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.
v.
ABC, INC., ET AL.

On Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

BRIEF AMICI CURIAE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THE E.W. SCRIPPS COMPANY IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

As advocates for the rights of the news media and others who seek to provide information to the public about important issues that affect them, *amici curiae* (described in Appendix A) have a strong interest in ensuring that the First Amendment guarantee of a free press is protected to the fullest extent. *Amici* believe this Court's long-standing jurisprudence strongly supports a finding that the current standard adopted and enforced by the Federal Communications Commission ("FCC" or "commission") to regulate broadcast indecency is unconstitutionally vague, despite the policy's exemption from indecency liability for material contained in bona fide news or public affairs programming. The news exception and its standardless application do not adequately protect speech at the heart of the First Amendment's protections.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the *amici curiae*, their members or their counsel made a monetary contribution intended to fund the preparation or submission of this brief; and counsel for Petitioners and Respondent s have filed blanket written consents to the filing of *amicus curiae* briefs in this matter.

SUMMARY OF ARGUMENT

Amici curiae urge the Court to affirm the decision below and take this opportunity to clarify that the indecency policy's news exemption, rather than saving the enforcement scheme from unconstitutionality, suffers from its same standardless manner of enforcement. And the effect is an impermissible intrusion into the editorial affairs of broadcasters that severely restricts their ability to report on matters of significant public interest and concern. A bright-line rule exempting fleeting expletives, in whatever format presented, from broadcast indecency regulations is the only means to ensure that news media, as they exist in a modern media landscape, can fulfill their constitutionally protected role as a vital source of public information.

Excessive fines that potentially put news broadcasters out of the business of speaking entirely compound the danger of unbounded official discretion to regulate content. In accordance with the Court's excessive fines and punitive damages jurisprudence, indecency fines that are highly disproportionate to the underlying violation and resulting harm and not in line with penalties imposed for comparable conduct are of dubious constitutionality.

A system of self-regulation by the broadcast industry is a feasible alternative to strict government regulation. Long-time self-policing efforts by broadcasters and their mass media counterparts indicate that such a regime would effectively balance the government's legitimate interest in shielding children from indecent programming and the

protections the First Amendment provides for the news media.

ARGUMENT

I. The Court should take this opportunity to find that the news exemption and its standardless application do not adequately protect speech at the heart of the First Amendment, and to do so any indecency standard must reflect modern changes in the media industry.

The FCC contends that uncertainty regarding its application of indecency standards to news programming is irrelevant to the proper disposition of this case because "there is no serious argument that the live broadcast of a Billboard Music award for 'Top 40 Mainstream Track' by Nicole Richie and Paris Hilton was 'news' or 'public affairs programming.'" Pet'r's Br. 30–31. But this assertion about the offending material at issue goes to the heart of Respondents' claim against the commission: Its indecency policy relies on subjective judgments by the commission, including its estimation of whether material qualifies as news or public affairs programming subject to the exception, that render it unconstitutionally vague.

As such, the Court should consider the news exemption and find its standardless application an intolerable restraint on the very type of speech entitled to special protection. A bright-line rule stating that broadcast indecency regulations cannot be applied to instances of fleeting expletives, in whatever format presented, would protect a news broadcaster's First Amendment rights while allowing the

government to punish unscrupulous broadcasters. This decision must be guided not by increasingly difficult-to-qualify exemptions but rather by a recognition that constitutionally protected speech about important public issues is now disseminated in a variety of formats dictated by technological changes in the modern media industry.

A. The indecency policy's news exemption vests the commission with unbounded discretion to decide what speech to allow and disallow.

As the FCC recognizes, the matters presented in news and public affairs programming are at the core of the First Amendment's free press guarantee. *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 F.C.C.R. 13299, 13327 (2006) [hereinafter *Remand Order*]. As such, the commission has declared it "imperative that [it] proceed with the utmost restraint when it comes to news programming." *Id.* However, FCC indecency findings belie this claim of restrained approach. Indeed, the decisions reveal determinations of indecency based on an assessment of the quality of the programming — an unconstitutionally discriminatory manner of enforcement in which favored speech is permitted and disfavored speech is sanctioned.

The FCC claims the exemption from indecency liability for statements made during a bona fide news interview should adequately assuage broadcasters' fear that news programming could be subject to fines. *Fox Television Stations, Inc. v. Fed. Commc'ns Comm'n*, 613 F.3d 317, 334 (2d Cir. 2010). Yet, one need look no further than the com-

mission's explicit reiteration that news status does not absolve a broadcast from a finding of indecency for ample proof of why the exception provides little comfort to news programmers: "To be sure, there is no outright news exemption from our indecency rules." *Remand Order*, 21 F.C.C.R. at 13327. Even absent this unequivocal assertion of the commission's discretion to decline to apply the news exemption, its indecency decisions sufficiently strip broadcasters of any assurance that news programming is immune from liability. For example, the FCC first deemed content in a news program indecent in 2004, when it imposed a fine for the momentary airing of a penis during a live interview on a morning news show with performers from a comedy stage. *Young Broad. of S.F., Inc.*, 19 F.C.C.R. 1751, 1751–52 (2004). The news program's hosts repeatedly warned viewers of the subject matter of the upcoming interview segment and immediately apologized after the accidental and unintentional exposure, which lasted less than a second and for which involved station personnel were suspended. *Id.* at 1752–53, 55. Nonetheless, the FCC found the broadcast to be "pandering, titillating and shocking." *Id.* at 1756–57. Moreover, broadcasts featuring "shock jock" Howard Stern amassed more than $2 million in indecency fines or settlements, despite a declaratory statement that his on-air interviews were "*bona fide* news interviewing programming" for purposes of the equal time rule. *In re Infinity Broad. Operations Inc.*, 18 F.C.C.R. 18603, 18604 (2003).

While neither of these examples risk confusion with stories about economic conditions or foreign affairs developments, the broader point is still important: There is no clear standard that enables

broadcasters to know what material they can safely air in that vast gray area between these extremes. Thus, despite the FCC's promises of a hands-off approach, news broadcasters cannot be confident about the immunity of their programming.

The FCC has expressed a willingness to rely on broadcasters' characterizations of their own programming as news programming in making indecency determinations. *Remand Order*, 21 F.C.C.R. at 13328 (deferring to CBS' "plausible characterization" of an interview of a reality television contestant who uttered the word "bullshitter" on "The Early Show" as a bona fide news interview). Yet, the commission has seemingly tasked itself with distinguishing between plausible and implausible broadcaster claims about the nature of the programming, making its own assessment of the newsworthiness, or lack thereof, of any news story with a sexual component. Lili Levi, First Amendment Ctr., *The FCC's Regulation of Indecency* 26 & n.142 (2008).[2] For example, the commission denied an application for review of an Enforcement Bureau finding that a discussion of whether a penis could be used to pull objects was indecent. *In re Entercom Seattle License, LLC*, 19 F.C.C.R. 9069, 9069 (2004). Although the station claimed the non-sexual references to male genitalia were made "in the context of a genuine news story," and the Enforcement Bureau conceded the discussion concerned a news item, the commission stated its view that "the material [was] not a *bona fide* newscast." *In re Enter-*

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[2] *Available at* http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FirstReport.Indecency.Levi_.final_.pdf.

com Seattle License, LLC, 17 F.C.C.R. 18347, 18349–50 (2002).

The commission also rejected the claim that the puppetry segment should not be found indecent because it aired during a morning news show. *Young Broad.*, *supra*, at 1755. In its Omnibus Order, the commission distinguished the momentary exposure of a flood victim's penis during another morning news show excerpt from the puppetry footage:

> [T]he [puppetry] display was not incidental to the coverage of a news event; rather, it occurred during an interview of performers who appear nude to manipulate their genitalia, and as the performer stood up to give an off-camera demonstration to the show's hosts. Here, in contrast, the [flood] program's focus is a rescue effort, and the complained-of material is incidental and easily could evade the notice of a viewer focused on this effort.

Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005, 21 F.C.C.R. 2664, 2717 (2006) [hereinafter *Omnibus Order*].

Concededly, a typical viewer may very well agree with the commission on this distinction. But it is a distinction that must be left to the producers and directors of news programming, not the government.[3] In this case, the distinction between a context in which the momentary airing of a penis

[3] For further discussion of the FCC's interference with broadcast journalists' editorial discretion, see *infra* Part I.B.

was appropriate and that in which it was indecent was seemingly an easy call for the government, and many broadcast journalists faced with the same editorial decision would likely come to the same result without great difficulty. However, journalism presents few instances in which the distinction between appropriate and inappropriate material is so easily discernible. In those situations where difficult decisions about whether to include particular material in a news report must be made, it is particularly crucial that the determination lie solely with the journalist in the exercise of his editorial discretion and judgment. As such, the government cannot be vested with the authority to make distinctions between decent and indecent content, even when the determination is likely an easy one.

Thus, the commission's decisions about whether the indecency policy's news exemption shields programs from liability often appear to be informed by the commission's evaluation of a program's merit — a "visage of . . . censor[ship that] is all too discernible . . . ." *Fed. Commc'ns Comm'n v. Pacifica Found.*, 438 U.S. 726, 766 (1978) (Brennan, J., dissenting). The policy's failure to "carefully define and narrow official discretion," *id.* at 748 (plurality opinion), results in an unconstitutionally discriminatory manner of enforcement.

B. This discriminatory application of the news exemption severely restrains the ability to effectively report on matters of public interest and concern.

Under the FCC's inherently boundless discretion, a news broadcaster's journalistic discretion to choose how it will inform its viewers is replaced by the commission's own highly subjective belief about whether a particular program is of high or low quality, tasteful or distasteful. That is, the policy severely restricts a news broadcaster's ability to report on matters that, although of significant public interest and concern, may displease or offend the FCC — a restraint on publication that this country, consistent with its recognition "that a press that is alert, aware, and *free* most vitally serves the basic purpose of the First Amendment," cannot tolerate. *N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (per curiam) (emphasis added).

An impossible-to-predict, discriminatory manner of indecency enforcement means protection for broadcasts about matters of public concern extends no further than a mere government assurance that "we may fine you for indecent comments, though we are cautious not to, but we still might," a standard that provides no guarantee of protection at all. This lack of reliable guidance as to what material is protected by the indecency policy's news exemption effectively grants the government a seat in the editing rooms of news broadcasters nationwide. Much like other important considerations — the timing of a particular event or the public status

of the subject of a report, for example — the potential to incur large fines informs daily decisions about what information is widely disseminated and what information is withheld from public view. And the effect is to leave viewers and listeners less than fully informed.

Choices about the content of broadcast news reports and their treatment of public issues constitute the exercise of editorial control and judgment. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Yet, to the extent those decisions are guided not by the broadcasters' discretion to publish over the airwaves that "which their 'reason' tells them should … be published," *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945), but rather by a concern about massive indecency fines or even loss of their licenses, the government impermissibly "meddle[s] in the internal editorial affairs" of broadcasters. *Tornillo*, 418 U.S. at 259 (White, J., concurring).[4] Interference with "this crucial process," *id.* at 258 (majority opinion), often results in self-censorship[5] of serious news programming about matters of public concern — speech that "oc-

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[4] In other contexts, regulations that infringe the news media's ability to exercise editorial discretion have, as a constitutional matter, exempted the press. For example, even before this Court's ruling in *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010), the Bipartisan Campaign Reform Act of 2002 expressly exempted the news media from its prohibition on corporate electioneering communications. 2 U.S.C. § 434(f)(3)(B)(i).

[5] Pursuant to Supreme Court Rule 37.1, *amici* do not repeat the ample evidence Respondents and fellow *amici* provide to show that the vagueness of the FCC's indecency policy has chilled protected speech, but do incorporate those numerous examples by reference.

cupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 131 S. Ct. 1207, 1211 (2011) (internal citation and quotation marks omitted).

As such, indecency regulations that implicate these constitutional rights must, at a minimum, be enforced in accordance with consistently applied standards that enable news and public affairs broadcasters to predict with reasonable certainty what material in any particular broadcast would be protected by the indecency policy's news exemption. Absent clear guidelines, the policy "threat[ens] . . . the free and robust debate of public issues . . . potential[ly] interfere[s] with a meaningful dialogue of ideas" and poses the risk of "a reaction of self-censorship" on matters of public import. *Id.* (internal citation and quotation marks omitted).

C. An increased blurring of the distinction between news and entertainment programming indicates that the current broadcast indecency enforcement scheme is unworkable.

As this Court recently noted, "the advent of the Internet and the decline of print and broadcast media" have "blurred" lines in the media landscape in ways that must be considered when evaluating regulations that affect the gathering and dissemination of news. *See Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 905–06 (2010). Indeed, this evolution in the industry is highly relevant to an analysis of the FCC's regulatory power.

As a preliminary matter, the FCC's authority to regulate content generally and news program-

ming specifically may be expanding in light of its proposal to regulate broadband services in a manner that could impose common carrier-style requirements on the companies that provide access to the Internet. The commission did abandon its "Third Way" of regulation, which would have reclassified broadband Internet access service as a "telecommunications service" under Title II of the Communications Act, saying it could achieve its goal of "preserv[ing] the freedom and openness of the Internet" without the negative consequences of broad application of Title II. *See* Julius Genachowski, Chairman, Fed. Commc'ns Comm'n, Remarks on Preserving Internet Freedom and Openness (Dec. 1, 2010).[6] Yet, questions remain about the FCC's authority to impose network management obligations on broadband providers under Title I of the act, raising suspicion that the commission may revisit its earlier proposal to regulate broadband services under the more stringent Title II. Howard W. Waltzman, *Federal Communications Commission Lacks the Authority to Reclassify Broadband Services As Information Services*, 14 No. 10 J. Internet L. 1, 6–7 (2011). Before the situation is complicated by such a development, however, the Court should take this opportunity to strike down a policy that infringes the First Amendment protections for news media as they exist in the broadcasting context.

Technological changes in the modern media industry and the economic consequences of those changes have drastically affected news reporting. Lili Levi, *A New Model for Media Criticism*, 61 U.

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[6] *Available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303136A1.pdf.

Miami L. Rev. 665, 681–82, 688 (2007). One of the most significant, and criticized, aspects of this changed environment is a blurring of the distinction between news and entertainment programming, a trend caused largely by 24-four hour cable news services. *Id.* at 686–88; *see also* Jonathan Yardley, *Entertainment? That's News to Me*, Wash. Post, Feb. 3, 1997, at D2 ("[T]he likes of ABC's 'PrimeTime Live' are not journalism but entertainment, not news reports but shows. . . . Television, a medium of images and emotions rather than words and ideas, by its very nature reduces everything it touches to show business[.]"). Despite allegations that economic pressures have negatively affected the quality of broadcast news reports, the reality remains that matters of public importance are increasingly presented in formats that resemble entertainment as much as journalism.

To be sure, *amici* do not contend that an utterance about cow excrement in a designer handbag necessarily constitutes a matter of public importance. But the incident is a strong example of the danger, given technological advancements that have changed the ways in which news is disseminated, of authoritative assertions that certain kinds of material cannot "serious[ly]" be considered news. Pet'r's Br., *supra*. Undoubtedly, the bestowing of awards that indicate success and prestige in a multi-billion dollar industry constitutes a matter of public importance, at least in the entertainment area. Would the same material be considered news if it were presented not in live entertainment programming but in a syndicated program that provided spot news coverage and news interviews about entertainment? In another context, the commission found that such programming was a bona

fide newscast. *In re Request for Declaratory Ruling by Paramount Pictures Corp., et al.*, 3 F.C.C.R. 245, 246 (1988) (holding that "Entertainment Tonight" and "Entertainment This Week" were exempt from the equal opportunities requirement of § 315 of the Communications Act).

These questions indicate that now more than ever broadcast indecency determinations must be governed by more than summary conclusions about a program's news status. In fact, nothing less than a policy guided not by increasingly difficult-to-qualify exemptions but by a recognition that constitutionally protected speech about important public issues is now disseminated in a variety of formats dictated by an ever-evolving media landscape will ensure that vital reporting about matters of public interest and concern remains robust. As such, the Court should adopt a bright-line rule that broadcast indecency regulations cannot be applied to instances of fleeting expletives, in whatever format presented. Concededly, "speech that many citizens may find shabby, offensive, or even ugly" or that the government concludes "is not very important" may reach the public airwaves under this standard. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826 (2000). But as the distinction between news and other types of programming promises to become even murkier as the practices, methods and modes of journalism continue to evolve alongside future technological advancements, such a clearly enunciated standard is necessary to protect important speech on public issues.

The indecency policy's news exemption does not save the regime from its vagueness. On the contrary, the discriminatory manner in which it is enforced severely restricts a news broadcaster's abil-

ity to report on matters of significant public interest and concern that the FCC may, in its sole estimation, find objectionable. As such, the government impermissibly "insinuate[s] itself into the editorial rooms of this Nation's [broadcasting] press." *Tornillo*, 418 U.S. at 259 (White, J., concurring). A holding that First Amendment protections extend to important speech presented in a variety of different modes is the only means to ensure that the news media, as they exist in a modern media landscape, can fulfill their constitutionally protected role as a vital source of public information.

II. Excessive fines imposed under the indecency policy increase its threat to First Amendment-protected speech and are of dubious constitutionality given this Court's excessive fines and punitive damages jurisprudence.

As the above discussion demonstrates, unbounded official discretion to regulate indecent material in news and public affairs programming is in and of itself a dangerous threat to journalists' ability to report on crucial issues of significant public interest. When such a restraint is compounded by excessive fines, however, it effectively puts the press and others who seek to gather and disseminate important information out of the business of speaking entirely. But imposition of the large fines, particularly where they are based on isolated and inadvertent utterances, may very well violate this Court's mandate that punitive sanctions be proportional to the harm caused by the underlying violation and in line with the amount of penalties for comparable conduct to withstand constitutional

scrutiny.

A. Fines for indecency violations could put some broadcasters out of business.

In April 2004, the FCC altered its method of calculating fines for indecency violations. Richard E. Wiley et al., *Communications Law 2004: Contentious Times in a Shifting Landscape*, 811 PLI/Pat 109, 168 (2004). Previously, the commission had interpreted the maximum fines in the statute as applying on a per-program basis. *Id.* Under the new policy, however, the commission adopted a per-licensee standard, treating each licensee's broadcast of the same program as a separate violation. *Id.* That is, the maximum fine the FCC could order for each instance was multiplied by the number of affiliates that aired the material, exposing networks to fines in the tens of millions of dollars for the utterance of a single expletive.[7] Moreover, in June 2006, Congress approved the Broadcast Decency Enforcement Act of 2005, which increased the maximum fine the FCC can impose by a factor of 10 – from $32,500 to $325,000. Pub. L. No. 109-235, 120 Stat. 491 (amending 47 U.S.C. § 503(b)(2)). The amendment also caps fines at $3 million per indecent incident per day. *Id.*

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[7] In its first application of the new policy, the FCC calculated apparent liability for a single complaint against a single station against the station's owner as follows: $27,500 (maximum permissible fine) x 3 (number of indecent utterances during the show) x 6 (number of stations that aired the material) = $495,000. Richard E. Wiley et al., *Communications Law 2004: Contentious Times in a Shifting Landscape*, 811 PLI/Pat 109, 168–69 (2004).

It is difficult to quantify the monetary effects of such exorbitant fines. But in many small markets nationwide, where the penalties actually exceed the stations' worth, bankruptcy is a legitimate possibility. Jim Puzzanghera, *Lawmaker Sees both Sides of Broadcast Legislation*, L.A. Times, July 5, 2006, at 1, *available at* 2006 WLNR 11556234;[8] *see also* Talk of the Nation: Obscenity over the Airwaves and Whether Congress or the FCC Should Tighten Restrictions and Regulations (National Public Radio broadcast Jan. 28, 2004), *available at* 2004 WLNR 21542514 (expressing a Portland, Oregon, resident's concern that "10 fines would take [a small community subscription alternative radio station] off the air completely"). As one Washington, D.C., attorney who represents broadcasters put it, "Half a million [dollars] times however many utterances, that amounts to enterprise-threatening fines." Deborah Potter, *Indecent Oversight*, Am. Journalism Rev., Aug.–Sept. 2004, at 80, 80, *available at* 2004 WLNR 22311518 (quoting attorney Kathleen Kirby).

B. Such harsh penalties are disproportionate to the severity of the indecency violations and fines imposed for comparable misconduct.

The Eighth Amendment to the U.S. Constitution prohibits the imposition of excessive fines. U.S. Const. amend. VIII. Although this Court has never addressed the constitutional prohibition on excessive fines in the context of broadcast indecen-

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[8] To facilitate access to secondary sources, "WLNR," or Westlaw NewsRoom, citations are provided when possible.

cy fines, its jurisprudence in other Eighth Amendment contexts suggests the indecency enforcement regime lacks the requisite proportionality to pass constitutional muster. This Court's statements about punitive damages in the civil procedure context further support this assertion, not only under a proportionality analysis but also through a comparison of the fines imposed for comparable misconduct.

The excessive fines prohibition was designed "to prevent *the government* from abusing its power to punish." *Austin v. United States*, 509 U.S. 602, 607 (1993). Whether a punitive fine is excessive is determined solely by a proportionality analysis, or a finding of whether the penalty bears some relationship to the seriousness of the violation it is designed to punish. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). A punitive fine violates the Excessive Fines Clause, the Court held, "if it is grossly disproportional to the gravity of [the] offense." *Id.* A "grossly disproportional" determination must be made on a case-by-case basis, considering the amount of the fine compared to the seriousness of and harm caused by the violation. *Id.* at 336–39.

Under this standard, a fine in the thousands, let alone millions, for a fleeting expletive uttered during a news program seems highly disproportionate, as the puppetry incident, discussed *supra*, strongly indicates. In that case, the FCC fined a station $27,500, the statutory maximum, for a depiction that lasted less than one second. *Young Broad.*, 19 F.C.C.R. at 1751, 1755. To be sure, the broadcast did not dwell on or repeat at length the indecent material, thereby minimizing the gravity of the violation. *See In re Industry Guidance on the*

Comm'n's Case Law Interpreting 18 U.S.C. § 1464, 16 F.C.C.R. 7999, 8003 (2001) (stating that the repetitive nature of the material is relevant to a finding of patent offensiveness). Moreover, because the show's hosts repeatedly warned viewers about the nature of the interview segment beforehand, parents concerned about their children's exposure to the material likely turned off the program. As such, the harm to children — the violation the indecency policy is designed to punish — was likely minimal. Finally, because the policy's aim is to punish broadcasters through both punitive and deterrent means, it seems logical that a proportionate fine would have taken the station's history of indecency violations into account. However, the notice of apparent liability does not indicate that this information was considered when deciding the amount of the fine. *See generally Young Broad.*, 19 F.C.C.R. 1751.

Such a proportionality analysis is also required when evaluating punitive damages in the civil context, the gross excessiveness of which "enter[s] the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 568, 575 (1996). Under this rule, a comparison of the punitive damages award and the penalties for comparable misconduct must also inform the determination. *Id.* at 583. Under this factor, fines for the overwhelming majority of news and public affairs broadcasts are clearly excessive because many similar programs are not subject to such indecency penalties. Using the puppetry example again, a broadcast of nearly the same footage — the momentary exposure of a penis during a morning news show — was exempt from an indecency fine. *Omnibus Order*, 21 F.C.C.R. at 2717; *see also Letter*

to Mr. Peter Branton, 6 F.C.C.R. 610, 610 (1991) (affirming that airing a National Public Radio news story featuring an expletive-laden surveillance tape of mobster John Gotti did not violate the FCC's indecency rules because the segment was an integral part of a bona fide news story about organized crime and used in a widely reported trial); Allison Romano, *Reporting Live. Very Carefully.*, Broadcasting & Cable, July 3, 2005, at 8, *available at* 2005 WLNR 10574802 (noting that the FCC did not take any action against a Los Angeles television station that aired a post-game interview with Shaquille O'Neal in which the former Lakers star cursed twice).

Finally, the degree of reprehensibility of the punished conduct is the most important indicium of the reasonableness of a punitive damages award. *BMW*, 517 U.S. at 575. Exemplary damages "should reflect the enormity of [the] offense" and "the accepted view that some wrongs are more blameworthy than others." *Id.* (internal citation and quotation marks omitted). In most cases, the airing of indecent material during news or public affairs programming is not an intentionally malicious or flagrant violation that would deem the conduct particularly reprehensible. As the puppetry footage represents, many of these incidents occur accidentally, without the broadcaster's prior knowledge, during live programming. *Young Broad.*, 19 F.C.C.R. at 1752. Subsequent apologies to viewers and disciplinary action against the responsible personnel further demonstrate a lack of willful intent. *See id.* at 1752–53; *see also Sports Talk*, Atlanta J. & Const., Sept. 14, 2011, at C1, *available at* 2011 WLNR 18179904 (reporting that "Monday Night Football" analyst Ron Jaworski

apologized on-air after inadvertently cursing during his commentary).

Indecency fines so large they potentially force broadcasters out of business raise serious constitutional concerns about the permissibility of the penalties. This is particularly the case where the penalty, seemingly unique despite numerous occurrences of comparable conduct, is imposed for the isolated and inadvertent utterance of an expletive during a live news broadcast. Arbitrariness in penalties that violate the constitutional right to receive fair notice of the conduct that will subject a person to punishment and the potential severity of the penalty is no more dangerous than it is in fines that threaten entirely one's fundamental right to speak about important public matters.

III. The Court should take this opportunity to find that broadcasters, much like most other mass media, are able to regulate themselves such that content control by the government is unnecessary.

The foregoing discussion highlights the constitutional challenges that arise from government regulation of content protected by the First Amendment. But this Court recently lent some support to the notion that self-regulation may adequately protect the legitimate interests that prompted government regulation in the first place. *See generally Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011). In finding California's ban on the sale or rental of violent video games to minors unconstitutional, the *Brown* Court noted that a state possesses the legitimate power to protect children from harm. *Id.* at 2736. Its interest in doing so,

however, is significantly reduced when an industry's voluntary, self-regulation system is fairly successful in its own attempts to ensure satisfaction of a state's legitimate interests. *Id.* at 2740–41. Because the video game industry "does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home," filling the remaining modest gap in concerned parents' control "can hardly be a compelling state interest." *Id.* at 2741. Moreover, effective self-policing in other largely unregulated media contexts indicates that leaving content regulation in the hands of the media does not produce a system whereby vulgar profanities are wildly hurled at children. In fact, self-regulation efforts already undertaken by broadcasters provide strong evidence that a decision to forgo strict broadcast regulation need not come at the expense of shielding children from indecent programming.

A. Despite an absence of government regulation, the print media closely monitor themselves to ensure that indecent material, save for those exceedingly rare situations where the public cannot be fully informed about an important issue without its use, is precluded from publication.

The stronger protection this Court has afforded the print media guarantees they are free from government meddling with editorial affairs and restricted in content matters "by only two factors: first, the acceptance of a sufficient number of

readers — and hence advertisers — to assure financial success; and, second, the journalistic integrity of its editors and publishers." *Tornillo*, 418 U.S. at 255 (internal citation and quotation marks omitted). Despite this lack of official regulation, however, the nation's leading newspapers take great efforts to avoid publication of profanities and otherwise indecent material.

The editorial policies are informed by several factors, including concerns about meeting audience expectations of community standards and preserving the publication's reputation. *See* Allan M. Siegal, New York Times Manual of Style and Usage 241 (1999) ("The Times virtually never prints obscene words, and it maintains a steep threshold for vulgar ones. In part the concern is for the newspaper's welcome in classrooms and on breakfast tables in diverse communities nationwide. But a larger concern is for the newspaper's character. The Times differentiates itself by taking a stand for civility in public discourse[.]"); Washington Post Deskbook on Style 6 (1989) ("The Washington Post as a newspaper respects taste and decency . . . We shall avoid profanities and obscenities unless their use is so essential to a story of significance that its meaning is lost without them. In no case shall obscenities be used without the approval of the executive editor or the managing editor or his deputy."); Notably, these standards are consistently observed despite public criticism that they do not accurately reflect modern culture's constantly changing concepts of taste and decency. Melissa McCoy et al., Los Angeles Times Stylebook 156–57 (Supp. 2008) ("We acknowledge that a wide range of vulgarities are commonplace on the Internet and elsewhere, but we intend to maintain a much higher standard.

We may describe and report on people whose speech is obscene, profane, crude or crass, but we should avoid doing so at their level."); Clark Hoyt, *When to Quote Those Potty Mouths*, N.Y. Times, July 13, 2008, at 12, *available at* 2008 WLNR 13107977 (defending the newspaper's decision to exclude from its coverage of the death of George Carlin the seven words he famously concluded one "can never say on television" and its decision to decline to publish inadvertently recorded comments Jesse Jackson made about then-Senator Barack Obama, a move that led one reader to wonder if The Times is edited by "prudish kindergarten teachers. It is not good when a NY Times reader is forced to wonder what actually the fuss is about and then must start looking at other newspapers to find out.").

Conceivably, the rationales underlying this self-regulation are even more compelling in the broadcasting context. While newspaper readers in most communities nationwide are limited to only one source of that information, television viewers often have the ability to receive similar reports from several sources, allowing them to protest the airing of material they find objectionable by just a quick flick to the remote control. The strong need to protect advertising revenue in this competitive market exerts a very strong pressure on broadcasters to self-regulate their indecent programming. Maria Matasar-Padilla, Note, *Music Lessons: What Adam Lambert Can Teach Us About Media Self-Regulation*, 29 Cardozo Arts & Ent. L.J. 113, 115 (2011). As such, audience regulation via channel changing is potentially just as effective as government regulation in ensuring that broadcast content conforms to community standards. *Id.* at 140–42.

B. Not immune from internal and external market pressures, cable broadcasters regulate indecency in their programming.

While newspapers are resolutely committed to preserving their reputations as tasteful and decent content providers notwithstanding the lack of government regulations requiring them to be so, cable television has gained a reputation as the racy, risqué and at times downright sleazy alternative to broadcast's less steamy programming. Yet, a fairly comprehensive content analysis indicates that the medium's use of offensive language may compare to that of its family-friendly counterpart more closely than its reputation suggests. *See* Barbara K. Kaye & Barry S. Sapolsky, *Taboo or Not Taboo? That Is the Question: Offensive Language on Prime-Time Broadcast and Cable Programming*, J. Broadcasting & Electronic Media, Mar. 2009, at 1. To be sure, *amici* recognize that accusations that cable programs contain more verbal indecencies than broadcast programs are not unfounded. *Id.* at 12. Indeed, primetime cable programs that aired over seven nights in fall 2005 included just over 1.5 times more offensive words[9] than broadcast programs that aired at the same time. *Id.* at 6, 12. Other find-

[9] Offensive words were defined as sexual, excretory and the seven words in George Carlin's monologue, as well as other "crudities" such as "damn," "slut" and "bitch." Barbara K. Kaye & Barry S. Sapolsky, *Taboo or Not Taboo? That Is the Question: Offensive Language on Prime-Time Broadcast and Cable Programming*, J. Broadcasting & Electronic Media, Mar. 2009, at 1, 7.

ings of the study, however, provide a useful context to a discussion of the medium's apparent efforts to regulate its indecent programming.

Overall, nine out of 10 programs on both broadcast and cable television contained at least one indecent word or phrase, some of which were bleeped, and risqué language was spoken nearly once every five minutes in both contexts. *Id.* at 11. Moreover, cable viewers are by no means confronted by the likes of George Carlin's veritable string of expletives every time they tune in. In fact, cable programs bleep or obscure slightly more than 25 percent of all offensive words. *Id.* at 12. In addition, although viewers of broadcast programs were exposed to slightly less than 10 objectionable words per hour compared to 15 words per hour on cable programs, a more careful examination of the data reveals that cable networks may not be equally to blame for the disparate inclusion of indecent material. *Id.* at 1, 13. For example, when certain programming was excluded from the calculation, the percent of indecent words that aired during the relevant time period during cable, as opposed to broadcast, programs decreased from 61.1 percent to 52.4 percent. *Id.* Thus, while cable programs still contain more vulgarities than broadcast programs, the discrepancy is significantly less, with the frequency of utterances nearly equal between the two media, once particular programming is excluded. *Id.*

Notably, however, even these worst offenders are not so irreverent as to be ignorant of the strong need to regulate their indecent programming in light of considerations ranging from desires to satisfy large corporate owners and executives to concerns about challenging viewers' expectations to

the extent they are unwilling to watch any further, thereby threatening advertising revenue. *See* Jim Rutenberg, *'South Park' Takes Gross to New Frontier*, N.Y. Times, June 25, 2001, at C9, *available at* 2001 WLNR 3390516 (recounting the "long and hard" thought process Bill Hilary, executive vice president of Comedy Central, then jointly owned by media giants Time Warner Entertainment and Viacom, underwent before excepting from the company's general policy against uncensored cursing a "South Park" episode that included 162 uncensored utterances of "shit" in an attempt by the sometimes-vulgar series starring foul-mouthed cartoon children to question why certain words are taboo). Thus, far from embracing an anything-goes policy of indecent programming, the overwhelming majority of cable broadcasters, sensitive to internal and external market pressures, regulate themselves in a manner that produces indecency findings on par with those of government-regulated broadcasters, without the threat of onerous fines that turn accidental utterances into restraints on the ability to speak out on important matters.

C. Effective self-regulatory measures already in place in the broadcast industry indicate the mass medium, much like its print and cable counterparts, is capable of regulating itself in a manner that obviates the need for government oversight.

Fortunately, the Court does not have to speculate about broadcasters' self-regulatory efforts should it find the media are capable of policing themselves and thus should not be subject to gov-

ernment regulation. Indeed, broadcasters have provided insight into their standards for judging "what constitutes material suitable for broadcast" and demonstrate attempts to consistently act in accordance with those policies.[10] CBS/Broad. Group, Program Standards for the CBS Television Network, *in* Television As a Social Issue 132, 132 (Stuart Oskamp ed., 1988).

In one of the few copies of networks' Standards and Practices publicly available,[11] CBS declares its television programming "a guest in the home . . . intended to conform to generally accepted boundaries of public taste and decorum, ..." *Id.* at 133. As such, language in a broadcast must be "generally considered to be acceptable by a mass audience. Coarse or potentially offensive language is generally avoided and, if permitted for important dramatic reasons, cannot be employed flippantly or

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[10] The government cites the fact that the broadcast networks' own internal standards generally prohibit airing the language at issue in this case and that Fox edited it out of later broadcasts to argue that the networks' own recognition of the indecency of the material strongly supports the permissibility of the FCC's action. Pet'r's Br. 18, 28. Simply put, however, that is not the point. The fact that responsible broadcasters monitor themselves to ensure compliance with the policy does not change its inherently subjective nature and chilling effect on protected speech. Put another way, the fact that most people opt to not burn American flags and thus would not be subject to a statute criminalizing the protected activity does not mean the law is somehow constitutional.

[11] Most broadcasters consider their Standards & Practices, their internal guidelines for controlling broadcast content, to be proprietary materials that are applied in a highly secretive manner. Maria Matasar-Padilla, Note, *Music Lessons: What Adam Lambert Can Teach Us About Media Self-Regulation*, 29 Cardozo Arts & Ent. L.J. 113, 115–16 & n.16 (2011).

exploitatively." *Id.* at 134. Likewise, scenes or dialogue involving sexually oriented material must be necessary for plot or character development, presented with "good taste and sensitivity" and not "gratuitous or exploitative." *Id.* Moreover, certain degrees of nudity are acceptable if "consonant with prevailing societal standards, used for legitimate dramatic or historical purposes, and not perceived as exploiting the body for prurient interests." *Id.* Additionally, as the lower court noted, rather than trying to test the limit on what material is permitted, the networks have expressed a "good faith desire to comply with the FCC's indecency regime." *Fox*, 613 F.3d at 331.

A relatively recent incident demonstrates the application of these standards and provides strong evidence of broadcasters' ability to effectively regulate themselves in accordance with their guidelines. During a live evening broadcast of the November 2009 American Music Awards on ABC, Adam Lambert, runner-up in the 2009 season of the popular singing talent competition "American Idol," performed a sado-masochism themed act in which he moved about the stage alternately kissing a male band member, leading a dancer on a leash, fondling another dancer and shoving one male dancer's head into his crotch. Matasar-Padilla, *supra*, at 113–14. Lambert, who had openly acknowledged his homosexuality since "American Idol" aired, ended the performance by glaring into the camera and raising his middle finger. *Id.* Concerned that its audience would find the content troubling or offensive, ABC made an on-the-spot decision to cut away from its camera coverage of Lambert to an aerial shot of the audience when the performer unexpectedly simulated oral sex with a male dancer. *Id.* at 128. The

network also decided to edit the simulated sex act from the West Coast rebroadcast while leaving other sexually charged aspects of the performance intact. *Id.* Citing 1,500 complaints filed against the performance, ABC announced the following day it had canceled Lambert's upcoming appearance on the news program "Good Morning America." *Id.* at 129. The network also canceled his scheduled appearance on the late-night interview program "Jimmy Kimmel Live." *Id.* at 131. Moreover, ABC announced a new policy for vetting live performances, establishing a system by which negative financial repercussions would be created for performers who engaged in unexpectedly indecent or obscene behavior during a live broadcast. *Id.* at 136. Additionally, other broadcasters engaged in self-regulation in their coverage of the event. CBS, for example, blurred a still photograph of Lambert kissing a male band member. *Id.* at 131–32.

Effective self-policing of indecent programming across various spectrums of the mass media indicates that a lack of strict government regulation does not necessarily produce a wild, freewheeling broadcast system whereby children are exposed to profanities at every utterance. Rather, broadcasters are fully capable of policing themselves in a manner that serves the FCC's legitimate interest in protecting children while avoiding the constitutional threats that arise from government regulation of content.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below and take this opportunity to clarify that the indecency policy's news exemption, rather than saving the enforcement scheme from unconstitutionality, suffers from its same standardless manner of enforcement. The FCC assures news and public affairs broadcasters that it takes a hands-off approach to regulation of programming about matters of public interest and concern. Yet, the government conspicuously reaches its hand into the editing rooms of this nation's broadcasters each time it replaces their journalistic discretion with its own subjective belief about the quality of a program. And the effect of this interference with the internal affairs of broadcasters is a severe restraint on the ability to effectively report on vital issues of significant public interest that leaves viewers and listeners less than fully informed.

A strict and constitutionally suspect enforcement scheme is not the only means to serve the government's legitimate interest in shielding children from indecent programming. The print media and cable broadcasters have created an indecency regime whereby the protection of children does not come at the expense of First Amendment protections necessary to preserve "the free and robust debate of public issues" and foster "a meaningful dialogue of ideas." *Snyder*, 131 S. Ct. at 1211 (internal citation and quotation marks omitted). The long-standing policy of self-regulation in the broadcasting context indicates that the medium is no less capable than its counterparts of monitoring its own indecent programming in a manner that

ensures that broadcast content conforms to community standards.

As currently enforced, the FCC's indecency policy generally and news exemption specifically belie government assertions of its recognition that matters presented in news and public affairs programming are the very type of speech entitled to special protection. On the contrary, the commission exercises its authority to regulate indecency in news broadcasts with the same level of arbitrariness it applies to other kinds of programming — a restraint on the publication of matters at the core of the First Amendment's protections that this country cannot tolerate. As such, a finding that the enforcement scheme, at least as applied to news and public affairs programming, infringes the First Amendment's guarantee of a free press is required by the Court.

Respectfully submitted,

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APPENDIX A

Descriptions of *amici curiae*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. The Reporters Committee is an unincorporated association of reporters and editors with no parent corporation and no stock.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information websites and licensing and syndication. The company's portfolio of locally focused media properties includes: 10 TV stations (six ABC affiliates, three NBC affiliates and one independent); daily and community newspapers in 13 markets; and the Washington-based Scripps Media Center, home of the Scripps Howard News Service. Scripps has agreed to a stock purchase of four ABC affiliates and five Spanish language stations from McGraw Hill Companies, Inc., pending FCC approval. Scripps is a publicly traded company with no parent company. No individual stockholder owns more than 10 percent of its stock.

APPENDIX B

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