

No. 10-1293

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IN THE  
**Supreme Court of the United States**

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

v.

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

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

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**BRIEF FOR RESPONDENTS  
CBS TELEVISION NETWORK AFFILIATES  
ASSOCIATION AND NBC TELEVISION  
AFFILIATES**

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## **RULE 29.6 CORPORATE DISCLOSURE STATEMENT**

Pursuant to Sup. Ct. R. 29.6, Respondents make the following disclosures:

The CBS Television Network Affiliates Association (the “CBS Affiliates”) and the NBC Television Affiliates (the “NBC Affiliates”) are non-profit, incorporated member associations of broadcast television stations that are affiliated, respectively, with the CBS and NBC Television Networks. The CBS Affiliates represent approximately 230 stations; the NBC Affiliates represent approximately 225 stations.

Neither the CBS Affiliates nor the NBC Affiliates has issued any shares of stock or debt securities to the public, and neither has a parent company, subsidiaries, or affiliates that have issued shares or debt securities to the public.

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## INTRODUCTION

The CBS Television Network Affiliates Association (the “CBS Affiliates”) and the NBC Television Affiliates (the “NBC Affiliates”) are associations of broadcast television stations that are affiliated, respectively, with the CBS and NBC Television Networks. Members of the CBS Affiliates operate approximately 230 television stations; members of the NBC Affiliates operate approximately 225 stations. All of the NBC Affiliates’ members, and a large majority of the CBS Affiliates’ members, are owned by entities other than the CBS and NBC Television Networks.

The Federal Communications Commission (“FCC” or “Commission”) has adopted a revised indecency policy that applies to members of the CBS and NBC Affiliates. Individual members of the CBS and NBC Affiliates have been the subject of indecency investigations by the FCC, and members devote substantial resources to efforts to understand and comply with the FCC’s indecency policy.

For decades, the Commission has taken a restrained approach to indecency enforcement, grounded in this Court’s decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Recently, however, the FCC has adopted a new indecency policy that lacks clear and consistent standards and infringes on the constitutional rights of broadcasters. The FCC’s new policy, combined with a huge increase in the maximum monetary penalty for indecency, from \$32,500 to \$325,000, *see* Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006), has dramatically escalated the risks

borne by broadcasters. The FCC has also warned that “multiple violations of [its] indecency rule by broadcasters may well lead to the commencement of license revocation proceedings.” *Complaints against Various Broadcast Licenses Regarding their Airing of the “Golden Globe Awards” Program*, 19 F.C.C.R. 4975, 4982, ¶ 17 (2004) (“*Golden Globes Order*”).

The FCC’s expanded indecency policy is both unconstitutionally vague and a constitutionally impermissible restriction on broadcaster speech. The FCC’s revised policy, combined with the enormous increase in the maximum penalty for violating the policy, may deter local television stations from covering live local events of interest to their communities.<sup>1</sup> Particularly in the case of live network programming, local television stations generally have no ability to avoid broadcasting fleeting expletives but nevertheless face liability for any such content under the FCC’s new policy. In addition, local stations often have no way to ascertain in advance whether a particular network-provided program episode contains fleeting nudity.<sup>2</sup> In these circumstances, the FCC’s indecency policy has an “obvious chilling effect on free speech,”

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<sup>1</sup> The FCC has declared that “there is no outright news exemption from [its] indecency rules” under the new enforcement regime. *See* Pet. App. 100a.

<sup>2</sup> Network affiliates generally lack effective technical or legal means to alter programming provided to them for broadcast by the networks. Affiliate television stations commit to accept and air such programming through contractual agreements with the networks, subject to a limited right to preempt network programming in advance.

because the threat of severe sanctions “may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.” *Reno v. ACLU*, 521 U.S. 844, 872 (1997).

### STATEMENT OF THE CASE

1. Congress enacted the indecency statute, 18 U.S.C. § 1464, as part of the Radio Act of 1927. The FCC did not engage in active indecency enforcement until the 1970s, and even then, enforcement actions were rare. *See E. Educ. Radio (WUHY-FM)*, 24 F.C.C.2d 408, 412, ¶ 11 (1970).

a. The scope of the FCC’s authority to enforce the indecency statute was challenged in 1975, when the agency found that a radio station licensed to the nonprofit Pacifica Foundation had violated the statute with its midafternoon broadcast of comedian George Carlin’s 12-minute “Filthy Words” monologue. In its *Pacifica* decision, the Commission indicated that it intended to play a limited role in regulating content, and that “the real solution is the exercise of licensee judgment, responsibility, and sensitivity to the community’s needs, interests and tastes.” *Citizen’s Complaint Against Pacifica Found.*, 56 F.C.C.2d 94, 100, ¶ 16 (1975).

This Court narrowly upheld the FCC’s decision. The Court’s decision emphasized that the broadcast repeated the expletives “over and over again.” *Pacifica*, 438 U.S. at 729. Two of the five justices who voted to uphold the FCC’s action did so on the assumption that the agency would “proceed cautiously, as it has in the past.” *Pacifica*, 438 U.S.

at 761 n.4 (Powell, J., concurring in part and concurring in the judgment); *id.* at 760-61 (distinguishing the “isolated use of a potentially offensive word” from “the verbal shock treatment administered by [the] respondent”).

b. Post-*Pacifica*, the FCC continued to “proceed cautiously,” and assured broadcasters that it “intend[ed] strictly to observe the narrowness of the *Pacifica* holding.” *WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254, ¶ 10 (1978). For decades, the FCC repeatedly concluded that isolated or fleeting expletives did not violate the indecency policy. *See, e.g., Regents of Univ. of Cal.*, 2 F.C.C.R. 2703 (1987); *In re Pacifica Found.*, 2 F.C.C.R. 2686, 2699, ¶ 13 (1987) (“speech that is indecent must involve more than an isolated use of an offensive word”); *Infinity Broad. of Pa.*, 2 F.C.C.R. 2705, 2705 ¶ 7 (1987) (same); *L.M. Commc’ns of S.C., Inc.*, 7 F.C.C.R. 1595 (1992) (broadcast “contained only a fleeting and isolated utterance which, within the context of live and spontaneous programming, does not warrant a Commission sanction”). The FCC applied the same restrained approach to isolated instances of nudity. *See, e.g., WGBH Educ. Found.*, 69 F.C.C.2d, at 1254, ¶ 10 & n.6 (observing “narrowness of the *Pacifica* holding” in finding that programs containing alleged “nudity and/or sexually oriented material” were not indecent); *WPBN/WTOM License Subsidiary*, 15 F.C.C.R. 1838, 1840-41, ¶¶ 9-10 & n.5 (2000) (discussing whether the material in question was “isolated or fleeting,” and declaring that “presentation of adult frontal nudity prior to 10 p.m. *per se* [does not] constitute[] indecent programming”).

c. In 2001, the FCC issued a policy statement intended to “provide guidance to the broadcast industry.” This guidance “describes the analytical approach the Commission uses in making indecency determinations.” *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464*, 16 F.C.C.R. 7999, 7999, ¶ 1 (2001) (“Industry Guidance”). According to the Industry Guidance, material is indecent if it (1) “describe[s] or depict[s] sexual or excretory organs or activities,” and (2) is “patently offensive as measured by contemporary community standards for the broadcast medium.” *Id.* at 8002, ¶¶ 7-8. The FCC’s Industry Guidance states that the FCC determines “patent offensiveness” by considering three factors: whether the material (1) is explicit or graphic in describing sexual or excretory organs or activities; (2) “dwells on or repeats” the description “at length”; and (3) appears to pander, is used to titillate, or is presented for shock value. *Id.* at 8003, ¶ 10 (emphases added).

The FCC stated that “[n]o single factor generally provides the basis for an indecency finding.” *Id.* Instead, “[e]ach indecency case presents its own particular mix of these, *and possibly other*, factors, which must be balanced to ultimately determine whether the material is patently offensive and therefore indecent.” *Id.* (emphasis added). The Commission’s Industry Guidance did not identify the “other” factors that could “possibly” be relevant in a particular case. Nor did the Industry Guidance distinguish between utterances and images in explaining its patent offensiveness analysis. *Compare id.* at 8010-11, ¶ 20 (utterances aired over a

radio program), *with id.* at 8011, ¶ 21 (images of sex organ models).

In discussing the “dwells on or repeats at length” factor, the Industry Guidance—consistent with the FCC’s longstanding interpretation and this Court’s decision in *Pacifica*—expressly distinguished between a “persistent focus on sexual or excretory material” and isolated, “passing or fleeting” references. *Id.* at ¶ 17; *see also id.* (where sexual or excretory references “have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency”).

d. In 2003, the FCC’s Enforcement Bureau found that the musician Bono’s use of the words “really fucking brilliant” during a live broadcast of the Golden Globe Awards was not indecent. In reaching that conclusion, the Bureau noted that it had “previously found that fleeting and isolated remarks of this nature do not warrant Commission action.” *“Golden Globe Awards” Program Complaints*, 18 F.C.C.R. 19,859, 19,861 ¶ 6 (Enf. Bureau, 2003). It also found that the utterance “did not describe sexual or excretory organs or activities,” but instead was used to “emphasize an exclamation.” *Id.* at 19,861, ¶ 5.

2. In 2004, the FCC changed course. The full Commission reversed the Enforcement Bureau’s 2003 decision involving Bono, finding that the word “fuck” and its variations “inherently ha[ve] a sexual connotation” and “invariably invoke[] a coarse sexual image.” Thus, the FCC determined, the word and its variations presumptively meet both the first component of the indecency definition (“depict or describe sexual activities”) and one of the “patently

offensive” factors (an “explicit or graphic” description or depiction of sexual activities). *Golden Globes Order*, 19 F.C.C.R. at 4979, ¶ 9. The FCC concluded that broadcasts of the term “fuck” and its derivatives were indecent regardless of whether they were fleeting—thus negating the “dwells on or repeats” factor for those terms. *Id.* at 4980-81, ¶¶ 12-13.

In 2006 and 2008, applying its newly-expanded indecency enforcement policy and contrary to its historical, *Pacifica*-based approach, the FCC found the three broadcasts at issue in this case to be indecent. All three broadcasts aired in 2002 or 2003, prior to the FCC’s 2004 announcement of a change in policy.

a. In 2006, the FCC found indecent two fleeting uses of “fuck” that aired during Fox’s broadcasts of the Billboard Music Awards in 2002 and 2003. *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664, 2691-2694, ¶¶ 100-111 (2006) (“*Omnibus Order*”); *see also* Pet. App. 90a-91a, 48a. In the same decision, the FCC came to a similar conclusion regarding a single use of the word “shit” that also aired during the 2003 program. The FCC found that the word “shit” is an “invariably vulgar, graphic, and . . . coarse excretory image,” thus meeting both the first part of the indecency definition and the first “patently offensive” factor. *Omnibus Order*, 21 F.C.C.R. at 2688-89, ¶¶ 91, 96; *see also* Pet. App. 48a. Accordingly, uses of the word “shit,” like “fuck,” were indecent whether fleeting or not.

b. In 2008, the FCC found indecent a clip from a 2003 episode of “NYPD Blue” that was “slightly less than seven seconds” in length and briefly depicted a woman’s buttocks in a nonsexual manner. Pet. App. 120a; *id.* 126a. In so finding, the Commission found that *Pacifica* “pose[d] no barrier to a finding of indecency” because “*Pacifica* involved spoken expletives, not images of nudity.” *Id.* 49a.

3.a. Several Respondents sought judicial review of the FCC’s Order finding that the two Billboard Music Awards broadcasts were indecent.<sup>3</sup> The court of appeals held that the FCC did not provide an adequate explanation for its change in policy, and therefore its action was arbitrary and capricious under the Administrative Procedure Act. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007).

After granting the FCC’s petition for certiorari, this Court reversed the court of appeals’ decision and remanded for consideration of the constitutional issues. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009). The Court held that the APA did not require the Commission to justify the “expan[sion] of its enforcement” by “reasons more substantial than those required to adopt a policy in the first instance.” *Id.* at 1810. Rather, it was sufficient for the FCC to provide “reasons for

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<sup>3</sup> The FCC’s Order also found that episodes of CBS’s “The Early Show” and ABC’s “NYPD Blue” were indecent. The FCC subsequently reversed its finding with respect to “The Early Show” and dismissed the complaint against “NYPD Blue” on procedural grounds. *See* Pet. App. 10a & n.5.

expanding the scope of its enforcement activity [that] were entirely rational.” *Id.* at 1813. The Court remanded to allow the court of appeals to address the “separate question” of the “lawfulness [of the policy] under the Constitution.” *Id.* at 1812.

b. On remand, the court of appeals unanimously held that the new indecency policy is unconstitutionally vague. Pet. App. 2a, 18a. The court of appeals concluded the policy fails to give broadcasters fair notice of “what is prohibited so that [they] may act accordingly.” *Id.* 19(a) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). By “provid[ing] no clear guidelines as to what is covered,” the policy “forces broadcasters to steer far wider of the unlawful zone, rather than risk massive fines.” *Id.* The FCC’s application of its “patently offensive” analysis to the broadcasts before the court “consisted of repetition of one or more of the factors without any discussion of how” they were being applied. *Id.* 24a. In addition, the Commission applied its “presumptive prohibition” of the words “fuck” and “shit” with “little rhyme or reason,” leaving broadcasters “to guess whether an expletive” will be found to violate the policy. *Id.* 26a-27a. The court of appeals found “ample evidence in the record that the FCC’s [new] indecency policy has chilled protected speech.” *Id.* 31a.<sup>4</sup>

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<sup>4</sup> In a separate case, the ABC Network and the ABC Television Affiliates petitioned for judicial review of the Commission’s finding that the 2003 “NYPD Blue” broadcast was indecent. Pet. App. 120a. The Second Circuit found that there was “no significant distinction between this case and *Fox*,” and that (...continued)

## SUMMARY OF THE ARGUMENT

The FCC's new indecency policy is unconstitutionally vague. The policy also imposes an unconstitutional restriction on broadcaster speech.

1.a. For decades prior to the broadcasts at issue, the FCC, guided by this Court's decision in *Pacifica*, maintained that fleeting expletives and fleeting nonsexual nude images were not indecent. In rejecting that longstanding approach, the FCC applied its new indecency policy to broadcasts that were not actionable at the time they aired. As a result, Respondents not only lacked notice that fleeting expletives and images would be found indecent; they had notice to the contrary.

The Government concedes that Respondents lacked fair notice of the new policy, but argues that this is irrelevant because the FCC did not impose a fine on the Fox Respondents. But the FCC's finding that broadcasters willfully violated a criminal statute may have adverse consequences apart from the levying of a fine. In *Pacifica*, the Court decided the constitutional issue even though the FCC did not impose a fine. *See* 438 U.S. at 730. Moreover, the FCC has fined the ABC Respondents more than \$1.2 million for the "NYPD Blue" broadcast.

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because it had earlier held in the *Fox* case that the FCC's new indecency policy was impermissibly vague, it was bound by that decision. *Id.* 124a. The Government sought this Court's review of both the *Fox* and *ABC* cases, and the Court granted certiorari.

b. Even as to future broadcasts, the FCC's expanded indecency policy is unconstitutionally vague because no reasonable broadcaster can determine what speech is prohibited. The FCC applies its indecency policy on a *post hoc*, case-by-case basis, giving unspecified and variable weight to enumerated and unenumerated factors. The record in this case demonstrates that the FCC's approach significantly chills protected broadcaster speech. Pet. App. 31a-34a.

c. The FCC's application of its new policy confirms that it relies on subjective judgments. In one case, for example, the Commission found that a viewer advisory was sufficient to weigh against finding that repeated uses of "fuck," "shit," and several other expletives were indecent, but in the "NYPD Blue" broadcast before the Court the FCC discounted the effectiveness of a similar advisory. Under the FCC's new policy, certain terms are inherently indecent even when used a single time, unless the FCC determines that those terms are "essential to the nature of the work," or that omitting them would have "diminished the power, realism, and immediacy" of the broadcast.

2.a. The newly expanded enforcement regime goes well beyond the First Amendment limits suggested by this Court's decision in *Pacifica*. In determining that fleeting expletives and nonsexual nude images can be punished, the FCC ignored this Court's emphasis in *Pacifica* on the narrowness of its holding. *Pacifica*, 438 U.S. at 760-61 (Powell, J., concurring).

b. Nor can the new policy survive the intermediate scrutiny standard applicable to broadcaster speech. Precisely stated, the Government's interest supporting the new policy is in preventing children from being exposed to *fleeting* expletives and nudity. This interest is not substantial, especially given that the new policy regularly permits the airing of such material outside of the Commission's safe harbor period. The new policy also burdens substantially more speech than is necessary to further the Government's asserted interest. Less restrictive, content-neutral alternatives, such as targeted blocking technologies, exist to empower parents to shield their children from material that the parents deem inappropriate.

## ARGUMENT

### I. The FCC's New Indecency Policy Is Unconstitutionally Vague.

The Due Process Clause of the Fifth Amendment requires that laws and regulations be set forth with "sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A law is impermissibly vague when it is "so standardless that it authorizes or encourages seriously discriminatory enforcement," *United States v. Williams*, 553 U.S. 285, 304 (2008), and when the government's interpretation of a statute's operative terms rely on "untethered" and "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2720 (2010) ("*HLP*") (citing *Papachristou v. Jacksonville*, 405 U.S. 156

(1972)). A law or regulation that “threatens to inhibit the exercise of constitutionally protected rights,” such as “the right of free speech,” is subject to “a more stringent vagueness test.” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).<sup>5</sup>

The FCC’s new indecency enforcement policy fails to satisfy these constitutional requirements. Under the FCC’s policy, a reasonable broadcaster cannot determine whether speech is, or is not, prohibited. That is true today, and it certainly was true at the time of the broadcasts at issue in this case, when decades of FCC decisions put broadcasters on notice that fleeting expletives and brief nude nonsexual images were *not* indecent.

**A. The FCC’s reinterpretation of its authority to enforce the indecency statute demonstrates that the new policy is impermissibly vague.**

The Fox and ABC Respondents aired the broadcasts at issue in 2002 and 2003. For decades prior to those broadcasts, the FCC maintained that a single airing of a fleeting expletive “should not call

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<sup>5</sup> Vagueness is of special concern when a criminal statute is at issue. *See Reno v. ACLU*, 521 U.S. 844, 871-72 (1997); *see also Pacifica*, 438 U.S. at 739 (noting that Section 1464 is a “criminal statute”). This Court has declined to adopt multiple interpretations of statutes that apply in both criminal and civil contexts, noting that such an approach would “render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case.” *Clark v. Martinez*, 543 U.S. 371, 382 (2005). *See also Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

for [it] to act under the holding of *Pacifica*.” See *WGBH Educ. Found.*, 69 F.C.C.2d at 1254, ¶ 10 n.6; see also Pet. Br. 5 (acknowledging that “after *Pacifica*, the Commission implemented an enforcement policy under which only deliberate, repetitive use” of expletives “would be deemed actionably indecent”). The FCC applied *Pacifica*’s “shock treatment” requirement to images as well as utterances, finding that brief, nonsexualized nude images were not indecent. See, e.g., *WGBH Educ. Found., id.*; *Omnibus Order*, 21 F.C.C.R. at 2718-19, ¶ 226 (broadcast of child’s buttocks not indecent because, *inter alia*, it did not “dwell on or repeat” an excretory organ description “at length,” but rather “shows the relevant segment once and then moves on to other videotapes”); *WPBN/WTOM License Subsidiary*, 15 F.C.C.R. at 1840, ¶ 9 (full frontal adult nudity in “Schindler’s List” not indecent); *accord*, Industry Guidance 16 F.C.C.R. at 8010, ¶ 21 (“very graphic sex organ models” used to “simulate the use” of condoms and diaphragms were “not presented in a pandering, titillating or vulgar manner”) (citing *King Broad. Co.*, 5 F.C.C.R. 2971 (1990)).<sup>6</sup>

Respondents and other broadcasters thus had notice, based on decades of FCC decisions cabined by this Court’s decision in *Pacifica*, that broadcasts of fleeting expletives or images would not be punished. Without advance notice, the FCC drastically

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<sup>6</sup> See also Pet. Reply 2 (“[T]he FCC has . . . expanded its indecency policy to cover isolated offensive words and images where circumstances warrant . . .”) (emphases added).

expanded its construction of the indecency statute's coverage and applied that interpretation to the three broadcasts in this case, thus criminalizing the broadcast of material that was not actionable at the time it was aired. This is worse than lack of fair notice, and worse even than no notice at all.

The FCC's prior, *Pacifica*-cabined enforcement decisions are directly relevant to the vagueness inquiry in this case. Two Terms ago, in *Skilling v. United States*, the Court surveyed "the origin and subsequent application" of the honest-services fraud statute to determine whether the conduct of the convicted defendant could be interpreted to come within those decisions. "Reading the statute to proscribe a wider range of offensive conduct [than prior decisions understood the statute to have criminalized], we acknowledge, would raise the due process concerns underlying the vagueness doctrine." *Id.*, 130 S. Ct. 2896, 2926, 2931 (2010); *see also id.* at 2940 (Scalia, J., joined by Thomas and Kennedy, JJ., concurring in part and concurring in the judgment) (statute void for vagueness because inconsistent interpretations of it "provide[] no ascertainable standard for the conduct it condemns") (quotation marks omitted). In *Bouie v. City of Columbia*, the Court recognized that even if the text of the applicable statute is clear—which is not the case here, *see* Argument Part I.B. *infra*—"unforeseeably and retroactively expand[ing] a statute by judicial construction" presents a "potentially greater deprivation of the right to fair notice" than the garden-variety vagueness case where "the uncertainty . . . resulted from vague or overbroad language in the statute itself." *Id.*, 378 U.S. 347,

351-52 (1964) (internal citations omitted). The same principle applies to retroactively expanding a statute by agency construction.

In view of the FCC’s longstanding enforcement policy, Respondents had “no reason to suspect that conduct clearly outside the scope” of the FCC’s enforcement of the indecency statute to that point—*i.e.*, fleeting expletives and images—“w[ould] be retroactively brought within it” by the FCC’s revised construction of its authority to enforce the statute. *Id.* at 352. Indeed, the FCC’s longstanding policy found substantial support in *Pacifica*. *See Pacifica*, 438 U.S. at 750 (“[w]e have not decided that an occasional expletive . . . would justify any sanction”); *id.* at 742 (plurality opinion); *id.* at 760-61 (Powell, J., concurring in part and concurring in the judgment) (Court’s decision “did not speak to cases involving the isolated use of a potentially offensive word”).

The Government *concedes* lack of fair notice in this case. *See* Pet. Br. 28, n.3 (“To be sure, Fox did not have reasonable notice at the time of the broadcasts that the Commission would consider non-repeated expletives indecent.”). *See also* Pet. App. 93a (FCC “acknowledge[s] that it was not apparent that Fox could be penalized for Cher’s comment at the time it was broadcast.”).<sup>7</sup> The Government

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<sup>7</sup> The Government does not expressly concede lack of fair notice as to ABC, but as noted above the FCC’s longstanding precedents do not distinguish between fleeting expletives and fleeting nudity. *See also CBS et al. v. FCC et al.*, No. 06-3575, slip op. at 6-12, 26-27, 57-69 (3d Cir. Nov. 2, 2011) (reaffirming that FCC indecency policy drew no distinction between (...continued)

attempts to minimize the significance of this concession by noting that the FCC declined to impose monetary penalties against Fox. Pet. Br. 28, 31. However, the agency made no such determination with respect to ABC and the *NYPD Blue* episode. Instead, the FCC imposed more than \$1.2 million in fines on the ABC stations that aired that episode. Moreover, the mere fact that the FCC declined to impose a monetary penalty for what it found to be “willful” violations of the indecency statute does not establish that its indecency findings have no collateral consequences for the broadcasters involved. See *Omnibus Order*, at 2691-95, ¶¶ 105-114; see also *id.*, at 2722 n.179 (Fox’s proposed change in its live programming practices “does not excuse the indecency violation in this case”). Such findings of wrongdoing can harm a broadcasters’ reputation with viewers and advertisers. In addition, though the FCC stated that its indecency findings would not adversely impact the license renewals of the Fox stations, nothing bars the agency from using its findings to justify enhanced penalties in the event of future violations of the policy.<sup>8</sup>

This Court has never held that the government’s decision to forbear from exercising its asserted authority to punish speech defeats a challenge to that authority. Indeed, in *Pacifica* itself the

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expletives and nudity in finding that fleeting material was not indecent).

<sup>8</sup> See 47 U.S.C. § 503 (granting Commission authority to increase forfeiture penalties in the case of “any history of prior offenses”); see also *Omnibus Order*, 21 F.C.C.R. at 2669, ¶ 20.

Commission “did not impose formal sanctions,” *Pacifica*, 438 U.S. at 730, but the Court nevertheless considered the important constitutional issues implicated by the FCC’s action. The Court should do the same here. *See United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) (“[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*.”)

**B. The FCC’s “patently offensive” factors lack constitutionally adequate standards.**

The Commission’s “patently offensive” factors fail to inform broadcasters of the weight that the FCC will give to each factor, of which factor (if any) will be dispositive in any particular case, and of what “other” factors the agency may consider relevant (or perhaps even dispositive) in assessing whether to punish a broadcaster for airing content.

1. The stated purpose of the three “patently offensive” factors set out in the Industry Guidance is to “provide guidance to the broadcast industry” regarding the FCC’s interpretation of the indecency statute. Industry Guidance, 16 F.C.C.R. at 7999, ¶ 1. By the FCC’s own admission, however, in applying the factors to a particular broadcast, the agency “weigh[s] and balance[s]” the factors “on a case-by-case basis,” and “[i]n particular cases, one or two of the factors may outweigh the others.” *Id.* at 8004, ¶ 13. The Commission further states that in some cases it will rely on “other” unspecified factors in addition to the three it has defined. *Id.* The FCC is the sole definer of the “contemporary community standards for the broadcast medium” that the agency

uses to “measure” patent offensiveness. Pet. Br. 19-20 (emphasis omitted); *see also* Pet. Reply 4-5. The FCC thus measures patent offensiveness on a *post hoc* basis, potentially weighing its three factors, and possibly others, differently in each case, based on “standards” that it is effectively free to revise or ignore. This essentially subjective approach falls short of what due process requires.

*Reno v. ACLU* confirms the “vagueness inherent in the open-ended term ‘patently offensive.’” 521 U.S. at 873. As was the case there, the FCC’s definition of “patently offensive” “omits any requirement that ‘patently offensive’ material . . . lack serious literary, artistic, political, or scientific value.”<sup>9</sup> *Id.* at 865. Nor do the three “patently offensive” factors set out in the Industry Guidance resolve the inherent vagueness that this Court recognized in *Reno*. As demonstrated above, the “coarseness” factor is “invariably” met by some

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<sup>9</sup> Although the FCC, in applying its new indecency policy, has asked whether content has “any social or artistic merit” in considering the “pander, titillate, or shock” component of its “patently offensive” test, *see* Pet. App. 147a; *see also 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, 4512, ¶¶ 11-13 (2005) (discussed *infra* at Argument Part I.C.), nothing compels the Commission to consider social or artistic merit in every case, and its determinations under the new policy have been procedurally and substantively erratic. *See Omnibus Order*, 21 F.C.C.R. at 2684-85, 2686-87, ¶¶ 74-78, 82, 84-85 (placing burden on broadcaster to “demonstrate[] it was essential to the nature of an artistic or educational work” to air expletives); *see also infra* Argument Part I.C. (discussing “The Blues”).

expletives, but not others. The “dwells on or repeats at length” factor applies in some cases but not others, depending on the “coarseness” of the aired expletive. And the “pander, shock, or titillate” factor is relevant only when the Commission deems it so. *See* Industry Guidance, 16 F.C.C.R. at 8014, ¶ 23 (“The absence of a pandering or titillating nature, however, will not necessarily prevent an indecency determination . . . .”); *see also infra* Argument Part I.C.2. (discussing inconsistencies in FCC’s “pander, shock, or titillate” determinations). These factors generate confusion, not guidance. They do not cure the inherently vague definition of “patently offensive.”

2. The arbitrary nature of the FCC’s new indecency policy has significantly chilled protected broadcaster speech. *See, e.g.*, Brief for *Amici Curiae* Public Broadcasters, *FCC v. Fox Television Stations, Inc.* (2008) (No. 07-582), pp. 13-16 (uncertainty arising from indecency enforcement caused public broadcasters to edit or refrain from airing a number of educational programs); Eggerton, “Pappas Won’t Air CBS’s 9-11 Doc.,” *Broadcasting & Cable* (Sept. 7, 2006). The court of appeals, mindful of this Court’s admonition that impermissibly vague regulations “inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked” (Pet. App. 19a, quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)), pointed to “ample evidence in the record” demonstrating that the Commission’s change in policy has caused broadcasters to self-censor across a range of programming types. Pet. App. 31a-34a. As the court noted, these chilling effects have been “profound,” and have adversely affected coverage of

“news and public affairs programming,” and even political debates and local memorial services. *Id.* 31a-32a.

By expanding its enforcement policy well beyond *Pacifica*’s bounds, and by doing so in a highly subjective manner, the FCC is achieving indirectly what it is barred from doing directly: “interfer[ing] with the right of [broadcasters] free speech.” 47 U.S.C. § 326.

3. It is no answer to claim that the FCC’s *post hoc* “context-based” methodology is consistent with the approach this Court approved in *Pacifica*. As the court of appeals recognized, the context in which an utterance or image occurs will change with each use, but the *standards* against which that utterance or image is assessed for enforcement purposes may not. Pet. App. 30a. Calling an opponent’s argument “bullshit” is, in context, quite different from Ms. Richie’s description of her Prada purse. But the new policy treats both utterances the same, because the use of “shit” or a derivative “invariably invokes a course [*sic*] excretory image in *any* context.” *Omnibus Order*, at 2693, ¶ 114 n.168 (emphasis added). In the Commission’s balancing, the role of context depends on the expletive uttered; context is relevant, says the FCC, except when it is not. These considerations are standardless—and thus impermissibly vague.

**C. The FCC’s indecency interpretations under the new policy fail to give broadcasters fair notice as to what programming will be found indecent.**

The FCC’s application of its new indecency policy confirms that its “patently offensive” determinations under the new standard are “wholly subjective.” *HLP*, 130 S. Ct. at 2720. Broadcasters are left to guess as to what broadcasts the Commission will find indecent.

1.a. In its 2006 *Omnibus Order* applying the new policy, the Commission found that use of the terms “shit,” “fuck,” and their derivatives by musicians during the PBS Martin Scorsese-directed documentary “The Blues” was indecent because, *inter alia*, the terms “invariably invoke” “coarse” sexual or excretory images. *Omnibus Order*, 21 F.C.C.R. at 2684-85, ¶¶ 74-76. Earlier, however, in applying the same policy, the FCC rejected an indecency challenge to a broadcast of the film “Saving Private Ryan” because it concluded that the actors’ use of the same words that the FCC found indecent in “The Blues”—indeed, use that far exceeded that of the musicians in “The Blues”—was “[e]ssential . . . to convey to viewers the extraordinary conditions in which the soldiers conducted themselves,” and “[d]eleting all of such language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers.” *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, 4512-13, ¶ 14 (2005) (hereinafter "*Saving Private Ryan*" Order). Given this lack of clarity in application, no broadcaster can determine in advance which broadcasts the FCC will deem "patently offensive." Broadcasters are thus unable to assess their potential liability under the indecency statute for having aired a particular program.

b. A similar subjectivity riddles the Commission's determinations as to which expletives are inherently "coarse" and therefore more likely to offend. For example, the Commission found under the new policy, without explanation, that the words "dick" and "dickhead," although descriptive of a "sexual organ," "did not have the same level of offensiveness as the 'F-Word' or 'S-Word'" and accordingly were not indecent. *Omnibus Order*, 21 F.C.C.R. at 2696-97, ¶ 127. Merely restating this determination highlights its essential subjectivity. The only "level" of "offensiveness" relevant to an indecency finding is the Commission's.<sup>10</sup>

c. The Commission's *post hoc* application of "other" factors is similarly standardless. In the

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<sup>10</sup> Similarly, the FCC assumes that the words "pissed off" and "ass," like the words "fuck" and "shit," "describe sexual or excretory organs or activities." But "pissed off" and "ass," in the FCC's view, do not do so "coarsely or graphically" and therefore do not patently offend—at least when used as a "slang expression that means angry" or "to denigrate or insult" respectively. See *Omnibus Order*, 21 F.C.C.R. at 2712-13, ¶¶ 196-98. These inconsistent applications affirm the inherent standardlessness of the new policy's indecency definition. No reasonable broadcaster can take comfort in such "guidance."

“Saving Private Ryan” case, the Commission gave significant weight to the “aural and visual viewer advisory and voluntary parental code” that aired prior to and during the program—evidence, by the FCC’s lights, that “parents had ample warning that this film contained material that might be unsuitable for children.” *“Saving Private Ryan” Order*, 20 F.C.C.R. at 4513, ¶ 15. But in the “NYPD Blue” proceeding now before the Court, the FCC concluded that any benefit provided by a similar advisory was outweighed by the “graphic, repeated, pandering, titillating, and shocking nature of the scene,” *regardless* of the effectiveness of the advisory. Pet. App. 147a-148a. The advisory’s effectiveness in warning parents was given substantial weight in the former case, but little if any weight in the latter case.

2. In *HLP*, this Court noted that Congress “took care to add narrowing definitions to the [statute at issue] over time,” which “increased the clarity of the statute’s terms.” *HLP*, 130 S. Ct. at 2720. The Commission, however, has taken no such steps to clarify its indecency definition. Instead, the new policy *expands* the FCC’s definition of indecency by finding that, contrary to its prior, more limited approach, “fuck,” “shit” and their variations “*inherently* ha[ve] sexual or excretory connotations” and thus, regardless of context, “depict or describe sexual activities.” *Omnibus Order*, 21 F.C.C.R. at 2684, ¶ 74 (emphasis added). Further, any use of those terms is sufficiently “coarse” to meet the “patently offensive” prong’s first requirement and thus is presumptively indecent. *Golden Globes Order*, 19 F.C.C.R. at 4979, ¶ 9. This interpretive expansion is far removed from the narrowing

constructions that the Court found saved the material-support statute in *HLP*. *Cf. HLP*, 130 S. Ct. at 2720.

The FCC's expansion of its indecency definition came at the expense of clarity. Despite the 2004 conclusion under the new policy that a single, fleeting use of the term "fuck" is inherently sexual and thus presumptively indecent, multiple uses of the term and its variations were found not indecent in "Saving Private Ryan." This is so due to the new policy's exception permitting the broadcast of expletives—even "numerous," inherently coarse expletives, *see "Saving Private Ryan" Order*, 20 F.C.C.R. at 4512, ¶ 13—where they are "demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance," and thus "not pandering and [] not used to titillate or shock." *Omnibus Order*, 21 F.C.C.R. at 2686, ¶ 82; "*Saving Private Ryan" Order*, 20 F.C.C.R. at 4512, ¶ 13.<sup>11</sup> Given such standardless, *post hoc* decisionmaking based on "shifting criteria," broadcasters are "left to guess whether an expletive will be deemed 'integral' to a program" and thus permissible. *Pet. App.* at 27a (citing *Grayned*, 408 U.S. at 108); *see also City of*

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<sup>11</sup> The FCC noted that the "Saving Private Ryan" characters' repeated use of expletives "realistically reflect the soldiers' strong human reactions" to their conditions. "*Saving Private Ryan" Order*, 20 F.C.C.R. at 4512-13, ¶ 14. Left unexplained, however, is how depictions in a fictional film could more "realistically reflect strong human reactions to conditions" than the words of actual historical figures in a documentary film such as "The Blues."

*Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988).

**D. The Government's attempts to save the FCC's new indecency policy from a finding of vagueness are unavailing.**

The Government advances several procedural and substantive arguments in support of its contention that the court below erred in finding the new indecency policy void for vagueness. None of these arguments is persuasive.

1. Relying on this Court's decision in *HLP*, the Government claims that the court below erred by considering the FCC's new indecency policy "as applied to the conduct of others" instead of Respondents' conduct. Pet. Br. 24-25 (citing *HLP*, 130 S. Ct. at 2718-2719). In so doing, the Government claims, the Second Circuit treated an as-applied challenge as a facial challenge. But this case is quite different from *HLP*. The Second Circuit's vagueness analysis in this case, which analyzed the FCC's application of the new indecency policy to actual broadcasts, is readily distinguishable from the Ninth Circuit's in *HLP*, in which the court of appeals "*imagine[d]* protected expression that f[ell] within the bounds" of the material-support statute's terms. *Id.* at 2714 (quoting court of appeals) (emphasis added). The Court in *HLP* stated that the plaintiffs there "c[ould] not seek refuge in imaginary cases." *Id.* at 2721. But there is nothing "imaginary" or "hypothetical" (*id.*) about the more than \$1 million in fines facing the ABC television stations that aired the episode of "NYPD Blue" that

is before the Court, or the other actual FCC enforcement decisions analyzed by the court of appeals.

2. The Government also claims that ABC and Fox had fair notice that the content in their broadcasts would violate the Commission's indecency standards because they and other broadcasters have historically avoided airing such content in the past, and have internal standards-and-practices departments charged with ensuring that such content is not aired whenever possible. Pet. Br. 34. This argument misses the point.

The issue, for purposes of a vagueness analysis, is not whether broadcasters have adopted internal standards for their own programming, but whether they had constitutionally adequate notice that fleeting expletives and nudity would violate the *FCC's* indecency standards at the time of the broadcasts in question—despite decades of FCC's findings to the contrary. As noted above, the Government correctly concedes that Fox lacked any such notice. *See* Pet. Br. 28, n.3. This concession refutes the Government's argument that broadcasters' prophylactic measures to prevent the airing of fleeting expletives, or Fox's bleeping the expletives in question when the broadcasts aired later on the West Coast, "concretely demonstrate" that Fox knew that "fuck" and "shit" were indecent under the FCC's policy. *See* Pet. Br. 28. The FCC decisions the Government points to as "further guidance that further clarifies the [indecency] standard" for broadcasters (Pet. Br. 33) were issued under a regime in which the FCC consistently held that a single, non-literal use of an expletive or a brief

nonsexualized nude image was not indecent. Accordingly, the cases the Government cites did not provide Respondents notice that the broadcasts in question would be found indecent, but rather the opposite.<sup>12</sup> *See supra* at Argument Part I.A.

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The subjective nature of the FCC’s interpretation of its indecency policy renders that policy unconstitutionally vague. A person of ordinary intelligence cannot understand what the Commission means by “patently offensive” if its interpretation of that term can change without notice, or if it relies on factors the agency can apply as it chooses in the case before it. Nor can broadcasters, who are exposed to potential criminal liability and millions of dollars in forfeitures.

## **II. The FCC’s New Indecency Policy Violates The First Amendment.**

The FCC’s new indecency policy is also an unconstitutional restriction on the free speech rights

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<sup>12</sup> The Government argues that because the FCC’s “*Saving Private Ryan*” Order came after the broadcasts at issue, the broadcasters cannot rely on it to show a lack of fair notice in an as-applied vagueness challenge. Pet. Br. 28. But in seeking this Court’s review, the Government cited to FCC decisions issued after the broadcasts at issue as evincing the Agency’s effort to “narrow potentially vague or arbitrary interpretations” of the new policy. Pet. 26 (citing a 2005 broadcast). The Government should not be permitted to use post-2003 decisions to demonstrate adequate notice and, at the same time, argue that broadcasters should be barred from using them to show a lack of fair notice.

of broadcasters. Some Respondents have invited the Court to use this case as an occasion to reconsider the level of constitutional protection afforded to broadcaster speech. *See, e.g.*, ABC et al. Br. in Opp. 29-32; CBS, Fox, and NBC et al. Br. in Opp. 26-27. It is well-established, however, that this Court “avoid[s] the unnecessary decision of [constitutional] issues.” *Pacifica*, 438 U.S. at 734. *See also Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). Mindful of this principle, there is no occasion in this case for the Court to reconsider its holdings in *Pacifica* or *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), or to hold that government restrictions on broadcaster speech are subject to strict scrutiny. The FCC’s new indecency policy fails to survive First Amendment review even under an intermediate scrutiny standard. Accordingly, questions regarding spectrum scarcity, the pervasiveness of broadcast television, and the accessibility of the Internet can and should be left for another day.<sup>13</sup>

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<sup>13</sup> *Pacifica* relied on broadcasting’s characteristics, not on spectrum scarcity. *See Pacifica*, 438 U.S. at 770 n.4 (Brennan, J., joined by Marshall, J., dissenting) (majority and concurring opinions “rightly refrain from relying on the notion of ‘spectrum scarcity’ to support their result”). As *amici* communications law scholars note, “[c]lasting doubt on the scarcity rationale” in this case “would inject uncertainty into a wide variety of actions that the government [has] adopted in reliance on that rationale.” Br. of Yale Information Society Project et al. at 4.

**A. The new indecency policy goes well beyond the constitutional limits suggested by *Pacifica*.**

1. In *Pacifica* this Court held that the FCC could sanction a midday radio broadcast of George Carlin's "Filthy Words" monologue. *Pacifica*, 438 U.S. at 732. Carlin's monologue, aired "as part of a program on contemporary attitudes toward the use of language," "deliberately repeated" the seven words in question "over and over again" "in a variety of colloquialisms," to discuss their capacity for shock, as well as their dexterousness of meaning based on the context in which they can be used. *Fox*, 129 S. Ct. at 1828 (Ginsburg, J., dissenting). To that end, the Carlin broadcast repeated the word "fuck" 30 times, the word "shit" or a derivative 70 times, and the word "motherfucker" twice. *See Pacifica*, 438 U.S. at 751-755 (Appendix).

In holding that the FCC could sanction the Carlin broadcast pursuant to its authority under the indecency statute, the Court "emphasized the narrowness of its holding." *Id.* at 750; *see also Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126-27 (1989) (*Pacifica* is "emphatically narrow"). This "narrowness," articulated in Justice Powell's concurring opinion, expressly distinguished the "verbal shock treatment administered" by the "Filthy Words" broadcast from fleeting use of expletives, stating that "[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word." *Pacifica*, 438 U.S. at 760-61 (Powell, J., concurring).

2. The Government recognizes that by finding a single fleeting expletive presumptively indecent, the FCC’s new indecency policy goes well beyond the FCC enforcement action upheld in *Pacifica*. Pet. Br. 37. It attempts to explain away the difference between a hundred uses of the words “fuck” and “shit” and a single use of those words by pointing to language in this Court’s *Fox* opinion that, in the Court’s words, went “to [its] holding on administrative law, and says nothing about constitutionality.” See *Fox*, 129 S. Ct. at 1818 n.7; see also *id.* at 1815 (characterizing broadcasters’ *Pacifica*-based arguments as “an administrative-law shield”). This language in *Fox* does not alter *Pacifica*’s express limitation of its *constitutional* holding to the “particular broadcast” before it, which made clear that it did not apply to isolated uses of “potentially offensive word[s].” *Pacifica*, 438 U.S. at 735, 742; see also *id.* at 760-61 (Powell, J., concurring).<sup>14</sup>

The same is true of purportedly indecent images. The Commission found for decades that its ability to punish broadcasting nude images, like its ability to punish broadcasting expletives, was constitutionally circumscribed by “the narrowness of the *Pacifica* holding.” *WGBH Educ. Found.*, 69 F.C.C.2d. at 1254, ¶ 10; see also *WPBN/WTOM*, 15 F.C.C.R. at 1841,

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<sup>14</sup> Justice Stevens, *Pacifica*’s author and the sole remaining member of the *Pacifica* Court when *Fox* was decided, stated that “the Commission’s changed view of its statutory mandate certainly would have been rejected if presented to the Court at the time.” *FCC v. Fox*, 129 S. Ct. at 1825 (Stevens, J., dissenting).

n.5 (assessing indecency of nude images involves “an analysis of whether the allegedly indecent material is isolated or fleeting”). But in the “NYPD Blue” proceeding, the FCC expanded its interpretation of its own authority to punish less than seven seconds of nonsexualized nudity during an hour-long adult drama aired in the late evening—even questioning *Pacifica*’s relevance to its indecency determination. See Pet. App. 45a. The FCC’s interpretation “venture[s] far beyond *Pacifica*’s reading of § 1464.” *Fox*, 129 S. Ct. at 1828 (Stevens, J., dissenting).

In sum, *Pacifica* indicates that the First Amendment imposes significant limitations on the government’s authority to punish non-obscene broadcaster speech, including “isolated” expletives and brief nudity that does not constitute “shock treatment.” The FCC’s new indecency enforcement policy exceeds these constitutional limitations.

### **B. The New Indecency Policy Cannot Survive Intermediate Scrutiny.**

Although *Pacifica* did not specify the level of scrutiny applicable to broadcasters’ speech under the First Amendment, this Court has explained that government restrictions on such speech “have been upheld only when [the Court was] satisfied that the restriction is narrowly tailored to further a substantial governmental interest . . . .” *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984). The new indecency policy cannot survive First Amendment scrutiny under this standard.

**1. The policy does not further a substantial government interest.**

1. Under intermediate scrutiny, “the party seeking to uphold a restriction” on speech “carries the burden of justifying it.” *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). To meet its burden, the government need not demonstrate a “direct causal link” between the interest asserted and the action taken. *Brown v. Ent. Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2010) (“*EMA*”). However,

[w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

*Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion) (citation and quotation marks omitted).

Here, the Government claims that the new indecency policy “implements Congress’s determination that indecent material is harmful to children” and “furthers the government’s long-recognized interest in protecting minors from exposure to vulgar and offensive spoken language.” Pet. Br. 41 (citations and quotation marks omitted). *Pacifica* and subsequent cases affirm that the Government has a “compelling interest in protecting the psychological well-being of minors” by shielding

them from indecent material “that is not obscene by adult standards.” *See, e.g., Sable*, 492 U.S. at 126-27. But that articulation of the government’s interest is insufficiently precise for assessing whether *this* indecency enforcement regime can survive intermediate scrutiny. The interest the Government asserts in support of the FCC’s new policy is to prevent children from being exposed to *fleeting* expletives and *fleeting* nudity—material the FCC has never before found indecent.

2. Once the Government’s interest is properly defined, it becomes clear that the Government has not shown that its interest is substantial.

a. To support its interest in shielding children from fleeting expletives, the Government again points to language from this Court’s administrative law analysis in *Fox*, which reasoned that granting broadcasters immunity for fleeting expletives would permit them to “air expletives at all hours of the day so long as they did so one at a time,” and that the FCC could prevent children from viewing such hypothetically expletive-peppered programming because children tend to repeat what they hear. Pet. Br. 37 (quoting *Fox*, 129 S. Ct. at 1813). But as the court below found, “broadcasters have never barraged the airwaves with expletives even prior to” the broadcasts at issue in this case, which were aired during an enforcement regime when fleeting expletives were not actionable. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 460 (2d Cir. 2007), *rev’d and remanded*, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009). The FCC agrees with the court of appeals on this point. *See* Pet. App. 60a-61a.

In light of the FCC’s admission that the airwaves would not be filled with fleeting expletives without an expanded indecency enforcement policy, the Government cannot demonstrate that it has a substantial interest in expanding the policy to proscribe fleeting expletives. The government may “bar public dissemination of protected materials” to children “only in relatively narrow and well-defined circumstances.” *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975). The government has not shown that those circumstances are present here.

b. To justify the FCC’s actions in the “NYPD Blue” proceeding, the Government attempts to rely on “the interests of *parents* in controlling the circumstances under which their children view [brief nude] images.” Pet. Br. 39 (emphasis added). It is doubtful whether this even qualifies as a proper governmental interest. *See EMA*, 131 S. Ct. at 2740 (“[W]e note our doubts that punishing third parties for conveying protected speech to children *just in case* their parents disapprove of that speech is a proper governmental means of aiding parental authority.”) (emphasis in original). And even if the Government’s stated interest could be interpreted as assisting parents to protect their children from viewing brief nonsexualized nudity on television, this interest is not substantial, since parents are already well-equipped for the task with parental guidelines, channel blocking technologies, and pre-program advisories such as the one that preceded the “NYPD Blue” broadcast. *See Part II.B.2. infra*.

3. The fact that a regulation is underinclusive cuts against the substantiality of the government’s claimed justification for it. *Metromedia, Inc. v. City*

of *San Diego*, 453 U.S. 490, 511 (1981) (applying intermediate scrutiny). “Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.” *EMA*, 131 S. Ct. at 2740.

Here, despite its asserted interest in shielding children from fleeting expletives and brief nude images, under the new policy FCC has permitted: (1) multiple uses of the words “fuck” and “shit” during “Saving Private Ryan,” “*Saving Private Ryan*” Order, 20 F.C.C.R. at 4513, ¶ 15; (2) use of the term “bullshitter” during a live interview on a morning television program, on the ground it aired during a bona fide news interview, Pet. App. 67a-73a; (3) a clearly visible image of graffiti showing the words “FUCK COPS,” *Omnibus Order*, 21 F.C.C.R. at 2709, ¶¶ 188-191; (4) multiple uses of the word “ass,” as well as a number of its derivatives, *id.*, at 2710, 2712, ¶¶ 193, 197; and (5) the image of a man’s penis, *id.*, at 2716-17, ¶¶ 214-218.

As a result, the FCC’s new enforcement policy is substantially underinclusive. The Government asserts a significant interest in protecting children from the very content that it regularly lets television stations air without penalty.

## **2. The policy is not narrowly tailored.**

Narrow tailoring in the intermediate scrutiny context requires that “the means chosen do not burden substantially more speech than is necessary to further the government’s legitimate interests.” *Turner Broad. Co.*, 512 U.S. at 662 (quoting *Ward v.*

*Rock Against Racism*, 491 U.S. 781, 799 (1989)); *cf.* *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 650 (7th Cir. 2006) (“[I]t seems unlikely that a statute is narrowly tailored . . . when it potentially criminalizes distribution of works featuring only brief flashes of nudity.”) (citing *Erznoznik*, 422 U.S. at 214 n.10).

In addition, when the government resorts to content-based regulation, it must prove that a “plausible, less restrictive alternative . . . will be ineffective to achieve its goals.” *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000). “[I]f a less restrictive means is available for the Government to achieve its goals, [it] must use it.” *Id.* at 815. Content-neutral “targeted blocking” is always a less restrictive alternative to content-based speech proscriptions, because it “enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners.” *Id.*; *see also Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 756 (1996) (where technology provides “other means to protect children from . . . ‘patently offensive’ material,” direct, content-based limitations on speech are not the least restrictive means).

Several less restrictive means exist to address the Government’s asserted interest. Every television set manufactured since January 2000 that is larger than 13 inches must include a “feature designed to enable viewers to block display of all programs with a common rating . . . .” 47 USC § 303(x). This congressional mandate has taken the form of the V-Chip, a “device that empowers viewers to block

broadcasts based on their age rating or content descriptors.” ABC et al. Br. in Opp. 5. A blocking device restricts less speech than massive fines and potential criminal liability for airing fleeting or brief content. *See Playboy Entm’t Grp.*, 529 U.S. at 815 (content-neutral, viewer-requested channel blocking regime less restrictive than content-based, statutorily imposed ban on showing constitutionally protected “sexually oriented programming” during certain hours of day). “Simply put, targeted blocking is less restrictive than banning.” *Id.*

Furthermore, nearly 90 percent of all television viewers receive broadcast programming via cable or satellite. “As a practical matter, cable and satellite-provided controls are the primary blocking tools used in most households.” *FCC Child Safe Viewing Act Report*, 24 F.C.C.R. 11,413, 11,438, ¶ 56 (2009). In addition, cable providers are “required by statute to fully block the audio and video programming” of a channel upon subscriber request. *See* Pet. App. 170a (citing 47 U.S.C. § 560). These content-neutral, congressionally-imposed technologies are far less restrictive means of supporting parents’ efforts to shield their children from content they decide is inappropriate for younger eyes or ears.

\* \* \*

This Court in *Pacifica* did not grant the Commission “unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes.” *Pacifica*, 438 U.S. at 759-60 (Powell, J., concurring). The FCC, heeding that guidance and

constrained by the First Amendment, maintained for decades that isolated material that is not the equivalent of “shock treatment” is not actionable. *WGBH Educ. Found.*, 69 F.C.C.2d at 1254, ¶ 10. The Commission’s new indecency enforcement regime transforms what the Commission long considered an “insurmountable obstacle” into “an open door.” *Fox*, 129 S. Ct. at 1834 (Breyer, J., dissenting). The Court should affirm that the FCC’s prior interpretation is correct, and that its new interpretation exceeds the limits of the First Amendment.

### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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