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 FOR PUBLIC BROADCASTERS AS AMICI CURIAE SUPPORTING RESPONDENTS

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August 2008

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INTEREST OF AMICI CURIAE

Amici curiae, the Public Broadcasting Service ("PBS"), the Association of Public Television Stations ("APTS"), National Public Radio, Inc. ("NPR"), and a host of public television producers and broadcasters, are leaders of the public broadcasting community.[1] For almost 40 years, amici have produced, distributed, and broadcast award-winning programming that addresses issues of public concern, including social, political, and historical events that play a pivotal role in shaping American culture and society.

Public broadcasters are subject to regulation under the Federal Communications Commission ("FCC") indecency policy that is before the Court. One amicus received a Notice of Apparent Liability from the FCC, alleging that a program it broadcast contained language that was indecent and proposing a monetary forfeiture as a penalty for broadcasting the program. Other public broadcasters have been the subject of indecency investigations by the FCC, and amici collectively dedicate substantial resources to efforts to understand and comply with the

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[1] Each party has consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. A list of the amici who are filing this brief is included in the Appendix.

indecency policy, while fulfilling their fundamental obligation to serve the public interest.

The FCC historically has taken a "cautious[]" and "restrained" approach to indecency enforcement. *See FCC v. Pacifica Found.*, 438 U.S. 726, 761 n.4 (1978) (Powell, J., concurring in part and concurring in the judgment) (citing Brief for Petitioner at 42-43 & n. 31); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 n. 14 (D.C. Cir. 1988). Recently, however, the agency has adopted a less restrained policy that it has failed to justify and that has produced arbitrary results. Amici submit this brief to describe the adverse effects of this policy, which amici believe is arbitrary and capricious and unconstitutional.

STATEMENT

For generations, Congress and the American people have relied on the nation's public broadcasters to provide programming that "address[es] issues of national concern and solves local problems." 47 U.S.C. § 396(a)(8). Congress thus encouraged public broadcasters to develop "programming that involves creative risks" and recognized that public broadcasters' success would "depend on freedom, imagination, and initiative on both local and national levels." 47 U.S.C. §§ 396(a)(3), 396(a)(6).

Some of the most highly acclaimed programming in the country is broadcast, for example, on public television. During the 2007-2008 season, PBS and its programming received 29 Emmy Awards, including 10 News & Documentary Emmys,

putting PBS ahead of all broadcast and cable networks for the seventh consecutive year. During the 2007-2008 award year, PBS and its producers also received eight George Foster Peabody Awards, fourteen Parents Choice Awards, one Golden Globe nomination, and one Academy Award, among many others. *See* PBS, "PBS Awards," *at* http://pbs.org/aboutpbs/aboutpbs_awards.html (Apr. 2008).

Public television continues to be widely viewed by the American public. PBS reaches nearly 73 million people each week through its on-air and online programming. PBS, "PBS: An Overview," *at* http://pbs.org/aboutpbs/aboutpbs_corp.html (Jul. 2007). A national Roper survey rated PBS and its member stations the country's most trusted public institution. Press Release, PBS, "New National Roper Poll Ranks PBS As Leader in Public Trust," *at* http://pbs.org/aboutpbs/news/20050216_roperpoll.html (Feb. 16, 2005).

Amici work hard to achieve these results and meet their obligation to offer programming responsive to the needs of their communities. Federal law requires most public broadcast stations that receive federal funding (except for certain government-owned and operated stations) to establish community advisory boards to provide input on the programming broadcast by their local stations. *See* 47 U.S.C. § 396(k)(8)(A). Public broadcasters also have a financial incentive to provide programming that serves community needs: Congress recognized in 1992 that "private contributions of $6.1 billion since 1972 constitute the

largest source of support for public television." Cable Television Consumer Protection & Competition Act of 1992, House Comm. on Energy & Commerce, H.R. Rep. No. 628, 102d Cong., 2d Sess. 69. Public broadcasters' reliance on private donations means that their success is tied directly to viewers' satisfaction. *See id.* (magnitude of private contributions indicates "the success of public television in serving the needs and interests of local communities").

To fulfill its statutory mission, public broadcasting must focus on the pivotal artistic, scientific, historic and social issues of our time, and it must report on these issues in a way that faithfully reflects their social implications, even when they are controversial or disturbing.

The FCC's new, aggressive enforcement policy, which lacks clear and consistent standards, undermines public broadcasters' ability to fulfill their public interest mission. Coupled with the crippling increase in potential indecency forfeitures, the uncertain legal terrain that amici must now traverse has forced them to engage in self-censorship to avoid potentially catastrophic financial consequences.

A. The FCC's Historic Approach to Indecency

The indecency statute dates to the Radio Act of 1927, ch. 169, § 29, 44 Stat. 1162, 1173 (codified as amended at 18 U.S.C. § 1464), but the FCC did not engage in active indecency enforcement until the 1970s, and, even then, actions were rare. *See*

Eastern Educ. Radio (WUHY-FM), 24 F.C.C.2d 408 (1970). The scope of the FCC's authority was challenged in 1975 when it found that a radio station had violated the indecency statute by broadcasting George Carlin's "Filthy Words" monologue. *See FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

In its *Pacifica* decision, the Commission indicated that it intended to play a limited role in the regulation of content and that "the real solution is the exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes." *Citizen's Complaint Against Pacifica Found.*, 56 F.C.C.2d 94 ¶ 16 (1975). This Court narrowly upheld the FCC's decision as applied to the broadcast of the Carlin monologue, and two of the five justices who voted to uphold the decision did so on the express assumption that the agency would "proceed cautiously, as it has in the past." *Pacifica*, 438 U.S. at 761 n.4 (Powell, J., joined by Blackmun, J., concurring in part and concurring in the judgment); *id*. at 760-61 (distinguishing the "isolated use of a potentially offensive word" from "the verbal shock treatment administered by [the] respondent").

In the wake of *Pacifica*, the FCC assured broadcasters that it "intend[ed] strictly to observe the narrowness of the *Pacifica* holding." *WGBH Educ. Found.*, 69 F.C.C.2d 1250, ¶ 10 (1978). Accordingly, it denied a complaint against a public television station that broadcast the word "shit," as well as other "sexually-oriented" content in the *Masterpiece Theatre* series and other programs, finding that the case before it did not resemble the "verbal shock treatment" in *Pacifica* and was

therefore "clearly . . . distinguishable." *Id.* The FCC emphasized that it would "construe the *Pacifica* holding consistent with the paramount importance we attach to . . . editorial discretion by broadcasters" *id.* at ¶ 11, and that it did not intend "to inhibit coverage of diverse and controversial subjects by licensees, whether in news and public affairs or in dramatic or other programming contexts," *id.* Speaking to a group of broadcasters shortly after *Pacifica*, the chairman of the FCC, Charles Ferris, declared, "*We at the FCC are far more dedicated to the First Amendment premise that broadcasters should air controversial programming than we are worried about an occasional four-letter word.*" Charles Ferris, Chairman, FCC, Address Before the New England Broad. Ass'n, at 8 (Jul. 21, 1978).

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

In 2001, the FCC issued a policy statement that described the standard it uses in indecency cases and provided examples in which the agency had previously applied this standard. *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464*, 16 F.C.C.R. 7999 (2001) ("*Policy Statement*"). According to the *Policy Statement*, material is indecent if it (1) "describe[s] or depict[s] sexual or excretory organs or activities," and (2) is "*patently offensive* as measured by contemporary community standards for the broadcast medium." *Id.* at 8002. Applying a national community standard, the FCC determines patent offensiveness by considering three factors: whether the material (1) is explicit or graphic in its description of sexual or excretory organs or activities; (2) dwells on or repeats at length the description; and (3) appears to pander, is used to titillate, or is presented for shock value. *Policy Statement*, 16 F.C.C.R. at 8003.

With respect to the second factor, the FCC drew a distinction between "fleeting and isolated" uses of coarse language, which generally would not be found indecent, and a "persistent focus on sexual or excretory material," which "exacerbate[s] the potential offensiveness of broadcasts." *See id.* at 8008-09. Consistent with this approach, the FCC's Enforcement Bureau held in 2003 that a singer's fleeting statement that his winning of a Golden Globe Award was "really fucking brilliant" was not indecent because it did not satisfy the first prong of the indecency standard—that is, it "did not describe sexual or excretory organs or activities," but instead was used to "emphasize an exclamation." *Complaints Against Various Broadcast Licensees*

Regarding Their Broadcast of the "Golden Globe Awards" Program, 18 F.C.C.R. 19859, 19861 (2003). The Bureau noted further that it had "previously found that fleeting and isolated remarks of this nature do not warrant Commission action." *Id.*

B. The FCC's New Indecency Policy

In 2004, the FCC departed from its longstanding policy by reversing the Bureau's decision, finding that the word "fuck" and its variations "inherently ha[ve] a sexual connotation" and thus, regardless of context, "depict or describe sexual activities." *Complaints Against Various Broadcast Licensees Regarding Their Broadcast of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4979 (2004) (*"Golden Globe"*). Under the new standard, any use of the word "fuck" appears to satisfy not only the first prong of the indecency test, but also the first patent offensiveness factor. That is because, according to the FCC, "[t]he 'F-Word'" "invariably invokes a coarse sexual image." *Id*. In addition, because even "isolated or fleeting" uses of coarse language may be indecent, a broadcaster could be liable even if the broadcast does not "dwell on or repeat" the (ostensible) depiction of sexual or excretory activity.

Following *Golden Globe*, the third patent offensiveness factor—whether the material is presented to pander or titillate or for shock value—became the key to determining liability for broadcasts of expletives. In applying that factor, the FCC has made clear that, outside the context of "news programming," *see In the Matter of Complaints*

Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 13299, 13327 (2006) (*"Remand Order"*), the burden is now on the broadcaster to convince the FCC that the use of an expletive is "necessary" to convey the program's message, *see* Joint App. 24-179, 73 (*"Omnibus Order"*).

The expansion in the scope of the FCC's definition of indecency was evident in the FCC's 2006 *Omnibus Order*. In that decision, the FCC found that a public television station's 2004 broadcast of a Martin Scorsese documentary, "The Blues: Godfathers and Sons," which concerned the growth of blues music in Chicago, was indecent because industry leaders used coarse language on eight occasions during interviews. *Id.* at 70-79 & n.111. Among others, the documentary profiled Marshall Chess. Chess's father, Leonard, was a Polish immigrant who learned to speak English in Chicago's black community as a teenager and was later inducted into the Rock and Roll Hall of Fame for co-founding Chess Records, the company that catalyzed Chicago blues.

The FCC based its finding that the documentary was indecent on variations of the word "fuck" that were spoken by Marshall Chess and the word "shit" spoken by hip-hop artists. Chess used expletives in recounting his father's relationship with blues artists. Among other quotes, Chess stated, "[M]y dad had so many people at his funeral, my uncle said, 'You see all those motherfuckers? They're coming to make sure he's dead, so they don't

have to pay back those motherfuckin' notes.'" *Id.* at 74 (quoting *The Blues*).

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

Although Commissioner Jonathan Adelstein found that the language was important to "convey the reality of the subject of the documentary," Joint App. 173 (statement of Comm'r Adelstein, concurring in part and dissenting in part), the FCC concluded that the language violated its indecency policy. The FCC first found that the word "shit," like the word "fuck," automatically satisfies the first prong of its indecency test and the first patent offensiveness factor because it "invariably invokes a coarse excretory image." Joint App. 73. Applying the second patent offensiveness factor, the FCC found that the expletives were "numerous" and "repeated." *Id.*

As for the third factor, the FCC concluded that the language was "shocking" because "we disagree that the use of such language was necessary to express any particular viewpoint" and because "many of the expletives in the broadcast are not used

by blues performers," but instead by hip-hop performers and a leading record producer. *Id*.[2]

C. The Adverse Effects of the FCC's New Policy

For years, PBS and public broadcasting producers have reviewed programming to identify content that some viewers may find objectionable. When they identify such content, these broadcasters may edit the programming to delete the content, retain the content but warn viewers and member stations, or offer multiple versions of the programming to member stations. This approach allows each local station to make choices that are tailored to its viewers' tastes.

The FCC's policy shift, combined with a recent increase in the maximum monetary forfeiture for uttering a single expletive from $32,500 to $325,000 per station, *see* Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006),

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[2] In contrast, the FCC rejected an indecency challenge to the broadcast of the film "Saving Private Ryan" because it concluded that expletives—the same words that the FCC found indecent in "The Blues"—were "[e]ssential . . . to convey to viewers the extraordinary conditions in which the soldiers conducted themselves," and "[d]eleting all of such language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers." *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4512-13 (2005) (*"Private Ryan"*).

has dramatically increased the risks borne by amici.[3] The new maximum forfeiture means that a single expletive broadcast in a program carried by all 356 PBS member stations could result in a forfeiture of more than $115 million. This amount is nearly a third of the Fiscal Year 2008 federal appropriation for the Corporation for Public Broadcasting's general fund, which provides the federal support for public broadcasting. Corp. for Public Broadcasting, "Appropriation Request & Justification: FY2009 and FY2011" (Feb. 2008), *available at* http://www.cpb.org/aboutcpb/financials/appropriation/justification_09-11.pdf.

The FCC's new policy toward fleeting expletives and its refusal to defer to broadcasters' editorial judgment has forced public broadcasters to edit their programming aggressively, in a way that frequently prevents a full and fair exploration of the topics they portray, in order to avoid the possibility

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[3] Public television amici are faced with similar perils with respect to broadcasts that include nudity. For example, the FCC's new, less restrained indecency policy forced public television stations to consider whether to edit an *Antiques Roadshow* episode including a 50-year-old lithograph of a nude celebrity, even though the episode had previously been broadcast without complaint. Comments of Public Broadcasters on Petitions for Recon., *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, FCC File No. EB-03-IH-0110, at 4-5 (May 4, 2004).

The United States Court of Appeals for the Third Circuit recently invalidated an FCC enforcement decision concerning fleeting nudity, holding that, as in this case, the FCC's decision violated the APA. *CBS Corp. v. FCC*, No. 06-3575, 2008 WL 2789307 (3d Cir. Jul. 21, 2008).

of these crippling forfeitures. Examples of this chilling effect and the burdens that the FCC's arbitrary and aggressive enforcement of its indecency policy has imposed include:[4]

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

[4] Copies of the programs described herein are available in the archives of amici and will be made available to the Court upon request.

- Enron: The Smartest Guys in the Room. This 2007 documentary, which profiled the rise and fall of Enron, contained a segment featuring phone recordings of Enron energy traders using the expletives "fuck" and "shit," evidencing the atmosphere of arrogance and contempt that was part of the Enron culture. In the wake of the FCC's Notice of Apparent Liability for broadcasting of "The Blues," the film was ultimately distributed with the expletives edited out of the program.

- Extreme Oil. This series, produced by New York station WNET, addressed the United States' challenge in maintaining a stable supply of oil. The "Pipeline" episode included video shot in Baku, Azerbaijan, including an image of graffiti that read "Fuck America." Even though foreign sentiment—intense hostility to the United States—was an important element of the program's message, WNET ultimately cut the image because of uncertainty about the FCC's policy.

- Frontline: The Soldier's Heart. This documentary on U.S. soldiers' difficulties in seeking treatment for post traumatic stress disorder while serving in Iraq included a veterans' advocate stating that a soldier suffering from the disorder was called a "fucking pussy" by his superiors in order to teach other solders that cowardice would not be tolerated. The producer excised the word "fucking" from the program, but Denver station KRMA-TV nevertheless received an FCC Letter of

Inquiry because the broadcast included the word "pussy."

- Marie Antoinette. This documentary on the French Queen included centuries-old political cartoons from the French Revolution depicting the queen engaged in sexual activity, and the reading of a letter written by King Louis' brother, who described the King's sexual dysfunction. Amici expended considerable resources to determine the legal status of the cartoons and the language describing the King's sexual activities in light of the new FCC policy. Although amici were reluctant to edit because of a desire to ensure that persons and events of historical significance were portrayed in an accurate light, some of the cartoons were edited to avoid liability. Despite the editing, some stations declined to air the program.
- Hip Hop: Beyond Beats and Rhymes. This documentary explores misogyny and sexism in modern hip hop music and how lyrics and images in music videos encourage objectification and subjugation of women. In light of the FCC's new indecency policy, many of the hip-hop videos and lyrics criticized in the documentary were edited.
- Operation Homecoming. This documentary explores the experiences of U.S. soldiers serving in Iraq and Afghanistan through their poetry, letters, journals and essays. The soldiers' writing, read as narration, included seven uses of coarse language. Video included images of Saddam Hussein monuments defaced with sexually-themed graffiti and a soldier giving the

middle finger to a mural of Saddam. PBS ultimately distributed the documentary to many stations with the language and images edited out to avoid costs associated with defending the program.

- Wide Angle: 18 With A Bullet. This documentary depicts L.A. gang culture in El Salvador, among Salvadoran nationals deported from the United States. The individuals being portrayed used the word "fuck" and its Spanish equivalent throughout the program. WNET bleeped that language, greatly disrupting the program and undercutting the realism of the program's subject matter.

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

SUMMARY OF ARGUMENT

The court of appeals correctly held that the FCC failed to justify a dramatic expansion in the scope of the speech prohibitions it imposes on broadcasters under 18 U.S.C. § 1464, and that the FCC's policy change therefore violated the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq*. Under this Court's precedent, the FCC was

required to "supply a reasoned analysis for the change." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). It has failed to do so.

Under the current policy, any use of the word "fuck" or "shit" is presumptively indecent, regardless of whether the words are used to refer to sexual or excretory activity, unless the broadcaster can demonstrate to the satisfaction of the FCC that the language was "necessary" to express a viewpoint or portray a subject. Respondents have explained that the FCC has not offered a reasoned explanation for this standard, which reflects an abandonment of the FCC's policy of restraint, under which it would have exempted isolated use of coarse language and afforded substantial deference to broadcasters' editorial judgment. Moreover, the FCC cannot provide a reasoned explanation for a policy that produces totally arbitrary results. Shifting to a policy that distinguishes between expletives spoken by blues musicians on the one hand and their record producers on the other, or between actors portraying soldiers and actual historic figures, or between news programming and documentary programs, is not supported by a reasoned explanation. And while the FCC has sought to justify abandonment of the fleeting expletives exemption on the ground that context is all important, its policy that the words "fuck" and "shit" always depict sexual or excretory activity rejects context in favor of a categorical rule. For all of these reasons, the FCC's policy change is arbitrary and capricious.

The FCC's new policy is also unconstitutionally overbroad and vague. The policy proscribes far more protected speech than necessary to further any legitimate role the FCC has in regulating indecent content. The policy also is so vague that a reasonable broadcaster cannot determine what speech is prohibited or what considerations will inform the FCC's decision in any future case. Instead, the vagueness of the policy allows the FCC to enforce indecency regulation on an entirely subjective basis.

The FCC's policy shift has imposed substantial costs on amici. In order to avoid calamitous fines that would compromise their ability to continue producing high-quality programming and even threaten their existence, amici are forced to devote substantial time and resources to screening material—including programming previously broadcast without complaints or enforcement action—and to make decisions that compromise their obligation to offer programming that honestly characterizes its subjects. Amici urge the Court to reject the FCC's new policy because of the chilling effect it imposes on constitutionally protected speech.

ARGUMENT

In sanctioning broadcasters for airing programs with content it deems indecent, the FCC engages in content-based regulation of constitutionally protected speech. Recognizing the fine line that the FCC walks in wielding this authority, members of this Court and others have relied on the FCC's exercise of restraint in rejecting

prior challenges to the FCC's indecency policy. In targeting fleeting instances of coarse language and imposing heavy burdens of justification on broadcasters, the FCC has abandoned restraint and crossed the line into arbitrary and unconstitutional agency action. Because the FCC has offered no coherent rationale for its policy change, broadcasters are left to guess what the FCC will find indecent in the next case. The uncertain legal terrain on which broadcasters now stand, together with the ruinous fines that may be imposed for a violation, creates a chilling effect on constitutionally protected speech that the First Amendment cannot tolerate.

I. The FCC's New Indecency Policy is Arbitrary And Capricious Under the APA.

Under the APA, courts will set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). As the court of appeals held, the FCC's new policy is arbitrary and capricious because the FCC has failed to justify its departure from its longstanding, more restrained approach. As Respondents explain, the FCC violated the APA because it refuses even to acknowledge that it has changed its policy by prohibiting speech falling far short of the "verbal shock treatment" that the Court considered in *Pacifica*, much less to offer a reasoned explanation for the change. *See, e.g.*, Brief for Respondent Fox Television Stations, Inc., at 23. The FCC's policy change also abandons deference to broadcasters' editorial judgment in favor of the subjective views of the Commissioners. Not

surprisingly, that change has produced inconsistent decisions and arbitrary results. This unexplained policy shift also violates the APA.

The FCC's decision in *The Blues* illustrates that the FCC's policy has changed and that the FCC has offered no reasoned explanation for the change. *See State Farm*, 463 U.S. at 42. In *Branton*, the FCC found no violation when ten variants of "fuck" spoken in rapid succession in a recorded statement by John Gotti were broadcast during an NPR news story on organized crime. In its decision, the FCC deferred to "the editorial judgments of broadcast licensees on how best to present serious public affairs programming." *Branton*, 6 F.C.C.R. at 610.

In *The Blues*, the FCC applied no such deference to a documentary, concluding that, even though the "licensee may have been under the good faith belief that the use of these expletives served a legitimate informational purpose," and the words "may have had some communicative purpose," it did not meet its burden of "demonstrat[ing] that [use of the expletives] was essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance." Joint App. 75.

The FCC's decision to abandon its approach of according substantial deference to broadcasters' editorial judgment—and instead to require the broadcaster to convince the FCC that the program was one of the "rare contexts" in which the language was "essential" to the program's message, *id.*—was entirely unsupported. If broadcasting the words of John Gotti was important to conveying a realistic

impression of him and his relationship with his underlings, so too was broadcasting the manner in which blues leaders spoke important to conveying a realistic impression of their industry.

The Blues reflects a departure from *Branton*'s "reluctan[ce] to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming." *Branton*, 6 F.C.C.R. at 610. Although the FCC continues to defer to broadcasters of "news programming," *see Remand Order*, 21 F.C.C.R. at 13327, it has not explained why similar deference does not apply to broadcasters of documentaries, a form of "serious public affairs programming" that was entitled to deference in *Branton*. *Id.*[5]

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[5] The FCC's finding (on remand from the Second Circuit) of no liability for CBS's "The Early Show" broadcast in which a contestant on the CBS program "Survivor: Vanuatu" referred to another contestant as a "bullshitter" illustrates the arbitrariness of deferring only to broadcasters of "news programming." Although the "Early Show" interview of the "Survivor" contestant could have been characterized as "merely promotions for CBS's own entertainment programming," the FCC "defer[red] to CBS's plausible characterization of its own programming," because "the important First Amendment interests at stake" make it "imperative that we proceed with the utmost restraint when it comes to news programming." *Remand Order*, 21 F.C.C.R. at 13327-28. First Amendment interests are no less important when it comes to "diverse and controversial subjects . . . whether in news and public affairs or in dramatic or other programming contexts." *WGBH Educ. Found.*, 69 F.C.C.2d at ¶ 11. The FCC's application of its indecency policy with less restraint to these other forms of programming is therefore arbitrary and capricious.

The FCC also cannot harmonize its approach to Scorsese's "The Blues" with its recent decision involving another eminent director, Steven Spielberg, and his fictionalized film "Saving Private Ryan." *Private Ryan*, *supra* n.2. Although the FCC found "fuck" and "shit" to be indecent in *The Blues*, it exonerated use of the same words in *Private Ryan* because it concluded that editing "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers." *Private Ryan*, 20 F.C.C.R. at 4512.

The FCC stated that "The Blues" is different from "Saving Private Ryan" because the documentary's educational purpose "could have been fulfilled and all viewpoints expressed without the . . . broadcast of expletives." Joint App. 76. But the disparity between these decisions is unsupported by any coherent rationale. "The Blues" aimed to portray its subject accurately and authentically, while "Saving Private Ryan" was a fictionalized account in which the producers could choose how their characters would speak. If anything, there is a *less* plausible basis to find, as the FCC did, that the expletives spoken by the individuals filmed in "The Blues" were designed to pander, titillate, or shock, where the producer did not choose the expletives but was merely portraying those who did.

The different outcomes illustrate that the FCC's new, less restrained policy lacks "a coherent, principled long-term framework that is rooted in common sense." Joint App. 174 (statement of Comm'r Adelstein concurring in part and dissenting

in part). The FCC's decision to adopt such a policy was arbitrary and capricious.[6]

II. The FCC's New Indecency Policy Is Overbroad.

No area is more sensitive for government than reconciling limited content regulation authorized by Congress, *see* 18 U.S.C. § 1464, with the First Amendment, s*ee* U.S. Const., amend. I. While Section 1464 prohibits "indecent" language, this Court has "made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'" *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997) (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)). The FCC thus must tread very carefully in its regulation of indecent

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[6] The FCC's policy change is also arbitrary because it has singled out two words as presumptively indecent while asserting that context is all important. As the court of appeals explained, the notion that the words "fuck" and "shit" invariably refer to sexual or excretory functions "defies any commonsense understanding of these words, which, as the general public well knows, are often used in everyday conversation without any 'sexual or excretory' meaning." Pet. App. 29a (quoting *Remand Order* ¶ 23); *see id.* at 29a-30a.

While applying a categorical rule to "fuck" and "shit," the FCC–at least for now—has not placed into that category other similarly coarse words. *See, e.g.*, Joint App. 100 (finding "bullshit," but not "dick" and "dickhead," indecent); *id*. at 138 (finding that "ass" does not "invariably invoke coarse sexual or excretory images" and was not patently offensive in context, because it was used "in a nonsexual sense"). The FCC's categorical approach to "fuck" and "shit" is inconsistent with its purported reliance on context.

speech to avoid violating the First Amendment and the Communication Act's prohibition of censorship. 47 U.S.C. § 326.

For years, the FCC did just that. Thirty years ago in *Pacifica*, two of the five members of the Court's majority rejected the broadcaster's overbreadth challenge on the ground that the policy would not create "an undue 'chilling' effect on broadcasters' exercise of their rights" because "the Commission may be expected to proceed cautiously, as it has in the past." *Pacifica*, 438 U.S. at 761-62 n.4 (Powell, J., joined by Blackmun, J., concurring). Ten years later, the D.C. Circuit in an opinion authored by then-Judge Ruth Bader Ginsburg similarly relied on the FCC's assurance "that it will continue to give weight to reasonable licensee judgments" as a basis for rejecting an overbreadth challenge to the FCC's indecency definition. *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 n.14 (D.C. Cir. 1988) ("[T]he potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.").

This Court can no longer rely on such assurances. The FCC has adopted a more aggressive indecency policy that reaches fleeting expletives, regardless of whether they actually refer to sexual or excretory activities, *see, e.g.*, *Golden Globe*, 19 F.C.C.R. at 4982, and that places a heavy burden on broadcasters to demonstrate that uses of those words are "essential" to convey a program's message or portray a subject, *see* Joint App. 75-76. As Commissioner Adelstein warned, the FCC has

embarked on a "perilous course" that "is certain to strike fear in the hearts of news and documentary makers, and broadcasters that air them, which could chill the future expression of constitutionally protected speech." *Id.* at 174 (statement of Comm'r Adelstein, concurring in part and dissenting in part). By expanding the scope of its indecency policy beyond the "verbal shock treatment" addressed in *Pacifica* to encompass a greater amount of constitutionally protected speech, the FCC has rendered it fatally overbroad.

A. The FCC's New Policy Prohibits A Substantial Amount Of Protected Speech.

The FCC's new approach to indecency is impermissibly overbroad because it prohibits a "substantial" amount of protected speech, "judged in relation to [its] plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). As amici have explained, *see* Statement Part I(C), *supra*, the FCC's current policy has had a profound chilling effect on their programming by preventing them from airing unedited versions of many programs for fear of massive liability. Examples of censored language that would not have been censored before the policy change include words spoken by a civil rights leader, by a former President of the United States, by gang members, and by a veteran describing his combat experience. *See id.* Amici have also censored documentaries concerning serious social matters including soldiers' writing about their experiences in Iraq and Afghanistan, hostile graffiti

directed at the United States, hip-hop images and lyrics expressing contempt for women, and centuries-old political cartoons depicting Marie Antoinette. *See id*. These examples are representative of a larger body of educational programming in which amici have resorted to self-censorship to avoid FCC action despite their firm belief that the excised material is constitutionally protected. The demonstrable chilling effect of the FCC's new policy on a substantial amount of constitutionally protected speech illustrates that the policy is impermissibly overbroad.

B. The Court Has Construed *Pacifica* "Emphatically Narrow[ly]."

This Court has emphasized the narrowness of *Pacifica*'s holding and underscored the need for caution when the government regulates allegedly indecent speech. In *Sable*, the Court stressed that *Pacifica* was "emphatically narrow" and invalidated a federal statute that imposed a blanket prohibition on indecent interstate commercial telephone messages. *Sable*, 492 U.S. at 126-27.

The Court again limited *Pacifica* in *Reno*, where it invalidated provisions of the Communications Decency Act ("CDA") that criminalized the knowing transmission of indecent messages to minors over the Internet. One of the provisions at issue in *Reno* featured a "contemporary community standard" that is similar to the indecency standard used by the FCC. 521 U.S. at 860, 873.

In *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 815 (2000), the Court

invalidated as overbroad a statute requiring cable companies to fully scramble sexually oriented programming or limit their transmissions to particular times when children were unlikely be in the audience As the Court explained, "the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests." *Id.*[7]

Decisions such as *Sable*, *Reno*, and *Playboy* demonstrate that government regulation of indecency is strongly disfavored under the First Amendment. In upholding the FCC's action concerning the Carlin monologue, the *Pacifica* Court relied on circumstances that in 1978 "narrow[ly]" (438 U.S. at 750) justified a restrained form of broadcast indecency regulation. The "narrowness" (*id.*) of the *Pacifica* ruling and the Court's more recent line of cases invalidating congressional attempts to regulate indecent content cast grave constitutional doubt on the FCC's decision to expand the scope of its indecency policy to reach not only the "verbal shock treatment" at issue in *Pacifica*, but

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[7] The *Playboy* Court further observed, "It is of no moment that the statute does not impose a complete prohibition" but instead channeled content to particular times of the day. 529 U.S. at 812. The Court explained that "[t]he distinction between laws burdening and laws banning speech is but a matter of degree" and that "[t]he Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Id.*

also the "isolated use of a potentially offensive word." *Pacifica*, 438 U.S. at 760-61 (Powell, J., concurring).[8]

Because the FCC's indecency policy today bears little resemblance to the restrained approach that the Court considered in 1978, the *Pacifica* decision does not support the constitutionality of the FCC's changed policy.

C. The FCC's New Policy Is Overbroad Under *Pacifica*.

Pacifica—on which the government so heavily relies—provides an insufficient foundation for the FCC's expanded indecency policy. Justice Powell made clear in his concurring opinion in *Pacifica* that he was relying in part on the FCC's representation that it would "proceed cautiously" in concluding that the policy was not overbroad, *Pacifica*, 438 U.S. at 761-62 n.4 (Powell, J., concurring), and the Court "emphasize[d] the narrowness of [its] holding" (*id*. at 750), which applied to content that was "undisputed[ly]" "vulgar, offensive, and shocking," (*id*. at 747) (internal quotation marks omitted)). *See*

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[8] The FCC has ratcheted up its enforcement while the justification for a government role in regulating indecent content has declined. Under the FCC's rules, viewers of broadcast television can now block individual channels in their entirety, or they may block specific programs on the basis of those programs' content ratings. 47 C.F.R. § 15.120(d)(2). *See also Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 19 F.C.C.R. 18279, 18347-49 (2004) (requiring digital television receivers with screens 13 inches or greater that are shipped in interstate commerce to be equipped with V-Chip technology).

also Action for Children's Television, 852 F.2d at 1336 (Ginsburg, R.B., J.) (emphasizing that "the FCC consistently reported that it would not essay expansive interpretation of the indecency concept").

The FCC is no longer "proceed[ing] cautiously" when regulating indecency. *The Blues* illustrates how difficult it will be for a broadcaster to justify the use of expletives as "necessary" to a program's message under the new policy. And a comparison of *The Blues* and *Private Ryan* demonstrates the inherent subjectivity of that requirement.

The FCC's expansion of its policy well beyond the restrained approach contemplated in *Pacifica* violates the First Amendment because it deters broadcasters from offering the most authentic version of many educational and cultural programs. *See* pp. 13-16, *supra*. As the Court recognized in *Cohen v. California*, 403 U.S. 15, 26 (1971), "words are often chosen as much for their emotive as their cognitive force." The FCC's policy suppresses their use for that purpose. Bleeping or deleting expletives spoken by documentary interviewees damages the quality of programming, distracts the viewer, and prevents the broadcaster from conveying a realistic portrait of the person, subject, or situation being portrayed.

The FCC cannot justify its new policy by arguing that constitutionally protected indecent content is not prohibited, but merely channeled to times of the day when children are not apt to be in

the audience.[9] This Court rejected a similar contention in *Playboy*, *see* note 7, *supra*, and should do so here as well. The unconstitutional nature of a content-based ban generally cannot be cured by turning it into a time or place restriction. As this Court has explained, regulation of the time when speech may occur "must *not* be based on the content of the message." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 n.3 (2002) (quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992)) (emphasis added). If it were otherwise, the First Amendment would not limit meaningfully government regulation of protected speech.

Channeling also fails as a practical matter. Many adult viewers watch television primarily outside the safe-harbor hours. These viewers are thus impermissibly reduced to watching "only what is fit for children." *Reno*, 521 U.S. at 875. The safe-harbor rule is especially burdensome for public television. Airing certain compelling programs only after 10 p.m. could undermine public service because fewer viewers are in the audience at that hour. Indeed, Nielsen Media Research reports that, during the current television season, PBS's average audiences during the 10 p.m. hour were approximately 26% smaller than the comparable audiences between 8 p.m. and 10 p.m. Nielsen Media Research, "Nielsen Galaxy Explorer," Household Ratings By Hour (Sep. 24, 2007 – Jul. 26,

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[9] As a result of litigation, broadcasters may now air programming between 10 p.m. and 6 a.m. without fear of indecency liability. See Pet. App. 148a-149a.

2008). Moreover, it is costly to edit or produce multiple versions of programming, and coordinating distribution uses a substantial amount of amici's limited resources. Regardless of the steps taken by amici, the FCC's new policy deprives many adults of a constitutionally protected viewing experience.

III. The FCC's New Indecency Policy Is Unconstitutionally Vague.

Finally, the FCC's new indecency policy must be invalidated because it is unconstitutionally vague.[10] The FCC's enforcement of Section 1464 violates the Due Process Clause of the Fifth Amendment because it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 128 S.Ct. 1830, 1845 (2008). *See also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).[11]

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[10] In *Action for Children's Television*, then-Judge Ginsburg observed that *Pacifica* "did not address, specifically, whether the FCC's [indecency] definition was on its face unconstitutionally vague." 852 F.2d at 1338. Instead, Judge Ginsburg concluded—while inviting "correction" from this Court—that rejection of such a challenge was "implicit" in the Court's decision. *Id.* at 1339. While upholding the FCC's definition "under governing precedent," Judge Ginsburg found that "vagueness is inherent in [the FCC's definition]." *Id.* at 1344.

[11] Due Process violations are particularly scrutinized when they involve a "criminal statute" like Section 1464. *Pacifica*, 438 U.S. at 739 n.13. Although the *Pacifica* plurality declined to decide the implications of Section 1464's criminal penalties, *id.*, (...continued)

The FCC has declared that "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Golden Globe*, 19 F.C.C.R. at 4980. But it has not provided fair notice of the circumstances in which the fleeting (or repeated) use of expletives *will be found* indecent. The key standard that the FCC has identified—whether the expletives were "essential" to the program—is impermissibly vague because it is inherently subjective. *See Williams*, 128 S. Ct. at 1846 (observing that the Court has invalidated criminal statutes that require an indecency finding because such a standard turns on "wholly subjective judgments").

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the Court generally prohibits multiple interpretations of a statute that applies in both criminal and civil contexts because such an approach would "render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." *Clark v. Martinez*, 543 U.S. 371, 382 (2005). *See also Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

Even if the FCC's enforcement scheme could be divorced from the criminal statute it is interpreting, due process principles would still apply because the forfeiture regime in place today is punitive in nature. The increased forfeiture amount is sufficient to put a smaller public broadcaster out of business, and an adjudicated violation of the indecency rules creates the potential for license renewal complications and carries a stigma. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499-500 (1982) (civil statute "quasi-criminal" because of stigma associated with violating it); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) (applying due process protections to civil statute).

The Blues places the vague and subjective nature of the FCC's standard in stark relief. Despite finding that the broadcaster might reasonably have believed that the expletives "served a legitimate informational purpose," Joint App. 78, the FCC held that the broadcaster failed to demonstrate that the expletives were "essential to the nature of [the program]," *id*. at 84. The FCC's decision suggested that the outcome might have been different had the expletives been spoken by blues musicians rather than record producers, but it did not explain this distinction. *Id*. at 73-74.

Just as the broadcaster of "The Blues" could not have foreseen that the FCC would rely on that arbitrary distinction, no broadcaster can predict the rationale that will control the FCC's application of its "necessary" or "essential" test, which requires the Commissioners to substitute their inherently subjective and unpredictable judgment for the editorial discretion of the broadcaster. Although the FCC maintains that its subjective judgments are based on its "collective experience and knowledge, developed through constant interaction with" various parties, *Infinity Radio License, Inc.*, 19 F.C.C.R. 5022, 5026 (2004), the Court has emphasized that "governmental officials cannot make principled distinctions in this area." *Cohen*, 403 U.S. at 25. Broadcasters are therefore at risk of discriminatory enforcement. *See* Joint App. 174 (statement of Comm'r Adelstein) (indecency policy applied in the *Omnibus Order* lacks "a coherent, principled long-term framework").

As this Court has observed, "[t]he vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno*, 521 U.S. at 871-72. This Court's decision in *Reno*, in which it invalidated for vagueness a provision of the CDA that banned the displaying of "patently offensive" material to a minor on the Internet, is instructive. The CDA, like the FCC's indecency policy, prohibited material that "depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." *Id.* at 871. The Court observed that "the absence of a definition" of "patently offensive" material would "provoke uncertainty among speakers about . . . just what [it] mean[s]." *Id.* at 872-73. The Court also found it significant that, unlike statutes outlawing obscenity, the statute did not preclude a finding of "patent[] offensive[ness]" if the material possessed "serious literary, artistic, political, or scientific value." *Id.* The Court explained that the "societal value" rule in obscenity cases "critically limits the uncertain sweep of the obscenity definition." *Id.* The absence of such a rule in the CDA meant that there was nothing to mitigate "the vagueness inherent in the open-ended term 'patently offensive,' and thus nothing to prevent the statute from "silenc[ing] some speakers whose messages would be entitled to constitutional protection." *Id.*

The FCC's new policy is impermissibly vague for much the same reasons. Although the FCC has identified three factors that it applies in determining whether material is "patently offensive," vagueness

still permeates the policy. It is unclear how much weight the FCC will accord each of the three factors in any given case, what word will be deemed sufficiently graphic or explicit, whether one word will be sufficient to trigger liability, and whether the word will be deemed "necessary" or "essential." Moreover, like the provision in *Reno*, the FCC's policy does not shield material of "societal value" from liability. In fact, the FCC will not defer to the reasonable judgments of broadcasters of such material, unless it falls into the FCC's "news programming" category.

IV. The FCC Should Apply A Standard More Deferential to Broadcasters' Editorial Judgment.

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

Under its current approach, the FCC is the sole arbiter of "community standards" and whether a word is "necessary" or "essential" as well. The FCC thereby imposes its subjective views on each of the communities that its broadcast licensees serve, substituting its judgment for that of broadcasters, an approach that chills constitutionally protected

speech and is thus anathema under the First Amendment. Applying a standard that would defer to the good-faith judgments of licensees that serve those communities would be a step towards returning the FCC to the cautious approach upheld in *Pacifica*—one in which the FCC would be "far more dedicated to the First Amendment premise that broadcasters should air controversial programming than . . . worried about an occasional four-letter word." Charles Ferris, Chairman, FCC, Address Before the New England Broad. Ass'n, at 8 (Jul. 21, 1978).

The FCC has adopted a similar deferential standard in another context. In light of the constitutional and statutory prohibitions on "any Commission actions that would improperly interfere with the programming decisions of licensees," 47 U.S.C. § 326; *see* U.S. Const., amend. I, the FCC defers to broadcasters' editorial discretion in the selection and production of news and editorial programming, and it interferes with that discretion only when exercised in bad faith. *See, e.g.*, *John V. Oldfield*, 22 F.C.C.R. 18638, 18642 (2007).

The FCC's deference in this area is based, in part, on the fact that broadcasters are in the best position to understand the needs of their local communities. Moreover, whether they are public stations that depend on individual contributions or commercial broadcasters that must earn advertising revenue, broadcasters have incentives to remain faithful to their audiences and avoid airing programming that would alienate viewers. Indeed, broadcasters have overwhelmingly refrained from

broadcasting explicit content from 10 p.m. to 6 a.m., when the FCC's indecency prohibition does not apply. *See* 47 C.F.R. § 73.3999. There is no reason to believe that, if the FCC adopted a more deferential standard, the character of the programming they broadcast during other hours would change. At the same time, such a standard would help mitigate the current regime's unconstitutional chilling effect on broadcasters' speech.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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DATED: AUGUST 2008

APPENDIX

AMICI CURIAE IN SUPPORT OF RESPONDENTS

The **Public Broadcasting Service** is a nonprofit membership organization which distributes national public television programming and provides other program-related services to 356 licensees of the nation's public television stations. PBS content reaches more than 65 million people weekly through television and online content.

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

National Public Radio, Inc. is producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves 26 million Americans each week by providing news programming to 285 member station licensees.

Educational Broadcasting Corporation is a producer of public television programming and the licensee of flagship public television station Thirteen/WNET and WLIW 21, serving the New York metropolitan area.

WGBH Educational Foundation is a producer of public television programming and the licensee of public television stations WGBH-TV and WGBX-TV, Boston, Massachusetts, and WGBY-TV,

Springfield, Massachusetts, and four public radio stations in Massachusetts.

San Mateo County Community College District is the licensee of public television station KCSM-TV, San Mateo, California.

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

Community Television of Southern California is a producer of public television programming and the licensee of public television station KCET, Los Angeles, California.

North Texas Public Broadcasting, Inc. is the licensee of public television station KERA-TV, Dallas, Texas.

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

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

State of Wisconsin — Educational Communications Board is the licensee of public television stations WHLA-TV, La Crosse; WLEF-TV,

Park Falls; WPNE, Green Bay; WHWC, Menomonie and WHRM-TV, Wausau, Wisconsin.

WQED Multimedia is a producer of public television programming and the licensee of public television station WQED, Pittsburgh, Pennsylvania.

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

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

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

Northern California Public Broadcasting, Inc. is the licensee of public television stations KQED, San Francisco; KTEH, San Jose and KQET, Watsonville, California.

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