No. 10-1293

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION ET AL.,
Petitioners,

v.

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

FEDERAL COMMUNICATIONS COMMISSION ET AL.,
Petitioners,

v.

ABC, INC. ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF RESPONDENTS ABC TELEVISION AFFILIATES ASSOCIATION ET AL.

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[Additional Respondents Listed on Inside Cover]

Additional Respondents Joining in Brief

Citadel Communications, LLC, WKRN, G.P., Young Broadcasting of Green Bay, Inc., WKOW Television, Inc., WSIL-TV, Inc., Cedar Rapids Television Company, Centex Television Limited Partnership, Channel 12 of Beaumont, Inc., Duhamel Broadcasting Enterprises, Gray Television Licensee, Inc., KATC Communications, Inc., KATV, LLC, KDNL Licensee, LLC, KETV Hearst-Argyle Television, Inc., KLTV/KTRE License Subsidiary, LLC, KSTP-TV, LLC, KSWO Television Company, Inc., KTBS, Inc., KTUL, LLC, KVUE Television, Inc., McGraw-Hill Broadcasting Company, Inc., Media General Communications Holdings, LLC, Mission Broadcasting, Inc., Mississippi Broadcasting Partners, New York Times Management Services, Nexstar Broadcasting, Inc., NPG of Texas, L.P., Ohio/Oklahoma Hearst-Argyle Television, Inc., Piedmont Television of Huntsville License, LLC, Piedmont Television of Springfield License, LLC, Pollack/Belz Communication Company, Inc., Post-Newsweek Stations, San Antonio, Inc., Scripps Howard Broadcasting Co., Southern Broadcasting, Inc., Tennessee Broadcasting Partners, Tribune Television New Orleans, Inc., WAPT Hearst-Argyle Television, Inc., WDIO-TV, LLC, WEAR Licensee, LLC, WFAA-TV, Inc., WISN Hearst-Argyle Television, Inc.

Corporate Disclosure Statement

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

ABC Television Affiliates Association is a non-profit trade association of approximately 160 television stations affiliated with the ABC Television Network and which represents its member stations before the FCC, Congress, and the courts. ABC Television Affiliates Association has issued no shares of stock or debt securities to the public and has no parent company, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Cedar Rapids Television Company, licensee of Television Station KCRG-TV, Cedar Rapids, Iowa, is a direct, wholly-owned subsidiary of The Gazette Company. The Gazette Company, which is a privately-held corporation, has no parent company, and no publicly-held company owns more than 10% of its stock.

Centex Television Limited Partnership, licensee of Television Station KXXV(TV), Waco, Texas, is a limited partnership whose partners are KSWO Television of Texas, Inc. (which is wholly owned by KSWO Television Co., Inc.) and Lawton Cablevision, Inc., and no publicly-held company owns shares in any of the partners.

Channel 12 of Beaumont, Inc., former licensee of Television Station KBMT(TV), Beaumont, Texas, has

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[*] Respondents' names in bold are the names of the parties as they originally appeared below. Many Respondents have since undergone corporate restructurings. All relevant entities are included in these disclosures.

been dissolved. Channel 12 of Beaumont, Inc.'s sole shareholder was Texas Telecasting, Inc., which remains in existence and is a 100% subsidiary of Texas Television, Inc., which is a privately-held corporation, and no stockholder is a publicly-held company.

Citadel Communications, LLC, licensee of Television Station KLKN(TV), Lincoln, Nebraska, is a privately-held limited liability company. No member of Citadel Communications, LLC is a corporation. Citadel Communications Company, L.P., which is also a limited liability company, is the only member of Citadel Communications, LLC that is not a natural person, and only one interest holder in Citadel Communications Company, L.P.—C.C.C. Communications Corporation—is a corporation, and no stockholder of that corporation is a publicly-held company.

Duhamel Broadcasting Enterprises ("DBE"), licensee of Television Station KOTA-TV, Rapid City, South Dakota, is a privately-owned corporation, and no stockholder of DBE is a publicly-held company.

Gray Television Licensee, LLC (f/k/a **Gray Television Licensee, Inc.**), licensee of Television Station KAKE-TV, Wichita, Kansas, and licensee of Television Station KLBY(TV), Colby, Kansas, is a subsidiary of Gray Television Group, Inc., which is, in turn, a subsidiary of WVLT-TV, Inc. The corporate parent of WVLT-TV, Inc. is Gray Television, Inc., a publicly-held company traded on the New York Stock Exchange.

KATC Communications, Inc., licensee of Television Station KATC(TV), Lafayette, Louisiana, is a wholly-owned subsidiary of Cordillera Com-

munications, Inc. Cordillera Communications, Inc. is, in turn, a wholly-owned subsidiary of Evening Post Publishing Company ("Evening Post"). Evening Post is a privately-held company. No publicly-held company has a 10% or greater direct or indirect ownership interest in Evening Post or in KATC Communications, Inc.

KATV, LLC, licensee of Television Station KATV(TV), Little Rock, Arkansas, is a wholly-owned subsidiary of Allbritton Communications Company, which is, in turn, wholly-owned by Allbritton Group, LLC, which is wholly-owned by Perpetual Corporation. All of the shares of Perpetual Corporation are indirectly owned by or for the benefit of Joe L. Allbritton, Barbara B. Allbritton, and Robert L. Allbritton.

KDNL Licensee, LLC, licensee of Television Station KDNL-TV, St. Louis, Missouri, is an indirect wholly-owned subsidiary of Sinclair Broadcast Group, Inc., a publicly-held company traded on NASDAQ.

KETV Hearst Television Inc. (f/k/a **KETV Hearst-Argyle Television, Inc.**), licensee of Television Station KETV(TV), Omaha, Nebraska, is a wholly-owned subsidiary of Hearst Properties Inc., which is a wholly-owned subsidiary of Hearst Television Inc. Hearst Television Inc. is a wholly-owned subsidiary of Hearst Broadcasting, Inc., which is, in turn, a wholly-owned subsidiary of Hearst Holdings, Inc., which is a wholly-owned subsidiary of The Hearst Corporation. The Hearst Corporation is a privately-held corporation, and no shareholder is a publicly-held company.

KLTV/KTRE License Subsidiary, LLC, licensee

of Television Station KLTV(TV), Tyler, Texas, is a wholly-owned subsidiary of KLTV/KTRE LLC, which is a wholly-owned subsidiary of TV-3, LLC, which is a wholly-owned subsidiary of Raycom TV Broadcasting, LLC, which is a wholly-owned subsidiary of Raycom TV Broadcasting, Inc. Raycom TV Broadcasting, Inc. is, in turn, owned by Raycom Media, Inc. and Liberty Corporation. Liberty Corporation is a wholly-owned subsidiary of Raycom Media, Inc. Raycom Media, Inc. is a privately-owned corporation, and no publicly-held company owns more than 10% of its stock.

KSTP-TV, LLC, licensee of Television Station KSTP-TV, St. Paul, Minnesota, is a wholly-owned subsidiary of Hubbard Broadcasting, Inc., which is a privately-owned corporation. No shareholder with 10% or greater interest in Hubbard Broadcasting, Inc. is publicly traded.

KSWO Television Co., Inc., licensee of Television Station KSWO-TV, Lawton, Oklahoma, is a privately-owned corporation, and no shareholder is a publicly-held company.

KTBS, LLC (f/k/a **KTBS, Inc.**), licensee of Television Station KTBS-TV, Shreveport, Louisiana, is a privately-owned limited liability company, and no interest holder is a publicly-held company.

KTUL, LLC, licensee of Television Station KTUL(TV), Tulsa, Oklahoma, is a wholly-owned subsidiary of Allbritton Communications Company, which is, in turn, wholly-owned by Allbritton Group, LLC, which is wholly-owned by Perpetual Corporation. All of the shares of Perpetual Corporation are indirectly owned by or for the benefit of Joe L.

Allbritton, Barbara B. Allbritton, and Robert L. Allbritton.

KVUE Television, Inc., licensee of Television Station KVUE(TV), Austin, Texas, is a direct, wholly-owned subsidiary of Belo Corp., a publicly-held company traded on the New York Stock Exchange.

McGraw-Hill Broadcasting Company, Inc., licensee of Television Station KMGH-TV, Denver, Colorado, is a wholly-owned subsidiary of The McGraw-Hill Companies, Inc., which is a publicly-held company traded on the New York Stock Exchange. No other publicly-held company has a 10% or greater direct or indirect ownership interest in McGraw-Hill Broadcasting Company, Inc. On October 3, 2011, The McGraw-Hill Companies entered into an agreement to sell its nine-station broadcasting group, including KMGH-TV, to Scripps Media, Inc. The transaction is subject to regulatory approvals and customary closing conditions.

Media General Communications Holdings, LLC, former licensee of Television Station WMBB(TV), Panama City, Florida, is a limited liability company the sole member of which is Media General Operations, Inc. Media General Operations, Inc. is a wholly-owned subsidiary of Media General Communications, Inc., which is, in turn, a wholly-owned subsidiary of Media General, Inc. ("Media General"). Media General is an independent, publicly-held company traded on the New York Stock Exchange. It has no parent companies. GAMCO Investors, Inc., a publicly-held company that trades on the New York Stock Exchange, indirectly owns more than 10% of Media General through its wholly-owned subsidiaries GAMCO Asset Management

Inc. and Gabelli Funds, LLC and through its majority-owned subsidiary Gabelli Securities, Inc.

Mission Broadcasting, Inc., licensee of Television Station KODE-TV, Joplin, Missouri, is a privately-owned corporation, and no shareholder is a publicly-held company.

Mississippi Broadcasting Partners, former licensee of Television Station WABG-TV, Greenwood, Mississippi, is a partnership whose 99% partner is Mississippi Telecasting Company, Inc. and whose 1% partner is Bahakel Broadcasting Company. Mississippi Telecasting Company, Inc. is a wholly-owned subsidiary of Greenwood Broadcasting Company, Inc. Greenwood Broadcasting Company, Inc. and Bahakel Broadcasting Company are both wholly-owned subsidiaries of Bahakel Communications, Ltd., which is a privately-held corporation, and no shareholder is a publicly-held company.

New York Times Management Services, former licensee of Television Station WQAD-TV, Moline, Illinois, was, prior to its dissolution, a Massachusetts Business Trust wholly owned by NYT Broadcast Holdings, LLC. The trustee of New York Times Management Services was NYT Group Services, LLC, which is a limited liability company, the sole member of which is The New York Times Company. NYT Broadcast Holdings, LLC is a limited liability company the sole member of which is NYT Holdings, Inc. NYT Holdings, Inc. is a wholly-owned subsidiary of NYT Capital, LLC, which is, in turn, a wholly-owned subsidiary of The New York Times Company. Until 2007, The New York Times Company indirectly owned nine television stations, including WQAD-TV, which

was licensed to New York Times Management Services. The New York Times Company has issued two classes of stock, Class A and Class B. The New York Times Company's Class A stock is publicly traded on the New York Stock Exchange. No publicly-held company has a 10% or greater direct or indirect ownership interest in The New York Times Company.

Nexstar Broadcasting, Inc., licensee of Television Station KQTV(TV), St. Joseph, Missouri, and licensee of Television Station WDHN(TV), Dothan, Alabama, is a wholly-owned subsidiary of Nexstar Finance Holdings, Inc., which is, in turn, a wholly-owned subsidiary of Nexstar Broadcasting Group, Inc. Nexstar Broadcasting Group, Inc. is a publicly-held company traded on the NASDAQ.

NPG of Texas, L.P., licensee of Television Station KVIA-TV, El Paso, Texas, is a wholly-owned subsidiary of NPG Holdings, Inc., which is a wholly-owned subsidiary of News-Press & Gazette Company. No shareholder is a publicly-held company.

Ohio/Oklahoma Hearst Television Inc. (f/k/a **Ohio/Oklahoma Hearst-Argyle Television, Inc.**), licensee of Television Station KOCO-TV, Oklahoma City, Oklahoma, is a wholly-owned subsidiary of Hearst Television Inc., which is a wholly-owned subsidiary of Hearst Broadcasting, Inc., which is, in turn, a wholly-owned subsidiary of Hearst Holdings, Inc., which is a wholly-owned subsidiary of The Hearst Corporation. The Hearst Corporation is a privately-held corporation, and no shareholder is a publicly-held company.

Piedmont Television of Huntsville License, LLC, former licensee of Television Station WAAY-TV,

Huntsville, Alabama, was, prior to dissolution, a privately-owned limited liability company, and no shareholder was a publicly-held company.

Piedmont Television of Springfield License, LLC, former licensee of Television Station KSPR(TV), Springfield, Missouri, was, prior to dissolution, a privately-owned limited liability company, and no shareholder was a publicly-held company.

Pollack/Belz Communication Company, Inc., licensee of Television Station KLAX-TV, Alexandria, Louisiana, is a privately-owned corporation, and no shareholder is a publicly-held company.

Post-Newsweek Stations, San Antonio, Inc., licensee of Television Station KSAT-TV, San Antonio, Texas, is a wholly-owned subsidiary of Post-Newsweek Stations, Inc., which is a wholly-owned subsidiary of The Washington Post Company, a publicly-held company traded on the New York Stock Exchange.

Scripps Media, Inc., licensee of Television Station KNXV-TV, Phoenix, Arizona, is the successor through merger to **Scripps Howard Broadcasting Co.**, both companies being wholly-owned subsidiaries of The E.W. Scripps Company, a publicly-held company traded on the New York Stock Exchange.

Southern Broadcasting, Inc., licensee of Television Station WKDH(TV), Houston, Mississippi, is a privately-owned corporation, and no shareholder is a publicly-held company.

Tennessee Broadcasting Partners, licensee of Television Station WBBJ-TV, Jackson, Tennessee, is a partnership whose 99% partner is Jackson Telecasters, Inc. and whose 1% partner is Bahakel Broadcasting Company. Jackson Telecasters, Inc. and Bahakel

Broadcasting Company are both wholly-owned subsidiaries of Bahakel Communications, Ltd., which is a privately-held corporation, and no shareholder is a publicly-held company.

Tribune Television New Orleans, Inc., licensee of Television Station WGNO(TV), New Orleans, Louisiana, is a wholly-owned subsidiary of Tribune Broadcasting Company, which is a wholly-owned subsidiary of Tribune Company. All three companies are privately held, and no shareholder is publicly held.

WAPT Hearst Television Inc. (f/k/a **WAPT Hearst-Argyle Television, Inc.**), licensee of Television Station WAPT(TV), Jackson, Mississippi, is a wholly-owned subsidiary of Hearst Television Inc., which is a wholly-owned subsidiary of Hearst Broadcasting, Inc., which is, in turn, a wholly-owned subsidiary of Hearst Holdings, Inc., which is a wholly-owned subsidiary of The Hearst Corporation. The Hearst Corporation is a privately-held corporation, and no shareholder is a publicly-held company.

WDIO-TV, LLC, licensee of Television Station WDIO-TV, Duluth, Minnesota, is a wholly-owned subsidiary of Hubbard Broadcasting, Inc., which is a privately-owned corporation. No shareholder with 10% or greater interest in Hubbard Broadcasting, Inc. is publicly traded.

WEAR Licensee, LLC, licensee of Television Station WEAR-TV, Pensacola, Florida, is an indirect wholly-owned subsidiary of Sinclair Broadcast Group, Inc., a publicly-held company traded on the NASDAQ.

WFAA-TV, Inc., licensee of Television Station WFAA-TV, Dallas, Texas, is a direct, wholly-owned

subsidiary of Belo Corp., a publicly-held company traded on the New York Stock Exchange.

WISN Hearst Television Inc. (f/k/a **WISN Hearst-Argyle Television, Inc.**), licensee of Television Station WISN-TV, Milwaukee, Wisconsin, is a wholly-owned subsidiary of Hearst Television Inc., which is a wholly-owned subsidiary of Hearst Broadcasting, Inc., which is, in turn, a wholly-owned subsidiary of Hearst Holdings, Inc., which is a wholly-owned subsidiary of The Hearst Corporation. The Hearst Corporation is a privately-held corporation, and no shareholder is a publicly-held company.

WKOW Television, Inc., licensee of Television Station WKOW-TV, Madison, Wisconsin, is a wholly-owned subsidiary of Quincy Newspapers, Inc. ("QNI"). QNI is a privately-owned corporation, and no shareholder with 10% or greater interest is a publicly-held company.

WKRN, G.P., licensee of Television Station WKRN-TV, Nashville, Tennessee, is a general partnership whose general partners are Young Broadcasting of Nashville LLC ("Young Nashville") and YBT, Inc. ("YBT"). Young Nashville is a wholly-owned subsidiary of Young Broadcasting of Knoxville, Inc., which is a wholly-owned subsidiary of Young Broadcasting, LLC ("YBL"). YBT is also a wholly-owned subsidiary of YBL. The sole member of YBL is New Young Broadcasting Holding Co., Inc. ("New Young"). New Young is a privately-held company and no shareholder with 10% or more interest is publicly traded.

WSIL-TV, Inc., licensee of Television Station WSIL-TV, Harrisburg, Illinois, is a privately-owned

corporation, and no shareholder is a publicly-held company.

Young Broadcasting of Green Bay, Inc., licensee of Television Station WBAY-TV, Green Bay, Wisconsin, is a wholly-owned subsidiary of Young Broadcasting, LLC, the sole member of which is New Young Broadcasting Holding Co., Inc. ("New Young"). New Young is a privately-held company, and no shareholder with 10% or more interest is publicly traded.

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BRIEF OF RESPONDENTS ABC TELEVISION AFFILIATES ASSOCIATION ET AL.

Introductory Statement

The Federal Communications Commission enforces the statutory prohibition on broadcast indecency, 18 U.S.C. § 1464,[1] by means of a multi-factor standard that purports to determine whether challenged speech is "patently offensive, as measured by contemporary community standards for the broadcast medium." *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, ¶ 4 (2001) ("*Policy Statement*"). The Government contends that the FCC's indecency regime raises no constitutional concerns at all because the agency is reasonable and moderate in its regulatory approach.

This case disproves the Government's contention. Just days before a five-year statute of limitations was set to run, the Commission imposed a $1.24 million sanction on several dozen broadcasters for airing a very brief and wholly non-sexual glimpse of an actress's buttocks in the opening minute of an hour-long, critically-lauded, prime-time adult drama that had

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[1] The statute makes it a crime to broadcast "any obscene, indecent, or profane language." 18 U.S.C. § 1464. The FCC is authorized to impose civil forfeitures for violations of the statute. *See* 47 U.S.C. § 503(b)(1). Because Section 1464 is a criminal statute, the rule of lenity requires that it be construed narrowly. *See, e.g.*, *Liparota v. United States*, 471 U.S. 419, 427 (1985); *United States v. Bass*, 404 U.S. 336, 347 (1971).

been on the air for a decade, that was widely recognized for its mature subject matter, that was preceded by audio and visual warnings, and that aired at a time of night when children were unlikely to be in the audience. This unprecedented fine was precipitated by and based on form complaints that lacked any indicia the "complainants" actually watched the allegedly offending material and that were filed months, and, in some cases, years, after the broadcast in issue. The Commission's decision to sanction that brief, non-sexual depiction of adult nudity as "indecent" neither respects broadcasters' significant First Amendment rights nor displays the regulatory restraint and sensitivity to context demanded by *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

The body of FCC decisions applying the agency's indecency standard to a wide range of broadcasts in the years between *Pacifica* and *NYPD Blue* confirms that the FCC's current regulatory approach is quite the opposite of reasonable and restrained. In fact, before the 2003 *NYPD Blue* episode aired, the Commission had *never* applied its indecency standard to find wholly non-sexual nudity indecent, and, just in 2000, it declared that "nudity itself is not *per se* indecent." *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd 1838, ¶ 11 (2000). The Commission nevertheless cites its "contextual" standard as sufficient to put broadcasters on notice that brief, wholly non-sexual nudity might be found indecent and punished by millions of dollars in fines, even in 2003. If that is the "standard" the Commission applies, it plainly lacks the clarity and predictability compelled by the Due Process Clause, particularly where constitutionally-protected speech hangs in the balance.

The Commission's indecency regime is neither sufficiently deferential to the critical First Amendment rights at stake nor adequately sensitive to context. It is also neither suitably understandable nor predictable for broadcast licensees. A talismanic incantation of "context" does not justify subjectivity and uncertainty, nor does it excuse infringement on the full constitutional protection afforded even indecent speech. Under both the First Amendment and the Fifth Amendment, the Commission's broadcast indecency standard and its application in this case are unconstitutional.

Statement of the Case

1. *NYPD Blue* aired for 12 seasons on the ABC Television Network at 10:00 p.m. Eastern/Pacific Time, 9:00 p.m. Central/Mountain Time, from September 1993 through March 2005. Distinctive from the outset,[2] *NYPD Blue* was one of the most lauded and popular shows in television history: Among other accolades, the gritty police drama garnered 84 Emmy nominations and 20 Emmy awards, including Outstanding Drama Series and Outstanding Writing for a Drama Series,[3] two Peabody Awards, three Humanitas Awards for Best Writing, a National Board

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[2] The pilot episode ended with a dimly-lit lovemaking scene containing partial male and female nudity. *See* NYPD Blue, Wikipedia, *available at* http://en.wikipedia.org/wiki/Nypd_blue; NYPD Blue, Museum of Broadcast Communications, *available at* http://www.museum.tv/archives/etv/N/htmlN/nypdblue/nypdblue.htm.

[3] *See* Advanced Primetime Awards Search, Academy of Television Arts & Sciences, *available at* http://www.emmys.tv/awards/awardsearch.php.

of Review award for Best Television Series, awards from Viewers for Quality Television for Best Drama and acting, and many Golden Globe awards. During its long run, more than 12,500,000 viewers, on average, watched *NYPD Blue* each week.[4] Despite its realistic portrayal of adult situations, occasionally including partial nudity, the show was never found to have crossed the legal line during its long television broadcast run.

The indecency determination that precipitated this litigation arose from a brief opening scene in an episode of *NYPD Blue* that aired on February 25, 2003, during the show's tenth season. The scene in question was part of a broader story arc, developing over many months, involving the relationship between lead character Andy Sipowicz and fellow detective Connie McDowell. Sipowicz, a widower, is struggling to raise his eight-year-old son Theo at the same time that his relationship with McDowell is becoming serious. Eventually, Sipowicz and McDowell move in together, which leads to the scene in question.

In the 57-second scene, McDowell has entered the bathroom and is preparing to shower when Theo, just getting out of bed and unaware that she is in the bathroom, opens the door and sees McDowell. Both are surprised and embarrassed. McDowell covers herself with her hands and arms, Theo exits and says "sorry"; McDowell, still covering herself, says through the now-closed door, "It's okay, no problem." No sexual or excretory activities or organs are depicted or described during the scene, and McDowell's nude buttocks are

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[4] *See* NYPD Blue, Wikipedia, *available at* http://en.wikipedia.org/wiki/Nypd_blue.

displayed for fewer than seven seconds (that is, less than 0.25% of the entire hour-long episode).

The challenged scene, placed in context, is integral to the episode's storytelling of the awkwardness and discomfiture accompanying the introduction of a new romantic partner into the life of a single parent and his only child, specifically, and the multifaceted aspects of humanity through interrelationships, more generally. Drama requires conflict and resolution, and the *NYPD Blue* storytellers exercised editorial discretion in choosing to illustrate those broad lessons in a realistic and powerful way in the brief scene involving McDowell and Theo.

2. Mindful of the episode's content, the ABC Network voluntarily applied a rating of TV-14-DLV to the challenged episode. The TV-14 rating means

> Parents Strongly Cautioned—This program contains some material that many parents would find unsuitable for children under 14 years of age. Parents are strongly urged to exercise greater care in monitoring this program and are cautioned against letting children under the age of 14 watch unattended.[5]

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[5] The TV Parental Guidelines, *available at* http://www.tvguidelines.org. The purpose of these voluntary program ratings is two-fold. *First*, program ratings alert parents to the type of material that a program contains so that they can make independent, contemporaneous judgments about whether that type of material is appropriate for their children. *Second*, program ratings enable parents with a V-chip-equipped television set to block the types of programs that they have determined in advance to be unsuitable for their unsupervised children.

The "D" designation means "intensely suggestive language." The "L" designation means "strong coarse language." The "V" designation means "intense violence." In addition, the episode was preceded by a visual and audio warning that stated,

> THIS POLICE DRAMA CONTAINS ADULT LANGUAGE AND PARTIAL NUDITY. VIEWER DISCRETION IS ADVISED.

The challenged episode aired at 10:00 p.m. in the Eastern and Pacific time zones and 9:00 p.m. in the Central and Mountain time zones—in the last hour of prime time but, in the Central and Mountain time zones, outside the FCC's regulatory "safe harbor" for broadcast indecency. *See* 47 C.F.R. § 73.3999(b).

3. On January 25, 2008, four years and 11 months after the episode was broadcast[6] and several years after *NYPD Blue* had ended its long television run, the Commission issued a Notice of Apparent Liability for Forfeiture[7] declaring for the first time its intent to challenge the episode as indecent. The *Notice* invoked the FCC's two-pronged definition of "broadcast indecency" as

> material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as

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[6] A five-year statute of limitations was about to run. *See* 28 U.S.C. § 2462.

[7] *Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue"*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 1596 (2008) ("*Notice*") (Pet. App. 215a-262a).

> measured by contemporary community standards for the broadcast medium.

Notice, ¶ 4, Pet. App. 218a. With respect to the second component of the indecency standard, the Commission identified in its *Policy Statement* three "principal factors" that inform the analysis of patent offensiveness:

> (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.

Policy Statement, ¶ 10 (emphases omitted). "[F]ull context," the FCC says, is "'critically important'" to the determination of patent offensiveness. *Notice*, ¶ 5, Pet. App. 220a (quoting *Policy Statement*, ¶ 9 (emphasis omitted)).

On February 11, 2008, just over two weeks after the *Notice* issued, and in accordance with the foreshortened timeline the Commission imposed, the broadcasters filed oppositions to the *Notice*.[8]

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[8] In a departure from the Commission's standard practice, the *Notice*, issued late on a Friday, required responses in just 17 days, including three intervening weekends. The Commission's own rules, however, afford respondents "a reasonable period of time (usually 30 days from the date of notice)" to contest an indecency notice. 47 C.F.R. § 1.80(f)(3). The Commission denied the broadcasters' repeated requests for extensions of time to respond

4. The Commission claims to adhere to a policy of predicating indecency enforcement action only upon complaints from *bona fide* in-market or over-the-air viewers of the complained-of material.[9] The *Notice*, however, did not attach any of the "numerous" letters of complaint the FCC claimed to have received about the *NYPD Blue* episode. *Notice*, ¶ 8, Pet. App. 222a. Because the cited stations could not determine whether the proposed forfeiture was in fact premised on *bona fide* viewer complaints without examining those letters, various ABC affiliates requested copies of the complaints, both orally and in writing and, ultimately, by means of formal FOIA requests on a station-by-station basis. When the Commission grudgingly began producing copies of the letters just days before a response to the *Notice* was due,[10] it quickly became clear that the "thousands" of complaints the FCC had referenced were, in fact, roughly 100 form email complaints generated by an orchestrated campaign of the advocacy group American Family Association.[11]

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to the *Notice*. In fact, prior to the *Notice*, the Commission had never required a response to a Notice of Apparent Liability for Forfeiture for indecency in fewer than 30 days.

[9] *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Order, 21 FCC Rcd 13299, ¶ 75 (2006) ("*Omnibus Remand Order*"), Pet. App. 102a-103a.

[10] As of the deadline for responses to the *Notice*, the Commission had not produced any complaints against eight of the stations it had already found apparently liable.

[11] Each complaint received by the Commission contained two identical sentences: "On February 25, ABC affiliate stations aired NYPD Blue. In the program, a young boy was exposed to full adult female nudity." *See, e.g.*, JA 298. The "complaints" simply parroted the language provided by the advocacy group.

The form "complaints" plainly were not *bona fide* complaints from actual viewers of the challenged program who had watched the program on the stations that were cited. None of the complaints were proximate in time: The earliest was dated July 8, 2003 (JA 300), nearly 4 1/2 months after the episode aired; the latest was dated April 22, 2005 (JA 372), more than two full years after the broadcast. None of the complaints indicated that the complainant's children had been exposed to the program. None of the form complaints stated that the complainant actually watched the episode in question, let alone on the station cited, and none provided a physical address to match the complaint with a television market and ABC station.[12] Each of the "complaints" objected not to the televised depiction of buttocks but—inaccurately—to the presumed in-studio exposure of the child actor to adult female nudity. *See* JA 298-417.[13] In their oppositions to the *Notice*, the broadcasters pointed out that the form "complaints" provided insufficient grounds for the proposed forfeiture under the Commission's own rules.[14]

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[12] The FCC belatedly attempted to remedy these deficiencies by sending an email to each "complainant" on December 29, 2005—some 34 months after the challenged broadcast—asking each to identify the call letters of the station on which, or the city in which, they watched the challenged episode. Notably, the Commission did not inquire whether any complainant actually *watched* the episode.

[13] In fact, throughout the filming of the scene, the actress's pubic area and parts of her breasts were covered with opaque fabric. *See* Brief for Respondents ABC, Inc. *et al.* at 6 n.4.

[14] As the form viewer "complaints" in this case illustrate, advances in technology have facilitated more than the widespread availability of the V-chip and the transition to digital television.

5. The legally deficient viewer "complaints" were the first but not the only flaw in the Commission's proposed indecency finding. Its lip service to "context" notwithstanding, the FCC failed to give appropriate consideration to the fact that the scene and its wholly non-sexual nudity were part of the episode's larger story arc,[15] and it simply ignored critical contextual factors that its own indecency orders have cited, including the character of the audience and the merit of the challenged program as it relates to the broadcast's patent offensiveness. *See*, *e.g.*, *Infinity Broad. Corp., et al.*, 3 FCC Rcd 930, ¶¶ 16, 17 (1987) (subsequent history omitted). *NYPD Blue* was in its tenth television season when the challenged episode aired. It had received numerous awards for its gritty, realistic portrayal of adult situations, occasionally containing partial nudity, and the show's format and content were well-known to its nationwide television viewing audience. With 212 episodes preceding this one, *NYPD Blue* had established a "brand": Viewers, including parents, knew what to expect and the type of material (including occasional nudity) the show was likely to contain. These facts stand in stark contrast to

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Of particular import here, modern technology facilitates sweeping internet campaigns orchestrated by interest groups to generate mass complaints targeted at disfavored speech—precisely the course of events that prompted the FCC's action against *NYPD Blue*.

[15] Other story lines in the episode also deal with family and relationships: A man learns that his wife, the mother of his two children, is having an affair and plotting to have him murdered. A detective learns of his father's suicide after they quarreled. McDowell and another detective learn to sympathize with the victim of a petty theft after discovering the victim's only child had recently been killed by a drunk driver.

those found problematic in *Pacifica*.

6. Notwithstanding the show's long history, the prominent viewer advisory, the brevity of the scene, the non-sexual nature of the nudity, and the many other relevant measures of "context," the FCC declared the challenged scene indecent. In a final order dated February 19, 2008 (the "*Forfeiture Order*"), the FCC imposed an indecency forfeiture of $27,500 (at that time, the statutory maximum fine) on each of 45 television stations—resulting in a total fine of $1,237,500.[16] ABC timely paid all of the forfeitures imposed by the Commission, and all Respondents in *ABC v. FCC* sought judicial review of the *Forfeiture Order*.

Before the court of appeals, the ABC Television Affiliates Association and 43 stations affiliated with, but not owned by, ABC (collectively, the "ABC Affiliates" or "Affiliates") challenged the *Forfeiture Order*'s indecency determination both on the constitutional grounds now before the Court and also as arbitrary and capricious under the Administrative Procedure Act because the brief nudity at issue did not

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[16] *Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue"*, Forfeiture Order, 23 FCC Rcd 3147 (2008) (Pet. App. 126a-214a) (imposing forfeitures on 43 television stations affiliated with the ABC Television Network as well as two ABC-owned stations). Since the issuance of the *Forfeiture Order*, Congress has increased the maximum fine for broadcast indecency to $325,000 per violation. *See* Pub. L. No. 109-325, 120 Stat. 491 (2006). The enormous fine imposed in this case belies the Government's suggestion that vagueness concerns are "mitigat[ed]" by the Commission's "consistent[]" refusal to "impose penalties in cases in which a broadcaster lacked fair notice that the Commission's indecency policy might apply." Petr. Br. at 20; *see also id.* at 31.

satisfy the FCC's own multi-factor indecency standard. The Affiliates argued that the depiction of buttocks failed to satisfy the first prong of the FCC's generic indecency definition because buttocks are not "sexual or excretory organs," and they contended that the challenged depiction did not satisfy the second prong based on the application of the Commission's three-factor test for "patent offensiveness" because the adult nudity was brief, wholly non-sexual, and integral to the storyline.

The ABC Affiliates further argued that the *Forfeiture Order* was arbitrary and capricious given its reliance on form complaints generated by a political advocacy group and lacking any indicia that a *bona fide* viewer of the program on each of the cited stations actually viewed the broadcast, was offended, and complained. Finally, the Affiliates contended that the *Forfeiture Order* deprived them of due process in light of the remarkable delay between the broadcast and the *Notice*, the FCC's belated and incomplete production of the underlying "viewer complaints," and the truncated schedule the agency imposed upon the Affiliates' response.

7. The United States Court of Appeals for the Second Circuit vacated the *Forfeiture Order*, relying on its prior decision in *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317 (2d Cir. 2010) (Pet. App. 1a-34a). *See ABC, Inc. v. FCC*, 404 Fed. Appx. 530 (2d Cir. 2011) (summary order) (Pet. App. 118a-125a). Applying this Court's long-settled vagueness jurisprudence, the *Fox* panel had held, in July 2010, that "the FCC's policy violates the First Amendment because it is unconstitutionally vague, creating a

chilling effect that goes far beyond" its treatment of fleeting materials. *Fox*, Pet. App. 2a; *see also id*. 23a.

The court of appeals concluded that "*Fox*'s determination that the FCC's indecency policy is unconstitutionally vague binds this panel." *ABC*, Pet. App. 124a. That is so, the court reasoned, because "[a]lthough this case involves scripted nudity, the case turns on an application of the same context-based indecency test that *Fox* found 'impermissibly vague.'" *Id*. (quoting *Fox*).[17]

Summary of Argument

1. It has long been the practice of this Court to decide cases on the narrowest ground available, particularly where constitutional issues are presented. *See, e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995). In this case, the Court need go no further than *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), to determine that the *Forfeiture Order* violates the First Amendment. *Pacifica* narrowly affirmed the application of the Commission's then-existing and far more restrained indecency enforcement policy to an afternoon radio broadcast of comedian George Carlin's expletive-laden "Filthy Words" monologue. As *Pacifica*'s carefully limited holding makes clear, the First Amendment protects even indecent speech against government regulation in circumstances other than those equivalent to the "verbal shock treatment" "repeated over and over" that *Pacifica* addressed.

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[17] Because it found *Fox* controlling, the court of appeals did not reach the other constitutional and procedural issues raised by the Affiliates.

The Government reads *Pacifica* as an open-ended endorsement of the Commission's regulatory regime, but the explicitly narrow decision in *Pacifica* was predicated on a commitment that the Commission would apply its indecency policy with restraint, sensitive to the substantial free speech interests of broadcasters. For years after *Pacifica*, the Commission kept that promise and limited indecency enforcement actions to repetitive "verbal assaults" of the sort proscribed in *Pacifica*, refusing altogether to find fleeting words or non-sexual images actionably indecent. Then the Commission changed its mind. The FCC's current indecency enforcement standard—pursuant to which even a fleeting, unscripted expletive or a brief, wholly non-sexual glimpse of adult nudity can be punished by millions of dollars in fines—bears no resemblance to the "restrained" policy this Court considered in *Pacifica*.

Pacifica's emphatically narrow holding confirms that the Commission cannot sanction the *NYPD Blue* episode as indecent: A brief, wholly non-sexual depiction of adult buttocks in the opening minute of a long-running prime-time adult drama widely recognized for its mature subject matter cannot be equated to a 12-minute, expletive-laced "verbal shock treatment" broadcast in the middle of the afternoon at a time when children were likely to be in the audience. That alone is sufficient reason to find the Commission's order in this case unconstitutional.

2. a. Although *Pacifica* is dispositive, this case highlights a second, and equally fatal, constitutional shortcoming in the Commission's indecency standard: Applying long-settled Fifth Amendment jurisprudence, the court of appeals concluded that the FCC's

indecency enforcement policy fails to give broadcast licensees reasonable notice of what speech is prohibited. The court of appeals acknowledged the holding in *Reno v. ACLU*, 521 U.S. 844, 874-75 (1997), that materially identical language in the Communications Decency Act was unconstitutionally vague, and it correctly concluded that the FCC's "gloss" on that language in the form of its multi-factor, contextual standard for patent offensiveness and decisions applying that standard only worsen the vagueness problem.

b. The Second Circuit's conclusion was predicated on the body of prior FCC decisions applying the indecency standard—decisions that the FCC itself cites as giving broadcasters guidance about where the indecency line will be drawn. Far from providing clarity and certainty, however, the Commission's indecency decisions, and the regulatory standard they purport to embody, offer no discernible guidance about what speech will, and will not, be considered actionably indecent "in context"—particularly with respect to brief, non-sexual televised nudity. Indeed, prior to the 2003 *NYPD Blue* broadcast, the Commission had *never* applied its indecency standard to find non-sexual nudity indecent. The lack of clear notice to broadcast licensees, and the resulting chill on constitutionally-protected speech, are intolerable.

c. Contrary to the Government's suggestion (*see* Petr. Br. at 24-25), *Holder v. Humanitarian Law Project*, 561 U.S. ---, 130 S. Ct. 2705 (2010), does not foreclose consideration of Commission decisions applying its indecency policy to other broadcasts to determine whether that policy is unconstitutionally vague. *Holder* did not rein in the contours of the

Due Process Clause's vagueness jurisprudence, and it does not preclude a facial vagueness challenge by a party (such as the broadcasters here) whose conduct was not clearly proscribed by the challenged rule.

3. The constitutional flaws in the Commission's "flexible" indecency standard are not cured by the existence of the regulatory "safe harbor" for broadcast indecency. *See* 47 C.F.R. § 73.3999(b). The Government points to nothing in this Court's Fifth Amendment jurisprudence that allows vague regulation of constitutionally protected speech so long as alternative channels for disseminating that speech remain. And this Court has long made clear that the First Amendment does not permit the Government to justify a content-based regulation by pointing to alternative avenues for the regulated speech.

Nor is the uncertainty inherent in the Commission's indecency standard acceptable because the Commission believes it would be "difficult" to craft a clear and predictable standard. As a matter of constitutional jurisprudence, the Commission is not permitted to infringe on the free speech rights of broadcasters simply because it finds the task of articulating and applying a more precise standard taxing.

* * *

The Commission's decision to abandon its formerly restrained approach to broadcast indecency regulation in favor of a "flexible" indecency policy that turns on the agency's talismanic invocation of "context" invites wholly subjective, and thus inherently unpredictable, judgments about where the indecency line will be drawn from one case to the next. As a matter of administrative law and procedure, the Commission

may be free to change its mind about where that line ought to be drawn, but the Constitution gives it far less leeway: The First Amendment affords broad protection even to indecent speech and thus firmly limits the reach of the FCC's regulatory authority, and the Fifth Amendment does not tolerate even the risk of content discrimination, or the resulting chill on constitutionally-protected expression, inherent in arbitrary and unpredictable regulation of speech by government decision-makers.[18] Measured against the settled requirements of both the First and the Fifth Amendments, the Commission's indecency policy cannot stand.

Argument

Whether measured against the First Amendment or the Fifth Amendment, the Commission's indecency enforcement regime and its application to the challenged episode of *NYPD Blue* are unconstitutional.

I. *Pacifica* Both Establishes the Analytical Framework for Evaluating the Constitutionality of the Commission's Indecency Regime and Defines the Limits of Its Regulatory Authority

The Affiliates agree with the Government (Petr. Br. at 20, 21, 36) that *Pacifica* need not be overruled to decide this case. Quite the contrary, the resolution of the First Amendment issues here follows directly from

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[18] *Cf. City of Lakewood v. Plain Dealer Publg. Co.*, 486 U.S. 750, 763-64 (1988) ("[W]ithout standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.").

a straightforward application of *Pacifica*'s narrow holding, which makes clear that the FCC's application of its indecency policy in *ABC* cannot be sustained.

A. *Pacifica* Makes Clear That the Commission's Authority to Regulate Indecency Is Extremely and Necessarily Limited in Light of the First Amendment and Cannot Extend to the Proscription of Brief, Non-Sexual Nudity

The ABC Affiliates agree with the Government that the FCC's indecency decisions here should be evaluated under the framework established by *Pacifica*.[19] That analytical framework begins with and necessarily acknowledges the full constitutional protection afforded even indecent speech. *See, e.g.*, *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("[E]xpression which is indecent but not obscene is

[19] Although the Government now embraces *Pacifica* as an endorsement of the Commission's indecency regulatory authority, in 1978, the Office of the Solicitor General filed a separate brief in *Pacifica* to express the view that the FCC's regulatory action in that case was an affront to the First Amendment—despite the fact that the Commission did not propose to impose any sanction on the broadcaster in *Pacifica* beyond placing a letter in the station's license file. *See* Br. for the United States, *FCC v. Pacifica Found.*, No. 77-528, 1978 WL 206846, at *24-*39 (Mar. 27, 1978); *Pacifica*, 438 U.S. at 730 (noting that the FCC declined to impose "formal sanctions, but it did state that the order would be 'associated with the station's license file'"). Much has changed: The Government now attempts to defend the Commission's indecency regime—and the $1.24 million fine imposed for the broadcast of less than seven seconds of non-sexual nudity during a prime-time drama targeted at an adult audience—as logical outgrowths of *Pacifica*.

protected by the First Amendment . . . ."); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression."); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 814 (2000); *Reno v. ACLU*, 521 U.S. 844, 874-75 (1997). Full First Amendment protection for all indecent speech is the background rule against which the Commission's attempts to regulate must be evaluated.

The Government now describes *Pacifica* as a broad endorsement of the Commission's indecency regime, but *Pacifica* was a categorically "narrow[]" decision, as the First Amendment required it to be. *See Sable Communications*, 492 U.S. at 127 (describing *Pacifica*'s holding as "emphatically narrow"); *Reno*, 521 U.S. at 870 (quoting *Sable*). The question before the Court in *Pacifica* was whether the FCC "has *any* power to regulate a radio broadcast that is indecent but not obscene." 438 U.S. at 729 (emphasis added).[20] In narrowly approving the FCC's authority only to the extent it had been invoked to sanction the daytime radio broadcast of comedian George Carlin's expletive-filled "Filthy Words" monologue, *Pacifica* effectively established the constitutional limits of the FCC's authority to regulate broadcast indecency: The Court allowed regulation of repeated expletives that were tantamount to a public nuisance. *Id.* at 750 ("The

[20] *See also Pacifica*, 438 U.S. at 735 ("the focus of our review must be on the Commission's determination that the Carlin monologue was indecent as broadcast"); *id.* at 742 ("our review is limited to the question whether the Commission has the authority to proscribe *this particular broadcast*" (emphasis added)).

Commission's decision rested entirely on a nuisance rationale under which context is all-important."). Importantly, in a portion of the fractured opinion that commanded a majority of the Court, *Pacifica* was careful to note that the Court did not intend to sanction the regulation of an isolated expletive or a brief image: The Court expressly did not "decide[] that an occasional expletive in [an Elizabethan comedy] would justify any sanction . . . ." *Id.* at 750.[21]

Any doubt about the narrow scope of the regulatory authority endorsed by *Pacifica* is eliminated by the concurrence of Justices Powell and Blackmun, without which there would have been no majority. Writing separately to underscore that *Pacifica* should not be read to confer upon the FCC "an 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," Justices Powell and Blackmun approved of FCC regulatory authority of only the narrowest scope:

> The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the *isolated* use of a potentially offensive word in the course of a radio broadcast, as distinguished from the *verbal shock treatment* administered by respondent here.

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[21] It bears mentioning that *Roots*, the most highly rated miniseries in television history, had aired on ABC stations around the country in January 1977 and thus was in the national consciousness when the Court issued its *Pacifica* decision. *Roots*, of course, included multiple depictions of non-sexual nudity, including images of topless female African villagers in its opening episode.

Id. at 759-60, 760-61 (Powell, J., concurring in part and concurring in the judgment) (emphases added).

Further underscoring the narrowness of the Court's holding, Justice Brennan dissented, admonishing the Commission that it should not cite *Pacifica* as authority "for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening and containing *the relentless repetition, for longer than a brief interval*," of language that meets the agency's definition of indecency, "[f]or surely broadcasters are not now on notice that the Commission desires to regulate any offensive broadcast other than the type of 'verbal shock treatment' condemned here." *Id*. at 772 n.7 (Brennan, J., dissenting) (emphasis added); *see also id*. at 771 (noting that the plurality and concurring opinions "do no more than permit the Commission to censor the afternoon broadcast of the 'sort of verbal shock treatment' . . . involved here" but otherwise seek to "insure that the FCC's regulation of *protected speech* does not exceed these bounds" (emphasis added)).[22]

Justice Powell's opinion makes clear where *Pacifica* drew the line between permissible regulation of speech and unlawful censorship: *Pacifica* permitted FCC

[22] Because obscenity is one of the few categories of speech historically recognized as falling outside the protections of the First Amendment, *see, e.g.*, *Miller v. California*, 413 U.S. 15, 23 (1973), a regulatory sanction for the broadcast of obscenity would raise no First Amendment concerns. Four dissenting Justices in *Pacifica* would have invalidated the Commission's regulation of the Carlin monologue on the ground that "indecent" in Section 1464 should be interpreted to mean "obscene"—and because the Carlin monologue did not satisfy the well-settled definition of obscenity, it could not be regulated at all. *See* 438 U.S. at 778-79 (Stewart, J., dissenting).

regulation of broadcast indecency in only the narrowest of circumstances. That narrow holding leaves *all* indecent speech other than a "verbal shock treatment" (or its visual equivalent)—including fleeting offensive words or isolated glimpses of nudity—fully protected against regulation. Measured against that rule, the FCC's indecency finding with respect to *NYPD Blue* cannot be squared with the First Amendment: It is impossible to equate the afternoon radio broadcast of the 12-minute, expletive-laden Carlin monologue, a "verbal shock treatment" "repeated over and over," *Pacifica*, 438 U.S. at 757 (Powell, J., concurring in part and concurring in the judgment), with the brief and isolated glimpses of an actress's buttocks in the opening minute of an hour-long, critically-acclaimed, prime-time adult drama that was preceded by visual and audio warnings about partial nudity and accompanied by a voluntary self-rating, had been on the air for a decade, and was widely known to feature mature themes and even occasional nudity.[23]

Straightforward application of *Pacifica*'s narrow holding against the backdrop of the full First Amendment protection accorded all indecent speech

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[23] Another important point of distinction exists: *Pacifica* considered the Commission's ability to regulate a radio broadcast that could not have been blocked. The *NYPD Blue* broadcast, by contrast, was accompanied by a V-chip rating that enabled parents to control children's access to the program. On that point alone, upholding the indecency sanction against the *NYPD Blue* episode would be a significant expansion of *Pacifica*'s narrow holding, and one totally unwarranted based upon its stated rationale and the Court's later jurisprudence. *See, e.g.*, *Playboy*, 529 U.S. at 815 ("[T]argeted blocking . . . support[s] parental authority without affecting the First Amendment interests of speakers and willing listeners . . . ."); *Reno*, 521 U.S. at 879.

compels the conclusion that the regulatory sanction imposed for the broadcast of the challenged *NYPD Blue* episode is unconstitutional. The Court need go no further to decide this case. *See, e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995) (noting that the Court first considers "the narrower ground for adjudication of . . . constitutional questions").

B. *Pacifica* Was Predicated on the FCC's Commitment to a Restrained Indecency Enforcement Regime That the Commission Has Now Abandoned

Not only was *Pacifica* an avowedly narrow decision, the Court expected the FCC to treat it as such going forward: It upheld the Commission's indecency determination on the precise facts of that case only because the FCC could be "expected to proceed cautiously, as it has in the past," to avoid "an undue 'chilling' effect on broadcasters' exercise of their rights." *Id.* at 761 n.4 (Powell, J., concurring in part and concurring in the judgment).

And for more than a quarter century after *Pacifica*, the Commission did just that, applying its indecency regime with restraint, remaining sensitive to the substantial First Amendment interests at stake. In particular, for nearly thirty years after *Pacifica*, the FCC itself read the case to draw a firm constitutional line between deliberate, repetitive language of the kind at issue in *Pacifica*, on the one hand, and isolated instances of "indecent" language, on the other.[24] The

[24] In a decision issued immediately after *Pacifica*, the

agency limited its enforcement actions accordingly. During that time, there were few complaints about television broadcasts and even fewer determinations of actionable indecency. In fact, the Commission issued no decisions finding televised non-sexual nudity indecent between 1978 and 2004, but it issued numerous decisions finding televised nudity, including even sexual nudity, *not* to be indecent during that lengthy period. *See* pp. 35-38, *infra*.[25]

Commission declared its "inten[tion] strictly to observe the narrowness of the *Pacifica* holding," which "relied in part on the repetitive occurrence of the 'indecent' words" in the Carlin monologue. *WGBH Educ. Found.*, 69 F.C.C.2d 1250, ¶¶ 2, 5-7, 10 (1978) (dismissing complaints about, *inter alia*, scenes of adult nudity in *Monty Python's Flying Circus* in the absence of the sort of repetition essential to the decision in *Pacifica*). In fact, for several years after *Pacifica*, the Commission adhered to the position that only the exact words used in the Carlin monologue would be found actionably indecent. *See Pacifica Found., Inc.*, 2 FCC Rcd 2698, ¶ 12 (1987). In 1987, the Commission declared its intent to return to the generic indecency standard it had applied in *Pacifica*, fearing that an enforcement policy limited to specific words was unduly narrow and easily circumvented. *See id*. ¶¶ 12-13. Even so, it continued to act with restraint, maintaining that a single, isolated expletive would not trigger indecency review. *See, e.g.*, *Regents of the Univ. of Cal.*, 2 FCC Rcd 2703, ¶ 3 (1987) ("Speech that is indecent must involve more than an isolated use of an offensive word."); *Pacifica Found.*, 2 FCC Rcd 2698, ¶ 13 ("[D]eliberate and repetitive use [of expletives] in a patently offensive manner is a requisite to a finding of indecency."); *Infinity Broad. Corp. of Pa.*, 2 FCC Rcd 2705, ¶ 6 (1987) (acknowledging that "the First Amendment dictate[s] a careful and restrained approach" to indecency regulation).

[25] In 2004, the Commission departed from this precedent and proposed a forfeiture based on a determination that the brief depiction of a penis for 23/100 of one second during a morning news show was actionable. *See Young Broadcasting of San*

Even as recently as its 2001 *Policy Statement*, which for the first time distilled from prior decisions the three factors that the Commission claims to weigh in order to determine "patent offensiveness," the Commission reiterated its restrained approach to the regulation of broadcast indecency. *See Policy Statement*, ¶¶ 3-5, 9. In keeping with its commitment to regulatory restraint, the *Policy Statement* maintained that "fleeting and isolated" expletives would not satisfy the patently offensive test. *Id.* ¶ 18.

Just three years later, however, the Commission changed course dramatically, declaring for the first time that even a single, non-literal "fleeting" expletive could be found actionably indecent. *See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 19 FCC Rcd 4975, ¶¶ 8-12 (2004) ("*Golden Globes Order*") (finding indecent singer Bono's exclamation upon winning a 2003 Golden Globe Award that "this is really, really, fucking brilliant"). Since that time, as the *Fox* and

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Francisco, Inc., 19 FCC Rcd 1751 (2004). As the ABC Affiliates have noted throughout this litigation, the Commission cannot rely on *Young Broadcasting* to establish that the brief, non-sexual depiction of adult nudity can be actionably indecent. The licensee in that case refused to pay the proposed forfeiture and opposed the Notice of Apparent Liability. The FCC refused to address the merits of the licensee's opposition for several years, and the expiration of the governing statute of limitations, 28 U.S.C. § 2462, prohibits the Commission from now taking enforcement action against the broadcaster. Accordingly, *Young Broadcasting* should be given no weight whatsoever. In any event, the *Young Broadcasting* decision was issued *after* the challenged *NYPD Blue* episode aired in 2003 and thus could not have provided notice to broadcasters that brief, non-sexual nudity might be found indecent under the Commission's "contextual" standard.

ABC decisions make clear, the indecency regime has come entirely unmoored from the FCC's longstanding pledge to proceed with caution and exercise restraint given "'the high value our Constitution places on freedom and choice in what the people say and hear'" (*Fox*, Pet. App. 27a (quoting *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*," Memorandum Opinion and Order, 20 FCC Rcd 4507, ¶ 11 (2005) ("*Saving Private Ryan*"))—the restraint that this Court expressly cited in permitting the regulation challenged in *Pacifica*. The FCC's broadcast indecency policy can no longer fairly be described as "restrained," as the First Amendment requires it to be.[26]

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[26] Because a careful reading and thoughtful application of the analytical framework established in *Pacifica* resolves the parties' challenges to the FCC's indecency regime, it is unnecessary for the Court to reconsider the "special treatment" given the regulation of broadcast indecency, *see Pacifica*, 438 U.S. at 748-50, or the congressionally-mandated public trustee regulatory framework for broadcast media approved in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). It is a long-settled jurisprudential rule that the "Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Kremens v. Bartley*, 431 U.S. 119, 136 (1977) (internal quotation marks and citation omitted); *see also Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (same); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985) (same; applying rule in First Amendment context). *Cf. Plaut*, 514 U.S. at 217; *see also PDK Labs., Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) ("[I]f it is not necessary to decide more, it is necessary not to decide more . . . .").

II. The FCC's Indecency Enforcement Regime Is Unconstitutionally Vague

The Commission's recent decision to trade certainty for "flexibility" (*see* Petr. Br. at 6-7, 35) has served only to create new and additional constitutional problems for the agency's indecency policy: The current multi-factor "contextual" indecency standard both fails to reflect the restraint compelled by the First Amendment and fails to provide the certainty and predictability compelled by the Due Process Clause, particularly where constitutionally-protected speech hangs in the balance.

It is well settled that our Constitution protects speakers against "arbitrary and discriminatory enforcement of vague standards" implemented by governmental decision-makers. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998). The Government correctly recites the applicable rule: A law avoids invalidation for unconstitutional vagueness only if it "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also United States v. Williams*, 553 U.S. 285, 304 (2008); Petr. Br. at 26. That notice to regulated entities is particularly important with respect to content-based restrictions on speech: "The vagueness of . . . a [content-based] regulation raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno*, 521 U.S. at 871-72; *see also NAACP v. Button*, 371 U.S. 415, 432-33 (1963) ("[S]tandards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow

specificity."). And "[t]hese principles apply to laws that regulate expression for the purpose of protecting children." *Brown v. Entertainment Merchants Ass'n*, 564 U.S ---, 131 S. Ct. 2729, 2743 (2011) (Alito, J., concurring) (citing *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 689 (1968)).

Applying these settled rules, the court of appeals correctly rejected the FCC's "new" indecency regime as unconstitutionally vague, concluding that "the absence of reliable guidance" in the FCC's indecency decisions "chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature." *Fox*, Pet. App. 34a. The Commission's erratic and unpredictable enforcement of its indecency standard in the years since *Pacifica*—and particularly since 2004—leaves broadcasters to guess at what speech the Commission might deem contextually "indecent," and that uncertainty has had a demonstrably strong chilling effect on broadcasters' constitutionally protected expression. *See Fox*, Pet. App. 27a, 31a-34a.[27]

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[27] The Government's defense of the indecency standard amounts to a contention that, even if there is lack of clarity "at the margins," the standard is sufficiently clear to give *most* broadcasters sufficient notice of where the line is drawn *most* of the time. *See, e.g.*, Petr. Br. at 35-36 (contending that "many if not most of the broadcasts that are close to the indecency line are . . . far removed from typical broadcast fare"). Broadcasters disagree with the predicate of the Government's argument, as the record makes clear that speech at the core, rather than just the periphery, of the First Amendment has been chilled. *See Fox*, Pet. App. 31a-34a (reciting record evidence that the vague indecency standard has resulted in broadcasters' refusals to air, among other things, news and public affairs programming and a Peabody Award-winning documentary about the events of September 11, 2001). In any event, it is the government, not the

Because the Commission's indecency regime fails to provide broadcasters with "fair notice of what is prohibited," the Fifth Amendment requires that it be set aside. *Williams*, 553 U.S. at 304.

A. *Reno* Establishes the Vagueness of the FCC's Generic Definition of Indecency

The Government places great weight on the fact that the Commission's basic definition of indecency has remained unchanged since the indecency determination this Court upheld in *Pacifica*.[28] The Government also makes much of the decision of the court of appeals in *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*ACT I*), that the FCC's generic indecency definition is not unconstitutionally vague.[29] Of course, both decisions

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speaker, that should steer clear of regulation where protected speech could be impacted.

[28] *See* Petr. Br. at 4, 33 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, ---, 129 S. Ct. 1800, 1806 (2009) (noting that the "definition of indecent speech" at issue in *Pacifica* is the same one the FCC "uses to this day")).

[29] *See* Petr. Br. at 7-8, 33, 40 (citing *ACT I*, 852 F.2d at 1334, 1338-39). In fact, *ACT I* did not purport to reach a considered conclusion that the FCC's indecency definition is not unconstitutionally vague. The court instead "infer[red] from [*Pacifica*] that the Court did not regard the term 'indecent' as so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." 852 F.2d at 1338-39 (internal quotation marks and citation omitted). But *Pacifica* said nothing about vagueness, because the broadcaster in that case had not raised a vagueness challenge. *See, e.g.*, 438 U.S. at 742. The later *ACT* cases simply followed *ACT I*'s vagueness "holding." *See Action for Children's Television v. FCC*, 932 F.2d

predated *Reno*, in which this Court held a definition of "patent offensiveness" materially identical to the FCC's basic definition of indecency to be impermissibly vague.

At issue in *Reno* was a provision of the Communications Decency Act that prohibited the online transmission to minors of material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[30] The Court found the statutory prohibition to contain so "many ambiguities" as to render it "problematic for purposes of the First Amendment" because the inherent vagueness of the prohibition had an "obvious chilling effect on free speech." 521 U.S. at 870 (first two quotations), 872 (third quotation). The CDA's definition of prohibited material is indistinguishable from the Commission's generic definition of indecency[31]; *Reno*, then, dictates that the Commission's basic definition of indecency is likewise unconstitutionally vague. As the court of appeals recognized, "language that is unconstitutionally vague in one context cannot suddenly become the model of clarity in another." *Fox*, Pet. App. 21a.

Even setting *Reno* aside, the Commission's generic definition of indecency is unconstitutionally vague as

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1504, 1508 (D.C. Cir. 1991) (*ACT II*); *Action for Children's Television v. FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995) (*ACT III*).

[30] The proscriptions are codified at 47 U.S.C. § 223.

[31] That standard, as noted above, "defines indecent speech as material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium." *Omnibus Remand Order*, ¶ 15, Pet. App. 45a.

applied to the *NYPD Blue* broadcast. According to the Commission, in order to be deemed indecent, material "*must* fall within the subject matter scope of our indecency definition—that is, the material *must* describe or depict sexual or excretory organs or activities." *Policy Statement*, ¶ 7 (emphases added). Buttocks do not fall within the "subject matter scope" of the Commission's indecency scheme because they are neither sexual nor excretory organs—indeed, they are not organs at all. Instead, buttocks are part of the muscular system, defined as "[e]ither of the two rounded prominences on the human torso that are posterior to the hips and formed by the gluteal muscles and underlying structures." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 262 (3d ed. 1996). They have no sexual or excretory function whatsoever.[32]

In this case, the Commission admits that buttocks are "not physiologically necessary to procreation or excretion" but objects to the application of "narrow physiological" definitions. *Forfeiture Order*, ¶¶ 8, 10, Pet. App. 133a, 137a. Instead, the Commission claims "broad discretion" to interpret Section 1464's ban on indecency so as to proscribe the depiction of body parts "that are closely associated with sexuality or excretion" and whose "public exposure is considered socially inappropriate and shocking." *Forfeiture Order*, ¶ 9, Pet. App. 134a-135a. But that interpretation is *two*

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[32] *Compare* W.D. Gardner & W.A. Osburn, ANATOMY OF THE HUMAN BODY 223-25 (3d ed. 1978) (describing buttocks as part of the muscular system) *with* R.T. Francouer, COMPLETE DICTIONARY OF SEXOLOGY 588 (2d ed. 1995) (defining sexual organs biologically) *and* Gordon Alexander, GENERAL BIOLOGY 203-04 (2d ed. 1962) (describing excretory system in humans).

steps removed from the statute and reaches substantially further than the clear language of the Commission's own indecency definition. Having defined indecency at the threshold in terms with established and understandable (biological) meanings, the Commission cannot now claim that the words that it itself chose to use mean something else altogether. If that is the Commission's argument, it is clear that no reasonable broadcaster, and certainly not the ABC stations subject to the million-dollar fine in this case, could have had "fair warning" of what was prohibited. *Williams*, 553 U.S. at 304.

B. Consideration of Context Does Not Justify the Inconsistent and Unpredictable Decisionmaking Reflected in the Commission's Application of Its Multi-Factor Test for Patent Offensiveness

The Government contends that *Reno* does not control because the Commission provides broadcasters with additional guidance beyond the generic indecency definition in the form of its multi-factor standard for "patent offensiveness" and a series of agency decisions applying that standard over the last decade.[33] Neither the "standard" nor Commission precedent cures the

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[33] *See, e.g.*, *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664, ¶ 2 (2006) ("*Omnibus Order*") ("The cases we resolve today represent a broad range of factual patterns. Taken both individually and as a whole, we believe that they will provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard.").

vagueness problem; both, in fact, make matters worse. The Commission's patent offensiveness "factors" do not purport to define indecency, they are inherently subjective and imprecise, and they offer no indication as to how the Commission will weigh them (or other, unspecified factors) in any case. Moreover, the Commission has applied its "contextual" definition of indecency so inconsistently and contradictorily that broadcasters simply cannot know with any reasonable degree of certainty where the Commission will draw the indecency line from one case to the next.

1. *Pacifica* Does Not Allow Regulation of Protected Speech Upon the Talismanic Invocation of "Context"

Contrary to the Government's suggestion (*see, e.g.*, Petr. Br. at 19, 35), the Commission's new, more "flexible" indecency standard, augmented by its multi-factor test for patent offensiveness, is not redeemed by the mere invocation of context. It is true that *Pacifica* cited context as a critical component of the Commission's indecency regime, but it did so because only by considering the "context" of the challenged broadcast (a 12-minute, expletive-laced "verbal assault" on radio listeners in the middle of the afternoon, when children were likely to be in the audience) could the agency (and this Court) determine that the FCC's indecency finding respected the First Amendment interests at stake. *See* 438 U.S. at 750. But *Pacifica*'s decidedly narrow holding did not give the Commission *carte blanche* to regulate constitutionally-protected speech so long as the agency simply recites consideration of "context." *Cf. United States v. Robel*, 389 U.S. 258, 263-64 (1967) (observing

that the "talismanic incantation" of Congress's "war power" cannot "remove constitutional limitations safeguarding essential liberties" (quotation omitted)).

As the court of appeals noted (*Fox*, Pet. App. 30a), the agency's "flexible" and *contextual* determinations of indecency must nevertheless identify and apply consistent, predictable, and objective criteria that give broadcasters fair notice of where the Commission will draw the indecency line. A "contextual" standard unaccompanied by such objective criteria creates an unacceptable risk of subjective, content-based decision-making. "Specificity, on the other hand, guards against subjectivity and discriminatory enforcement." *Fox*, Pet. App. 19a; *see also, e.g.*, *NAACP v. Button*, 371 U.S. at 438 ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.").

2. The Commission's Multi-Factor Test for Patent Offensiveness and the "Contextual" Indecency Decisions Applying It Failed to Give Notice That the Brief, Non-Sexual Nudity in *NYPD Blue* Would Be Considered Indecent

1. The Government contends that the court of appeals ignored what the Government describes as "the dispositive question" in this case: "whether Fox and ABC had fair notice that the expletives and nudity in the broadcasts under review could violate the Commission's indecency standards." Petr. Br. at 17, 25. But that is precisely the question the court of

appeals addressed (*see Fox*, Pet. App. 22a-23a), and it answered that question in the negative based on its determination that the FCC's own decisions applying its "contextual" indecency policy—the very same decisions that the Commission itself touts as providing regulatory guidance to broadcasters—have produced "a standard that even the FCC cannot articulate or apply consistently." *Fox*, Pet. App. 27a. The Commission's body of indecency decisions—and the application of its indecency standard in this case—reveal an indecency policy that is inconsistent, irreconcilable, and incapable of being distilled into any discernible rules or standards that could provide broadcasters with the notice and predictability the Constitution requires.

Most significantly in this case, prior to the *NYPD Blue Notice*, broadcasters had no reason to believe that the broadcast of brief, non-sexual nudity would be found indecent. The Commission had declared unequivocally in 2000 that "nudity itself is not *per se* indecent." *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd 1838, ¶ 11 (2000) ("*Schindler's List*").[34] And, until the *Notice*, the FCC *had never found non-sexual nudity indecent*. *Compare Schindler's List*, ¶¶ 11, 13 (finding televised nudity, including two extended scenes containing multiple depictions of breasts,

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[34] The Commission has illustrated the point in a number of decisions finding various depictions of partial nudity not sufficiently "graphic or explicit" to trigger the indecency standard. *See, e.g.*, *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, 20 FCC Rcd 1931, ¶¶ 6, 9 (2005) (depiction of animated character's buttocks entering shower not graphic or explicit); *Omnibus Order*, 21 FCC Rcd 2664, ¶ 215 (depiction of penis on *The Today Show* "not explicit or graphic").

buttocks, and full frontal male and female adult nudity, not actionably indecent "in context" because the nudity was "neither pandering nor titillating") *and WGBH Educ. Found.*, 69 F.C.C.2d 1250, ¶¶ 2, 10 (1978) (dismissing complaint challenging scenes of nudity in *Monty Python's Flying Circus* given absence of evidence that the broadcaster had engaged in the type of repeated shock treatment necessary to trigger action under *Pacifica*) *with Forfeiture Order*, ¶ 18, Pet. App. 148a (finding depiction of nude buttocks lasting less than seven seconds actionably indecent).[35]

The Commission attempts to discount broadcasters' confusion in light of the dearth of *published* decisions by the full Commission finding nudity non-actionable.

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[35] Evidence of the Commission's inability to apply its "contextual" standard consistently so as to provide fair warning to broadcast licensees is not confined to rulings on depictions of nudity. Its decisions with respect to expletives are equally perplexing. As one example, the Commission originally deemed a single use of the word "bullshitter" indecent because it occurred in the course of a live interview broadcast during a morning news segment. *Omnibus Order*, 21 FCC Rcd 2664, ¶¶ 137, 141. Upon remand from the Second Circuit (at the Commission's request), the agency reversed course and declared the same use of the term not actionably indecent precisely *because* it aired during a "bona fide news interview." *Omnibus Remand Order*, 21 FCC Rcd 13299, ¶¶ 71-73. To similar effect, compare *Saving Private Ryan*, 20 FCC Rcd 4507, ¶ 14 (finding numerous expletives uttered during television broadcast of the fictional movie *Saving Private Ryan* not indecent because deletion of the expletives "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers") *with Omnibus Order*, 21 FCC Rcd 2664, ¶ 82 (finding expletives used by real musicians during PBS documentary *The Blues: Godfathers and Sons* indecent because the educational purpose of the film "could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives").

In only a single (and distinguishable, it says) published order—*Schindler's List*—has the Commission applied its "contextual" standard to find televised nudity not indecent. *See* Petr. Br. at 31-32. That argument ignores the long line of FCC staff decisions[36] finding televised depictions of adult nudity, including sexualized nudity and depictions of nudity far longer than seven seconds, not actionable "in context." In the years before *NYPD Blue*, the agency found "scenes of a topless woman in bed with her lover, with her breasts very clearly exposed [and] several scenes of a topless woman running on the beach" not indecent.[37] It found a *30-second* depiction of nude male buttocks "*very brief*" and thus not indecent "in context of a full length drama, the primary theme of which was the horrors of

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[36] The Commission has objected to the citation of these unpublished decisions, citing 47 C.F.R. § 0.445(e) ("unpublished opinions and orders of the Commission or its staff 'may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question *or by such persons against the Commission*'" (emphasis added)). Setting aside the fact that the ABC Affiliates clearly have notice of the staff decisions (as they have relied upon them throughout this litigation), this Court has made clear that, especially where constitutional rights are at stake, an agency cannot hide behind the unpublished nature of its actions. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *see also, e.g.*, *Perez-Vargas v. Gonzales*, 478 F.3d 191, 193 n.3 (4th Cir. 2007) ("[C]ourts typically look askance at an agency's unexplained deviation from a prior decision, even when the prior decision is unpublished.").

[37] Letter from Edythe Wise to Suzan Cavin, File No. 91100738 (Aug. 13, 1992) (together with associated complaint) (Br. App. 18a-21a) (complaint about the broadcast of the movie *Devices and Desires*).

war."[38] It found an evening news segment about strip clubs that cut from strip club dancers appearing on the witness stand during a trial to a scene at the strip club itself showing a woman's "completely bare" buttocks and, when she turned around, "complete genital nudity" for approximately 5-7 seconds not indecent.[39] Its decisions in the years following the *NYPD Blue* broadcast were consistent: It found the broadcast of a woman shown nude from the rear straddling her lover in a sex scene "not sufficiently graphic" to be found indecent.[40] It similarly found a "musical number during which the title character's naked torso and genital area are blocked by objects, furniture, and in one instance, by his hands" not "sufficiently graphic or explicit, or sustained, to rise to the level of being patently offensive."[41] These decisions—many of which

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[38] Letter from Norman Goldstein to David Molina, File No. 97110028 (May 26, 1999) (emphasis added) (Br. App. 1a-2a) (complaint about the broadcast of the movie *Catch-22*).

[39] Letter from Edythe Wise to Deborah Engleman, File No. 91060832 (Apr. 14, 1992) (together with associated complaint) (Br. App. 22a-26a). *See also, e.g.*, Letter from Edythe Wise to Donald E. Wildmon, File No. C11-144 (Feb. 23, 1990) (together with associated complaint) (Br. App. 27a-30a) (dismissing complaint against the program *The People Next Door* despite allegation that the program contained a scene with a woman "shown nude from the waist up").

[40] Letter from William D. Freedman, File No. EB-03-IH-0644 (Apr. 21, 2004) (together with associated complaint) (Br. App. 3a-7a) (complaint about the broadcast of the movie *Hollywood Wives: The Next Generation*).

[41] *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, 20 FCC Rcd 1920, ¶¶ 6, 9 (2005) (broadcast of the film *Austin Powers: The Spy Who Shagged Me*).

were issued years *before* the challenged *NYPD Blue* broadcast, *compare* Petr. Br. at 25—are fully consistent with *Pacifica*.

2. Against the backdrop of *Pacifica* and the Commission's application of its indecency standard to televised nudity in the years that followed, the claim that broadcasters had sufficient notice that the FCC would find the challenged episode of *NYPD Blue* actionably indecent is untenable. Fully aware of the FCC's application of the indecency standard to televised nudity since 1978, broadcasters reasonably concluded that the brief, non-sexual depiction of adult buttocks in the opening minute of an hour-long drama broadcast during prime time in the show's tenth season and preceded by subject-matter warnings would not be deemed indecent.[42] No reasonable licensee in 2003 would have concluded otherwise.[43]

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[42] The ABC stations in particular had ample reason to believe that the broadcast of brief, non-sexual nudity would not be deemed indecent. After all, *Roots* aired on ABC stations in 1977, and the FCC never suggested that its multiple depictions of non-sexual nudity triggered indecency concerns. More than a quarter of a century later, ABC stations had no reason to suspect that the brief, non-sexual nudity in *NYPD Blue* would be problematic. That is particularly true because the series had been on the air for ten years in 2003, and numerous earlier episodes had included brief adult nudity. *See, e.g.*, Frequently Asked Questions About NYPD Blue, *available at* http://www.stwing.upenn.edu/~sepinwal/faq.html (noting that at least 20 characters appeared nude or partially nude during the series' 12-year run). Before 2008, the FCC had never suggested that any of those brief depictions would trigger indecency enforcement, and for the reasons discussed above, its body of indecency decisions supported the broadcasters' reasonable conclusion that brief, non-sexual nudity would not be found indecent.

[43] The Commission at once both chastises broadcasters for

Although the Commission touts its sensitivity to "context," the Commission displayed none in its consideration of the episode at issue. Most importantly, the *Forfeiture Order* discounted the facts that the nudity in question was exceptionally brief, it was not portrayed in a sexualized manner, and neither character in the scene engages in sexual or excretory activity or exhibits any sexual response.[44] During the scene, McDowell, standing in front of a mirror, removes

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citing staff decisions and insists that broadcast licensees "are highly sophisticated entities that operate in a heavily regulated market" and "can reasonably be expected both to pay particular attention to the agency's explication of its indecency standard and to be familiar with 'contemporary community standards for the broadcast medium.'" Petr. Br. at 19-20 (emphasis and citation omitted); *see also id*. at 34. The ABC Affiliates *have* paid close attention to everything the Commission has said about televised nudity; it is the Commission that appears to be conveniently and deliberately blind to its own staff's prior decisions implementing Commission policy.

[44] The Commission has elsewhere suggested to broadcasters that it will weigh these very same "contextual" factors and find no actionable indecency. In its *Omnibus Order*, for instance, the Commission held that the depiction of two characters (one male, one female) adjusting another character's breasts upwards was not indecent because

> the episode addresses the anxiety associated with a first date and Grace's friends' efforts to lend assistance—a topic that is not shocking, pandering, or titillating. Moreover, the touching of the breasts is not portrayed in a sexualized manner, and does not appear to elicit any sexual response from Grace.

Omnibus Order, 21 FCC Rcd 2664, ¶ 158 ("*Will & Grace*"); *see also id*. ¶ 226 (finding depiction of infant's buttocks not shocking, pandering, or titillating because it was "not sexualized in any manner whatsoever").

her robe as she prepares to shower, and McDowell's full buttocks are visible for approximately 2 2/3 seconds. McDowell then walks toward the shower and is seen in profile with her buttocks visible from one side for approximately 1.9 seconds. The scene shifts to Theo getting out of bed and walking to the bathroom; the camera then cuts back to McDowell preparing to step into the shower. McDowell's full buttocks are visible again for approximately 2 1/4 seconds. Thereafter, Theo and McDowell are both surprised and embarrassed, and McDowell's nudity is subsequently covered in the remainder of the scene.[45] In sum, McDowell's full buttocks are visible for less than 5 seconds, and her buttocks are visible from the side for less than 2 seconds, which, together, constitute approximately 12% of the entire 57-second scene and less than 0.25% of the entire hour-long episode. The Commission discounted the *de minimis* length of the scene relative to the full episode (no other part of which was found to be indecent).[46] In opposition to the *Notice*, the ABC Affiliates emphasized that the

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[45] Although the Government before this Court makes repeated mention of partial shots of the actress's breast, *see, e.g.*, Petr. Br. at 15-16, the FCC's indecency determination was predicated entirely on the brief depiction of her *buttocks*. *See Forfeiture Order*, ¶¶ 7, 18, Pet. App. 132a, 148a.

[46] Instead, the Government here again before this Court attempts to spice up its argument by citing the title of the challenged *NYPD Blue* episode, *Nude Awakening*, no fewer than five times (*see* Petr. Br. at 15, 25, 31, 38)—although the title was never broadcast to viewers. The title of the episode, however, cannot alter the fact that the nudity depicted in the opening seconds of the episode was wholly *non*-sexual. And the mere allusion to "nudity" in the episode's title lends no support to the FCC's indecency sanction, because the Commission itself has made clear that nudity is not *per se* indecent. *See* p. 35, *supra*.

exceedingly brief nudity at issue is manifestly not "dwelled on or repeated"—the second of the Commission's "patent offensiveness" factors. The Commission's own decisions suggested to broadcasters that the brevity of the nudity should have weighed against a finding of indecency.

The FCC likewise gave no weight to the theme of the challenged scene or its place in the broader story arc of the hour-long episode. It disregarded the fact that a later scene shows McDowell worrying about the incident with Theo, reading a book about raising children, and expressing her embarrassment to a colleague. She also asks Sipowicz whether Theo was all right when Sipowicz dropped him off at school, and he attempts to reassure her. Subsequent episodes continue the story arc dealing with Theo's adjustment to a new parental figure. The FCC's supposedly "contextual" analysis failed to give appropriate consideration to this brief scene as a part of the larger story arc[47]—another factor the Commission's prior decisions had weighed against an indecency finding. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n.7 (1975) ("Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. . . . [A] motion picture must be considered as a whole, and not as isolated fragments or scenes of nudity."); c*f.* Letter from Norman Goldstein to David Molina, File No. 97110028 (May 26, 1999) (Br. App. 2a) (finding nudity in *Catch-22* not indecent in the context of "a full length drama, the primary theme of which was the horrors of war").

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[47] *See* n. 15, *supra*.

All of these (and other) "contextual" considerations should have compelled the conclusion that the brief nudity in *NYPD Blue* is not indecent within the meaning of the Commission's multi-factor indecency standard. The Commission's prior indecency decisions certainly suggested as much. Despite the Government's insistence that the FCC's "contextual" indecency standard is faithful to *Pacifica* and predictable to broadcast licensees, the *NYPD Blue* indecency order lacks any meaningful *constitutionally-compelled* sensitivity to context and cannot be reconciled with the Commission's application of its indecency standard to televised nudity in the years before 2003.

3. Consideration of Context Does Not Give the Commission License to Make Artistic Judgments

The vagueness of the FCC's indecency standard invites arbitrary and wholly subjective enforcement. As the body of its indecency decisions makes clear, the Commission adjusts and reweighs each of its patent offensiveness factors (or simply recites the factors with no explanation of how and why the Commission weighed them as it did) to reach an outcome in each case consistent with the Commission's subjective views about the artistic merit of a given work.

Although the Commission disclaims any intent to interfere with or oversee the artistic decisions made by broadcasters, its *Forfeiture Order*, like its Brief, reveals the agency's extreme preoccupation in this case with such matters as camera angles, "panning," and scene composition. *See* Petr. Br. at 15-16; *see also id*. at 19,

32 (describing nudity in *NYPD Blue* as "voyeuristic"). The Government seems particularly displeased, for example, that the child actor's face was displayed from behind and between the actress's legs and that in the second full shot of the actress's buttocks, the camera "'pans down . . . then pans up.'" Petr. Br. at 15 (quoting *Notice*, ¶ 10, Pet. App. 224a).[48] The Commission may well have preferred that the scene be framed and filmed differently, but the First Amendment does not permit the Commission to punish speech that it finds distasteful based on the Commissioners' entirely subjective "artistic" preferences. More to the point, whether the "panning," the camera angles, or the scene composition were artistically necessary to the scene are matters for the broadcaster to decide, not for the Government to dictate.[49]

The Commission's preoccupation with the artistic merit of the challenged *NYPD Blue* scene is intolerable but unsurprising. The agency's assertion of authority to make what amount to artistic judgments is, in fact, a centerpiece of its indecency regime. For example, the Commission approved the repeated use of "fuck," "shit," and other expletives in the film *Saving Private Ryan*

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[48] It bears noting that the shot from between the actress's legs that the Government dislikes occurs *after* all three of the extremely brief glimpses of nudity and thus cannot support the FCC's finding that this framing device "heighten[ed] the titillating and shocking nature of the scene." *Forfeiture Order*, ¶ 16, Pet. App. 144a.

[49] *Cf.* 47 U.S.C. § 326 ("Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.").

because (it decided) those expletives were "*integral* to the film[]" and "[*e*]*ssential* to the ability of the filmmaker to convey" his message; omitting them, the Commission said, would "alter[] the nature of the artistic work and diminish[] the power, realism, and immediacy of the film experience for viewers." *Saving Private Ryan*, 20 FCC Rcd 4507, ¶ 14 (emphases added). The Commission determined that far more limited expletives broadcast in a documentary about real jazz musicians, *The Blues*, were actionably indecent because the film's educational purposes "*could have been fulfilled* and all viewpoints expressed without the repeated broadcast of expletives." *Omnibus Order*, 21 FCC Rcd 2664, ¶ 82 (emphasis added). As the court of appeals noted, those evidently irreconcilable decisions almost certainly reflect the Commission's level of (dis)comfort with the subject matter and themes of the broadcasts. *See Fox*, Pet. App. 29a.

Having appointed itself the ultimate producer and director of all televised video as well as the arbiter of newsworthiness, artistic merit, and social acceptability, the Commission's indecency determinations predictably reflect the Commissioners' own subjective views about the merits of particular programming (or, worse still, their personal preferences). *See, e.g.*, Petr. Br. at 28-29 (defending varied indecency determinations concerning allegedly offensive terms such as "shit," "dickhead," and "kiss my ass" as "reasonably assess[ing] the . . . *social acceptability* of [the challenged] words" (emphasis added)). But if "social acceptability" is the Commission's new barometer, its determination that the brief *NYPD Blue* scene was "indecent" is even less

defensible. For decades, for example, the Coppertone girl's buttocks were exposed on billboards across America—and in plain sight of children.

As the North Carolina Supreme Court has observed:

> To hold that buttocks are private parts would make criminals of all North Carolinians who appear in public wearing "thong" or "g-string" bikinis or other such skimpy attire during our torrid summer months. Our beaches, lakes, and resort areas are often teeming with such scantily clad vacationers. We simply do not believe that our legislature sought to discourage a practice so commonly engaged in by so many of our people . . . .

State v. Fly, 501 S.E.2d 656, 659 (N.C. 1998). Not only is there no constitutional basis for the government to gauge, let alone control, "social acceptability," but any attempt to do so is doomed to failure.

The point is well-illustrated by *NYPD Blue* itself. The show was tremendously popular throughout its long run, attracting more than 11,300,000 viewers each

week on average during even its tenth season.[50] Yet the FCC acted here on about 100 (< 0.001% of viewership) form email complaints generated by an advocacy group complaining, inaccurately in fact, about the in-studio exposure of a child to full adult nudity. But the Commission's touchstone of "community standards" has never depended on what the most supersensitive or least tolerant deem socially acceptable. *See, e.g.*, *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd 1838, ¶ 10 (2000) (stating that the Commission's indecency standard turns on "an average broadcast viewer or listener and not the sensibilities of any individual complainant"). And it is well settled that First Amendment-protected speech depends on more "breathing space" than that to survive. *See, e.g.*, *NAACP v. Button*, 371 U.S. at 432-33.

The fact is any Commission yardstick for "acceptability" would measure only the Commissioners' personal preferences. But this Court has long made clear that the Commission "'may not impose upon [broadcasters] its private notions of what the public ought to [see and] hear.'" *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 650 (1994) (quoting *Network Programming Inquiry*, Report and Statement of Policy, 25 Fed. Reg. 7293 (1960)). "[J]udgments [about art and literature] are for the individual to make, not for the Government to decree . . . ." *Playboy*, 529 U.S. at 818.

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[50] *See* NYPD Blue, Wikipedia, *available at* http://en.wikipedia.org/wiki/Nypd_blue.

C. The Second Circuit's Vagueness Analysis Is Not in Conflict with *Holder*

Contrary to the Government's suggestion (Petr. Br. at 24-25), *Holder v. Humanitarian Law Project*, 561 U.S. ---, 130 S. Ct. 2705 (2010), does not draw the Second Circuit's vagueness rulings into question. *Holder* establishes that an as-applied vagueness challenge must be evaluated on the basis of the plaintiff's own speech and acts rather than the purely hypothetical speech or actions of others. In this case, unlike *Holder*, the broadcasters' vagueness challenges *are* predicated on their own speech (which the FCC has punished under its indecency standard), not on the hypothetical speech of others. (*Holder*, it bears noting, was a "preenforcement challenge," 130 S. Ct. at 2722, while the broadcasters' challenge here is a post-enforcement one.)

But nothing in *Holder*'s analysis or holding precludes a party whose conduct is *not* "clearly proscribed" by the challenged rule from bringing a facial vagueness challenge. And the broadcasts at issue in these cases were not "clearly proscribed" by the FCC's indecency standard. *Cf. Holder*, 130 S. Ct. at 2719 (noting that "a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice" and "certainly cannot do so based on the speech of others"). Indeed, the broadcasters' vagueness challenge to the indecency standard is not predicated on an argument that the standard "applies to a substantial amount of protected expression"—

essentially an overbreadth challenge[51]—but instead on the very argument that *Holder* made clear the plaintiffs in that case could have made (but did not): that the FCC itself has been unable to interpret and apply the "standard" in a consistent manner so that "'person[s] of ordinary intelligence'" can have "'fair notice of what is prohibited.'" *Holder*, 130 S. Ct. at 2720 (quoting *Williams*, 553 U.S. at 304). The inconsistency and unpredictability inherent in the FCC's indecency decisions give broadcasters no certain basis for determining at the outset whether their (constitutionally-protected) speech will be found to run afoul of the FCC's ever-shifting "contextual" analysis.

In any event, *Holder* distinguished the statute at issue in that case from statutes (like Section 1464) that proscribe "indecent" speech—statutory language the Court has elsewhere found to be unconstitutionally vague under the "more stringent vagueness test" applicable to regulation of speech. *See Holder*, 130 S. Ct. at 2719, 2720. *Holder* described specific terms such as "indecent" as inviting "'wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.'" *Id.* at 2720 (quoting *Williams*, 553 U.S. at 306). *Holder*'s general observation rings true here. Even the FCC's purported narrowing construction (in the form of its multi-factor standard for patent offensiveness) empowers the

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[51] There may be overbreadth issues with the FCC's indecency enforcement policy as well. For instance, in *ABC* the FCC has sanctioned the brief depiction of buttocks but, anatomically, buttocks have no sexual or excretory function and, therefore, fall outside the narrowing construction the FCC has given to Section 1464's prohibition against the broadcast of "indecent" language. *See* pp. 30-32 & n. 32, *supra*.

agency to make "wholly subjective" and hopelessly inconsistent judgments about the artistic merit of constitutionally-protected speech. *See* pp. 43-47, *supra.*

III. The Constitutional Infirmities in the Commission's Indecency Regime Are Not Cured by the Regulatory Safe Harbor or by the Commission's Claim of Difficulty in Creating a More Precise Standard

It is no answer to suggest, as the Government does repeatedly (Petr. Br. at 20, 23, 36, 40-41, 48), that broadcasters uncertain about whether a particular broadcast will later be deemed "indecent" can simply air it after 10:00 p.m., during the FCC's regulatory "safe harbor." The Government points to nothing in this Court's Fifth Amendment jurisprudence to suggest that vagueness is ameliorated by the existence of alternative channels for disseminating the regulated speech.

The mere existence of the "safe harbor" does not advance the Government's First Amendment argument either. The Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." *Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 541 n. 10 (1980) (citing cases).[52] And this case readily illustrates why content-based "channeling"

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[52] *See also Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981) ("time, place and manner" regulation "'may not be based upon either the content or subject matter of speech'" (quoting *Consolidated Edison Co.*, 447 U.S. at 536)).

is intolerable: The Government's argument would allow the Commission to channel (only) disfavored speech to the times of day when that speech is least likely to reach a broad audience, based on nothing more than the Commission's own tastes and preferences.[53] As the Court has declared even with respect to content-neutral bans on particular avenues of speech, speakers are "not to have the exercise of [their] liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State of N.J. (Town of Irvington)*, 308 U.S. 147, 163 (1939).[54]

It is also no answer to suggest that the regulatory task before the Commission is a difficult one (*see, e.g.*, Petr. Br. at 7, 20, 35) and that complete precision cannot be expected (*id.* at 26-27). That alternative approaches, such as a rigid list of prohibited words and images, would present serious First Amendment problems does not excuse the Commission from formulating, and consistently applying, a standard that provides broadcasters with clarity and predictability. The Constitution demands no less. *Cf. Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781,

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[53] *Cf. City of Lakewood v. Plain Dealer Publg. Co.*, 486 U.S. 750, 763 (1988) ("[A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.").

[54] The Government agreed with that proposition in *Pacifica*: Its brief took the position that "[a] prohibition of otherwise protected speech is not permissible under the First Amendment merely because it is limited to certain places or certain times." Br. for the United States, 1978 WL 206846 at *31 (citing *Erznoznik*, 422 U.S. at 209-12).

795 (1988) ("[T]he First Amendment does not permit the State to sacrifice speech for efficiency." (citing cases)).

In any event, history demonstrates that the Commission's concern about the "difficult task" of crafting an acceptable indecency standard is seriously overstated. For nearly 30 years after *Pacifica*, the FCC applied a restrained broadcast indecency policy, and its enforcement regime was subject to few legal challenges, let alone a finding of unconstitutionality. Only since 2004, when the FCC first departed from its long-restrained policy in favor of a wholly subjective "contextual" approach that leaves broadcasters (and courts) perpetually uncertain about what constitutes "indecent" speech, have the contours of the indecency policy come under sustained legal attack. Contrary to the Government's suggestion, it is clear that the Commission can do better than its current "contextual" standard.

Finally, the suggestion that broadcasters themselves will weed out broadcasts that lie close to "the indecency line" (Petr. Br. at 35) overlooks the fundamental problem with the Commission's current regime: Broadcasters simply cannot tell where that line will be drawn in any particular case and "must guess at its contours." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048 (1991). That shifting line necessarily chills constitutionally-protected speech.

* * *

It is ironic that the Government closes its Brief with an appeal to precedent and settled expectations, contending that a "'universal and long-established tradition of prohibiting certain conduct creates a strong

presumption that the prohibition is constitutional.'" Petr. Br. at 53 (quoting *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. ---, 131 S. Ct. 2343, 2347-48 (2011)). The Commission's indecency regime is precisely the antithesis of a "long-established tradition of prohibiting certain conduct." The very orders to which the Government now points as evidence of its reasonable, moderate, predictable, and understandable indecency regime in fact reflect hopeless inconsistency, lack of clarity, and results-oriented decision-making. And the Commission's own wildly inconsistent application of its indecency standard and the resulting lack of coherent precedent simply beget more subjective and unpredictable decision-making—precisely what the vagueness doctrine is intended to prevent. Where free speech rights hang in the balance, that uncertainty is flatly intolerable.

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Wade H. Hargrove
Counsel of Record
Mark J. Prak
David Kushner
Julia C. Ambrose
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, LLP
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November 3, 2011

[Logo]

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

[May 26, 1999]

1800C1-TRW
97110028

Mr. David Molina
9852 Hot Springs Drive
Huntington Beach, CA 92646

Dear Mr. Molina:

This is in response to your complaint alleging that television station KCET, Los Angeles, CA, broadcast indecent material on October 25, 1997, between 9 p.m. and 11 p.m. In support of your complaint you submitted a video tape of the movie "Catch 22."

Under Section 503 of the Communications Act and Section 1464 of the U.S. Criminal Code, the Commission has authority to take action against the broadcast of indecent material. Recent cases reflect the Commission's ongoing commitment to enforce the statutory indecency prohibition where actionable violations occur. In determining whether a particular complaint can be acted upon, however, we are obliged to comply with the legal standards set out in this area by the courts. See, e.g., FCC v. Pacifica Foundation, 438 U.S. 726 (1978). Under these standards, indecent material has been defined as that which, in context, depicts or describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. Subject matter alone does not render material indecent.

We have thoroughly reviewed your complaint and supporting material. Nudity itself is not per se indecent. Rather, the Commission must consider the context in which allegedly indecent material is presented. Here, the segment of the movie which included nudity was very brief and appeared in context of a full length drama, the primary theme of which was the horrors of war. Such material does not, in our view, rise to the level of patent offensiveness as to render the broadcast actionably indecent. Accordingly, while we recognize that the material may be offensive to some, we cannot find the necessary legal basis for further Commission action. The enclosure discusses the law with respect to indecent broadcasts and our enforcement procedures.

We appreciate your interest in this matter.

Sincerely,

/s/ Norman Goldstein
Norman Goldstein, Chief
Complaints and Political
Programming Branch
Enforcement Division
Mass Media Bureau

Enclosure

cc: Theodore D. Frank, Esq.
Arnold & Porter

[Logo] [Received Apr 26, 2004]

FEDERAL COMMUNICATIONS COMMISSION
Enforcement Bureau, Investigations
and Hearings Division
445 12th Street, S.W., Room 3-B443
Washington, D.C. 20554

April 21, 2004

In Reply Refer to:
EB-03-IH-0644

[Redacted Address]

Dear [Redacted]:

This letter responds to your complaint in which you allege that Station KUTV(TV), Salt Lake City, Utah, broadcast unlawful programming during its airing on October 19, 2003, at 8:30 p.m., of the film "Hollywood Wives: The Next Generation." Although we appreciate your concern, the information that you have submitted to us concerning this broadcast does not provide us with a legal basis to take action. Accordingly, for the following reasons, we deny your complaint.

The Federal Communications Commission is authorized to license radio and television broadcast stations and is responsible for enforcing the Commission's rules and applicable statutory provisions restricting obscene or indecent broadcasts. Specifically, title 18 of the United States Code, section 1464, prohibits the utterance of "any obscene, indecent or profane language by means of radio communications." 18 U.S.C. §1464.

Because the standard for proving that programming is indecent is less rigorous than that for proving obscenity, when considering broadcast complaints, the Commission generally focuses its analysis on indecency. In this regard, consistent with a subsequent statute and court case, section 73.3999 of the Commission's rules provides that no radio or television station shall broadcast indecent material during the period 6 a.m. through 10 p.m. *See* 47 C.F.R. § 73.3999. We note that the Commission's role in overseeing program content is limited, however, by the First Amendment to the United States Constitution and section 326 of the Communications Act of 1934, as amended (the "Act"), which prohibit the Commission from censoring program material and from interfering with broadcasters' freedom of expression. *See* 47 U.S.C. § 326. Therefore, consistent with relevant court decisions, the Commission must exercise great care when evaluating programming for possible indecent material.

The Commission defines indecent speech as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. In determining whether the complained-of material is patently offensive, three factors are particularly relevant (1) the explicitness or graphic nature of the description or images; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock. The Commission applies these three factors as part of a balancing test to determine if the material is indecent. *See In the Matter of Industry Guidance On the Commission's Case Law Inter-*

preting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd 7999 (2001).

In response to your complaint, on March 8, 2004, we sent a letter of inquiry to KUTV Holdings, Inc., the licensee of the station, which provided us with a recording of the program. After reviewing that recording, we have concluded that the material cited in your complaint, in context, is not sufficiently graphic and/or sustained to meet the Commission's standard for indecency. Accordingly, we are denying your complaint.

We appreciate and recognize your concern. To assist you further, we include an information sheet that discusses the law with respect to indecent and obscene broadcasts and our enforcement procedures. In addition, there is a way that one can avoid 'objectionable programming. Most television and cable networks voluntarily rate much of their programming to alert viewers if a show contains language or other material that a viewer may find inappropriate. The Act requires that all televisions 13 inches or larger manufactured after 1999 be equipped with a V-chip, which can use these ratings to block individual programs or channels. (Set-top boxes are available to allow consumers with older sets that lack this capability to use V-chip technology.) For further information on how to restrict access to objectionable programming, as well as other useful facts, see http://www.fcc.gov/parents/. We also encourage you to convey your concerns directly to

station management, because viewers' opinions often influence management's programming decisions.

Thank you for your interest.

Sincerely,

/s/ William D. Freedman
William D. Freedman
Deputy Chief
Investigations and Hearings Division
Enforcement Bureau

Enclosure

cc: Howard F. Jaeckel, Esq.

[FCC Enforcement Bureau
2003 DEC 8 P 3:46
Investigations and
Hearings Division]

December 1, 2003

RE: Formal Complaint

FCC
Enforcement Bureau, Investigations and
Hearings Division
445 12th Street, SW
Washington, D.C. 20554

To Whom it May Concern:

I found the following show offensive and indecent. I do not know the name of the show, I happened to be browsing channels when I discovered this scene and quickly changed the channel. The scene was of a man and woman making love. It showed a woman nude from the back straddling her partner while sitting up and engaging in sexual intercourse. I found this scene pornographic, and not appropriate on network television at anytime. However, the prime-time display of this material made it even worse. Please register my formal complaint against this programming. The broadcast information is listed below:

Date: 10/19/2003

Time: 8:30pm

Channel: KUTV, Salt Lake City, UT (CBS)

Sincerely,

[Redacted]

CBS [Illegible Enforcement Bureau stamp]

CBS
1515 BROADWAY
NEW YORK, NEW YORK 10336-5794

(212) 845-3595
FAX: (212) 846-1907
hjaeckel@cbs.com

HOWARD F. JAECKEL
VICE PRESIDENT AND ASSOCIATE GENERAL COUNSEL

Delivered by Hand

William H. Davenport
Chief, Investigations and Hearing Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Suite 3-B443
Washington, D.C. 20554

Re: Response to Letter of Inquiry
File No. BB-03-1H-0644

Dear Mr. Davenport: April 7, 2004

This is in response to a Letter of Inquiry (the "Inquiry Letter") from the Enforcement Bureau concerning a complaint (the "Complaint") alleging that KUTV(TV), Salt Lake City, Utah (the "Station") broadcast indecent material on October 19, 2003, at approximately 8:30PM Mountain Time, in violation of 18 U.S.C. § 1464 and 47 CFR § 73.3999. The response is respectfully submitted on behalf of KUTV Holdings, Inc. ("KUTV Holdings"),[1] the Station's

[1] KUTV Holdings, Inc. is an indirect subsidiary of CBS Broadcasting Inc., the licensee of several stations in the Viacom

licensee; CBS Broadcasting Inc. ("CBS"), operator of the CBS Television Network; and Viacom Inc. ("Viacom"), the ultimate parent company of KUTV Holdings and CBS, and the ultimate owner of the 39 television stations constituting the Viacom Television Stations Group.[2]

The Complaint attached to the Inquiry Letter did not name a particular program and was sent by an unidentified person who claimed to be "browsing channels" before he or she "quickly changed the channel" on seeing the complained of material. However, based on the date and time of the program cited in the Complaint, the complainant may have been referring to a brief scene contained within a two hour, made-for-television movie entitled "Hollywood Wives: The Next Generation" (the "Program"), which was transmitted by the CBS Television Network from 9:00PM to 11:00PM Eastern Time, and broadcast by KUTV(TV) between 8:00 and 10:00PM Mountain

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Television Stations Group. CBS Broadcasting Inc. is an indirect wholly-owned subsidiary of Viacom.

[2] The Communications Act defines a "licensee" simply as the "holder of a . . . station license." 47 U.S.C. § 153 (24). The Inquiry Letter, however, defines "Licensee" far more broadly, to include "KUTV Holdings, Inc." and any "predecessor-in-interest, affiliate, parent company, wholly or partially owned subsidiary, other affiliated company or business, and all owners., including, but not limited to, partners or principals" as well as "all directors, officers, employees, or agents, including consultants and any other persons working for or on [its] behalf." In the interest of full cooperation with the Inquiry Letter, this response provides information on behalf of Viacom and its subsidiaries, but neither Viacom nor its subsidiaries waives any potential objections, in connection with the present or future inquiries, to the reach of this overly broad definition of the term "Licensee."

Time, on October 19, 2003. The Licensee is providing information on this Program only because it aired on the Station at the date and time named in the Complaint, and not because CBS concurs that the Complaint accurately describes the Program, or merits further inquiry under the Commission's longstanding enforcement procedures concerning the alleged broadcast of indecent material.[3]

To the extent the Complaint is directed toward "Hollywood Wives: The Next Generation," we believe that it mischaracterizes both the Program, when viewed in full context, as well as the brief scene that the Complainant purportedly encountered while "browsing." CBS respectfully submits that the scene did not constitute a graphic depiction of sexual activity that could be considered "patently offensive"

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[3] Although the Commission has recently improvidently moved away from its long established requirement that a tape or transcript must be supplied by a complainant before the FCC will consider an indecency complaint, *Capstar TX Limited Partnership*, Notice of Apparent Liability for Forfeiture, FCC 04-36 (rel. March 18, 2004) ("*Capstar*"), it has always required complaints to be "documented" with some type of credible "supporting material." *Compare Industry Guidance on the Commission's Case Law Interpreting 18 US.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999, 8015 (2001) ("*Industry Guidance*"). Having a demonstrable basis for Commission inquiry is a basic due process requirement that the Commission previously has recognized as being necessary to have "a sufficient basis for identifying prima facie violations of the statute before requiring broadcasters to respond to complaints." *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd. 930, 938 n.49 (1987). The Licensee hereby notes its objection to issuance of the Inquiry Letter without a tape, transcript, or any substantive support having been provided by the Complainant, and does not waive any due process or other objections to the inadequacy of the Complaint.

as measured by contemporary standards for the broadcast medium. The imposition of any sanction based on the scene in question, which comprised approximately 10 seconds of a two hour movie, would be contrary to law, inconsistent with FCC precedent, and would unconstitutionally infringe on the First Amendment rights of the Station and CBS.

Responses to the Commission's specific inquiries are set forth below. In accordance with the Inquiry Letter, this response is signed by Howard F. Jaeckel, Vice President, Associate General Counsel of CBS Broadcasting Inc., and Assistant Secretary, Viacom Inc., and verified by his declaration, attached hereto as Exhibit 1.

1. State whether the Licensee broadcast the material described in the Complaint over Station KUTV (TV) on October 19, 2003, at 8:30PM and/or any other date between 6AM and 10PM.

As noted above, the Station broadcast the CBS Television Network movie "Hollywood Wives: The Next Generation" between 8 and 10PM on October 19, 2003. Without accepting complainant's characterization of the nature of the programming, the movie contains a scene of approximately 10 seconds duration that is broadly consistent with the one described in the Complaint.[4] CBS believes that the

[4] However, because the complainant admittedly only saw a brief, out-of-context snippet of the program while "browsing channels," did not know the program's name, and "quickly changed the channel" on happening upon the scene that he or she found offensive, the possibility' of the complainant's being mistaken about the station and network in question cannot be excluded. The Complaint did not include a tape or transcript of the program, included no detailed description of the program,

scene in the Program was not "indecent" in light of the principal factors generally considered by the Commission in evaluating indecency complaints, because: (1) the material was neither explicit nor graphic; (2) it did not dwell on the depiction of sexual activities and there was no depiction of sexual organs; and (3) it did not pander or titillate, nor was it presented for its shock value.[5]

2. With regard to each broadcast referred to in response to Inquiry 1 above, if the programming described in the Complaint does not accurately reflect the material broadcast over Station KUTV(TV), describe any inaccuracies.

Assuming for purposes of this response that the Complaint referred to the Program as broadcast on KUTV, the inflammatory description of the programming in the Complaint does not accurately characterize any actual telecast on that station. The Complaint's very brief description of the scene in the unnamed program refers to a "pornographic" depiction of "sexual intercourse," which would suggest that

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and provided no other supporting information. Ultimately, therefore, a Commission determination that the Complaint in fact concerns the Program discussed herein—rather than other programming that may have been running on another channel at approximately the same time—would be based only on its own inference. Given the FCC's longstanding policy of "not independently monitoring broadcasts for indecent material," *see*, *Industry Guidance, supra*, 16 FCC Rcd at 8015, it would be improper for the Commission to pursue an indecency enforcement action where the complaint, standing alone, is insufficient to state a *prima facie* case.

[5] *See*, *Industry Guidance*, *supra*, 16 FCC Rcd at 8003 (2001). The Commission has noted that, in assessing each of these factors, "the overall context of the broadcast in which the disputed material appeared is critical. *Id*.

the depiction was graphic. In fact, while the Program includes a scene depicting two characters engaged in sexual activity, it is brief, non-graphic, does not involve exposure of sexual organs or frontal nudity, and is comparable to other programming broadcast by the major networks and elsewhere on television. Accordingly, any suggestion that the Program includes either a "graphic" depiction of sexual activity, or that the Program, taken in full context, is patently offensive as measured by contemporary community standards for the broadcast medium, is erroneous.

3. With regard to each broadcast referred to in the response to Inquiry 1 above, provide any and all compact discs, tapes, transcripts, or other Documents reproducing or discussing the material reflected in the Complaint, plus the fifteen (15) minutes of material broadcast immediately before and after the material referred to in the complaint. Provide any and all such recordings on compact disc (CD-R) and a written transcript of the material contained in each recording.

Pursuant to discussions with the Commission staff, CBS is submitting herewith a VHS tape of the movie "Hollywood Wives: The Next Generation," as the film was transmitted by the CBS Television Network, and broadcast by KUTV, on October 19, 2003.[6]

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[6] Providing this videotape of the Program does not waive any objections Viacom or its subsidiaries may have to the overbreadth of the Commission's request for a 15-minute "buffer zone" beyond the programming putatively described in the Complaint. By extending its inquiry beyond the bounds of a complaint, as it does here, the Bureau shills the burden to the Licensee to provide a tape and transcript of the complained of material, plus additional material on either side thereof. This

4. State whether the Licensee broadcast all or any portion of the material described in the complaint over any station licensed to it other than station KUTV(TV).

Because of the non-specific and unsubstantiated nature of the Complaint, there is no adequate basis on which the Commission may properly conclude that any CBS owned or affiliated stations broadcast the material described therein. However, subject to Viacom's objection to the scope of this inquiry—an inquiry which improperly expands the Commission's reach beyond the complaint—a list of the Viacom owned television stations that broadcast the Program is attached hereto as Exhibit 1. Each of these stations broadcast "Hollywood Wives: The Next Generation," on October 19, 2003; stations located in the Eastern Time Zone (WCBS-TV, KYW-TV, WBZ-TV, WWJ-TV, WFOR-TV, KDKA-TV, WJZ-TV, WWHO-TV and WJMN-TV) broadcast the Program beginning at 9:00PM; stations in the Central Time Zone (WBBM-TV, KTVT(TV), WCCO-TV, KCCO-TV, KCCW-TV, KEYE-TV and WFRV-TV) broadcast the Program beginning at 8:00 PM; stations in the Mountain Time Zone (KCNC-TV and KUSG(TV) broadcast the Program beginning at 8:00PM; and stations in the Pacific Time Zone (KCBS-TV and KPIX-TV) broadcast the Program beginning at 9:00 PM.

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approach abandons critically important restraints in this sensitive area and greatly magnifies the potential for unlawful government intrusion into programming matters.

5. If the answer to Inquiry 4 above is "yes," provide, for each broadcast referred to in the response to Inquiry 4, above:

   a. the call sign, community of license and licensee;

   b. the date(s) and time(s) of the broadcast(s);

   c. if only a portion of the material was broadcast, describe the material so broadcast;

   d. if the Complaint does not accurately reflect the material broadcast, describe any inaccuracies; and

   e. any and all compact discs, audio tapes, transcripts or other Documents reproducing, discussing, or otherwise relating to the material so broadcast over the station. Provide any such recordings on compact disc (CD-R). Also provide a written transcript of the material contained in the recording.

See responses to Inquiries 1 through 4, above regarding the characterization of the broadcast. The list of Viacom owned and operated stations set forth in Exhibit I provides each station's call sign, community of license, address, and facility ID number. In discussions with CBS outside counsel, the Enforcement Bureau staff indicated that production of a VHS tape of the Program sufficiently responds to the production requests set forth in Inquiry 5.

6. Identify each station licensed to an entity or individual other than the Licensee that had the contractual right with the Licensee to air the material in question and, for each such station, state whether the Licensee has reason to believe that the station did not air the material in question and the basis for that belief.

All affiliates of the CBS Television Network had the contractual right to broadcast the Program on a "first call" basis. To the best of our knowledge, all such stations (which are listed in Exhibit 2, along with their call signs, communities of license, and addresses) broadcast the Program as scheduled by the Network, with the exception of WBNS(TV), Columbus, Ohio.

7. Provide copies of all Documents that provide the basis for or otherwise support the responses to Inquiries 1-6 above.

As stated above, the Enforcement Bureau has indicated, in discussions with CBS outside counsel, that production of a VHS tape of the Program, along with lists of the Viacom owned and CBS affiliated stations that aired the Program, sufficiently responds to the production requests set forth in the Inquiry Letter.

Very truly yours,

/s/ Howard F. Jaeckel

DECLARATION

I, Howard F. Jaeckel, in my capacity as Vice President, Associate General Counsel of CBS Broadcasting Inc. ("CBS"), and Assistant Secretary, Viacom Inc. ("Viacom"), hereby declare under penalty of perjury that to the best of my knowledge, information and belief, the responses submitted to the March 8, 2004, letter of inquiry from William H. Davenport, Chief, Federal Communications Commission, Enforcement Bureau, Investigations and Hearings Division, to KUTV Holdings, Inc., are true and complete.

/s/ Howard F. Jaeckel
Howard F. Jaeckel

[Aug 13 1992]

8310-TR
91100738

Ms. Susan Cavin
905-46E 7th Avenue
Garner, NC 27529

Dear Ms. Cavin:

This is in reference to your complaint against television station WUNC, Chapel Hill, NC. In that complaint you brought to our attention the station's broadcast of certain possibly indecent material October 13 and 20, 1991, at 10:30 a.m. during parts two and three of "Devices and Desires." In support of your complaint you submitted a video tape of the above programs.

Under Section 503 of the Communications Act and Section 1464 of the U.S. Criminal Code, the Commission has authority to take action against the broadcast of indecent material. Recent cases reflect the Commission's ongoing commitment to enforce the statutory indecency prohibition where actionable violations occur. In determining whether a particular complaint can be acted upon, however, we are obliged to comply with the legal standards set out in this area by the courts. See e.g., FCC v. Pacifica Foundation, 438 U.S. 726 (1978). Under these standards, indecent material has been defined as that which, in context, depicts or describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. Subject matter alone does not render material indecent.

We have thoroughly revived your complaint and supporting material. On the basis of that review, we conclude that the broadcast material identified in

your complaint is not actionably indecent. Accordingly, while we recognize that the material in your complaint may be offensive to many, we cannot find the necessary legal basis for further Commission Action.

You indicate the programs were also broadcast an October 10 and 17, 1991, at 9:00 p.m. respectively. A federal court has held unconstitutional the 'Commission's rule prohibiting the broadcast of Indecent Material 24 hours a day. Action for Children's Television v. FCC, 932 F. 2d 1504 (D.C. Cir. 1991). The court has remanded that case with instructions that the Commission establish a "safe harbor" during which material that may be indecent, but is nevertheless constitutionally protected, may be broadcast. Therefore, until such time as a new safe harbor goes into effect, the Commission's enforcement authority against indecent broadcasts does not extend to material broadcast often 8:00 p.m. or before 6:00 a.m. See Action for Children's Television v. FCC, 852 F. 2d 1332 (D.C. Cir. 1988).

I emphasize, however, that the Commission takes seriously its obligation to enforce the statutory prohibition of broadcast indecency and continues to evaluate complaints regarding indecent broadcasts. For example, we recently initiated proceedings against several licensees for the broadcast of indecent material during daytime hours.

We appreciate your concern regarding this matter.

Sincerely,

Edythe Wise, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

S. Cavin
905-46E 7th Ave.
Garner, NC 27529
October 21, 1991

[91100738]
[Illegible Stamp]

Gentlemen;

I have enclosed a copy of a television movie which contains material I believe to be illegal for the broadcast medium, especially during morning hours.

The videocassette contains parts two and three of "Devices and Desires", a movie which was shown on a noncable channel, WUNC-TV 4, Chapel Hill, (Research Triangle Park.)

Part two was broadcast on Sunday morning, October 13, 1991 from 10:30am to 11:30am, and on Thursday October 10, 1991 from 9pm to 10pm. Part three was shown on Sunday morning, October 20, 1991 from 10:30 am to 11:30am. Also on Thursday October 17, 1991 from 9pm to 10pm.

This movie contains scenes of a topless woman in bed with her lover, with her breast very clearly exposed, several scenes of a topless woman running on the beach, and several scenes of a nude female corpse, with the breasts clearly exposed.

Parts 4 through 6 of this movie "Devices and Desires" will be broadcast on Sunday mornings October 27, November 3rd and 10th, 1991 from 10:30 am to 11:30 am.

This and many other similar movies and programs on WUNC-TV containing full frontal and rear nudity have convinced me the channel is not serving the public interest and is especially harmful to children.

Please take action against WUNC-TV 4 for the broadcast of this material, especially in the morning hours.

I understand the license of this channel is now being considered for renewal. I would like to request the license not be renewed.

Sincerely,
S. Cavin

Address of WUNC-TV 4
10 TW Alexander Dr., P.O. Box 14900
Research Triangle Park, NC 27709-4900

[14 APR 1992]

8310-TRW
91060832

Mrs. Deborah Engelman
1083 Ormewood Avenue S.E.
Atlanta, GA 30316

Dear Mrs. Engleman:

This is in reference to your complaint against WAGA-TV, Atlanta, GA. In that complaint you brought to our attention the station's broadcast of certain possibly indecent material the evening of June 5, 1991, at 6:00 p.m. during "Eyewitness News."

Under Section 503 of the Communications Act and Section 1464 of the U.S. Criminal Code, the Commission has authority to take action against the broadcast of indecent material. Recent cases reflect the Commission's ongoing commitment to enforce the statutory indecency prohibition where actionable violations occur. In determining whether a particular complaint can be acted upon, however, we are obliged to comply with the legal standards set out in this area by the courts. See e.g., FCC v. Pacifica Foundation, 438 U.S. 726 (1978). Under these standards, indecent material has been defined as that which, in context, depicts or describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. Subject matter alone does not render material indecent.

We have thoroughly reviewed your complaint and supporting material. On the basis of that review, we conclude that the broadcast material identified in your complaint not actionably indecent. Accordingly

while we recognize that the material in your complaint may be offensive to many, we cannot find the necessary legal basis for further Commission action.

We appreciate your concern regarding this matter.

Sincerely,

Edythe Wise, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

[Received
Jun 18, '91
MMB Enforcement
Control Section Stamp]

June 6, 1991

Mass Media Bureau
Federal Communications Commission
ATTENTION: COMPLAINTS AND
COMPLIANCE DEPARTMENT
1919 "M" Street, Room 8210
Washington, D.C. 20554

RE: Genital Nudity on TV

Dear Sir/Madam:

I am writing to inform the Mass Media Bureau of a graphic or televised showing of nude female dancers—"strippers". This took place on the 6:00 PM evening "Eyewitness" news of the CBS affiliate here in Atlanta—WAGA TV—on June 5, 1991. I have described the broadcast to the local monitoring station of the FCC and was informed that this graphic showing of female stripers, who were shown totally nude from the waist down, was definitely illegal.

The nude strippers were shown during a segment on the trial of Mr. Hans Krause here in Atlanta. During this trial, dancers from a local club were called to testify. As the reporter was giving the details of their testimony, the camera was at first showing these women in the courtroom on the witness stand. Then as the reporter was continuing his story on their testimony, the courtroom scene was gone, and in its place was a scene from a strip joint. The camera showed from the back the lower torso of a woman

dancing. The buttocks were completely bare. Then the dancer turned around, revealing complete genital nudity. This nude dancing scene lasted approximately 5-7 seconds. During the program no warning was given that explicit scenes of nudity were going to be broadcast. Watching this program with me was my young son, aged 4 1/2.

The news director responsible for this broadcast was Mr. Bud McEntee. I managed to speak with him on the telephone this morning. His explanation for this scene was that the reporter wanted to "show pictorially what he was talking about." One must therefore wonder if the reporter believes that adults in Atlanta do not know what strippers actually do. Or perhaps this "pictorial explanation" was meant for children whose parents had managed thus far in their innocent lives to shield them from these aspects of the adult world. Thanks to Eyewitness News, my son is now an "eyewitness" to the world of strip clubs. Mr. McEntee was completely unapologetic and expressed no concern for my feelings as a viewer of WAGA-TV.

This unjustifiable use of sex to titillate the news raises questions not only about the competence of WAGA TV's employees, but the policies by which their broadcasting decisions are made.

I am requesting that you investigating this matter, for the sake of those people who want to watch prime time television without being assaulted by graphic

obscenity. I would appreciate being kept informed of whatever action you take. Thank you.

Sincerely,

/s/ Deborah Engleman
Mrs. Deborah Engleman
1083 Ormewood Ave. SE
Atlanta, Georgia 30316

cc: Mr. Anthony Malara
Audience Viewing Affiliates
CBS, New York

Mr. Jack Sander
President and General Manager
WAGA-TV, Atlanta

[FCC Mail Section
FEB 23 3:42PM '90
Dispatched By]

8310-TRW

Mr. Donald E. Wildmon
American Family Association
P. O. Drawer 2440
Tupelo, MS 38803

Dear Mr. Wildmon:

This is in reference to your complaint against WCBI-TV, Columbus, MS. In that complaint you brought to our attention the station's broadcast of certain possibly indecent material the evening of September 18, 1989, at approximately 7:30p.m.

Under Section 503 of the Communications Act and Section 1464 of the U.S. Criminal Code, the Commission has authority to take action against the broadcast of indecent material. A number of recent cases reflect the Commission's ongoing commitment to enforce the statutory indecency prohibition where actionable violations occur. In determining whether a particular complaint can be acted upon, however, we are obliged to comply with the legal standards set out in this area by the courts. See e.g., FCC v. Pacifica Foundation, 438 U.S. 726 (1978). Under these standards, indecent material has been defined as that which, in context, depicts or describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. Subject matter.

We have thoroughly reviewed your complaint and supporting material. On the basis of that review, we conclude that the broadcast material identified in your complaint not actionably indecent. Accordingly while we recognize that the material in your complaint may be offensive to many, we cannot find the necessary legal basis for further Commission action.

We appreciate your concern regarding this matter.

Sincerely,

Edythe Wise, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

[AFA Fish Logo]

September 20, 1989

Federal Communications Commission
Mass Media Bureau
Enforcement Division
Complaints and Investigations Branch
1919 M Street, N.W.
Washington, D.C. 20554

Dear Sir or Madam:

I am submitting to you a video tape recording of the television program, "The People Next Door", broadcast on WCBI-TV at 7:30 p.m. CST on September 18, 1989. This program was broadcast in violation of the federal indecency laws.

The program used the double entendre with reference to sexual acts. More egregious, however was the gratuitous use of nudity in the show. During one scene a woman's dress is suddenly removed and she is shown nude from the waist up. While the scene was brief, it nonetheless sets the stage for more flagrant and regular use of nudity on broadcast television.

Television is such a pervasive and influential medium that such abuses of the public trust cannot go unnoticed. This material was specifically designed to attract an audience and was used during promotional advertisements for the program. The presentation of this material during the early evening hours was clearly intended to test the limits of decency on broadcast television. Material that is so clearly exploitive presented at an hour when children are <u>expected</u> to be in the audience demonstrates

a true lack of responsibility on the part of the broadcaster.

I am asking that you take the necessary action against this broadcaster and impose administrative sanctions as well as refer this matter for possible criminal action. If you should need any additional information, please do not hesitate to contact me. I await your prompt resolution of this matter.

Sincerely,

/s/ Donald E. Wildmon
Donald E. Wildmon
Executive Director