No. 10-1293

In the
Supreme Court of the United States

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Federal Communications Commission, Et Al.,

*Petitioners,*
v.

Fox Television Stations, Inc. Et Al.,

*Respondents*

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Federal Communications Commission, Et Al.,
*Petitioners,*
v.

ABC, Inc. Et Al.,
*Respondents*

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

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# *AMICI CURIAE* BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AND THE MEDIA INSTITUTE IN SUPPORT OF RESPONDENTS

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## STATEMENTS OF INTEREST OF *AMICI CURIAE*[1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country. The Center is familiar with the issues presented in this appeal having filed as *amici curiae* when this matter was previously before this Court, *FCC v. Fox Television Stations*, 556 U.S. 502 (2009) and when it was before the United States Court of Appeals for the Second Circuit, *Fox Television Stations v. FCC*, 613 F.3d 317 (2nd Cir. 2010).

The Media Institute is an independent, nonprofit research organization located in Arlington, Va. Through conferences, publications, and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment, a competitive

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[1] Pursuant to S. Ct. R. 37.6, the amici state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Brit Hume, a Trustee of the Thomas Jefferson Center and an employee of one of the parties, took no part in the decision to file in this case, or in the preparation and submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission. The parties' written consent to the filing of amicus curiae briefs is on file with the court.

communications industry, and journalistic excellence. The Institute has participated as *amicus curiae* in numerous court proceedings, including cases before the United States Supreme Court and federal courts of appeal.

## ARGUMENT

### I. *FCC V. Pacifica*, And By Extension 18 U.S.C. § 1464, Should Be Invalidated Because They Violate The First Amendment.

It is a hallmark of First Amendment law that expression is presumptively protected unless it falls within one of several carefully prescribed exceptions. *Brown v. Entm't Merchants Ass'n*, 564 U.S. ____; 131 S.Ct. 2729, 2733 (2011). "Indecent" expression that falls short of obscenity has never been one of these exceptions. Nevertheless, this Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), sanctioned the content-based regulation of such speech when it occurs over broadcast media. In doing so, the Court relied upon statutory language that establishes criminal and civil punishments for anyone who utters "indecent . . . or profane language by means of radio communication." 18 U.S.C. § 1464. Such regulation of protected First Amendment speech lacks historical precedent and is unwarranted by any prominent component of our nation's legal traditions. It thus cannot be justified under the standard endorsed recently by this Court in *United States v. Stevens* for evaluating government attempts to expand the long-recognized categorical exceptions to First Amendment protections of speech and press. 559 U.S. ____; 130 S. Ct. 1577 (2010).

Given the holding in *Stevens*, *Pacifica* should be reversed in its entirety, and those parts of 18 U.S.C. § 1464 concerning "indecent or profane language" should be nullified. Although cautious about lightly overturning its own precedents, this Court has repeatedly emphasized that *stare decisis* is but a pragmatic policy of judicial restraint. It cannot

be used to shield past decisions that infringe clear constitutional commands. *Pacifica* was such a decision, and *amici* respectfully pleads that the Court use this opportunity to rectify a troubling discrepancy in its First Amendment jurisprudence.

### A. *Pacifica* Impermissibly Created A Novel Category Of Unprotected Speech.

Indecent but non-obscene expression is protected by the First Amendment. This principle applies even to speech that is "patently offensive" in its reference to "sexual and excretory activities and organs." *Pacifica,* 438 U.S. at 732 (quoting 56 F.C.C.2d 94, 96). It does not belong to those "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[2] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73 (1942). In adopting this historical approach, the Court firmly rejected a "simple balancing test that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test." *Brown*, 131 S.Ct. at 2734 (quoting *Stevens,* 130 S.Ct. at 1585) (internal quotation marks omitted).

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[2] This Court has addressed the forms of non-protected speech in a number of prior decisions. See *Miller v. California*, 413 U.S. 15, 24 (1973) (obscenity); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (speech inciting lawless activity); *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) ("true threats"); *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography).

In permitting the censorship of "indecent" broadcast expression, the majority in *Pacifica* rejected the traditional categorical approach later reaffirmed in *Stevens*. *See Pacifica*, 438 U.S. at 763 ("[A]ll members of this Court agree that the [speech at issue] . . . does not fall within one of the categories of speech . . . that is totally without First Amendment protection.") (Brennan, J., dissenting). It sanctioned the FCC order at issue despite the fact it proscribed otherwise protected expression – that is, speech beyond what was strictly obscene under *Miller v. California*. *See Pacifica*, 438 U.S. at 740-41 ("Prurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."). The Court justified this departure from tradition by identifying certain unique qualities of the broadcast medium. *Id.* at 748-50.

While both respondents and *amici* (*see* Part I.B.ii, *infra*) argue that these "unique qualities" have effectively eroded over time, the doctrinal premise of the *Pacifica* decision is itself erroneous. The medium in which speech occurs does *not* determine the standard by which its content-based censorship is evaluated. Whether such regulation survives scrutiny turns on whether the speech belongs to a historically-recognized categorical exception to the First Amendment. *Stevens* made this point undeniably clear. *See Stevens*, 130 S.Ct. at 1584 ("From 1791 to the present . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas and has never include[d] a freedom to disregard these traditional limitations.") (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 127 (1991)

(Kennedy, J., concurring)) (internal quotation marks omitted).

The *Pacifica* Court cited *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952), to support its conclusion that "each medium of expression presents special First Amendment problems." *Pacifica*, 438 U.S. at 748. In *Burstyn*, this Court invalidated a licensing scheme that permitted state administrative officials to ban motion picture films that they determined to be "sacrilegious." 343 U.S. at 497. Although the Court noted that "[e]ach method [of expression] tends to present its own peculiar problems," it immediately concluded that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles . . . make freedom of expression the rule." *Id.* at 503. This holding *undermines* the media-centric premise of the *Pacifica* decision, and it reflects the categorical standard ratified by this Court in *Stevens*. It also accords with other recent decisions holding that First Amendment strictures on content discrimination do not fluctuate with the form of media being employed. *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997) (internet).

#### i. "Indecent" Speech Cannot Be Regulated As Such Under The *Stevens* Standard Because It Is Not A Historically-Recognized Exception to First Amendment Protection.

This Court has stated emphatically that "most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions." *Cohen v.*

*California*, 403 U.S. 15, 24 (1971). "Indecency" and "profanity" are not among the list of such exceptions. While "lewd" and "profane" are among the unprotected categories suggested by *Chaplinsky*, this Court's holdings in obscenity cases have clarified that lewd and profane materials are to be prohibited only when they satisfy the requirements of the *Miller* standard for obscenity. In deciding whether a work is obscene, the triers of fact must consider: "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24 (internal citations omitted). This Court has made it clear that sexually explicit material does not lose its protected status unless it meets the *Miller* standards for obscenity. *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974). The FCC's regulatory scheme cannot, therefore, be justified by the existence of obscenity law or by historical references to censorship of "lewd" materials.

Prior to its decision in *Miller*, the Supreme Court held that a state may consider the age of the potential viewer in determining whether the material is obscene when limiting distribution of obscene material to minors. *Ginsberg v. New York*, 390 U.S. 629 (1968). This holding was unaltered by *Miller*, and the *Miller/Ginsberg* holdings are now key when assessing the constitutionality of any governmental effort to restrict or prohibit distribution of obscene materials to minors. The

*Miller*/*Ginsberg* standard, therefore, should be the constitutional limit of restrictions on materials that merely *may* reach minors, absent factors that would allow such a restriction to pass strict scrutiny.

The *Ginsberg* ruling was strikingly and specifically limited in scope. Rather than establish another separate and distinct exception to First Amendment protection, the Court allowed the regulation of the materials in question because they conformed to the standards of a previously defined exception – obscenity – as specifically applied to minors. *Ginsberg*, 390 U.S. at 636. In *Ginsberg*'s companion case decided the same day, *Interstate Circuit, Inc., v. City of Dallas*, the majority noted, "The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children." 390 U.S. 676, 689 (1968). With this caveat, *Interstate* effectively placed a limit on *Ginsberg* similar to *Jenkins*'s limitation on *Miller*, *i.e.*, only by strictly complying with *Ginsberg* may materials that are not obscene for adults be deemed obscene for minors. Regulations on speech may not be left vague with the rationale that this will better protect minors.

The materials prohibited by the FCC do not conform to the *Miller/Ginsberg* standard. Fleeting expletives and nudity must be considered within the context of a television program which otherwise has artistic and political value to its viewers, and which as a whole does not appeal to the prurient interest of a minor. Although arguably there exists the same interest in shielding children from harmful speech, *Ginsberg* and *Interstate Circuit* make clear the fact

that this interest, absent satisfaction of the *Miller* standards as applied to children, is not sufficient to render speech unprotected. The FCC's regulations therefore fall outside the categorical exceptions to First Amendment protection.

### ii. This Court Has Declined To Create Additional Categories Of Unprotected Speech In Similar Contexts.

This Court has recently declined to create an additional category of unprotected speech because of its possible harmful effects to children. In *Brown*, this Court was urged to establish portrayals of violence as a new category of unprotected speech and ruled that the ban on sales of violent video games to minors could not survive strict scrutiny. 131 S. Ct. 2729. The regulations at issue here must pass the same scrutiny. This case involves speech that is certainly protected outside of the broadcast context and, as discussed below, there remain no valid justifications for treating broadcast media differently from other media.

### iii. The FCC's Current Regulatory Scheme Is Not Consistent With Time, Place, And Manner Restrictions.

The *Pacifica* analysis emphasizes that the FCC is not engaging in censorship of indecent broadcasts but merely "channeling" such broadcasts to a time period in which it is less likely that children will be in the audience. *See* 438 U.S. at 731-32, 750. In this regard, the analysis resembles a time, place, or manner regulation of speech but for one critical

difference: the constitutionality of such regulations is dependent upon their neutrality with respect to the content of speech. *See Cox v. New Hampshire*, 312 U.S. 569, 578 (1941). *Pacifica*, by contrast, sustains the regulation of speech specifically because of its content.

Analogy of *Pacifica*'s "channeling" to the zoning of adult-oriented businesses to particular location is similarly flawed because of the former's focus on content. In *Young v. American Mini Theatres, Inc.*, for example, the city of Detroit amended its "Anti-Skid Row Ordinance" to include the restriction that no adult businesses could be located within 1,000 feet of any two existing adult businesses or within 500 feet of any residential area. 427 U.S. 50, 52 (1976) (plurality opinion). While conceding that the adult establishments were engaged in some protected speech, this Court ultimately upheld the restrictions as valid uses of the city's zoning powers, noting:

> The Common Council's determination was that a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. *It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech.*

*Id.* at 71 n.34 (emphasis added). In *Renton v. Playtime Theaters*, this Court also held that a zoning ordinance represented "a valid government response" to the "admittedly serious problems created by adult theaters," and that the ordinance is "completely

consistent with our definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'" 475 U.S. 41, 54, 48 (1986) (citations omitted).

As this Court declared in *United States v. Playboy Entertainment Group*, any attempt to apply the secondary effects rationale to content-based restrictions on protected speech is a fruitless effort. 529 U.S. 803, 815 (2000) (stating emphatically that content-based restrictions must be subject to strict scrutiny). "We have made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech. The statute now before us burdens speech because of its content; it must receive strict scrutiny." *Id.* (citations omitted). Because of the concededly content-based nature of the FCC's indecency regime,[3] the secondary effects doctrine has no applicability and strict scrutiny treatment cannot be avoided on these grounds.

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[3] "So long as the federal government must exercise selectivity in allocating limited spectrum among numerous licensees (and broadcasters benefit from the use of a valuable public resource without charge), it may constitutionally require licensees to accept content-based restrictions that could not be imposed on other communications media." (Pet. Br. 43-44)

### B. Overturning *Pacifica* Would Align With This Court's Jurisprudence on *Stare Decisis* And The First Amendment.

Because *Pacifica* deviates so drastically from established First Amendment precedent, it should be overruled in its entirety. *Amici* fully understands the importance of *stare decisis*, and it recognizes that this Court's past decisions are "to be respected unless the most convincing of reasons demonstrates that adherence to it puts [the Court] on a course that is sure error." *Citizens United v. Fed. Election Comm'n*, 558 U.S. ____, 130 S.Ct. 876, 911-12 (2010). Nevertheless, this Court has made it equally clear that it will not tolerate precedent that infringes upon essential constitutional liberties, particularly in the arena of the First Amendment. *Pacifica* sets just such a precedent. Moreover, the practical foundations that seemingly supported the decision over thirty years ago have eroded so much that its reasoning can no longer be credibly defended.

#### i. *Stare Decisis* Does Not Protect Past Decisions That Violate Core First Amendment Principles.

*Stare decisis* may not be employed by the Government to protect a decision that stands as an affront to free speech and an otherwise consistent line of interpretation of the First Amendment for several decades. In determining whether this Court should adhere to the principle of *stare decisis*, the relevant concerns are the continued workability of the precedent, its antiquity, the reliance interests at stake, and the quality of the decision's reasoning. *Citizens United*, 130 S.Ct. at 912 (quoting *Montejo v. Louisiana*, 556 U.S. 778, ____; 129 S.Ct. 2079, 2088-

89 (2009)). Additionally, this Court has examined whether "experience has pointed up the precedent's shortcomings." *Citizens United*, 130 S.Ct. at 912 (quoting *Pearson v. Callahan,* 555 U.S. 223, ____; 129 S.Ct. 808, 816 (2009)).

*Stare decisis* is not "an inexorable command . . . rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Moreover, this Court has a "considered practice" not to apply this principle of policy "as rigidly in constitutional as in nonconstitutional cases." *Glidden Co. v. Zdanok,* 370 U.S. 530, 543 (1962). This is because "correction through legislative action is practically impossible" in the former case. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Ultimately, *stare decisis* is only an "adjunct of [the Court's] duty as judges to decide by [their] best lights what the Constitution means." *McDonald v. Chicago*, 130 S. Ct. 3020, 3063 (2010) (Thomas, J., concurring).

If anywhere, this notion is particularly applicable in matters concerning the First Amendment. "This Court has not hesitated to overrule decisions offensive to the First Amendment." *Citizens United*, 130 S.Ct. at 912 (quoting *Fed. Election Com'n v. Wisconsin Right to Life, Inc*, 551 U.S. 449, 500 (Scalia, J., concurring)). Notably, First Amendment cases do not concern property or contractual rights, where reliance interests are most at stake. *Wisconsin Right to Life*, 551 U.S. 502 (Scalia, J., concurring). Indeed, this point can be easily observed in this Court's recent decision in *Citizens United* to reverse *Austin v.*

*Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which had existed undisturbed for twenty years by the time it was overruled. Quite clearly, this Court has not been circumspect in rectifying disparities between its precedent and core First Amendment protections of free speech and press in favor of the latter.

### ii. The Justifications In *Pacifica* Are No Longer Operative In Today's Media Landscape.

This Court should overturn *Pacifica* because the justifications for that ruling are no longer operative in today's media landscape. Time and technology have undermined whatever logical support the holding merited over three decades ago. The dominant position of licensed broadcasting has been steadily eroded by ever-expanding options in television viewing. The impact of licensed broadcasting's content on national mores and values has therefore diminished accordingly. Moreover, the assumption that licensed broadcasters are uniquely capable of inflicting harm on unwary young listeners and viewers has long since been undermined if not wholly repudiated.

In *Pacifica*, this Court noted that broadcasted speech has received the most restricted First Amendment protection. *Pacifica*, 438 U.S. at 731-32, 748. It justified this limitation on two grounds: "[f]irst, the broadcast media have established a uniquely pervasive presence in the lives of all Americans," and "[s]econd, broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 748-49. Neither of these reasons has withstood

the test of time and neither are rational restrictions in today's media landscape.

### 1. Most viewers Have Both Cable And Broadcast Television, Delegitimizing The "Pervasiveness" Argument In *Pacifica*.

Although broadcast media still constitutes a pervasive presence in the lives of some Americans, it can no longer be considered "unique" and no longer holds up as a justification for specialized limitations on free speech. In 2005, only 14% of American television households limited themselves exclusively to broadcast stations. *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 F.C.C.R. 2503, 2508 (2006). Of the 109.6 million U.S. households that had cable services in their homes in 2005, 69.4% of those homes had some form of cable television service. *Id.* at 2506. Since this Court's 1978 *Pacifica* decision, the number of cable subscribers has grown from 9.4 million users to 59.8 million in 2010 – a six fold increase in the number of subscribers.[4] Additionally, streaming internet video services like Netflix and Amazon Video on Demand (the former boasting over 20 million subscribers worldwide[5]), and network television streaming video

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[4] National Cable and Telecommunications Association, *Basic Video* Consumers 1975-2010, http://www.ncta.com/Stats/BasicCableSubscribers.aspx.

[5] Securities and Exchange Commission, *Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, at 22, http://files.shareholder.com/

websites[6] have continued to draw a large number of consumers.

These numbers represent a significant departure from the broadcast media-dominated landscape that existed during the time of *Pacifica* and undermine the very notion that broadcast television is unique in its pervasiveness. With the rise of digital cable, satellite television, and video on demand options, television media is available for consumption in a wider variety of formats than at any point in history. The once-unique character of broadcast television has become overshadowed by the wide variety of alternative media delivery options, eliminating whatever weak justification remained for treating broadcast media differently.

### 2. The "Captive Audience" Doctrine Has No Applicability In The Context Of Media Viewed Privately In The Home.

This Court stated in *Cohen* that the "mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense." *Cohen v.*

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downloads/NFLX/1497281522x0x460274/17454C5B-3088-48C7-957A-B5A83A14CF1B/132054ACL.PDF.

[6] Perhaps an admission of the rising dominance of internet television streaming, the Nielsen ratings agency added internet views to its ratings numbers starting in 2009. Brian Stelter, *Nielsen to Add Online Views to Its Ratings*, The New York Times (December 1, 2009), http://www.nytimes.com/2009/12/02/business/media/02nielsen.html.

*California*, 403 U.S. at 21. Although this statement was limited at the time to "captives" outside of the home, the distinction is today superficial. Other information sources, such as cable television and internet, also invade the home but content-based regulation is forbidden under the First Amendment. "We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech." *Reno v. ACLU*, 521 U.S. 844, 879 (1997).

This Court also failed to apply the captive audience doctrine with regard to media in *Erznoznik v. Jacksonville*, where it struck down an ordinance regulating drive-in movies. 422 U.S. 205 (1975). As the ordinance only targeted nudity in these movies, it discriminated solely on the basis of content. The Court held that the media was not "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it" and stated that "the offended viewer readily can avert his eyes." *Id.* at 212. The same concept applies to broadcast media. Offended individuals are free to avert their eyes, turn off the television or radio, or avoid bringing a television or radio into their home in the first place.

Most recently, the Court denied use of the captive audience doctrine in *Snyder v. Phelps*, a case involving the First Amendment rights of protestors at the funeral of a marine who was killed in the line of duty. 131 S. Ct. 1207 (2011). Describing the extremely restricted and limited use of the doctrine, the Court stated that it has been applied "only sparingly to protect *unwilling listeners*." *Id.* at 1220 (emphasis added). If a man witnessing the protest of his son's funeral is not an unwilling listener, then

watchers and listeners of television and radio who deliberately turn on and choose the programs that they hear are certainly not unwilling either.

Televisions, like any other information source, are voluntarily brought into the home and are turned on and off at the viewer's discretion. Parents can control their children's use of broadcast television in the same way that they can control use of cable television, internet, video games, literature, and countless other forms of media choices. In *Cohen*, the Court limited governmental protection from offensive speech to contexts with "substantial privacy interests." *Cohen*, 403 U.S. at 21. Because of the new pervasiveness of other types of media, these substantial privacy interests no longer exist for television and radio broadcasts.

### 3. Children Cannot Be Considered More Of A Captive Audience In The Broadcast Media Context Than Any Other Technology.

These changes in the comparative pervasiveness of media have also affected the way the Court should view the impact of accessibility to young children. Although the Court in *Pacifica* believed it was necessary to assist parents in their "authority in their own household," recent decisions have indicated a departure from this paternalistic view. *Pacifica*, 438 U.S. at 749 (quoting *Ginsberg v. New York*, 390 U.S. 629). Although the Court distinguished aspects of its *Reno* decision from *Pacifica* in an effort to avoid diverging from precedent, its statements regarding parental control

support a more modern view of the accessibility of media to children. *Reno v. ACLU*, 521 U.S. 844, 866 (1997). In striking down the restrictions on the internet, for example, this Court stated that "neither the parents' consent – nor even their participation – in the communication would avoid the application of the statute." *Id.* at 865.

Most recently, in *Brown v. Entertainment Merchants Association*, the Court stated:

> [We] note our doubts that punishing third parties for conveying protected speech to children *just in case* their parents disapprove of that speech is a proper governmental means of aiding parental authority. Accepting that position would largely vitiate the rule that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors]."

131 S.Ct. 2729, 2740 (2011) (quoting *Erznoznik*, 422 U.S. 205, 212-13 (1975)). Although the *Pacifica* holding attempted to mitigate its impact on free speech by establishing a safe harbor zone between 10:00 PM and 6:00 AM, this is an antiquated system that is not practical in today's society of webcasting and digital video recorders. Not only do time zones create difficulties in actually taking advantage of this safe harbor, but technology allows children to record and later watch programming regardless of the hour it was originally broadcast thereby effectively destroying the "safe" harbor that existed in 1978.

### 4. Radio Listeners Can Listen to Satellite Services and Internet Radio On A Multitude of Devices.

With the rise of television as an alternative to terrestrial radio broadcasts, radio's growth has slowed in the last half century as compared to television. With the advent of satellite and internet streaming radio, however, new growth in radio listenership has been dominated by these two new forms. After signing "shock jock" Howard Stern in 2004, Sirius satellite radio station saw a significant increase in listeners, contributing to a nearly 500% increase in subscriptions during the year of his defection, and XM Radio similarly saw a 400% rise in listeners that year.[7] Similar to the cable television subscription model, satellite radio services offer a subscription service for a monthly fee, which comes with access to a wider variety of channels and services, and without the geographical limitations of terrestrial radio stations.

In addition to these pay subscription services, internet streaming radio companies like Pandora and Spotify have created another avenue for radio listeners to seek content. Pandora is a free, advertisement-based service that allows users to listen musical artists or genres of their choice directly through the Pandora website or on their mobile devices through a downloadable "app." These kinds of internet streaming services have exploded in

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[7] Daren Fonda, *The Revolution in Radio*, Time (April 11, 2004), http://www.time.com/time/magazine/article/0,9171,610082,00.html.

popularity in recent years, with Pandora boasting over 60 million total listeners in 2010[8] and over 2 million iPhone downloads by 2008.[9] This shift from terrestrial radio to satellite and internet radio has delegitimized the pervasiveness justification in the radio arena – similar to the shift from broadcast television to cable television.

### C. More Narrowly Tailored Alternatives Exist Than The FCC's Safe Harbor Provision

In *United States v. Playboy Entertainment Group*, this Court struck down a provision of the Telecommunications Act of 1996 which "require[d] . . . sexually-oriented programming either to [be] fully scramble[d][10] or otherwise fully block[ed]" or confined to "hours when children are unlikely to be viewing . . . 10 p.m. and 6 a.m." 529 U.S. 803, 806 (2000) (internal citations omitted). Because scrambling did not always result in fully blocking audio and video, cable operators felt that

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[8] MG Siegler, *You are on Pandora: Service Hits 60 Million Listeners, Adding Users Faster Than Ever*, Techcrunch (July 21, 2010), http://techcrunch.com/2010/07/21/pandora-stats/.

[9] *2,000,000 Pandora iPhone users!!,* Pandora Blog (December 2, 2008), http://blog.pandora.com/pandora/archives/2008/12/2000000-pandora.html.

[10] "[T]he term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner." Telecommunications Act of 1996, §505, Pub. L. 104-104, 110 Stat. 136, 47 U.S.C. § 561 (1994).

they had "no practical choice" but to confine sexually explicit programming to the allowable 8-hour time period. *Id.* at 809. This Court affirmed the lower court's decision that "a regime in which viewers could order signal blocking on a household-by-household basis presented an effective, less restrictive alternative," and that therefore effectively prohibiting cable operators from airing sexually explicit material for sixteen daytime hours was unconstitutional. *Id.* at 807.

In the instant case, this Court is presented with a similar restriction on television programming between 6 a.m. and 10 p.m. but the material censored by the FCC is notably less explicit than the content at issue in *Playboy*. Although the FCC regulates broadcast television and not cable, the distinction between the two that this Court articulates in *Playboy* is no longer meaningful in light of recent technological advances. (*See* Part I.C.ii., *infra*). Therefore, this Court's consideration of *Playboy* reflects the proper analysis of the issue now before the Court. Because a less restrictive alternative for blocking children's access to indecent material exists today, the FCC's regulatory scheme must be rejected in favor of the alternative.

#### i. *Playboy* provides the Operative Framework For Analyzing The FCC's Time-Based Content Censorship.

In both the instant case and in *Playboy*, "[t]he overriding justification for the regulation is concern for the effect of the subject matter on young viewers." *Id.* at 811. This Court is unambiguous in its analysis:

> As we consider a content-based regulation, the answer should be clear: The standard is strict scrutiny. This case involves speech alone; and even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.

*Id.* at 814. Furthermore, "When the purpose . . . of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression." *Id.* at 826. Just as in *Playboy*, the fact that television programming is left uncensored between 10 p.m. and 6 a.m. does not redeem the regulation.

This Court, therefore, should apply strict scrutiny and consider alternative means to achieving the government's goals. "If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.* at 813. In *Playboy*, this less restrictive alternative was § 504 of the Telecommunications Act, "which requires a cable operator, upon request by a cable service subscriber . . . without charge, [to] fully scramble or otherwise fully block any channel the subscriber does not wish to receive." *Id.* at 809-10 (internal citations omitted). This Court characterized this option as the "key difference between cable television and the broadcasting media, which is the

point on which this case turns." *Id.* at 815. While the analysis of why restrictions on cable television fail strict scrutiny is still valid, this particular distinction – the *key* difference – no longer exists.

### ii. The V-Chip Now Places Broadcast Television On Equal Footing With Cable and Satellite.

It is now appropriate to align treatment of broadcast television with the current treatment of cable television. Since 2000, the year of the *Playboy* decision, the FCC has required all new televisions with screens greater than 13" to include the V-chip.[11] As the FCC describes on its website, "[t]he V-chip allows parents or other caregivers to block programming on their televisions that they don't want children to watch." "*Putting Restrictions on What Your Children Watch*." Ratings similar to that of the Motion Picture Association of America system[12] are encoded into the television program, allowing a parent to block whole channels or to block certain programs based on ratings or sex, violence, and language content. *Id.*

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[11] "*V-Chip – Putting Restrictions on What Your Children Watch | FCC.gov*," Federal Communications Commission, http://www.fcc.gov/guides/v-chip-putting-restrictions-what-your-children-watch (last visited November 8, 2011) ("*Putting Restrictions on What Your Children Watch*").

[12] The FCC's website lists and explains television-specific ratings, such as TV-Y, TV-PG, and TV-MA, as well as the ratings used for movies and established by the Motion Picture Association of America (such as G, PG, PG-13, and R), which are also programmed into V-chips. "*Putting Restrictions on What Your Children Watch*."

The V-chip is precisely the "digital technology [that] may one day provide [a] solution" to the imperfect scrambling system applied to sexually-explicit cable networks. *Playboy*, 529 U.S. at 808. It is a more precise version of the "less restrictive alternative" that resulted in the censoring provision of *Playboy* being struck down. The V-chip allows television to be tailored not only to minors, but also to those just under the age of majority, or to younger teenagers, or alternatively to young children. "*Putting Restrictions on What Your Children Watch*." Additionally, the V-chip can be used throughout the day, protecting children from indecent programming even when they watch television past the assumed bedtime of 10 p.m.

This Court acknowledged in *Playboy* that neither the time restriction nor the scrambling technology was perfect; there was "the possibility that a graphic image could have a negative impact on a young child [and] it is hardly unknown for [adolescents] to be unsupervised in front of the television set after 10 p.m." *Playboy*, 529 U.S. at 826. Yet this Court concluded that more strict restrictions on programming were not necessary and not permissible under the First Amendment. *Id.* at 807. The V-chip is thus a less restrictive and more efficient mechanism than the FCC's blanket prohibition on indecency between 6 a.m. and 10 p.m.

This Court has expressed a preference for listeners exercising control over what speech they receive, rather than the government placing limitations on the distribution of speech. The V-chip conforms to this preference, allowing users to easily and consistently block indecent programming or, if

they prefer, to choose from the range of indecent programming offered by networks. This "enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners — listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt." *Id.* at 815; *see also United States v. Am. Library Assoc.* 539 U.S. 194, 220 (2003) (Breyer, J., concurring) (relying on the ease with which an adult can overcome blocks on internet sites in concluding that those blocks are constitutionally permitted).

The FCC's indecency regulation scheme is content-based and must be subject to strict scrutiny. In applying strict scrutiny in *Playboy*, this Court has struck down regulation that was similar, but more well-defined and targeted at speech that is arguably more offensive or harmful to children. The regulations at issue in this case, in contrast to *Playboy*, involve a protected First Amendment speech. The distinction between broadcast and cable television is no longer meaningful and the V-chip places broadcast television on equal footing with cable and satellite. Therefore, this Court should overturn *Pacifica* by the reasoning set forth by this Court in *Playboy*.

## II. Even If *Pacifica* Is Retained, The FCC'S Current Indecency Enforcement Regime Unconstitutionally Chills Protected Speech.

The FCC's current indecency standard is so vague that broadcasters cannot reasonably predict what speech the agency will censor. As a result, broadcasters are forced to navigate through a maze of inconsistent decisions, which inevitably leads to

the chilling of speech protected by the First Amendment. *E.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) ("Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked.") (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (internal citations and alterations omitted)). Petitioners seek to remedy this infirmity by enacting a "policy of forbearance." Pet. Br. 31. In effect, the FCC asks that broadcasters trust the agency to "declin[e] to sanction" them when material was not clearly indecent. *Id.* Broadcasters, however, should not be expected to rely upon the FCC's unregulated discretion as guarantors of their First Amendment rights.

### A. The FCC's Vague Indecency Standards Chill Speech That Is Undeniably Protected by the First Amendment.

Industry practices under the FCC's current indecency standard demonstrate the vagueness of this regime. In 2007, award-winning filmmaker Ken Burns directed a seven-part, 14 1/2-hour documentary about World War II entitled *The War*. This documentary, like many of Mr. Burns's other films, was broadcast on PBS. The film included former World War II soldiers speaking on camera and, to be true to the archival material, included profanity from the soldiers to describing the hellishness of their combat experience. The soldiers

also explained the meaning of common military euphemisms such as "fubar."[13]

The FCC's vague indecency standards led some PBS stations to air edited versions of *The War*. These stations included WETA, a co-producer of Mr. Burns's films which is based in Arlington, Virginia, and WHUT, which is based out of Howard University. In a telling quote, PBS's chief content officer stated:

> The core problem is, we don't really know what the FCC will do with a complaint because the guidelines aren't clear. . . . We all feel as confident as we can under the circumstances with the 'Saving Private Ryan' decision. But I still think if you're a general manager of a station in a community somewhere in the U.S., you have to think carefully about whatever jeopardy [airing an unbleeped 'War'] might cause you."[14]

This quote is emblematic of the issues facing broadcasters. The FCC's current standard provides virtually no guidance to broadcasters as to what

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[13] Paul Farhi, Fearing Fines, PBS to Offer Bleeped Version of "The War," Washington Post, August 31, 2007, available at http://www.washingtonpost.com/wpdyn/content/article/2007/08/30/AR2007083001945.html ("*PBS to Offer Bleeped Version of Ken Burns Documentary*"). The term "fubar," as explained in the film Saving Private Ryan, means "fucked up beyond all recognition."

[14] Farhi, "*PBS to Offer Bleeped Version of Ken Burns Documentary.*"

constitutes indecency. Instead, broadcasters simply succumb to self-censorship and protected First Amendment speech is chilled.

This scheme was not always so. The FCC, however, adopted a policy in 2001 seeking to enforce "community standards" as to indecency. *Industry Guidance on Communication's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999 ¶ 7-8 (2001) ("Policy Statement"). The Policy Statement also included a subjective, three-part test for determining when material is indecent. *Id.* ¶ 10. Just three years later, the FCC drastically altered its policy again to sanction fleeting uses of expletives. *See, e.g.*, *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975 ¶ 12 (2004) (issuing fine for use of fleeting expletive by Bono of the musical group U2 at the Golden Globes awards show). These new "standards" essentially reversed over twenty-five years of FCC policy that, regardless of its faults, provided broadcasters with more-definite guidance as to what constitutes indecency.

The FCC's uneven application of these vague standards demonstrates the difficulty broadcasters (let alone the FCC) have in determining what constitutes indecency. For example, the FCC found, within the same opinion, that the word "bullshit" was patently offensive under contemporary community standards but not the word "dickhead." The FCC later found that the use of the word "bullshitter" was not indecent. Fox Br. in Opp. 8, 46.

The FCC's vague indecency standard leaves broadcasters with two unpalatable options: either air content that may be provocative in some way and risk massive fines or "steer far wider of the unlawful zone" to prevent fines. The risk of sanctions thus impermissibly "hovers over each content provider, like the proverbial sword of Damocles." *Reno v. ACLU*, 521 U.S. 844, 882 (1997) (quoting *ACLU v. Reno*, 929 F.Supp. 824, 885-56 (E.D. Penn. 1996)).

### B. The FCC's Erratic Enforcement Regime Validates This Court's Concerns About Vesting Administrative Agencies with Unrestricted Regulatory Discretion Over Protected Expressive Activities.

The FCC, in an effort to remedy its vague definition of indecency, promises it will enact a "policy of forbearance" by magnanimously "declining to sanction" broadcasters for airing material that the FCC would not clearly regard as indecent. Pet. Br. 31. This promise simply reinforces the obvious: the FCC has unrestricted discretion to decide what it believes constitutes (purportedly) indecent expression.

Yet the guidance provided by the FCC in this regard is as equally vague as the FCC's current indecency standard. Petitioners state, for example, that ABC "had sufficient notice that its broadcast of the nude adult images . . . might violate the FCC's indecency standards." Pet. Br. 31. This equivocal notice, standing alone, fails to provide broadcasters with definitive boundaries as to whether such images are actually indecent. Petitioners' position is even more problematic because it relies upon a "notice" that is over fifty years old, *id.* at 31-32; even the FCC

must concede that "community standards" have changed dramatically in the last fifty years. This purported notice was also vague fifty years ago: "the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. 1464." *Id.* at 32 (quoting *Enbanc Programming Inquiry*, 44 FCC Rcd. 2303, 2307 (1960)).

The FCC cannot simply reserve for itself such unbridled discretion to evaluate when and how it choose to enforce its policies. *See City of Lakewood v. Plain Dealer Publg. Co.*, 486 U.S. 750, 764 (1988) ("[W]ithout standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker."). This Court has thus rejected government promises to limit enforcement of its statutes and regulatory schemes because these promises insufficiently protect against potential abuse.[15]

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[15] Even in the obscenity context, which receives no protection under the First Amendment, governments must still employ safeguards to minimize the risk of chilling protected speech. The government, therefore, cannot use "threat[s] of invoking legal sanctions and other means of coercion, persuasion, and intimidation" to prevent booksellers from challenging government determinations of objectionable content. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963); see also *Blount v. Rizzi*, 400 U.S. 410, 416 (1971) (finding procedures to censor obscene materials from the mails "violate the First Amendment unless they include built-in safeguards against curtailment of constitutionally protected expression"); *Smith v. California*, 361 U.S. 147, 218 (1960) (striking down strict liability obscenity law because it created potential for self-censorship that would restrict

Indeed, this issue was recently addressed in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2009). Chief Justice Roberts, in a revealing exchange at oral argument, questioned the FEC's ability to limit the reach of 2 U.S.C. § 441b to certain types of media, *see id.* at 904: "But we don't put our – we don't put our First Amendment rights in the hands of FEC bureaucrats . . . ." *Citizens United v. Fed. Election Comm'n*, No. 08-205, 2009 WL 6325467, Tr. of Oral Argument, at *65-66 (Sept. 9, 2009); *see also Citizens United*, 130 S. Ct. at 904 ("This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure.").

*Dirks v. SEC*, 463 U.S. 646, 664 n.24 (1983) reached a similar conclusion in an analogous situation.[16] At issue in *Dirks* was the censure of a securities analyst by the SEC for investigating and revealing a massive fraud. The broker learned of the information from a corporate insider, and the lower courts determined that the broker violated SEC Rule

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public's access to constitutionally protected material). The common thread running through these cases is a serious judicial concern with the implementation of laws that may create a chilling effect on constitutionally protected speech. These principles, which apply in the unprotected obscenity context, should apply with greater force to constitutionally protected indecent speech.

[16] This statement has implications beyond securities litigation, as the *Dirks* Court noted that imprecise rules prevent parties from complying with legal requirements. *Id.* at 658 n.17. The same principle, albeit in the First Amendment context, is at issue in these cases.

10b-5, 17 CFR § 240.10b-5. *Id.* at 649-52. The SEC brought its action even though an earlier SEC commissioner remarked that analysts and reporters would not be subject to insider trading liability. This Court specifically addressed that commissioner's statement when it explained that "rely[ing] on the reasonableness of the SEC's litigation strategy . . . can be hazardous." *Id.* at 664 n.24.

Nor does the proposed "policy of forbearance" bear any resemblance to the FCC's current policy. As compared to the twenty-five years after *Pacifica*, the FCC in the last ten years has brought more enforcement actions and imposed vastly higher fines. *See generally* Fox Br. in Opp. 5-10; ABC Br. in Opp. 23-26, 35-38. As these cases demonstrate, the FCC now frequently passes judgment, inconsistently, as to whether limited, non-sexual nudity[17] or coarse language[18] is indecent. These uneven decisions by the FCC only reinforce this Court's prior precedents

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[17] *Compare, e.g.*, *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd. 1838 (2000) *("Schindler's List")*, *with Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue,"* Notice of Apparent Liability for Forfeiture, 23 FCC Rcd. 1596 (2008).

[18] *Compare, e.g.*, *Complaints Against Various Televisions Licensees Regarding Their Broadcast on November 11, 2004 of the ABC's Television Network's Presentaiton of the Film Saving Private Ryan*, 20 FCC Rcd. 4507 (2005), *with Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd. 2664 ¶ 82 (2006) ("*The Blues*").

concerning the dangers of trusting government bureaucrats to police themselves when the public's rights are at stake.

## CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to affirm the judgment of the Second Circuit Court of Appeals in favor of respondents.

/s/ J. Joshua Wheeler

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