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 PETITIONERS

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QUESTIONS PRESENTED

(1) Since Congress passed the Radio Act of 1927, there has been a statutory prohibition on the broadcast of indecent material. The FCC's current definition of indecency is identical to the one it applied when this Court first upheld an indecency determination in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). In light of more than thirty years of guidance to broadcasters about how to comply with these rules, are the FCC's indecency regulations void for vagueness under either the First or Fifth Amendments?

(2) When broadcasters are "granted the free and exclusive use of a limited and valuable part of the public domain . . . that franchise is burdened by enforceable public obligations." *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981). These "obligations" include a congressional prohibition on the broadcast of indecent material between 6 A.M. and 10 P.M. Under the First Amendment, does the government's interest in protecting children from unwanted, indecent material in the home outweigh broadcasters' interest in transmitting indecent content when children are likely to be in the audience?

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 Televisions Stations v. FCC*, 613 F.3d 317 (2d Cir. 2010), 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 Televisions Stations 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*, 404 F. App'x 530, 535 (2d Cir. 2011), 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 III 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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STATEMENT OF JURISDICTION

The panel decision of the court of appeals was filed on July 13, 2010. The petition for writ of certiorari was filed on April 21, 2011 and granted on June 27, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. The Fifth Amendment provides, in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

Section 1464 of Title 18 of the United States Code provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." Section 503(b)(1)(D) of Title 47 of the United States Code provides, in relevant part, that "[a]ny person who is determined by the [Federal Communications] Commission . . . to have violated any provision of section . . . 1464 . . . of Title 18 shall be liable to the United States for a forfeiture penalty."

STATEMENT OF THE CASE

This case, which comes before the Court for the second time, arises out of two broadcasts by Fox Television Stations, Inc. and its affiliates ("Fox") during 2002 and 2003. The Federal Communication Commission ("FCC" or "Commission") found both broadcasts indecent in violation of 18 U.S.C. § 1464, although it did not initiate forfeiture proceedings. Fox appealed, claiming that the agency's determination was "arbitrary" and "capricious" under 5 U.S.C. § 706(2)(A) and that its regulations were unconstitutional under the First and Fifth Amendments. In *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) ("*Fox I*"), the Court held that the FCC had not acted arbitrarily or capriciously. However, it declined to reach the constitutional question, which had not been resolved by the lower court, and remanded the case for further proceedings. *Id.* at 1819. On remand, the Second Circuit found the FCC's indecency regime unconstitutionally vague. *See Fox Television Stations, Inc. v. FCC,* 613 F.3d 317 (2d Cir. 2010). Now, this Court faces the constitutional questions it left open in *Fox I*.

A. History of FCC Regulatory Authority

Congress first prohibited the broadcast of "obscene, indecent, or profane language" over the public airwaves in the Radio Act of 1927, Pub. L. No. 69-632, § 29, 44 Stat. 1162, 1173 (1927), and has since codified the requirement at 18 U.S.C. § 1464. Congress has tasked the FCC with enforcing § 1464 through imposing monetary forfeitures and by denying or revoking licenses. *See* 47 U.S.C. §§ 309(k) (licensure provisions); 312(a)(6) (renewal provisions); 503(b)(1)(D) (forfeitures).

The FCC first exercised this authority in 1975 in response to a 2 P.M. radio broadcast of George Carlin's "Seven Dirty Words" monologue. Prompted by listener complaints, the FCC issued a declaratory order seeking to "clarify the standards which will be utilized in considering

the public's complaints about the broadcast of 'indecent' language." *In re A Citizen's Complaint Against Pacifica Foundation*, 56 F.C.C.2d 94, ¶ 2 (1975) ("*Pacifica Order"*). The Commission explained that it defined indecency 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.* ¶ 11. Because the Carlin monologue used "words such as 'fuck,' 'shit,' 'piss,' 'motherfucker,' 'cocksucker,' 'cunt' and 'tit'," was broadcast at a time when children were undoubtedly in the audience, and was deliberately broadcast, the broadcast was indecent under § 1464. *Id.* ¶ 14. The Supreme Court upheld the FCC's action in *Pacifica Foundation v. FCC*, 438 U.S. 726 (1978).

In the decades following *Pacifica*, the Commission took a careful but gradually expanding approach to indecency regulation. It initially limited its enforcement to those specific words used in the Carlin monologue, but in 1987 it repudiated this view, finding it "unduly narrow as a matter of law and inconsistent with [the Commission's] enforcement responsibilities under § 1464." *In re Infinity Broadcasting Corp. of Pa.*, 3 F.C.C.R. 930, ¶5 (1987) (*"Infinity Order*"). The D.C. Circuit upheld the new "generic indecency" policy against a challenge that it was unconstitutionally overbroad, holding that the FCC's contextual inquiry was a legitimate method of channeling speech in order to protect children. *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339-40 (1988) (R. Ginsburg, J.), superseded in part by *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc).[1]

[1] The D.C. Circuit also upheld, with minor modifications, FCC regulations promulgated pursuant to the Public Telecommunications Act of 1992, § 16(a), Pub. L. No. 102-356, 106 Stat. 954 (1992). The regulations, codified at 47 C.F.R. § 73.3999(b), state that the Commission will enforce the statutory indecency ban only between the hours of 6 A.M. and 10 P.M. *See Action for Children's Television*, 58 F.3d at 654.

Despite the more expansive policy articulated in *Infinity Broadcasting*, the Commission continued to hold that "[i]f a complaint focuses solely on the use of expletives, we believe that . . . deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency." *In re Pacifica Foundation, Inc.*, 2 F.C.C.R. 2698, ¶13 (1987). In a 27-page policy statement released in 2001, the Commission moved away from this deliberate and repetitive expletive requirement. It explained that the "full context in which the material appeared is critically important" and outlined three principal factors that guided its decision-making: (1) whether the material is explicit or graphic; (2) whether the material dwelled on or repeated a description of sexual or excretory organs or activities; and (3) whether the material is intended to pander, titillate, or shock. *In re Industry Guidance On the Commission's Case Law Interpreting 18 U. S. C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999, ¶¶ 9, 10 (2001) ("*Industry Guidance*").

An incident at the 2004 Golden Globe Awards prompted the Commission to further clarify its policy on fleeting expletives. After receiving the "Best Original Song Award," the singer Bono commented on camera that the win was "really, really fucking brilliant." *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, ¶ 3 n.4 (2004) ("*Golden Globes Order*"). The Commission found Bono's language indecent. It reasoned first that "given the core meaning of the 'F-Word,' any use of that word . . . inherently has a sexual connotation." *Id.* ¶ 8. Second, "[t]he 'F-Word' is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language." *Id.* ¶ 9. Furthermore, the FCC declared that, in light of the potential for abuse and the development of technology that allowed broadcasters to "bleep" offending words using a short video delay, the "fleeting expletive" exception announced in its *Pacifica Order* was

no longer good law. *Id.* ¶¶ 9-11. It did not initiate enforcement proceedings, but announced that the *Golden Globes Order* served as "clear notice" of the fleeting indecency policy going forward. *Id.* ¶ 17.

B. The Present Indecency Determinations

These cases arise from incidents that occurred during the Billboard Music Awards in 2002 and 2003. Fox and its affiliates broadcast both of these programs live in the Central and Eastern Time Zones. In 2002, the artist Cher received a Lifetime Achievement Award and declared, "I've also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck 'em." In 2003, award presenters Nicole Richie and Paris Hilton engaged in a colloquy about their reality TV show "The Simple Life":

> Paris Hilton: Now Nicole, remember, this is a live show, watch the bad language.
>
> Nicole Richie: Okay, God.
>
> Paris Hilton: It feels so good to be standing here tonight.
>
> Nicole Richie: Yeah, instead of standing in mud and cow[blocked]. Why do they even call it "The Simple Life"? Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.

In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664, ¶ 12 n.164 (2006) ("*Omnibus Order*").

On March 15, 2006, the FCC issued its *Omnibus Order* to address hundreds of thousands of complaints regarding indecency on broadcast channels. The FCC ultimately concluded that four shows, including the 2002 and 2003 Billboard Music Awards, were indecent. As in the *Golden Globes Order*, the FCC did not propose a forfeiture because the broadcasters were not on notice about the fleeting expletive policy when the programming aired. *Id.* ¶¶ 106, 120.

Fox and its affiliates appealed, claiming that the fleeting expletive policy announced in the *Golden Globes Order* was arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A) and that it was an unconstitutional restriction on free speech. After the Second Circuit remanded the case so that the FCC could provide justifications for the policy, the Commission upheld its initial order. *See In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 13299 (2006) ("*Remand Order*"). The Second Circuit then held that the FCC's reasoning for the policy change did not satisfy the requirements of the Administrative Procedures Act. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2007). The Supreme Court reversed and remanded the case to the Second Circuit. *Fox I*, 129 S. Ct. at 1819.

C. The Decision Below

On remand, the Second Circuit considered Fox's constitutional objections to the FCC indecency policy. The Second Circuit recognized that "[b]roadcast radio and television . . . have always occupied a unique position when it comes to First Amendment protection." 613 F.3d at 325. Nevertheless, the Second Circuit concluded that "the FCC's indecency policy is unconstitutional because it is impermissibly vague." *Id.* at 327. In particular, the court objected to the FCC's determination that some words—like "bullshit"—were patently offensive, while others—like "pissed off"—were not. *Id.* at 330. It also thought the agency inconsistently applied its "*bona fide* news" and "artistic necessity" exceptions to the presumptive indecency of "fuck" and "shit." *Id.* at 331-32. In the court's view, this vested unpredictable discretion in the agency and opened the door for discriminatory enforcement, even though it admitted it "had no reason to suspect the FCC is using its indecency policy as a means of suppressing particular points of view." *Id.* at 333. The court then canvassed examples in which broadcasters claimed that they made editorial or programming choices because they were worried about inadvertently violating

the indecency policy. *Id.* at 334-35. The court concluded that the FCC's policy "has the effect of promoting wide self-censorship of valuable material which should be completely protected under the First Amendment." *Id.* at 335.

SUMMARY OF ARGUMENT

In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), this Court stated that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Id*. at 386. Since *Red Lion*, it has become a central pillar of this Court's First Amendment jurisprudence that the broadcast medium possesses unique characteristics that bolster Congress's regulatory power beyond what may be permissible in other expressive contexts. This "expansive" power, *id*. at 380, flows from the fact that a "licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981). Since 1960, one of those burdens has been the possibility of a civil forfeiture for violation of the statutory prohibition on the broadcast of indecent speech. 47 U.S.C. § 503(b)(1)(D).

This Court first upheld an FCC indecency determination in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), ruling that it was permissible for the Commission to issue a declaratory order against a radio station that had aired George Carlin's famous "dirty words" monologue. While the FCC has changed the *manner* in which it enforces the indecency statute, it applies the same definition of indecency today that it did when this Court decided *Pacifica* in 1978: "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." *Pacifica Order*, 56

F.C.C.2d 94, ¶ 11. Despite over 35 years of FCC guidance clarifying the nature of indecency, respondents contend that the FCC's indecency regulations are void for vagueness on First and Fifth Amendment grounds. This conclusion has no basis in either law or fact.

The purpose of vagueness doctrine is to ensure that individuals have "a reasonable opportunity to know what is prohibited" such that they can tailor their conduct to ensure compliance with the law. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The FCC's indecency regulations easily satisfy this standard. First, the FCC applies the same definition of indecency that it has for decades, ensuring that no "difference in language will provoke uncertainty among speakers." *Reno v. ACLU*, 521 U.S. 844, 870-71 (1997). Second, the FCC has continued to provide substantial industry guidance to broadcasters specifying how its indecency rules function in practice. This mitigates against a finding of vagueness, since even where regulations are marked by "flexibility and reasonable breadth," such indeterminacy is permissible so long as it is "clear what the [regulation] as a whole prohibits." *Grayned*, 408 U.S. at 110. Third, the FCC has been exceedingly cautious about imposing forfeitures when there is any chance of applying indecency rules in a novel or unfair way. This Court in *Fox I* emphasized that "the agency's decision not to impose any forfeiture or other sanction precludes any argument that it is arbitrarily punishing parties without notice of the potential consequences of their action." 129 S. Ct. at 1813. In short, the FCC has been meticulous when it comes to applying its indecency rules fairly and with ample notice to broadcasters. Consequently, the FCC's indecency regime is sufficiently clear to survive a vagueness challenge.

The FCC's indecency rules also pass muster under First Amendment overbreadth analysis. *Pacifica* made clear that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." 438 U.S. at 748. Hence, laws regulating

speech in the broadcast context must only further substantial state interests and not suppress substantially more speech than necessary. The FCC's indecency policy advances at least three state interests. It furthers parental control over children's access to indecent content in the home. It vindicates the State's independent "compelling interest in protecting the physical and psychological well-being of minors." *Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989). And it ensures that unwanted indecent material cannot intrude unannounced into the privacy of the home. Moreover, the FCC's policy has an insubstantial effect on speech rights because broadcasters can air material in the recognized safe harbor between 10 P.M. and 6 A.M. or shift to other media. The burden on viewers is also slight in an age of media abundance and developments like digital time-shifting (such as DVR) and video-on-demand services. Because it furthers state interests and does not substantially burden speech, the indecency regime satisfies judicial scrutiny.

Despite respondents' arguments to the contrary, *Pacifica*'s holding retains its vitality even with the rise of cable and the Internet and the availability of limited filtering technology. Broadcast remains the sole source of programming for a substantial segment of the population, and it continues to draw the largest numbers of viewers during prime time hours and for major entertainment and sporting events. Broadcast is also the only medium that comes into the home without any affirmative steps, even as consumers exercise no choice over the channels they receive, and it remains uniquely accessible to young children. *See Pacifica*, 438 U.S. at 749. Meanwhile, present filtering technology may complement the FCC's indecency policy, but it suffers from several fundamental shortcomings. The technology is not universally available, many parents find it difficult to use, and it does not cover significant types of broadcast material. Filtering alone is not an effective substitute to the FCC's efforts to further the state's interests. In

addition, broadcasting and the media evolve dynamically and unpredictably. The FCC and Congress are "far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon an issue as complex and dynamic as that presented here." *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 665-66 (1994) (internal quotations omitted). The Court should be wary of making predictions that, should they turn out to be wrong, would seriously constrain the government's ability to effectuate its important interests.

Congress has directed the FCC to regulate the airwaves "as public convenience, interest, or necessity requires." 47 U.S.C. § 303. In an effort to fulfill that mission while enforcing the indecency statute, the FCC has promulgated indecency regulations that have, over several decades, become a central component of the broadcast medium in the United States. No change in technology, enforcement practice, or public policy warrants upending this Court's settled precedent and striking down the FCC's indecency regime. This Court should reverse the Second Circuit and hold that the FCC's indecency rules are constitutional.

ARGUMENT

I. Congress has more expansive power to regulate the public airwaves than other media.

The insight that different forms of mass media pose unique public policy challenges warranting differential treatment is central to modern First Amendment jurisprudence. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 868 (1997) ("Each medium of expression . . . may present its own problems.") (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975)); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969) ("[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them."); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952) (stating that motion pictures are not "necessarily subject to the precise rules governing any other particular method of expression.").

This medium-by-medium approach provides the government flexibility in an ever-changing media ecosystem while remaining true to constitutional principles of free expression.

Virtually since its inception, the broadcast medium has been subject to more robust regulation than other media. In *Red Lion*, the Court canvassed this history, particularly the broad powers given to the FCC and its predecessor agency to regulate broadcasts in the public interest. 395 U.S. at 386-89. "This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one" that the Court characterized as "expansive." *Id*. at 380 (quoting *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943)). This power flows from the fact that broadcast licensees hold the "privilege of using scarce radio frequencies as proxies for the entire community." *Id*. at 394; *see also FCC v. League of Women Voters of California*, 468 U.S. 364, 376 (1984) ("[W]e have long recognized that Congress, acting pursuant to the Commerce Clause, has power to regulate the use of this scarce and valuable national resource."); *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) ("A licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations."). The Court has interpreted the FCC's "expansive" power as allowing the FCC to regulate aspects of the broadcast industry—for example, right-of-reply provisions or licensing requirements—that the First Amendment prohibits in other contexts. *Compare Red Lion*, 395 U.S. at 367 (1969) (upholding right-of-reply requirement for broadcasters), *with Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down the same for newspapers).

For over eighty years, Congress has maintained a legislative regime restricting the transmission of indecent material over the broadcast airwaves. *See* Radio Act of 1927, Pub. L. No. 69-632, § 29 (now codified at 18 U.S.C. § 1464). This Court first upheld an FCC indecency

determination in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), ruling that it was constitutionally permissible for the FCC to issue a declaratory order against a radio station that had aired George Carlin's infamous "dirty words" monologue. *Pacifica* emphasized that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Id*. at 748. Applying this premise, the *Pacifica* Court identified three key reasons why Congress possesses broader power to regulate broadcasters than other media providers. First, the broadcasting medium is "a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Id.* Second, broadcasting is "uniquely accessible to children, even those too young to read." *Id.* at 749. In the Court's view, "the government's interest in the well-being of its youth and in supporting parents' claim to authority in their own household. . . amply justify special treatment of indecent broadcasting." *Id.* at 749-50 (internal quotation marks and citation omitted). Third, the Court recognized that the FCC's indecency regulations operated more in the manner of a time, place, and manner restriction than an outright ban, changing the balance of First Amendment equities. *Id*. at 761 (Powell, J., concurring) (noting that the FCC's rules do not prohibit an indecent broadcast at later hours when children are unlikely to be listening).[2]

Even as subsequent cases have declined to extend the broadcast rationale to other media—*see United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (cable); *Reno v. ACLU*, 521 U.S. 844 (1997) (Internet); *Turner Broadcasting Systems, Inc. v. FCC*, 512

[2] While this rationale for upholding the FCC's *Pacifica* order appeared in Justice Powell's concurrence rather than the majority opinion, this Court has since treated the lack of a total ban on indecent broadcasts as central to the *Pacifica* holding. *See Sable Communications of California v. FCC*, 492 U.S. 115, 127 (1989) (distinguishing a total ban on indecent material in telephone messages from the "time of day" restriction in *Pacifica*).

U.S. 622 (1994) (cable); *Sable Communications of California v. FCC*, 492 U.S. 115 (1989) (telephone)—they have reaffirmed *Pacifica*'s core holding. In *Turner*, the Court reasoned that "there are more would-be broadcasters than frequencies available in the electromagnetic spectrum" and that this "inherent physical limitation . . . has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees." 512 U.S. at 637-38 (internal citations omitted). Similarly, in *Reno* the Court explicitly recognized *Pacifica's* "special justifications for regulation of the broadcast media," 521 U.S. at 868, even as it found them inapplicable to the Internet. In addition to affirming the vitality of *Pacifica*'s medium-specific analysis, the *Reno* Court noted that the FCC "had been regulating radio for decades" and was "familiar with the unique characteristics of the [medium]." 521 U.S. at 867. By contrast, the Internet has not traditionally "been subject to the type of government supervision and regulation that has attended the broadcast industry." *Id.* at 868-69.

The arc of this Court's precedents is clear: at least four aspects of broadcasting—scarcity of spectrum, pervasiveness, the need to protect children, and the limited scope of rules prohibiting indecent content—justify more robust congressional regulation with respect to broadcasting than other forms of expression. While the Court has declined to extend *Pacifica* to other media, the Court has repeatedly affirmed Congress's capacious authority to regulate broadcasters in light of these unique characteristics.

II. Because the FCC's indecency regulations provide sufficient guidance to broadcasters, they are not unconstitutionally vague under the First and Fifth Amendments.

This Court's vagueness doctrine establishes that statutes and administrative regulations are void if their prohibitions "are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The rationale rests on a basic notion of fairness: without "a reasonable

opportunity to know what is prohibited," *id*., an individual cannot tailor his or her conduct to ensure compliance with the law and avoid penalties for violations.

In the proceedings below, the Second Circuit concluded that the FCC's current indecency regime does not satisfy this basic requirement. *Fox*, 613 F.3d at 327. In doing so, however, the Second Circuit held the FCC to a far more stringent standard of "clarity" than this Court has ever recognized when it comes to broadcast regulations. Because the FCC's current rules satisfy this Court's requirements for legal clarity, the Second Circuit decision is in error and this Court should hold that the FCC's indecency are not void for vagueness.

A. The indecency criteria provide sufficient clarity and predictability to broadcasters.

Pacifica and *Red Lion* together stand for the proposition that indecency determinations will necessarily involve fact-specific judgments by FCC regulators. In reconsidering its decision to issue a declaratory order against Pacifica, the FCC cautioned that it made its determination "in a specific factual context." *In re A Petition for Clarification or Reconsideration of a Citizen's Complaint Against Pacifica Foundation*, 59 F.C.C.2d 892, ¶ 4 (1976). In *Pacifica*, this Court stated that such an "approach is appropriate for courts as well as the Commission when regulation of indecency is at stake, for indecency is largely a function of context—it cannot be adequately judged in the abstract." 438 U.S. at 742. The *Pacifica* Court pointed to language from *Red Lion* indicating that "parade of horribles" arguments are particularly unpersuasive in the context of challenges to indecency determinations. The *Red Lion* Court cautioned that it "need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable . . . but will deal with those problems if and when they arise." 395 U.S. at 396.

Following these context-endorsing directives from this Court, the FCC evaluates broadcast indecency under a system of reasonably flexible criteria, allowing it to "reconcile conflicting values." *Fox Television Stations, Inc. v. FCC*, 489 F.3d at 471 (Leval, J., dissenting). The key question facing this Court is whether the FCC's indecency criteria are so amorphous as to be void for vagueness. They are not.

First, it is important to emphasize that the FCC's current definition of "indecency" is the same as the one it adopted when issuing its declaratory order against Pacifica in 1975:

> [T]he concept of "indecent" is intimately connected with the exposure of children to 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.

Pacifica Order, 56 F.C.C.2d 94, ¶ 11. The FCC reaffirmed this definition of indecency in 1987. *Infinity Order*, 3 F.C.C.R. 930, ¶ 5. The Court of Appeals for the District of Columbia has rejected a vagueness challenge to this definition, holding that it was the same definition that the FCC applied in *Pacifica* itself and that, while the *Pacifica* case was not framed as a vagueness challenge, the Court must have implicitly concluded that the indecency definition was specific enough to pass constitutional muster. *Action for Children's Television v. F.C.C.*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) (R. Ginsburg, J.), *superseded in part*, 58 F.3d 654 (D.C. Cir. 1995) ("In sum, if acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction.").

The fact that the FCC's current definition of indecency is the same as the one that this Court approved in 1978 weighs heavily against a finding of unconstitutional vagueness. For example, when this Court struck down the Communications Decency Act in *Reno*, one of the

aspects of the statute it found problematic was the fact that two of its provisions used a "different linguistic form" when describing indecent content. The Court worried that "this difference in language will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean." 521 U.S. at 870-71. Similarly, in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), the Court struck down a Nevada Supreme Court Rule that forbade lawyers from making "extrajudicial statements" that could prejudice an "adjudicative proceeding." *Id*. at 1060. The rule contained a safe harbor provision that allowed defense lawyers to "state without elaboration . . . the general nature of the . . . defense." *Id*. at 1048. The Court, however, rejected the argument that the safe harbor provision rehabilitated the rule, noting that the terms "general . . . and elaboration . . . have no settled usage or tradition of interpretation in law" and that a lawyer would have "no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated." *Id*. at 1048-49. The FCC's current definition suffers from none of this indeterminacy-inducing novelty. Broadcasters have been on notice for *decades* that any content contravening the 1975 standard violates FCC rules.

In substance, respondents' current argument is akin to the challenge this Court rejected in *Ginsberg v. New York*, 390 U.S. 629 (1968). In *Ginsberg*, the petitioner argued that the New York obscenity statute was so unclear that "an honest distributor of publications cannot know when he might be held to have violated" it. *Id*. at 643. The Court rejected that argument on the grounds that New York had adopted a definition of obscenity "virtually identical" to that upheld by the Court and, consequently, the statute provided "adequate notice of what is prohibited." *Id*. Of course, in this case the FCC's indecency definition is not "virtually identical," but *wholly* identical to one previously considered by this Court.

Moreover, in 2001 the FCC issued over 8,300 words of guidance aimed at providing broadcasters with additional clarification regarding indecency findings. *See Industry Guidance*, 16 F.C.C.R. 7999. Under these guidelines, an indecency determination rests on three key questions. First, does the material reference sexual or excretory organs? Second, is the material "patently offensive" in light of "community standards"? Third, is the purpose of the material to pander, titillate, or shock the audience? *Id*. ¶ 10. Each of these criteria will necessarily involve a degree of subjective analysis. It is important to recognize, however, that "perfect clarity and precise guidance" have never been the touchstone of vagueness inquiry. *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) (rejecting a facial challenge to a municipal noise regulation). Instead, the FCC need only show that broadcasters have sufficient guidance such that a "person of ordinary intelligence [has] a reasonable opportunity to know what is prohibited." *Grayned*, 408 U.S. at 108. This "fair notice" determination is a functional one. Even where the regulation is marked by "flexibility and reasonable breadth," such indeterminacy is permissible so long as it is "clear what the [regulation] as a whole prohibits." *Grayned*, 408 U.S. at 110.

To this end, the FCC has adopted various presumptions that clarify the application of its indecency rules. Thus, the FCC presumes that "fuck" and "shit" are indecent. *See Omnibus Order*, 21 F.C.C.R. 2664, ¶¶ 102, 105. These presumptions, however, are rebuttable. The FCC has recognized two categories in which the general indecency rules are relaxed. First, an expletive uttered during a *bona fide* news broadcast will generally not be considered indecent. *Remand Order*, 21 F.C.C.R. 13299, ¶¶ 68-70. Second, the use of expletives where such language is "essential" to the material in question is also generally acceptable. *See In re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the*

ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 F.C.C.R. 4507, ¶ 14 (2005) ("*Ryan Order*").

In sum, the FCC indecency regime provides substantially *more* specificity and guidance than it did when *Pacifica* came down in 1978.

1. Decisions under the new indecency regime have not been contradictory or irrational.

The court below identified several supposed inconsistencies in the FCC's application of its indecency criteria. *Fox*, 613 F.3d at 333-34. From the mere fact that such differences existed, the court reasoned that the regulations themselves must be impermissibly vague. Upon closer inspection, however, each of these instances evinces only a difference of opinion between the court and the FCC regulators about the advisability of the FCC's decisions. The law, however, does not allow the court to wholly substitute its own judgment for that of an agency. *See Fox I*, 129 S. Ct. at 1810 ("We have made clear, however, that 'a court is not to substitute its judgment for that of the agency'") (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (rejecting an arbitrary and capricious challenge)). The fact that the court below disagreed with the FCC's application of its indecency criteria does not *ipso facto* make those criteria impermissibly vague.

First, the court of appeals held that the FCC's presumptions regarding the indecency of the words "fuck" and "shit" are impermissibly vague because the FCC has held that other words, like "pissed off," "dickhead," and "ass" are not "patently offensive." 613 F.3d at 330. The disparity, the court felt, smacked of unconstitutional vagueness. This conclusion confuses "arbitrary and capricious" analysis under the Administrative Procedure Act with vagueness analysis under the Constitution. As this Court held in its first review of the Second Circuit, just because the court of appeals disagreed with the rationale underlying the FCC's new indecency

regime rules, those rules are not invalid. *Fox I*, 129 S. Ct. at 1819 ("In the end, the Second Circuit and the broadcasters quibble with the Commission's policy choices and not with the explanation it has given."). The court below is essentially disagreeing with the categories the FCC has delineated for different words. If anything, however, this establishes the FCC's regulations *are* understandable and the concomitant fines avoidable. It is the existence of those clear lines, and not their exact configuration, that matters in vagueness analysis.

Second, the court below cited several examples of allegedly "inconsistent" holdings. In particular, the court pointed to FCC determinations that the use of "shit" in an *Early Show* interview was permissible (under the news exception) and the use of expletives in the movie *Saving Private Ryan* was permissible (under the "artistic integrity" exception) but that the use of expletives in a Martin Scorsese documentary about blues music and the broadcast of a fictional rape scene were, by contrast, impermissible. 613 F.3d at 331-32. The court went so far as to find "no rhyme or reason" in the FCC's rulings. *Id*. at 332.

The notion that there was "no reason" for distinguishing these broadcasts is demonstrably false. *Saving Private Ryan* is, at its core, about the horrors and stresses of war. The use of expletives by soldiers under such pressure is therefore integral to the work as a whole. *See Ryan Order*, 20 F.C.C.R. 4507, ¶ 14 ("The expletives uttered by these men as these events unfold realistically reflect the soldiers' strong human reactions to, and, often, revulsion at, those unspeakable conditions and the peril in which they find themselves."). By contrast, blues music is not, at its core, about the profanity of its composers. *Omnibus Order*, 21 F.C.C.R. 2664, ¶ 82 (finding that the documentary's "educational purpose" could have been fulfilled without repeated use of expletives). Requiring the broadcaster to "bleep" out the expletives in question would not

undermine the message of the documentary in the slightest.[3] The FCC also reasonably concluded that the fictional rape scene in question was indecent, explicitly relying on the extremely graphic nature of the portrayal and its multi-minute length (under the "community standards" prong) rather than the artist integrity exception. *Id*. ¶ 38. This is not evidence of gross arbitrariness but rather the FCC applying its indecency criteria in a reasoned manner. The fact that the court of appeals disagreed with that application does not render the regime itself unconstitutionally vague.

2. The FCC has enforced its new indecency regime with caution and restraint.

One of the key reasons that this Court has prohibited vague legal rules is that they invite the possibility of inscrutable and erratic enforcement. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988) (holding a permit scheme for licensing newspaper racks on public streets unconstitutional because "post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy."). A broad rule in the hands of a malicious or incompetent regulator is a recipe for mischief and unfairness.

It does not follow, however, that the FCC's indecency regime is open to this kind of pernicious manipulation. First, the FCC is not a city official suddenly empowered with a new legal mechanism for discriminating among local citizens, as in *City of Lakewood*. Forfeiture as a penalty for indecency has been part of the broadcast landscape since Congress authorized it in 1960. 47 U.S.C. § 503(b)(1)(D). Indeed, the Court in *City of Lakewood* focused on the fact that "speakers denied a license will have no way of proving that the decision was unconstitutionally

[3] In Scorsese's documentary, the offending language was interspersed throughout the broadcast and its cumulative impact was not central to its meaning. For example, in one scene an artist named Juice declares, while shopping for clothing, "This looks crazy! See that? This is the kind of shit I buy! I mean, my man is wearing pink gear - that shit, that shit is crazy right there! I'm buyin' it!" *Omnibus Order*, 21 F.C.C.R. 2664, ¶ 77. Bleeping out these words does not, in any meaningful way, undermine the integrity of the documentary's message.

motivated, and, faced with that prospect, they will be pressured to conform their speech to the licensor's unreviewable preference." 486 U.S. at 760. This impermissible licensure process could not be more dissimilar to the FCC's transparent process for imposing a civil forfeiture for violation of its indecency rules, replete with opportunities to be heard and to challenge the Commission's determinations. *See* 47 C.F.R. § 1.80 (outlining forfeiture procedures).

It is worth comparing the FCC's indecency regulations with a scheme that falls in the heart of vagueness doctrine. In *Forsyth County. v. Nationalist Movement*, 505 U.S. 123 (1992), this Court considered the constitutionality of a county ordinance allowing the county administrator to "vary the fee for assembling or parading to reflect the estimated cost of maintaining public order." *Id*. at 125. The Court articulated a panoply of reasons why the regulation raised the specter of discriminatory enforcement, including the fact that the decision to charge a parade fee rested on the "whim" of a single official; the complete lack of "articulated standards" for enforcement; the fact that the administrator need not "provide any explanation for his decision," which was unreviewable; and the potential for viewpoint discrimination through arbitrary levying of fees. *Id*. at 132-33. By contrast, the solicitude of the FCC's adjudicatory procedures towards broadcasters wishing to challenge an indecency finding belies any fear that the FCC will act with this kind of unconstitutional caprice.

Moreover, like the federal courts themselves, the FCC operates under the restraining influence of its own precedents. In *Fox I*, for example, this Court recognized that the FCC had acted reasonably by not imposing forfeiture penalties for indecent broadcasts occurring before the FCC fully articulated its new fleeting expletives policy in its *Golden Globes Order*. *See* 129 S. Ct. at 1813 (noting that "the agency's decision not to impose any forfeiture or other sanction precludes any argument that it is arbitrarily punishing parties without notice of the potential

consequences of their action."). Indeed, one of the key aspects of vagueness analysis is the extent to which the implementing authority does or does not tread cautiously in the face of indeterminacy. In *Red Lion*, the Court noted approvingly that "[p]ast adjudications by the FCC give added precision to the regulations . . . Moreover, the FCC itself has recognized that the applicability of its regulations to situations beyond the scope of past cases may be questionable . . . and will not impose sanctions in such cases without warning." 395 U.S. at 395-96. Likewise, in *Ward* the Court recognized that when "determining the meaning of a law challenged for vagueness, the Court is 'relegated . . . perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it.'" 491 U.S. 795 (quoting *Grayned*, 408 U.S. at 110). In light of these admonitions, the FCC has been scrupulous about not imposing civil forfeitures in situations where its rules might not have been crystal clear. *See, e.g., Omnibus Order*, 21 F.C.C.R. 2664, ¶ 5 (finding a single use of the word "shit" indecent, but declining to issue a forfeiture because of the Commission had not "previously announced this conclusion."); *Remand Order*, 21 F.C.C.R. 13299, ¶¶ 54, 63 (declining to issue forfeitures in relation to Nicole Richie's comments at the 2003 Billboard Music Awards and Cher's comments at the 2002 Billboard Music Awards for similar reasons).

Despite this record of cautious enforcement, the court below feared that, in light of the flexibility of its indecency criteria, the FCC would engage in precisely the kind of arbitrary enforcement the vagueness doctrine seeks to prohibit. For example, the court expressed reservations about the fact that the FCC refused to adopt an ironclad "*bona fide* news exception." 613 F.3d at 334. The court cited evidence that some local broadcasters had become fearful of interviewing off-color politicians or local officials for fear of FCC sanctions. *Id*. at 335. This fear is misplaced. The reason for not establishing a per se rule is that the FCC cannot possibly

anticipate the full panoply of potentially indecent conduct and such a rule might leave it powerless to issue a sanction were a broadcaster to abuse the exception.[4] Petitioner happily concedes that if the FCC were to ever act as arbitrarily as the court below fears, fining some newscasts while permitting others for no demonstrable reason, the FCC's conduct would be constitutionally impermissible. There is no evidence, however, that the FCC has behaved so capriciously in the past or will do so in the future.

3. Current indecency rules do not have an unreasonable chilling effect on broadcasters.

This Court has held that vague statutes implicating the First Amendment impermissibly chill constitutionally protected speech. *See, e.g.*, *Grayned*, 408 U.S. at 109 (vague regulations "inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."). The court below aggressively applied this admonition, citing examples of broadcasters that had declined to show live programming or televise certain newsworthy events for fear of violating the new FCC indecency rules. 613 F.3d at 335 n.12.

The purpose of the vagueness doctrine, however, is not to vindicate the overly cautious. Indeed, this kind of application of vagueness rules amounts to nothing more than a kind of inverse "heckler's veto." In essence, anyone who feared speech-related sanctions could overturn *any* regulatory scheme on First Amendment grounds. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring) ("Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement") (declining to find standing for a father

[4] One can imagine an "infotainment" news broadcast in which a network purposefully interviewed celebrity guests while encouraging them to make outrageous, indecent comments that flirted with the "verbal shock treatment" in *Pacifica* in an effort to gin up ratings. A per se "news exception" might needlessly tie the FCC's hands in addressing this possibility.

challenging the recitation of the Pledge of Allegiance on Establishment Clause grounds). This is plainly not what vagueness law intends.

The FCC's indecency regime contains numerous protections to ensure that broadcasters are not impermissibly chilled. First, the FCC's own precedents and rulings create a reliance interest that is binding. *See Fox I*, 129 S. Ct. 1811 (noting that an administrative agency must justify a policy change when a prior policy "has engendered serious reliance interests that must be taken into account") (internal citation omitted). If the FCC began treating similarly situated broadcasters disparately, the courts would certainly overturn the sanctions on an "as applied" challenge. Second, the *bona fide* newscast exception provides robust protections. The FCC has repeatedly affirmed its "commitment to proceeding with caution in our evaluation of complaints involving news programming." *Remand Order*, 21 F.C.C.R. 13299, ¶ 71 (discussing the FCC's decision not to fine NPR for a story about John Gotti in which the station broadcast audio of Mr. Gotti using various iterations of the f-word during a wiretap). Finally, the indecency rules only restrict indecent content aired before 10 P.M. 47 C.F.R. § 73.3999(b) . A particularly cautious broadcaster could air indecent material within the safe harbor window without suffering any impermissible burden on its First Amendment rights.

The court below expressed particular concern about local broadcasters who claimed they feared airing live events, such as political debates and news interviews, because of the potential for unexpected fines. *See* 613 F.3d at 335 (discussing a station owner in Moosic, Pennsylvania who submitted an affidavit stating that he had decided to no longer provide live, direct-to-air coverage of news events). This fear is simply not a reasonable reaction to the FCC's extensive guidance on indecency, especially as it relates to live broadcasts. The FCC is extremely sensitive to the equitable concerns attendant to punishing broadcasters for live content. The Nicole Richie

case is instructive. In its *Remand Order*, the FCC specifically found that "Fox's efforts to prevent and edit out Ms. Richie's comments were not diligent or reasonable." 21 F.C.C.R 13313, ¶ 35. The Commission determined that Fox knew or should have known that there was an "increased . . . likelihood that Ms. Riche would ad-lib offensive remarks" given the content of the original script and Ms. Richie's history of uttering indecencies on the network. *Id.* ¶ 33. The record did not indicate Fox took any precautions to mitigate this risk. *Id.* Furthermore, Fox knew that the standard five-second delay had failed the year before, during the Cher incident, but it did not take precautions to add additional safeguards. *Id.* at ¶ 34. Even so, the Commission promised to take into account the fact that "no delay and editing system is foolproof." *Id.* ¶ 35.

The FCC record on this issue is unequivocal: the FCC simply *would not fine* a local broadcaster that was ambushed by a fleeting expletive in the course of a live, newsworthy telecast.[5] Indeed, the FCC's research has indicated that local broadcasters face precisely the opposite problem. When local affiliates carry broadcasts from national networks, they often feel "hindered in their ability to refuse to broadcast network programming that is indecent or otherwise deemed to be unsuitable for the station's local community." *In re Broadcast Localism*, 23 F.C.C.R. 1324, ¶ 90 (2008). In any event, the fears articulated by the court below are simply not persuasive in light of the FCC's extensive guidance on this issue.

B. A return to the "fleeting expletives" exception invites manipulation and abuse.

The FCC has repeatedly explained that one of the reasons it abandoned its fleeting expletives policy was because of the perverse incentives such a system creates. *See Fox*, 613 F.3d at 331. In essence, by constructing a "safe harbor" for single instances of indecency, the

[5] Were the FCC to ever issue such a fine, the broadcaster would have a strong basis on which to mount an "as applied" challenge. *See* discussion of *scienter*, *infra* at pages 27-28.

FCC would create a regulatory interstice allowing broadcasters to string indecent words together so long as there were lengthy pauses in-between. Judge Leval in dissent below recognized that this is a real possibility in a television milieu in which cable programs often use the shock value of indecency to compete for ratings. *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 472 (2d Cir. 2007). In *Fox I*, this Court recognized that this fear "makes entire sense" and "is surely rational." 129 S. Ct. at 1814, 1812.

By contrast, the court below, while ignoring the FCC's good-faith protestations as to its own restraint, gave enormous credence to the professed good faith of broadcasters. *See, e.g.*, 613 F.3d at 331 ("And while the FCC characterizes all broadcasters as consciously trying to push the envelope on what is permitted, much like a petulant teenager angling for a later curfew, the Networks have expressed a good faith desire to comply with the FCC's indecency regime."). A rigid, inflexible set of indecency criteria, however, would prevent the FCC from addressing this kind of manipulation should it arise.

Ultimately, the broadcasters challenging the FCC's regulations have been "granted the free and exclusive use of a limited and valuable part of the public domain; when [they accept] that franchise it is burdened by enforceable public obligations." *CBS*, 453 U.S. at 395. Since *Pacifica*, this Court has recognized that one of those obligations—the prohibition on indecent content—is constitutionally permissible. The FCC uses the same indecency definition today that it applied when the Court decided *Pacifica* 1978. Nothing has changed between now and then that would make it difficult for broadcasters "of ordinary intelligence . . . to know what is prohibited." *Grayned*, 408 U.S. at 108. Consequently, this Court should overrule the determination of the Second Circuit and hold that the FCC's indecency regulations are not void for vagueness under the First and Fifth Amendments.

III. The resolution of this case does not depend on the level of *scienter* required to impose civil forfeitures for broadcasting indecent content.

Respondents argue that the FCC's policy is unconstitutional "as applied" because the agency has failed to show *scienter* on the part of the networks. They made this assertion when the case was initially before the Second Circuit, but the court did not reach the question. *See Fox*, 489 F.3d at 454. The Second Circuit did not address *scienter* at all on remand.

In *Fox I*, this Court declined to address the constitutional question because it is a "court of final review, not of first view." 129 S. Ct. at 1819 (internal quotation omitted). The same principle applies here. "[W]ithout a lower court opinion," *id*., the Court should decline to address the *scienter* question. This approach is especially prudent because the *scienter* question is one of first impression. There is no circuit precedent on what level of *scienter* is required in the *civil* indecency context, and what little precedent exists in the criminal context is of questionable relevance. *See Pacifica*, 438 U.S. at 739 n.13 (stating that "the validity of the civil sanctions is not linked to the validity of the criminal penalty").[6]

Supposing *arguendo* that the Court decides to proceed without a lower court opinion, the *scienter* argument is moot. The FCC has announced it will not pursue forfeitures in either of the Billboard Music Awards cases. In other words, regardless of what level of *scienter* is constitutionally required for civil liability (if any), it will not affect the outcome in this case. Therefore, there is no need for this Court to resolve the question. The FCC's determination cannot be unconstitutional "as applied" if no rule has been applied in the first place.

[6] The Seventh Circuit imposes a *scienter* requirement on 18 U.S.C. § 1464 but has only considered the question in the criminal context. *See Tallman v. United States*, 465 F.2d 282, 288 (7th Cir. 1972). The Third Circuit previously concluded that there was a § 1464 *scienter* requirement in the civil context. *CBS Corp. v. FCC*, 535 F.3d 167, 189 (3d Cir. 2009), vacated by *FCC v. CBS Corp.*, 129 S. Ct. 2176 (2009). However, after the Supreme Court remanded the case in the wake of *Fox I*, the Third Circuit "decline[d] to readopt that portion of the analysis." *CBS Corp. v. FCC*, ___ F.3d ___, 2011 WL 5176139, at *10 (3d Cir. Nov. 2, 2011).

IV. The FCC's indecency rules are not unconstitutionally overbroad.

Because "broadcast regulations involve unique considerations," this Court has never required that speech restrictions on broadcasters "serve 'compelling' governmental interests." *League of Women Voters*, 468 U.S. at 376; s*ee also Fox I*, 129 S. Ct. at 1821 (Thomas, J., concurring) (noting that "the Court has declined to apply the lesser standard of First Amendment scrutiny imposed on broadcast speech" to other media). The Second Circuit has described the appropriate standard as "akin to intermediate scrutiny." *Fox*, 613 F.3d at 326. Under intermediate scrutiny, the government may "employ the means of its choosing so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and does not burden substantially more speech than is necessary to further that interest." *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 213-14 (1997) (internal quotations, ellipses, and citations omitted).

Because the Commission's indecency policy (a) promotes government interests in supporting parental control, protecting children, and preventing intrusions into the home, and (b) does not substantially burden speech, it satisfies intermediate scrutiny. Moreover, even if the Court decides to depart from *Pacifica* and apply strict scrutiny, the FCC's regime is narrowly tailored to serve compelling government interests.

A. Regulating indecency furthers compelling state interests.

In *Ginsberg v. New York*, 390 U.S. 629, 639 (1968), this Court "recognized that parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of society." *See also Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents."). On the basis of this interest, the Court in *Ginsberg* upheld a prohibition on the sale of non-obscene but sexually

explicit literature to children. Subsequent cases have affirmed the importance of the parental interest articulated in *Ginsberg*. *See Reno*, 521 U.S. at 865; *Pacifica*, 438 U.S. at 749.

The FCC's indecency regime furthers this parental interest. As Justice Ginsburg wrote for the D.C. Circuit in 1988, the policy, in combination with the appropriate safe harbor, is a valid means of effecting the government's interest in "shelter[ing] children from exposure to words and phrases their parents regard as inappropriate for them to hear." *Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988). It ensures that parents can be confident that at least one medium will not contain indecent material during the hours when children are most likely to be in the audience. During these hours, moreover, many children lack parental supervision. 5.3 million grade school-aged children, or 14% of the total, "cared for themselves on a regular basis during a typical week." Department of Commerce, Census Bureau, *Who's Minding the Kids? Child Care Arrangements: Spring 2005/Summer 2006*, at 12 (2010). Hence, the policy allows parents to better balance the competing demands of work and family life without sacrificing their control over their children's viewing habits.

At the same time, the regulations are properly tailored to give parents the final say over what content is appropriate for their household. The FCC's policy leaves parents free to expose their children to indecent material if they so choose, either by time-shifting (i.e., recording material originally broadcast during the safe harbor) or by taking affirmative steps to bring it into the home (e.g., subscribing to cable packages). *See Ginsberg*, 390 U.S. at 639 (noting that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children"). In other words, the indecency regime merely establishes a default presumption that children should not be exposed to patently offensive sexual or excretory references simply because their parents are unaware of, or unable to restrict, their viewing habits.

Ginsberg also recognized "an independent [state] interest in the well-being of its youth" that justified government regulation of indecent material. 390 U.S. at 640. *See also Reno*, 521 U.S. at 865; *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996); *Sable Communications*, 492 U.S. at 126. Even though parents retain primary responsibility for monitoring their children's media consumption, the government interest complements parents' interests, especially insofar as many parents are unable to supervise children during the workday.

The Court's recent pronouncements on the parental interest in childrearing do not undermine the rationale for limiting children's exposure to indecent speech. In *Brown v. Entertainment Merchants Assoc.*, 131 S. Ct. 2729 (2011), the Court struck down a ban on the sale of violent video games to children. It reasoned that the ban sought to "create a wholly new category of content-based regulation that is permissible only for speech directed at children." *Id*. at 2735. The indecency regime here is distinguishable on two key grounds. First, nothing about the FCC's indecency rules is "wholly new," since those rules (or their predecessors) have been in effect for over eighty years. Second, the Court in *Brown* emphasized that there is a long tradition of violent speech intended for children's consumption. *See id*. at 2736 ("Grimm's Fairy Tales . . . are grim indeed."). By contrast, the FCC's indecency policy focuses on sexual or excretory descriptions, not violence, and thus hews much closer to the standard articulated in *Ginsberg*. *See Pacifica*, 438 U.S. at 750.

Finally, *Pacifica* recognized a nuisance rationale for channeling indecency such that it does not intrude into the home. Unlike other media that require subscribers to take affirmative steps to receive content, broadcasters have access to the public airwaves and can reach viewers unbidden. "Patently offensive, indecent material presented over the airwaves confronts the

citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica*, 438 U.S. at 748*; see also Sable*, 492 U.S. at 127 (broadcasting can "intrude on the privacy of the home without prior warning"). Moreover, prior warnings are much less effective because so many viewers tune in and out of broadcasts. *Pacifica*, 438 U.S. at 748. To be sure, outside the home the expected response to unwanted indecency may simply be to look away. *Cohen v. California*, 403 U.S. 15 (1971) (upholding the right to wear clothing with indecent language while in public). Inside the home, however, the unwilling viewer's privacy interest is higher, and the government may regulate to ensure that the free speech rights of purveyors of indecency do not override the rights of private citizens to be let alone.

Respondents argued below that *Pacifica*'s holding only applies to broadcasts like the Carlin monologue wherein the repeated use of expletives amounts to "verbal shock treatment." *Pacifica*, 438 U.S. at 757 (Powell, J., concurring). But, as the Supreme Court explained in *Fox I*, "we have *never* held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expletives may not be forbidden." 129 S. Ct. at 1815 (emphasis added). To the contrary, *Pacifica* itself explicitly left open the possibility that an "occasional expletive" might justify a sanction. 438 U.S. at 750. In fact, the FCC's current policy is not just permitted by *Pacifica*'s holding, but is fully consistent with its underlying principles.

First, *Pacifica* clearly established that "context is all-important" when evaluating indecency. 438 U.S. at 750. In *Fox I*, this Court viewed the FCC's policy as a natural outgrowth of that contextual inquiry. *See* 129 S. Ct. at 1812 ("The Commission's decision to look at the patent offensiveness of even isolated uses of sexual and excretory words fits with the context-based approach we sanctioned in *Pacifica*."). Here, the Commission's determination relied

heavily on contextual factors, such as the fact that the broadcasts occurred during prime time. The FCC observed that the Billboard Music Awards were "intended to draw a large nationwide audience that could be expected to include many children interested in seeing their favorite music stars." *Remand Order*, 21 F.C.C.R. 13299, ¶ 18. The viewing audience for the 2003 Billboard Music Awards contained 2.3 million children, almost half of whom were between 2 and 11 years old. *Id.* This sort of youth-oriented entertainment spectacle is a far cry indeed from the "two-way radio conversation" or "Elizabethan comedy" that the *Pacifica* Court suggested lay outside the scope of its holding. 438 U.S. at 750.

Second, *Pacifica* endorsed the theory that viewers, particularly children, should not be forced to bear the "first blow" of indecency. *See* 438 U.S. at 748-49 ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."). This has special resonance where the first blow is an indecent word that "could . . . enlarge [] a child's vocabulary in an instant." *Id.* at 749. The FCC crafted its fleeting expletive policy with the "first blow" theory in mind. *Remand Order*, 21 F.C.C.R. 13299, ¶¶ 24-25.

B. Current indecency rules do not unconstitutionally burden First Amendment rights.

The FCC's indecency policy only minimally infringes on the rights of broadcasters to air indecent material. The policy is not a ban, but a restriction that channels indecency into certain hours of the broadcast day. *See Sable*, 492 U.S. at 127 (distinguishing the FCC's limited indecency rules from a total ban on "dial-a-porn" services). Broadcasters who want to air content that would otherwise violate § 1464 can simply move that programming into the safe harbor. Many can also move content from their networks to affiliated cable channels where the FCC has no authority to regulate indecency. Fox, for example, is part of media conglomerate whose

holdings include the FX cable channel. Finally, for those broadcasters who display live content, widely available delay technology can protect the public from patently offensive material without altering the viewing experience. *See Remand Order*, 21 F.C.C.R. 13299, ¶¶ 36-37. Especially since "any chilled references to excretory and sexual material surely lie at the periphery of First Amendment concern," *Fox I*, 129 S. Ct. at 1819 (internal quotation omitted), these are minimal burdens in exchange for the valuable privilege of a monopoly over a segment of the public airwaves.

The policy also leaves adults who wish to view indecent material between 6 A.M. and 10 P.M. with ample alternatives. As the Court noted in *Pacifica*, "The Commission's action does not by any means reduce adults to hearing only what is fit for children. Adults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear those words." 438 U.S. at 750 n.28. Subsequent technological developments have made it even easier for adults to access unregulated programming. For example, adults can easily time-shift using digital video recorders to capture material broadcast during the safe harbor and play it back on demand. They can stream content over the Internet or watch cable. And, of course, they can watch broadcast programming after 10 P.M.

Admittedly, this Court's recent non-broadcast cases have been skeptical of the ban/burden distinction, holding that even partial temporal restrictions on indecent material are content-based regulations subject to strict scrutiny. *See Playboy, 529* U.S. at 815. Setting aside the fact that broadcast does not receive strict scrutiny under *Pacifica*, this view is outmoded in an age of media abundance. Applying strict scrutiny to content-based regulations without considering alternative avenues of communication puts the entire burden of avoiding unwanted speech on the listener. This view ignores the fact that "[i]n modern society, violent and sexually

explicit speech is . . . not only . . . in great supply, but it is accessible to the point of unavoidability." Patrick M. Garry, *A New First Amendment Model for Evaluating Content-Based Regulation of Internet Pornography*, 2007 B.Y.U. L. Rev 1595, 1609 (2007). The fairer approach would acknowledge that, when individuals "have so many alternative ways of satisfying their tastes at other times," "[i]t seems entirely appropriate that the marginal convenience of some adults be made to yield to the imperative needs of the young." *Action for Children's Television v. F.C.C.*, 58 F.3d 654, 667 (D.C. Cir. 1995) (en banc).

C. Changes in technology and media have not undermined the government's interest in regulating broadcast indecency.

The Second Circuit identified two developments that it felt might lead the Court to reconsider *Pacifica*. First, an "explosion of media sources" has made broadcast less uniquely pervasive. 613 F.3d at 326. Second, it noted that that *Playboy* distinguished broadcasting from cable in part because cable systems allowed for household-level blocking and that most televisions currently sold in the United States contain software that allows viewers to exercise some control over broadcast content. *Id.* at 326-27. Neither argument is availing.

1. Despite competition from cable and Internet providers, broadcast media is still the central pillar of the media landscape.

It is true that, as a result of changes in media consumption, broadcast is no longer as pervasive as it was in 1978. *See Fox I*, 129 S. Ct. at 1822 (Thomas, J., concurring) (noting that broadcast television is increasingly bundled with cable or satellite services). However, these changes should not lead the Court to abandon *Pacifica*. The argument that broadcast is no longer uniquely pervasive is not new. *See, e.g., Denver Area*, 518 U.S. at 744 (observing that cable is as accessible as broadcast). Despite these arguments, the Court has reaffirmed *Pacifica*'s core holding with respect to broadcast even as it declines to extend it to other media.

Moreover, empirical evidence confirms that reports of broadcast media's death have been greatly exaggerated. Approximately 15.5 million households, or 14% of the U.S. total, rely on over-the-air television as their sole source of video programming. *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 F.C.C.R. 542, ¶ 16 (2009). Many families receive broadcast channels over cable but also own additional, broadcast-only sets. Indeed, this is the case for approximately one-third of the televisions in children's bedrooms. *See* Kaiser Family Foundation*, Generation M2: Media in the Lives of 8- to 18-Year-Olds* 9 (2010). And, even with more media options, broadcast continues to dominate prime-time viewership. Of the one hundred most-watched television shows in the 2010-11 season, ninety-five aired on broadcast. *See* TVB, *TV Basics: A Report on the Growth and Scope of Television* 11 (Aug. 2011). On a relative basis, then, it is still entirely appropriate to characterize broadcasting as uniquely pervasive.

Moreover, *Pacifica*'s second justification for distinguishing broadcasting—that the medium is "uniquely accessible to children, even those too young to read," 438 U.S. at 749—remains true today. Cable subscribers must take affirmative steps to access cable programming in their homes, and in many cases they have the ability to select different tiers of programming, including family-oriented programming. Broadcast audiences, by contrast, "have no choice but to 'subscribe' to the entire output of traditional broadcasters." *Remand Order*, 21 F.C.C.R. 13229, ¶ 51 (quoting *Action for Children's Television v. FCC*, 58 F.3d 654, 660 (1995)). Effective use of the Internet requires technical know-how even as blocking technology in the computer market is more sophisticated than for televisions. *See id*. ¶ 52 (noting the availability of software that blocks websites based on their content rather than a third-party rating). These distinctions continue to justify broadcast's unique status in this Court's doctrine.

One final point is critical—not all households have equal means to substitute between free, over-the-air programming and costly cable or Internet subscription packages. Empirically, poorer families will be the ones that rely most heavily on broadcast media to obtain news and information. An FCC staff report concluded that broadcast-only households were "somewhat disproportionately African-American, Hispanic, and low-income." *FCC Media Bureau Staff Report Concerning Over-the-Air Broadcast Television Viewers*, MB Docket No. 04-210 (Feb. 28, 2005). Moreover, 2011 industry research found that almost 46 million Americans rely exclusively on over-the-air broadcasting. These households skew disproportionally towards minorities and lower-income individuals. Knowledge Networks*, Over-the-Air Homes Now Include 46 Million Consumers* (2011), http://www.knowledgenetworks.com/news/releases/2011/060611_ota.html. These statistics highlight clear distributional concerns obscured by simply treating broadcast like any other medium.

2. The Court ought to move cautiously in a technically complex and rapidly evolving media environment.

Media observers have recently begun to describe a trend in the broadcast industry called "cord-cutting"—canceling expensive cable subscriptions and consuming video programming instead through a combination of internet sources and free over-the-air broadcasting. *See, e.g.*, Marvin Ammori, *Copyright's Latest Communications Policy: Content-Lock-Out and Compulsory Licensing for Internet Television*, 18 Commlaw Conspectus 375, 393-95 (2010). If these trends continue, broadcast's status may strengthen in the coming years, especially relative to cable. It is impossible to predict with certainty how the media landscape will evolve. If this Court were to upend *Pacifica* on the grounds that broadcast media's place in the market has declined since 1978, the Court would not be describing an empirical reality but instead be making a market prediction. Rather than make a predictive judgment about an area in which it

has no special competence, the Court should defer to Congress and the FCC, "institution[s] . . . far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon an issue as complex and dynamic as that presented here." *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 665-66 (1994) (internal quotations omitted); *see also* Cass R. Sunstein, *Constitutional Caution*, 1996 U. Chi. Legal F. 361, 363 (1996) ("[T]he Court does best if it proceeds cautiously and with humility, allowing some room for political judgment and maneuvering in a setting [modern communications markets] that is in such flux.").

The Court recognized these limitations in *FCC v. League of Women Voters*, declaring that it was "not prepared . . . to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." 468 U.S. 364, 376 n.11 (1984). It is thus quite significant that Congress, far from signaling its desire to revise the existing regulatory framework, recently affirmed the FCC's broadcast enforcement regime and increased the authorized civil forfeiture penalties for violation of 18 U.S.C. § 1464. *See* Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006). While the Court exercises independent judgment in constitutional matters, *Sable*, 492 U.S. at 129, the considered view of a coordinate branch of government should not be easily disregarded. *See Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 102-103 (1973) ("[I]n evaluating the First Amendment claims of Respondents, we must afford great weight to the decisions of Congress and the experience of the Commission.").

In sum, the Court ought to abide by the rule of *stare decisis*. That doctrine has special force when applied to a "rule [that] has . . . become part of the basic framework of a sizeable industry," which radio and broadcast certainly are. *Quill Corp. v. North Dakota*, 504 U.S. 298,

317 (1992). *Pacifica* is not "a remnant of an abandoned doctrine"; it was based on facts that have since changed, but not enough to "rob[] the old rule of significant application." *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (citations omitted). Any changes in the media landscape since *Pacifica* are not sufficient to depart from decades of established precedent.

3. The V-chip is not an effective alternative to the congressional limitation on broadcasting indecent content.

Every television sold in the United States since 2000 is required to contain a V-chip, software that permits the user to block shows on the basis of a third-party rating system. 47 U.S.C. § 303(x). The Second Circuit suggested that this technology allows parents to prevent children from accessing indecent material themselves, rendering the FCC's policy overbroad.[7] *Fox*, 613 F.3d at 326-27. "When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be insufficient to achieve its goals." *Id.* at 816. However, the purported alternative must be "*at least as effective* in achieving the legitimate purpose that the statute was enacted to serve." *Reno v. ACLU*, 521 U.S. at 874 (emphasis added). Although the V-chip may be less restrictive of speech than the FCC regime, this does not end the inquiry. "The . . . question is whether [there is] a less restrictive, but similarly practical and effective, way to accomplish [the regulation's] child-protecting objective." *Playboy*, 529 U.S. at 840 (Breyer, J., dissenting).

The V-chip is not a practical and effective method for accomplishing the indecency regime's objectives for three reasons. First, there are serious practical impediments to the large-scale adoption of the technology. Older television sets do not contain V-chips. Overturning the ban would thus deprive owners of these sets of their sole means of preventing indecent broadcast

[7] The requirement only pertains to television broadcasts. *See* 47 U.S.C. § 303(x) (limiting requirement to "an apparatus designed to receive television signals"). Regardless of the Court's determination about overbreadth in the television context, then, the FCC's regime should still be deemed narrowly tailored as to radio.

material from entering their homes.[8] As for owners of new sets, more than half of parents who purchased a TV since 2000 were not even aware it contained a V-chip. *In re Implementation of the Child Safe Viewing Act: Examination of Parental Control Technologies for Video or Audio Programming*, 24 F.C.C.R. 3342, ¶ 15 (2009) ("*CSVA Implementation*"). Even for those who do know about the chip, the technology is unintuitive, confusing, and otherwise inconvenient to use. Two recent studies, from 2004 and 2007, showed that only 15% and 16% of parents, respectively, were using the V-chip. *Id.* Confusion also abounds about the third-party ratings system. One survey indicated that 9% of parents thought that the "FV" label—which refers to "fantasy violence"—meant "family viewing," virtually the same number that gave the correct answer (11%). *Id.* ¶ 17. Given these formidable obstacles to full implementation, it is unlikely that the chip can function as an effective prophylactic for indecency entering the home.

Second, the ratings do not cover sporting events, news, promotions, or commercials. *See Implementation of Section 551 of the Telecommunications Act of 1996, Report and Order*, 13 F.C.C.R 8232, ¶ 21 (1998). Much of this programming routinely draws large numbers of viewers, but, because it is not rated, it cannot be blocked by the V-chip. Yet surely parents' interest in protecting children from indecency in commercial advertisements and sports programming is no different from indecency in scheduled material.

Finally, the V-chip is useless against broadcasts than contain indecent material despite their ratings.[9] Studies show that ratings are often misleading. *See CSVA Implementation*, 24

[8] While digital converter boxes contain V-chip technology, it is too soon after the analog-to-digital switchover to draw any conclusions about the number of converter boxes in use or their effect, if any, on parental blocking. *Cf. In re Implementation of the Child Safe Viewing Act: Examination of Parental Control Technologies for Video or Audio Programming,* 24 F.C.C.R. 11413, ¶ 11 n.20 (2009) (noting that the Commission does not have data on whether portable and mobile DTV receivers are being manufactured with V-chips).

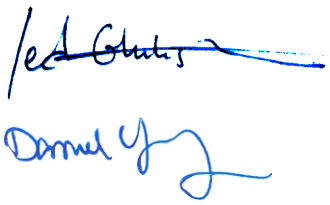
[9] This distinguishes the chip from the Internet filtering alternative discussed in *Reno v. ACLU*, 521 U.S. 844, 855 (1997). That software blocked websites in part by analyzing the pages' actual content, rather than its rating. *See Remand Order*, 21 F.C.C.R. 13299, ¶ 52.

F.C.C.R. 3342, ¶ 18. Indeed, the 2003 Billboard Music Awards received a TV-PG rating such that "even an informed use of a V-chip would not necessarily have protected children from Ms. Richie's vulgar comments." *Remand Order*, 21 F.C.C.R 13229, ¶ 51. The FCC regulations are not meant to protect children from ratings, but from indecent content. V-chips accomplish only the former. TV Parental Guidelines may serve as a useful proxy, but where indecent material is transmitted despite the ratings, more is needed to further the state's compelling interests.

CONCLUSION

For the foregoing reasons, petitioners request that this Court overrule the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,



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