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 THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION, AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, DIRECTORS GUILD OF AMERICA, FIRST AMENDMENT PROJECT, MINNESOTA PUBLIC RADIO/AMERICAN PUBLIC MEDIA, NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE, NATIONAL COALITION AGAINST CENSORSHIP, NATIONAL FEDERATION OF COMMUNITY BROADCASTERS, PEN AMERICAN CENTER, AND WASHINGTON AREA LAWYERS FOR THE ARTS IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI*[1]

Amici are a diverse group of media, arts, and advocacy organization concerned about free expression in broadcasting. Their individual statements of interest are set out in an appendix to this brief.

STATEMENT OF THE CASE

This case arose in 2006 after the Federal Communications Commission issued an "*Omnibus Order*" resolving dozens of indecency complaints that it received between 2002 and 2005. The agency found ten broadcasters guilty of indecency and six also guilty of profanity; it imposed "forfeitures" against six of the ten.[2] The other four indecency/profanity findings were unaccompanied by forfeitures because they were based on a new rule, announced in 2004, that presumptively bans even one "fleeting expletive" from the airwaves.[3] Since the broadcasters in these

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[1] Pursuant to Rule 37.3, letters of consent from the parties have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae,* its members or its counsel made a monetary contribution to its preparation or submission.

[2] 18 U.S.C. 1464, the basis of the FCC's authority to censor, bars "obscene, indecent, or profane language by means of radio communication."

[3] The fleeting expletives rule was first announced in *"Golden Globe Awards,"* 19 FCC Rcd 4975 (2004). The FCC applied the

four cases could not have known that a single vulgar word in a program would be considered unlawful, the FCC imposed no fine, and there was accordingly no avenue of appeal within the agency. The broadcasters petitioned for review in the U.S. Court of Appeals for the Second Circuit.

The FCC requested a remand so that it could further consider the four cases. The court of appeals obliged, meanwhile ordering a stay of the fleeting expletives rule. On remand, the FCC changed its mind about two of the programs – episodes of "NYPD Blue" and "The Morning Show" – and affirmed its rulings against the other two: Billboard Award shows from 2002 and 2003.

The court of appeals held that the fleeting expletives rule was arbitrary and capricious, in violation of the Administrative Procedure Act. The court found that the FCC had not given a reasonable explanation for its dramatic change in policy – from its many statements over the years that a mere fleeting expletive would not be sufficient for an indecency finding, to a wholesale reversal in 2004, announcing that a single vulgarity (in particular, any variant of the words "shit" or "fuck") is presumptively both indecent and profane.

The court of appeals found that the FCC's main justification for its new rule – that minors must be shielded from the "first blow" of a vulgar word – is irrational, in part because the agency had already

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rule in its *Omnibus Order* even though an administrative appeal of *Golden Globe* was still pending. See Pet. App. 13a.

made exceptions that allowed a "first blow" to occur: for the film "Saving Private Ryan," because of its artistic merit; for "The Early Show" (after remand), because of its status as a news interview; and indeed, for news broadcasts about this very litigation. Pet. App. 25a-28a.[4]

In extensive dicta, the court of appeals expressed doubt that any explanation for the fleeting expletives rule would pass constitutional muster.[5] It noted that speech covered by the FCC's indecency policy "is fully protected by the First Amendment." *Id.*, 35a-36a. Pointing to the many inconsistencies and subjective elements of Commission decision-making, the court concluded that the indecency test "is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague." It "fails to provide the clarity required by the Constitution, creates an undue chilling effect on free speech, and requires broadcasters to 'steer far wider of the unlawful zone.'" *Id.*, 36a-37a (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

The court of appeals found persuasive precedent in *Reno v. ACLU*, 521 U.S. 844, 874 (1997), which, it said, held the indecency standard – adopted by Congress to regulate the Internet – to be unconstitutionally vague. The court was "skeptical

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[4] The court also ruled that the Commission's new approach to profanity was irrational, Pet. App. 33a – a conclusion that the government does not appear to contest.

[5] The court explained that addressing the constitutional issues would serve judicial economy by guiding the FCC's deliberations on remand.

that the FCC's identically-worded indecency test" for broadcasting could "provide the requisite clarity to withstand constitutional scrutiny." Indeed, the Second Circuit said, "we are hard pressed to imagine a regime that is more vague than one that relies entirely on consideration of the otherwise unspecified 'context' of a broadcast indecency." Pet. App. 37a-38a. The court remanded the case to the Commission for further review.

Judge Leval dissented with respect to the Administrative Procedure Act, but did not take issue with the court's constitutional analysis. Indeed, he argued that "[i]f there is merit in the majority's argument that the Commission's actions are arbitrary and capricious because of irrationality in its standards for determining when expletives are permitted and when forbidden, this argument must be directed against the entire censorship structure." *Id.*, 54a.

In its petition for certiorari, the FCC acknowledged that "[i]n most cases, a remand to an agency for a fuller explanation of a policy would not merit this Court's review." But, it said, the court of appeals' *dicta* – analyzing why the Commission would not be able to surmount the constitutional hurdles – made the remand into "a Sisyphean errand." Pet. 15. The FCC asserted that the appeals court not only deprived it of power to enforce the fleeting expletives rule; it "call[ed] into serious question the Commission's authority to regulate even *repeated* uses of offensive sexual or excretory language." Certiorari was essential because the Commission was now "in an untenable position,"

without "any permissible scope" to regulate indecency. *Id.*, 27, 29-30.

SUMMARY OF ARGUMENT

Having sought Supreme Court review solely because the court of appeals' First Amendment analysis created a "Sisyphean errand" and put the agency "in an untenable position," the FCC now argues that the Court must avoid all constitutional questions. But the FCC cannot have it both ways. Deciding whether agency action is arbitrary and capricious in violation of the Administrative Procedure Act necessarily encompasses an inquiry into the constitutional implications of the agency's interpretation of its governing statute, and an analysis of the proper limitations of that statute.

Like all federal laws, 18 U.S.C. § 1464 must be construed to avoid constitutional difficulties. Where free speech is at risk, regulatory agencies must act with caution. Whether the fleeting expletives rule – and indeed, the entire indecency regime – is permitted by section 1464, or is arbitrary and capricious within the meaning of the APA, are questions that inevitably have constitutional dimension.

The FCC's conduct in the thirty years since *Federal Communications Commission v. Pacifica Foundation,* 438 U.S. 726 (1978), narrowly permitted censorship of "indecency" has been unpredictable, at times sweeping, and highly subjective. The problem intensified in 2004 after the Commission announced that even one "fleeting expletive" was now, in most

circumstances, barred from the airwaves; then applied that new rule to reverse its previous decision that the rock star Bono's single exclamation ("fucking brilliant!") was enough to make a Golden Globe Awards program unlawfully indecent and profane. In the next two years, the agency made additional arbitrary judgments, finding no indecency in the movie "Saving Private Ryan," with its many expletives, but condemning the Martin Scorsese documentary, "The Blues" because of vulgar words used by musicians and their music industry colleagues. Thirty years of such discretionary and inconsistent decision-making compels the conclusion that the entire indecency regime is vague, arbitrary, capricious, and overbroad. The fleeting expletives rule in particular has had a widespread chilling effect on valuable programming. And the unconstitutionality of the present system is not remedied by the existence of a late-night "safe harbor" for possibly indecent programs.

The Court in *Pacifica* accepted the FCC's broad reading of 18 U.S.C. § 1464 because it found broadcasting to be "uniquely pervasive" and "uniquely accessible to children." *Id.*. at 748-49. But given the FCC's history of vague and unpredictable enforcement, the Court's recent condemnations of the indecency test, and technological developments since *Pacifica,* the Commission's reading of section 1464 is no longer constitutionally viable.

In *Reno v. ACLU,* the Court condemned the indecency test as both vague and overbroad. Although stopping just short of a holding on vagueness, the Court vividly outlined the evils of

essentially standardless indecency enforcement. It then struck down the indecency test on grounds of overbreadth. The only factor distinguishing the FCC's indecency regime from the unconstitutional enforcement scheme in *Reno* was the perceived invasiveness of broadcasting, against a general background of regulation justified by the scarcity of the airwaves. *Reno,* 521 U.S. at 868-70.

Technological developments since *Pacifica,* however, indicate that the rationale for censorship of nonobscene broadcasting has lost whatever persuasive force it once may have had. Given cable television, the Internet, and other electronic media today, broadcasting is no longer "uniquely pervasive" and "uniquely accessible to children." This case does not address the Commission's power to regulate broadcasting in structural, content-neutral ways, or even to impose affirmative requirements that do not directly censor protected speech. But 18 U.S.C. § 1464 can no longer be construed to authorize content-based censorship of particular words, or of other material that a federal agency finds "patently offensive," unless it meets the constitutional standard for obscenity.

New technologies have also created less burdensome alternatives to government censorship for parents who wish to shield their children from vulgar language or images on the airwaves. Hence, whether or not First Amendment strict scrutiny applies to the FCC's indecency regime, it is, today, an overly restrictive remedy for speech that some viewers and listeners find offensive.

ARGUMENT

I. THE FCC CANNOT AVOID THE CONSTITUTIONAL ISSUES THAT ARE AT THE HEART OF THIS CASE

The petition for certiorari turned entirely on the court of appeals' First Amendment analysis. The FCC acknowledged that the case would not otherwise merit Supreme Court review. It urged review because the court of appeals' constitutional *dicta* made an administrative remand futile.

Now, however, the agency asks the Court to ignore the First Amendment and focus narrowly on whether it gave a reasoned explanation for its fleeting expletives rule. The Commission wants the Court to decide only such limited linguistic questions as whether it was within agency discretion to determine that the common words "fuck" and "shit" always have sexual or excretory "connotations."

But the First Amendment is at the core of this case. Courts must construe statutes and regulations to avoid constitutional difficulties. A necessary corollary of this rule of statutory construction is that courts cannot defer to claims of agency expertise – linguistic or otherwise –where constitutional rights hang in the balance.

In *National Labor Relations Bd. v. Catholic Bishop of Chicago*. 440 U.S. 490, 500 (1979), the Court summarized the rule: laws "ought not be construed to violate the Constitution if any other possible construction remains available." This principle is especially important where free

expression is at risk, because "[t]he values enshrined in the First Amendment plainly rank high 'in the scale of our national values.'" *Id.* at 501 (quoting *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963)). In *Catholic Bishop,* the Court engaged in a full-scale constitutional analysis before concluding that a likelihood of excessive church-state entanglement required it to reject the relevant administrative agency's construction of its governing statute, and to interpret the statute not to authorize agency jurisdiction over church schools.

The Court followed *Catholic Bishop* in *Rust v. Sullivan*, 500 U.S. 173, 190 (1991), and as in *Catholic Bishop*, the constitutional analysis focused on agency regulations. Although the *Rust* Court ultimately determined that it was not necessary to "invalidate the regulations in order to save the statute from unconstitutionality," 500 U.S. at 191, it recognized the need to undertake that inquiry. See also *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) ("the elementary rule is that every reasonable construction must be resorted to, in order to *save a statute* from unconstitutionality'") (quoting *Hooper* v. *California*, 155 U.S. 648, 657 (1895)).

Careful constitutional scrutiny of the current indecency regime is likewise required in this case. The meanings of "indecent" in 18 U.S.C. § 1464, and of "arbitrary and capricious" in the Administrative Procedure Act, are necessarily informed by the limits that the First Amendment places on both

legislation and agency discretion. As section II below demonstrates, the FCC's sweeping assertion of wholly discretionary power to make judgments about artistic necessity, news value, and other matters that it is no business of government to determine goes way beyond anything approved in *Pacifica* and raises the gravest of doubts as to the constitutionality of the indecency regime.

The FCC's argument for judicial deference to its claimed expertise is likewise misplaced. Questions of linguistics, newsworthiness, and aesthetic value are not within the agency's expertise, nor should they be, given the constitutional ramifications. As the Court explained in *DeBartolo*, although agency interpretations "would normally be entitled to deference," this is not so where the agency's construction "would raise serious constitutional problems." 485 U.S. at 574-78.

The FCC's attempt to avoid the First Amendment is particularly misplaced given its heavy reliance on *Pacifica* to defend its "contextual" decision-making. To evaluate this reliance on *Pacifica*, the Court must address the meaning of that narrow and fractured ruling, and its application to today's very different culture and technology.

II. THE FCC'S ASSERTION OF BROAD, DISCRETIONARY CENSORSHIP POWER UNDER 18 U.S.C. §1464 CREATES INSURMOUNTABLE CONSTITUTIONAL PROBLEMS

A. FCC Enforcement Since *Pacifica* Has Been Unpredictable, Inconsistent, and Highly Subjective

1. The indecency regime, culminating in the new "fleeting expletives" rule, has not been narrow and restrained, as contemplated by Pacifica

In 1978, a bare majority of the Court approved the FCC's censorship of "indecent" speech on the airwaves, in the context of the "verbal shock treatment" of one satiric monologue. *Pacifica*, 438 U.S. at 757 (Powell, J., concurring). The decision turned on a very lenient standard of First Amendment scrutiny, applicable to broadcasting, the Court said, largely because it is "uniquely pervasive" and "uniquely accessible to children." *Id.* at 748-49.

The Court in *Pacifica* emphasized the "narrowness" of the holding. *Id.* at 750-51; see also *Sable Communications v. FCC,* 492 U.S. 115, 126 (1989); *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983). This narrowness was important, given the breadth of the agency's definition of indecency, which remains unchanged today: "language that describes, in terms patently offensive as measured by contemporary community standards

for the broadcast medium, sexual or excretory activities and organs." *Pacifica,* 438 U.S.at 732.

For the next nine years, the FCC followed the restrained enforcement policy that it had promised the Court in *Pacifica*. Pet. App. 6a-12a. In 1987, however, it expanded its indecency regime to embrace any sexual innuendo or other content that the commissioners considered offensive, regardless of whether there was "verbal shock treatment." Two of the three programs condemned under this new "generic" indecency standard had aired on noncommercial radio stations; one concerned homosexuality and AIDS. *New Indecency Enforcement Standards*, 2 FCC Rcd 2726 (1987); *Pacifica Foundation*, 2 FCC Rcd 2698 (1987); *Regents of the U. of California*, 2 FCC Rcd 2703, on reconsideration, 3 FCC Rcd 930 (1987).[6]

The agency's indecency enforcement between 1987 and 2003 was unpredictable and sporadic. In 2001, it ruled that the African-American poet and theater artist Sarah Jones's "Your Revolution," broadcast on a noncommercial community station, was indecent. "Your Revolution" is a poetic protest against misogyny in hip-hop music. The FCC's decision was tone-deaf to the relevance of Jones's work to African-American women. After Jones sued,

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[6] The new generic standard was a response to pressure from Morality in Media and other groups to reverse the Reagan Administration's "laissez faire" approach to indecency. *See* John Crigler & William Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329 (1989).

and just before the FCC's brief was due in the court of appeals, the agency reversed itself and decided that the poem was not indecent after all, thereby mooting Jones's challenge to the indecency standard. *KBOO Foundation*, 18 FCC Rcd 2472 (2003).

Up to this point, the FCC did not consider "fleeting expletives" indecent. It changed its policy after two incidents: the musician Bono's exclamation, "this is really fucking brilliant" at the 2003 televised Golden Globe Awards ceremony and, a few months later, the singer Janet Jackson's "wardrobe malfunction" at the February 2004 Super Bowl half-time show.

The FCC initially ruled that Bono's exclamation was not indecent because it did not refer to sexual or excretory functions. *Complaints Against Various Licensees Regarding Their Airing of the "Golden Globe Awards,"* 18 FCC Rcd 19859 (2003). However, a month after the Super Bowl incident, and quite plainly in response to the ensuing political uproar, the agency reversed gears and announced that all uses of the words "fuck," even fleeting exclamations, necessarily refer to sex and therefore are presumptively indecent. The commissioners asserted that even though Bono used "fucking" as "an intensifier," not a sexual reference, any use of the word, or a variation, "invariably invokes a coarse sexual image." Previous agency rulings to the contrary were "no longer good law." *"Golden Globe Awards,"* 19 FCC Rcd 4975, 4978-79 (2004).

In an even more dramatic departure from prior practice, the FCC also ruled that Bono's

exclamation was profane. Until *Golden Globe,* the agency had understood "profanity" to have a religious dimension. See Pet. App. 13a. In *Golden Globe*, however, it rejected all of its previous statements on the subject, and created a vague new profanity definition that essentially overlapped with the new fleeting expletives rule – "language so grossly offensive to members of the public who actually hear it as to amount to a nuisance." *Golden Globe.* 19 FCC Rcd at 4981.

It was not long after the FCC created these new rules that it announced an exception for the film "Saving Private Ryan," broadcast by many ABC stations on Veterans Day in 2004. Complaints had cited dialogue including "'fuck,' and variations thereof; 'shit,' 'bullshit,' and variations thereof, 'bastard,' and 'hell,'" as well as "Jesus" and "God damn." *Complaints Against Various Licensees Regarding Their Broadcast of the Film "Saving Private Ryan,"* 20 FCC Rcd 4507, 4509 (2005). The Commission found that the material, "in context, is not patently offensive and therefore, not indecent," or profane. *Id.* at 4510. The reason was that the rough language was "integral to the film's objective of conveying the horrors of war through the eyes of these soldiers," and that deleting or bleeping "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience." *Id.* at 4512-13.

This sensitivity to "the nature of the artistic work" did not extend, a year later, to the FCC's March 2006 *Omnibus Order*, which condemned a PBS documentary "The Blues," directed by Martin

Scorsese, because of expletives. The commissioners refused to apply the "Saving Private Ryan" exception to "The Blues" because, they said, "we do not believe" that the station that aired the show "has demonstrated that it was essential to the nature of an artistic or educational work … or that the substitution of other language would have materially altered the nature of the work." *Omnibus Order*, 21 FCC Rcd 2664, 2685-86 (2006), J.A. 76.[7]

The *Omnibus Order* addressed dozens of other programs containing coarse language or sexual situations. Non-explicit suggestions of teenagers' sexual activity were indecent in the CBS program "Without a Trace"; but explicit discussions of teen sex on "Oprah" were not. *Id.* at 2705-09, J.A.123-24; *Complaints Against Various Licensees Concerning Their December 31, 2004 Broadcast of "Without a Trace,"* 21 FCC Rcd 2732 (2006).[8] Fleeting expletives by celebrities at Billboard Award shows were indecent and profane; expletives on other shows, including "Fuck Cops!" (visible on graffiti), "pissed off," "up yours," "kiss my ass," and "wiping his ass" were not. 21 FCC Rcd at 2690-95, 2709-13, J.A. 86-98, 132-40.

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[7] Commissioner Adelstein dissented because the "coarse language is a part of the culture of the individuals being portrayed," and "if prohibited, would undercut the ability of the filmmaker to convey the reality of the subject of the documentary." J.A. 173.

[8] *Without a Trace* was the subject of a separate ruling issued on the same date as the Omnibus Order.

The *Omnibus Order's* evaluation of "NYPD Blue" provided a striking (if amusing) example of unbridled subjectivity. The commissioners decided that "bullshit" (uttered by the one character) was profane and indecent, but "dick" and "dickhead" were not. *Id.* at 2699-2700, J.A. 98-103. Why? According to the FCC, "bullshit, …whether used literally or metaphorically, is a vulgar reference to the product of excretory activity and therefore falls within the first prong of our indecency definition." And it is patently offensive (the second prong of their definition) because the "S-Word" (again, whether used literally or not) is "one of the most vulgar, graphic and explicit descriptions of excretory activity in the English language." J.A. 101. "Dickhead," by contrast, was not "patently offensive" to them for the circular reason that it was "not sufficiently vulgar, explicit, or graphic." J.A. 100.

The FCC's most recent intellectual acrobatics came after this case was remanded for reconsideration of the four indecency and profanity rulings that were before the court of appeals. The agency dismissed the case against "NYPD Blue" on a technical ground (the complainant did not reside in the time zone where the broadcast occurred). And it reversed itself on the utterance of "bullshitter" in "The Early Show" because, it now said, the show was a news interview, a context where government should defer to producers' editorial judgment. But this deference was as vague and unpredictable as everything else in the FCC's censorship domain: the commissioners warned that "there is no outright news exemption from our indecency rules."

Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, FCC 06-166 (Nov. 6, 2006) ("Remand Order"), Pet. App. 127a.

The unavoidable conclusion from even this brief review of indecency enforcement since *Pacifica* – and in particular since announcement of the fleeting expletives rule – is that the FCC's conduct has been woefully inconsistent – characterized by unpredictable detours and unprincipled reversals. 18 U.S.C. § 1464, interpreted as it must be to avoid First Amendment difficulties, does not permit this situation to continue.

2. The FCC's unbridled discretion in deciding whether a program is "patently offensive," and its second-guessing of the artistic judgments of filmmakers and programmers, are classic hallmarks of an unconstitutional censorship system

The FCC's record of enforcement demonstrates the evils of a vague, overly discretionary censorship regime. As the court of appeals noted, the agency's subjective judgments embody the same arbitrariness and unpredictability that led to invalidation of licensing schemes in *Forsyth County v. Nationalist Movement,* 505 U.S. 123 (1992), and *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988); see Pet. App. 39a. Indeed, the indecency regime outdoes the licensing processes in these cases in the sheer breadth of the agency's claim of discretion to decide what, in the personal judgment

of the commissioners, is patently offensive and what has sufficient artistic necessity, news value, or other merit to escape punishment.

With its contrasting decisions on "Saving Private Ryan," "The Blues," "The Early Show," and many other programs at issue in the *Omnibus Order*, the FCC has appointed itself the arbiter of both news value and artistic necessity. Under our constitutional system, it is not the place of government officials to second-guess artistic or editorial judgments. See *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (broadcasters' decisions "should be left to the exercise of journalistic discretion"); *Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241, 256-258 (1974) (protecting newspaper's exercise of editorial judgment).[9] It is the writer, artist or filmmaker who decides what is artistically necessary in a creative work. The question "What is art?" is one of the oldest in human history. Considering the diverse attempts to define it – from Tolstoy's essay *What is Art?* to the Dada movement's "Anything is art if an artist says it is"[10] – the inherent subjectivity

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[9] The sole exception is obscenity law, where "serious value" is part of the three-part test for determining whether a work is constitutionally protected in the first place. *Miller v. California*, 413 U.S. 15, 24 (1973). Once expression *is* constitutionally protected, government officials cannot ban or burden content they dislike based on their assessments of artistic value or necessity. *Winters v. New York*, 333 U.S. 507, 510 (1948). Of course, government makes judgments about artistic value in awarding prizes, *e.g., National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) – a context not relevant here.

[10] LEO TOLSTOY, WHAT IS ART? (1897); MUSEUM OF MODERN ART, THREE GENERATIONS OF TWENTIETH-CENTURY ART (1972)

of the task alone makes it inappropriate for a government agency.

The FCC's disparate treatment of "The Blues" – an educational film portraying the actual figures who influenced a significant element of America's culture and musical history – and "Saving Private Ryan" – a violent film with fictional characters – is a striking illustration of the unbridled discretion that the agency claims. Although the Commission found variants on "fuck" and "shit" to be indecent in "The Blues," it absolved the far more frequent use of those words in "Saving Private Ryan" because it thought editing "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience." It is unclear how the Commission arrived at these contrary conclusions. One possible explanation is that the cultural milieu of the mainstream movie "Saving Private Ryan" was more familiar to the commissioners than the largely African-American background of "The Blues." A similar dynamic can be seen in the Commission's earlier finding of indecency against Sarah Jones's "Your Revolution" – a poem that speaks most directly to African-American women. Thus, even without intending any racial or ethnic bias, decisionmakers in a subjective and discretionary censorship system may be more likely to find "patently offensive" those cultural expressions with which they are unfamiliar.

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48 (quoting Marcel Duchamp), *excerpt reprinted at* www.moma.org/collection/browse_results.php?object_id=81631 (visited 11/6/06).

Like any overly discretionary censorship system, the FCC's indecency regime deploys a cultural bias that favors mainstream values at the expense of constitutionally protected but less mainstream speech. From its censorship in 1987 of a program dealing with homosexuality and AIDS to its tone-deafness to the educational and artistic value of authentic colloquial language in "The Blues," the Commission's thirty years of indecency enforcement have borne out Justice Brennan's warning that allowing a government agency to ban what it considers "patently offensive" represents "an acute ethnocentric myopia" that has no place in our "land of cultural pluralism," where "there are many who think, act, and talk differently" from the commissioners of the FCC. *Pacifica*, 438 U.S. at 775 (Brennan, J., dissenting).

The FCC's attempted distinctions among various vulgar words in its *Omnibus* and Remand Orders provide further examples of unbridled discretion. Whether "dickhead" or "pissed off" are more or less offensive than "bullshit" is a matter of taste, and the commissioners' efforts to support their particular tastes only demonstrate the arbitrary nature of the enterprise. The Remand Order reversal on the use of "bullshitter" in "The Early Show," similarly, confuses rather than clarifies the agency's shifting standards. By changing its mind about its original indecency and profanity ruling but simultaneously warning that "there is no outright news exemption from our indecency rules," the FCC leaves news broadcasters in as much limbo as documentary and feature producers as to when it

might find an exception to the fleeting expletives rule.

The FCC further assumes the linguistic expertise to decide that fleeting expletives – in particular, "fuck," "shit," and their many compounds and variations – always refer to sexual or excretory activities or organs even when they are only used for color or intensity. But as "The Blues" and many other documentary films demonstrate, these words have many nonsexual and nonexcretory meanings. The court of appeals noted that "even the top leaders of our government have used variants of these expletives in a manner that no reasonable person would believe referenced 'sexual or excretory organs or activities.'" Pet. App. 29a (citing President Bush's remark to British Prime Minister Blair that the UN should "get Syria to get Hezbollah to stop doing this shit," and Vice President Cheney's widely-reported "Fuck yourself" to Senator Patrick Leahy on the Senate floor). The FCC's effort to elide this distinction by arguing that there is always a sexual or excretory "connotation" stretches its own definition of indecency (reference to sexual or excretory activities or organs) to the breaking point.

Scholarship supports the conclusion that expletives not only have a multitude of nonsexual or excretory meanings; they often have serious value. As Professor Timothy Jay explains, expletives are used for emphasis and emotive charge; they serve psychological and social purposes and communicate powerful messages wholly apart from their more literal meanings. Timothy Jay, WHY WE CURSE (2000).

In 2004, Professor Jay submitted expert testimony in an FCC case involving a radio documentary, "Movin' Out the Bricks," which explored the lives of Chicago public housing residents, including one woman who described drug use as getting "fucked up and shit like that." Jay explained that in many contexts, "fuck" and "shit" are part of ordinary conversation and have no sexual or excretory connotation. In this case, they were essential to the documentary's authenticity. To clean up the woman's language would "undermine the listeners' understanding of the impact of public housing … If we substitute *inebriated* for *fucked up,* we erase the emotional impact." Timothy Jay, Statement of Expert Opinion, *WBEZ-FM*, No. EB-04-IH-0323, (Sept. 21, 2004).[11]

Among the diverse nonsexual meanings of "fuck" and its compounds, Jay offered the terms "FUBAR" ("fucked up beyond all recognition") and "SNAFU" (U.S. Army slang for "situation normal all fucked up"). Both "refer to a state of confusion and have been in use for over 50 years in American English." *Id.* at 5. These words are learned in childhood and do not come as a shock to most children. *Id.* at 9-10.

The First Amendment protects these expletives in literature, art, and political speech in part because of their emotive power. *Cohen v. California*, 403 U.S. 15, 26 (1971); see also *Denver Area Ed. Telecommunications Consortium v. FCC*, 518 U.S.

[11] The WBEZ case is still under investigation. *Amici* will supply a copy of Professor Jay's Statement at the court's request.

727, 805 (1996) (opinion of Kennedy, J.) ("[i]n artistic or political settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying 'otherwise inexpressible emotions.'") (quoting *Cohen* in part); *Morse v. Frederick,* 127 S. Ct. 2618, 2636 (2007) (Alito and Kennedy, JJ., concurring) (the First Amendment protects any speech "that can plausibly be interpreted as commenting on any political or social issue").

Underlying the fleeting expletives rule is the FCC's assumption that all uses of these versatile and common words, whether in art, literature, documentary, news, or ordinary conversation, are harmful to minors – or almost all uses: the commissioners reserve for themselves the power to create an exception. The agency's brief illustrates the irrationality of this approach when it assumes harm from a child's asking a parent the meaning of "fuck" or a variant, whether uttered by a celebrity at an awards show, an actor in a romantic comedy, or President Bush. Pet. Brief 10, 18. But children ask their parents the meaning of words all the time; generally, we consider that a good thing. It is the parent's job to teach the child that highly charged vulgar words are not appropriate in polite conversation – not the government's job to make sure children do not hear these words at all. There has never been any evidence that merely hearing a vulgar word is harmful to children. In today's world, children hear these words from many sources. The important point is that they learn when the words are appropriate and when they are not. As in *Reno*

v. ACLU, 521 U.S. at 878, at the very least, "the strength of the government's interest in protecting minors is not equally strong" throughout the broad reach of the FCC's indecency regime.

The FCC recites the mantra of "context" in an attempt to escape the irrationality of its flat presumption against two common words that it finds offensive, along with any of their variants. But as the foregoing examples demonstrate, the FCC's idea of "context" means essentially unbridled discretion. The agency's claim to know when an expletive should be allowed relies not on any evidence of when a child might be adversely affected, but on the personal tastes and cultural assumptions of the commissioners, as the record amply shows.

A final example appears in the FCC's brief to this Court. The agency argues that its contextual judgments about offensiveness are justified, for surely a curse word used by "a wire-tapped organized-crime figure on a news program is far removed from the use of the same word in a dialogue on an awards show." Pet. Brief, 18. But who makes this judgment, and by what right does a government agency decide that a news program can use the actual words of a criminal (or perhaps a celebrity?), but an awards program cannot? What if the criminal curses during a docudrama? Why is this different from a police officer cursing during a fictional program such as "NYPD Blue"? Why are musicians barred from using vulgar words in a documentary, but (perhaps) allowed to use them on a news show?

Imposing on broadcasters the burden of demonstrating artistic or editorial necessity – as the FCC did in the case of "The Blues" – compounds the injury. As the Court recognized in *Freedman v. Maryland*, 380 U.S. 51 (1965), the First Amendment has a procedural dimension, which prohibits laws or regulations that impose on speakers the burden of proving that their speech should not be censored. See also *Ashcroft v. ACLU*, 542 U.S. 656, 670-71 (2004) (*Ashcroft II*) ("[t]here is a potential for extraordinary harm and a serious chill upon protected speech" where prosecution is likely and "only an affirmative defense is available"). The FCC's notion that broadcasters should bear the burden of establishing artistic necessity turns the First Amendment upside down.

Justice Breyer has noted that sometimes it is wise to watch how a medium develops before imposing strict legal rules. *Denver Area Ed. Telecommunications Consortium*, 518 U.S. at 740–42. We now have thirty years' experience with FCC censorship of broadcasting. It is long enough to conclude that the indecency regime cannot be reconciled with the First Amendment, and accordingly, can no longer be thought authorized by 18 U.S.C. § 1464.

3. FCC enforcement, both before and after its new fleeting expletives rule, has chilled valuable expression

The Court has repeatedly warned that the overbreadth doctrine "prohibits the Government

from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 237 (2002) (*Ashcroft I*). This is precisely what has happened as a result of the FCC's vague and shifting indecency regime.

In response to the fleeting expletives rule, PBS bleeped soldiers' language, and with it the reality of war reporting, from the documentaries "A Soldier's Heart" and "Return of the Taliban," and from a Frontline episode, "The New Asylums."[12] Language in PBS's "The Enemy Within" was purged even though it documented the specific words used by an informant to threaten a suspect.[13] A TV station in Boston said it would "probably have to edit references to sexual activities in a coming *Masterpiece Theater* production, 'Casanova.'"[14] PBS similarly wondered whether to pixilate actress Helen Mirren's mouth as she uttered an inaudible "fuck"

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[12] Kara Canty, *FCC'S Punishing Fines Have Chilling Effect on Broadcasters*, BALTIMORE SUN, Oct. 13, 2006, www.freepress.net/news/18315 (visited 10/13/06); Rebecca Dana, *@$#&% Ken Burns!* NEW YORK OBSERVER, Oct. 2, 2006, www.observer.com/20061002/20061002_Rebecca_Dana_media_nytv.asp (visited 10/thirty/06); Louis Wiley, Jr., *Censorship at Work*, CURRENT.ORG, July 2006, www.current.org/fcc/fcc0613indecency.shtml (visited 10/30/06).

[13] Wiley, *supra* n.13.

[14] Elizabeth Jenson, *Soldier's Words May Test PBS Guidelines*, NEW YORK TIMES, July 22, 2006, at A13.

from the driver's seat in another *Masterpiece Theater* production.[15]

In 2002, a documentary produced by American Public Media ("APM"), which chronicled "the sounds and voices of the World Trade Center and its surrounding neighborhood," was broadcast uncut on dozens of public radio stations. The program included a poem with the word "bullshit." When the show was rebroadcast in September 2006, APM "felt that it had no choice but to alert its affiliates and to 'bleep' this word" from the poem. Comments of Minnesota Public Radio/American Public Media, FCC Remand Proceedings, DA 06-1739 (Sept. 21, 2006), Affidavit of Thomas Kigin, ¶10, J.A. 188-90.

Niagara Frontier Radio administers a radio reading service for the blind; by 2006, it had aired more than 150,000 hours of book readings to thousands of visually impaired listeners. It broadcast through a leased subcarrier of a local FM signal as well as a local ABC affiliate with a wider range. In 2005, the ABC station removed the program, citing a single complaint about the Tom Wolfe novel *I Am Charlotte Simmons*. When the program was reinstated two weeks later, the station would air it only after 10 p.m., thereby reducing both the hours that visually impaired listeners can enjoy the show and the size of the listening audience. *Id.*, Affidavit of Robert Sikorski, J.A. 239-45.

The widely syndicated program *Broadway's Biggest Hits*, with more than 150,000 listeners, faced

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[15] Dana, *supra* n. 13.

many dilemmas in the wake of the new indecency and profanity rules. In 2004, stations fearful of FCC punishment were given a sanitized version of a song in the hit musical *A Chorus Line*, which "humorously tells of how plastic surgery and improving one's 'tits and ass' can improve one's chances for a job." In the next two years, these concerns resulted in full review of the playlist and deletion of "well-known, popular, and culturally and musically significant songs" from such shows as *Les Miserables*, *The Producers*, *Avenue Q*, and *Miss Saigon*. *Id.*, Affidavit of Stanley Wilkinson, J.A. 213-21.

It will not avail the FCC to argue that in some or all of these instances, it might find that the vulgar words, "in context," were not indecent. Programmers – especially at noncommercial stations with limited budgets – cannot afford to risk an indecency fine,[16] or even pay the legal fees to respond to FCC investigations. Because the permissible parameters are so shifting and unclear, self-censorship of fiction, drama, history, and journalism has occurred with increasing frequency. PBS President Paula Kerger explained: "When you have stations whose operating budgets in some cases are only a couple of million dollars, even frankly the old fines, once you factor in all the legal work and so forth, were daunting. The fines now would put stations out of business."[17] The

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[16] In 2006, Congress increased the fines for broadcast indecency tenfold, to $325,000 for each violation. Broadcast Indecency Enforcement Act, Pub.L. 109-235, 120 Stat. 491 (2006).

[17] Quoted in Matea Gold, *PBS "War" Battle Plans*, LOS ANGELES TIMES, July 27, 2006, www.freepress.net/news/16755 (visited 11/6/06). See also Kigin Affidavit, ¶5, J.A. 183 ("MPR simply

FCC's presumptive ban on fleeting expletives, with exceptions to be invoked at the agency's discretion, has created a severe chill, especially in noncommercial broadcasting.

B. The Post 10-p.m. Safe Harbor Does Not Save the FCC's Censorship Regime

The plurality in *Pacifica* pointed to the post-10 p.m. safe harbor as saving the indecency regime from constitutional infirmity. There are several reasons why today the safe harbor does not adequately protect the First Amendment rights of broadcasters, producers, directors, writers, and performers.

First, the audiences are smaller late at night. TV viewing falls significantly after 10 p.m.; radio listening begins to shrink after 6 p.m. and drops to negligible levels by 10.[18] Second, the safe harbor realistically offers only two hours for potentially risky programming, since most people are sleeping and not watching TV or listening to the radio from midnight to 6 a.m. It was not without reason that the

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cannot risk either huge fines or license revocation …. if it were to guess wrong about what is now acceptable for broadcast").

[18] The Nielsen website lists the ten most-watched broadcast TV shows every week. For the week of October 30, 2006, only one of the ten most-watched shows aired at or after 10 p.m. *See* Nielsen Media Research, *Top TV Ratings* (Nov. 10, 2006), www.nielsenmedia.com (visited 11/10/06). For radio, listening peaks around 7 a.m., "remains strong" through 6 p.m., and tapers off after that, with just a tiny fraction of the daytime audience by 10 p.m. ARBITRON, RADIO TODAY (2005 ed.), at 6, www.arbitron.com/downloads/radiotoday05.pdf (visited 11/17/06).

D.C. Circuit referred to the safe harbor as "broadcasting Siberia." *Becker v. FCC*, 95 F.3d 75, 84 (D.C. Cir. 1996).

Consigning possibly indecent programs to the post-10 p.m. safe harbor is rarely an adequate substitute for earlier time slots. Southern California Public Radio ("SCPR"), for example, for years broadcast performances at LA Theater Works, typically on Saturday nights at 8 pm – "consistent with when the curtain typically rises on live performances." Kigin Affidavit, ¶8, J.A. 186. In 2004, SCPR aired Theater Works' production of "Dinah Was," a Tony Award-winning play about singer Dinah Washington. "Not surprisingly," APM official Thomas Kigin says, "given Ms. Washington's life and times, the play contains various commonplace 'swear' words and sexual expressions." Heightened FCC censorship and the threat of large fines, however, made SCPR nervous. First, it stopped the broadcasts entirely; then, having concluded "that it is neither appropriate nor feasible to edit the performances for language," SCPR moved the broadcasts to 10 p.m. But their future was uncertain, for SCPR and Theater Works agree "that broadcasts at this late hour will attract only a fraction of the former audience for this series of outstanding theatrical events." *Id.,* J.A. 186-87.

The "safe harbor" is even less of an adequate alternative for live programming. A letter submission in the FCC's remand proceeding explained: "Live broadcast television is a direct link to the real world around us, and while sometimes unpredictable, is nonetheless one of the things that

continues to bring Americans together to share historic moments." Center for Creative Voices in Media *et al.*, Letter to William Davenport, No. DA 06-1739 (Sept. 21, 2006). Spontaneous news coverage largely happens before 10 p.m.; delay defeats its purpose by denying the public the immediacy of live programming.

A safe harbor might have made sense under the facts of *Pacifica,* where one "specific broadcast … represented a rather dramatic departure from traditional program content," *Reno*, 521 U.S. at 867. But given the FCC's expanded and highly subjective censorship rules, and the pervasiveness of frank language in today's art, literature, news, and documentary programming, there is simply not enough time after 10 p.m. and before midnight to accommodate all the of the constitutionally protected material that is endangered. This problem is exacerbated by the unpredictability and overbreadth of the indecency standard. Broadcasters, especially small or noncommercial broadcasters that cannot afford hundreds of thousands of dollars for a single indecency violation, will end up purging anything that might conceivably be offensive to a majority of FCC commissioners from most of their shows in order to air them before 10 p.m.[19]

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[19] Although time-shifting technologies such as TiVo make it possible to record late night programming for viewing at more convenient times, it is questionable how many people take advantage of this option. Certainly, this technological advance has not led broadcasters to begin to air popular but potentially risky programs late at night; instead, they have self-censored in response to the fleeting expletives rule.

As the Court recognized in *Reno*, programming that the FCC might consider indecent would have value for many minors. 521 U.S. at 877-78. Books by John Steinbeck and Toni Morrison, documentaries such as "The Blues," and news coverage that, the agency has warned in its Remand Order, might be found indecent are examples of valuable material that should not be consigned to the few available late-night hours.

In *U.S. v. Playboy Entertainment Group,* 529 U.S. 803 (2000), the Court struck down a safe harbor requirement for sexually explicit material – a narrower category of speech than the potentially indecent speech at issue in this case. *Playboy* involved cable TV, which enters the home exactly as broadcast television does for most Americans today. Indeed, the programming at issue in *Playboy* came into the home uninvited, largely in the form of "signal bleed." The Court found, however, that time channeling "silences … protected speech for two-thirds of the day." *Id* at 812. "It is of no moment," the Court explained, "that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. *Ibid.*

Thus, whatever the acceptability of time-channeling in the era of *Pacifica*, it is not adequate today to secure First Amendment rights. Given the breadth and uncertainty of the FCC's indecency regime, and the disadvantages of late-night programming, broadcasters are forced to "steer far wider of the unlawful zone" in order to air material before 10 p.m.

III. SECTION 1464 SHOULD BE CONSTRUED TO BAN ONLY CONSTITUTIONALLY UNPROTECTED OBSCENITY

The foregoing sections not only show why 18 U.S.C. § 1464 cannot be construed to permit the fleeting expletives rule; they also show that the entire indecency regime, in light of thirty years' experience, can no longer be justified by any constitutionally permissible construction of the statute. Indeed, the Court has already held that the FCC's indecency standard is unconstitutionally overbroad, and has essentially held that it is unconstitutionally vague as well. Although it is not necessary to resolve this case, the Court should take the opportunity to clarify that, given the dramatic changes in media technology since 1978, government censorship of constitutionally protected speech on the airwaves can longer be supported by section 1464.

A. Case Law Since *Pacifica* Has Recognized the Vagueness and Overbreadth of the FCC's Indecency Test

Pacifica was an "emphatically narrow" decision, *Sable Communications,* 492 U.S. at 127. Nevertheless, Congress chose the FCC's indecency standard to regulate the Internet when it passed the 1996 Communications Decency Act (the "CDA"). Invalidating the CDA in *Reno v. ACLU*, the Court condemned the indecency test as both vague and overbroad.

The Court found the test "problematic" because such terms as "patently offensive" and

"community standards" are left undefined. The lack of definition creates "special First Amendment concerns because of its obvious chilling effect on free speech." *Reno,* 521 U.S. at 870-72. The Court explained the difference between "patently offensive" in the CDA, where it was troublesomely vague, and in obscenity law, where it is only one part of the definition of prohibited speech. The other, more specific requirements of the obscenity definition – that the expression appeal to "the prurient interest," lack serious value, and be "specifically defined by the applicable state law" – cabin the inherent vagueness of "patent offensiveness." *Id.* at 872-74. Without these additional safeguards, the CDA's ban on "patently offensive" speech "unquestionably silences some speakers whose messages would be entitled to constitutional protection." *Id.*. at 874. Although the conclusion on vagueness fell just short of a square holding, the Court has recently cited *Reno* for the proposition that the indecency standard is unconstitutionally vague because it requires "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *United States v. Williams,* 128 S. Ct. 1830, 1846 (2008) (citing *Reno*, 521 U.S. at 870-71 & n. 35); see also *Ashcroft II*, 535 U.S. at 578 (describing the indecency standard's "unprecedented breadth and vagueness").

Reno struck down the indecency standard on grounds of overbreadth. The Court reiterated that "[s]exual expression which is indecent but not obscene is protected by the First Amendment," 521 U.S. at 874; see also *Sable,* 492 U.S. at 126, and

noted that indecency "cover[s] large amounts of nonpornographic material with serious educational or other value." 521 U.S. at 877-78. Following the time-honored rule that government cannot reduce the adult population to reading or viewing "only what is fit for children," *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957), the Court noted that there are less constitutionally burdensome ways to shield youngsters from material that may not be appropriate for them. 521 U.S. at 874-79.

Although *Reno* distinguished *Pacifica*, the Court's condemnation of the indecency standard on grounds of both vagueness and overbreadth cannot be reconciled with the FCC's broad-ranging and whimsically discretionary application of that standard to broadcasters over the past thirty years. The Commission's use of the same indecency test that the Court condemned in *Reno, Ashcroft II,* and *Williams* cannot be squared with a constitutional reading of section 1464.

B. Broadcasting Is No Longer "Uniquely Pervasive" and "Uniquely Accessible to Children – The Characteristics That in *Pacifica* Were Said to Justify FCC Censorship of Constitutionally Protected Expression

At the time of *Pacifica,* broadcasting was the only electronic mass medium; now, it is one of many, and indistinguishable to most viewers from cable television. Thus, the "uniquely pervasive" presence of broadcasting that this Court identified in *Pacifica* as the main rationale for subjecting this particular

medium to FCC censorship of nonobscene speech no longer exists. As the court of appeals recognized, "it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children." Pet. App. 40a .

To be sure, broadcasting remains pervasive, but no longer uniquely so, given that about 90% of the nation's households receive *all* their TV programming through one, nonbroadcast distributor (usually either cable or satellite).[20] This convergence of technology eliminates the justification for a government censorship system that is constitutionally off-limits for every other medium. *E.g., Reno*, 521 U.S. 844 (the Internet); *Denver Area Ed. Telecommunications Consortium*, 518 U.S. 727 (public and leased access cable).

Underlying *Pacifica* was a history of lesser First Amendment protection for broadcasting. Government regulation was justified because of the limited capacity of the broadcast spectrum, and consequent scarcity of licenses. Whatever one thinks of the scarcity rationale in the modern media world, there is surely a difference between structural

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[20] *Satellite TV Penetration Up Significantly,* CONSUMERAFFAIRS.COM, Aug. 18, 2005, www.consumeraffairs.com/news04/2005/jdpower_satellite.html (visited 11/6/06); see also *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, 2506-07 (2006) (94.2 million out of a total of 109.6 million TV households receive all their video programming through an "MVPD" [multichannel video programming distributor] – either cable, satellite, or other nonbroadcast technology).

rules designed to promote more speech, see *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943) (approving FCC rules that curbed national networks' market power by prohibiting them from dictating the programming of affiliated stations),and censorship rules based on broad, shifting, and culturally driven criteria such as "patent offensiveness."

Moreover, as the court of appeals noted, technological developments since *Pacifica* make government control unnecessary in those instances where parents wish to shield their children from programming they consider inappropriate. Pet. App. 41a. The FCC itself has recognized that v-chips and lockboxes are readily available blocking technologies. *Saving Private Ryan*, 20 FCC Rcd at 4508, nn. 8-9. Similarly, this Court, held that lockboxes and other technologies were less constitutionally burdensome ways of addressing parental concerns in striking down a time-channeling requirement for indecency on cable. *Playboy*, 529 U.S. at 809-15. The same reasoning applies here. Just as the courts have long recognized that section 1464 cannot be read literally to impose a total ban on nonobscene broadcast speech, but must include a safe harbor,[21] so section 1464 can no longer be read to permit a federal agency's unbridled discretion to censor nonobscene speech that it considers "patently offensive."

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[21] See *Action for Children's Television v. FCC,* 932 F.2d 1504, 1509-10 (.D.C. Cir. 1991) (*"ACT II"*); *Action for Children's Television v. FCC,* 852 F.2d 1332, 1343 (D.C. Cir. 1988) (*"ACT I"*).

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

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APPENDIX

STATEMENTS OF INTEREST

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization that has defended free speech principles since its founding in 1920. Of particular relevance here, the ALU has participated in many of the leading cases challenging the government's efforts to restrict speech on the basis of "indecency," including *FCC v. Pacifica,* 438 U.S 726 (1978), and *Reno v. ACLU,* 521 U.S. 844 (1997)**. The New York Civil Liberties Union** (NYCLU) is a statewide affiliate of the national ACLU.

American Booksellers Foundation for Free Expression (ABFFE) is the bookseller's voice in the fight against censorship. Founded by the American Booksellers Association in 1990, ABFFE's mission is to promote and protect the free exchange of ideas, particularly those contained in books, by opposing restrictions on the freedom of speech.

American Federation of Television and Radio Artists (AFTRA) is a national labor organization with a membership of over 70,000 professionals working in the news, entertainment, advertising and sound recordings industries. AFTRA's membership includes actors, news reporters, anchors, sportscasters, talk show hosts, announcers, disc jockeys, producers, writers and other on-air and off-air broadcast employees; royalty artists and background singers whose sound recordings are played on radio stations; and other performers on radio and broadcast TV.

Directors Guild of America (DGA) represents approximately 13,400 directors and

members of the directorial team working in U.S. cities and abroad. Their creative work is represented in feature film, television, commercials, documentaries, and news. The DGA's mission is to protect the economic and creative rights of directors and the directorial team.

First Amendment Project (FAP) is a nonprofit organization dedicated to protecting and promoting freedom of information, expression, and petition. Among FAP's clients are several independent, nonprofit broadcast content-providers that are threatened by the ambiguities and inconsistencies in the FCC's policies and whose ability to report on issues of local and national significance is thus compromised.

Minnesota Public Radio (MPR) is a regional public radio network that serves some 650,000 listeners each week across seven states on 37 public radio stations. In addition, as **American Public Media** (APM), it produces more nationally distributed news and documentary programming than any other station-based public radio organization, reaching some 15.5 million people around the world per week.

National Alliance for Media Arts & Culture (NAMAC) is the national service organization for the media arts, providing leadership training and professional development, organizational capacity building support, and original research about the field. With more than 300 member organizations serving an estimated 400,000 film, video, audio, and digital creators, NAMAC has a strong interest in ensuring that language or gestures central to the meaning of film and audio

works remain intact and are not eliminated or altered when presented to the public.

National Coalition Against Censorship (NCAC), founded in 1974, is an alliance of 50 national nonprofit organizations, including religious, educational, professional, artistic, labor and civil rights groups united in the conviction that freedom of thought, inquiry and expression are indispensible to a healthy democracy. The positions advocated by the NCAC in this brief do not necessarily reflect the positions of each of its participating organizations.

National Federation of Community Broadcasters (NFCB) represents over 200 community-oriented radio stations across the United States. Community radio is committed to airing diverse, authentic voices and finds the current FCC indecency regulations inconsistent and overbroad. Since most community radio stations operate on small budgets, they can not afford the fines that can now be charged for an inadvertent broadcast of something that the Commission might decide is indecent or profane, which has a chilling effect on their editorial freedom and ability to serve their communities.

PEN American Center (PEN) is an organization of over 2,900 novelists, poets, essayists, translators, playwrights, and editors. As part of International PEN, it and its affiliated organizations are chartered to defend free and open communication within all nations and internationally. American PEN has taken a leading role in attacking rules that limit freedom of expression in this country.

Washington Area Lawyers for the Arts is the largest provider of pro bono legal services and legal education on arts-related matters in the Washington, D.C., metropolitan area, annually serving hundreds of artists and artistic organizations. Through the work of attorney volunteers who regularly counsel low-income artists, the organization has observed directly the chilling effects on artists' free expression rights caused by vague and overreaching government censorship.