

No. 10-1293

**In the
Supreme Court of the United States**

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,

v.

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

*On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit*

**BRIEF OF PARENTS TELEVISION COUNCIL
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

Parents Television Council (PTC) is a nonprofit, nonpartisan, grassroots organization dedicated to improving the content of entertainment programming, with an emphasis on prime time television. Founded in 1995, PTC is funded by contributions from its 1.3 million members and other supporters throughout the United States. It works with television producers, broadcasters and sponsors in an effort to stem the increasing tide of harmful messages targeted at children.

PTC has encouraged elected and appointed government officials and agencies to enforce broadcast decency standards that exist in statute and regulation, and it has encouraged its members and others to file complaints with the FCC about broadcasts they believe violate the indecency law, including the broadcasts at issue in this case. Many of the complaints filed with the FCC about the 2002 and 2003 Fox broadcasts at issue in this case came from PTC members. PTC also participated as *amicus curiae* in the Second Circuit proceeding

¹ As required by Supreme Court Rule 37.6, *amicus* 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. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* states that all parties have consented in writing to the filing of this brief.

below, and as *amicus curiae* in *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).

STATEMENT OF THE CASE

PTC adopts the Petitioners' Statement.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FCC's enforcement regime does not affect *whether* respondents can broadcast expletives or titillating bathroom scenes involving children and nude women; it is about *when* they can do so. The FCC's enforcement efforts are aimed only at channeling indecent broadcasts away from the 6 a.m. to 10 p.m. time period. 47 C.F.R. 73.3999(b). Fox, ABC and the other respondents are free to broadcast whatever they want (as long as it is not obscene) on over-the-air television between 10 p.m. and 6 a.m.

They are also free to broadcast the same language and the same bathroom scene at issue here at any time on any of the dozens of cable channels they own.² Petitioners therefore cannot realistically claim that simply channeling indecent broadcasting to the hours after 10 p.m. somehow chills their speech when they own so many other avenues for speech, particularly when strong Congressional

² See, for example, the list of cable channels owned by Fox and ABC at: For Fox: <http://www.newscorp.com/operations/cable.html>; For ABC: http://corporate.disney.go.com/careers/who_abc_cable.html.

policy and this Court's holdings show that the protection of children from broadcast indecency is of paramount importance.

The Commission's enforcement regime therefore addresses only a portion of respondents' broadcast fare on the public airwaves. It requires only that respondents restrain themselves during the times when children are most likely to be watching television. That was a reasonable restriction in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and it is still reasonable, for in *Pacifica* this Court held that the government's interest in the well-being of its youth justified the regulation of otherwise protected speech. *Id.* at 749 (quoting *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (quotations omitted)).

The Commission's regime is bottomed on 18 U.S.C. § 1464, a statute that has been on the books since the 1930s, and it uses a definition of indecency that has been in place since 1975. 56 F.C.C. 2d 94, 98. Almost 34 years ago, *Pacifica* effectively sanctioned the Commission's definition of indecency and since then, using the public airwaves, respondents and other broadcasters have profited handsomely without running afoul of the Commission's indecency policies and guidelines.

Several years ago, the Commission expanded the scope of its indecency enforcement activity to reach the single use of expletives on broadcast television. In addition, it began to police the racy material broadcast in scripted programming.

Respondents and other broadcasters launched an array of objections to the FCC's new enforcement regime, among them a claim that it violated the Administrative Procedure Act, 5 U.S.C. §551, *et seq.* (APA).

This Court affirmed the Commission's current enforcement regime, holding that the FCC's decision to expand the scope of its enforcement activity to reach the single use of expletives on broadcast television was entirely rational and therefore lawful under the APA. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009). What the Court called the "pervasiveness of foul language and the coarsening of public entertainment in other media such as cable," justified the Commissions' new policy of more closely regulating broadcast programming in order that concerned parents need not worry that their children would see and hear on broadcast television the kind of increasingly coarse fare carried on cable. 129 S. Ct. at 1819. The Court also noted that "Congress has made the determination that indecent material is harmful to children and has left enforcement of the ban to the Commission." *Id.* at 1813.

Respondents have been granted the free and exclusive use of the public airwaves. Their broadcasts dominate public entertainment. For example, in sports, they broadcast NFL games, the Super Bowl, the NCAA Final Four, the World Series, the Masters Golf Tournament and the Kentucky Derby. In popular entertainment, they broadcast *Dancing With the Stars* and *American Idol*, to name

only two hugely popular shows. In return for their privileged position in the broadcast arena, they are required to observe Section 1464's stricture against broadcast indecency. They have not done so.

In this case, they seek complete immunity to broadcast expletives of the kind broadcast by Fox two years in a row on the same show. ABC contends that it did nothing wrong in broadcasting in prime time an episode of NYPD Blue that included a scene in which a young boy walks in on a nude woman in the bathroom. The episode's lighting, sultry music and lingering shots of the woman's buttocks prove otherwise. Simply put, respondents want out from under the indecency regime. For them, the free use of the public airwaves is about their rights, but not about their responsibilities.

The FCC's current enforcement regime is a response to respondents' increasingly aggressive probing of the limits of what they can broadcast. Respondents argue that those who do not want to watch what they broadcast should use technology to avoid it, putting the burden on the viewing public, which owns the airwaves, to avoid offensive material. Even if such technology worked and it - does not, in part because respondents mislabel their broadcasts - it is respondents, not their audience, who are obliged to take steps to avoid broadcasts of indecent material.

ARGUMENT

I. Respondents' Free And Exclusive Use Of The Public Airwaves Is A Public Trust

There should be no dispute that those who have been granted a license to broadcast over scarce public airwaves serve in a sense as a fiduciary for the public. In *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981), this Court noted that “[a] licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.”

As part of the public trust granted to broadcasters in exchange for their free and exclusive use of the public airwaves, they are required to abide by the Congressional prohibition against indecent broadcasts, which applies only during the hours of 6 a.m. to 10 p.m. *Fox*, 129 S. Ct. at 1806, citing 18 U.S.C. § 1464 and the Public Telecommunications Act of 1992, §16(a), 106 Stat. 954.

II. Broadcasting Is a Uniquely Pervasive Medium

The Court has observed in another context that “broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.” *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)). Recent studies show

that by any measure broadcast television is *still* a uniquely pervasive influence in America.

In 2003, the FCC found that more than 15 million households relied exclusively on broadcast television, rather cable or satellite service. Pet. App. 79a-80a, ¶ 49. In addition, the FCC found, in 2003 some 68% of children between the ages of eight and 18 had a television set in their bedrooms, and almost half of those received only broadcast content. *Id.*

The numbers of those who get only broadcasting, rather than cable, has substantially increased since the Commission's 2003 findings. The National Association of Broadcasters (NAB) announced just a few months ago that the number of those who rely solely on broadcast television has tripled (to 46 million, amounting to 15% of the television-watching public).³ Other research has shown that a quarter of Asian-American households, 23% of Spanish-speaking households and 17% of African-American homes rely solely on over-the-air broadcast television. Home Technology Monitor 2011 Ownership Survey and Trend Report.⁴ Overall, some 20% of adults in the 18-34 year old demographic get only broadcast television. *Id.*

The NAB also recently bragged that over 90 of the top 100 primetime shows on television are on

³ <http://missouri-news.org/opinion/whats-the-best-use-of-broadcast-airwaves/6720>

⁴ http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news_view&newsLang=en&newsId=20110606006638&div=-1063439563

broadcast television, including NFL games, the NCAA Final Four, the World Series, the Masters and the Kentucky Derby.⁵ The NAB failed to mention that popular hits like American Idol and Dancing With the Stars are also on broadcast television. In September 2006, each of the top ten broadcast programs had more than 15 million viewers; only one cable program had even 5 million viewers. Pet. App. 80a ¶ 50. During the 2004-2005 season, of the 495 most-watched programs, 485 of them were on broadcast television and the highest-rated cable program rated only 257 on the list of most-watched programming. *Id.* With broadcasting that far ahead of all other televised entertainment, it is safe to say that it is not only pervasive, it is also uniquely pervasive – and it is uniquely accessible to children.

Simply put, broadcast programming saturates the nation's airwaves and dominates what is seen and heard in the nation's homes, particularly by children. That is why, despite their claims that they are besieged on all sides by viewing and listening alternatives on cable, the internet and elsewhere, none of the broadcasters has chosen to abandon the free public airwaves.

⁵ See the businesswire.com article at n.4, *supra*.

III. The FCC's Enforcement Regime Is A Response To The Increasingly Coarse Content On Broadcast Television When Children Are Most Likely To Be Watching

In *Fox*, this Court noted “the pervasiveness of foul language and the coarsening of public entertainment in other media such as cable. . . .” 129 S. Ct. at 1819. The same can be said of broadcast television as well. For studies of cable and broadcast content show that cable is a leading indicator of what is to come in broadcasting.

PTC published a November 2004 report entitled, *Basic Cable Awash in Raunch: A content analysis of expanded basic cables Original Prime-Time series*.⁶ There, PTC compiled a 16-page manuscript of dialog and stage directions culled from basic cable television programming on the air at the time. The 2004 programming had it all: all seven dirty words discussed in *Pacifica*, and graphic sexual content, including explicit dialog, strippers, nudity, masturbation and oral sex.

By 2008, it was worse. That year, PTC released another study of basic cable fare, *Children Assaulted by Sex, Violence, Drugs and Explicit Language on BET and MTV*,⁷ conducted in

⁶ PTC's 2004 report is at:
<http://www.parentstv.org/PTC/publications/reports/2004cablestudy/print.pdf>

⁷ The 2008 report is found at:
<http://www.parentstv.org/PTC/news/release/2008/0410.asp>.

conjunction with Enough is Enough, a campaign protesting the commercialization and marketing of negative and derogatory images of black men and women in the entertainment industry, sponsored by Citizens for Change, Inc.⁸ PTC's study analyzed adult content airing on BET's Rap City and 106 & Park and on MTV's Sucker Free on MTV for a two-week period in December 2007 during afternoon or early evening hours when children were at home after school, and in March 2008. The latter period showed even higher levels of adult content in March 2008 than in December 2007. For example, PTC found:

- 746 sexually explicit scenes or lyrical references in the 27.5 hours of analyzed programming from the December study period for an average of 27 instances per hour, or one instance every 2.2 minutes. Sexual content was even more common in the March test period, with an average 40 instances per hour, or one instance every 90 seconds;
- 475 uses of explicit language and obscene gestures in December for an average of 17 instances per hour, or one instance every 3.5 minutes, and 495 uses of explicit language and obscene gestures in March, for an average of 35 instances per hour, or one instance every 1.7 minutes.

⁸ www.enoughisenoughcampaign.com

Last year, PTC conducted a study comparing the first two weeks of the 2010 season's primetime broadcast programming with the same period in 2005, with a focus on the volume and harshness of profanity occurring on broadcast television. See *Habitat for Profanity: Broadcast TV's Sharp Increase in Foul Language*.⁹

PTC found that:

- The use of profanity on prime-time broadcast entertainment programming increased 69.3% from 2005 to 2010;
- The largest increases were found in the use of what the Report referred to as the “harshest profanities,” and in explicit references to genitalia and bodily functions;
- The greatest increase in the use of the harshest profanities occurred in the 8 p.m to 9 p.m ET time period, which is also known as the Family Hour;
- Use of the word “fuck,” whether bleeped or muted, increased from 11 instances in 2005 to 276 instances in 2010 – including a ten-fold increase in the use of that word during Family Hour. Use of the word “shit” was used in bleeped or muted form 11 times in 2005; by 2010 it was used 95 times. That count does

⁹ PTC's complete study, with data, results and analysis is at: <http://www.parentstv.org/PTC/publications/reports/2010ProfanityStudy/study.pdf>.

not included the coy use of “shit” in the title of the CBS show, *##! My Dad Says*, or NBC’s scripted, unbleeped use of the word in a recent broadcast of *30 Rock*. At 3;

- Use of the word “balls” to refer to male genitalia increased 200%, use of the word “screw” increased 121%, and use of the word “boobs” in reference to breasts increased 90%. *Id.*

The study noted a 69% increase in scripted profanity on pre-planned, filmed entertainment, showing that use of such language by the networks is both deliberate and pervasive.

If the Commission’s enforcement regime is struck down, there will soon be little difference between cable and broadcast content, and the public airwaves will afford no shelter for parents who want to shield their children for as long as they can from the corrosive effects of what broadcasters think is appropriate.

IV. V-Chip Technology Is Not a Substitute For Broadcasters’ Obligation To Avoid Indecent Broadcast Material When Children Are Most Likely To Be Watching Television

Those who contend that viewers who want to avoid indecent broadcasting should use a technology filter have it backwards. The FCC’s enforcement regime is bottomed on Section 1464, which addresses

broadcasting, not receiving. That statute should not be ignored by making viewers fend for themselves so that broadcasters can have a free hand with the public airwaves.

By putting the onus of Section 1464 on the broadcasters, Congress chose the simplest and most direct way of addressing the problem of broadcast indecency. Congress did not leave the viewing public to look out for itself. A technological solution at the viewers' end – if it worked, and it does not - shifts the problem of broadcast indecency from the broadcasters to the public, and effectively reverses the power flow of Section 1464 from a restriction on broadcasters to a burden on viewers and listeners.

There are several reasons why technology does not trump the indecency statute.

1. V-chip and similar technology touted by respondents and their supporters address only video broadcasts, yet section 1464 and the Commission's enforcement regime apply to both television and radio broadcasts. There is no technology available to radio listeners that would permit them to avoid indecent material.

2. A purported technology "solution" burdens viewers, leaving respondents, who have free use of a public resource, unfettered by any restraints at all in what they can broadcast, and when. That turns the Congressional regulatory scheme on its head.

This Court in *Pacifica* noted the intrusive nature of broadcasting, commenting that it comes into the privacy of the home, “where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.” 438 U.S. at 748.¹⁰ The Court has made the same point in other cases. See *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 738 (1970) (right to avoid unwelcome speech has special force in the privacy of the home); and *Frisby v Schultz*, 484 U.S. 474, 485 (1988) (“We have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom”).

As to the Fox broadcasts, those observations are particularly apt here. As noted above, the ratings that Fox assigned to the 2002 and 2003 broadcasts were inadequate to warn parents that their children were at risk of being subjected to gratuitous expletives and semi-nudity on prime time television. There is no reason why viewers should have to filter broadcasters’ fare against indecency, and every reason why the broadcasters should do the job themselves, as Congress intended.

3. The technology available to viewers is not an effective bulwark against indecent broadcasting.

¹⁰ In his concurrence in *Pacifica*, Justice Powell put it this way: “broadcasting – unlike most other forms of communication – comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds.” 438 U.S. at 759 (citations omitted).

It is only as good as the rating system it is based on, and that system is bad.

The best evidence of that is the inaccurate TV-PG underrating Fox gave to its 2002 and 2003 Billboard Music Awards broadcasts. See *FCC Order*, Pet. App. 92a and 82a. Inaccurate rating of television programming is not at all uncommon, and may be driven by economic incentives, since programs with more restrictive ratings command lower advertising revenues. *Id.* at 82a-84a, n.162.

In *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011), this Court struck down California's prohibition on sale of violent video games to those under the age of 18. In doing so, it was important to the Court that the video-game industry had in place an efficacious ratings system backed up by point-of-sale enforcement by merchants that resulted in a significant reduction in the number of minors able to buy violent video games *Id.* at 2740-2741. The same cannot be said here. As shown above, the broadcasters' rating system is a slapdash affair, unevenly applied and often driven by commercial concerns, rather than an honest effort to alert viewers to the true content of broadcasts. As a consequence, some 2.5 million minors saw the two Fox Billboard Music Awards shows at issue in this case. *Fox*, 129 S. Ct. at 1809.

A different point, but just as damning for the broadcasters' rating system, is the fact that, as the FCC Order noted, the "TV-PG" rating is the most common rating given by the broadcasters to their

programming, covering a majority of programming. That rating means that a program may contain material that parents find unsuitable for younger children, and that parents may want to watch that program with their children. Pet. App. 50a-51a, n.47. If the broadcasters have accurately rated their programming, then by their own estimation, the majority of what they broadcast must be watched with caution by children. That is a telling indictment of what the broadcasters are sending into the nation's living rooms.

4. Viewers do not understand the ratings system. Apart from the broadcasters' consistent mislabeling of the content of their broadcasts, ignorance among viewers of the ratings system and v-chip technology makes the v-chip particularly useless as a safeguard against broadcast. For example, among parents who have even heard of the broadcasters' ratings system, fewer than half understand what the ratings mean. See *Implementation of the Child Safe Viewing Act: Examination of Parental Control Technologies for Video or Audio Programming*, 24 F.C.C.R. 11413 (2009). A 2007 Kaiser Family Foundation study cited in the Commission's report found that only 16% of parents had used the v-chip.¹¹

5. The broadcasters have at hand technology that readily permits them to avoid spontaneous vulgarities of the kind uttered in the 2002 and 2003 Billboard Music Awards Shows. See *Fox*, 129 S. Ct.

¹¹ *Parents, Children & Media: A Kaiser Family Foundation Survey* (June 2007) at 9.

at 1813 (“The fact that technological advances have made it easier for broadcasters to bleep out offending words further supports the Commission’s stepped-up enforcement policy”). Broadcasters can and should use technology at their end, by delaying the broadcast of live events 10 seconds or so, or however long is necessary, in order to ensure that they do not run afoul of their obligations under Section 1464. If broadcasters took their obligations seriously, they would do so already for the broadcast of award shows, which have proven to be unpredictable and troublesome.

Section 1464, which underpins the FCC’s enforcement regime, is not a dead letter. The ever coarser fare broadcast over the public airwaves during the day and in prime time prompted Congress, over the objection of the broadcasters, to put real teeth in the statute when it significantly increased the penalty for broadcast indecency. *See* Broadcast Indecency Enforcement Act of 2005, Public Law No. 109-235, 120 Stat. 491. Respondents should not be allowed to end-run Congress by placing the burden on parents to try to protect their children against exposure to what this Court, quoting *Pacifica*, rightly characterized as material “at the periphery of First Amendment concern.” *Fox*, 129 S. Ct. at 1819.

CONCLUSION

Broadcasters are not unfairly put upon by not being able to broadcast whatever they want until after 10 p.m. each day. Nor are they really at a competitive disadvantage with cable; they own significant portions of the cable spectrum and therefore control and sometimes even create the very cable content that they contend so disadvantages them as broadcasters. They cannot with a straight face point to their often coarser fare on cable as a reason to permit them to do the same on broadcast television.

This case is not an affront to artistic expression or a threat to the First Amendment. Instead, it is about whether Section 1464 is to have any continuing vitality in affecting what the broadcasters can send into America's homes, or whether, as respondents seem to argue, the indecency statute is a polite fiction that can be safely ignored.

Technology cuts both ways. There is no reason why the broadcasters cannot impose a brief time delay in their live broadcasts in order to avoid unscripted vulgarities. After all, Fox's 2002 and 2003 broadcasts were delayed by one hour in the Mountain time zone and three hours in the Pacific time zone. Pet. App. 68a ¶ 36. A 10-second delay should not be an onerous burden in order to give meaning to Section 1464.

The Court should uphold the FCC's new enforcement policy contained in the Remand Order as constitutionally valid as a logical extension of the holding of *Pacifica*.

Respectfully Submitted,

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