No. 07-582

IN THE

# Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

*Petitioners*,

—v.—

FOX TELEVISION STATIONS, INC., *et al.*,

*Respondents*.

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

## BRIEF *AMICUS CURIAE* OF MORALITY IN MEDIA, INC. IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICUS CURIAE*

Morality in Media, Inc. ("MIM") as *amicus curiae*,[1] files this brief in support of the Petitioner in this case, which is before this Honorable Court on the merits under the provisions of Rule 37.

MIM is a New York, non-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media.

MIM has an interest in this case because it is concerned with legal and law enforcement issues related to obscenity, child pornography, the broadcasting and other mass communication of indecent material. MIM recognizes this case to be a major precedent in regulating broadcast indecency.

*Amicus* is filing this brief in support of the Petitioner because we believe our brief contains relevant matter and alternative arguments that should be heard and may not be presented to the Court by the parties.

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[1] This Brief *Amicus Curiae* was authored in whole by Counsel of Record Robin S. Whitehead and Co-Counsel Robert W. Peters of Morality in Media, Inc. and no part of the brief was authored by any attorney for a party. No person or entity other than this *amicus* made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

## CONSENT TO FILE BRIEF

The written consents of the parties were requested and all parties have consented in writing to the filing of this brief.

## SUMMARY OF ARGUMENT

The lower court erred in finding that the FCC's policy regarding "fleeting expletives" was arbitrary and capricious under the Administrative Procedure Act. In the seminal case of *FCC v. Pacifica* this honorable court never stated that an "occasional expletive" could not be actionable, nor was it decided that only literal uses of expletives were actionable. *Amicus* argues that a nuisance rational provides a "middle road" between banning all expletives and allowing at least one in every broadcast program, regardless of circumstances. Lastly, *amicus* maintains that strict scrutiny analysis is not appropriate for regulations concerning the broadcast medium.

## ARGUMENT

### I. IN *PACIFICA*, THE SUPREME COURT DID NOT HOLD THAT AN 'OCCASIONAL EXPLETIVE' CAN NEVER BE ACTIONABLE

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) ("*Pacifica*"), this Honorable Court upheld a Federal Communications Commission determination that a 12 minute George Carlin monologue entitled "Filthy Words" was indecent as broadcast. The *Pacifica* Court emphasized the "narrowness of its holding,"[2] stating:

> This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction…[3]

Justice Powell also said in his concurring opinion that the holding:

> [D]id 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 her.[4]

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[2] *Id.* at 750.
[3] *Id.*
[4] *Id.* at 760-761 (Powell, J., concurring).

In emphasizing the narrowness of its holding, however, the *Pacifica* Court did not hold that a single expletive could never be actionable, since that issue was not before the Court. The Court did say that the FCC's decision "rested entirely on a nuisance rationale under which context is all important"[5] and that the "concept requires consideration of a host of variables."[6]

While the FCC chose to interpret *Pacifica* in the narrowest possible manner (and in good measure negating its responsibility for maintaining decency standards in broadcasting[7]), most broadcasters took a different view, as indicated by the following articles:

> When it was the 'Seven Dirty Words,' we knew what they were and we didn't say them," says Rick Cummings, president of Emmis's radio division, referring to the forbidden words made famous by the comedian George Carlin uttering them…[8]
>
> In 1978, the FCC ruled that piss and six other words were indecent and forbidden

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[5] *Id.* at 750.
[6] *Id.*
[7] *Fox Television Stations v. FCC*, 489 F.3d 444, at 449, n.4 (2d Cir. 2007)["At the time, the Commission interpreted *Pacifica* as involving a situation 'about as likely to occur again as Haley's Comet.' Brief of *Amici Curiae* Former FCC Officials at 6 (quoting FCC Chairman Charles D. Ferris, Speech to New England Broadcasting Assoc., Boston, Mass, July 21, 1978)"].
[8] Ann Marie Squeo, "Firing of 'Love Sponge' Signals Cleanup of Shock Radio," *Wall Street Journal*, Feb. 25, 2004, p. B1.

when children are likely among a broadcast station's audience.[9]

For the first time since the Supreme Court affirmed the ability of the FCC to regulate when so-called indecent material could be aired on radio…the FCC clarified what exactly what might be considered indecent material…Prior to this document, there was a common assumption in the radio biz that indecency primarily amounted to the "seven dirty words," and the best way to avoid a fine was to avoid or bleep these words…[10]

The [*Pacifica*] Court's concerns were also allayed by the narrowness of the FCC's "seven dirty words" rule. The majority argued that speakers could always find another vocabulary to express the same ideas. The broadcast industry took this statement as an invitation. The 1980s and '90s saw the proliferation of "shock jocks:" loud, crude (and highly popular) radio hosts - typified by Howard Stern - who frequently found ways to talk about sex without using the seven dirty words.[11]

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[9] Bill McConnell, "Seven provisionally dirty words? Damn!," *Broadcasting & Cable*, July 8, 2002.
[10] "FCC Crackdown on Indecency?," www.mediageek.net/index.php?paged=138, 6/21/01
[11] Jonathan Wallace, "Pervasive problem: The 1978 Supreme Court Decision Allowing Censorship of Dirty Words on Radio Threatens Free Speech in Cyberspace," *Reason Magazine*, Oct. 10, 1998.

## II. CHILDREN DO NOT NEED TO HEAR A CURSE WORD REPEATED OVER AND OVER IN ORDER TO ENLARGE THEIR VOCABULARY

In distinguishing *Cohen v. California,* 403 U.S. 15 (1971), the *Pacifica* Court observed, "Although Cohen's written message[12] might have been incomprehensible to a first grader, *Pacifica's* broadcast could have enlarged a child's vocabulary in an instant."[13]

A child does not need to hear a four-letter word repeated over and over again in order to enlarge his or her vocabulary.[14] That can happen in an instant. Nor does a child have to understand the meaning of a four-letter word for harm to result. All the child has to do is repeat the word. Nor does a child have to be exposed to "verbal shock treatment" for harm to result. To the contrary, as the excerpt from an article published in the *New York Daily News* indicates, children often think that four-letter words are exciting.

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[12] Cohen entered a courthouse wearing a jacket emblazoned with the words "F--k the Draft."

[13] *Pacifica,* 438 U.S. at 749.

[14] *See, e.g.*, "It's A Whabbit," Talaris Institute ("Sometime around 18 months, a big change occurs. Young children start to recognize familiar sounds and sound patterns quickly when they hear them, and they begin to piece these familiar sounds together like puzzle pieces to form new words. This helps children learn to say new words after hearing them only once or twice."), published at http://www.talaris.org/spotlight_wabbit.htm; *See also*, "What A Chatterbox," published at http://www.talaris.org/spotlight_wordspurt.htm.

Sarah was stunned when her then 4-year-old daughter, Abby, started swearing like Richard Pryor…Turns out Abby wasn't the only underage fan of the phrase. Her entire preschool class had picked it up. "One boy learned it last year and it went around," remembers Sarah, a 35 year-old teacher who lives in the upper West Side [of New York City]. Abby (all names have been changed to protect the not-so-innocent children) didn't know what she was saying, but 5 year-old Breanne certainly does. The kindergartner from Ridgewood, NJ, calls her older sister an "a-------" and makes an obscene gesture at her…Bad language is an epidemic. And one that's striking those at the tenderest age. These days, tots are almost as likely to swear as grownups. But while most adults know when to hold their tongues… kids may not. And whether they're 4 or 14, they risk sounding aggressive, obnoxious, crude and very, very rude…True enough, but why are little one's mouthing off? One reason is that it is exciting… Not only is it fun to swear, but most epithets are appealingly multi-purpose and can be inserted into every sentence…Youngsters also trash talk because it's so widespread in the media. Whether it's David Wells hurling an expletive after a bad pitch during the World Series, U2's Bono shouting the same one at the Golden Globes…indecent

phrases are on TV, videos, popular music and print.[15]

To their partial credit the broadcast TV networks have never aired programming as grossly vulgar as George Carlin's "Filthy Words" monologue. And yet, as the following surveys show, a large majority of parents are concerned about what their children hear on TV.

According to survey conducted in 2007,[16] 77% of parents said they were concerned that their children are exposed to too much "adult language" in the media that they use; and 32% of parents said that "inappropriate content" in TV was what concerned them "most" (in comparison, 21% said inappropriate content in the Internet was what concerned them "most").

According to a survey conducted in 2005,[17] 69% of parents were concerned that their children hear "adult language" on TV.

According to a survey conducted in 2002,[18] 90% of parents said "TV gets worse by the year in terms of bad language and adult themes."

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[15] Alev Aktar, "From the Mouths of Babes…Comes Forth a Stream of Foul Language. What's All the Gutter talk?" *N.Y. Daily News*, May 16, 2004; *See also*, Pat Burson, "What Did You Say?! Television, music and even parents are a big influence when children talk trash," *Newsday*, Apr. 16, 2008.

[16] "Parents, Children & Media," Kaiser Family Foundation, June 2007, pp. 24, 22.

[17] "Support for Tougher Indecency Measures, But Worries About Government Intrusiveness," Pew Research Center for People & Press, Apr. 19, 2005, pp. 12-13.

In 1993, more than 500 readers responded to a *N.Y. Daily News* survey[19] on the subject of TV violence. In response to the question, "Do you think language on prime time shows is damaging to your children," 69.6% said yes. In response to the question, "Have you noticed your children's language change after they watched a show," 54.8% said yes.

It would, of course, be helpful to have "scientific proof" showing both that children do learn "bad words" from listening to media in general and broadcasting in particular and that their use of these words can result in various harms to them and others. But it would be foolish and unethical to expose a group of children to an "isolated expletive" or to a barrage of expletives to determine whether or how such exposure affects them and others.

Furthermore, as the Supreme Court observed in *Paris Adult Theater I v. Slaton*,[20] the Constitution does "not demand of legislatures 'scientifically certain criteria of legislation.'" That scientific proof is lacking, however, does not mean there is no harm. Set forth below are excerpts from many articles showing the adverse effects of kids cursing or swearing in schools.

> Many of the students I've known won't sit down unless they are repeatedly asked to

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[18] Press Release, "Parents in New Survey Report Limited Success Teaching Their Kids 'Absolutely Essential' Values," Public Agenda, Oct. 2, 2002.
[19] "Feds Gotta Act Now," *N.Y. Daily News*, Dec. 12, 1993.
[20] 413 U.S. 49, at 61 (1973); *See also*, *Ginsberg v. New York*, 390 U.S. 629, at 641-643 (1968).

(maybe not even then), and they don't listen just because the teacher is speaking; even "good teachers" are occasionally drowned out by the din of 30 students simultaneously using language that would easily earn a movie an NC-17 rating.[21]

Reprimands didn't work. Neither did detentions or suspensions… In November, [educators and police officials] authorized police officers assigned to two of the city's public high schools to begin issuing tickets to students who hurl expletives. The fine: $103. The officers have issued about 60 tickets to students…There are already signs that the new approach may be working, some teachers and principals say. Fights have decreased, classrooms are calmer, and there is less cursing in the corridors.[22]

A young girl sits bleeding and hysterical in the school nurse's office after getting punched in the face by another kid… Students curse at each other and cut classes to wander in trash-strewn halls beneath falling down ceilings. These are scenes from some of the city's most troubled middle schools – all in Brooklyn… IS 91 "is one of the saddest schools we've ever seen," wrote…Vanessa Witenko after

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[21] Tom Moore, "Classroom Distinctions," *N.Y. Times*, Jan. 19, 2007.

[22] Abigail Sullivan Moore, "Say #!% and Pay $$$, Hartford Tells High School Students," *N.Y. Times*, Dec. 14, 2005.

a visit last spring…"The day of our visit, students cursed each other and belittled adults and one another," she wrote.[23]

Dan Horwich's English class is a bastion of clean language, where students read the classics and have weighty discussions free of invective and profanity. But when the bell rings and they walk out his door, the hallway vibrates with talk of a different sort. "The kids swear almost incessantly," said Horwich, who teaches at Guildford High School in Rockford, Ill. "They are so used to swearing and hearing it at home, and in the movies, and on TV, and in the music they listen to that they have become desensitized to it." In classrooms and hallways and on the playground, young people are using inappropriate language more frequently than ever, teachers and principals say. Not only is it coarsening the school climate and social discourse, they say, it is evidence of a decline in language skills. Popular culture has made ugly language acceptable and hip, and many teachers say they only expect things to get uglier.[24]

When Linda's son was just 10, she says he showed her a nasty e-mail written about

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[23] Elizabeth Hays, "'Saddest' Schools," *N.Y. Daily News*, Sept. 4, 2005.

[24] Valerie Strauss, "More and More, Kids Say the Foulest Things; Anti-Swearing Efforts Falling on Deaf Ears," *Washington Post*, Apr. 12, 2005.

him that was laced with expletives and sent to his classmates behind his back. She says her son told her…it had been written by his 10-year-old best friend. The nasty e-mail had been triggered by an argument the two had at school…"My son was upset by it."[25]

New York public high school teachers are taking it from all sides. They deal with pot-smoking, curse-spewing kids who disrupt their classes…Most of the kids I teach…are cooperative and want to learn. But…I've found that there are always two or three bad apples. They're the ones who talk, curse…This morning, I saw an ex-student in the halls. Whenever I pass this 14-year-old she mutters "b----" under her breath…I tried calling a student's home today, because of behavioral problems. She is a 15-year old who called me a f------ b---- and tells me I cannot "f------ tell her what to do."[26]

Some folks think salty language adds flavor to the way we communicate…But many others agree with Pamela Boyd, calling it part of the dumbing down of America. "The f-word and the s-word are just huge on the playground," says Boyd, 52, who teaches fifth and sixth graders in Tumwater, Wash.

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[25] Julie Janovsky, "When Kids Turn Cyber Bullies," *N.Y. Newsday*, Apr. 1, 2004.

[26] Anonymous, "Bell to Bell: A Day In a Teacher's Life, *N.Y. Post*, Apr. 13, 2000.

> Recently, she heard a social worker use the s-word on a cable TV news show. And she recalls hearing the word used on a prime-time TV show, CBS' *Chicago Hope*, and treated by reviewers "as if it were a breakthrough. Movies and TV keep pushing the envelope and calling it progress. It becomes much harder to draw the line in schools."[27]
>
> Today the halls of the nation's schools echo with language that would stand a sailor's hair on end. Teachers and principals say kids are cursing more often than they used to…In a recent poll of high school principals, 89% said they face profane language and provocative insults towards teachers and other students on a regular basis. Educators say that cursing shows students' lack of respect for themselves and others…Bill Carruthers, a ninth grade teacher at Hurst (Texas) Junior High School, says if he hears students cursing casually in the hallway, he tells them its inappropriate language … Carruthers blames the cursing problem on TV. "Students hear the language on TV and at the movies, and they get the impression its acceptable anywhere." He also thinks cursing is a sign of laziness.[28]

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[27] Karen S. Peterson, "SAY WHAT? Pervasive Profanity Has Turned Self-Expression to $#@*!," *USA Today*, Mar. 21, 2000.
[28] Nanci Hellmich, "Today's Schools Cursed by An Increase in Swearing," *USA Today*, May 20, 1997.

> Out of the mouth of babes comes Marine-barracks language. Loud and crude, it can be heard in school hallways…American school children have never been more foul-mouthed – or so it seems to many parents and educators who are privy to the trash talk that often passes as childish chatter…Other kids are so inured to cursing that they seem baffled that some find it offensive…But profanity can still be potent, even for those who use it casually. In schools, "language is the first symptom of conflict—the small stuff escalates," says Ronald D. Stephens, executive director of the National School Safety Center…When center officials interviewed 4th-through-12th-graders around the nation during a two year study, students mentioned name calling, cursing or staring…as the most common triggers for violence, he says. [29]
>
> …Adds [name omitted here], "Guys come up to me and say right to my face, 'Girl, you got some big (ones)'"…These young women aren't talking about construction workers on the street, but their classmates at [school name omitted] in Alexandria, VA, where I teach English…One senior girl told me that the most vulgar comments she has heard directed towards girls came from white boys at a small, private Episcopal school she used to attend…Legal considerations aside, the major question is

[29] Ellen Graham, "Language of Childhood: No Expletives Deleted," *Wall Street Journal*, July 17, 1995.

how schools can help bring about more civil and respectful relationships in a generation of boys and girls who have been constantly exposed to gross-out sitcoms, radio DJs, music lyrics.[30]

Day after day, 7-year-old [name omitted here] complained to her mother about the teasing, foul language and even lewd behavior of boys on the school bus…[Name omitted] may be the youngest student ever to have a federal sexual harassment complaint filed on her behalf against another student…The school denies any wrongdoing. "We teach kids from kindergarten on you should not be abusive in your language…," Superintendent Jerry McCoy says. Children, influenced by TV and videos, are using saltier language at a younger age than a few years ago, said child psychologist Susan Erbaugh, director of children's services at Minneapolis Children's Medical Center. [Name omitted], a second grader, told of children on her bus using four-letter words…Another time, she said a boy stared at two first-grade girls and made lewd comments about their sex organs.[31]

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[30] Patrick Welsh, "Students Find Sexual Harassment A Way of Life," *USA Today*, Jan. 6, 1999.

[31] "Harassment Suit Accuses Boys on School Bus," *Associated Press*, Oct. 21, 1992.

## III. IN *PACIFICA,* NEITHER THIS COURT NOR THE FCC DETERMINED THAT ONLY LITERAL USES OF EXPLETIVES WERE ACTIONABLE

On October 3, 2003, the FCC's Enforcement Bureau released an Order[32] denying 234 complaints regarding the live broadcast of the Golden Globe Awards. The complainants said that during the program the performer Bono uttered the phrase, "this is really, really, fucking brilliant" or "this is fucking great."[33] In its Order, the Bureau stated:

> As a threshold matter, the material aired during the Golden Globe Awards program *does not describe or depict sexual or excretory activities and organs*. The word "fucking" may be crude and offensive, but, in the context presented here, *did not describe sexual or excretory organs or activiti*es. Rather, the performer used the word "fucking" as an adjective or expletive to emphasize an exclamation. Indeed, in similar circumstances, we have found that offensive language used as an insult rather than as a description of sexual or excretory activity or organs is *not within the scope of* the Commission's prohibition of indecent program content.[34] [Emphasis added by *Amicus*]

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[32] In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 FCC Rcd. 19859.

[33] *Id.*

[34] *Id.* at 19861.

It is one thing for the Commission to determine that *how* an expletive is used (as an adjective, expletive, insult or description) is a variable in determining whether content is indecent. It is quite another for the Commission to determine that a vulgar term for sexual or excretory activities or organs, when used as an "adjective" (as in, "That c---k s----r is the best in the business") or as an "expletive to emphasize an exclamation" (as in, "Holy s--t, I won!") or as an "insult" (as in, "You mother f---- r"), is per se not indecent. The latter determination is not only a departure from *Pacifica,* it is also a departure from common sense.

Nowhere did the FCC or the *Pacifica* Court say or hold that the seven "dirty words" were actionable only when Carlin meant to use them literally (as in, "Did you see those kids f-----g in the car seat?"). In fact, one of Carlin's uses of the s-word was quite similar to Bono's use of the f-word in the Golden Globe program. At one point during his monologue, Carlin stated, "S--t, I won the Grammy, man, for the comedy album."[35] As *Broadcasting & Cable* also observed in an editorial,[36] "But hasn't George Carlin's M-word always been an epithet rather than an accusation of incest?" Rather than focusing on whether Carlin used the words figuratively or literally, both the Commission and the Court looked to the plain meaning of the words.

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[35] *Id.* at 752.

[36] "Curioser and Curioser," July 8, 2002.

In its Declaratory Order,[37] the Commission noted that the monologue consisted of a:

> comedy routine, frequently interrupted by laughter from the audience, and that it was almost always totally devoted to the use of words as "shit" and "fuck," as well as "cocksucker," "motherfucker," "piss," and "cunt"…Thereafter, there is repeated use of the words "shit" and "fuck" in a manner designed to draw laughter from his audience.[38]

> ….the Commission concludes that words such as "fuck," "shit," "piss," "motherfucker," "cocksucker," "cunt," and "tit" *depict* sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly "indecent."[39] [Emphasis supplied by *Amicus*]

In describing the Commission's action, the *Pacifica* Court said:

> The Commission identified several words that *referred to* excretory or sexual activities or organs, stated that the repetitive, deliberate use of those words in

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[37] Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), New York, NY, 56 FCC2d 94, Released Feb. 21, 1975.
[38] *Id.* at 95.
[39] *Id.* at 99.

> an afternoon broadcast when children are in the audience was patently offensive, and held that the broadcast was indecent.[40] [Emphasis supplied by *Amicus*]

In rejecting the contention that "prurient appeal is an essential component of indecent language,"[41] the *Pacifica* Court said:

> Similarly, regardless of whether the *"4-letter words"* and sexual description set forth in "Lady Chatterly's Lover"…made the book obscene for mailing purposes, *the utterance of such words* or the depiction of sexual activity on radio or TV would raise similar public interest and Section 1464 questions.'"[42] [Emphasis supplied by *Amicus*]

In rejecting the contention that the indecency definition was overbroad, *Pacifica* said:

> The Commission's definition of indecency will deter only the broadcasting of patently offensive *references to* excretory and sexual organs and activities."[43] [Emphasis supplied by *Amicus*]

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[40] *Pacifica*, 438 U.S. at 739.
[41] *Id.* at 741.
[42] *Id.* at 741, n.16.
[43] *Id.* at 743.

## IV. NUISANCE RATIONALE PROVIDES A 'MIDDLE ROAD' BETWEEN BANNING ALL EXPLETIVES AND ALLOWING AT LEAST ONE IN EVERY BROADCAST PROGRAM, REGARDLESS OF CIRCUMSTANCES

It ought to go without saying that when Congress enacted the Radio Act of 1927, it did not intend to give broadcasters a right to use the public airwaves to curse or swear at least once in every program. That Act included a provision making it unlawful to "utter *any* obscene, indecent, or profane language by means of radio communications." [Emphasis supplied by *Amicus*]

Presumably, had persons of influence thought Congress exceeded its authority when it prohibited *any* indecent language in the Radio Act of 1927 they would have challenged the prohibition in the courts. Presumably, they would also have gone to court in 1934 when Congress adopted the 1934 Communications Act, which included this provision: "No person within the jurisdiction of the United States shall utter *any* obscene, indecent, or profane language by means of radio communication." And again in 1948, when Congress enacted 18 U.S.C. 1464 which then read: "Whoever utters *any* obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."

Perhaps it would be unwise at this late date to attempt to roll back the clock to 1927 or 1934 or 1948 and to insist that when Congress said *any* obscene, indecent or profane language, it meant what it said.

*Amicus* would also contend, however, that it would be just as unwise, if not more so, for this Honorable Court to now determine that broadcasters have a constitutional right to utter a single or "occasional" expletive, regardless of circumstances.

It doesn't take much imagination to think what will happen if this Court holds that the First Amendment gives broadcasters a constitutional right to curse or swear at least once in every program, regardless of circumstances.

Instead of it being Ed McMahon beginning the Tonight Show with, "Here's Johnny," it will be someone saying, "Here's your favorite c--k s----r." Instead of it being Red Skelton signing off with, "Good night and God bless," it will be someone signing off with, "Good night and go f--k someone or yourself." And that's just the program beginnings and endings.

The Court below was of the opinion that the Commission's warning about what broadcaster's would do if this Court were to hold that they had a right to curse or swear at least once in each program was "divorced from reality."[44] But many TV broadcasters think they must compete with cable TV to succeed;[45] and when it comes to profanity, just

[44] *Fox Television Stations v. FCC*, 489 F.3d 444, at 460 (2d Cir. 2007).

[45] *See, e.g.*, Barbara S. Kaye & Barry S. Saplosky, "Offensive Language in Prime-Time TV: Four Years After Television Age & Content Ratings," *Journal of Broadcasting & Electronic Media,* Dec. 2004 ["The fierce competition between cable and broadcast programs is also a contributing factor…Broadcast executives feel that bowing to network censors and advertisers

about anything goes on cable.[46] And it isn't just TV broadcasters; it is also radio broadcasters who air "shock jocks." Furthermore, since broadcasters often refuse to delay live programming, they will have no control over what some "celebrity" will say in an entertainment, "news" or sports program.

Following passage of the Telecommunications Act of 1996, which prescribed procedures for establishment of a TV rating system and for inclusion of the V-Chip in new TV sets, your *Amicus* submitted comments to the FCC in response to a Public Notice.[47] *Amicus* stated in part: "While Morality in Media supports an acceptable rating system, it also believes the 'V-Chip' will be a 'Trojan Horse' if it becomes another excuse to shift responsibility off the purveyors of objectionable programming onto parents."

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puts their programs at a disadvantage to cable fare that is not subject to the same content restrictions (Armstrong, 2001; Farhi, 2002; Van Munching, 2001)"].

[46] *See, e.g.*, Ann Oldenburg, "Cussing on 'Deadwood' Sets Tongues A-Wagging," *USA Today*, May 2, 2004 ("On Sunday's show, there were at least 63 mentions of the f-word in the hour."); Kristen Fyfe, "South Park Filth Fest," Culture & Media Institute, June 15, 2007 ("*South Park,* one of the signature shows on Viacom's Comedy Central network, is trumpeting this weekend's broadcast of its "Dirty Dozen"…No, *South Park's* "Dirty Dozen" is proudly promoted as the 'twelve most foul-mouthed, filthiest and sexually offensive episodes ever.' These episodes include one in which the s-word was used 162 times…").

[47] Public Notice, *Commission Seeks Comment on Industry Proposal for Rating Video Programming*, CS Docket No. 97-55, FCC 97-34, Report No. CS 97-6 (Feb. 7, 1997).

According to one study that examined "the types and amounts of offensive language on prime-time TV four years after age and content restrictions were implemented:"

> The broadcast industry claims that the content- and aged-based ratings systems adequately alert viewers to offensive content. This study supports assertions that the warning systems give further license to broadcasters to include more profane television dialogue. The rate per hour of curse words jumped by 51% to about one such word every 8 minutes in prime time. Offensive language on prime-time television declined in 1997, but in the 4 years between 1997, when the age- and content-based alerts were first implemented, and 2001, each category of swearing increased. Mild-other words grew in frequency by 44% and excretory words spiked 547%.[48]

According to a study conducted by Parents Television Council:

> Foul language during the Family Hour increased by 94.8% between 1998 and 2002 and by 109.1% during the 9:00 p.m. ET/PT time slot. Ironically, the smallest increase (38.7%) occurred during the last hour of

[48] Barbara S. Kaye & Barry S. Saplosky, "Offensive Language in Prime-Time TV: Four Years After Television Age & Content Ratings," *Journal of Broadcasting & Electronic Media,* Dec. 2004

> prime time – the hour when young children are least likely to be in the viewing audience.[49]

Whatever the strength or weaknesses of arguments for prohibiting all obscene, indecent or profane words or for allowing at least one obscene, indecent or profane word in each broadcast program, there is a middle road between the two extremes – namely, when utterance of such language amounts to a nuisance, it can be prohibited in broadcasting. Factors to consider in determining whether of a single expletive constitutes a nuisance include:

1. Time of day (e.g., the so-called "family hour")
2. Nature of the audience (e.g., large numbers of kids likely to be watching)
3. Nature or character of the person uttering the expletive (celebrity, hero, etc.)
4. Nature of the expletive (some words are more offensive than others)
5. How the word is used (whether used literally or figuratively)
6. Nature of the program (e.g., having serious political, literary, artistic or scientific content as opposed to banal entertainment)
7. Whether use of the expletive itself is "justified" by its serious journalistic,

[49] Executive Summary, "The Blue Tube: Foul Language on Prime-Time Network TV," *Parents Television Council*, Sept. 15, 2003, p.5.

artistic, literary, or political value (e.g., as in "Saving Private Ryan")

8. Whether the program is live or recorded (problem of unforeseen utterances)

Since the *Pacifica* Court has stated that the regulation of indecency is so closely tied to that of nuisance law,[50] *amicus* maintains that a single act of indecency can be found to constitute a nuisance. In *Michigan v. Bennis*, 527 N.W.2d 483 (Mich. 1994), *aff'd.*, *Bennis v. Michigan*, 516 U.S. 442 (1996), the defendant was arrested for gross indecency after police officers approached his parked car, shined a flashlight into the front seat, and witnessed a known prostitute performing an act of fellatio on him. After defendant was convicted, the prosecutor filed a complaint alleging that defendant's vehicle was a public nuisance subject to abatement.

The Michigan Court of Appeals reversed the decision of the trial court, holding that the prosecution had an obligation to demonstrate that defendant's wife knew that he used the vehicle in a manner proscribed by the statute and that proof of a single incident of lewdness, assignation, or prostitution is insufficient to establish a nuisance.

In reversing the Court of Appeals, the Michigan Supreme Court held that the language of the Michigan nuisance statute obviates the requirement of an owner's knowledge of the proscribed activity[51] and that the nuisance abatement statute allows the abatement of a vehicle

[50] *Pacifica*, 438 U.S. at 750-51.

[51] 527 N.W.2d at 493-495.

where the driver contributed to an existing condition (i.e., prostitution) that is a public nuisance.[52]

One of the issues in *Bennis* was what amount of activity was necessary to prove the existence of a nuisance since the statute did not indicate the amount of activity necessary to prove the existence of a nuisance.[53] Looking to Michigan precedent,[54] the State Supreme Court held that the nuisance statute "does not specifically require more than a single incident of conduct."[55]

*Bennis* illustrates that a single act can constitute a nuisance and also provides authority for the proposition that when a single act is part of a larger problem, a single act can constitute a nuisance.

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[52] *Id.* at 491.

[53] *Michigan v. Bennis*, 527 N.W.2d at 489.

[54] *Id.* at 490. "This Court has declared a public nuisance where an act 'offends public decency.' *Bloss v Paris Twp*, 157 N.W.2d 260 (1968) (The *Bloss* Court upheld an injunction of the operation of an outdoor theater showing explicit movies where neighborhood children could view the films from outside the drive-in. The Court held: 'It is our judgment that the foisting off of a display of pictures not fit for children to see onto places within their view on public streets, on residential properties and in private homes, without the consent of the property owners and the parents, is a public nuisance.')…In *Garfield Twp v Young*, 82 N.W.2d 876 (1957), the Michigan Supreme Court held that to constitute a nuisance the activity must be harmful to the public health, or create an interference in the use of a way of travel, or affect public morals, or prevent the public from the peaceful use of their land and the public streets. The rationale is that a nuisance involves a continuing detrimental effect on the public. The nuisance abatement statute serves the same general purpose.

[55] *Id.* at 489.

## V. 'STRICT SCRUTINY' IS NOT THE APPROPRIATE STANDARD FOR REVIEW OF BROADCAST REGULATION

In *FCC v. League of Women Voters*, 468 U.S. 364, at 374-376 (1984), the Supreme Court had this to say about the appropriate standard of review for broadcast regulation:

> We begin by considering the appropriate standard of review. The District Court acknowledged that our decisions have generally applied a different First Amendment standard for broadcast regulation than in other areas, but after finding that no special characteristic of the broadcast media justified application of a less stringent standard in this case, it held that § 399 could survive constitutional scrutiny only if it served a "compelling" governmental interest…At first glance, of course, it would appear that the District Court applied the correct standard…But, as the Government correctly notes, because broadcast regulation involves unique considerations, our cases have not followed precisely the same approach that we have applied to other media and have never gone so far as to demand that such regulations serve "compelling" governmental interests.

Another Supreme Court precedent, *Columbia Broadcasting v. Democratic National Committee*, 412 U.S. 94 (1973), is also applicable here. Quoting *Red Lion*, the *Columbia Broadcasting* Court said, "it is

idle to posit an unabridgeable first amendment right to broadcast comparable to the right of every individual to speak, write or publish."[56]

In *Pacifica*, this court also said:

> We have long recognized that each medium of expression presents special First Amendment problems…And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection…The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans… Second, broadcasting is uniquely accessible to children, even those too young to read.[57]

In the case below, however, the Court of Appeals stated that it is "increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children"[58] and that the TV networks "rightly rest their constitutional arguments in part"[59] on *United States v. Playboy Entertainment Group*,[60] where the court applied "strict scrutiny" to a federal law that would have required cable TV operators to either completely scramble the signals for pay porn channels or to air

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[56] *Columbia Broadcasting*, 412 U.S. at 101.
[57] *Pacifica*, 438 U.S. at 748-749.
[58] *Fox Television Stations v. FCC*, 489 F.3d at 465.
[59] *Id.*
[60] 529 U.S. 803 (2000).

the imperfectly scrambled signals only from 10 p.m. to 6 a.m.

In the first place, when Congress enacted the Radio Act of 1927 and made it unlawful to "utter *any* obscene, indecent, or profane language by means of radio communications," it could not have been said that radio "had established a uniquely pervasive presence in the lives of all Americans."[61] By 1930, only 40% of all U.S. households had purchased radio receivers.[62]

In the second place, *Amicus* would contend that in 1978 it was not broadcasting's "uniqueness" per se that justified special treatment but rather the fact that by 1978 broadcasting had in fact become pervasive, unlike any other form of media. By 1978, televisions were in almost every home and radios were in almost every home, car and truck. Portable radios could also be taken almost anywhere. The average citizen also willingly spent far more time in front of a TV or near a radio than they did reading a daily newspaper, and unwilling listeners were often also exposed to broadcasts. Broadcasting was also accessible to children too young to read.

In the third place, today, unlike cable[63] and satellite[64] TV systems, broadcast TV signals reach

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[61] *Pacifica*, 438 U.S. at 748.

[62] Steve Craig, "How America Adopted Radio: Demographic Differences in Set Ownership…in 1930-1950 U.S. Censuses." *Jrnl. of Broadcasting & Electronic Media,* Vol. 48, No. 2, 2004.

[63] *See, e.g.*, "Satellite TV Gains on Cable," www.consumeraffairs.com, Aug. 16, 2006 ("58% of households subscribe only to cable").

into almost 99% of homes and the audience for broadcast radio is vastly larger than for satellite radio.[65] Thus broadcasting still does have a "uniquely pervasive"[66] presence in the lives of all Americans. Furthermore, while terrestrial broadcasting must now compete with cable, satellite, and the internet, if anything, broadcast *programming* is even more pervasive because it is carried on all cable and satellite TV systems[67] and to a growing extent, on the internet.

Furthermore, the concerns that justified regulation of broadcasting in the first place – namely, protecting the privacy of the home and children – were made even more pressing by the proliferation of new forms of electronic media, which also reach into the home and are accessible to children. The advent of cable TV, satellite TV and radio, the Internet, and wireless, not to mention videotapes, DVDs and videogames, has made a parent's job tougher, not easier.[68]

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[64] *Id.* ("29% of U.S. households subscribe to satellite service alone").

[65] *See, e.g.*, "State of the News Media 2008: Radio Audience," Project for Excellence in Journalism, published at http://www.stateofthenewsmedia.org/2008/radio

[66] *Pacifica*, 438 U.S. at 748.

[67] Over the air broadcasting had its limitations, including susceptibility to atmospheric and electrical interference and inability to reach remote regions.

[68] *See, e.g.*, "Navigating the Children's Media Landscape: A Parent's and Caregiver's Guide," By American Institutes for Research, Prepared for Cable in the Classroom and National PTA, Apr. 4, 2004.

According to a survey conducted in 2007 by Kaiser Family Foundation, "two-thirds (65%) of parents say they are 'very' concerned that children are exposed to too much inappropriate content in the media and a similar proportion (66%) favor government regulations to limit TV content during the early evening hours."[69]

In the instant case, the Court of Appeals also stated that "blocking technologies such as the V-chip have empowered viewers to make their own choices about what they do, and do not, want to see on television."[70] The V-chip, however, doesn't block particular words or programs; it blocks all programs with a particular rating; and if a parent wants to use the V-chip to block a particular program, that parent must also block all other programming with the same rating, including programming that may not be objectionable to the parent.[71] How a program is rated also depends on the integrity and good sense (or lack thereof) of the producer who created it or the network that broadcasts it; and many programs are not properly rated.[72] The V-chip also does not block sponsor advertisements or program promos or news and sports programs;[73] and many TVs (older TVs and

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[69] "Parents, Children & Media," June 2007.
[70] *Fox Television Stations*, 489 F.3d at 465.
[71] Perhaps this helps explain why only 16% of parents say they have "ever used" the V-Chip to block specific TV content. *See*, "Parents, Children & Media," June 2007, p.10.
[72] *See, e.g.*, Executive Summary, "The Ratings Sham II," www.parentstv.org (2007).
[73] CRS Report for Congress, "V-Chip & TV Ratings: Monitoring Children's Access to TV Programming," Congressional Research Service, Updated, May 2, 2005, CRS-3.

those with screens under 13") are not equipped with a V-chip; and radios do not come with V-chips.

In the case below, the Court of Appeals also pointed out that "'cable systems have the capacity to block unwanted channels on a household-by-household basis.'"[74] While cable systems do permit subscribers to block channels, most of these channels come as part of basic channel packages that subscribers have no choice putting together; and with so many channels now offered on cable and satellite TV systems,[75] it is unrealistic to expect parents to know in advance[76] which channels now or in the future may air indecent content. There is also a possible drawback when parents block an entire channel to shield children from some of its programming. Other worthwhile programming may also be blocked. Imagine, for example, blocking all major broadcast TV network channels because some programs contain indecent language.

It is also unrealistic to put the whole burden on parents. For a variety of reasons, many parents will not use the V-Chip or other technology intelligently or at all. Those reasons include: difficulty using the technology; parental concerns

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[74] *Fox Television Stations*, 489 F.3d at 466.

[75] Nielsen Media Research, "Average U.S. Home Now Receives 104.2 TV Channels," Mar. 19, 2007.

[76] *Pacifica*, 438 U.S. at 748-749 ("Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected … content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.").

about over-blocking; parental language barriers; parental disabilities; parental fear of negatively affecting their relationship with a child; parental naiveté (as in, "My child wouldn't be interested in that"); and neglect.

*Amicus* would also respectfully contend that *United States v. Playboy*[77] was wrongly decided for several reasons. First, the *Playboy* Court held in effect that when it comes to cable TV, "the First Amendment rights of an intruder" "plainly outweighs" "the individual's right to be left alone."[78] And in the *Playboy* case, the Petitioner was a most unwelcome intruder. In homes all across the nation, the imperfectly scrambled signals for pornographic films were bleeding into the homes of non-subscribers. Under the law, either the home is a special place or it isn't; and if is special, an intruding pig is still an intruding pig regardless of whether it travels by air or wire.

Second, the *Playboy* Court held in effect that when it comes to cable TV, it is alright to expose children to pornography as long as caring parents can plug up the smut after exposure. Petitioner in the *Playboy* case did not establish and could not have established that parents were and would always be made aware of a bleeding problem, before their children discovered it. In so holding, the *Playboy* Court ignored a principle enunciated in *Ginsberg v. New York*:

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[77] 529 U.S. 803 (2000).

[78] *Pacifica*, 438 U.S. at 748.

> First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society…The legislature could properly conclude that parents…are entitled to the support of laws designed to aid discharge of that responsibility.[79]

Third, the *Playboy* Court held in effect that when it comes to cable TV, it is alright to expose children to pornography as long as parents have a means by which they can plug up the smut, either before or after exposure, even if many don't make use of that means for one reason or another.[80] Petitioner did not establish and could not have established that all parents would become aware of a bleeding problem and block channels when they became aware. In do so doing, the *Playboy* Court ignored yet another principle enunciated in *Ginsberg v. New York*:

> The State also has an independent interest in the well-being of its youth…"While the supervision of children's reading habits may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify

[79] 390 U.S. 629, at 639 (1968).

[80] Those reasons include language barriers, inability to read, disability, naive and neglect.

> reasonable regulation of the sale of material to them."[81]

Fourth, by applying "strict scrutiny" to a needed law that was intended to restrict children's access to content that is not constitutionally protected for children, because the law incidentally burdened adult access**,** the *Playboy* Court also turned a deaf ear to the warning enunciated in *Columbia Broadcasting System v. Democratic National Committee*:

> Thus, in evaluating the First Amendment claims of respondents, we must afford great weight to the decisions of Congress… Professor Chafee aptly observed: "Once we get away from the bare words of the Amendment, we must construe it as part of a Constitution which creates a government for the purpose of performing several very important tasks. The [First] Amendment should be interpreted so as to not cripple the regular work of government."[82]

There are at least two problems with the application of the "strict scrutiny" standard in the *Playboy* case. First, it is disingenuous for the Supreme Court to say that obscene content is unprotected speech for minors[83] and that the

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[81] 390 U.S. at 640 (quoting *People v. Kahan*, 206 N.E.2d 333, 334 (N.Y. 1965)).

[82] 412 U.S. 94, at 102-103 (1947).

[83] *Ginsberg*, 390 U.S. at 636–37 ("It is enough for the purposes of this case that we inquire whether it was constitutionally impermissible for New York . . . to accord minors under 17 a

government has a compelling interest in protecting children against such content[84] and then to say that "[i]t is rare that a regulation restricting speech because of its content will ever be permissible."[85]

The word "compel," as defined in *Webster's New Collegiate Dictionary,*[86] means: "1 to drive or urge forcefully or irresistibly 2 to cause to do or occur by overwhelming pressure." If a governmental interest is truly "compelling," then other interests (including those grounded in the First Amendment) must yield, at least to some extent. But judging from the *Playboy* decision, rarely will a law intended to protect children from harmful content withstand scrutiny, if the law in any way burdens adult access.

Second, there is or certainly ought to be a difference between a law that is intended to ban or restrict adult access to content that is presumptively protected for adults,[87] and a law that only incidentally burdens adult access to such speech when the law's primary intention is to shield

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more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see. We conclude that we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors.").

[84] *Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.")

[85] *Playboy,* 529 U.S. at 818.

[86] WEBSTER'S NEW COLLEGIATE DICTIONARY, 227, (1981).

[87] *See, e.g., Boos v. Barry*, 485 U.S. 312 (1988) (applying strict scrutiny and holding unconstitutional a statute limiting political speech in front of embassies).

children from content that is harmful to children and to which their access is not protected. For the latter type of law, the appropriate level of scrutiny should be intermediate scrutiny.

*Amicus* would point out that federal courts did not apply "strict scrutiny" when evaluating the constitutionality of laws that restrict the display of harmful to minors material in retail stores. As the Eleventh Circuit put it in *American Booksellers v. Webb*:[88]

> We are content to note that (1) content-based restrictions on speech survive constitutional scrutiny only under extraordinary circumstances; but (2) material judged "obscene" under the appropriate constitutional standard is not protected by the First Amendment; (3) indirect burdens placed on protected speech in an effort to regulate obscenity must be supported by important state interests and should not be unnecessarily burdensome; and (4) the state's interest in protecting its youth justifies a limited burden on free expression.

*Amicus* would also point out that as a result of the *Playboy* decision there are still no enforceable federal or state laws that require persons who commercially distribute pornography on the Internet

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[88] 919 F.2d 1493, 1500-1501 (11th Cir. 1990), *cert. denied*, 500 U.S. 942 (1991).

to take reasonable steps to restrict children's access to the material.[89]

## VI. THE FCC'S INDECENCY ENFORCEMENT SCHEME DOES NOT THREATEN THE FIRST AMENDMENT

Whether a majority of Justices agreed with him or not, Justice Stevens got it right when he wrote in the plurality opinion in *Pacifica*:

> A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by use of less offensive language.[90]

As this Court has pointed out on more than one occasion, the purpose of the First Amendment is to protect "ideas," not vulgar or lewd descriptions or depictions of sexual or excretory activities or organs. As the Court stated in *Miller v. California*:

> The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and

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[89] *See generally*, Robert Peters, "It Will Take More than Parental Use of Filtering Software to Protect Children from Internet Pornography," 31 *N.Y.U. Rev. L. & Soc. Change* 829 (2007).
(The article argues that while laws alone can protect children from Internet pornography, laws will be necessary and that the courts should apply intermediate rather than strict scrutiny to the Child Online Protection Act).

[90] 438 U.S. at 743, n.18.

> political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a "misuse of the great guarantees of free speech and free press…" *Breard v. Alexander*, 341 U.S. at 645…"The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people," *Roth v. United States, supra*, at 484 (emphasis added)….[91]

As the Court also pointed out in *Bethel School District v. Fraser*:[92]

> In our Nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate. The Manual of Parliamentary Practice, drafted by Thomas Jefferson and adopted by the House of Representatives to govern the proceedings in that body…likewise provides that "[no] person is to use indecent language against the proceedings of the House"…The Rules of Debate applicable in the Senate likewise provide that a Senator may be called to order…Senators have been censured for

[91] 413 U.S. 15, at 34-35 (1973).
[92] 478 U.S. 675, at 681-682 (1986).

> abusive language directed at other Senators… Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?

To their credit, most mainstream daily newspapers still have rules against use of "four-letter" words. Either they do not print these words at all or they use symbols like, @#%, to represent the words or they skip letters, as in "s--t." And on the whole, our nation's daily newspapers do a far better job of keeping the pubic informed about matters of public importance than anything found on broadcast TV these days, with the possible exception of PBS.

Television and radio also have a technique for allowing their audience to understand that someone has used a four-letter word, without actually repeating it. It's called "bleeping," and in most instances "bleeping" is a satisfactory way to handle cursing in the broadcast media. As a result of federal court decisions in the 1980s and 1990s, broadcasters also have another means by which they can handle cursing or swearing – namely, airing the programming after 10 p.m.

Furthermore, just because the FCC insists that it must have authority to sanction use of single expletive, depending on circumstances, doesn't mean it intends to sanction every expletive. The Commission also considers "serious value" an important factor in determining whether content is

"indecent." The Court below criticized this policy,[93] but the indecency definition, like the obscenity definition, is an attempt to find a balance between governmental interests (e.g., protecting the privacy of the home and children) and freedom of speech. In cases where content has the power both to offend and to inform, society may at times choose to tilt the balance in favor of informing (freedom of speech), even though harm can still result.

## CONCLUSION

For all of the above reasons, your *Amicus* prays that this Honorable Court reverse the judgment of the court below and declare that the FCC's policy regarding "fleeting expletives" is not arbitrary and capricious under the Administrative Procedure Act.

Respectfully submitted,

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[93] *Fox Television Stations*, 489 F.3d at 458-459.