was that it would be impossible. *See Cohen*, 403 U.S. at 21-22 (holding that speech may only be banned if listeners are "powerless" to avoid it). The V-Chip solves this problem: users can block out indecency before it ever arrives in the home. "It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient . . . ." *Playboy*, 529 U.S. at 824. The First Amendment is frequently inconvenient, but as a society we have chosen to bear

that burden. *See Consol. Edison Co.*, 447 U.S. at 542 (holding that, even in the home, people can be forced to bear the inconvenience of throwing out political mail).

Second, parents do know about and understand the television ratings and the V-Chip. As of 2007, 70% of parents knew about the V-Chip and over 80% knew about television ratings.[9] Kaiser Family Found., *Parents, Children, & Media: A Kaiser Family Foundation Survey* 8 (2007), *available at* www.kff.org/entmedia/upload/7638.pdf. There is some confusion about the more arcane ratings—only 11% of parents understood that TV-FV, which covers fantasy violence, had something to do with violence. *Id.* at 27. But most parents did understand what TV-MA and TV-14 meant—mature audiences and audiences 14 or older, respectively—and those are the only ratings parents would need to block to avoid indecency. *Id.* at 28. In fact, of the 80% of parents who knew about the ratings, 89% understood them well enough to find them useful. *Id.* at 21. As of 2007, 53% of parents were using the television ratings. *Id.* at 8. That is almost identical to the proportion of parents who use the video game ratings (56%), Kaiser Family Found., *supra*, at 8, which were found to be a sufficient alternative to a ban on violent video games in *Brown v. Entertainment Merchants Association*, 131 S. Ct. at 2740-41.

The V-Chip is similarly popular and well-understood. Among those who used V-Chips, 89% found them useful. *Kaiser*, *supra*, at 30. For parents who did not use the V-Chip, the number one reason they did not use it was because they did not feel it was necessary. *Id.* at 10. Less than 1% said that they did not to use the V-Chip because they did not understand it. *Id.* at 31. In fact, parents have ample knowledge and understanding of the V-Chip. And over time the amount of knowledge has only grown. *Id.* at 22, 28, 30. But even if there were a general lack of knowledge or understanding about the V-Chip, the government bears the burden of showing that increased educational efforts would be ineffective. *Playboy*, 529 U.S. at 825-26.

[9] Those numbers are likely even higher now because of the conversion to digital television.

Third, the least restrictive alternative need not be perfect. *Playboy*, 529 U.S. at 821. A small amount of indecency slipping through does not doom an alternative as "ineffective." *Id.* Moreover, technology currently exists, and is available to parents, that automatically screens out selected words from television programs. *Parental Control*, 24 FCC Rcd. at 11445-48; *see also Playboy*, 529 U.S. at 814 ("[T]he mere possibility that user-based . . . screening software [will] 'soon be widely available' [is] relevant to our rejection of an overbroad restriction of indecent [speech]." (quoting *Reno*, 521 U.S. at 876-77)).

Just as importantly, a regulation violates the First Amendment if even a "substantial" amount of its speech restrictions are impermissible. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). While the V-Chip may not prevent unscripted indecency, it is the least restrictive alternative for the vast majority of programming, which is scripted and rated appropriately in advance. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("[W]e have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."). Under the current rules, broadcasters cannot air many popular or critically acclaimed movies unedited for risk of drawing the FCC's ire. Edgy television programs are reined in for fear of offending. *See* J.A. 284-85. By design, a substantial amount of programming is being kept from the airwaves.

The V-Chip is a less restrictive alternative to the FCC's current regulations. Bans on broadcasting indecency may have been appropriate in an earlier era, but new technology allows for individuals, instead of the government, to choose what they wish to see and hear. The First Amendment requires that people be given that choice.

C. The Regulations Are Not Narrowly Tailored Because They Are Underinclusive

The FCC's regulations are also underinclusive to meet their asserted goals. Underinclusiveness may be permissible in some laws, but it is unacceptable in the First Amendment context.[10] *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 58 (1986). "Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Entm't Merchs. Ass'n*, 131 S. Ct. at 2740. Even on its own, underinclusiveness is enough to invalidate a regulation. *Id.*

The FCC argues that it must restrict fleeting expletives because even a single use of an indecent word can harm a child or offend an unwilling listener. *Golden Globes*, 19 FCC Rcd. at 4982. The FCC's regulations are underinclusive to meet that asserted interest, however, because they allow for indecent language on "*bona fide* news" programs, *Remand Order*, 21 FCC Rcd. at 13327-28, and some other programs, *see Private Ryan*, 20 FCC Rcd. 4507.

If the FCC were truly concerned that hearing even one vulgar word would "enlarge[] a child's vocabulary in an instant," *Golden Globes*, 19 FCC Rcd. at 4982 (quoting *Pacifica*, 438 U.S. at 749), then it would forbid indecent language on all programs, even news programs. It does parents little good to protect children from reality stars at the *Billboard Music Awards*, but not reality stars on *The Early Show*. The FCC has justified its news exception by noting the special importance of the press to the First Amendment. *Remand Order*, 21 FCC Rcd. at 13327. But the Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." *Citizens United v. FEC*, 130 S. Ct. 876, 905 (2010) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia,

[10] The Court found that the underinclusiveness of the FCC's regulations were not enough to make the regulations arbitrary and capricious. *Fox II*, 129 S. Ct. at 1814. But the constitutional issue was explicitly reserved. *Id.* at 1819.

J., dissenting)). Entertainment and fiction receive equally full First Amendment protection as news or current events. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2733. Setting aside certain topics for protection does not honor the First Amendment; it violates it. *Police Dep't v.* Mosley, 408 U.S. 92, 96 (1972).

Reliance on the "full context" of the programming cannot change the matter. *See Remand Order*, 21 FCC Rcd. at 13304. For *Saving Private Ryan*, the FCC felt that removing the language would "alter[] the nature of the artistic work and diminish[] the power, realism[,] and immediacy of the film experience for viewers." *Private Ryan*, 20 FCC Rcd. at 4513. But that judgment has no bearing on protecting children or offended adults. Under the FCC's asserted rational, no one should have to endure the "first blow" of indecency, even for high-quality programming. *See Remand Order*, 21 FCC Rcd. at 13309. The Constitution does not allow the FCC to be an arbiter of taste. *See United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010) (stating that the concept of measuring First Amendment protections by balancing the costs and benefits of speech "is startling and dangerous").

News shows and war movies may be directed at an adult audience, *Private Ryan*, 20 FCC Rcd. at 4513, but "audiences are constantly tuning in and out," *Pacifica*, 438 U.S. at 749, and anyone could easily stumble upon the indecent language. Moreover, there is no reason to believe that seeing indecency on news programs or war movies will have less of a harmful effect on children. "[C]hilden mimic the behavior they observe," *Fox II*, 129 S. Ct. at 1813; they can be expected to mimic news programs or war movies just like any other programs.

* * *

Broadcasting may receive a lower degree of First Amendment protection, but regulations must still be narrowly tailored. The government has not met that requirement. As they stand, the

FCC's regulations are underinclusive to meet the government's asserted interests. Because the V-Chip and other technology now allow for viewers to choose for themselves what content to view and not view, the FCC's regulations are also not the least restrictive means available. Without narrow tailoring, the regulations violate the First Amendment and should be invalidated.

III. THE FCC'S REGULATIONS VIOLATE THE FIRST AMENDMENT AND ARE INVALID AS APPLIED BECAUSE THEY DO NOT REQUIRE SCIENTER

If the Court holds that the FCC's regulations are not facially invalid, it should hold that the regulations are invalid as applied to unscripted, fleeting expletives. The Court has previously held that any rule forbidding obscenity must include a scienter element. *Smith v. California*, 361 U.S. 147, 155 (1959). While it is not necessary that the person have known the material was obscene, the government must show that the person knew of its content. *Hamling v. United States*, 418 U.S. 87, 123 (1974). Any protection the Court has provided to obscenity applies even more strongly here. While obscenity is outside of the First Amendment, *Smith*, 361 U.S. at 152, indecency is protected speech, *Sable*, 492 U.S. at 126.

In *Smith*, the court made several holdings relevant to this case: (1) while the government may restrict the sale of obscene books, it may not restrict the sale of non-obscene books, *Smith*, 361 U.S. at 152 ("[O]ur . . . [obscenity cases] do[] not recognize any state power to restrict the dissemination of books which are not obscene . . . ."); (2) penalizing the unknowing sale of obscene books will lead booksellers to sell only books they have been able to inspect, *id.* at 153 ("[I]f the bookseller is criminally liable without knowledge of the contents . . . he will tend to restrict the books he sells to those he has inspected . . . ."); and (3) forcing booksellers to inspect all of their books is a restriction on non-obscene books, and is thus unconstitutional, *id.* ("[T]he bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted."). Each step of that logical progression applies here.

First, even accepting a robust power to regulate indecency, the FCC has no authority to regulate speech that is *not* obscene, indecent, or profane. *See* 18 U.S.C. § 1464.

Second, holding broadcasters liable for all indecency they air, even when they did not know the content in advance, will lead broadcasters to air only material that they can prescreen. J.A. 262-63, 288-89, 295 (declarations by television executives that the regulations are forcing them to eliminate live broadcasts and breaking news coverage). Instead of live broadcasts, broadcasters will be forced to use delaying technology or prerecorded material. The FCC cannot dispute this fact. Not only has the FCC acknowledged that its rules *will* encourage prescreening, it has stated that it *wants* its rules to encourage prescreening. *Remand Order*, 21 FCC Rcd. at 13312-14; J.A. 110 n.179.

Third, forcing broadcasters to prescreen all material is a restriction on non-indecent material. The vast majority of live programming is not indecent. Requiring broadcasters to prescreen all programming burdens that non-indecent material at significant cost. The delaying technology itself is expensive, *Fox III*, 613 F.3d at 334 n.10, but the true cost, as in the case of bookstores, is the cost of manpower, J.A. 283-86 (stating that between four and eight employees are necessary to screen each live broadcast). Also, delaying technology is not foolproof—the *2003 Billboard Music Awards* were broadcast with a delay, but the indecency slipped through—and broadcasters will be hesitant to take the risk. J.A. 109-10. As with bookstores, these burdens on speech have the inevitable effect of reducing the material available to the public.

The FCC has claimed that the burden of delaying broadcasting is minimal. Even if true—which it is not—that misses the point. Whether minimal or not, the FCC has no right to burden non-indecent speech. *See League of Women Voters*, 468 U.S. at 380 n.13, 402; *see also Playboy*, 529 U.S. at 812 (holding that burdens on speech implicate the First Amendment as much as bans

on speech). For all the same reasons that scienter is required in obscenity prosecutions, scienter must be required here. Punishing the broadcasters when they did not know the content of the messages would chill protected speech.

In its initial ruling, the FCC held that the broadcasters had satisfied the necessary statutory scienter elements. J.A. 112. Its rationales for this holding, however, pose grave First Amendment issues. The FCC asserted that broadcasters should be held responsible because they are "on notice" that celebrities sometimes curse on the air. J.A. 109. That argument proves too much. After all, booksellers were "on notice" that obscene books existed, but that was insufficient for the Court in *Smith*.

The FCC implies that broadcasters should be held responsible when they knowingly use scripts including risqué language—like "freaking" and "crap"—that could ultimate lead to indecency. *Remand Order*, 21 FCC Rcd. at 13311-12; *see* J.A. 110 n.180 (holding that "crap" is not indecent). But the risqué language is not itself indecent. Basing liability on the planned use of such language is a burden on that language. While the FCC may disapprove of words like "freaking" and "crap," it may not burden their use.

Finally, the FCC argues that the broadcasters should be held responsible because they knowingly relied on celebrities with histories of indecency like Ms. Richie. *Remand Order*, 21 FCC Rcd. at 13312. The consequence of this argument, if accepted, would be that broadcasters would be reluctant to allow risky speakers on the air. Such a result is a clear chilling of speech. *See Fox III*, 613 F.3d at 334-35 (noting that a local station has refused to broadcast a political debate including candidate who had previously sworn on air). No matter how vulgar Ms. Richie may be—and no matter how distasteful the FCC may find her—the FCC may not burden her

ability to speak. Disfavoring particular speakers is a core First Amendment sin. *Citizens United*, 130 S. Ct. at 898-99.

* * *

Holding broadcasters liable for indecency without requiring that they knew of the content will have a chilling effect. It may be possible for the broadcasters to avoid liability by prescreening all programs—just as booksellers could have prescreened all books—but that places too high of a burden on protected speech. The Court has required scienter before obscenity can be punished; it should do the same for indecency. The FCC's regulations should be held to be invalid as applied to speech where the broadcasters did not know the content before broadcast.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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