No. 06-1760-ag(L), 06-2750-ag(CON), 06-5358-ag(CON)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FOX TELEVISION STATIONS, INC., CBS BROADCASTING INC., WLS TELEVISION, INC., KTRK TELEVISION, INC., KMBC HEARST-ARGYLE TELEVISION, INC., ABC INC.

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA,

Respondents,

NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., NBC TELEVISION AFFILIATES, FBC TELEVISION AFFILIATES ASSOCIATION, CBS TELEVISION NETWORK AFFILIATES, CENTER FOR THE CREATIVE COMMUNITY, INC., doing business as CENTER FOR CREATIVE VOICES IN MEDIA, INC., ABC TELEVISION AFFILIATES ASSOCIATION,

Intervenors.

On Petition for Review of an Order of the Federal Communications Commission

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BRIEF OF FORMER FCC OFFICIALS AS AMICI CURIAE IN SUPPORT OF PETITIONERS AND IN SUPPORT OF A DECLARATION THAT INDECENCY ENFORCEMENT VIOLATES THE FIRST AMENDMENT

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INTEREST OF AMICI AND AUTHORITY TO FILE

Amici are former officials of the FCC who oppose the recent indecency enforcement actions of the Commission. Henry Geller, currently retired, served as General Counsel of the FCC from 1964 to 1970, and as special assistant to the Chairman in 1970. After leaving the FCC Geller was Administrator of the National Telecommunications and Information Administration from 1978 to 1981. Glen Robinson, currently the David A. and Mary Harrison Distinguished Professor of Law at the University of Virginia, served as FCC Commissioner from 1974 to 1976, and later as U.S. Ambassador to the World Administrative Radio Conference from 1978 to 1979. As former officials of the FCC, Amici have been personally associated with the indecency controversy in the past, and we are not without sympathy for the FCC's concerns. Indeed, one of us participated in the original *Pacifica* decision.[1] However, we have been dismayed by a series of recent decisions that have transformed a hitherto moderate policy of policing only the most extreme cases of indecent broadcast programming into a censorship crusade that will put a chill on all but the blandest of program fare. Amici have authority to file this brief pursuant to Rule 29(a), Fed. R. App. P., the parties having granted their consent.

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[1] *Pacifica Found. Station WBAI(FM), New York, N.Y.*, 56 F.C.C.2d 94 (1975).

SUMMARY OF ARGUMENT

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 broadcast performers into an ever-expanding campaign against ordinary radio and television programming. In pursuit of an otherwise laudable policy of protecting children against exposure to extremely offensive language the Commission has embarked on an enforcement program that has all the earmarks of a Victorian morals 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, even non-commercial documentaries. The instant case, *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd. 2664 (2006) ("*Omnibus Order*"), is but one of many recent decisions in which the Commission's new indecency policy has exceeded the boundaries established by the FCC and assumed by the Supreme Court when it allowed regulating deliberate and flagrant instances of indecent language. We urge the court to take this occasion to hold that the Commission's expansive and aggressive new campaign of enforcement goes beyond

the limitations assumed by the Supreme Court when it affirmed the FCC's indecency doctrine in 1978, and violates the First Amendment.

ARGUMENT

I. THE EVOLVING STANDARDS OF INDECENCY REGULATION

Until its 1975 decision in *Pacifica Foundation*, the FCC interpreted 18 U.S.C. § 1464 as an obscenity statute, governed by the constitutional definition and constraints of *Miller v. California*, 413 U.S. 15 (1973). 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 *Miller*, 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." 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 FCC proceeded to invent a third option, which was to give independent significance to "indecency" but define for it a different scope than for obscenity. Under traditional Supreme Court precedent, obscenity is unprotected speech and as such subject to total

suppression.[2] In contrast, indecent speech called simply for time and place regulation; the time being between a period when children were likely to be in the audience,[3] the place being radio and television.[4]

The Commission's move was novel; there was no judicial or administrative precedent for it. But it was also very limited. Except where it qualified as obscenity, indecent language was limited to that which described "sexual or excretory activities and organs" and did so in a manner that was "patently offensive" as measured by

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[2] In *Roth v. United States*, 354 U.S. 476 (1957), the Court held that obscenity was completely beyond the pale of protected speech, and this has remained the traditional learning. However, the Court's recent decision in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), suggests that this may no longer be the case if there are less restrictive means of protecting children from accessing it, as by the use of filters.

[3] The FCC did not originally set precise time limits. The present period, set first by the FCC and then by Congress, is between the hours of 6 a.m. and 10 p.m.

[4] Indecency controls have been generally limited to broadcasting, but the current FCC Chairman, Kevin Martin, has endorsed an extension of indecency controls to cable and satellite providers. *See The Broadcast Decency Enforcement Act of 2004: Hearings on H.R. 3717 Before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce*, 108th Cong. 87 (2004) (statement of Kevin Martin) ("*Hearings on H.R. 3717*"). Even assuming the continued viability of *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), extending indecency beyond broadcasting would be deeply problematic in light of *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), where the Court held that the ability to block cable channels distinguished it from broadcasting and thus required a higher degree of constitutional scrutiny. *See also Reno v. ACLU*, 521 U.S. 844 (1997) (*Pacifica* cannot be applied to the internet); *Sable Comms. of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (*Pacifica* cannot be applied to telephone where there are adequate means of preventing access by children to "dial-a-porn" messages).

contemporary community standards for the broadcast medium, at times of day when there is a reasonable risk that children may be in the audience. *Pacifica Found.*, 56 F.C.C.2d 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 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 Foundation Station WBAI(FM), New York, N.Y.*, 59 F.C.C.2d 892, 893 n.1 (1976). This announced policy of restraint was critical to how the Supreme Court viewed the new doctrine when it affirmed the FCC in 1978. As Justice Powell noted in a concurring opinion, "the Commission may be expected to proceed cautiously, as it has in the past." 438 U.S. at 761 (Powell, J., concurring).

And cautiously is how the FCC did proceed. Immediately after the Supreme Court affirmed its authority to regulate, the FCC 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, 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." FCC Chairman Charles D. Ferris, Speech to New England Broadcasters Assoc., Boston Mass. (July 21, 1978).

As it happened Ferris' prediction was unduly optimistic. Halley's Comet makes a periodic appearance about every 76 years; indecency reappeared before 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. Still, the FCC responded with restraint. It revised its post-*Pacifica* policy limiting enforcement policy to the precise seven words of Carlin's famous monologue and reinstated the original "generic" policy. The Court of Appeals for the District of Columbia Circuit affirmed the FCC's generic policy, albeit not without reservation and with an admonition to the FCC to proceed cautiously with enforcement. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*"). 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[5] in which the FCC, Congress and courts took turns exploring the permissible limits of the new indecency regime. We will not 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.[6] 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.[7] Third, the court was seriously concerned about the risk that the regulation of indecency could get out of hand. The repeated references to the need for caution in defining and enforcing the restrictions, the reversal of Congress' attempt to make the restrictions absolute, and the 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

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[5] 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. FCC*, 59 F.3d 1249 (D.C. Cir. 1995) ("*ACT IV*"). The court rejected the challenges.

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

[7] *See Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) ("*ACT III*"), *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 a broader period, 6 a.m. to 12 a.m., for commercial stations).

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 broadcast personalities like Howard Stern whose syndicated talk show has been responsible for a very large percentage of all fines paid for indecent broadcasting over the past score years.[8] In 2001 the FCC issued a set of guidelines on indecency policy, *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999, 8008-09 (2001), but the guidelines did not announce any new policy.

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[8] In 1995 Infinity Broadcasting paid a then-record sum of $1.7 million to settle indecency complaints over a series of Howard Stern Shows. Paul Farhi, Stern 'Indecency' Case Settled: After 7-Year Fight With FCC, Broadcasting Firm to Pay $1.7 Million, *Washington Post*, Sept. 2, 1995, at F01. That was not the last of it. The Howard Stern Show continued to be the occasion for fines. For example, a single show on April 9, 2003 resulted in the Commission issuing a notice of apparent liability, for Clear Channel stations carrying the show, for fines aggregating $495,000. *Clear Channel Broad. Licensees, Inc.*, 19 FCC Rcd. 6773 (2004). The Howard Stern Show will no longer draw indecency fines. In January 2006 Stern left commercial radio to join Sirius, a subscription-based satellite radio provider. *See* Howard Kurtz & Frank Ahrens, Sirius Lands a Big Dog: Howard Stern, *Washington Post*, Oct. 7, 2004, at A01. The FCC's indecency regulations do not apply to subscription media. *See Harriscope of Chicago*, 3 FCC Rcd. 757, 757 n.2 (1988), *remanded on other grounds, Monroe Communications Corp. v. FCC*, 900 F.2d 351 (D.C. Cir. 1990).

Yet, the time was not far off when things would change – radically. In 2004 the FCC embarked on what then Chairman Michael Powell described as the "most aggressive enforcement regime in decades." *See Hearings on H.R. 3717* at 79 (statement of Michael Powell). More precisely he could have said the most aggressive enforcement regime *ever*. Not only did the Commission find more violations and impose more penalties than in the entire prior history of the indecency doctrine,[9] it greatly expanded 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 and ephemeral use of the F-word was a violation of its policy. *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975 (2004) ("*Golden Globe Awards*").[10] To magnify the impact still further the FCC redefined what counted as a

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[9] In 2004 the FCC assessed nearly $8 million in proposed fines and settlements, compared to $440,000 a year earlier. So far the 2004 total is the high water mark for annual collection. In the first half of the current year the FCC assessed notices of apparent liability totaling just under $4 million, with seven cases still pending. Indecency Complaints and NALs: 1993-2006, http://www.fcc.gov/eb/oip/ComplStatChart.pdf.

[10] In ruling that a single use of the "F-word" was a violation the Commission overturned its own prior limitation of indecency to descriptions or depictions of "sexual and excretory activities and organs." Perhaps to shore up this new expansion the FCC also declared that use of the "F-word" was "profane" – a definition that again departed from precedent, as well as from conventional linguistic understandings. As late as 1999 the Commission took the position that not only was mere profanity not

violation by now deciding 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.*, 19 FCC Rcd. at 6779 (applying per utterance policy). The Commission's new campaign has also moved beyond the traditional targets for indecency enforcement. With a few exceptions the traditional targets for enforcement were radio talk shows that deliberately and repeatedly followed a pattern of provocative programming. In its new phase, however, the Commission has undertaken a close inspection of movies, regular television series, live events, and even educational documentaries, to locate objectionable language or images. With critically honored television programs like "Without a Trace" and "NYPD Blue" now being the targets of indecency patrols, *see Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast 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 program); *Omnibus Order*, 21 FCC Rcd. at 2696-98 (finding violation but imposing no forfeiture for "NYPD Blue" program),[11]

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part of its indecency policy, but it could not constitutionally be made a part. *See Federal Communications Commission, The Public and Broadcasting*, 1999 WL 391297 (a "manual" for the public, containing an overview of broadcast regulatory policy) (June 1999).

[11] The Commission's remand decision in the *Omnibus Order* dismissed the complaint against "NYPD Blue" on a procedural ground; however, this dismissal does

prime time viewers may soon experience a sense of déjà vu as television programming reverts to the genre of "Leave It To Beaver."

II. OMNIBUS ORDER

The Commission's *Omnibus Order* before this court illustrates all of these radically expansionist moves.

To begin, the Commission has unmoored indecency from its original meaning of language that described or depicted sexual or excretory activities. In the new version indecency can mean as little as the casual use of an expletive. For example, in the *Omnibus Order* the Commission finds that a documentary program, "The Blues: Godfathers and Sons," broadcast by a noncommercial educational station, was indecent because of the use of the "F-word" or "S-word" by some of the artists being interviewed. 21 FCC Rcd. at 2684-85. Citing its earlier decision in *Golden Globe Awards*, the Commission held that "'any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our

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not alter the substance of its earlier finding that the program contained indecent and profane language. *See Complaints Regarding Various Broadcasts Between February 2, 2002 and March 8, 2002*, FCC 06-166 (rel. Nov. 6, 2006) ("*Omnibus Remand Order*").

indecency definition.'" *Id.* at 2684. It went on to say that the S-word similarly "has an inherently excretory connotation." *Id.*

The Commission's new "inherency doctrine" is 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" is vulgar, *id.* at 2698-2700, but only a silly literalism would think that she was describing an excretory function. When Cher (in another live broadcast) answered her critics by exclaiming "fuck em," *id.* at 2690-92, any viewer would understand that as a crude insult not an evocation of sexual activity.

In an attempt to bolster its expansive definition of indecency the Commission in its 2004 *Golden Globe Awards* order, and again throughout the present *Omnibus Order*, has declared that the F-word and S-word, and derivative words, are not only indecent but "profane," within the meaning of 18 U.S.C. § 1464. *See, e.g.*, *Omnibus Order*, 21 FCC Rcd. at 2699. The Commission draws support for this lexicographic novelty from a Seventh Circuit decision, *Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972), holding that "profane" could be interpreted as any "personally reviling epithets naturally tending to provoke violent resentment or denoting language so grossly offensive to members of the public who actually hear it as to amount to a nuisance." However, the Seventh Circuit's interpretation was for the purpose of

bringing "profane" within the constitutional safe harbor of the "fighting words" doctrine of *Chaplinski v. New Hampshire*, 315 U.S. 568 (1942). *See Tallman*, 465 F.2d at 286.[12] That purpose has no application in any of these cases as the Commission concedes. *Omnibus Order*, 21 FCC Rcd. at 2669. The FCC has simply appropriated the court's nuisance label without the particular meaning given it by the court. In all events we confess to being perplexed about the FCC's invocation of "profane" here since it would seem to overlap completely its new verbal formula for "indecency." We conjecture that the Commission must be insecure in its extraordinary proclamation that an exclamation of the F-word or S-word is inherently indecent and has therefore sought additional support by citing a colloquial use of the word "profane." Setting aside what Congress may have meant by the use of the word profane – about which the FCC offers no illumination – we think the First Amendment issue cannot be answered by engaging in this kind of word play.

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[12] The *Tallman* court's interpretation was for the purpose of saving the constitutionality of 18 U.S.C. § 1464 against a claim that it was facially overbroad. By bringing the word "profane" within the fighting words doctrine the court believed the statute could survive that facial challenge. The court was not presented with any application of this broad definition of profane because the court below had found defendant's speech to be obscene. *See* 465 F.2d at 286.

The FCC's expansive (and vague) definitions of indecency and profanity would be disturbing enough even if the agency had continued to restrict their application to the traditional targets that prompted *Pacifica* in the first place – programs that are deliberately provocative. However, that is not a credible description of the live coverage of the "2002 Billboard Music Awards" where Cher's single use of the F-word was found a violation, *Omnibus Order*, 21 FCC Rcd. at 2690-92, nor does it appropriately apply to Nichole Richie's brief, unscripted remarks in the 2003 Billboard Music Awards, *id.* at 2692-95. It is similarly inapplicable to "The Blues" program, as well as other programs covered by the *Omnibus Order*, such as the popular network series, "NYPD Blue," where the FCC again found occasional uses of the S-word to be a violation. *Id.* at 2696-2698.

In each of these and other cases the FCC professes to consider the words in "context." We agree that words and images should be assessed in context, but this cannot be an excuse for the subjective and arbitrary judgments that are reflected in the Commission's new indecency jurisprudence. In the name of context the Commission mechanically recites that the offending language is "gratuitous" and "shocking." *E.g.*, *Omnibus Order*, 21 FCC Rcd. at 2685, 2688-89, 2692, 2697, 2699. This characterization is supposed to distinguish these cases from "Saving Private Ryan" where the repeated use of the same words is deemed to be "essential" to the artistic

work. *E.g.*, *id.* at 2696, 2698. Employing an artistic standard apparently unknown to real artistic directors the FCC determines that the S-word is "essential" when it is part of a war film but "gratuitous" when it is part of a police series. Perhaps the Commission intends to embrace Justice Stewart's famous test for obscenity: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).[13] If so, it should say so candidly without obfuscating its methodology with meaningless and mechanically reiterated adjectives like "gratuitous" and "shocking."

Of course, any enforcement policy that is contextually oriented entails a risk of inconsistency. As former regulators Amici are very familiar with this problem so we have some sympathy for the difficulties the FCC faces in trying to produce a coherent enforcement policy amid the confusion and pressure of politically charged events such as those that underlie the current indecency campaign. However, it is precisely these difficulties – the confusion and pressure of political demands – that the First Amendment was designed to counter.

[13] The most noteworthy part of his statement was the concluding line: "and the motion picture involved in this case is not that." *Id.* at 197 (Stewart, J., concurring).

What is at stake here is not simply the problem of assuring fair treatment to broadcasters who have to discern the illusive boundaries of indecency/profanity. Equally important is the loss of speech from self-censorship by risk averse broadcasters who choose to steer clear of the landmines that the FCC's uncertain jurisprudence has created. And it will not be simply the Bono's and the Cher's the broadcasters will have to avoid. A Vermont public radio station recently chose the path of ultra caution when it came to hosting a debate among electoral candidates for the Senate. The station decided to bar one of the candidates because, during a previous student forum the candidate had lost his temper and called two students "shits." The station manager reported that he feared the candidate might again become exited and use similar language, thereby subjecting the station to the possibility of a forfeiture "as much as $325,000."[14] *See* www.vnews.com/campaign2006/ussenate20061020.htm. No doubt this manager was unusually risk averse, but a small public radio station might well think that the risk was not worth taking when it could be so easily avoided.[15] Who could say that the manager is wrong? If the candidate had appeared

[14] This is the cap recently set by the Broadcast Decency Enforcement Act of 2005, Pub. L. 109-235, § 2, 120 Stat. 491, amending 47 U.S.C. § 503(b), for "each violation or each day of a continuing violation" of 18 U.S.C. § 1464.

[15] The excluded political candidate was, to put it generously, a fringe candidate. However, one of the core purposes of the First Amendment is to protect speakers who are beyond the pale of social acceptability.

and blurt out the S-word in a fit of fury, the station's non-commercial status or small size would not protect it. *See Omnibus Order*, 21 FCC Rcd. at 2683-87 (San Mateo County Community College television station found in violation for expletives uttered in documentary). Nor would the spontaneity of the utterance be a defense. *Id.* at 2690-2692 (violation found for failure to have a delaying technique to avoid spontaneous expletives such as Cher's F-word). Of course, the Vermont station could invest in costly tape-delay equipment to protect itself against this kind of risk, but it would be hard to fault the manager of a tiny public radio station for concluding the game was not worth the candle. It's so much easier to just say no.

III. THE POLITICS OF REGULATION

The FCC's enforcement actions make it appear as if 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.[16] The number of complaints is misleading, however, and the FCC's reference in the *Omnibus Order*, 21 FCC Rcd. at 2665, to "hundreds of thousands of complaints alleging that various broadcast

[16] In 2004 the number of complaints was reported to be just over 1.4 million, of which a large percentage were generated by an email campaign by Parents Television Council and other activist citizen groups. In 2005 the number of complaints fell to just over 233,000. For 2006 the number has risen, with just over 275,000 reported for the first quarter of 2006. *See Indecency Complaints and NALs: 1993-2006*, http://www.fcc.gov/eb/oip/ComplStatChart.pdf.

television programs aired between February 2002 and March 2005 are indecent, profane, and/or obscene" is disingenuous. The outpouring of public complaints is a product of campaigns by Parents Television Council and other activist groups.[17] The Commission well knows the power of such get-out-the-complaints campaigns by special interest groups, and in calmer times it might have been expected to take them in stride.[18] In the present case, however, the complaints aroused Congress which

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[17] Parents Television Council has been in the forefront of recent efforts, but it is not alone. Others engaged in public campaigns against indecency include Morality in Media, American Family Association, American Decency Association, Family Research Council, Christian Coalition, and American Values to give only a partial list. For many of these groups the indecency issue is part of a more general religious and moral agenda. *See, e.g.*, http://www.ouramericanvalues.org/about.php (describing the group's purpose as "defending life, traditional marriage, and equipping our children with the values necessary to stand against liberal education and cultural forces"). *See also* Kimberly Zarkin, *Anti-Indecency Groups and the Federal Communications Commission: A Study in the Politics of Broadcast Regulation* 71-80 (2003) (describing American Family Association campaigns against programs that it deems to be pro-homosexuality, anti-family, or contain negative views of Christianity).

[18] Campaigns to generate public complaints against indecency are anything but a new phenomenon. *See* Zarkin at 114-115 (describing a letter writing campaign by American Family Association in 1986-1987). However, in recent years these campaigns have become easier to mount thanks to the internet and email. *See* https://www.parentstv.org/PTC/fcc/fcccomplaint.asp (providing email forms and instructions for complainants). The FCC has reason to know the ability of intensely interested groups to generate complaints. It still receives mail – much of it form letters and email sponsored by church groups – protesting a petition to freeze licensing of religious broadcasters – a petition it denied over thirty years ago! Yuki Noguchi, Fighting a Myth of Biblical Proportions, *Washington Post*, Dec. 26, 2001, at D7 (citing an FCC staff estimate of some 10 million calls, letters or emails received as of 2001).

demanded more aggressive action by the FCC. 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 the *Golden Globe Awards* case. S. Res. 283, 108th Cong. (2003); H.R. Res. 500, 108th Cong. (2004).

The FCC responded, both in the *Golden Globe Awards* case and in the instant case. Shortly after this case Congress reaffirmed its desire for tougher enforcement by enacting the Broadcast Decency Enforcement Act, Pub. L. 109-235, § 2, 120 Stat. 491, amending 47 U.S.C. § 503(b), to authorize increased forfeiture penalties. While it may seem entirely natural for an agency to respond to congressional signals it is nevertheless essential for the agency to conform its actions to the rule of law. The Broadcast Decency Enforcement Act did not define any new standard of indecency, or profanity. Moreover, neither that act nor the earlier resolutions of the House and Senate can constitutionally direct law enforcement policy; elementary separation of powers principles forbid Congress to exercise executive (and especially prosecutorial) powers in this fashion. *See Bowsher v. Synar*, 478 U.S. 714 (1986). Finally, and most importantly, Congress cannot insulate the indecency standard from First Amendment constraints.

The FCC's course of action in recent years indicates that it is no longer mindful of past admonitions by the Supreme Court and the court of appeals to proceed with caution on this constitutionally delicate path of enforcing program standards. The court should not be subtle in re-instructing the FCC on this score. As the agency has chosen to give no deference to the judgment of its licensees, the court should give no deference to the agency. There may be occasions for deferring to an agency's decision even when constitutional issues are at stake if the decision reflects a judgment on matters especially within the ken of the agency. But no such case is presented here.[19] The question of indecency does not entail any special expertise, and even if it did the FCC has not exercised any. It has simply capitulated to political pressures.

IV. THE COURT'S OPTIONS

The time is ripe for a reexamination of the FCC's indecency policy. The court can approach this task in two ways. One, it can consider the general constitutionality

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[19] In *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195-96 (1997), the Court noted that *Congress* is entitled to deference in making legislative judgments even where they raised First Amendment issues. It compared that deference to the deference owed to administrative agencies implying that an agency empowered by Congress to make policy judgments was similarly entitled to deference. However, the deference given to Congress (and indirectly to the FCC) in *Turner* is irrelevant here. First, *Turner* did not involve content-specific regulation, which obviously is involved in indecency regulation. Second, *Turner* involved difficult issues of economic predictions about the effects of various policy options, which find no counterpart in the present setting. On matters of direct content regulation that necessarily implicate the First Amendment even Congress is not accorded deference. *Sable*, 492 U.S. at 129.

of the indecency program in light of the FCC's interpretation and course of enforcement. Two, it can limit itself to a review of the specific applications now before the court on the assumption that a decision on the constitutionality of indecency controls in general remains foreclosed by *Pacifica.* Even if the court chooses the second option we think the applications of *Pacifica* in the *Omnibus Order* must be found unconstitutional as exceeding anything authorized by the Supreme Court in 1978. However, we urge the court to take the first option and rule that, in light of the FCC's interpretations and enforcement practices, 18 U.S.C. § 1464 may no longer be enforced against any material that does not meet the constitutional standards of obscenity.

In the ordinary course of events lower courts are not empowered to second guess a prior Supreme Court decision, of course. But where a series of events or actions have undermined the foundations on which the Court's decision rested it is another matter. The Court has not directly reconsidered the specific holding in its *Pacifica* decision, but it has repeatedly delimited its scope. Most notably the Court in *Reno v. ACLU* held that such rules could not be applied to the internet. The Commission's *Omnibus Remand Order* dismisses the relevance of *Reno* in particular on the ground that the Court explicitly distinguished the internet from broadcasting. *Omnibus Remand Order* at ¶ 45. Indeed, it did. However, the Court's distinction was based on

the original *Pacifica* case, not on the *current* indecency policy that is now before this court. What is important about *Reno* is its expression of concern about the problem of vagueness and the problem of regulatory creep in enforcing indecency:

> Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment. For instance, each of the two parts of the CDA uses a different linguistic form. The first uses the word "indecent," 47 U.S.C. § 223(a) (1994 ed., Supp. II), while the second speaks of material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," § 223(d). Given the absence of a definition of either term, this difference in language will provoke uncertainty among speakers about how the two standards relate to each other; and just what they mean. Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* opinion, or the consequences of prison rape would not violate the CDA? This uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials.

521 U.S. at 870-71. The Court's concern about lack of tailoring is precisely the problem that the FCC's current enforcement policies present.

To be sure, this court could address the tailoring issue by simply examining the enforcement actions in this case. However, this will not get at the root problem which is the FCC's demonstrated responsiveness to political pressures from Congress and activist citizen groups. An ad hoc approach is not responsive to the chilling effect problem arising from uncertain enforcement of an ill-defined concept.

Finally, we note that technology has introduced new opportunities for the public to control their children's access to indecent programming, which calls into question the need for conventional legal sanctions. In *Ashcroft*, in upholding a preliminary injunction against enforcement of the Child Online Protection Act, 47 U.S.C. § 231(a)(1) ("COPA"), the Court relied on the fact that blocking and filtering technology appeared to provide a less restrictive alternative to the criminal sanctions the Act imposed; unless the government could prove that this technology was inadequate the Act was unconstitutional.[20] The same option must be considered a factor in the case of television broadcast indecency given the alternative of technologies such as the V-chip device. In its *Omnibus Remand Order* the FCC dismisses the V-chip as a solution to broadcast indecency on the ground that most television sets do not contain the device; parents are unaware of it or do not know how to use it, and in any event it will not work where the program is not accurately rated, or cannot be rated for unanticipated utterances. *See Omnibus Remand Order* at ¶ 51. This cavalier dismissal of the V-chip device is stunning. What was the point of Congress's mandating the V-chip technology, 47 U.S.C. § 303(x), or the

[20] *See also Sable*, 492 U.S. at 128-29 (emphasizing the importance of alternative methods of preventing children from access to indecent telephone messages).

Commission's approval of a system of industry ratings to work with that technology, *Video Programming Ratings,* 13 FCC Rcd. 8232 (1998), if parents are to be told that they don't need it – the government will take care of the matter for them? We concede that filtering devices like the V-chip are not a solution for all offensive language cases, but that fact cannot excuse the FCC's complete indifference to self-help measures where they are available. In fact technology has solved most of this problem for television without regard to the V-chip device. Currently almost 86% of television households receive their television via cable or satellite, *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming,* 21 FCC Rcd. 2503, 2506 (2006), which gives them access to the same blocking technology that the Court cited in *Playboy Entertainment* as a basis for finding an adequate, less restrictive, alternative to governmental censorship. *See* 529 U.S. at 815 (noting the ability of cable to provide "targeted blocking"). The effectiveness of such blocking technology will increase with the full deployment of digital technology, as the Court in *Playboy* also noted. *Id.* at 808. With such less restrictive means available to parents the First Amendment does not allow the FCC to act as a national nanny to protect children in lieu of their parents.

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 as we have noted, the Commission's enforcement policy in the immediate aftermath of *Pacifica* seemed to render such predictions hyperbole. As it happens, 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. The present case is merely one example of what Pool predicted. With flags flying in pursuit of the new enemy of good taste in broadcasting the FCC has aimed its guns at the broadcast industry and, echoing Commodore Perry in the Battle at Lake Erie in 1813, has announced, "we have met the enemy and he is ours." More accurately it might have echoed Pogo's twist on Perry's quip: "we have met the enemy and he is *us*."

We urge the court to recognize that it is time to put an end to this experiment with indecency regulation. *Pacifica* has ceased to be a limited tool for reining in a small number of provocative broadcast personalities and irresponsible licensees; it has become a rallying cry for a revival of Nineteenth Century Comstockery. As former regulators we appreciate that the FCC is in an uncomfortable position, buffeted by the

turbulent passions of moral zealots and threats from over-excited congressmen. But that is precisely why the matter must be taken out of the agency's hands entirely. The FCC has now made irrevocable political commitments to a program of expanded and intensive enforcement. Four of the present commissioners have emphasized their support for a more vigorous enforcement, signaling to Congress and its activist constituencies that there will be no going back to the original understanding of *Pacifica*.[21] In light of the Commission's commitment not only to pursue but even escalate its censorial campaign, we urge this court to declare that 18 U.S.C. § 1464 is constitutionally limited to language or images that satisfy the prevailing standards for obscenity.

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[21] *See, e.g., Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Show*, 21 FCC Rcd. 2760, 2781-90 (2006) (concurring statements of Chairman Martin and Commissioners Adelstein, Copps and Tate). Only Commissioner Adelstein expressed reservations about the scope of enforcement, notably dissenting from sanctioning isolated instances of the "F-word" and "S-word" in the *Omnibus Order*, issued by the FCC on the same day. At the same time, he also declared his support for a stepped up enforcement policy generally. *Id.* at 2784. *See also Hearings on H.R. 3717*, 108th Cong. 83-106 (statements of Commissioners Martin (before he became chairman), Adelstein and Copps). To the best of our knowledge the recently appointed fifth member of the FCC, Commissioner McDowell, has not yet publicly expressed any views on the subject.

Respectfully Submitted,

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