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 FOR *AMICI CURIAE* FORMER FCC OFFICIALS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT..... 3

ARGUMENT 5

I. THE FCC'S EVOLVING STANDARDS OF INDECENCY 5

II. THE FCC'S CURRENT REGIME AND JUSTICE BRENNAN'S WARNING 12

III. *PACIFICA'S* OBSOLESCENCE 19

A. Singling Out Broadcasters 20

B. Burning the House to Roast the Pig 28

IV. *VOX POPULI* AND THE POLITICS OF INDECENCY REGULATION..... 34

CONCLUSION..... 37

TABLE OF AUTHORITIES

Page

CASES

ACLU v. Ashcroft,
542 U.S. 656 (2004).....6, 29, 31

ACLU v. Gonzales,
478 F. Supp. 2d 775 (E.D. Pa. 2007),
aff'd sub nom. ACLU v. Mukasey,
534 F.3d 181 (3d Cir. 2008).....29

Action for Children's Television v. FCC,
852 F.2d 1332 (D.C. Cir. 1988).....8

Action for Children's Television v. FCC,
932 F.2d 1504 (D.C. Cir. 1991).....9

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58 F.3d 654 (D.C. Cir. 1995), *cert. denied*,
516 U.S. 1072 (1996).....9

Action for Children's Television v. FCC,
59 F.3d 1249 (D.C. Cir. 1995).....8

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002).....28

Bowsher v. Synar,
478 U.S. 714 (1986).....36

Brown v. Entm't Merch. Ass'n,
131 S. Ct. 2729 (2011).....18, 26, 27, 31, 33

Butler v. Michigan,
352 U.S. 380 (1957).....28, 29, 36

CBS Corp. v. FCC,
___ F.3d ___, No. 06-3575
(3d Cir. Nov. 2, 2011).....11

TABLE OF AUTHORITIES – Continued

Page

Citizens United v. FEC,
130 S. Ct. 876 (2010).....27, 28, 38

City of Ladue v. Gilleo,
512 U.S. 43 (1994).....26

Denver Area Educ. Telecomm. Consortium, Inc. v. FCC,
518 U.S. 727 (1996).....20

FCC v. Fox Television Stations, Inc.,
129 S. Ct. 1800 (2009).....14

FCC v. Pacifica Found.,
438 U.S. 726 (1978).....*passim*

Fox Television Stations, Inc. v. FCC,
613 F.3d 317 (2d Cir. 2010).....14, 15, 19, 20, 31

Miller v. California,
413 U.S. 15 (1973).....5

Pearson v. Callahan,
129 S. Ct. 808 (2009).....28

Red Lion Bctg. Co. v. FCC,
395 U.S. 367 (1968).....21

Reno v. ACLU,
521 U.S. 844 (1997).....19, 21, 28, 33

Sable Commc'ns v. FCC,
492 U.S. 115 (1989).....28, 36

United States v. Playboy Entm't Grp., Inc.,
529 U.S. 803 (2000).....*passim*

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND LEGISLATIVE MATERIALS

18 U.S.C. § 1464 .....5, 8

47 U.S.C. § 231(a)(1).....29

47 U.S.C. § 503(b).....36

Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, § 2, 120 Stat. 491 (2006).....35

H.R. Res. 500, 108th Cong. (2004).....35

S. Res. 283, 108th Cong. (2003) 35

OTHER AUTHORITIES

A.L. Gutnick et al., *Always connected: The new digital media habits of young children* (Sesame Workshop and the Joan Ganz Cooney Center 2011).....25

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Bill Rose & Larry Rosin, *The Infinite Dial: Radio's Digital Platforms* (Arbitron Inc./ Edison Media Research 2006) 23, 24

Broadcast Decency Enforcement Act of 2004: Hearings on H.R. 3717 Before the Subcomm. On Telecomms. and the Internet of the H. Comm. on Energy and Commerce, 108th Cong. (2004) 10

TABLE OF AUTHORITIES – Continued

Page

Cecilia Kang, *Number of cellphones exceeds U.S. population: CTIA trade group*, WASH. POST, Post Tech, Oct. 11, 2011 23

Charles D. Ferris, Chairman, FCC, Address before the New England Broad. Assoc. (July 21, 1978) 7

Citizen's Complaint against Pacifica Found. Station WBAI(FM), 56 F.C.C.2d 94 (1975).....5, 6

Clear Channel Broad. Licenses, Inc., 19 FCC Rcd 6773 (2004).....11

Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd 4975 (2004).....11, 13, 35

Complaints Against Various Television Licensees Concerning Their Dec. 31, 2004 Broad. of the Program "Without a Trace," 21 FCC Rcd 2732 (2006).....12

Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broad. of the Program "NYPD Blue," 23 FCC Rcd 1596 (2008).....15

Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broad. of the Program "NYPD Blue," 23 FCC Rcd 3147 (2008).....35

TABLE OF AUTHORITIES – Continued

Page

Complaints Against Various Television Licensees Regarding Their Broad. on Nov. 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 FCC Rcd 4507 (2005) 14

Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005, 21 FCC Rcd 2664 (2006) 12, 13, 14, 15, 34

Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005, 21 FCC Rcd 13299 (2006) 12, 14

Hulu Home Page, http://www.hulu.com/ 22, 24

Implementation of the Child Safe Viewing Act: Examination of Parental Control Techs. for Video or Audio Programming, 24 FCC Rcd 11413 (2009) 22, 31, 32, 33

Indecency Complaints and NALs: 1993-2006, FCC, http://www.fcc.gov/eb/oip/ComplStatChart.pdf 11

Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency, 16 FCC Rcd 7999 (2001) 10

ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM (1983) 37

Michelle Kung, *McG Hopes "Aim High" Will Redefine Social Viewing*, WALL STREET JOURNAL, Speakeasy, Oct. 18, 2011.....24

TABLE OF AUTHORITIES – Continued

Page

Paul Fahri, *Stern 'Indecency' Case Settled; After 7-Year Fight With FCC, Broadcasting Firm to Pay $1.7 Million*, WASH. POST, Sept. 2, 1995 10

Petition for Reconsideration of a Citizen's Complaint against Pacifica Found. Station WBAI(FM), 59 F.C.C.2d 892 (1976).....7

Streaming Radio Guide, http://www.streaming radioguide.com/ 23

Television Audience 2009, Nielsen, http://blog. nielsen.com/nielsenwire/wp-content/uploads/ 2010/04/TVA_2009-for-Wire.pdf 20

Video of Bono's Acceptance Speech at the Golden Globes, YouTube.com, http://www.you tube.com/watch?v=COlPQlNguvU 25

WGBH Educ. Found., 69 F.C.C.2d 1250 (1978).....7

INTEREST OF *AMICI CURIAE*

Amici are former commissioners and officials of the Federal Communications Commission ("FCC" or "Commission") who oppose its indecency enforcement policy.[1] We are a bipartisan group with different views about some issues of radio and television regulation, but we are of one view on the issue now before this Court: the discriminatory and arbitrary enforcement of controls on indecent broadcast speech violates the First Amendment.

Mark Fowler, currently a wireless radio project investor and entrepreneur, was Chairman of the FCC from 1981 to 1987. Jerald Fritz, Sr. Vice President and General Counsel for Allbritton Communications Company, served as Legal Advisor and Chief of Staff to FCC Chairman Mark Fowler from 1981 to 1987. Henry Geller, retired, served as General Counsel of the FCC from 1964 to 1970, as special assistant to the Chairman in 1970, and was Administrator of the National Telecommunications and Information Administration from 1978 to 1981. Newton N. Minow, Senior Counsel at Sidley & Austin, LLP, was Chairman

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici* or their counsel contributed monetarily to the preparation and submission of this brief.

Petitioners and respondents have filed blanket consent letters with the Court as to the submission of *amicus* briefs in this case. The parties' blanket consent letters are on file with the Clerk of Court.

of the FCC from 1961 to 1963. Glen O. Robinson, the David A. and Mary Harrison Distinguished Professor of Law Emeritus at the University of Virginia, was FCC Commissioner from 1974 to 1976. Kenneth G. Robinson, a Washington, D.C. communications attorney, was Senior Legal Advisor to FCC Chairman Alfred Sikes from 1989 to 1993, as well as senior policy advisor to five Assistant Secretaries of Commerce for Communications and Information.

As former FCC commissioners and officials, *amici* have been personally associated with the indecency controversy in the past, and we once had some sympathy for the FCC's concerns. Indeed, one of us joined in the Commission's original *Pacifica* decision, and a second participated in an earlier decision that partly anticipated *Pacifica*. However, the FCC's enforcement policies have destroyed any expectations we had for moderation and restraint in this endeavor and have caused us to regret our earlier involvement in it. *Amici* have previously filed briefs in this Court and in the Second Circuit urging that this out-of-control regime of program control be declared unconstitutional.[2]

[2] Former FCC Chairman and Commissioner James Quello participated in our earlier brief in this Court; he has since passed away.

SUMMARY OF THE ARGUMENT

After several times up and down the appellate ladder, this Court is now squarely presented with the question whether the FCC's current indecency enforcement regime violates the First Amendment. Thirty-three years ago, the Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), guardedly approved the restriction of "indecent" broadcast programming. Today, the Commission's arbitrary and excessive enforcement policies have exceeded anything contemplated by the Court in *Pacifica* and should be struck down.

The FCC's policy towards broadcast indecency has evolved from a restrained effort to regulate clear, flagrant instances of indecent language by a handful of broadcast licensees and performers into an ever-expanding campaign against ordinary radio and television programming. In pursuit of a policy of protecting children against exposure to offensive language, the Commission has embarked on an enforcement program that has all the earmarks of a Victorian crusade. To effectuate its new clean-up-the-airwaves policy, the Commission has radically expanded the definition of indecency beyond its original conception; magnified the penalties for even minor, ephemeral images or objectionable language; and targeted respected television programs, movies, and even non-commercial documentaries.

The Commission's actions in this case are but a few of several recent actions taken by the Commission

that exceed the boundaries it originally set and that were assumed by this Court in the *Pacifica* decision. The Commission purports to be able to discern whether language or images are indecent by looking at the "context" in which they appear. However, the banner of "context" masks subjective and arbitrary value judgments. With no discernable standards to the Commission's *ad hoc* enforcement regime, broadcasters inevitably steer far clear of the margins, taking with them much constitutionally-protected expression. By its vagueness, the Commission's policy casts an intolerably overbroad net by First Amendment standards.

In today's media environment, the distinctions drawn by *Pacifica* between broadcast and other electronic media are unsustainable. Viewers can access the same content across broadcast, cable, satellite, and the internet or can subvert the Commission's enforcement efforts by simply switching channels or turning on a computer. This reality makes plain that the Commission's efforts to impose a separate standard on broadcasters is woefully underinclusive. The First Amendment cannot tolerate discrimination against one of several like speakers. It is time for this Court to declare that the same First Amendment principles apply to all media.

As former officials of the Commission, we understand very well the political and popular pressures it faces. However, it is an elementary principle of American democracy that such pressures must be constrained by the Constitution. The Commission has no

warrant to subordinate fundamental First Amendment principles to the censorial demands of public moralists or their political representatives.

ARGUMENT

I. THE FCC'S EVOLVING STANDARDS OF INDECENCY

Until its 1975 decision in *Citizen's Complaint against Pacifica Foundation Station WBAI(FM)*, 56 F.C.C.2d 94 (1975), the Commission interpreted 18 U.S.C. § 1464 as an obscenity statute, governed by the constitutional definition and constraints of the Supreme Court's obscenity jurisprudence. The statutory proscription of "indecent or profane" language was treated as synonymous with obscenity. Although some of the pre-1975 cases might have been debatable candidates for the application of the obscenity standard announced in *Miller v. California*, 413 U.S. 15 (1973), they had never forced the Commission to consider a different standard under the rubric of indecency or profanity.

Pacifica was different: George Carlin's monologue on the seven words that "you couldn't say on the public, ah, airwaves," clearly did not satisfy the first prong of *Miller's* definition of obscenity, requiring that the material "appeals primarily to the prurient interest." 413 U.S. at 24. Confronted on the one hand with a choice of declaring Carlin's monologue to be obscene and inviting certain reversal in court, and on

the other hand dismissing the complaint as *damnum absque injuria*, the Commission proceeded to invent a third option, which was to give independent significance to "indecency" but prescribe a different scope for its regulation than that applied to obscenity. *Pacifica,* 56 F.C.C.2d at 97. Traditionally, obscenity has been treated as unprotected speech and, as such, is subject to total suppression.[3] In contrast, the FCC's approach to indecent speech called for a kind of time-and-place regulation; the time being the period when children were likely to be in the audience (subsequently fixed between the hours of 6 a.m. and 10 p.m.), the place being radio and television broadcasts. *Id.* at 99.

The Commission's move was novel, and even radical in light of established jurisprudence, but it was at least limited in scope. Except where it qualified as obscenity, indecent language was generally confined to that describing "sexual or excretory activities and organs" in a manner that was "patently offensive" as measured by contemporary community standards for the broadcast medium, at times of day when there is a reasonable risk that children may be in the audience. *Id.* at 97-98. The Commission made clear that it was concerned only with "clear-cut, flagrant cases" and emphasized "that it would be inequitable to hold a licensee responsible for indecent

[3] *ACLU v. Ashcroft*, 542 U.S. 656 (2004), suggests that obscenity is no longer completely beyond the pale of First Amendment protection, but that question is not in issue here.

language" when "public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing." *Petition for Reconsideration of a Citizen's Complaint against Pacifica Found. Station WBAI(FM)*, 59 F.C.C.2d 892, 893 n.1 (1976). This announced policy of restraint was critical to how this Court viewed the new doctrine when it affirmed the Commission in 1978. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). As Justice Powell noted in a concurring opinion, "the Commission may be expected to proceed cautiously, as it has in the past." *Id*. at 761 n.4.

And it did. Immediately after the Supreme Court affirmed its authority to regulate, the Commission rejected a petition by Morality in Media to deny a license renewal for one of the foremost educational stations in the country on the ground that it had consistently broadcast "offensive, vulgar and otherwise harmful material to children." *WGBH Educ. Found.*, 69 F.C.C.2d 1250 (1978). The Commission held that the Court's decision "affords this commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station. We intend strictly to observe the narrowness of the *Pacifica* holding." *Id*. at 1254. To underscore the point, then-Chairman Charles Ferris announced that another case like *Pacifica* was "about as likely to occur again as Halley's Comet." Charles D. Ferris, Chairman, FCC, Address before the New England Broad. Assoc. (July 21, 1978).

Paint Ferris the optimist, Halley's Comet turned out to be the wrong benchmark; the Comet makes a periodic appearance about every 76 years, but indecency returned to the FCC in just nine. In 1987, the FCC was drawn back into the indecency issue by the appearance of "shock radio" that was designed to push the limits of provocative programming beyond what Carlin had attempted a decade earlier. Despite the broadcasts' deliberately provocative character, the Commission responded with restraint. It revised its post-*Pacifica* view that the enforcement policy was limited to the precise seven words of Carlin's famous monologue and reinstated the original "generic" policy instead. The Court of Appeals for the District of Columbia affirmed the Commission's generic policy, albeit not without reservation and with an admonition to the Commission to proceed cautiously. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). Echoing Justice Powell in his *Pacifica* concurrence, the court pointedly noted its assumption that "the potential chilling effect of the FCC's generic definition will be tempered by the Commission's restrained enforcement policy." *Id*. at 1340 n.14.

The decision was to be the first act of a three-ACT play in which the Commission, Congress, and the court of appeals took turns exploring the permissible limits of the new indecency regime.[4] We will not

[4] There was a fourth *ACT* case, but it dealt only with a constitutional and statutory challenge to the procedures for enforcing 18 U.S.C. § 1464. *Action for Children's Television v.*

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examine the plot in detail except to observe that in the course of the play three things were firmly established. *First*, the proscription on indecency was limited to certain hours; the First Amendment forbids a 24-hour ban.[5] *Second*, the Commission was required to apply the indecency restrictions on a consistent basis and was barred from discriminating against commercially sponsored programs or stations.[6] *Third*, the court was seriously concerned about the risk that the regulation of indecency could get out of hand. Its repeated references to the need for caution in defining and enforcing the restrictions, reversal of Congress's attempt to make the restrictions absolute, and insistence on a consistent and principled policy make clear that the court was alert to the dangers that a policy of reining in a small number of broadcast provocateurs could easily become a vehicle for an unconstitutional morals crusade against the entire industry.

In the aftermath of the *ACT* cases, the Commission continued to view indecency as a problem of controlling a small number of rogue broadcasters and

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FCC, 59 F.3d 1249 (D.C. Cir. 1995). The court rejected the challenges.

[5] In the second "act," *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), the court struck down Congress's attempt in 1989 to eliminate the indecency "safe harbor."

[6] *See Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996) (affirming the ban on indecency between the hours of 6 a.m. and 10 p.m. for all stations; reversing the use of broader period, 6 a.m. to 12 a.m., for commercial stations).

broadcast personalities like Howard Stern, whose syndicated talk show was responsible for a very large percentage of all fines paid for indecent broadcasting over the past score years.[7] In 2001, the Commission issued a set of guidelines on its indecency policy, but the guidelines did not announce any new policy. *See Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 FCC Rcd 7999 (2001).

Yet, the time was not far off when things would change – radically. In 2004 the Commission embarked on what then-Chairman Michael Powell described as the "most aggressive enforcement regime in decades." *See Broadcast Decency Enforcement Act of 2004: Hearings on H.R. 3717 Before the Subcomm. on Telecomms. and the Internet of the H. Comm. on Energy and Commerce*, 108th Cong. 87, at 79 (2004). He could have more precisely said the most aggressive enforcement regime *ever*. Not only did the Commission find more violations and impose more penalties in that one year than in the entire prior history of the indecency doctrine,[8] it greatly expanded

[7] In 1995, for example, Infinity Broadcasting paid a then-record sum of $1.7 million to settle indecency complaints over a series of Howard Stern Shows. Paul Fahri, *Stern 'Indecency' Case Settled; After 7-Year Fight With FCC, Broadcasting Firm to Pay $1.7 Million*, WASH. POST, Sept. 2, 1995, at F1.

[8] In 2004, the FCC assessed nearly $8 million in proposed fines and settlements, compared to $440,000 a year earlier. Between 1993 and 2006, 2004 was the high water mark for

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the scope of what constituted indecency, as, for example, in its extraordinary and unprecedented ruling in the Golden Globe Awards decision that a single, spontaneous exclamation – "Fucking brilliant" – by Bono upon receiving the award was indecent. *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975 (2004) ("*Golden Globe*").[9] To magnify the impact still further, the Commission decided that each utterance of a forbidden word may be counted as a separate violation, instead of looking at a particular program as a single, integrated unit. *See Clear Channel Broad. Licenses, Inc.*, 19 FCC Rcd 6773 (2004).

The Commission's new campaign also moved beyond the traditional targets for indecency enforcement. With a few exceptions, those traditional targets were radio talk shows that deliberately and repeatedly followed a pattern of provocative programming. In its new phase, however, the Commission has undertaken

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annual collection. *See Indecency Complaints and NALs*: 1993-2006, FCC, http://www.fcc.gov/eb/oip/ComplStatChart.pdf.

[9] The Commission's decision in *Golden Globe* to punish fleeting expletives and images was such a dramatic departure from its previous enforcement policy that the U.S. Court of Appeals for the Third Circuit recently held an attempt to fine CBS for airing a fleeting image of Janet Jackson's breast during the 2004 Super Bowl Halftime Show – which occurred *prior* to *Golden Globe* – to be arbitrary and capricious under the Administrative Procedure Act. *CBS Corp. v. FCC*, No. 06-3575, slip op. at 18 (3d Cir. Nov. 2, 2011).

a close inspection of movies, regular television series, live events, and even educational documentaries, to locate objectionable language or images. Even critically honored television programs like "Without a Trace" and "NYPD Blue" have become targets of indecency patrols. *See Complaints Against Various Television Licensees Concerning Their Dec. 31, 2004 Broad. of the Program "Without a Trace*," 21 FCC Rcd 2732 (2006) (finding violation and proposing forfeiture of $32,000 for each CBS owned or affiliated station carrying the program); *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCC Rcd 2664, 2696-98 (2006) (finding violation but imposing no forfeiture for "NYPD Blue" program) ("*Omnibus Order*").[10]

II. THE FCC'S CURRENT REGIME AND JUSTICE BRENNAN'S WARNING

The orders now before the Court exemplify the character of the Commission's radically expansionist indecency regime. The Commission has traveled far afield of *Pacifica's* narrow confines to embrace an *ad hoc* approach with a broad and unpredictable nature

[10] The Commission's remand decision in the *Omnibus Order* dismissed the complaints against "NYPD Blue" on a procedural ground; however, this dismissal does not alter the substance of its earlier finding that the program contained indecent and profane language. *See Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCC Rcd 13299, 13328-29 (2006) ("*Omnibus Remand Order*").

that chills vast swaths of speech protected by the First Amendment. The First Amendment will not tolerate such a vague and overbroad exercise of authority.

Under the new enforcement regime, indecency can mean as little as the casual use of an expletive. For example, in the *Omnibus Order* the Commission found that the documentary, "The Blues: Godfathers and Sons," broadcast by a non-commercial educational station, was indecent because of the use of the F-word or S-word by some of the artists interviewed. 21 FCC Rcd at 2684-85. The Commission held that "any use of [the F-word] or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition." *Id.* at 2684 (quoting *Golden Globe*, 19 FCC Rcd at 4978). It went on to say that the S-word similarly "has an inherently excretory connotation." *Id*.

However, the Commission's attempt to classify certain words as "inherently" sexual or excretory is utterly perplexing when viewed alongside its treatment of other words.[11] According to the Commission,

[11] The Commission's "inherency doctrine" is also preposterously out of touch with the way language is used and understood today. It may be that Twila Tanner (in a live interview) describing a fellow contestant on "Survivor: Vanuatu" as a "bullshitter" was vulgar. *Omnibus Order*, 21 FCC Rcd at 2698-2700. However, only a silly literalist would think that she was describing an excretory function. As Justice Stevens aptly observed in his dissenting opinion in the Court's 2009 *Fox* decision, "As any golfer who has watched his partner shank a short approach knows, it would be absurd to accept the suggestion that the

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it is indecent to call someone a "bullshitter," *id*. at 2698-2700, but it is all right to call him an "ass," *id*. at 2712, or even a "dickhead," *id*. at 2696. You may never say "fuck 'em" – even in an off-handed way, *id*. at 2690-92 – but it is at least sometimes okay to say "up yours" with all deliberate intensity, *id*. at 2712.

The Commission justifies its unpredictable enforcement policy by professing to consider offending language or images in "context." Under this approach, the Commission may determine an expletive is indecent in one context, but is "integral" to a work's artistic value in another. *See Omnibus Remand Order*, 21 FCC Rcd at 13327. As the U.S. Court of Appeals for the Second Circuit aptly noted below, this standardless approach begets uncomfortable results, such as the disparate treatment of the film "Saving Private Ryan" and the documentary, "The Blues." *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 333 (2d Cir. 2010). The words "fuck" and "shit" were deemed integral to the "realism and immediacy" of a film about combat in World War II, but indecent in the context of artists interviewed on the history of blues music. *Compare Complaints Against Various Television Licensees Regarding Their Broad. on Nov. 11, 2004, of the ABC Television Network's Presentation of the Film*

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resultant four-letter word uttered on the golf course describes sex or excrement and is therefore indecent. But that is the absurdity the FCC has embraced in its new approach to indecency." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1827 (2009).

"Saving Private Ryan," 20 FCC Rcd 4507, 4513 (2005), *with Omnibus Order*, 21 FCC Rcd at 2684-85. Though the Second Circuit saw "no reason to suspect that the FCC is using its indecency policy as a means of suppressing particular points of view[,]" the policy's vulnerability to discriminatory enforcement and subjective value judgments was clear. *Fox*, 613 F.3d at 332-33.

The Commission's contextual approach applies with equal force to its treatment of images. With almost no explanation, the Commission declared that seven seconds of a woman's buttocks and a brief view of the side of her breast while she prepares for a shower constitutes an "explicit," "graphic," "shocking," and "titillating" depiction of sexual organs. *See Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broad. of the Program "NYPD Blue,"* 23 FCC Rcd 1596, 1598-1600 (2008). At the same time, the Commission defends its judgment that the full frontal nudity of concentration camp prisoners in the film "Schindler's List" is not indecent by simply stating that ABC could not "reasonably" expect the two to be treated alike. Pet'r's Br. 32. The Commission's terse explanation ignores the fact that, though the two contexts are indeed very different, they give no guidance or standards for networks to follow in the future. Pointing to "context" is not an explanation in itself. It leads to a subjective agency judgment whether material in one program is artistically permissible (*e.g.*, Private Ryan; Schindler) and material in others is titillating and thus gratuitous

(*e.g*., Blues; NYPD Blue). With such subjective censorship, the FCC becomes the national nanny of who gets an artistic pass and who does not. Indeed, it is impossible to predict whether the landmark miniseries "Roots," premiered by ABC in 1977 and based on Alex Haley's famous saga on slavery, could be broadcast today; the series opens with scenes featuring topless female African villagers.

The Commission's reliance on "context" as an all-encompassing justification flies in the face of *Pacifica's* use of the concept. Context was a *limiting* principle for the *Pacifica* Court. It has now become a tool, not for curtailing the reach of the Commission's indecency regime, but for expanding it. The *Pacifica* plurality invoked the concept of context to distinguish Carlin's monologue from circumstances in which similar language would be protected by the First Amendment. 438 U.S. at 746-47. The plurality determined that the "Dirty Words" of Carlin's monologue lacked constitutional protection in the unique context at bar: the intentionally provocative repetition of profanities over a twelve minute period during a daytime broadcast. In his concurrence, Justice Powell rejected the idea that that Court could generally opine on the value of speech, but joined the judgment on the understanding that the Commission would confine itself to punishing only the sort of "verbal shock treatment" that Carlin's monologue inflicted. *Id*. at 757, 761 & n.4.

It was Justice Brennan, in his prescient dissent, who foresaw how his colleague's assertedly narrow

opinion could be exploited. He highlighted the pathway leading directly to the panoptical policy we see today. He noted that the Court's two justifications for limiting First Amendment protection – the intrusive nature of radio and the presence of children in the listening audience – imported no natural limitation to potential censorship:

> These two asserted justifications are . . . plagued by a common failing: the lack of principled limits on their use as a basis for FCC censorship. No such limits come readily to mind, and neither of the opinions constituting the Court serve to clarify the extent to which the FCC may assert the privacy and children-in-the-audience rationales as justification for expunging from the airways protected communications the Commission finds offensive. Taken to their logical extreme, these rationales would support the cleansing of public radio of any "four-letter words" whatsoever, regardless of their context. The rationales could justify the banning from radio of a myriad of literary works, novels, poems, and plays . . . ; they could support the suppression of a good deal of political speech . . . ; and they could even provide the basis for imposing sanctions for the broadcast of certain portions of the Bible.

Id. at 771-72 (Brennan, J., dissenting).

Justice Brennan observed that the plurality and concurrence were prepared to "take the FCC at its word" that the agency recognized the *limited factual*

context of tolerable enforcement, but did not share their faith himself. *Id*. at 769, 771. As Justice Brennan feared, the Commission has now taken the *Pacifica* rationales "to their logical extreme" and turned a unique context – a factual outlier – into a malleable justification meaning, in effect, "regardless of context." *Id*. at 770-71.

The lack of standards and *ad hoc* enforcement of the Commission's indecency policy leaves broadcasters with no compass and little to do but try to avoid fines by steering far clear of potentially objectionable programming. This Court has repeatedly recognized that the First Amendment will not tolerate such overbroad and chilling regulation. As recently as last term, the Court emphasized that even legitimate government aims, when burdening First Amendment rights, "must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2741-42 (2011). Addressing a state ban on the sale of violent video games to minors, the Court in *Brown* highlighted the danger of government-imposed morality in finding the law overinclusive: "While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want." *Id*. at 2741 (emphasis in original). Similarly here, the Commission's indecency policy has become a vehicle for imposing its own value judgments on broadcasters and viewers. The inevitable result is that broadcasters censor themselves in an attempt to predict what

those values will be. It is time for the Court to heed Justice Brennan's advice: "I would place the responsibility and the right to weed worthless and offensive communications from the public airways where it belongs . . . in a public free to choose those communications worthy of its attention from a marketplace unsullied by the censor's hand." *Pacifica*, 438 U.S. at 772. (Brennan, J., dissenting).

III. *PACIFICA'S* OBSOLESCENCE

From the beginning, the sole source of the constitutional authority to regulate indecency has been this Court's decision in *Pacifica*. As the Second Circuit noted, post-*Pacifica* courts have applied "something akin to intermediate scrutiny" to the Commission's indecency regime. *Fox*, 613 F.3d at 326. The orders now before the Court serve to underscore how differently broadcast media is treated from cable and internet, which receive strict scrutiny. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000); *Reno v. ACLU*, 521 U.S. 844 (1997). At the same time, modern technology has collapsed the traditional distinctions between media on which *Pacifica* relied to treat broadcasting in a separate class. This singular treatment of broadcasting is woefully underinclusive when viewed alongside readily-accessible content available through other media. *Pacifica* should be overruled and the artificial and discriminatory isolation of broadcast media lifted. If afforded full First Amendment protection, it is clear the Commission's indecency policy cannot pass constitutional muster.

A. Singling Out Broadcasters

The factors relied on by *Pacifica* to treat broadcast media as unique were that broadcasting was considered to be a "uniquely pervasive presence in the lives of Americans" and "uniquely accessible to children." *Pacifica*, 438 U.S. at 748-59. The Second Circuit expressed skepticism that these distinctions are still valid today. *See Fox*, 613 F.3d at 326 ("The past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus."). That skepticism is well grounded. In 2006, about 86% of television households received their television programs from cable or satellite (classified by the Commission as "multichannel video program distributors" or "MVPD"). *Annual Assessment of the Status of Competition in the Mkt. for the Delivery of Video Programming*, 24 FCC Rcd 542, 546 (2009). In January 2010, the Nielsen Company reported that 9% of homes with televisions relied only on broadcast service, and the number has been steadily decreasing year-to-year. Television Audience 2009, Nielsen, http://blog.nielsen.com/nielsenwire/wp-content/uploads/2010/04/TVA_2009-for-Wire.pdf. In an environment where the vast majority of TV-watching homes access channels not subject to the Commission's indecency regime directly alongside those that are, it makes no sense whatsoever to continue to regard broadcast programs as "*uniquely* pervasive" or "*uniquely* accessible to children." *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 744-45 (1996) (Breyer, J.) (plurality)

(finding the pervasiveness factors cited in *Pacifica* applicable to cable television).[12]

In the internet age, the same observation holds true for online viewing. This Court, refusing to apply *Pacifica* to the internet, treated it as qualitatively different from broadcast media in *Reno v. ACLU*, 521 U.S. 844 (1997).[13] However, the Court in *Reno* would have needed a crystal ball to predict the changes to come over the next fourteen years in the content available on the internet and its pervasive presence in the lives of American adults and children. Today,

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[12] In light of the broadcasting-is-different mantra, it bears emphasizing here that the foremost technological feature that has been thought to make broadcasting different from other media – the use of scarce spectrum – was not part of the indecency doctrine. *See Pacifica*, 438 U.S. at 770 n.4 (Brennan, J., dissenting) (noting that both the majority opinion by Justice Stevens and the concurring opinion by Justice Powell "rightly refrain from relying on the notion of 'spectrum scarcity' to support their result"). The public trustee rationale of *Red Lion Bctg. Co. v. FCC*, 395 U.S. 367 (1968), is thus not involved here.

[13] Among other things, the Court in *Reno* reasoned that the internet, unlike broadcasting, is not "invasive" and does not "appear on one's computer screen unbidden." 521 U.S. at 849. This idea that broadcasting is invasive is a curious one, conjuring the image of hapless captives of the TV screen who are unable to defend themselves even with a remote control that can change channels faster than a speeding bullet. Be that as it may, it no longer makes sense to distinguish between broadcasting and cable on this basis. Yet in *Playboy*, 529 U.S. 803, the Court held that cable content controls were unconstitutional absent a showing that it was the least restrictive means of accomplishing the objective of protecting children. No consideration was given to the invasiveness/surprise element.

the walls have all but collapsed between media with regard to what, when, and where programming content is available, as evidenced by the steadily increasing popularity of streaming internet video. *See Implementation of the Child Safe Viewing Act; Examination of Parental Control Techs. for Video or Audio Programming*, 24 FCC Rcd 11413, 11471-73 (2009) ("*Congressional Report*") (discussing expansive availability of video on the internet). In 1997, it might have been plausible to suppose that children would not stumble upon offensive language or images online because most users searched for discrete content. In today's era, the element of surprise is as likely for streaming online video as it is for broadcast video. The reality is the internet is becoming an alternative platform for viewing programs that are seen on conventional TV, as Hulu illustrates. *See* Hulu Home Page, http://www.hulu.com/. Hulu (a joint venture of NBC, Fox, and ABC, with some additional outside investment) offers commercially supported streaming video of regular TV shows and movies from broadcast networks and other sources (including a number of cable networks). Except for the smaller screen size of the display terminal there is no important difference between watching an episode of "House" on conventional TV and watching it as a video stream on the internet. Of course, any broadcast-based programs that appear on Hulu are subject to indecency controls *if* they are *broadcast* during the hours of 6 a.m. to 10 p.m. But a program that was broadcast during the safe harbor period is available on Hulu any time, with no restrictions on content.

In terms of access, "[t]he typical home of 2.6 people has an average of 24 gadgets, including at least one smartphone – double the number 15 years ago. . . ." Cecilia Kang, *Number of cellphones exceeds U.S. population: CTIA trade group*, WASH. POST, Post Tech, Oct. 11, 2011, http://www.washingtonpost.com/blogs/post-tech/post/number-of-cell-phones-exceeds-us-population-ctia-trade-group/2011/10/11/gIQARNcEcL_blog.html. The advent of smartphones and other internet-accessible mobile gadgets increasingly makes the content the FCC attempts to suppress available anytime, anywhere.

The internet has likewise rendered it absurd to treat radio broadcasting as a unique medium for First Amendment purposes. Thousands of radio stations that are subject to the Commission's indecency regime while broadcast over the airwaves are also available as streaming radio or podcasts over the internet, where *Pacifica* has no application. *See Streaming Radio Guide,* http://www.streamingradioguide.com/. In 2006, an estimated 12% of Americans had listened to internet radio within the past week – a 50% increase over the previous year – and one in five had listened within the past month. Bill Rose & Larry Rosin, *The Infinite Dial: Radio's Digital Platforms* 4-5 (Arbitron Inc./Edison Media Research 2006), http://www.arbitron.com/downloads/digital_radio_study.pdf.

The Commission argues that because so much of the available network content *originates* as broadcast programming, it can achieve much of its purpose by

simply regulating the broadcast end of the distribution pipeline. This short-sighted argument will prove at best a temporary and increasingly futile means of achieving the Commission's aims, forcing false distortions between programming delivered to broadcast channels and that available on the internet. The rapid proliferation of web-only series makes this likelihood clear. Hulu already lists "Web Originals" as its own genre of programming, offering a number of series that can be accessed with a single click. *See* Hulu, http://www.hulu.com/genres/Web. Recently, producer/filmmaker McG launched the web series "Aim High" for Warner Bros. Digital Distribution, allowing viewers to interact with the show through social media. Michelle Kung, *McG Hopes "Aim High" Will Redefine Social Viewing*, WALL STREET JOURNAL, Speakeasy, Oct. 18, 2011, http://blogs.wsj.com/speakeasy/2011/10/18/mcg-hopes-aim-high-will-redefine-social-viewing/. In internet radio, podcasts (downloadable program-oriented online audio files) are available to provide web-only content to a growing audience. *See* Rose, *The Infinite Dial*, at 2, 9.

In all events, it simply defies common sense to assume that cleansing the broadcast airwaves of material deemed indecent by the Commission curtails children's access to the same material through other media. Some of the same programs the Commission has labeled indecent when broadcast can be seen on YouTube. Indeed, because they are archived, they can be seen and seen again. No one knows how many children saw the 2003 Golden Globe award show

when Bono exclaimed the F-word on receiving the award. But it is a fair guess that a larger number will see it on YouTube, where it has been archived since 2007.[14] *See* Video of Bono's Acceptance Speech at the Golden Globes, YouTube.com, http://www.youtube.com/watch?v=COlPQlNguvU.

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[14] According to a report by the Joan Ganz Cooney Center at Sesame Workshop:

> More children use the Internet regularly and for longer periods of time than ever before. Most children who go online do so a few times a week, and unsurprisingly, usage increases with age. Among very young children (0 to 5) who use the Internet, about 80% do so at least once a week. At age 3, about one-quarter of children go online daily, increasing to about half by age 5. And by age 8, more than two-thirds use the Internet on any given weekday. Children ages 5 to 9 average about 28 minutes online daily. In 2009, the oldest children in our review (8 to 10) spent about 46 minutes on a computer every day . . . This is more than double the amount of time 8-to-10-year olds spent online in 2006 (19 minutes).

A.L. Gutnick et al., *Always connected: The new digital media habits of young children* 16 (Sesame Workshop and the Joan Ganz Cooney Center 2011), http://joanganzcooneycenter.org/upload_kits/jgcc_alwaysconnected.pdf.

Though young children still spend much more media time with TV (encompassing both cable and broadcast) than the internet, *see id.*, the key point is that even very young children go online regularly and the number is increasing. To be clear, the suggestion is not that children go online in order to access indecent program content (just as they do not normally turn on the TV to do so). Rather, the critical point is that the reasons for treating the media differently can no longer hold water in the modern media environment.

The fact that there is nothing "unique" about broadcast programming content makes clear that the Commission's efforts to apply its indecency policy are painfully underinclusive. *See City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) ("the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles") (emphasis in original). With a click of the remote control or by turning on a computer, viewers turn effortlessly between media subject to vastly different standards of First Amendment review. This underinclusiveness raises two important concerns: First, an underinclusive regulation undermines the purpose of the restraint, without which there can be no excuse for the restriction of speech. Second, a regulation that is underinclusive by applying to one speaker, but not other like speakers, discriminates against the censored speaker. The Court recently underscored both of these points in *Brown*. The Court noted that, although California banned the sale of violent video games to minors, it failed to ban other avenues of delivering violent images shown to have the same effect on children, such as "cartoons starring Bugs Bunny or the Road Runner" or video games like "Sonic the Hedgehog" rated as appropriate for all ages. *Brown*, 131 S. Ct. at 2739. Justice Scalia reasoned:

> The consequence is that [California's] regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about

> whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.

Id. at 2740; *see also Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others").

The Commission replicates here the precise issues that troubled the *Brown* Court. It attempts to cleanse one medium of speech deemed indecent while other media with like content escape similar scrutiny. It is of no moment that the Commission's inability to enforce its indecency regime against cable and the internet derives from a lack of authority to do so. The result is the same: broadcasters are disfavored among media for no persuasive reason.

It is simply incoherent and discriminatory to have multiple First Amendments for different electronic media used to deliver the same basic words and images to the end consumer. *Pacifica* must be overruled and the same strict scrutiny applied to broadcast media as is applied to cable and the internet. As *Citizens United* very recently emphasized:

> [A]ny effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those

> differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux.

130 S. Ct. at 890. The Court in *Citizens United* itself overruled precedent that was only ten years old, emphasizing that *stare decisis* principles must yield where "experience has pointed up the precedent's shortcomings." *Id*. at 912 (quoting *Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009)). "Rapid changes in technology – and the creative dynamic inherent in the concept of free expression – counsel against upholding a law that restricts political speech in certain media or by certain speakers." *Id*. at 912-13.

B. Burning the House to Roast the Pig

If the Commission's indecency policy receives the strict scrutiny it is due, it clearly cannot pass constitutional muster consistent with the Court's treatment of other media. Even assuming the legitimacy of the Commission's underlying concerns about the impact of profanity or provocative images on children, the First Amendment requires the least restrictive means to be employed to address them. The Court has repeatedly held that the government cannot "reduce the adult population . . . to reading [or seeing] only what is fit for children." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (quoting *Butler v. Michigan*, 352 U.S. 380, 381 (1957) and citing *Playboy*, 529 U.S. at 814; *Reno*, 521 U.S. at 875; and *Sable Communications v. FCC*, 492 U.S. 115, 130-31

(1989)). To do so is – as Justice Brennan put it in his *Pacifica* dissent – "to burn the house to roast the pig." *Pacifica*, 438 U.S. at 766 (quoting *Butler*, 352 U.S. at 383).

Addressing cable programming in *Playboy*, 529 U.S. at 826, the Court held that the government must show the absence of effective alternative private means of controlling offensive content before imposing government controls. In *ACLU v. Ashcroft*, 542 U.S. 656, 670 (2004), the Court upheld a preliminary injunction against enforcement of the Child Online Protection Act, 47 U.S.C. § 231(a)(1), on the ground that blocking and filtering technology appeared to provide an effective and less restrictive alternative to direct government control.[15] Indeed, the availability of blocking technology was the "key difference between cable television and the broadcasting media" identified by the *Playboy* Court in distinguishing *Pacifica*:

> The option to block [unwanted channels] reduces the likelihood, so concerning the Court in *Pacifica*, . . . that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem . . . *Simply put, targeted blocking is less restrictive than banning, and the*

[15] The Court remanded for further hearings on the question whether available filtering technology was an effective and less restrictive alternative. On remand the lower court confirmed that it was. *See ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd sub nom. ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008).

> *Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests*.

Playboy, 529 U.S. at 815 (emphasis added).[16]

Equivalent technology is available for television broadcasting, such as the V-chip device.[17] As the Second Circuit noted:

> Every television, 13 inches or larger, sold in the United States since January 2000 contains a V-chip, which allows parents to block programs based on a standardized rating system . . . Moreover, since June 11, 2009, when the United States made the transition to digital television, anyone using a digital converter box also has access to a V-chip . . . In short, there now exists a way to block programs that contain indecent speech [or images] in a way that was not possible in 1978.

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[16] Note that the "ban" referred to in *Playboy* was in fact an analogous restriction to the safe harbor hours applicable to broadcasters. The legislation at issue in *Playboy* required cable television operators to block channels "primarily dedicated to sexually-oriented programming" except between the hours of 10 p.m. and 6 a.m. 529 U.S. at 806.

[17] Admittedly, an equivalent to the V-chip does not currently exist for radio broadcasting. However, the Commission's post-2004 enforcement regime has increasingly focused on television and the absence of a radio equivalent does not detract from the V-chip as an effective, less restrictive alternative allowing parents to control a child's television programming access.

Fox, 613 F.3d at 326. As a simple and effective means of filtering broadcast television, parental control provides a viable means of screening indecent content that is effectively indistinguishable from private controls previously approved by the Court.

It is no objection to the viability of the V-chip that it is not widely used or understood by parents, as the Commission argues. As the Court emphasized in *ACLU v. Ashcroft*, it is not actual use but the *availability* of individualized filtering devices that makes them a less restrictive alternative. 542 U.S. at 669-70. The Government does not have a compelling interest in doing what informed and empowered parents can do for themselves in protecting children. *Playboy*, 529 U.S. at 526. As the Commission itself noted in a 2009 Congressional Report, "The limited number of parents who have used the V-chip find it beneficial." *Congressional Report*, 24 FCC Rcd at 11422; *see also id*. at 11424 (studies indicate that parents who use the broadcast, cable, and movie rating system for television content find it useful). That parents have access to the tools they need should be the end of the inquiry. Whether they are used is a personal choice, not one for the government. *See Brown*, 131 S. Ct. at 2741 (it is not narrow tailoring to legislate, not based on what parents actually want, "but what the State thinks parents *ought* to want") (emphasis in original).

The Commission can and should engage in public education and cooperate with media providers to improve awareness of the V-chip and other parental

controls. Empowering parents to make informed choices is a useful and appropriate role for the government. The Commission acknowledges this in its Congressional Report, where it discusses a number of avenues of planned study to increase awareness and usage of the V-chip, such as improvements to the industry rating system, providing instructional inserts with TV purchases, and encouraging manufacturers to offer a V-chip button on remote controls. *See Congressional Report*, 24 FCC Rcd at 11423, 11435. In reality, many parents do not use the V-chip because they "use other kinds of parental control tools and parenting strategies to monitor and guide their children's media use . . . including setting rules about when children can use media and what channels they can watch, keeping the TV and/or computer in a public space in the home, or blocking TV channels through their cable service." *Id*. at 11422-23. Across all media, however, commentators favored "greater education and media literacy for parents and more effective diffusion of information about the tools available to them." *Id*. at 11414. It is through education and encouraging industry innovation that the Commission can best help parents monitor a child's media intake without severely burdening the First Amendment rights of broadcasters and viewers who want to receive screened content.

It is also no argument against the V-chip to highlight its imperfections. The Commission asserts the V-chip is not a substitute for indecency enforcement because it may not catch unexpected content or

because programs may be inaccurately rated. Pet'r's Br. 49-51. However, this Court has already rejected the argument against imperfect parental controls. Though the Court in *Brown* acknowledged that the voluntary video game rating system at issue was imperfect and some minors would still purchase violent video games, the Court nonetheless concluded: "Filling the remaining modest gap in concerned-parents' control can hardly be a compelling state interest." 131 S. Ct. at 2741. "[S]ome gap in compliance is unavoidable." *Id*. at 2741 n.9. The Court in *Playboy* similarly refused to discount blocking technology because it "may not go perfectly every time," recognizing that "[a] court should not assume a plausible, less restrictive alternative would be ineffective." 529 U.S. at 824. Indeed, the Court in *Reno* was heavily influenced by the prospect of better parental controls for internet-users *in the future* in concluding the government failed to explain why a less restrictive alternative like parental controls was not as effective as a ban on delivering indecent content to minors over the internet. 521 U.S. at 877, 879; *see also Congressional Report*, 24 FCC Rcd at 11424-35 (discussing potential improvements to make the V-chip more effective).

Moreover, the Commission's complaints about the V-chip's imperfections belie the assumption that its current indecency policy will do a better job. As a practical matter, the only way to assure a perfect result is to employ precisely the means the post-2004 Commission has embraced: cast a wide net and scare

off so much speech that "accidents" simply do not arise. Again, the Commission's demand for perfection seeks to "burn the house to roast the pig."

Parental controls empower individuals by allowing them to tailor their children's programming according to *the parent's* idea of what is appropriate while avoiding a burden on the rights of viewers who wish to receive the restricted content. The Commission's indecency controls do not empower parents; they merely empower the government – along with a handful of activist morality groups – to assume the parental role on their behalf.

IV. *VOX POPULI* AND THE POLITICS OF INDECENCY REGULATION

The Commission's post-2004 indecency enforcement regime is, to a certain extent, a product of popular pressures. The Commission certainly cannot ignore the concerns and complaints of viewers, political groups, and Congress. However, the Commission's enforcement actions make it appear that there has been some rampant growth in broadcast indecency, and indeed a casual inspection of the number of recorded public complaints might suggest as much. The number of complaints is misleading, however, and the Commission's reference in the *Omnibus Order*, 21 FCC Rcd at 2665, to "hundreds of thousands of complaints between February 2002 and March 2005" is completely disingenuous. The Commission is fully aware that the overwhelming percentage of recent

complaints target a handful of programs, and most of them are computer-generated electronic complaints provided by activist groups such as the Parents Television Council. In some cases, the Commission's complaint count has even included duplicate complaints from the same person to different commissioners and staff as separate complaints. To further underscore the artificiality of the complaint process, the Commission ruled that it will act on complaints even if the complainant does not claim to have watched or heard the program. *Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broad. of the Program "NYPD Blue,"* 23 FCC Rcd 3147, 3156 (2008). The Commission's complaints policy has become so artificial that it naturally prompts the question, why does the Commission not simply turn the monitoring function over to the Parent's Television Council? The answer is simple: it already has.

Adding to the influence of activist crusaders like the Parents Television Council, the Commission has also been influenced by congressional pressure. In 2003 and 2004, the Senate and House adopted resolutions that not only declared the FCC should be more vigorous in its enforcement of indecency but should specifically overrule its enforcement bureau's finding of no violation in *Golden Globe*. S. Res. 283, 108th Cong. (2003); H.R. Res. 500, 108th Cong. (2004). The FCC responded, both in *Golden Globe* and here. Shortly thereafter, Congress reaffirmed its desire for tougher enforcement by enacting the Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235,

§ 2, 120 Stat. 491 (2006), amending 47 U.S.C. § 503(b), to authorize increased forfeiture penalties by an order of magnitude $32,500 to $325,000. The decimal point movement is a powerful motivator.

Of course, we expect agencies to respect congressional directives, but the agency must still conform its actions to the rule of law. Since Congress cannot direct how the law should be enforced, *see Bowsher v. Synar*, 478 U.S. 714 (1986), the Commission is owed no deference for being responsive to Congress's wishes or directives on that score. And quite apart from separation of powers principles, the First Amendment allows no deference to Congress or the FCC on matters implicating direct regulation of speech content. *Sable*, 492 U.S. at 129.

If political pressure from Congress does not justify the Commission's enforcement actions, neither does the clamor of public groups. In fact, the louder the clamor, the greater the need for First Amendment protection. It would be an impoverished First Amendment indeed that accommodated every public agitation for laws designed to suppress free speech in the name of protecting the morals of young people. *See, e.g., Butler*, 352 U.S. at 381 (rejecting ban of material "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth"); *see also Playboy*, 529 U.S. at 253 (when the government acts to protect children, it must do so "in a way consistent with First Amendment principles").

CONCLUSION

In 1983, Ithiel de Sola Pool, a distinguished political scientist and student of communications law, described *Pacifica* as a "legal time bomb" that would explode into "radical censorship." ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 134 (1983). Indecency regulation was then in its infancy, and the Commission's enforcement policy in the immediate aftermath of *Pacifica* seemed to render such predictions hyperbole. As it happened, Professor Pool was prescient, in ways that those of us who were involved in indecency regulation in its infancy did not appreciate at the time. This case is merely one example of what Pool predicted.

The indecency doctrine this Court approved in *Pacifica* has become an intolerable threat to free speech. The court below concluded with the observation that perhaps the Commission could craft an indecency doctrine that would pass constitutional muster – despite its conspicuous failure to do so. However, we see no hope of reviving the doctrine that the Court saw before it in *Pacifica*.

For one thing, technology has destroyed any basis for censorial controls aimed only at broadcasting. Broadcasting is no longer unique, and it is time for the Court to bring its views of the electronic media into alignment with contemporary technological and social reality.

For another, the history of its enforcement shows the practical impossibility of containing it within

acceptable boundaries. What began as a limited tool for reining in a small number of provocative broadcast personalities and irresponsible licensees has become a rallying cry for a revival of Nineteenth Century Comstockery. Mindful of this enforcement history the court below did not limit its decision to "fleeting expletives." This Court should not do so either. It should overturn *Pacifica* as an ill-considered, but in any case obsolescent, precedent, adherence to which puts the Court on a future course "that is sure error." *Citizens United,* 130 S. Ct. at 912.

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