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No. 10-1293

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Petitioners,

—v.—

FOX TELEVISION STATIONS, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE STUDENT PRESS LAW CENTER AND COLLEGE BROADCASTERS, INC., IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amici Curiae are the College Broadcasters, Inc. (CBI) and the Student Press Law Center (SPLC).[1] The CBI is an association representing students involved in student operated radio, television, webcasting and other media-related ventures. The CBI is committed to education and students' pursuit of excellence through active involvement in electronic media, promotes cooperative efforts with other national, regional, and state media organizations, and facilitates the discussion of issues related to student-operated electronic media. The SPLC is a national, non-profit, non-partisan organization established in 1974 to perform legal research and provide information and advocacy for the purpose of promoting the rights of student journalists. The SPLC serves as a repository of legal research about the issues impacting the ability of students to gather and distribute information across all mediums. The SPLC frequently appears as a friend-of-the-court to speak for the student media in cases that implicate students' ability to publish or broadcast freely.

SUMMARY OF ARGUMENT

The wide-ranging, randomly enforced indecency regime employed today bears little

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. This *amicus* brief is filed pursuant to the consent of all parties of record.

resemblance to the narrow scheme of content-based regulation upheld as constitutional in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The Federal Communications Commission's (hereinafter "FCC" or "Commission") current approach to indecency enforcement – to the extent that any coherent approach can be discerned – has become unmoored from its foundational justification of protecting vulnerable ears from the "repetitive, deliberate use" of "patently offensive" language delivered over a uniquely accessible medium. The Second Circuit accurately recognized that the Commission's "indiscernible" standards invite viewpoint-based discrimination and properly struck them down as unconstitutionally vague.

The Commission's re-characterization of "indecency" as including stray, isolated profanities has no room to navigate between the Scylla of overbreadth and the Charybdis of vagueness. A *per se* rule proscribing all uses of sexual or excretory invective undeniably would penalize speech of overriding journalistic or artistic import. However, lacking clear guidance (or a consistent record of enforcement activity) to the contrary, broadcasters today must conduct themselves as if this *is* the standard to which they will be held. Recognizing the fatal overbreadth of such a standard, the Commission claims that it can be trusted to make case-by-case enforcement decisions, applying a less-than-categorical exemption for programs of serious artistic or journalistic value. In effect, the Commission is telling the Court, "Our regulations can't be unconstitutionally overbroad – just look how vague they are."

An ambiguous regulatory regime adversely affects all broadcasters, but it uniquely impacts student broadcasters, for several reasons. First, student broadcasting operations often lack the financial capacity to pre-screen all programming for stray curse-words, or to absorb five- and six-figure fines for momentary lapses. Second, student-run stations represent a training ground for future broadcast professionals, and a "zero tolerance for mistakes" regime simply is unrealistic in an educational setting. Finally, campus stations exist to serve a primary listening audience whose tastes exist at the outer edges of the "community standards" the Commission purports to enforce, including ethnic and minority listeners whose needs often go unmet by mainstream commercial broadcasters. Campus broadcasting cannot function as a laboratory for experimentation – experimentation that is essential unless "community standards" are to remain frozen in 1978, never to evolve – if it must conform to ill-defined notions of indecency that inadequately protect *bona fide* artistic and journalistic expression. The Commission's current approach chills college broadcasters into self-censoring their speech so as to leave a broad buffer before reaching the indistinct boundary where indecency may (or may not) lie. This is the hallmark of an unconstitutionally vague regulatory regime.

ARGUMENT

I. The FCC's Indecency Regime Is Substantially Overbroad

The FCC's indecency framework is substantially overbroad. The Commission's current indecency regime is far more expansive than anything considered by the Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and now regulates speech that the FCC did not restrict thirty years ago.

A regulation violates the First Amendment if it "sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected." *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). The Commission's current indecency regime casts a shadow over news, artistic programming, and other speech that the government has no important or compelling interest in regulating. As a result, the FCC's current policy violates the First Amendment.

A. The FCC's Indecency Regime Has Expanded Greatly Since Pacifica

As the Second Circuit detailed, the FCC has steadily broadened what it considers indecent programming since *Pacifica*. *See Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 319-324 (2d Cir. 2010). In *Pacifica*, a plurality of the Court upheld the Commission's indecency rules as applied to a monologue by comedian George Carlin. *Pacifica*, 438 U.S. at 744. The plurality upheld the ban on

indecent broadcasting as applied to the Carlin monologue because the government had an interest in protecting children from uniquely accessible harmful depictions, *id.* at 749-50, and in protecting individuals' private spheres from a "uniquely pervasive" form of communication, *id.* at 748-749. It follows that any content-based regulation of indecent speech in broadcasting must further these rationales.

The Commission currently defines actionably "indecent" programming, *see* 18 U.S.C. § 1464 (2010), 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," *see In re Citizen's Complaint Against Pacifica Found. Station WBAI (FM)*, 56 F.C.C.2d 94, 98 ¶ 11 (1975). To determine whether a program is actionably indecent, the Commission embarks on a conjunctive two-part test.

First, the Commission will determine whether a program depicts sexual or excretory organs and activities. *In re Indus. Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C. Rcd. 7999, 8002 ¶ 7 (2001) (hereinafter "*Industry Guidance*"); *see In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C. Rcd. 4975, 4978 ¶ 8 (2004) (hereinafter "*Golden Globes Order*") (Commission will also regulate terms and depictions not intended to refer to proscribed organs or

functions if the term is deemed "inherently" sexual). Second, the FCC will determine whether a program is "patently offensive as measured by contemporary community standards for the broadcast medium." *Golden Globes Order*, 19 F.C.C. Rcd. at 4977 ¶ 6. The Commission has changed its interpretation of this second inquiry markedly since *Pacifica*. *Compare In re Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254 ¶ 10 (1978) ("[w]e intend strictly to observe the narrowness of the *Pacifica* holding"), *with In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 F.C.C. Rcd. 2664, 2668 ¶ 13 (2006) (hereinafter "*Omnibus Order*").

In 2001, the Commission stated that a program's "*full context*" is critical when determining whether it is patently offensive. *Industry Guidance*, 16 F.C.C. Rcd. at 8002 ¶ 9. Despite espousing a "full" contextual approach, the FCC often exclusively relies on three "principle factors" to determine patent offensiveness. *See, e.g., Omnibus Order*, 21 F.C.C. Rcd. at 2668 ¶ 13. Those "principle factors" 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.*

Industry Guidance, 16 F.C.C. Rcd. at 8003 ¶ 10.

From time to time, the Commission has articulated other contextual considerations when determining whether a program is patently offensive. For instance, the Commission has stated that it will rarely deem *bona fide* news programs to be indecent. *See In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 F.C.C. Rcd. 13299, 13327 ¶¶ 70-73 (2006) (hereinafter "*Remand Order*"). The Commission's treatment of news programming, however, has been disjointed to say the least.

In its *Remand Order*, the Commission stated that news coverage is not categorically outside of the indecency regime. *Remand Order*, 21 F.C.C. Rcd. at 13327 ¶ 71 ("To be sure, there is no outright news exemption from our indecency rules."). Yet, in its next breath, the Commission excused otherwise indecent content for no reason other than the fact that it was aired as part of a news program. *Id.* at 13327-28 ¶¶ 72-73. In other cases, the Commission has analyzed news programming using its three "principle factors," not categorically. In 2000 the Enforcement Bureau ruled that a news segment broadcasted by National Public Radio (NPR), which aired the word "fuck" (or a derivative thereof) ten times, was not pandering or titillating and therefore not patently offensive. *See Letter to Peter Branton*, 6 F.C.C. Rcd. 610 (EB 2000). Broadcasters will

rarely, if ever, air news programming for the purpose of pandering or titillation. As a result, the Enforcement Bureau's ruling had the potential to provide broadcasters with some reassurance that news programming is safe from enforcement action. The FCC, however, has elsewhere stated that a broadcast need not be pandering or titillating to be punishable as patently offensive, stripping all reassurance. *Industry Guidance*, 16 F.C.C. Rcd. at 8014 ¶ 23 ("The absence of a pandering or titillating nature, however, will not necessarily prevent an indecency determination . . . .").

Additionally, the Commission has stated that a program's artistic nature is a contextual factor worth consideration. In 2005 the FCC refused to fine a licensee for broadcasting indecent terms used in a film because they were integral to the work's artistic message. *See In re Complaints Against Various Television Licensees Regarding Their Broad. on Nov. 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 F.C.C. Rcd. 4507, 4512-13 ¶ 14 (2005) (hereinafter "*Saving Private Ryan Order*"). However, the FCC has not protected all films or artistic works similarly. *See Omnibus Order*, 21 F.C.C. Rcd. at 2685 ¶ 77, 2688-89 ¶ 93 (documentary and film's use of explicit terms actionable).

In sum, what started with narrow authority to limit verbal "shock treatment" on the airwaves has metastasized into something far different. The FCC's current expansive indecency regime restricts substantially more speech than it did in 1978, and applies to news and artistic expression although to what extent is a mystery.

B. The FCC's Current Indecency Regime Violates the First Amendment Because It Regulates News, Artistic, and Other Programming That Does Not Harm Children or Invade a Listener's Privacy

The FCC's modern interpretation of what it considers "indecent" programming sanctions speech that in no way harms children or supports the other state interests upheld in *Pacifica*. As a result, it violates the First Amendment as substantially overbroad.

This Court should employ a First Amendment overbreadth analysis to this case. In *Pacifica*, the plurality did not invoke the substantial overbreadth doctrine to analyze the FCC's narrow and limited indecency regime. *Pacifica*, 438 U.S. at 743*; see In re Application of WGBH Educ. Found.*, 69 F.C.C.2d at 1254 ¶ 10 ("We intend strictly to observe the narrowness of the *Pacifica* holding"). Now that the FCC has greatly expanded the scope of its regime, this Court must employ such "strong medicine." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Broadcasters have urged the FCC to restrain itself when taking indecency enforcement actions, *see Remand Order*, 21 F.C.C. Rcd. at 13301-02 ¶¶ 9-10, and have sought non-constitutional grounds to relieve the current regime's stifling effect on speech*, see Fox Television Stations*, *Inc.*, 129 S. Ct. 1800 (2009). These efforts have been in vain. Thus, an overbreadth challenge is proper in this case as a "last resort." *Broadrick*, 413 U.S. at 613.

A law is facially overbroad if a substantial number of its applications are unconstitutional, as judged in relation to its plainly legitimate sweep. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 n.6 (2008). In order to determine whether a law is overbroad, a court must "construe the challenged statute." *United States v. Williams*, 553 U.S. 285, 293 (2008). Once that has been accomplished, a court will contrast a law's legitimate sweep against its illegitimate sweep. *See Broadrick*, 413 U.S. at 615-16. If a law, on its face, restricts a substantial amount of speech above that necessary to meet a permissible goal, the regulation violates the First Amendment. *See United States v. Stevens*, 130 S. Ct. 1577 (2010). To determine whether a regulation is overbroad, a court will not limit its review to actual enforcement practices. *See id.* at 1591 ("We would not uphold an unconstitutional statute merely because the government promised to use it responsibly.").

It is difficult to define the scope of the FCC's current indecency regime, which applies to both literal depictions of sexual or excretory organs and functions as well as terms that were not intended to refer to such functions. *See Golden Globes Order,* 19 F.C.C. Rcd. at 4978 ¶ 8. The regime also applies to news programming, artistic films, and musical performances – any and all broadcasting.

The *Pacifica* plurality found that a restrained indecency regime directed at a narrow class of speech was constitutional as applied to the Carlin comedy skit. There, the indecency regulation's legitimate scope was to: (1) protect children from a repeated bombardment of harmful images; and (2)

protect the sanctity of the home and other private spheres from unwanted messages.

The FCC's current indecency regime, on its face, prohibits substantially more speech than is necessary to protect children. The FCC has no legitimate interest in restricting speech that does not harm children even if it is "unsuitable" for them, *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2736 n.3 (2010), or may be offensive, *Pacifica*, 438 U.S. at 745. Even assuming *arguendo* that repetitive verbal shock treatment harms children, *see Pacifica*, 438 U.S. at 749-50 (citing studies that concluded *obscene* material harms children), that is no longer all the Commission's indecency policy prohibits.

For instance, the FCC's current indecency policy now regulates news programming. *See Remand Order*, 21 F.C.C. Rcd. at 13327 ¶ 71 ("To be sure, there is no outright news exemption from our indecency rules."). The FCC does not contend, nor could it, that indecent terms broadcast in a news program harm children to the point that such terms should be proscribed. Indeed, the *Pacifica* plurality noted that if the FCC began regulating discussions of socially important issues, its indecency regime may well not pass constitutional muster. *Pacifica*, 438 U.S. at 733.

Just last term, this Court reaffirmed minors' constitutionally protected right to receive information, even where the government deems the content to be potentially harmful. *Brown*, 131 U.S. at 2736 n.3. And yet, the Commission claims authority to fine (or not to fine, at its unfettered discretion) a broadcaster for airing socially

important information based on a theoretical harm to minors even less well-supported by research than that found inadequate in *Brown*.

If a radio broadcaster wished to air an unedited version of former President Nixon's Oval Office tape recordings so that listeners may make their own determinations as to the President's conduct, the broadcaster could not do so without fear of FCC reprisal. *See* Mark Steyn, *The Fifth Nixon*, THE ATLANTIC (April 2005) (Nixon tapes contained many terms the FCC has elsewhere determined to be indecent). As the Commission has emphasized, no *per se* exception to the indecency regime exists for discussion of matters of public importance, *Remand Order*, 21 F.C.C. Rcd. at 13327 ¶ 71, and the "principle factor[]" that may save a news program from enforcement action (pandering or titillation) "will not necessarily prevent an indecency determination," *Industry Guidance*, 16 F.C.C. Rcd. at 8014 ¶ 23. With the threat of a substantial fine, broadcasters are unlikely to air the unedited program despite its historical value. In effect, the indecency regime does what this Court has expressly forbidden in all contexts outside of over-the-air broadcasting: reduce the level of discussion to terms an administrative agency deems fit for children. *See Butler v. Michigan*, 352 U.S. 380, 383 (1957) (printed material cannot be censored so as to meet a standard of what is deemed fit for a child to read).

The FCC's current policy goes further than simply regulating news programming. The current indecency regime puts the government into the business of picking-and-choosing what programming

constitutes *bona fide* news. Under its current "patently offensive" framework, the FCC will selectively, using unpublished standards, bestow the classification of "news" on some broadcasts, *see Remand Order*, 21 F.C.C. Rcd. at 13327-28 ¶ 72, but not others, *see Letter to Merrell Hansen*, 6 F.C.C. Rcd. 3689 (MMB 1999) (programming describing an issue "in the news" was not considered a news program and ruled to be patently offensive). Allowing government to judge the legitimacy of journalistic activity is an exercise fraught with peril. *See Branzberg v. Hayes*, 408 U.S. 665, 703-04 (1972).

Additionally, the indecency regime now regulates artistic programming even though such programming is unlikely to harm children. *See Omnibus Order*, 21 F.C.C. Rcd. at 2683-845 ¶¶ 72-78, 2688-89 ¶ 93. Again, the *Pacifica* plurality warned that satire and other artistic expressions may be outside of the FCC's lawful reach. *Pacifica*, 438 U.S. at 746, 750. The FCC's current contextual "patently offensive" standard allows the Commission to determine for itself which expressions are integral to an artistic message, *see Saving Private Ryan Order*, 20 F.C.C. Rcd. at 4512-13 ¶ 14, and which are not, *see Omnibus Order*, 21 F.C.C. Rcd. at 2683-85, ¶¶ 72-78. The Commission may not appoint itself the arbiter of which lyrics are too vulgar to qualify as "art" for indecency purposes. *See Cohen v. California*, 403 U.S. 15, 25 (1971) ("one man's vulgarity is another man's lyric").

The FCC's current indecency regulation also restricts far more speech than necessary to protect individuals' right to privacy against a uniquely

pervasive medium. Broadcasting no longer has a "uniquely pervasive presence" in this country. *Pacifica*, 438 U.S. at 748. Since *Pacifica,* other technologies that similarly place information into a listener's private sphere, such as cable and satellite systems, have become as ubiquitous as broadcasting. There were roughly 9.8 million cable subscribers in the mid 1970s, compared to the 66.25 million cable subscribers in 2000 and the 62 million tallied in 2009. *The Info. Needs of Communities*, FEDERAL COMMUNICATIONS COMMISSION, 2011 WL 2286864 at *117 (June 2011). Direct broadcast satellite (DBS) television service was not generally available to consumers in the United States until 1994. Richard A. Gershon, TELECOMMUNICATIONS AND BUSINESS STRATEGY 118 (2009). As of 2010, however, the two largest DBS providers, DirecTV and DISH Network, had roughly 33.5 million subscribers. *The Info. Needs of Communities*, FEDERAL COMMUNICATIONS COMMISSION, 2011 WL 2286864 at *119 (June 2011). In total, subscription-based television, which includes cable and satellite television services, now makes up roughly 90 percent of household television service. *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd. 542, 546 ¶ 8 (2009).

Moreover, the current indecency regime restricts far more speech than necessary to protect individuals' privacy. The FCC does not require an individual filling an indecency complaint to have

viewed or heard the allegedly indecent program.[2] Even if no listener reported being surprised by indecent language while listening at home or in a car, the Commission could still issue a forfeiture order. This practice extends the current indecency regime far beyond the state interest of protecting listeners' privacy.

Thus, the FCC's current indecency standard is substantially overbroad. The current regime allows a government agency to define and regulate "news" and "artistic" programming without any claim that such programming harms children. Moreover, the current regime regulates programming regardless of whether it intrudes on a listener's private sphere. As a result, the Commission's indecency regime violates the First Amendment.

The Commission claims that its contextual "patently offensive" standard limits its indecency authority only to those depictions that harm children or protects individuals' privacy in ways similar to that upheld in *Pacifica*. Even if that contextual standard saves the FCC's indecency regime from being substantially overbroad – and it does not, *see Stevens*, 131 U.S. at 1591 (enforcement decisions do not alleviate overbreadth concerns) – it renders the regime unconstitutionally vague.

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[2] The FCC's instructions on filing an indecency complaint are available at http://transition.fcc.gov/eb/oip/Compl.html.

II. The FCC's Indecency Regime Is Void For Vagueness

The Commission's indecency regulation, as it is currently understood, violates the Due Process Clause of the Fifth Amendment. The FCC's regime also is unconstitutionally vague, in part, because it allows for irreconcilable, arbitrary, and erratic enforcement against all broadcasters.

A. This Court Should Consider The Fifth Amendment Interests of Broadcasters Not Party To This Case Regardless of Whether Respondents' Speech Was Clearly Proscribed

This Court may consider whether the FCC's indecency regime violates the Fifth Amendment, regardless of whether Respondents' speech was clearly proscribed, because the regime: (1) is subject to a facial challenge; (2) directly restricts a constitutionally-protected right; and (3) presents a threat of arbitrary enforcement. When these three conditions are present this Court's precedent allows a party to challenge a regulation regardless of whether a party's own conduct was clearly proscribed.[3]

The Due Process Clause may render a law unconstitutionally void for vagueness for one of two independent reasons. *See Williams*, 553 U.S. at 304; *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). First, a court may invalidate a law on vagueness

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[3] *Amici* do not contend that the Respondents' speech was clearly proscribed – it was not.

grounds when it does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Second, the Constitution will invalidate a law if it authorizes or encourages arbitrary or discriminatory enforcement, *Morales*, 527 U.S. at 56, or the threat thereof, *Gentile v. State Bar*, 501 U.S. 1030, 1051 (1991). The Fifth and Fourteenth Amendments' prohibition on vague laws applies to all regulations, even those that "regulate expression for the purpose of protecting children." *Brown*, 131 S. Ct. at 2743 (internal citations omitted).

In *Morales*, this Court voided on facial vagueness grounds, 527 U.S. at 55, a Chicago ordinance that prohibited "criminal street gang members" from "loitering" with one another, *id.* at 45-46. The Court noted that loitering was a constitutionally protected "liberty." *Id.* at 53. Although the ordinance may have clearly proscribed the actions of some respondents joined in the *Morales* consolidated appeal, *id.* at 82-83 (Scalia, J., dissenting), the Court invalidated the ordinance because, in part, it did not "provide sufficiently specific limits on the enforcement discretion of the police," *id.* at 64. In striking the regulation, this Court's opinion continually considered how the regulation affected the average Chicago citizen. *Id.* at 61-63. Thus, in a (1) facial vagueness challenge; (2) to a regulation that directly restricted a constitutionally protected right; (3) as arguably allowing for arbitrary enforcement, the Court has considered the application of the regulation to third parties regardless of whether the speaker's actions

were clearly proscribed.

Similarly, in *Coates v. City of Cincinnati*, this Court invalidated an ordinance on its face because a violation to the law "may entirely depend upon whether or not a policeman is annoyed." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). The Cincinnati ordinance at issue in *Coates* directly restricted the constitutionally protected right of assembly. *Id.* at 614. The Court in *Coates* acknowledged that the record did not reveal what actions subjected the petitioner to liability. *Id.* Nonetheless, the Court found the Cincinnati statute to be unconstitutionally vague. Thus, *Coates* demonstrates that this Court will entertain a vagueness challenge regardless of whether the ordinance at issue clearly applied to the parties before the Court when a regulation directly impairs a constitutionally protected right and is challenged on the grounds that it grants government officials unbridled discretion. *See also Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983).

As the above-mentioned cases demonstrate, the FCC errs in claiming that this Court may not consider the indecency regime's effect on broadcasters not party to this case. To support its argument the FCC incorrectly cites *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982) and *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2718-19 (2010) (hereinafter "*HLP*"). Neither, however, is on point to this case.

In *Hoffman Estates*, a village required businesses to obtain a license to sell items "designed

or marketed for use with illegal cannabis or drugs[.]" *Id.* at 492. In its majority opinion, this Court stressed that the challenged ordinance did not directly restrict speech. *Id.* at 496 (stating "the village does not restrict speech as such" and "insofar as any *commercial* speech interest is implicated here, it is only the attenuated interest"). Additionally, the ordinance at issue in *Hoffman Estates* was challenged as vague because it did not provide adequate notice of what conduct was proscribed, not because the regulation allowed for arbitrary enforcement. *Id.* at 503 ("no evidence has been . . . introduced to indicate whether the ordinance has been enforced in a discriminatory manner"). Thus, *Hoffman Estates* is off the mark.

HLP similarly is inapposite, for the primary reason that it did not involve a facial vagueness challenge at all. *See Holder*, 130 S. Ct. at 2712. It is an unremarkable position to say that a court may not decide an as-applied challenge – the type of claim brought in *HLP* – on the basis of situations and parties not before the court. Additionally, as in *Hoffman Estates*, the law at issue in *HLP* was not challenged on the basis that it may lead to arbitrary enforcement practices. *HLP*, 130 S. Ct. at 2719-20. Thus, *HLP* is not applicable to this case.

In the instant case, this Court granted *certiorari* on the broad question of whether the Commission's "current indecency enforcement regime violates the First or Fifth Amendments to the United States Constitution." The question presented to this Court is thus not limited to an "as applied" challenge. Additionally, the FCC's indecency regulation is challenged for allowing

discriminatory and arbitrary enforcement, which necessarily requires considering how the Commission might enforce the statute against others in the future. *See Fox Television Stations, Inc.*, 613 F.3d at 332-33 ("With the FCC's indiscernible standards comes the risk that such standards will be enforced in a discriminatory manner.").

Because the FCC's indecency regulation is subject to a facial challenge, directly restricts broadcasters' constitutionally protected freedom of speech, and allows for arbitrary enforcement, the Court may consider the Fifth Amendment interests of all broadcasters subject to the FCC's indecency regime, even if Respondents' speech was clearly proscribed.

B. The FCC's Indecency Regime Violates the Fifth Amendment Because it Permits Arbitrary Enforcement Practices

The standard that the FCC now uses to determine whether a program is patently offensive renders the Commission's indecency regime unconstitutionally vague. The Commission arrogated to itself too much discretion when it enlarged the scope of its indecency standard, violating the Fifth Amendment.

The FCC has erected an indecency enforcement structure that allows it to consider (or not consider) any contextual factor, whether previously noted as relevant or not, in sum or in isolation, to determine whether a program is

patently offensive. This is the essence of an unconstitutionally vague system. In one ruling, the Commission may claim that a program's "*full context*" will be considered, *Industry Guidance*, 16 F.C.C. Rcd. at 8002 ¶ 9, but in another it may make a "patently offensive" determination exclusively based on the interplay of three contextual factors, *see, e.g.*, *Omnibus Order*, 21 F.C.C. Rcd. at 2668 ¶ 13, and yet in some "particular cases" the Commission may state that any single contextual factor will lead to an indecency determination by itself, *id.* Although some contextual considerations may sometimes excuse a program, *Saving Private Ryan Order*, 20 F.C.C. Rcd. at 4512-13 ¶ 14, to what extent is unknown, *Omnibus Order*, 21 F.C.C. Rcd. at 2685 ¶ 77, 2688-89 ¶ 93 (terms used in a documentary and a film "patently offensive"). The Commission's current indecency regime allows it to rationalize any enforcement ruling without any indication how it will rule in the future and, under a "*full context*" approach, to apply new and yet-unpublished contextual factors to rationalize the desired outcome.

The post-2001 standard has resulted in arbitrary and irreconcilable enforcement results within any given subject matter. Take, for instance, the Commission's treatment of programming related to oral sex. Broadcasters may air programming on the topic of oral sex, but the extent is uncertain given Commission enforcement actions.

According to Commission precedent, a broadcaster may refer to a penis using the term "dickhead," *Omnibus Order*, 21 F.C.C. Rcd. at 2696 ¶ 127 (not sufficiently vulgar, explicit or graphic),

may use the term "suck[]," *id.* at 2715 ¶ 208 (term "sucked" is "not an explicit or graphic description of sexual . . . activities"), and may even refer to someone as a "six foot blow job machine," *In re KBOO Found.*, 18 F.C.C. Rcd. 2472, 2474 ¶ 9 (EB 2003) (phrase not sufficiently graphic), *rescinding*, 16 F.C.C. Rcd. 10731 (EB 2001). However, a broadcaster may not refer to cunnilingus as "eating pussy." *In re Infinity Radio License, Inc.*, 19 F.C.C. Rcd. 5022, 5024 ¶ 8 (2004) (phrase sufficiently "graphic, explicit, crude and vulgar"). In these cases, the graphic nature of the description was a critical, if not a determinative contextual consideration, yet the Commission offered no explanation as to why the term "eating pussy" is more graphic than "blow job." The Commission's subjective determination as to a single contextual factor can be all-important, highlighting why the lack of discretionary guardrails is so troubling. *See Omnibus Order*, 21 F.C.C. Rcd. at 2668, ¶ 13 (any "one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive . . . or, alternatively, removing the broadcast material from the realm of indecency").

Additionally, the Commission has ruled that depicting a woman performing fellatio on television through transposed images and insinuation is not sufficiently graphic to warrant Commission action. *Omnibus Order*, 21 F.C.C. Rcd. at 2714 ¶ 206 (male actor naked from the waist up while female actor was given "the appearance of her performing oral sex on the man"). However, loosely describing fellatio techniques is sufficiently graphic when done on the radio. *Letter to Citicasters Co.*, 13 F.C.C.

Rcd. 22004, 22010 (1998) (January 18, 1998 broadcast on WXTB-FM containing phrases such as, "What if I can't fit it into my mouth?"). Again, the Commission offered no rationale to explain why depicting fellatio on the television is not as graphic as a clinical discussion of oral sex techniques on the radio.

Furthermore, the Commission has arbitrarily determined what constitutes pandering, titillating, or shocking programming in connection to broadcasts discussing oral sex. In the *Omnibus Order* the Commission ruled that an episode of the Oprah Winfrey Show was not patently offensive because it was not presented in a pandering or titillating manner. *Omnibus Order*, 21 F.C.C. Rcd. at 2706 ¶¶ 177-78. In that program, a commentator described a "salad toss" as "oral anal sex" and a "rainbow party" as a gathering of multiple women who each apply lipstick and then perform fellatio on a male. *Id.* at 2705 ¶ 173. The Commission stated that the program was "highly graphic" and continued "at length," yet was not patently offensive because it was not pandering or used to shock the audience. *Id.* at 2706 ¶ 177. However, when a radio broadcaster invited Dr. Natasha Terry, a certified clinical sexologist, to describe oral sex techniques, the Enforcement Bureau found the program to be patently offensive apparently exclusively because it was "pandering and titillating." *In re Citicasters Co.*, 15 F.C.C. Rcd. 19095, 19096 ¶ 6 (EB 2000). The Bureau stated that the program, which aired statements such as "she should go up and down the shaft about five times, licking and sucking and on the fifth swirl her tongue around the head before

going back down," was proven to be pandering and titillating because a radio host laughed during the discussion and made statements such as "oh yea, baby." *Id.* This illustrates one of the infirmities of the Commission's "contextual" approach, since it apparently is the Commission's view that a phrase can become sanctionably indecent based on how a listener reacts *after* it has already been said.

The above-cited examples highlight how arbitrary the Commission's "patently offensive" standard has become. The FCC has not attempted to reconcile its arbitrary enforcement determinations, nor could it. What the Commission considers actionably "graphic" or "pandering" programing is a mystery, yet all-important. *See Omnibus Order*, 21 F.C.C. Rcd. at 2668 ¶ 13.

Outside of programming discussing oral sex, the Commission's current contextual standard grants it the ability to make discriminatory and arbitrary enforcement decisions. The Commission's free-floating standard allows it – a government agency – to determine what constitutes "news" programming. *See Remand Order*, 21 F.C.C. Rcd. at 13327-28 ¶¶ 70-73. Any such determination carries an inherent risk of discriminatory enforcement. *See Branzberg*, 408 U.S. at 703-04. Additionally, FCC precedent allows the Commission to categorically excuse news programming from indecency violations in practice while claiming that no such categorical exception exists, *Remand Order*, 21 F.C.C. Rcd. at 13327-28 ¶¶ 71-73, or claim that news programming is unlikely to incur indecency liability because it is not pandering or titillating while claiming that such a determination is not necessary to an indecency

finding, *see Industry Guidance*, 16 F.C.C. Rcd. at 8014 ¶ 23 ("The absence of a pandering or titillating nature, however, will not necessarily prevent an indecency determination . . . ."); *Letter to Mr. Peter Branton*, 6 F.C.C. Rcd. 610. Faced with these contradictory interpretations, a broadcaster must presume that the less forgiving of two will apply and behave accordingly – chilling speech.

The Commission's on-again, off-again application of its undefined "artistry" exception further illustrates the regulation's arbitrary nature. In its *Omnibus Order*, the Commission stated that explicit language used in a documentary warranted enforcement action. *Omnibus Order*, 21 F.C.C. Rcd. at 2685 ¶ 77. However, in other films, the FCC has stated that explicit terms may be integral to an artistic work and therefore not patently offensive. *Saving Private Ryan Order*, 20 F.C.C. Rcd. at 4512-13 ¶ 14. When making these determinations, the Commission has not – because it cannot – attempted to articulate *why* certain terms used in a film were pandering and titillating. *See Omnibus Order*, 21 F.C.C. Rcd. at 2688-89 ¶ 93 (stating, *ipse dixit*, that a film's use of the "S-word" was used to "titillate the audience"). If the Commission began explaining why certain terms were "titillating" in one instance but "integral" in another, it would narrow the indecency regime's scope and limit the FCC's authority to make future determinations, something the Commission is willing to avoid at all costs.

When the government purports to sit in the director's chair and make after-the-fact determinations about whether profanity is artistically necessary – or "integral" if the

Commission prefers – the potential for viewpoint-based abuse is readily apparent. Even if regulators go into the exercise with the best of intentions, it is impossible to divorce an assessment of artistic merit from personal taste, and the programs at greatest risk of being labeled insufficiently artistic disproportionately will be those appealing to niche or "counter-culture" audiences with non-mainstream tastes.

In sum, as the FCC currently understands the phrase, "patently offensive" grants it a free-floating license to sanction one broadcast while comparable broadcasts go unpunished without any indication of how the Commission will act in the future. As a result, the FCC's indecency standard – as currently applied by the Commission – violates the Fifth Amendment.

The threat of erratic FCC action is especially harmful to collegiate broadcasters who do not have experience navigating FCC indecency precedent. The FCC has many times acknowledged that it licenses spectrum to unsophisticated broadcasters and in fact designates swaths of spectrum to be used by individuals who may not have any broadcast experience at all. *In re Creation of a Low Power Radio Service*, 15 F.C.C. Rcd. 2205, 2206 ¶ 1 (2000) (the low power FM radio service "will provide opportunities for new voices to be heard and will ensure that we fulfill our statutory obligation to authorize facilities in a manner that best serves the public interest"), *reconsidered in*, 15 F.C.C. Rcd. 19208 (2000). The Commission has even taken steps to make it easier for inexperienced broadcasters to license spectrum from the FCC. *See In re Creation*

of a Low Power Radio Service, 22 F.C.C. Rcd. 21912, 21944 ¶ 78 (2007) ("This tool enabled unsophisticated potential applicants to identify without expense available FM spectrum in their local communities.").

The Commission's commitment to licensing spectrum to unsophisticated entities is further demonstrated by regulations regarding university-licensed broadcast frequencies. The FCC allows universities to license frequencies by creating an exception to its rules in order to "promote our goals of maximizing diversity of ownership in a community and providing a medium for new speakers, including students, to gain experience in the broadcast field." *In re Creation of Low Power Radio Service*, 15 F.C.C. Rcd. at 19241 ¶ 84. When licensing a low power FM station to a university under these rules, the FCC mandates that the station "be managed and operated by students of the university, although as the licensee, the University must retain ultimate control of the station's operations." *Id.* FCC Commissioner Michael Copps recently noted the unique benefit that collegiate-run radio stations offer their community in an interview with WPTS (FM), a radio station run by the students of the University of Pittsburgh. *Audio of our Interview with FCC Commissioner Michael J. Copps*, 92.1 WPTS, http://wptsradio.org/?tag=indecency. Thus, not only has the FCC acknowledged that it will license spectrum to inexperienced and unsophisticated individuals, but it actually promotes the practice.

III. The FCC's Indecency Regulation Has A Disparate and

Demonstrated Chilling Effect on Student Broadcasters

The FCC's vague indecency regime has chilled and continues to chill student broadcasters' speech. The Commission has acknowledged that college and other hyper-local broadcasters serve a unique role in informing their community. The FCC's vague indecency standard, however, hampers these broadcasters' ability to fulfill their mission.

A. Student Broadcasters Serve a Unique Role in Informing Their Community

Student and other local broadcasters are uniquely suited to serve their communities. According to the Commission, these entities have played a major role in serving the public when most in need. *The Info. Needs of Communities*, FEDERAL COMMUNICATIONS COMMISSION, 2011 WL 2286864 at *68, *196 (June 2011). Recently, FCC Commissioner Copps said that college broadcasters "have an increasingly important role to play in the media age in which we live if we are not going to completely lose sight of what is happening in our communities . . . ." *Audio of our Interview with FCC Commissioner Michael J. Copps*, 92.1 WPTS, http://wptsradio.org/?tag=indecency.

Student and other hyper-local broadcasters also present a uniquely democratic form of communication. As the Commission approvingly noted, licensing frequencies to non-sophisticated broadcasters allows for "highly local radio stations grounded in their communities." *In re Creation of a*

Low Power Radio Service, 15 F.C.C. Rcd. at 2208 ¶ 3. These local broadcasters, who include members of under-represented minorities, are often best able to serve their communities because they are in fact part of that community. *Id.* at 2213 ¶ 17.

Thus, collegiate and other hyper-local broadcasters have a unique role to play in informing the public. These broadcasters are best able to inform their communities about local issues and the Commission has commended them for doing so. However, the FCC's overbroad and vague indecency regime has impaired broadcasters' ability to realize their potential.

B. The FCC's Indecency Regime Has Made it Difficult for Student Broadcasters to Serve Their Community Adequately

The FCC's overbroad and vague indecency regulation has stifled college broadcasters' attempts to serve their communities. College broadcasters are in no way exempt from FCC indecency sanctions and their chilling effect. Indeed, the FCC has twice ruled that collegiate radio stations violated the indecency regime. *See In re State Univ. of N.Y.*, 13 F.C.C. Rcd. 23810 (1998) ($4,200 forfeiture ordered against WSUC (FM), licensed to the State University of New York and operated by students at Cortland University); *In re The Regents of the Univ. of Cal.*, 2 F.C.C. Rcd. 2703 (1987) (song lyrics broadcasted by KCSB (FM) "constituted actionable indecency" although no forfeiture ordered). The indecency regime also applies to non-commercial

stations. *See In re KBOO Found*, 16 F.C.C. Rcd. 10731 (song lyrics were patently offensive), *rescinded by,* 18 F.C.C. Rcd. 2472 (FCC "now conclude[s] that the broadcast was not indecent").

Communities are often best served through live local broadcasts. Live broadcasts are inherently unscripted and unpredictable, posing a unique risk that someone will blurt profanity at times even unbeknownst to a careful broadcast technician. The FCC's current indecency regime deters broadcasters from offering valuable live programming, which may result in heavy financial penalties.

Live broadcasting is essential in the face of a natural disaster or emergency. *See The Info. Needs of Communities*, 2011 WL 2286864, at *68, *196. Live broadcasting of news events promotes listener calls and comments, thereby furthering civic participation. Additionally, live broadcasting ensures that listeners are able to gather timely and unfiltered information to make important decisions. Finally, live broadcasting is the only viable means to present certain programming. In the age of the Internet and social media, it is not viable to delay the broadcast of programs such as popular sporting events. If CBS had to scrub-clean its upcoming Super Bowl broadcast to make sure that a sideline microphone did not broadcast a fan swearing at a referee, it could delay the program's broadcast to the point of appearing untimely to an audience following the action via online media. As this Court has noted in other contexts, being the first to publish information can carry with it viability. *See Harper & Row v. Nation Enter.*, 471 U.S. 539, 562 (1985) (there is a commercial interest inherent in "first

publication"). Live broadcasting must be preserved to ensure an informed public and the vitality of broadcasting.

The FCC states that it has "long recognized that it may be inequitable to hold a licensee responsible for airing offensive speech during live coverage of a public event under some circumstances." *Remand Order*, 21 F.C.C. *Rcd.* at 13311-12 ¶ 33. However, the Commission has gone out of its way to avoid explaining what "circumstances" excuse a broadcaster from unintentionally airing indecent content during a live broadcast. *Id.* at 13311-12 ¶ 33, 13325 ¶ 62. It appears the only known rule in the FCC's "long recognized" policy is that the Commission will fine a broadcaster for airing indecent material if the licensee was "on notice" that a third party might use, and the licensee thereby broadcast, indecent language. *Golden Globes Order,* 19 F.C.C. Rcd. at 4979 ¶ 10. By that logic, a broadcaster at any live event might arguably be liable for broadcasting a stray expletive because broadcasters should be on notice that people at public events sometimes use indecent language. As recognized by the Second Circuit, this "notice" concept will also induce broadcasters to steer clear of interviewees who have ever used salty language, *see Fox Television Stations, Inc.*, 613 F.3d at 332, even if there is an overriding public interest in their remarks. Thus, the FCC's indecency regime chills college broadcasters' ability to confidently broadcast live sporting and news events.

Additionally, the Commission's indecency policy restricts broadcasters' ability to offer a

community desired music and entertainment. Although we all may be nostalgic for a simpler time, the reality is that George Carlin's vocabulary words have become commonplace in the mainstream entertainment enjoyed by tens of millions of people. The Academy of Motion Picture Arts and Sciences – the arbiter of artistic achievement in American cinema – presented an Oscar in March 2006 to the rap artists Three Six Mafia, a musical act popular among college audiences that frequently performs on campuses, for their gritty song, "It's Hard Out Here For a Pimp," which includes the lyric: "It's fucked up where I live, but that's just how it is." Three Six Mafia, *It's Hard Out Here For a Pimp*, *on* HUSTLE & FLOW SOUNDTRACK (Atlantic Records 2005). For better or for worse, we live in a society (a "community," if the Commission prefers) in which coarse language is now routine – and nowhere more so than in the music favored by college audiences.

The popular music television network MTV maintains a subsidiary channel, mtvU, designed to serve college students with the programming they enjoy. On March 16, 2011, mtvU held its "Woodie Awards" ceremony, which honors the musicians whose work is "voted 'best' by the US college audience." *About the Show*, http://www.mtv.com/ontv/woodieawards/2011/about.jhtml. This year, the artist Wiz Khalifa won "Woodie of the Year" for his song "Black & Yellow." Wiz Khalifa, *Black and Yellow* (Rostrum Records 2011). That song contains the phrases "Bitches love me 'cause I'm fuckin' with their best friends" and "She wanna fuck with them cats, smoke weed, count stacks." A college student (or young child) wishing to

hear the song regarded by young people as the year's best could do so by accessing it on the Internet, *see Reno v. ACLU*, 521 U.S. 844, 874 (1997), accessing it on a cable program such as mtvU, *see United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813-14 (2000), or could have a friend play it over the phone, *Sable Comm. Of Cal. v. FCC*, 492 U.S. 115 (1989), but could not hear it on the radio. What constitutes harmful or taboo speech is allowed to evolve in every other format of communication, but the FCC's indecency regime freezes societal norms in over-the-air broadcasting.

Although the *Pacifica* plurality upheld the Commission's indecency rules in the limited context of a one-of-a-kind program that "represented a rather dramatic departure from traditional program content . . . ," *Reno*, 521 U.S. at 867, there is no "dramatic departure" in playing the chart-topping songs of the day; that is, and long has been, the bread-and-butter of radio programming. Rather, the "dramatic departure" is in telling listeners waiting to hear their favorite songs to check back at midnight. It was rare in George Carlin's heyday for a chart-topping song to use the word "fuck," but the popularity of songs such as "Black & Yellow" indicates just how community standards can and must be allowed to evolve. College broadcasters are not permitted to offer their community the entertainment programming that its members routinely enjoy, unless they alter that programing by replacing or "bleeping" indecent terms. Doing so changes the meaning and impact of an artist's expression. *See Cohen*, 403 U.S. at 25. Thus, the FCC's indecency regime unduly hampers collegiate

broadcasters from offering their community the programming it desire.

To avoid liability, the FCC offers broadcasters two options. First, broadcasters may time-channel their programming. Restricting speech between the hours of 6:00 a.m. and 10:00 p.m. is "a significant restriction of communication between speakers and willing adult listeners, communication which enjoys First Amendment protection." *Playboy Entm't Grp.*, 529 U.S. at 812. Time-channeling restricts broadcasters from offering programming at the times of peak audience interest. For instance, radio broadcasts are most popular during "drive times," which may last anywhere from 6:00 a.m. – 10:00 a.m. and 3:00 p.m. – 7:00 p.m. NORMAN A. P. GOVONI, DICTIONARY OF MARKETING COMMUNICATIONS 63 (2004). During these time periods, significantly more people are listening to the radio. Yet, at precisely the time that a collegiate broadcaster could reach the most substantial portion of his or her community, the FCC restricts speech in a manner that is arbitrary, inconsistent and contrary to the First Amendment.

Second, the FCC advises that broadcasters may purchase "delay" technology. *Remand Order*, 21 F.C.C. Rcd. at 13311 ¶ 32. However, the technology that the FCC suggests broadcasters purchase is remarkably expensive for a collegiate or hyper-local broadcaster. The AirTools 6100, a standard broadcast audio delay technology, retails for over $2,500. To implement that technology, additional in-studio audio equipment, new and expensive computer software, multiple employees, and training may be needed.

Moreover, "delay" technology is itself vulnerable to human failings. A radio technician, who is focused on the main elements of the broadcast, may overlook the muttered use of an indecent term in the background – but a vigilant advocacy organization may, upon repeated playings, unearth the profanity and bring a complaint. In such a scenario, the FCC may force a broadcaster to pay a fine regardless of the broadcaster's investment in "delay" technology.

Finally, the need for "delay" technology underscores the vagueness and chilling effect that the FCC's indecency regime promotes. By suggesting that broadcast outlets purchase "delay" technology, the Commission thereby expects a college student with little radio experience, no legal training, and her nervous finger on a "delay" button to weigh the FCC's confusing indecency precedent and come up with a definitive conclusion in mere seconds. This is a daunting task, particularly given the fact that the Commission – with its scores of trained attorneys – has had trouble navigating the indecency regime. *See Omnibus* Order, 21 F.C.C. Rcd. at 2699 ¶ 142 (live broadcast "legally actionable") *rev'd, Remand Order*, 21 F.C.C. Rcd. at 13328 ¶ 72 (live interview not actionably indecent); *In re KBOO Found*, 16 F.C.C. Rcd. at 10733 ¶ 8 (broadcast actionably indecent) *rescinded by,* 18 F.C.C. Rcd. at 2474 ¶ 9 (broadcast not indecent). Given the unique characteristics of college radio, "delay" technology forces a student broadcaster to make a choice: self-censor every questionable term, thereby eliminating the speech from the marketplace of ideas, *see Golden Globes Order*, 19

F.C.C. Rcd. at 4979 ¶ 9 (FCC will fine for one-time use of an expletive), or risk the station's future. The existence of a delay button does not obviate the FCC's unconstitutional chilling of speech – to the contrary, it *gives effect* to the chilling.

In sum, the FCC's indecency regime restricts college broadcasters' ability to fulfill their communities' news and entertainment needs. There is a distinct interest in providing communities with live, cutting edge and local broadcasting. However, the FCC makes it impossible for college broadcasters to offer programming without risk or fear. Student broadcasters are restricted from providing their fellow students with popular programming available in every other medium. As a result, this Court should strike the FCC's indecency regime in order to allow student broadcasters to serve their communities adequately.

C. The FCC's Vague Indecency Regime Has Chilled Speech and Forced Student Broadcasters To Engage In Demonstrated Self-Censorship

The FCC's vague indecency regulation has forced student broadcasters to institute chilling self-censorship policies. Vague regulations chill speech by forcing would-be speakers to self-censor and "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). Given the unique characteristics of collegiate broadcasting, the FCC's policies have had a tangible

chilling effect.

Student broadcasting outlets rarely, if ever, generate enough revenue to offset their costs and are often a cost center to the host institution. The Commission should not penalize these host institutions for providing students with the educational opportunities. Student broadcasters pride themselves on being public service related learning institutions more than money-making operations. *In re Creation of Low Power Radio Service*, 15 F.C.C. Rcd. at 2213 ¶ 17.

Under current regulations, the FCC may fine a licensee as much as $325,000 for *each* indecent utterance. 47 C.F.R. § 1.80(b)(1). The Commission may reduce forfeiture amounts if it would cause a licensee undue financial hardship. However, the Commission will only consider the financial standing of the named licensee when making such a determination. *See In re Tri-State Univ.*, 24 F.C.C. Rcd. 4961, 4963-64 ¶ 9 (MB 2009). College broadcasting outlets are often operated by students but licensed to the university itself. As a result, the FCC will not reduce a forfeiture amount even if it exceeds the broadcaster's entire annual budget because it is the university's finances, not the student operated broadcaster's finances, that the Commission considers. *See In re State Univ. of N.Y.*, 13 F.C.C. Rcd. at 12811 ¶ 5 (1987) (original forfeiture amount exceeded the station's budget). Given the often altruistic character of college broadcasting and the FCC's policy regarding forfeiture reduction, an FCC indecency fine would "[a]bsolutely kill" a collegiate broadcasting outlet. Robert Arcamona, *Dirty Words*, STUDENT PRESS LAW

CENTER REPORT, Fall 2008, at 31. Indeed, when Cortland University's student radio station was fined in 1987 for broadcasting indecent terms, the university "shut down the station to resolve the problem . . . ." Steve Knopper, *College Radio Suffers Growing Pains*, BILLBOARD, July 9, 1994, at 84. In essence, the FCC's indecency policy has the very real potential to sink successful hyper-local broadcasters who serve a uniquely beneficial role in society.

The threat of financial ruin, combined with the FCC's arbitrary indecency enforcement precedent, has chilled collegiate broadcasters' speech. The FCC has forced collegiate broadcasters to adopt policies that favor self-censorship over free speech. For instance, WXUT-FM is operated by the students of the University of Toledo but owned by the university itself. In its manual, the station acknowledges that broadcasters often will not know what speech is prohibited by the FCC and should engage in aggressive self-censorship. *Obscenity/Indecency Policy, WXUT-FM*, http://wxut.pbworks.com/f/Obscenity.pdf (students "must carefully monitor what we say and play. WHEN IN DOUBT, DON'T"). Similarly, KWUR-FM, which is operated by the students of the Washington University in St. Louis but owned by the university, warns students, "If you have to think about it, don't say it." *The KWUR Bible*, oldsu.wustl.edu/file.php?id=545. At WESN-FM, a station licensed to the Illinois Wesleyan University, students are told that on-air policies are in place "due to either a campus policy or an FCC regulation" and warned that students may not

discuss "anything that graphically or explicitly describes sexual or 'potty' functions or activities." *The WESN DJ Manuel*, http://www.iwu.edu/~wesn/info/djmanual.htm.

In sum, the FCC's indecency policy has a disparate impact on student broadcasters. Hyper-local broadcasting offers unique benefits to society, but the FCC's indecency regime has hampered local broadcasters' ability to offer the very programing that the Commission commends as singularly valuable. Given the unique financial characteristics of student broadcasting, the FCC's indecency regime has led to rampant self-censorship. As a result, this Court should strike down the FCC's indecency regime as it is currently understood and allow student broadcasters to fulfill their community-service mission.

CONCLUSION

For the foregoing reasons, *amici curiae* submit that the ruling of the court below should be AFFIRMED.

Respectfully Submitted,

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