

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 OF PUBLIC BROADCASTING SERVICE  
AS AMICUS CURIAE SUPPORTING  
RESPONDENTS

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICUS CURIAE.....	1
STATEMENT .....	2
A. Public Broadcasting.....	2
B. The FCC’s Historic Approach To Indecency .....	7
C. The FCC’s New Indecency Policy.....	11
D. The Effects Of The FCC’s New Policy.....	14
SUMMARY OF ARGUMENT .....	20
ARGUMENT.....	22
I. The FCC’s New Indecency Policy Is Unconstitutionally Vague.....	22
A. The FCC’s New Indecency Policy Fails To Provide Clear Standards And Therefore Allows For Discrim- inatory Enforcement.....	23
B. The FCC’s New Indecency Policy Fails To Provide Fair Notice To Broadcasters Of What Material It Will Consider Indecent.....	26
II. The FCC Should Return To A Standard More Deferential To Broadcasters’ Editorial Judgment.....	31
CONCLUSION .....	36

TABLE OF CONTENTS—Continued

	Page
APPENDIX	
APPENDIX A: Public Broadcasters, Related Trade Associations, And Other Entities In Support Of Respondents .....	1a

## TABLE OF AUTHORITIES

CASES	Page
<i>Action for Children’s Television v. FCC</i> , 852 F.2d 1332 (D.C. Cir. 1988) .....	1-2, 9, 22
<i>Ashcroft v. Free Speech Coalition</i> , 535 U.S. 234 (2002) .....	31
<i>Citizen’s Complaint Against Pacifica Found. Station WBAI (FM), N.Y.C., N.Y.</i> , 56 F.C.C. 2d 94 (1975).....	8
<i>Cohen v. California</i> , 403 U.S. 15 (1971).....	33
<i>FCC v. Pacifica Found.</i> , 438 U.S. 726 (1978) .....	<i>passim</i>
<i>Forsyth County, Ga. v. Nationalist Movement</i> , 505 U.S. 123 (1992) .....	23, 25
<i>Fox Television Stations, Inc. v. FCC</i> , 613 F.3d 317 (2d Cir. 2010).....	20, 25, 26
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972) .....	22, 23, 26, 31
<i>Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.</i> , 452 U.S. 640 (1981) .....	23
<i>In re Application of WGBH Educ. Found. for Renewal of License for Noncommercial Educ. Station WGBH-TV, Bos., Mass.</i> , 69 F.C.C. 2d 1250 (1978).....	8
<i>In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program</i> , 18 FCC Rcd 19859 (2003) .....	11, 27

## TABLE OF AUTHORITIES—Continued

	Page
<i>In re Complaints Against Various Broadcast Licensees Regarding Their Broadcast of the “Golden Globe Awards” Program, 19 FCC Rcd 975 (2004)</i> .....	11-12
<i>In re Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program “Married by America” on April 7, 2003, 23 FCC Rcd 3222 (2008)</i> .....	27
<i>In re Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program “Without a Trace,” 21 FCC Rcd 2732 (2006)</i> .....	26
<i>In re Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, 21 FCC Rcd 2760 (2006)</i> .....	13
<i>In re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network’s Presentation of the Film “Saving Private Ryan,” 20 FCC Rcd 4507 (2005)</i> .....	24, 26, 28, 31
<i>In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCC Rcd 13299 (2006)</i> .....	12, 29, 30, 32

## TABLE OF AUTHORITIES—Continued

	Page
<i>In re Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency</i> , 16 FCC Rcd 7999 (2001) .....	10, 11, 24, 27, 32
<i>In re Infinity Radio License, Inc., Licensee of Station WLLD(FM), Holmes Beach, Fla.</i> , 19 FCC Rcd 5022 (2004).....	33
<i>In re Various Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005</i> , 21 FCC Rcd 2664 (2006) .....	12-13, 14, 28, 29
<i>In re WUHY-FM Eastern Educ. Radio, 4548 Market St., Phila., Pa.</i> , 24 F.C.C. 2d 408 (1970) .....	7
<i>In the Matter of Infinity Broad. Corp. of Pa., Licensee of Station WYSP (FM), Phila., Pa.</i> , 2 FCC Rcd 2705 (1987), <i>aff’d</i> 3 FCC Rcd 930 (1987) .....	9, 34
<i>Mr. Peter Branton, 1007 Scenic Highway, Tenn.</i> , 6 FCC Rcd 610 (1991) .....	10
<i>United States v. Williams</i> , 553 U.S. 285 (2008) .....	22, 23
 CONSTITUTION	
U.S. Const. amend. I.....	22, 23, 25, 26, 31, 35

## TABLE OF AUTHORITIES—Continued

	Page
STATUTES	
47 U.S.C. § 396(a)(1) .....	2
47 U.S.C. § 396(a)(3) .....	3
47 U.S.C. § 396(a)(6) .....	3
47 U.S.C. § 396(a)(8) .....	2
47 U.S.C. § 396(k)(8)(A) .....	5
Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491, 47 U.S.C.A. § 503(b)(2)(C)(i) .....	15
47 U.S.C.A. § 503(b)(2)(C)(ii) .....	15
Radio Act of 1927, ch. 169, § 29, 44 Stat. 1162, 1173, 18 U.S.C. § 1464 .....	7
OTHER AUTHORITIES	
Barbara J. Wilson, Children Now, Educationally/Insufficient? An Analysis of Availability & Educational Quality of Children's Programming (2008), <i>available at</i> <a href="http://pbskids.org/lions/parentsteachers/pdf/childrennow_report.pdf">http://pbskids.org/lions/parentsteachers/pdf/childrennow_report.pdf</a> .....	3
CBS, SEC Form 10-K, Fiscal Year 2010, <i>available at</i> <a href="http://www.sec.gov/Archives/edgar/data/813828/000104746911001419/a2202111z10-k.htm">http://www.sec.gov/Archives/edgar/data/813828/000104746911001419/a2202111z10-k.htm</a> .....	6
Charles Ferris, Chairman, FCC, Address Before the New England Broad. Ass'n, (Jul. 21, 1978) .....	9, 35

## TABLE OF AUTHORITIES—Continued

	Page
Corp. for Public Broad., Appropriation Request & Justification: FY2012 and FY2014 (Feb. 2011), <i>available at</i> <a href="http://www.cpb.org/appropriation/justification_12-14.pdf">http://www.cpb.org/appropriation/justification_12-14.pdf</a> ....	15
H.R. Rep. No. 102-628 (1992) .....	5, 6
<i>The Blues: Godfathers and Sons</i> (PBS television broadcast Mar. 11, 2004)..... <i>passim</i>	
PBS, Awards <a href="http://pbs.org/about/awards">http://pbs.org/about/awards</a> (last visited Nov. 7, 2011) .....	4
PBS, IRS Form 990 (June 30, 2010) .....	6
PBS, PBS Mission and Values, <a href="http://www.pbs.org/about/corporate-information/mission/">http://www.pbs.org/about/corporate-information/mission/</a> (last visited Nov. 7, 2011).....	3
PBS: Overview, <a href="http://pbs.org/aboutpbs/aboutpbs_corp.html">http://pbs.org/aboutpbs/aboutpbs_corp.html</a> (last visited Nov. 8, 2011) ....	4
Steven Waldman, The Federal Communications Commission, The Information Needs of Communities (July 2011) <i>available at</i> <a href="http://www.fcc.gov/infoneedsreport">http://www.fcc.gov/infoneedsreport</a> .....	3, 4, 5, 33, 34, 35
TVNewsCheck, Polls: PBS Most Trusted News Source (Feb. 18, 2010), <a href="http://www.tvnewscheck.com/article/2010/02/18/39961/polls-pbs-most-trusted-news-source">http://www.tvnewscheck.com/article/2010/02/18/39961/polls-pbs-most-trusted-news-source</a> .....	4
U.S. Gov't Accountability Office, GAO 07-150, Telecommunications: Issues Related to Structure and Funding of Public Television (January 2007).....	5, 6, 34



## INTEREST OF AMICUS CURIAE

Amicus curiae, the Public Broadcasting Service (“PBS”), and a host of public television producers, broadcasters, and national associations are leaders of the public broadcasting community (“amici”).<sup>1</sup> For more than 40 years, amici have produced, distributed, and broadcast award-winning programming that addresses issues of public concern, including social, political, and historical events that play a pivotal role in shaping American culture and society.

Public broadcasters, like Respondents, are subject to regulation by the Federal Communications Commission’s (“FCC” or “Commission”) new indecency policy, the validity of which is now before the Court. Public broadcasters have been the subject of indecency investigations and at least one Notice of Apparent Liability by the FCC, and collectively they dedicate a substantial amount of their limited resources to efforts to comply with the FCC’s indecency policy, while still fulfilling their fundamental obligation to serve the public interest.

The FCC historically has taken a “cautious[]” and “restrained” approach to indecency enforcement. *See FCC v. Pacifica Found.*, 438 U.S. 726, 761 n.4 (1978) (Powell, J., concurring in part and concurring in the judgment) (citing Brief for Petitioner at 42-43 & n. 31); *Action for Children’s Television v. FCC*, 852

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<sup>1</sup> Each party has consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part in connection with the matter now pending, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. A list of public broadcasters, related trade associations, and other entities who have endorsed this brief in full is included in Appendix A.

F.2d 1332, 1340 n.14 (D.C. Cir. 1988). Recently, however, the Commission has adopted a less restrained, less principled, and less clear approach to regulating broadcast content. The FCC's new indecency enforcement regime is predicated upon an unconstitutionally vague policy that is difficult for any broadcaster to understand, let alone predict how it might possibly apply to its programming. PBS submits this brief to describe the adverse effects of the FCC's new indecency policy on the public broadcasting community.

## **STATEMENT**

### **A. Public Broadcasting.**

The primary mission of public broadcasting is to render a public service by developing and broadcasting programs that instruct, educate, and promote the dissemination of arts and culture. In recognition of these laudable ambitions, Congress declared that “it is in the public interest to encourage the growth and development of public radio and television broadcasting. . . .” 47 U.S.C. § 396(a)(1) (2006). Federal, state, and local governments have endorsed the invaluable service public broadcasting provides by consistently making funding available to public broadcasting for more than forty years.

The American people rely on our nation's public broadcasters to inform, educate, and foster debate by providing programming that “address[es issues of] national concern and solve[s] local problems. . . .” 47 U.S.C. § 396(a)(8) (2006). Congress therefore encourages public broadcasters to develop “programming that involves creative risks” and has recognized that public broadcasters' success “depends on freedom, imagination, and initiative on both local and

national levels. . . .” 47 U.S.C. §§ 396(a)(3), 396(a)(6) (2006).

Public broadcasting fulfills its mandate by delivering content that educates, informs, and inspires. It serves as a trusted window to the world, offering documentaries that open up new worlds, non-commercialized news programs that keep citizens informed about world events and cultures, and programs that expose Americans to music, theater, dance, and art.

As “America’s largest classroom,” public broadcasting brings creativity and imagination to the forefront in formulating a multitude of programming dedicated to education, especially children’s education. PBS, PBS Mission and Values, <http://www.pbs.org/about/corporate-information/mission/> (last visited Nov. 7, 2011). Public broadcasting outlets provide thousands of hours of programming to elementary and secondary schools, and produce programs specifically targeting early childhood education. “[C]ommerical outlets tend to excel at entertainment programming, while public broadcasting emphasizes educational content, content geared toward younger children, and content designed specifically to improve cognitive functioning and school performance.” Steven Waldman, The Federal Communications Commission, *The Information Needs of Communities*, 155-56 (July 2011) *available at* <http://www.fcc.gov/infoneedsreport> (“Community Needs Report”); *see also* Barbara J. Wilson, *Children Now, Educationally/Insufficient? An Analysis of Availability & Educational Quality of Children’s Programming* (2008), *available at* [http://pbskids.org/lions/parentsteachers/pdf/childrennow\\_report.pdf](http://pbskids.org/lions/parentsteachers/pdf/childrennow_report.pdf). For many children, public broadcasting teaches them the letters they need for literacy and

the numbers they need to learn math and science. As such, public broadcasters are acutely aware of children's access to and interest in their stations, taking both factors into account in making programming decisions.

Public broadcasting's efforts have met with great success. Some of the most highly-acclaimed programming in the country is broadcast on public television. During the 2010-2011 season, PBS programs received twenty-six Emmy Awards, including six News & Documentary Emmys and twelve Daytime Emmys. PBS topped all broadcast and cable networks for children's programming for the fourteenth consecutive year. *Sesame Street* was honored with eight Emmys, and *The Electric Company* received three awards, including Outstanding Children's Series. During the 2010-2011 award year, PBS and its producers also received nine George Foster Peabody Awards, fourteen Parents Choice Awards, and one Academy Award nomination, among many others. PBS, Awards <http://pbs.org/about/awards> (last visited Nov. 7, 2011); *see also Community Needs Report*, at 155.

Public television continues to be viewed widely by the American public. In a typical month, more than 124 million people watch their local PBS stations. PBS, PBS: Overview, [http://pbs.org/aboutpbs/aboutpbs\\_corp.html](http://pbs.org/aboutpbs/aboutpbs_corp.html) (last visited Nov. 8, 2011). A national Roper survey has consistently rated PBS and its member stations the country's most trusted national institution. TVNewsCheck, Polls: PBS Most Trusted News Source (Feb. 18, 2010), <http://www.tvnewscheck.com/article/2010/02/18/39961/polls-pbs-most-trusted-news-source>; *Community Needs Report*, at 157.

Public broadcasting earns this trust through its unique role in the communities it serves. Public broadcasters partner with local organizations and directly engage their audience. In addition to nationally-distributed primetime and children's programs, public broadcasters also provide locally-produced and instructional programming to meet the needs of their communities, as well as non-broadcast outreach programs to promote literacy, facilitate teacher training, and provide services for civic engagement and health outreach. U.S. Gov't Accountability Office, GAO 07-150, Telecommunications: Issues Related to Structure and Funding of Public Television 18 (January 2007) ("GAO Report"). Public broadcasting disseminates information regarding local art, music, and other cultural events that is not provided by other sources. And, in a world in which large media corporations are forming ever-larger conglomerates, public broadcasters are often the only locally-owned media providers. *Community Needs Report*, at 158.

These factors, and others, make public broadcasters uniquely responsive to their communities. Federal law requires most public broadcast stations that receive federal funding to establish community advisory boards to provide input on the programming broadcast by their local stations. 47 U.S.C. § 396(k)(8)(A) (2006). Public broadcasters also have a financial incentive to provide programming that serves community needs: Congress recognized in 1992 that "private contributions of \$6.1 billion since 1972 constitute the largest source of support for public television." H.R. Rep. No. 102-628 at 69 (1992). Public broadcasters' reliance on private donations means that their success is tied directly to

viewers' satisfaction. *See id.* (magnitude of private contributions indicates "the success of public television in serving the needs and interests of local communities"). This creates weighty disincentives to providing programming that may offend their audience or otherwise betray its trust. That eighty-seven percent of donations are relatively small—less than \$1000—bespeaks the personal nature of the relationship between stations and donors and the breadth of support public broadcasting receives. *GAO Report*, at 28.

Notwithstanding the generous support of their local communities, public broadcasters' resources are dwarfed by those of the major commercial television networks. PBS, for example, a national program distributor serving over 350 member stations located across the United States and its territories, earned approximately \$500 million in revenue during 2010. PBS, IRS Form 990, 1 (June 30, 2010). As a point of comparison, CBS, which serves a network of about 230 stations across the country, earned over \$14 billion in revenue in the same year. CBS, SEC Form 10-K, Fiscal Year 2010, at I-2, II-3, *available at* <http://www.sec.gov/Archives/edgar/data/813828/000104746911001419/a2202111z10-k.htm>. In light of their relatively limited financial resources, a vague indecency policy weighs especially heavily on public broadcasters and carries with it a substantial risk that they will engage in self-censorship that, in turn, results in the withholding of the unique and valuable content they would otherwise present. Indeed, the threat of large fines has already altered the content amici are willing to broadcast, irrespective of their underlying editorial judgment.

To fulfill its statutory mission, public broadcasting must focus on the pivotal artistic, scientific, historic, and social issues of our time, and it must report on these issues in a way that faithfully reflects their social implications, even when they are controversial or disturbing. The FCC's new, aggressive enforcement policy, lacking in clear and consistent standards, undermines public broadcasters' ability to fulfill their public interest mission. Coupled with the crippling increase in potential indecency forfeitures, the uncertain legal terrain that public broadcasters now must traverse has forced them to engage in self-censorship to avoid potentially catastrophic financial consequences.

### **B. The FCC's Historic Approach To Indecency.**

The federal indecency statute dates to the Radio Act of 1927, ch. 169, § 29, 44 Stat. 1162, 1173 (codified at 18 U.S.C. § 1464), but the FCC did not engage in active indecency enforcement until the 1970s, and, even then, actions were rare. *In re WUHY-FM Eastern Educ. Radio, 4548 Market St., Phila., Pa.*, 24 F.C.C. 2d 408 (1970). The scope of the FCC's authority to regulate indecency was challenged in 1975 when the FCC concluded that a radio station had violated the indecency statute by broadcasting George Carlin's "Filthy Words" monologue. *Pacifica.*, 438 U.S. 726. In concluding that the Carlin monologue was indecent, the FCC determined that "the repetitive, deliberate use of [several words that referred to excretory or sexual activities or organs] in an afternoon broadcast when children are in the audience was patently offensive. . . ." *Id.* at 739.

In its *Pacifica* decision, the Commission indicated that it intended to play a limited role in the

regulation of 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. Station WBAI (FM), N.Y.C., N.Y.*, 56 F.C.C. 2d 94, ¶ 16 (1975). This Court narrowly upheld the FCC’s decision as applied to the broadcast of the Carlin monologue, and two of the five justices who voted to uphold the decision did so on the express 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”).

In the wake of *Pacifica*, the FCC assured broadcasters that it “intend[ed] strictly to observe the narrowness of the *Pacifica* holding.” *In re Application of WGBH Educ. Found. for Renewal of License for Noncommercial Educ. Station WGBH-TV, Bos., Mass.*, 69 F.C.C. 2d 1250, ¶ 10 (1978). Accordingly, it denied a complaint against a public television station that broadcast the word “shit,” as well as other “sexually-oriented” content in the *Masterpiece Theatre* series and other programs, finding that the case before it did not resemble the “verbal shock treatment” in *Pacifica* and was therefore “clearly . . . distinguishable.” *Id.* The FCC emphasized that it would “construe the *Pacifica* holding consistent[ly] with the paramount importance we attach to . . . editorial discretion by broadcasters,” *id.* at ¶ 11, and that it did not intend “to inhibit coverage of diverse and controversial subjects by licensees, whether in news and public affairs or in dramatic or other programming contexts,” *id.* Speaking to a group of broadcasters shortly



after *Pacifica*, then-FCC Chairman, Charles Ferris, declared: “We at the FCC are far more dedicated to the First Amendment premise that broadcasters should air controversial programming than we are worried about an occasional four-letter word.” Charles Ferris, Chairman, FCC, Address Before the New England Broad. Ass’n, at 8 (Jul. 21, 1978).

Through most of the 1980s, the FCC limited its definition of indecent material almost exclusively to the words emphasized in Carlin’s monologue, and consistently refrained from regulating isolated uses of those same words. However, a decade after *Pacifica* was decided, the Commission rejected the proposition that only the “filthy words” expressed by Carlin in his monologue were indecent speech, concluding that the sustained and repetitive use of sexual innuendo and entendre in Howard Stern’s morning show was patently offensive. *In the Matter of Infinity Broad. Corp. of Pa.*, Licensee of Station WYSP (FM), Phila., Pa., 2 FCC Rcd 2705, ¶ 8 (1987), (“Infinity Broadcasting I”) *aff’d* 3 FCC Rcd 930 (1987) (“Infinity Broadcasting II”). With the introduction of context to analyze patent offensiveness, *Infinity Broadcasting* made the distinction between decent and indecent less clear because broadcasters could no longer be assured that they could avoid liability by omitting specific language. Although context was admittedly fact specific and difficult to define in the abstract, *Infinity Broadcasting II*, 3 FCC Rcd 930, at ¶ 16, the FCC’s broadened definition survived constitutional challenge only because of the FCC’s steadfast deference to broadcaster judgment. *See, e.g., Action for Children’s Television*, 852 F.2d at 1340 n.14 (endorsing the FCC’s definition of indecency in part because of its assurances that the

Commission will continue its “restrained enforcement policy.”).

The Commission continued to take a more restrained approach over the succeeding decade, especially in its consideration of news programming. In 1991, for example, the agency denied a complaint involving an NPR broadcast of a wiretapped telephone call in which gangster John Gotti uttered ten variations of the word “fuck” in rapid succession during NPR's *All Things Considered* news program. *Mr. Peter Branton, 1007 Scenic Highway, Tenn.*, 6 FCC Rcd 610 (1991) (“Peter Branton”). Observing that “the program segment, when considered in context, was an integral part of a bona fide news story,” *id.* at 612, the Commission concluded that the language was not “patently offensive,” and therefore not indecent. The FCC further observed that it “traditionally ha[s] been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming.” *Id.*

In 2001, the FCC issued a policy statement that described the standard it currently uses in indecency cases and provided examples in which the agency had previously applied this standard. *In re Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 FCC Rcd 7999, ¶ 1 (2001) (“Policy Statement”). According to the *Policy Statement*, 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 ¶¶ 7-8. Applying a national community standard, the FCC determines patent

offensiveness by considering three newly-identified contextual factors: whether the material (1) is explicit or graphic in its description of sexual or excretory organs or activities; (2) dwells on or repeats at length the description; and (3) appears to pander, is used to titillate, or is presented for shock value. *Id.* at ¶ 10.

With respect to the second factor, the FCC drew a distinction between “fleeting and isolated” uses of coarse language, which generally would not be found indecent, and a “persistent focus on sexual or excretory material,” which “exacerbate[s] the potential offensiveness of broadcasts.” *Id.* at ¶¶ 17-18. Consistent with this approach, the FCC’s Enforcement Bureau held in 2003 that U2 lead singer Bono’s fleeting statement that his winning of a Golden Globe Award was “really fucking brilliant” was not indecent because it did not satisfy the first prong of the indecency standard—that is, it “did not describe sexual or excretory organs or activities”—but instead was used to “emphasize an exclamation.” *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 18 FCC Rcd 19859, ¶ 5 (2003) (“Golden Globe I”). The Bureau noted further that it had “previously found that fleeting and isolated remarks of this nature do not warrant Commission action.” *Id.* at ¶ 19.

### **C. The FCC’s New Indecency Policy.**

In 2004, the FCC departed from its longstanding policy by reversing the Bureau’s decision, finding that the word “fuck” and its variations “inherently ha[ve] a sexual connotation” and thus, regardless of context, “depict or describe sexual activities.” *In re Complaints Against Various Broadcast Licensees*

*Regarding Their Broadcast of the “Golden Globe Awards” Program*, 19 FCC Rcd 975, ¶ 8 (2004) (“Golden Globe II”). Under the new standard, which breathed new meaning and significance into the three “principal” contextual factors, any use of the word “fuck” appears to satisfy not only the first prong of the indecency test, but also the first patent offensiveness factor because, according to the FCC, “[the ‘F-Word’] invariably invokes a coarse sexual image.” *Id.* at ¶19. In addition, because even “isolated or fleeting” uses of coarse language may be indecent, a broadcaster could be liable even if the broadcast does not “dwell on or repeat” the (ostensible) depiction of sexual or excretory activity. In some ways, the emphasis on specific word choice was a return to the standard put forward after *Pacifica*, because it was primarily the word itself to which the FCC took offense. However, after the Golden Globe reversal, the context which had been paramount in *Pacifica* no longer seems to be the guiding consideration in finding liability.

Following *Golden Globe II*, the third patent offensiveness factor—whether the material is presented to pander or titillate or for shock value—became the key to determining liability for broadcasts of expletives and other sexually-themed material. In applying that factor, the FCC has made clear that, outside the context of “news programming,” *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 13299, ¶¶ 69-73 (2006) (“Remand Order”), the burden is now on the broadcaster to convince the FCC that the use of an expletive is “necessary” to convey the program’s message, see *In re Various Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21

FCC Rcd 2664, ¶ 77 (2006) (“Omnibus Order”). This third factor was the deciding factor in the FCC’s finding that the exposure of Janet Jackson’s breast at the 2004 Super Bowl Halftime Show for 19/32 of a second was indecent. *In re Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 21 FCC Rcd 2760, ¶ 13 (2006) (“Super Bowl Order”).

The expansion in the scope of the FCC’s indecency definition was evident in the FCC’s 2006 *Omnibus Order*. The FCC found that a public television station’s 2004 broadcast of a Martin Scorsese documentary, *The Blues: Godfathers and Sons* (PBS television broadcast Mar. 11, 2004), which concerned the growth of blues music in Chicago, was indecent because industry leaders used coarse language on eight occasions during interviews. Among others, the documentary profiled Marshall Chess. Chess’s father, Leonard, was a Polish immigrant who learned to speak English on the streets of Chicago as a teenager and was later inducted into the Rock and Roll Hall of Fame for co-founding Chess Records, the company that catalyzed Chicago blues.

The FCC based its finding that the documentary was indecent on variations of the word “fuck” that were spoken by Marshall Chess and the word “shit” spoken by several hip hop artists. Chess used expletives in recounting his father’s relationship with blues artists. Among other quotes, Chess stated, “[M]y dad had so many people at his funeral, my uncle said, ‘You see all those motherfuckers? They’re coming to make sure he’s dead, so they don’t have to pay back those motherfuckin’ notes.’” *Omnibus Order*, 21 FCC Rcd 2760, at ¶ 77 (quoting *The Blues*). In another scene, the documentary showed hip hop

artists in a record store with Chess. During the scene, one artist states, “I’ll buy some shit,” and another states, “This looks crazy! See that? This is the kind of shit I buy! I mean, my man is wearing pink gear—that shit, that shit is crazy right there! I’m buyin’ it!” *Id.* (quoting *The Blues*).

Although Commissioner Jonathan Adelstein found that the language was important to “convey the reality of the subject of the documentary,” *id.* at 2728 (Statement of Comm’r Adelstein, concurring in part and dissenting in part), the FCC concluded that the language violated its indecency policy. The FCC first found that the word “shit,” like the word “fuck,” automatically satisfies the first prong of its indecency test and the first patent offensiveness factor because it “invariably invokes a coarse excretory image.” *Id.* at ¶ 75. Applying the second patent offensiveness factor, the FCC found that the expletives were “numerous” and “repeated.” *Id.* at ¶¶ 75-76.

As for the third factor, the FCC concluded that the language was “shocking” because “we disagree that the use of such language was necessary to express any particular viewpoint” and because “many of the expletives in the broadcast are not used by blues performers,” but instead by hip hop performers and a leading record producer. *Id.* at ¶ 77. The *Omnibus Order* thus places an onerous burden on broadcasters to justify their editorial decisions, in particular with regards to the third factor of whether the material is presented to titillate, pander to, or shock the audience.

#### **D. The Effects Of The FCC’s New Policy.**

The FCC’s policy shift, combined with a ten-fold increase in the maximum monetary forfeiture for

uttering a single expletive from \$32,500 to \$325,000 per violation, *see* Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006) (codified as amended at 47 U.S.C.A. § 503(b)(2)(C)(ii) (West 2011)), has dramatically increased the risks borne by public broadcasters. Because each station is treated as a separate violator, the FCC may impose a penalty on every PBS member station that broadcasts indecent or profane material as a separate violation. *See* 47 U.S.C.A. § 503(b)(2)(C)(i) (West 2011). Thus, under the new increased maximum forfeiture, a single expletive broadcast in a program carried by all 353 PBS member stations could result in a forfeiture of nearly \$115 million. This amount is over a quarter of the Fiscal Year 2012 federal appropriation for the Corporation for Public Broadcasting's general fund, which provides the federal support for public broadcasters. Corp. for Public Broad., Appropriation Request & Justification: FY2012 and FY2014, 2 (Feb. 2011), *available at* [http://www.cpb.org/appropriation/justification\\_12-14.pdf](http://www.cpb.org/appropriation/justification_12-14.pdf).

Particularly because of its commitment to educational and children's programming, PBS has always maintained high editorial standards to ensure that the material it distributes to its member stations is appropriate for its audiences likely to be watching at various times of the day. Member stations are then the final decision makers with respect to what they broadcast to their local communities. In spite of its mission to provide high-quality educational and informative broadcasts, the specter of crippling forfeitures has caused PBS to alter long-standing programming practices.

Before the FCC's decision in *The Blues*, PBS delegated decisions about program content to

experienced production and editorial personnel who follow established editorial standards for program accuracy, integrity and diversity. In response to *The Blues* decision, public television content decisions now require added layers of review by legal counsel for producers, stations, and distributors. Allocating funds that could otherwise be used to produce and disseminate broadcasts in accordance with their public service mission to expensive legal analysis places a significant burden on amici's limited budgets. More importantly, it elevates counsel's efforts to apply a vague policy—scrutinizing decisions to make an educated guess as to what the FCC may deem indecent thereunder—above reasoned editorial judgment, resulting in a chilling effect on speech. Thus, programming decisions now may turn not on whether PBS and its member stations believe material to be editorially appropriate for their audiences, but whether particular words, phrases, or situations have been previously adjudicated by the FCC. With the threat of massive fines and editorial judgment hamstrung, public broadcasters cannot risk incorrectly applying the FCC's vague contextual factors. Instead, public broadcasters search for contextual safe harbors that might be inferred from FCC decisions. When none can be found, or the inference is questionable, programs are edited.

The FCC's broadened enforcement activities and its refusal to defer to broadcasters' editorial judgment has forced public broadcasters to edit their programming aggressively, in a way that frequently prevents a full and fair exploration of the topics they portray. Examples of this chilling effect and the



burdens imposed by the enforcement of the FCC's vague indecency policy include:<sup>2</sup>

- American Experience: Eyes on the Prize. This award-winning documentary series about the Civil Rights era included footage of civil rights activist James Forman addressing a rally and concluding a heated speech by stating, "If we can't sit at the table, let's knock the fucking legs off, excuse me." The series was first broadcast in 1987 with no FCC action and without any known complaints about the language. When the series was rereleased in 2006, approximately two dozen stations chose to edit Forman's language.
- American Experience: George H.W. Bush (Bush 41). This documentary about President George H.W. Bush featured a conversation between President Lyndon Johnson and Bush (repeated by the narrator) in which Johnson advises Bush, then a member of the House, that he should run for the Senate because "the difference between being a member of the Senate and a member of the House is the difference between chicken salad and chicken shit." Some stations chose to edit the program because of liability concerns.
- Enron: The Smartest Guys in the Room. This 2007 documentary, which profiled the rise and fall of Enron, included a segment featuring phone recordings of Enron energy

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<sup>2</sup> Copies of the programs described herein are available in the archives of amici and will be made available to the Court upon request.

traders using expletives, including “fuck” and “shit.” In the wake of the FCC’s Notice of Apparent Liability for broadcasting of *The Blues*, the film was ultimately distributed with the expletives edited out of the program despite the FCC’s *Peter Branton* decision.

- Extreme Oil. This series, produced by New York station WNET, addressed the United States’ challenge in maintaining a stable supply of oil. The “Pipeline” episode included video shot in Baku, Azerbaijan, including an image of graffiti that read “Fuck America.” Even though foreign sentiment—intense hostility to the United States—was an important element of the program’s message, WNET ultimately cut the image because of uncertainty about the FCC’s policy.
- Frontline: The Soldier’s Heart. This documentary on U.S. soldiers’ difficulties in seeking treatment for post traumatic stress disorder while serving in Iraq included a veterans’ advocate stating that a soldier suffering from the disorder was called a “fucking pussy” by his superiors in order to teach other soldiers that cowardice would not be tolerated. The producer, WGBH, excised the word “fucking” from the program, but Denver station KRMA-TV nevertheless received an FCC Letter of Inquiry because the broadcast included the word “pussy.”
- Marie Antoinette. This documentary on the French Queen included centuries-old political cartoons from the French Revolution depicting the queen engaged in sexual activity, and the reading of a letter written by King Louis’

brother, who described the King's sexual dysfunction. Amici expended considerable resources to determine the legal status of the cartoons and the language describing the King's sexual activities in light of the new FCC policy. Although amici were reluctant to edit because of a desire to ensure that persons and events of historical significance were portrayed in an accurate light, some of the cartoons were edited to avoid liability. Despite the editing, some stations declined to air the program.

- Antiques Roadshow. The unpredictability of the FCC's new indecency policy forced public broadcasters to consider whether to edit an episode to omit footage of a fifty-year-old nude lithograph of Marilyn Monroe, even though the episode had previously been broadcast without known complaints.
- Hip Hop: Beyond Beats and Rhymes. This documentary explores misogyny and sexism in modern hip hop music and how lyrics and images in music videos encourage objectification and subjugation of women. In light of the FCC's new indecency policy, many of the hip hop videos and the very lyrics at issue in the documentary were ultimately edited.
- Operation Homecoming. This documentary explores the experiences of U.S. soldiers serving in Iraq and Afghanistan through their poetry, letters, journals, and essays. The soldiers' writing, read as narration, included seven uses of coarse language. Video included images of Saddam Hussein monuments

defaced with sexually-themed graffiti and a soldier giving the middle finger to a mural of Saddam. PBS ultimately distributed the documentary to many stations with the language and images edited out to avoid costs associated with defending the program in the event of an FCC inquiry.

- The War. This Ken Burns documentary on World War II included a personal account of combat experience by a veteran who used two expletives (“asshole” and “shit”). It also included an episode entitled “FUBAR” that described the terms “FUBAR” (“fucked up beyond all recognition”) and “SNAFU” (“situation normal, all fucked up”). Because of concern about the new FCC policy, many stations chose to air an edited version of the program.

These are but some of the many examples of honest, valuable content that viewers have lost because of the FCC’s vague new indecency policy.

### **SUMMARY OF ARGUMENT**

The Second Circuit correctly held that “[b]y prohibiting all ‘patently offensive’ references to sex, sexual organs, and excretion without giving adequate guidance as to what ‘patently offensive’ means, the FCC effectively chills speech, because broadcasters have no way of knowing what the FCC will find offensive.” *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 335 (2d Cir. 2010). In other words, the FCC’s new indecency policy provides no discernible standard by which broadcasters may accurately predict what content is prohibited.

Without deference to the editorial judgment of broadcasters, the FCC's new policy is unconstitutionally vague. The prohibition on "patently offensive" sexual or excretory organs or activities is so vague that a broadcaster cannot determine what speech is prohibited or what considerations will inform the FCC's decision in future cases. Before the FCC's new focus on context, the only saving characteristic of the policy was the FCC's recognition that caution was needed when indecency complaints implicated broadcasters' editorial judgment. Without deference to editorial judgment, the vagueness of the policy allows the FCC to enforce indecency regulation on an entirely subjective basis.

The FCC's aggressive new indecency policy imposes substantial costs on public broadcasters, whose limited financial resource cannot abide the threat of enterprise-threatening fines. To avoid calamitous fines that would compromise their ability to continue producing high-quality educational and cultural programming, amici must devote substantial time and resources to screening material—including programs previously broadcast without complaints or enforcement actions—and to make decisions that may compromise their obligations to offer programs that honestly characterize their subjects. Amici urge the Court to reject the FCC's new indecency policy because of the chilling effect it imposes on constitutionally-protected speech.

The FCC should adopt an enforcement policy that is clear and easy to apply in advance, that gives suitable deference to editorial judgment, and in particular, the intent to provide educational, informational, and cultural programs through documentaries, and other similar programs that address

matters of public interest, and that explicitly recognizes the greater chilling effect fines have on not-for-profit broadcasters.

## ARGUMENT

This Court has relied on the FCC's exercise of restraint in rejecting prior challenges to its indecency policy. The FCC has now abandoned restraint by imposing heavy burdens of justification on broadcasters without meaningful deference to their editorial judgment. The FCC's vague new indecency policy operates on a post-hoc, retrospective basis, leaving broadcasters to guess what the FCC will find indecent in each case. The uncertain legal terrain on which broadcasters now teeter, creates a chilling effect on constitutionally-protected speech that the First Amendment cannot tolerate.

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

The FCC's new indecency policy is unconstitutionally vague,<sup>3</sup> because it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, [and] is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008); see also *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

The dramatic shift in FCC enforcement efforts and the evolution of its contextual framework

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<sup>3</sup> In *Action for Children's Television*, then-Judge Ginsburg observed that *Pacifica* "did not address, specifically, whether the FCC's [indecency] definition was on its face unconstitutionally vague, 852 F.2d at 1338, and went on to conclude that "vagueness is inherent in [the FCC's definition]." *Id.* at 1344.

for determining patent offensiveness expose a failure to establish consistent, adequate standards for reviewing “context,” and mark a precipitous departure from the restrained enforcement approach required by *Pacifica*. The result is a policy that provides too much flexibility for the FCC subjectively to reach any desired outcome when applied *post hoc*, and not enough clarity to allow broadcasters acting prospectively to avoid violations without engaging in self-censorship. This prospective avoidance is acutely taxing on amici because it significantly drains the already limited funds available to them to make and distribute quality programming.

**A. The FCC’s New Indecency Policy Fails To Provide Clear Standards And Therefore Allows For Discriminatory Enforcement.**

The FCC’s new indecency policy is an effectively standardless framework that permits discriminatory agency enforcement borne from subjective reasoning. *See Williams*, 553 U.S. at 306 (observing that the Court has invalidated statutes that require an indecency finding because such a standard turns on “wholly subjective judgments”). The danger that inheres therein is plain: “A vague law [that] impermissibly delegates basic policy matters to [government officials] on an *ad hoc* and subjective basis,” *Grayned* 408 U.S. at 108-09, “has the potential for becoming a means of suppressing a particular point of view,” *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (quoting *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)). The FCC’s recent enforcement history lends credence to this most fundamental of First Amendment fears.

The FCC's new indecency policy purports to find consistency in the application of three principal factors to guide determinations of whether material is patently offensive: (1) "the explicitness or graphic nature of the description or depiction"; (2) "whether the material dwells on or repeats at length" the description or depiction; and (3) "whether the material appears to pander or is used to titillate, or whether the materials appears to have been presented for its shock value." *Policy Statement*, 16 FCC Rcd 7999, at ¶ 10. But the application of these factors has led to unpredictable results.

In applying its newly-anointed principal factors to a host of programs in an effort to provide industry guidance, the FCC has been more successful in promoting industry confusion. Applying these factors to *Saving Private Ryan*, which on its face meets all three factors for patent offensiveness, the FCC concluded that the film was not indecent because other factors such as "merit," and the "essential" nature of the language counteracted the weight of the shocking, pandering, or titillating factor. *In re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 FCC Rcd 4507, ¶¶ 11, 14 (2005) ("Saving Private Ryan"). The FCC reached the opposite conclusion in applying these factors to *The Blues*, concluding that the use of coarse language indistinguishable from that used in *Saving Private Ryan* rendered the Martin Scorsese documentary about the growth of blues music in Chicago indecent. Unexplainable by reference to the three patent offensiveness factors, broadcasters are left to formulate their own explanation of the differing outcomes in *Saving Private Ryan* and *The Blues*.



One such explanation may be a results-oriented approach to indecency review whereby the subjective biases of regulators concerning the value of specific content or the merit of a particular viewpoint are the guide. The mere appearance of that troubling result raises grave First Amendment concerns. *See Fox*, 613 F.3d at 333; *Forsyth County, Ga.*, 505 U.S. at 130.

The FCC may defend the appearance of seemingly contradictory results as unavoidable in the contextual indecency regime *Pacifica* upheld. *Pacifica*, 438 U.S. at 742 (observing that “indecency is largely a function of context—it cannot be adequately judged in the abstract”). Yet, *Pacifica*’s observation was tempered by the high degree of regulatory restraint exhibited by the FCC at that time, *id.* at 760-61 (Powell, J., concurring in part and concurring in the judgment), an approach the FCC has long since abandoned, *see Fox*, 613 F.3d at 329. In decreasing its regulatory restraint, the FCC necessarily has increased its regulatory discretion, through an abstract notion of context, to a level *Pacifica* never condoned. In that regard, *Pacifica* would seem to offer the FCC no greater comfort than that which its indecency policy offers broadcasters. None.

That the touchstone of indecency review is context does not lessen the need for clear principles to guide and cabin agency discretion. Because the FCC’s new indecency policy provides no clear principles, it is too vague to survive any searching constitutional review.

**B. The FCC’s New Indecency Policy Fails To Provide Fair Notice To Broadcasters Of What Material It Will Consider Indecent.**

The Commission’s new indecency policy fails to provide broadcasters with clear guidance that would allow them confidently to “steer” between decent and indecent content as defined by the FCC. *Grayned*, 408 U.S. at 108. Instead, “because the boundaries of the forbidden areas [are not] clearly marked,” *id.* at 109, broadcasters, especially public broadcasters, must “steer far wider of the unlawful zone, rather than risk massive fines” that may threaten the continued viability of their organizations, *Fox*, 613 F.3d at 328 (internal citations omitted). Because the FCC’s indecency policy does not provide broadcasters with fair notice of what conduct it prohibits, it cannot pass First Amendment muster.

The FCC’s varying, inconsistent application of its three factor “patently offensive” test highlights the constitutional deficiency of its indecency policy. In practice, the factors—particularly the shock-pander-titillate factor—are nothing more than vague abstractions of a host of ever-changing, fact-specific determinations that the FCC makes behind the scenes to determine patent offensiveness. In some cases, a warning to viewers of the fact that a program is not intended as “family entertainment” may influence the Commission. *Saving Private Ryan*, 20 FCC Rcd 4507, at ¶¶ 3 & 15. In others, the presence of minors may control. *In re Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program “Without a Trace,”* 21 FCC Rcd 2732, ¶ 15 (2006). In still others, an FCC decision may turn on what a hypothetical child

watching the program could discern from the material. *In re Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program “Married by America”* on April 7, 2003, 23 FCC Rcd 3222, ¶ 12 (2008). Specific past applications provide little illumination because of these varying considerations and because their scope is nearly impossible to establish. At best, the FCC’s *post hoc*, case-by-case, analyses are harbingers of its approach to the exact same specifically-complained-of material in the future.

*The Blues* exemplifies the fatal lack of notice the FCC provides to broadcasters. Before *The Blues* episode at issue aired on March 11, 2004—seven days before the FCC’s new indecency policy came to life in *Golden Globes*, see 18 FCC Rcd. 19859 (rel. March 18, 2004)—broadcasters had but a handful of FCC decisions against which to measure the documentary, *Policy Statement*, 16 FCC Rcd. 7999. The vast majority of these addressed “shock-jock” comedy sketches. Few concerned cultural, educational, and informational programs like *The Blues*. Accordingly, broadcasters could only compare *The Blues* to an NPR news story on mob figure John Gotti that contained multiple uses of “fuck”, *id.* at ¶ 21, graphic female nudity in *Schindler’s List*, *id.*, and three talk-show programs best categorized as sex education programs, *id.* In light of the contextual range established by the 2001 *Policy Statement*, it is no wonder that broadcasters of *The Blues* adjudged the program to be closer in content to educational and informational programs that the FCC previously had concluded were not indecent because any objectionable content in *The Blues* was not presented in a pandering or titillating manner. *Id.*

It was not until nearly one year after *The Blues* aired that the FCC announced what is now its key standard for determining when fleeting (or repeated) expletives render a program indecent. *Saving Private Ryan*, 20 FCC Rcd 4507, at ¶¶ 14, 18. Under that standard, the FCC considers whether the expletives are “essential” or “integral to the film’s objective.” *Id.* at ¶ 14. Applying this standard in *Saving Private Ryan*, the FCC concluded that the uses of “fuck,” “shit,” “hell,” “ass,” “son of a bitch,” “bastard,” and their variations, *id.* at ¶ 13, did not render the material patently offensive because “deleting all of such language or inserting milder language . . . would have altered the nature of the artistic work and diminished [its] power [and] realism,” in conveying the horrors of war, *id.* at ¶ 14 (emphasis added).

Handing down *The Blues* decision more than two years after that program aired and nearly one year after its *Saving Private Ryan* decision, the FCC concluded that the use of “fuck” and “shit” and their variations in *The Blues* rendered it indecent material, despite also finding that the broadcaster might reasonably have believed that the expletives in *The Blues* “served a legitimate informational purpose.” *Omnibus Order*, 21 FCC Rcd 2664, at ¶ 85. The FCC did not explain, however, why it concluded that the expletives were not “essential to the nature” of the program, considering that *The Blues* is a documentary intended to tell the *real life* story of persons “with their own words,” *id.* at ¶ 73, an especially troubling result in light of the FCC’s emphasis on the need to promote “realism” in condoning the use of expletives in *Saving Private Ryan*, a *fictional*, albeit realistic, depiction of war, *Saving Private Ryan*, 20 FCC Rcd 4507, at ¶ 14

(emphasis added). The lack of fair notice that broadcasters must endure persists as the FCC identifies new and varied contextual distinctions with each new case. Indeed, *The Blues* suggests additional finely-distilled contextual distinctions are still to come. See *Omnibus Order*, 21 FCC Rcd. 2664, at ¶ 77 (suggesting that the FCC's indecency conclusion may have been otherwise different if the expletives had been spoken by the performers, rather than the industry executives).

Even with their incrementally increased knowledge of new contextual factors, broadcasters cannot ascertain the scope of the FCC's contextual framework. Presumably, the FCC does not intend to limit permissible uses of "fuck," "shit," and graphic nudity *only* to news programs and dramatic war films about World War II. To do so effectively would create categorical exemptions: a result the FCC wishes to avoid. See *Remand Order*, 21 FCC Rcd 13299, at ¶71 (clarifying that the FCC recognizes "no outright news exemption"). But this is the practical effect when the scope of the FCC's contextual framework is established by things that *do not* qualify. Broadcasters relying on FCC guidance to analyze expletives and nudity in upcoming broadcasts cannot possibly have fair notice of the potentially limitless number of contextual factors (or the level of importance assigned to each one) on which the next FCC decision may turn.

Evaluating material that has received little, if any, FCC attention is even more problematic. For example, amici face a real dilemma with anthropological documentaries about indigenous foreign cultures, some members of which, in their natural environments, do not cover their sexual

organs with clothing.<sup>4</sup> Notwithstanding the FCC's vague notion of community standards, amici strongly believe that a study of other cultures mandates an accurate portrayal of those cultures in their natural settings. Editing documentary footage of indigenous tribal people for fear of FCC fines unjustly injects alien cultural norms into the material in direct conflict with its educational purpose. But with no known FCC decisions on nudity in the context of an anthropological documentary, and without being able to rely on editorial judgment because it is unclear whether such a program would qualify as "news and public affairs" programming, amici are left to wonder if nudity in this context will be allowed under *Schindler's List*, under some other contextual reasoning, or prohibited all together.<sup>5</sup> For amici,

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<sup>4</sup> Oregon Public Broadcasting ("OPB"), producer of *Art Wolfe's Travel to the Edge*, was compelled to edit the episode, "Ethiopia: The Omo Valley," featuring Ethiopian tribes-people in their native dress after a discussion with their distributor and legal counsel about the risk of bare buttocks appearing on television. OPB eventually edited this footage out of the episode for national audiences despite a firm belief that the material was suitable for its audience in Portland in the context of a nature documentary.

<sup>5</sup> Another example of the FCC's failure to provide fair notice of what constitutes indecent conduct is the absence of guidance on the use of the middle finger gesture, which was at issue in *Operation Homecoming*. *See supra*, at 19. Although amici have been unable to find any FCC case concluding that the gesture is indecent, the *Remand Order* referenced Nicole Richie and Paris Hilton's use of the gesture during an episode of "The Simple Life" to refute Fox's assertion that it could not have predicted Ms. Richie would use expletives during "The Billboard Music Awards." *Remand Order*, 21 FCC Rcd 13299, n.94. Although editorial judgment may dictate the image of a U.S. soldier in Iraq making the gesture to a mural of Saddam Hussein highly relevant within the context of the documentary,

editing a program to be less culturally accurate runs counter to their highly respected statutory mission, but may be a necessary means to avoid fines that would threaten their continued ability to fund their programming.

FCC decisions provide some insight into how the Commission will evaluate American soldiers using expletives in combat situations, nude Holocaust victims in a Nazi concentration camp, or celebrities making off the cuff remarks during live award shows, but the clarifying nature of the FCC's rulings ends with the facts specific to those cases. Operating under the FCC's vague indecency policy, broadcasters struggle to apply FCC "guidance" to new material that does not fall neatly within the contextual analyses of previous FCC decisions. The First Amendment will not permit that result. See *Grayned*, 408 U.S. at 108 ("[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 238 (2002) ("The First Amendment requires . . . precise restriction[s].").

## **II. The FCC Should Return To A Standard More Deferential To Broadcasters' Editorial Judgment.**

The FCC should adopt an enforcement policy that is not only clear and easy to apply in advance, but one that gives suitable deference to editorial judgment, and in particular, editorial judgment motivated by the intent to educate and inform the public. A standard that distinguishes between this

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the *Saving Private Ryan* order does not clearly protect the gesture.

intent and the intent to shock, pander, or titillate would greatly reduce the chilling effect that fines may have on amici, as not-for-profit broadcasters. By establishing a clear and deferential standard, the Commission would bolster the public mission that amici have undertaken, and that decades of Congressional policy and federal, state, and private funding have recognized and encouraged.<sup>6</sup>

In the years following *Pacifica*, the FCC recognized that a restrained enforcement policy required deference to broadcaster editorial judgment for all forms of programming. This approach allowed broadcasters, such as amici, to provide quality documentary, educational, and journalistic programming that explored important political, social, and historical topics without fear that coarse language or imagery may render it indecent. When the FCC established its contextual framework in the 2001 *Policy Statement*, it made no mention of consideration for broadcaster judgment. Since that time, the FCC has clearly given more weight to an arbitrary application of three abstract contextual factors at the expense of broadcaster editorial decision making. Broadcaster judgment is now only considered as a safety valve—and only in undefined “news and public affairs” contexts—when a plain application of the FCC’s contextual framework produces the wrong conclusion. *See Remand Order*, 21 FCC Rcd 13299, at ¶¶ 69-71 (reversing the Commission’s own indecency finding against “The Early Show”). The FCC’s move to abandon, in most

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<sup>6</sup> The FCC has adopted a deferential standard in the selection and production of news and editorial programming. Similar deference to documentary and educational programming would facilitate amici’s obligation to perform a similar public service.



cases, its deference to broadcasters' judgment flies in the face of the restrained approach required by *Pacifica*.

No broadcaster can predict the rationale that will control the FCC's application of its various contextual factors, which requires FCC Commissioners to substitute their inherently subjective judgment for the editorial discretion of the broadcaster. Although the FCC maintains that its subjective judgments are based on its "collective experience and knowledge, developed through constant interaction with" various parties, *In re Infinity Radio License, Inc., Licensee of Station WLLD(FM), Holmes Beach, Fla.*, 19 FCC Rcd 5022, ¶ 12 (2004), the Court has emphasized that "governmental officials cannot make principled distinctions in this area," *Cohen v. California*, 403 U.S. 15, 25 (1971). Without due consideration of the editorial judgment of broadcasters, any FCC policy is unconstitutionally vague under *Pacifica*.

The FCC's indecency policy ignores public broadcasters' public service mission and their ties to local communities. Public television stations are owned and operated by organizations firmly rooted in local communities, including state and local governments, colleges and universities, and other locally-run not-for-profit entities. *See Community Needs Report*, at 153 ("The broad base of public broadcasting funding is an underappreciated attribute of the system . . . . [A] system [that is] rooted in local connections, civil society partnerships . . . and diverse financial support."). For a national program distributor like PBS, its member stations provide a more direct feedback loop concerning community standards than any FCC indecency policy ever could. Indeed, PBS is routinely reminded by its

member stations that what plays in New York does not necessarily play in New Mexico.

Public broadcasters have developed their editorial judgment for adult programs in light of decades of serving local viewing audiences. Public broadcasters also take seriously their role as a safe haven for children amidst a crowd of other television channels. *GAO Report*, at 21-22. Public broadcasters recognize that the nature and quality of their children's programs draw children to their channels during the day and foster public trust. This knowledge compels public broadcasters to make all programming decisions, whether for adult or child content, in light of the impact they may have on the public's trust. *Community Needs Report*, at 152 (“[P]ublic broadcasters have generally achieved a high level of respect among the public . . . [and] [p]ublic television . . . seems to occupy a special place of honor for a wide swath of Americans.”).

The FCC's new indecency policy suffers from many fundamental flaws. Amici focus on the FCC's abandonment of deference to editorial judgment as manifested by its decision in *The Blues*, where the FCC imposed a heavy burden of justification on the broadcaster and thereby overrode its editorial judgment. The utterly subjective nature of the rationale the Commission provided for finding liability in *The Blues* is a lesson in the peril that attends permitting the government to punish speech.

Before the new FCC indecency policy, broadcasters were not just permitted to rely on their own judgment to determine whether material may be indecent, they were “obligated” to do so. *Infinity Broadcasting II*, 3 FCC Rcd 930, at ¶ 15. But under the FCC's current approach, in an apparent move

away from *Pacifica*, it is the sole arbiter of “community standards.” The FCC thereby imposes its subjective views on each of the communities that its broadcast licensees serve, substituting its judgment for that of broadcasters. This approach chills constitutionally protected speech and is thus anathema under the First Amendment. Amici are closely tied to the local communities they serve. As such, they are far more likely to have an accurate gauge of, and commitment to, community standards, which the FCC has all but acknowledged in broader contexts. *Community Needs Report* at 155 (“It has been left largely up to local public broadcasters to define what [it] means [to serve the public with media content], with each creating its own mix of educational, music, cultural, talk, and public affairs programming.”). Applying a standard that would defer to public broadcasters’ good faith judgments would be a step toward returning to the cautious, constitutionally-acceptable approach endorsed in *Pacifica*—one in which the FCC would be “far more dedicated to the First Amendment premise that broadcasters should air controversial programming than . . . worried about an occasional four-letter word.” Charles Ferris, Chairman, FCC, Address Before the New England Broad. Ass’n, at 8 (Jul. 21, 1978).

Amici are closely attuned to the standards expected and the values supported by their audience. The Commission should return to an indecency policy that defers to amici’s judgment in identifying the best means of fulfilling their statutory mission.

**CONCLUSION**

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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## **APPENDIX**

**APPENDIX A**

**PUBLIC BROADCASTERS, RELATED TRADE ASSOCIATIONS, AND OTHER ENTITIES IN SUPPORT OF RESPONDENTS**

Amicus, the **Public Broadcasting Service** is a nonprofit membership organization of the licensees of the nation's public television stations. PBS distributes national public television programming and provides other program-related services to the nation's public television stations.

The following entities and organizations endorse the positions set forth in this brief in full:

The **Association of Public Television Stations** is a nonprofit organization whose members comprise the licensees of nearly all of the nation's Corporation for Public Broadcasting-qualified noncommercial educational television stations.

**WGBH Educational Foundation** is a major producer of national public television programming, including *American Experience*, *Frontline*, *Masterpiece*, and *NOVA*, and the licensee of three public television and five public radio stations in Massachusetts.

**WNET** is a pioneering provider of public television programming and the licensee of THIRTEEN (WNET), the flagship public television station serving the New York metropolitan area, and WLIW21 (WLIW), the third most watched public television station in the nation.

**San Mateo County Community College District** is the licensee of public television station KCSM-TV, San Mateo, California, and was subject to an FCC indecency finding and proposed forfeiture in

2006 for its broadcast of *The Blues: Godfathers and Sons*.

**Iowa Public Broadcasting Board** is the licensee of public television stations KIIN, Iowa City; KSIN-TV, Sioux City; KDIN-TV, Des Moines; KRIN, Waterloo; KBIN-TV, Council Bluffs; KTIN, Fort Dodge; KHIN, Red Oak; KYIN, Mason City and KQIN, Davenport, Iowa.

**Rocky Mountain Public Broadcasting Network, Inc.** is the licensee of public television stations KRMA-TV, Denver; KTSC, Pueblo; KRMU, Durango; KRMJ, Grand Junction and KRMZ, Steamboat Springs, Colorado.

**State of Wisconsin — Educational Communications Board** is the licensee of public television stations WHLA-TV, La Crosse; WLEF-TV, Park Falls; WPNE, Green Bay; WHWC, Menomonie and WHRM-TV, Wausau, Wisconsin.

**WHYY, Inc.** is the licensee of public television stations WHYY-TV, Wilmington, and WDPB, Seaford, Delaware.

**KCTS Television** is the licensee of public television stations KCTS-TV, Seattle and KYVE, Yakima, Washington.

**Oregon Public Broadcasting** is the licensee of public television stations KOPB-TV, Portland; KOAC-TV, Corvallis; KEPB-TV, Eugene; KTVR-TV, La Grande and KOAB-TV, Bend, Oregon.

**Twin Cities Public Television, Inc.** is the licensee of public television stations KTCA-TV and KTCI-TV, St. Paul/Minneapolis, Minnesota.

3a

**Greater Washington Educational Telecommunications Association** is a producer of public television programming and the licensee of public television station WETA-TV, Washington, D.C.