Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	GN Docket No. 13-86
FCC Reduces Backlog of Broadcast	)	
Indecency Complaints; Seeks Comment on	)	
Egregious Cases Policy	)	

COMMENTS OF FOX ENTERTAINMENT GROUP, INC. AND FOX TELEVISION HOLDINGS, INC.

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June 19, 2013

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Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. (together, "Fox") respectfully submit these comments in response to the above-captioned Public Notice calling for feedback "on whether the full Commission should make changes to its current broadcast indecency policies or maintain them as they are."[1] Fox urges the Commission to conclude that it is legally required, and logically bound, to cease attempting to enforce broadcast indecency limits once and for all. Time and technology have marched inexorably forward, but the Commission's untenable effort to define indecent content through a hodgepodge of inconsistent and uneven rulings remains stuck in a bygone era. Whatever validity may once have existed for indecency regulation, the time clearly has arrived to lay rest to the anachronistic notion that broadcast stations deserve anything less than the full First Amendment protection bestowed on *all* speakers by the Constitution.

Should the Commission defy the Constitution and common sense, nonetheless concluding that it must maintain a role in regulating indecency, Fox urges the FCC to narrowly

[1] *FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy*, Public Notice, 28 FCC Rcd. 4082 (2013) ("*Public Notice*").

construe its authority and to hew strictly to a regime that provides broadcasters with wide editorial discretion to select programming. Consistent with the First Amendment and Supreme Court precedent, and the Commission's own historically limited approach, such a regime would permit the Commission to pursue indecency enforcement *only if* the subject matter of the broadcast content constitutes the equivalent of a highly graphic and sustained verbal or visual "shock treatment." Moreover, the Commission should confine its interest, at most, to content that indisputably includes an explicit portrayal of sexual or excretory organs or activities. The Commission has no business attempting to regulate isolated or fleeting words or images, nor should the FCC concern itself with innuendo or entendre. And in no event should the Commission ever attempt to sanction content during live programming or during news or public affairs programming. Put simply, if the Commission continues to play any role at all, it should never substitute its own judgment for that of broadcast speakers' editorial discretion.

Regardless of the path it chooses to pursue going forward, the Commission owes it to broadcasters and the Supreme Court to dismiss whatever remains of the backlog of pending indecency cases. The Supreme Court's directive in *Fox II* rings loudly but has gone completely unheeded: the Commission cannot constitutionally impose sanctions under its indecency regime without providing broadcasters with fair notice, in advance, of what is prohibited.[2] Given the wild fluctuations and contortions that have characterized FCC indecency enforcement efforts, whatever complaints remain pending cannot possibly form the basis for any indecency enforcement proceeding because, as the Supreme Court pointed out in *Fox II*, the Commission's inconsistency deprived broadcasters of any ability to know what content was permissible and

[2] *FCC* v. *Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) ("*Fox II*").

what was prohibited. Accordingly, no matter the policy it attempts to follow for the future, the Commission must start fresh and dismiss all pending cases.

I. THE COMMISSION CAN NO LONGER REGULATE BROADCAST INDECENCY CONSISTENT WITH THE CONSTITUTION

A. The Entire Constitutional Construct for Indecency Oversight Rests Precariously on the Outdated, and Narrowly-Decided, *Pacifica* Case

As the Supreme Court long has recognized, content-based restrictions on speech are presumptively unconstitutional, including restrictions on indecent material that comes into the home.[3] These principles generally apply regardless of the specific medium of communication.[4] Indeed, the Supreme Court recently reiterated that "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears."[5] The "most basic of those principles" is that "[a]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[6]

For the last several decades, however, the Commission has treated broadcast media as second-class citizens. Relying on an exceedingly-narrow, fact-specific Supreme Court decision – *Pacifica*[7] – the FCC has censored broadcast content that allegedly falls within the

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3 *See United States* v. *Playboy Entm't Grp.*, 529 U.S. 803, 814–16 (2000); *Reno* v. *ACLU*, 521 U.S. 844, 885 (1997); *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989).

4 *Playboy*, 529 U.S. at 814 (cable television); *Reno*, 521 U.S. at 874 (internet); *Sable*, 492 U.S. at 126 (telephone); *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) (mails); *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) (print); *United States* v. *12 200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 130, n.7 (1973) (film).

5 *Brown* v. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (quotation omitted).

6 *Id.* (quotation omitted) (omission in original).

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

constitutionally nebulous category of "indecency." The entire construct has been built flimsily on the always suspect, and now obviously incorrect, perception that broadcasting is somehow unique among media. The supposition that broadcasting's characteristics were unique was "dubious from [its] infancy."[8] And if it was dubious then, it is incontrovertibly untrue now. Not only does broadcasting represent just a small sliver of the panoply of video content available to an average consumer today, it is also less uniquely pervasive and accessible to children than it was 30+ years ago.

The Commission, therefore, should conclude that it no longer has any lawful grounds to "police" broadcast speech on the basis that it is indecent. Instead, the FCC should affirm that it has no right to deny broadcasters the same First Amendment protections enjoyed by every other medium of communication.

B. The Foundations of *Pacifica* Were Built on Sand

The Supreme Court in 1978 upheld the FCC's indecency regime based on its perception, 30+ years ago, that broadcasting had "a uniquely pervasive presence in the lives of all Americans" and that it was "uniquely accessible to children."[9] The Commission already is well aware that the ensuing decades have borne witness to a massive volume of change, both within broadcasting and among all media. These radical changes have rendered both of *Pacifica*'s core assumptions invalid. In the decades since the divided Court ruled in *Pacifica*, the Supreme Court has consistently struck down attempts to regulate indecency in a wide variety of other media.[10] As two members of the current Court now have acknowledged, there is simply nothing "'unique[

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8 *Denver Area Educ. Telecomms. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 813 (1996) (Thomas, J., concurring and dissenting in part).

9 *Pacifica*, 438 U.S. at 748–49.

10 *See, e.g.*, *Sable*, 492 U.S. at 131 (sex chat lines); *Reno*, 521 U.S. at 885 (Internet); *Playboy*, 529 U.S. at 826–27 (cable signal bleed).

]'" or special about broadcasting today that can justify the perpetuation of differential treatment.[11]

First and foremost, broadcasting is not in any sense uniquely pervasive. Americans today, including children, spend more time engaged with non-broadcast channels delivered by cable and satellite television, the Internet, video games, and other media than they do with broadcast media. Indeed, 87% of American households today subscribe to cable or satellite services, and only a small percentage of Americans relies on the airwaves to receive television. As a result, the vast majority of Americans watch broadcast stations side-by-side with hundreds of non-broadcast channels that are not (and could not constitutionally be) bound by the Commission's indecency rules. The Supreme Court already wisely has noted that cable is just as "'pervasive . . . in the lives of all Americans'" as broadcasting.[12]

Consumers today have a multitude of options for watching video programming (including broadcast programs) over the Internet, and that trend is rapidly accelerating. Consumers can find broadcast programming on these Internet services one click away from a vast array of material that is not, and could not be, subjected to the FCC's indecency rules. It is not hyperbole to say that one consumer literally might encounter the exact same content online, at the exact same time, as another consumer views that content via an over-the-air broadcast transmission. With the emergence of live streaming apps and online video players, broadcast signals are themselves now available through methods of delivery other than direct over-the-air reception. Given the ubiquity of these alternative media, there can be no credible argument that broadcasting retains any residue of pervasiveness unique among media.

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[11] *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 530–35 (2009) ("*Fox I*") (Thomas, J., concurring); *Fox II*, 132 S. Ct. at 2321 (*Pacifica* "was wrong when it issued") (Ginsberg, J. dissenting).

[12] *Denver Area*, 518 U.S. at 745 (plurality opinion) (citation omitted).

Second, broadcasting is not uniquely accessible to children. As the FCC itself acknowledges, "[c]hildren today live in a media environment that is dramatically different from the one in which their parents and grandparents grew up decades ago."[13] There is no shortage of media – most notably cable and satellite television and the Internet – that are equally available to children today. According to Nielsen data, the percentage of children 17 and under in U.S. television households viewing primetime broadcast network programming in 2012-13 was 13.0%, versus 34.3% for basic cable, with most households receiving their broadcast programming via cable or satellite.[14] The Internet – just an obscure Defense Department project in 1978 – is now another extraordinarily accessible medium of communication. More than 80% of U.S. households had an Internet connection in 2012, up 18% since 2007.[15] Internet users spend an average of 32 hours a week online – a revolution in media usage since *Pacifica*.[16] As of 2009, more than 80% of 8- to 18-year-olds had watched video programming on the Internet.[17]

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[13] *Empowering Parents and Protecting Children in an Evolving Media Landscape*, 24 FCC Rcd. 13171, 13174, ¶ 11 (2009).

[14] There are more than 94 million subscribers to multichannel video programming distributors in the U.S. (out of approximately 115 million U.S. television households). *See* Leichtman Research Group, *Multi-Channel Video Industry Has First-Ever Annual Net Subscriber Loss*, May 20, 2013, *available at* http://www.leichtmanresearch.com/press/052013release.html.

[15] Leichtman Research Group, *Broadband Internet Access and Services in the Home 2012*, Research Study, *available at* http://www.leichtmanresearch.com/research/bband_home_brochure.pdf (last visited June 14, 2013); Leslie Cauley, *Internet use triples in decade; broadband surges*, USA Today, June 4, 2009, *available at* http://usatoday30.usatoday.com/tech/news/2009-06-03-internet-use-broadband_N.htm?.

[16] Media Bistro, *How People Spend Their Time Online*, http://www.mediabistro.com/alltwitter/files/2012/05/spending-time-online.gif (last visited June 18, 2013).

[17] Victoria J. Rideout et al., Kaiser Family Foundation, *Generation M2: Media in the Lives of 8- to 18- Year-Olds*, at 22, Jan. 2010, *available at* http://kaiserfamilyfoundation.files.wordpress-.com/2013/01/8010.pdf.

And today, teenagers between the ages of 12 and 17 spend an average of approximately 3.5 hours a week playing video game consoles and an average of more than another 1 hour a week watching online video on a computer or mobile phone.[18]

In addition, as Justice Thomas noted in *Fox I*, since 1978 "technology has provided innovative solutions to assist adults in screening their children from unsuitable programming – even when that programming appears on broadcast channels."[19] Today, the V-Chip enables television viewers to block objectionable or "indecent" programming from entering their homes.[20] As a result of Congressional mandates and the nationwide digital television conversion in 2009, virtually every television in the nation has access to a V-Chip.

The Supreme Court repeatedly has invalidated bans on indecency when these types of blocking technologies are available, and the presence of the V-Chip requires the same outcome here.[21] Indeed, the Supreme Court specifically has endorsed blocking technologies similar to the V-Chip as sufficient to invalidate restrictions on indecent speech on cable systems under the First Amendment.[22]

The V-Chip, of course, is only the beginning; parents today have many other new technologies that allow them to control the programming to which their children are exposed. Since 1978, the widespread availability of video-cassette recorders, DVD and Blu-ray players, digital video recorders (DVRs), and video-on-demand services now gives parents far greater

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[18] Nielsen NPOWER/NPM Panel, *Traditional TV, Timeshifted TV, DVD, Game Consoles 12/31/12 - 03/31/13*.

[19] *Fox I*, 556 U.S. at 534, n. * (Thomas, J., concurring).

[20] FCC, *V-Chip: Viewing Television Responsibly*, http://transition.fcc.gov/vchip/ (last visited June 14, 2013).

[21] *Sable*, 492 U.S. at 115; *Playboy*, 529 U.S. at 815; *Ashcroft* v. *ACLU*, 542 U.S. 656, 666–67 (2004).

[22] *Denver Area*, 518 U.S. at 755–56.

flexibility to record and prescreen material their children watch. Parents have recently gained even more options with the proliferation of Internet services that deliver programming, such as Hulu and Netflix. These services allow parents to create personal libraries of content they deem fit for their children, thereby allowing today's parents to act as a much more effective gatekeeper between their children and broadcast media than was even imaginable in 1978. These tools also typically contain robust parental control technologies that provide parents advanced capabilities to restrict the content accessible to their children.

Given that parents now have numerous technological means to manage and supervise their children's exposure to broadcasting, the First Amendment requires the government to trust that parents will use those tools to exercise their supervisory authority.[23] The Commission's content-based ban, backed up by draconian fines "just in case" all of these parental controls fail, is unconstitutional, just as the Supreme Court has found in all other contexts.[24]

In short, there is no lawful rationale for the Commission to continue to hide behind *Pacifica* as the basis for regulating indecency. Because the facts upon which *Pacifica* was predicated – the unique pervasiveness and unique accessibility of broadcasting – have evaporated, the Commission cannot simply hold that case out as the shield against an unconstitutional regulatory regime.[25]

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[23] *Playboy*, 529 U.S. at 824 ("a court should not presume parents, given full information, will fail to act").

[24] *Brown*, 131 S. Ct. at 2741 ("Filling the remaining modest gap in concerned-parents' control can hardly be a compelling state interest.").

[25] To the extent that the Commission would seek to fall back on the so-called "scarcity doctrine" to justify lesser First Amendment protection for broadcasting, that effort would be entirely misplaced. The scarcity doctrine has never been the basis for indecency enforcement. In *Pacifica*, the Supreme Court specifically stated that two factors have relevance to indecency restrictions: unique pervasiveness and accessibility to children, not the scarcity doctrine. *Pacifica*, 438 U.S. at 748–49; see *id.* at 770, n.4 (Brennan, J., dissenting). The Commission itself expressly disavowed the scarcity doctrine as a basis for indecency restrictions more than 20 years

II. EVEN IF IT CONTINUES TO USE *PACIFICA* AS A BASIS FOR ACTION, THE COMMISSION MUST RETURN TO ITS HISTORICALLY RESTRAINED APPROACH TO INDECENCY REGULATION

Should the Commission feel compelled to adhere to *Pacifica*, the FCC must revert to the historic restraint that always has formed an essential component of the judicial findings sustaining the indecency regime as constitutional.[26] In recent years, the Commission has veered far astray from the guidelines set forth in *Pacifica* and reinforced by the D.C. Circuit,[27] with the FCC seeking to classify as indecent an ever-widening variety of content. It should be apparent now, however, that *Pacifica* represents the outer limits of permissible regulation.

A. The *Golden Globe*-Style Policy That Has Characterized Commission Enforcement Action in the Last Decade Is Flatly Contrary to the First Amendment

Any Commission enforcement policy that subjects an amorphous, wide-ranging array of content to multi-million-dollar fines cannot survive First Amendment scrutiny under any

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ago. *Infinity Broad. Corp. of Pa.*, 2 FCC Rcd. 2705, 2707, ¶ 7 n.7 (1987) ("[W]e no longer consider the argument of spectrum scarcity to provide a sufficient basis for [indecency] regulation."), *aff'd on recon.* 3 FCC Rcd. 930, 936, ¶ 3, n.11 (1987) (acknowledging express rejection of scarcity rationale).. Regardless, the scarcity doctrine has no continuing validity, if it ever did. Over the past three decades, the doctrine has been subjected to withering criticism from all quarters. As Justice Thomas noted in *Fox I*, 556 U.S. at 1821, the scarcity doctrine has always been conceptually nonsensical. "[A]ll economic goods are scarce," and "[s]ince scarcity is a universal fact, it can hardly explain regulation in one context and not another." *Telecomms. Research & Action Ctr.* v. *FCC*, 801 F.2d 501, 506–09 (D.C. Cir. 1986). And, since *Red Lion* was decided in 1969, "dramatic technological advances have eviscerated the factual assumptions underlying" that decision. *Fox I*, 556 U.S. at 533 (Thomas, J., concurring). There are more than twice as many over-the-air broadcast stations than there were 40 years ago, *id.*, and as explained above, the number of additional media outlets has exploded during that time with the development of cable and satellite television and the Internet.

[26] *See, e.g., Fox I*, 556 U.S. at 544, n.5 (Stevens, J., dissenting) ("the changes in technology . . . certainly counsel a restrained approach to indecency regulation, not the wildly expansive path the FCC has chosen").

[27] *Action for Children's Television* v. *FCC*, 59 F.3d 1249 (D.C. Cir. 1995) ("*ACT IV*").

standard. The government's restriction of broadcast speech must at least be narrowly tailored to serve a substantial governmental interest.[28] Even if there were a sufficiently substantial governmental interest in shielding children from broadcast content, the Commission's expansive approach, as epitomized by its aggressive enforcement actions over the past decade, is in no way tailored to advance that interest because it is wildly under- and over-inclusive.

The Public Notice calls for "comment on whether the full Commission should make changes to its current broadcast indecency policies or maintain them as they are."[29] In doing so, the FCC distinguishes these options by asking whether it should treat purportedly offensive content "in a manner consistent" with historic restraint (limiting enforcement to cases involving "deliberate and repetitive use in a patently offensive manner") or, alternatively, whether it should "maintain the approach" established in the *Golden Globe* order[30] (where even isolated or fleeting content can form the basis for an indecency penalty).[31] Fox submits that, even if the Commission finds that it has a constitutionally valid role to play in regulating broadcast content, that role cannot include a *Golden Globe*-type approach.

Assuming that the Commission has a governmental interest in protecting children from "indecency" at all, that interest exists at most only where the material at issue is exceptionally offensive and can plausibly threaten the "physical and psychological well-being of minors."[32] In *Pacifica*, Justice Powell stressed in his concurrence that the government's interest stems from a child's inability to protect himself from material that would be "shocking to most adults" and

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28 *See FCC* v. *League of Women Voters*, 468 U.S. 364, 380 (1984).

29 *Public Notice* at 1.

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

31 *Public Notice* at 1.

32 *Sable*, 492 U.S. at 126.

that "may have a deeper and more lasting negative effect on a child."[33] Similarly, the Supreme Court's other cases involving restrictions on "indecency" focused on graphic sexual material that was overtly pornographic.[34] Thus, the First Amendment recognizes a fundamental difference between protecting children from graphically indecent content and protecting children from any merely momentary exposure to a word or image (or from mere innuendo). In declining to decide that "an occasional expletive . . . would justify any sanction,"[35] *Pacifica* specifically recognized the distinction between such momentary exposures and the type of language epitomized by George Carlin's monologue, which had been chosen for its offensive quality and "repeated over and over as a sort of verbal shock treatment."[36] The Supreme Court has never found a governmental interest in restricting speech among adults merely because a child might be momentarily exposed to a potentially offensive word or image.[37]

Moreover, the Commission's *Golden Globe* approach is not narrowly tailored. Even if its interest could be considered substantial, the FCC's recent policy of exceedingly broad enforcement does not meaningfully advance that interest, and it is certainly not narrowly tailored

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33 *Pacifica*, 438 U.S. at 757–58 (Powell, J., concurring).

34 *See Sable*, 492 U.S. at 117–18 (dial-a-porn); *Denver Area*, 518 U.S. at 752 (plurality opinion) (statute aiming at "pictures of oral sex, bestiality, and rape"); *Playboy*, 529 U.S. at 811 ("sexually explicit adult programming" that "many adults themselves would find . . . highly offensive") (internal quotations omitted).

35 *Pacifica*, 438 U.S. at 750.

36 *Id.* at 757 (Powell, J., concurring).

37 The Supreme Court made clear in *Cohen* v. *California* that "[s]urely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." 403 U.S. 15, 25 (1971). The same is true of momentary exposure to nudity that is not graphically sexual. In ruling on an ordinance banning a drive-in movie theater from showing films containing nudity when the screen was visible from a public street or place, the Court distinguished between films containing "sexually explicit nudity" and a more "sweeping[]" ban on films "containing any uncovered buttocks or breasts, irrespective of context or pervasiveness." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 213 (1975).

to do so. When the government acts to restrict speech, the First Amendment requires that the measures at issue "in fact alleviate [the identified] harms in a direct and material way."[38] Moreover, "[i]f a statute regulates speech based on its content, it must be narrowly tailored to promote" the governmental interest.[39]

The FCC's *Golden Globe* policy is fatally under-inclusive. Singling out broadcasters for indecency enforcement in an attempt to shield children from momentary exposure to indecent words or images is not just ill tailored to achieve that asserted interest; it is quixotic. Children today are exposed to potentially offensive words and images from a vast array of sources other than broadcast television. They can encounter such words or images on the hundreds of non-broadcast channels available in nearly 90% of homes; on the Internet, DVDs, or video games; in books and magazines; on playgrounds, at sporting events, or simply upon overhearing an adult conversation. Indeed, the Supreme Court already has acknowledged that there is essentially no difference between cable and broadcast television when it comes to the effects of television on children.[40]

In addition, the FCC's policy is under-inclusive even as to broadcasting, because it allows certain offensive words when, in the FCC's view, they are artistically necessary or appear in an FCC-defined "news" show. This incoherent policy thus leaves children susceptible to momentary exposure to potentially offensive content from a multitude of sources. The FCC's current policy is "wildly underinclusive," and such underinclusiveness "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a

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38 *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 664 (1994) (plurality opinion); *see also CBS, Inc.* v. *DNC*, 412 U.S. 94, 127 (1973).

39 *Playboy*, 529 U.S. at 813; *see also League of Women Voters*, 468 U.S. at 380.

40 *See Denver Area*, 518 U.S. at 748 (plurality opinion).

particular speaker or viewpoint."[41] In the current media environment, it is fanciful to believe that aggressive indecency enforcement solely against broadcasters will be effective in preventing children from exposure to potentially offensive words or images, and that "alone [is] enough to defeat it."[42]

The policy is also grossly over-inclusive. Fewer than one-third of American television households have children under 18 years old.[43] Even in the minority of households with children, not all children who hear an offensive word "have parents who *care* whether" they hear those words.[44] Although the Commission's *Golden Globe* policy "may indeed be in support of what some parents . . . actually want, its entire effect is only in support of what [the FCC] thinks parents *ought* to want."[45] Children inevitably will be exposed to potentially offensive words before they reach adulthood, and the First Amendment requires the government to trust parents to teach their children about those words. Any effort by the FCC to ban content cannot be "the narrow tailoring to 'assisting parents' that restriction of First Amendment rights requires."[46]

For that matter, as explained above, there exist today numerous parental controls and guidance that did not exist in 1978, and the First Amendment requires the Commission to rely on those parental controls. "[E]ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection[s] can be

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41 *Brown*, 131 S. Ct. at 2740.

42 *Id.*; *see also CBS, Inc.*, 412 U.S. at 127 ("sacrifice [of] First Amendment protections for so speculative a gain is not warranted").

43 *See Census Reveals Plummeting U.S. Birthrates*, USA Today, June 24, 2011 (noting that the "number of households that have children under age 18 has stayed at 38 million since 2000, despite a 9.7% growth in the U.S. population. As a result, the share of households with children dropped from 36% in 2000 to 33.5%").

44 *Brown*, 131 S. Ct. at 2741.

45 *Id.*

46 *Id.*

accomplished by a less restrictive alternative."[47] In addition, "if a less restrictive means is available for the Government to achieve its goals, the Government *must* use it."[48] Blocking technologies allow the government "to support parental authority without affecting the First Amendment interests of speakers and willing listeners."[49] Therefore, the V-Chip and other technological tools for controlling children's access to broadcasting render the FCC's content-based enforcement unconstitutional.[50]

B. Since a *Golden Globe*-Style Regime Is Impossible to Enforce Consistently, It Is Also Unconstitutionally Vague

In *Fox II*, the Court reaffirmed that a "fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[51] And "[w]hen speech is involved, rigorous adherence to" clear and predictable standards "is necessary to ensure that ambiguity does not chill protected speech."[52] Accordingly, the Court held that, in the absence of clear, affirmative guidance from the Commission, it would violate broadcasters' Fifth Amendment rights to sanction them for indecency because licensees do not have fair notice of what material may be considered actionably indecent.[53]

Thus, the Court held that ABC lacked fair notice that the FCC would find seven seconds of nudity in an episode of "NYPD Blue" actionably indecent when the Commission had "declined to find isolated and brief moments of nudity" indecent in similar but not identical

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47 *Playboy*, 529 U.S. at 814.

48 *Id.* at 815 (emphasis added); *see Turner*, 512 U.S. at 641–42; *Pacifica*, 438 U.S. at 748; *see also League of Women Voters*, 468 U.S. at 395, 398–99.

49 *Playboy*, 529 U.S. at 815.

50 *Id.*

51 *Fox II*, 132 S. Ct. at 2317.

52 *Id.*

53 *Id.* at 2319.

circumstances.[54] Indeed, the Commission had previously addressed a broadcast that was similar to the seven seconds of nude buttocks at issue in "NYPD Blue" and "deemed 30 seconds of nude buttocks 'very brief' and not actionably indecent."[55] Given these prior decisions, the Court emphasized that the Commission could only sanction ABC if it could point to something that "would have given ABC affirmative notice that its broadcast would be considered actionably indecent."[56] "[B]road language" or "isolated and ambiguous" statements were insufficient to overcome contrary Commission rulings.[57]

The Court similarly held that the Commission's indecency standard was unconstitutionally vague as applied to two Fox broadcasts of the "Billboard Music Awards" because the Commission failed to give Fox "fair notice prior to the broadcasts" that "fleeting expletives" could be "found actionably indecent."[58] Prior FCC decisions had been all over the map when it came to the issue of fleeting expletives. The Court emphasized that any Commission sanction under its indecency standards violates due process if the Commission "fails to provide a person of ordinary intelligence fair notice of what is prohibited."[59] "This would be true with respect to a regulatory change this abrupt on any subject, but it is surely the case when applied to the regulations in question, regulations that touch upon sensitive areas of basic First Amendment freedoms."[60]

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54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.* at 2320.

59 *Id.* (quoting *United States* v. *Williams*, 553 U.S. 285, 304 (2008)).

60 *Id.* at 2318 (internal quotation marks omitted).

The waffling that undermined the sanctions against "NYPD Blue" and "The Billboard Awards Show" is emblematic of the years upon years in which the Commission has released different decisions about substantively similar, although not identical, material.

The Commission's inconsistency is nowhere more apparent than in the disparate treatment of the film "Saving Private Ryan" and the documentary "The Blues: Godfathers and Sons." The Commission ruled that the words "fuck" and "shit" were integral to the "realism and immediacy of" the fictional story in "Saving Private Ryan" and were therefore not "shocking" or actionably indecent.[61] But the Commission found the use of these very same words indecent in "The Blues," a documentary by Martin Scorsese containing immersive interviews with blues performers.[62] The Commission found these words in "The Blues" "shocking," expressly "disagree[ing] that the use of such language was necessary to express any particular viewpoint."[63] The impossibility of squaring these different results, in order to divine what the FCC will find "shocking," deprives broadcasters of any hope of determining what "is forbidden or required" by the Commission's standards, and certainly has left licensees in no man's land, able to do no more than guess how the FCC might react to any particular program.[64]

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61 *Complaints Against Various Television Licensees Regarding Their Broad. on Nov. 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 FCC Rcd. 4507, 4512, ¶ 14 (2005).

62 *See Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 FCC Rcd. 2664 2684–85, ¶¶ 73–78 (2006) ("*Omnibus Order*").

63 *Id.* at 2685, ¶¶ 76–78. To make matters worse, after the broadcaster filed its opposition to the NAL against "The Blues," the Commission simply declined to take further action, neither issuing a forfeiture order nor vacating the NAL. Instead, the Commission evidently allowed the statute of limitations to lapse in March 2009, five years after the broadcast. *See* 28 U.S.C. § 2462. This failure to issue a final ruling on "The Blues" leaves broadcasters with no discernible ability to understand the applicable law, chilling broadcast speech while insulating the Commission's NAL from judicial review.

64 *Fox II*, 132 S. Ct. at 2317.

The Public Notice seeks comment only with respect to fleeting expletives and images, ignoring entirely the categories of innuendo and "suggestive" content that has in recent years repeatedly led the Commission to sanction broadcasts.[65] Yet in other, similar instances, the Commission has held broadcasts not to be indecent when they have depicted individuals in "sexually suggestive" situations where "[n]o sexual acts or organs are shown."[66] These cases, too, are often impossible to distinguish, and broadcasters have no notice of what material falls on which side of the line.[67]

As is apparent, the FCC's *Golden Globe* approach to indecency enforcement not only vastly exceeds the equivalent of a "verbal shock treatment" as contemplated by the Court in *Pacifica*, it also leaves broadcasters subject to the vagaries of indiscriminate enforcement. The result has been nothing less than the scourge of a frigid Arctic wind, chilling vast amounts of important speech that is fully protected by the First Amendment. Under the *Golden Globe* policy, broadcasters have been forced to choose between censoring themselves from showing controversial programs, or else risking massive fines (along with the threat of license

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65 *See Complaints Against Various Licensees Regarding Their Broad. of the Fox Television Network Program "Married by America" on Apr. 7, 2003*, 23 FCC Rcd. 3222, 3226, ¶ 11 (2008) ("*Married by America Forfeiture Order")* ("full exposure of sexual or excretory organs is [not] required to satisfy the first prong of the broadcast indecency standard"); *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 FCC Rcd. 2664, 2671, ¶ 24 (2006) (display of pixilated nude breasts and buttocks, along with other "innuendo," is a depiction of sexual organs or activities for the purposes of the first prong of the indecency test); "Statement of Commissioner Deborah Taylor Tate," *Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broad. of the Super Bowl XXXVIII Halftime Show*, 21 FCC Rcd. 2760, 2789 (2006) ("*Super Bowl Forfeiture Order*") ("the use of sexual innuendo may, depending on the specific case, subject a licensee to potential forfeiture"); *AMFM Radio Licenses, L.L.C.*, 19 FCC Rcd. 10751, 10755, ¶ 10 (2004) ("the use of euphemism or innuendo is not a defense to a finding of indecency").

66 *Omnibus Order*, 21 FCC Rcd. at 2704–05, ¶¶ 170–71; *see also id.* at 2701, ¶¶ 148–52 (finding an episode of "Alias" not to be indecent when it "shows the male and female characters kissing, caressing, and rubbing in bed" but does not display sexual organs or acts).

67 *Fox II*, 132 S. Ct. at 2319.

revocation). Given this obvious dilemma, it should come as no surprise that broadcasters often err on the side of caution – refusing to speak at all rather than risking arbitrary and unlawful enforcement penalties.

Several CBS affiliates, for instance, have refused to broadcast a Peabody Award-winning documentary about the September 11 terrorist attack, which contains expletives spoken by firefighters in the World Trade Center in the aftermath of the attack.[68] In addition, some stations have ceased providing any live programming in an effort to mitigate the risk of enforcement. A television station in Arizona dropped live coverage of a memorial service for Pat Tillman, the former football star killed in Afghanistan, because of language used by Tillman's family members in expressing their grief. And a station in Pennsylvania ceased providing any live coverage of news events "unless they affect matters of public safety or convenience."[69]

As the courts have acknowledged, if the Commission's *Golden Globe* policy remains in place, "there will undoubtedly be countless other situations where broadcasters will exercise their editorial judgment and decline to pursue contentious people or subjects, or will eschew live programming altogether, in order to avoid the FCC's fines. This chill reaches speech at the heart of the First Amendment."[70]

The chilling effect has extended even to programs that merely reference or discuss sexual or excretory organs or activities. Fox, for example, has chosen not to re-broadcast an episode of "That 70s Show" that dealt with masturbation, even though the episode did not depict the act of masturbation, nor did it discuss the act it explicit terms. As the Second Circuit noted, the

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68 *See* Larry Neumeister, *Some CBS Affiliates Worry over 9/11 Show*, Associated Press, Sept. 3, 2006.

69 *Fox Television Stations, Inc.* v. *FCC*, 613 F.3d 317, 335 (2d Cir. 2010).

70 *Id*.

"episode subsequently won an award from the Kaiser Family Foundation for its honest and accurate depiction of a sexual health issue."[71] Fox similarly compelled producers to re-write an episode of "House" in light of concerns that a character's psychiatric struggles related to his sexuality would be considered indecent by the FCC.[72]

In short, the FCC's current enforcement policy does not further any legitimate governmental interest.[73] The FCC's authority extends no further than sanctioning the kind of repetitive "shock treatment" typified by the Carlin monologue, and any attempt to expand its policy beyond the limits of *Pacifica* is unconstitutional under both the First and Fifth Amendments.[74]

C. No Indecency Policy Could Survive Scrutiny, But At Least Under an Appropriately Restrained Approach, the Commission Would Abandon Its Constitutionally Suspect Efforts to Apply Its Oversight Beyond Sexual or Excretory Content That Amounts to a 'Shock Treatment'

As demonstrated above, the Commission has failed in its hopeless struggle to apply a *Golden Globe*-style policy in a consistent manner. Under *Fox II*, this kind of unpredictable and irregular application of law would continue to deprive broadcasters of the constitutionally-required fair notice. The only alternative to this vagueness quandary would be for the Commission to completely ban *every* instance of certain words or images, so that broadcasters would have clear notice of precisely where the lines are drawn. But even the FCC must acknowledge that such a stark approach would violate the First Amendment. There is simply no way out of this dilemma that could preserve a *Golden Globe* line of enforcement.

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71 *Id.*

72 *Id.*

73 *See Pacifica*, 438 U.S. at 761 (Powell, J., concurring) (courts cannot assess "which speech protected by the First Amendment is most 'valuable'"); *WHUY-FM, E. Educ. Radio, 4548 Market Street, Philadelphia, Pa.*, 24 F.C.C.2d 408, 413, ¶ 13 (Apr. 3, 1970).

74 *See also Fox I*, 556 U.S. at 539, 541–46, n.5 (Stevens, J., dissenting).

Accordingly, if the FCC insists on maintaining an indecency policy, the Commission has no choice but to return to the historic limits that cabined its approach to indecency for many years prior to the *Golden Globe* order. The Commission's indecency regime is constitutional, if at all, *only* if the FCC maintains a restrained enforcement policy. In *Pacifica*, Justice Powell provided the necessary vote to uphold the Commission's authority to regulate indecency solely because he believed that "the Commission may be expected to proceed cautiously, as it has in the past."[75] The D.C. Circuit subsequently relied on Justice Powell's "expectation that [the] Commission will continue to proceed cautiously" in rejecting an overbreadth challenge to the agency's indecency regime, because "the potential chilling effect of the FCC's generic [indecency] definition . . . will be tempered by the Commission's restrained enforcement policy."[76] And for most of its history, the Commission itself recognized that it can "act only in clear-cut, flagrant cases; doubtful or close cases are clearly to be resolved in the licensee's favor."[77]

Under an appropriately-restrained policy, the FCC would consider sanctioning broadcast content as indecent *only if* the subject matter of the program constitutes the equivalent of a highly graphic and sustained verbal or visual "shock treatment" *and if* the content indisputably includes an explicit portrayal of sexual or excretory organs or activities. This would achieve two critical aims, both of which would move the indecency policy away from the manifestly unconstitutional rut it has been stuck in for the past 10 years.

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75 *Pacifica*, 438 U.S. at 756, 761–62, n.4 (Powell, J., concurring).

76 *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1340, n.14 (D.C. Cir. 1988) ("*ACT I*") (Ginsburg, R.B., J.), *superseded in part*, 58 F.3d 654 (D.C. Cir. 1995) (en banc) ("*ACT III*").

77 *WUHY-FM, E. Educ. Radio*, 24 F.C.C.2d at 412–14, ¶¶ 10–14.

First, this restrained type of policy would restore a bright line approach, giving broadcasters comfort that the Commission would not penalize content unless it was sustained and repetitive in a manner akin to the George Carlin monologue that launched the FCC headlong into this quagmire in the first place. In addition, broadcasters would know that content would not be sanctioned if it excludes explicit and graphic sexual or excretory words or images. This would eliminate from the FCC's target list content that includes mere innuendo or double entendre. Along with it, the Commission would jettison efforts to sanction content that includes bleeps or pixilation, which necessarily does not depict or portray anything sexual or excretory. Importantly, this would, at least to some extent, respect licensees' editorial discretion, leaving broadcasters – not the government – to make the judgment calls about whether content is artistically or otherwise important to the stories they tell or the events they cover.

Second, a restrained policy would comport with the D.C. Circuit's longstanding admonition that an indecency regime targeting content beyond that which is exceptionally offensive (like the verbal or visual "shock treatment" at issue in *Pacifica* itself) would chill far too much speech to survive First Amendment scrutiny. Only by reverting to restraint can the Commission eliminate the powerful incentive that today compels broadcasters to censor themselves. Broadcasters currently are buffeted by the ever-present threat of penalties and the headwinds of haphazard enforcement. As a result, the mere threat of an indecency investigation creates a substantial chilling effect on speech. As chronicled above, broadcasters often feel they have no choice but to avoid programs that might potentially spark the ire of the Commission's indecency watchdog. A restrained approach – coupled with the type of objective criteria described above – would enable broadcasters to identify in advance the exceptionally limited circumstances that would warrant a refusal to broadcast content based on indecency concerns.

Not incidentally, this type of restraint also would give the Commission its best chance to satisfy the *Fox II* mandate that it give regulated entities the constitutionally-required fair notice of how the law will be applied.

Finally, and equally significantly, under any restrained approach the Commission must declare that content appearing during live event coverage (including entertainment and sports) or during a news or public affairs program is off limits to any enforcement action. Not only is a clear-cut rule necessary to avoid the interminable vagueness problems embedded in the FCC's whipsawing yes-then-no approach to news under the *Golden Globe* style policy, but it also is critically important to avoid chilling speech that lies at the heart of the First Amendment. News, in particular, should never be the subject of government enforcement activity on the basis of its content.

III. *FOX II* REQUIRES THE COMMISSION TO DISMISS ALL PENDING INDECENCY COMPLAINTS BECAUSE THE LACK OF FAIR NOTICE, RESULTING FROM THE FCC'S SCATTERSHOT ENFORCEMENT APPROACH, MAKES IT CONSTITUTIONALLY IMPERMISSIBLE TO FIND ANY OF THOSE BROADCASTS ACTIONABLY INDECENT

The Supreme Court's decision in *Fox II* requires the dismissal of all currently-pending indecency complaints.

First, the pending complaints cannot form the basis of any indecency enforcement proceeding because, under the principles reaffirmed in *Fox II*, published decisions in which the Commission addressed indecency were so inconsistent and irreconcilable that no reasonable broadcaster possibly could have had fair notice of the applicable legal standard.[78] Over the past 10 years, no reasonable speaker could have known how the FCC would treat any particular piece of content under the indecency rules. Indeed, the Commission's rampant flip-flopping on

[78] *See Fox II*, 132 S. Ct. at 2319.

indecency matters as described above has deprived broadcasters of any "affirmative notice that [their] broadcast[s] would be considered actionably indecent."[79]

Second, no broadcaster could have had fair notice that a pending complaint against a news or current affairs program could lead to an indecency sanction. The Commission has provided no discernible guidance, much less fair notice, regarding whether or under what circumstances isolated expletives or images during a live news program will be found actionably indecent. The Commission at one point determined that an interviewee's use of the word "bullshitter" on the CBS news program "The Early Show" was indecent in part because it was uttered on a news show.[80] On remand of that order, after CBS filed an appeal of this decision in Federal court, the Commission reversed the indecency finding regarding "The Early Show" specifically *because* the expletive was used in a "'*bona fide* news interview.'"[81] But the Commission also stated that "there is no outright news exemption from our indecency rules."[82] And the Commission has provided no subsequent guidance on when news or other current affairs programming might be exempted. The Commission's treatment of news and current affairs programming exemplifies how broadcasters including Fox have been deprived of fair notice that material during news content could be found actionably indecent.

The same uncertainty about news broadcasts also extends to the unintentional broadcast of a fleeting expletive during a wide range of live programs, such as sports events. The

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79 *Id*.

80 *Omnibus Order*, 21 FCC Rcd. at 2698–700, ¶¶ 137–45.

81 *See Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 FCC Rcd. 13299, 13326–28, ¶¶ 67–73 (2006) ("*Remand Order*"). When CBS and other broadcasters filed appeals of FCC indecency orders, the Commission itself asked that the cases be remanded for reconsideration. Only then did the FCC partially reverse itself, no doubt recognizing the quicksand it was mired in with respect to news content.

82 *Id.* at 13327, ¶ 71.

Commission certainly has not provided the fair notice required for any enforcement of pending complaints relating to fleeting expletives uttered during live sports broadcasts. Even former FCC Chairman Genachowski tweeted, in the aftermath of the Boston Marathon bombings, his support of Red Sox slugger David Ortiz after the player uttered an expletive during a pre-game ceremony that apparently was broadcast live: "David Ortiz spoke from the heart at today's Red Sox Game. I stand with Big Papi and the people of Boston – Julius."[83] Yet other sports broadcasts have been investigated (and cases may remain pending) relating to field microphones capturing ambient sounds of games that include expletives uttered by passionate athletes, or a camera panning the crowd that happens to capture an image of a fan with an expletive on a T-shirt.[84]

Any pending complaint against coverage of live events also must fail because no broadcaster could be found to have had the necessary scienter to violate § 1464 with respect to content appearing during live coverage, regardless of whether the event relates to news, entertainment or sports.[85] Although the Commission has recently taken the extreme position that § 1464 imposes essentially a strict liability standard as to the content of a broadcast,[86] that

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83 Twitter (Apr. 20, 2013), *available at* https://twitter.com/FCC/status/325714412143013888) (last visited June 14, 2013).

84 *See Activists angry over f-word shirt*, Variety, Jan. 16, 2007 (describing an image of a woman wearing a T-shirt inscribed "Fuck da Eagles" at an NFL game). The Commission requested a video tape of Fox's coverage of the game and advised that the FCC was investigating the matter. Fox has no knowledge of the current status of the investigation.

85 *See CBS Corp.* v. *FCC*, 535 F.3d 167, 201 (3d Cir. 2008) ("[T]he statutory prohibition of broadcast indecency, 18 U.S.C. § 1464, should be read to include a scienter element"), *vacated*, 129 S. Ct. 2176 (2009); *United States* v. *Smith*, 467 F.2d 1126, 1128 (7th Cir. 1972) (recognizing scienter as an essential element of § 1464 violation); *Tallman* v. *United States*, 465 F.2d 282, 285 (7th Cir. 1972) (same); *Gagliardo* v. *United States*, 366 F.2d 720, 724 (9th Cir. 1966) (same).

86 *See, e.g.*, *Super Bowl Forfeiture Order*, 21 FCC Rcd. at 2767–68, ¶ 15 (CBS acted willfully because it "consciously and deliberately broadcast the halftime show, whether or not it intended to broadcast nudity . . .").

position is unconstitutional and cannot be squared with longstanding precedent.[87] The Supreme Court has made clear that "the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct,"[88] and courts historically have applied this principle to §1464 and have required at least specific knowledge of the content.[89] Accordingly, the Commission should dismiss these cases and make clear that to violate § 1464, one must act with some degree of foreknowledge with respect to the utterance of offending language – not just the broadcast itself, irrespective of the actual content.

In short, the Commission should dismiss all pending complaints. Unless and until the FCC provides definitive guidance about how it intends to apply its indecency enforcement

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87 Indeed, courts have already reacted negatively to the Commission's position. The Third Circuit rejected the Commission's interpretation of the relevant statutes as to scienter in its initial decision vacating the Super Bowl forfeiture order, and although that court declined to reach the scienter issue after the Supreme Court remanded the case for reconsideration in light of *Fox I*, Judge Scirica again rejected the Commission's extreme position in his concurrence. *See CBS Corp.* v. *FCC*, 535 F.3d 167 (2008), *vacated and remanded for reconsideration in light of Fox I*, 556 U.S. 502, *on remand*, 663 F.3d 167 (3d Cir. 2011), 168–76 (Scirica, J., concurring).

88 *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994); *see also Smith* v. *California*, 361 U.S. 147, 152–53 (1959) ("There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller."); *Mishkin* v. *New York*, 383 U.S. 502, 511 (1966) ("The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."); *Hamling* v. *United States*, 418 U.S. 87, 123 (1974) (concluding that the "constitutional requirements of scienter" are satisfied where "the prosecution show[s] that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials"); *Ginsberg* v. *New York*, 390 U.S. 629, 644 (1968).

89 *See United States* v. *Smith*, 467 F.2d at 1128-29 ("[I]t would be error to omit a charge that defendant must have knowledge of the contents of his utterances" and reversing a § 1464 conviction where the jury was not instructed "on the necessity of finding *scienter* as an essential element"); *Tallman*, 465 F.2d at 285 (holding in a § 1464 prosecution that "*scienter* is an ingredient of the crime charged here"); *Gagliardo*, 366 F.2d at 724 (holding that "the defendant's intent is a very pertinent and necessary element in a conviction for use of obscenity"); *see also Manual Enters., Inc.* v. *Day*, 370 U.S. 478, 492–93 (1962) (Harlan, J.) (proof "that a defendant did not make a 'good faith' effort to ascertain the character of . . . materials" is not adequate to support conviction for distributing "obscene" materials).

powers, broadcasters lack fair notice of what the Commission would consider actionably indecent. Any complaint currently pending necessarily relates to a program that was broadcast at a time when broadcasters had no ability to discern the FCC's approach. The Commission could not impose a judicially sustainable sanction against any of these broadcasts under the First or Fifth Amendments. Accordingly, and in light of *Fox II*, the FCC should take this opportunity to clean the slate.

IV. THE COMMISSION ALSO MUST REMEDY THE UNCONSTITUTIONAL FLAWS IN ITS ENFORCEMENT POLICIES, SHOULD IT DESIRE TO CONTINUE TO REGULATE INDECENCY

For all of the reasons set forth above, Fox submits that the Commission should exit the indecency enforcement business once and for all. If the FCC nonetheless attempts to continue to enforce indecency regulations, it must remedy the ongoing constitutional violations inherent in the current scheme of indecency enforcement, which has developed into an informal scheme of censorship in violation of the First and Fifth Amendments.

A. The Constitution Requires the Commission to Maintain a Restrained Indecency Enforcement Regime Providing Stringent Procedural Safeguards and Prompt Access to Judicial Review

The D.C. Circuit has made clear that the First Amendment requires stringent procedural protections, because otherwise the Commission's indecency enforcement activities can become a "scheme of informal censorship" and a *de facto* system of prior restraint.[90] In particular, the court emphasized that the Commission "may not move to suppress speech by means of a scheme that, as a practical matter, forecloses the speaker from obtaining a judicial determination of

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90 *ACT IV*, 59 F.3d at 1259, 1262.

whether the targeted speech is unprotected."[91] Even if the Commission does not administer "anything akin to a literal prior restraint," the Commission's enforcement regime may become a "prior restraint *in effect* even though specific materials are not evaluated prior to . . . broadcast."[92] The test is whether the threat of enforcement "in practice causes a speaker of reasonable fortitude to censor itself in order to conform with an unconstitutional standard," and which "as a practical matter forecloses the speaker from obtaining a judicial determination of whether the targeted speech is unprotected."[93]

In *ACT IV*, the D.C. Circuit was examining the Commission's enforcement practices as they existed in the early 1990s, and even then it found the Commission's enforcement regime "troubling."[94] The court noted that several features of that regime – including the possibility of a five-year wait for judicial review of whether a broadcast included indecent material, the possibility of additional regulatory consequences in the meantime, and the lack of official guidance on what material may be deemed indecent – all threatened to turn the regime into one of *de facto* prior restraint.[95] The D.C. Circuit also has recognized that "the system of broadcast regulation by Congress and the FCC . . . provides ample opportunity for substantial chilling of First Amendment freedoms," and enforcement mechanisms within that structure can serve "to facilitate those exercises of power and persuasion which create the chill."[96] Specific enforcement practices, such as "forwarding viewer or listener complaints to the broadcaster with

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91 *Id.* at 1260; *see also Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963) (regulations of speech require "procedures that will ensure against the curtailment of constitutionally protected expression").

92 *ACT IV*, 59 F.3d at 1260–61 (emphasis added).

93 *Id.* at 1260–61.

94 *Id.* at 1260.

95 *Id.* at 1254–55.

96 *Cmty.-Serv. Broad. of Mid-Am., Inc.* v. *FCC*, 593 F.2d 1102, 1115 (D.C. Cir. 1978).

a request for a formal response to the FCC" or the "issuance of notices of inquiry . . . serve[d] as means for communicating official pressures to the licensee," can restrain the licensee's speech.[97]

The D.C. Circuit rejected a facial challenge to the Commission's practices of the early 1990s in *ACT IV*, but on very narrow and specific grounds. The court held that the statutory forfeiture penalty was capable of constitutional application only because "prompt and efficient enforcement by the Commission could surely expedite the administrative process to an extent that leaves ample breathing space for first amendment rights."[98] In particular, "nothing in the statutes or regulations prevents the Commission from issuing a NAL, imposing a forfeiture, and if need be referring the case to the Department of Justice all within a period of time short enough virtually to eliminate any concern with delay" – "within, say, 90 days."[99] If the Commission met this 90-day goal "and then allowed the broadcaster to stipulate that it will not pay unless ordered by a district court to do so, then judicial review could begin almost immediately."[100] In other words, the key to avoiding a *de facto* scheme of prior restraint is *efficient* adjudication of complaints coupled with *prompt* access to judicial review.[101] Such efficient administration also "cabin[s] the Commission's opportunity to rely upon its own unreviewed forfeiture decisions in setting standards for decency, thereby reducing the tendency for one unconstitutional decision to beget others."[102]

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97 *Id.* at 1116; *see also MD/DC/DE Broadcasters Ass'n* v. *FCC*, 236 F.3d 13, 19 (D.C. Cir 2001) ("Investigation by the licensing authority is a powerful threat, almost guaranteed to induce the desired conduct.").

98 *ACT IV*, 59 F.3d at 1259.

99 *Id.*

100 *Id.* (citations omitted).

101 *Id.*

102 *Id.* at 1259–60. *See also* Ajit Pai, *Unlocking Investment and Innovation in the Digital Age: The Path to a 21st-Century FCC*, 2012 WL 2928397, at *4 (Jul. 18, 2012) ("the

B. Changes to the Commission's Enforcement Approach Have Produced An Unconstitutional Scheme Of Informal Censorship That Chills Broadcasters' Speech

The D.C. Circuit also narrowly rejected an as-applied challenge to the Commission's 1990s-era regime, based on four reasons: (1) the plaintiffs did not show that the Commission at that time was taking steps to "discourage judicial review" of an indecency complaint; (2) the court could not conclude at that time that Commission was "developing a body of precedent in any way at odds with the first amendment;" (3) there was no evidence that the Commission was using unreviewed indecency complaints to impose additional regulatory consequences in other contexts, such as "increas[ing] the fine for a subsequent violation or decid[ing] not to renew a license;" and (4) the court found that the plaintiffs had not alleged any specific facts that would "show that speech that is not indecent is in fact being chilled."[103]

Today, in stark contrast, all four of these threats loom ever-present over the Commission's indecency enforcement landscape, leaving the current regime to operate as a *de facto* scheme of prior restraint in violation of the First Amendment. In the years since *ACT IV* was decided, the Commission has made fundamental changes to its indecency enforcement procedures that have resulted in precisely the type of scheme of prior administrative restraint about which the D.C. Circuit was so concerned. The *in terrorem* effect of this informal scheme of censorship has caused Fox and other broadcasters to censor themselves, chilling speech that is protected by the First Amendment.

Commission should . . . mak[e] decisions in a timely manner."); *Se. Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 560 (1975) (the "censor" must bear the burden of instituting judicial proceedings and the burden of proof, "any restraint prior to judicial review" must be for a "specified brief period and only for the purpose of preserving the status quo," and "a prompt final judicial determination must be assured.").

103 *ACT IV*, 59 F.3d at 1261–62.

Notably, the Commission attempted to provide guidance about its enforcement procedures in 2001 – guidance that it has honored more in the breach than in actual cases.[104] The Commission explained that it does not independently monitor broadcasts for indecency, but instead relies entirely on "documented complaints of indecent broadcasting received from the public."[105] The Commission stated that it would usually dismiss complaints that are facially invalid without broadcasters ever learning about them – that is, it would dismiss complaints that fall within the "safe harbor" or that describe material that falls outside the scope of the indecency definition.[106] Only after Commission staff has determined that a complaint meets the basic subject matter requirements for an indecency violation would the content be evaluated for patent offensiveness.[107] If a broadcast were not patently offensive, the complaint would be denied. If staff believed further investigation may be necessary, they then would decide, in conjunction with the Enforcement Bureau ("Bureau"), the appropriate procedure, including whether to deny the complaint; issue a Letter of Inquiry ("LOI"); issue a Notice of Apparent Liability ("NAL"); or refer the case to the full Commission.[108]

Beginning in 2004, however, the Commission made fundamental changes to its indecency enforcement procedures, each of which has had the effect of expanding both the

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104 *See Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency*, 16 FCC Rcd. 7999 (2001) ("*Indecency Policy Statement*").

105 *Id.* at 8015, ¶ 24.

106 *Id.* ¶ 25.

107 *Id.* ¶ 26.

108 *Id.* If an LOI were issued, the licensee generally would have an opportunity to respond to the allegation. *Id.* at 8016, ¶ 27. If staff then determined that the material were indecent, an NAL would be issued, and the licensee again would have an opportunity to respond. *Id.* After the Commission had considered the licensee's response, it could order payment of a monetary penalty through a Forfeiture Order, which the licensee could then appeal to the courts. *Id.* ¶¶ 28–29.

number of pending and unresolved complaints and the extent of the threat of monetary fines and other regulatory consequences pending against broadcasters at any one time. These procedural changes, both individually and together, exacerbate the intense disconnect between current policies and a construct that might be permissible under the four factors of *ACT IV*.

First, the Commission's current regime actively "discourages" and even thwarts prompt judicial review.[109] Rather than quickly reviewing and adjudicating complaints – "within, say, 90 days" – the FCC leaves them pending indefinitely.[110] As a result, the Commission allowed a backlog of what was publicly reported as of July 2012 as more than 1.5 million indecency complaints, involving 9,700 or more separate television broadcasts.[111] While the Public Notice announced that the FCC had dismissed 1 million complaints, many of these nonetheless were permitted to languish for five or more years.[112] That represents at least five years of uncertainty and the concomitant chilling of countless amounts of speech.

Even worse, the Commission has greatly increased the administrative and judicial delay involved in any indecency enforcement proceeding. Beginning several years ago, in exchange for regulatory actions essential to broadcasters' business operations, the FCC began extracting from licensees onerous agreements that toll or waive the statutory time limits that apply to

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109 *ACT IV*, 59 F.3d at 1261 (prior regime constitutional in part because no evidence that the Commission takes steps "actively to discourage judicial review").

110 *Id.* at 1259.

111 *See* Bill Mears, *High court rules for broadcasters on TV 'indecency,'* CNN, June 21, 2012, http://articles.cnn.com/2012-06-21/us/us_scotus-tv-indecency_1_fleeting-expletives-cher-and-nicole-richie-broadcasters?_s=PM:US (reporting on Commissioner McDowell's estimation of pending indecency complaints); Jonathan Make & Bryce Baschuk, *Supreme Court Tosses Indecency Issue Back to FCC*, Commc'ns Daily, June 22, 2012, at 4 (same); *see also* Tim Doyle, *Who decides what's indecent on cable, late night?*, SNL Kagan Washington Watch, Feb. 17, 2010, http://www.snl.com/interactivex/article.aspx?CDID=A-10741265-12341 (reporting 1.45 million pending complaints and 12,049 open cases at the Bureau at the end of 2009); *see also* Make, *supra*.

112 *Public Notice* at 1.

Commission actions on indecency complaints. These "tolling" agreements have had the purpose and effect of keeping the threat of large fines hanging over broadcasters' heads for years – indeed, far beyond the statutory five-year limitations period.[113] Before acting on license renewal applications,[114] applications for transfer of control of broadcast licenses, or applications for assignment of broadcast licenses,[115] the Commission started demanding that applicants execute an agreement waiving any right to assert a statute of limitations defense based upon 47 U.S.C. § 503(b)(6) or 28 U.S.C. § 2462 in any indecency enforcement action. Unless broadcasters accepted these tolling agreements, they could not consummate the renewal, assignment or transfer. Initially, the Bureau demanded tolling agreements extending the statute of limitations for a fixed period of time beyond the five-year statutory limitations period.[116] But later, the Commission sometimes insisted on indefinite tolling agreements, which in effect amounted to complete waivers of any statute of limitations defense.[117]

Fox itself has entered into six tolling agreements with the Bureau. The first two agreements, executed in 2007 in connection with renewal applications for Fox's broadcast licenses, tolled the applicable statute of limitations for three years following the Commission's grant of Fox's renewal applications. Four others, entered into in 2008 in connection with pending applications to assign or transfer several broadcast licenses in connection with station

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113 *Cf. ACT IV*, 59 F.3d at 1259.

114 *See* 47 U.S.C. § 309.

115 *See id.* §§ 309, 310.

116 In *ACT IV*, the D.C. Circuit recognized that the "general five-year period of limitations on forfeiture proceedings, *see* 28 U.S.C. § 2462, would effectively prevent the Government from filing a civil action more than five years after the indecent material was aired." 59 F.3d at 1254.

117 *See also* Make, *supra*, at 111 (noting tolling agreements and that "agency more recently has asked licensees to agree to tolling periods of indefinite length") More recently, the Commission appears to have reverted to using tolling agreements of more limited duration.

sales, waived the statute of limitations indefinitely for pending indecency complaints, LOIs, and NALs. In connection with these tolling agreements, the Bureau did not disclose the number of indecency complaints, the number of programs involved, or even the identity of the programs that had complaints pending against them. In one instance, the tolling agreement expressly covered any *future* indecency complaints that were filed with the Commission prior to the grant of a license renewal application. Nonetheless, Fox had no choice but to agree to these waivers: Commission staff informed Fox that the Commission would not act on Fox's pending license assignment or transfer applications – thereby blocking Fox's station sales – unless Fox agreed to indefinite waivers of its statute of limitations defenses for any pending indecency matter. When a multi-billion dollar transaction is at stake, the Commission knows broadcasters are between a rock and a hard place, with no effective way to reject these types of demands.[118]

In addition, under the Commission's current regime, Fox does not even know how many complaints are pending or whether the limitations period has run, because the tolling agreements Fox has signed are generally not limited to specific indecency complaints. As noted above, in at least one instance, the applicable tolling agreement waives any statute of limitations defense against some complaints filed after the execution of the tolling agreement.

The Commission also actively evades judicial review, chilling broadcasters' speech, either by initiating complaint proceedings through LOIs and NALs and then taking no action, or by using tolling agreements to defer taking action altogether.[119] In *ACT IV*, the D.C. Circuit was

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[118] Even the time-limited tolling agreements, which purported to extend the statute of limitations for only three years, are not triggered until the date that the FCC grants a station's license renewal. Because the Commission has delayed action on several of Fox's license renewal applications, these more "limited" tolling agreements are, in effect, just as unlimited as the pernicious "indefinite" agreements.

[119] *See MD/DC/DE Broadcasters*, 236 F.3d at 19 ("Investigation[s] by the licensing authority is a powerful threat, almost guaranteed to induce the desired conduct."); *Cmty.-Serv.*

concerned that a theoretical delay of more than 90 days in a *single* complaint case could result in an unconstitutional chilling effect.[120] In real-world practice, the Commission has created that very effect on a massive scale, with inaction and tolling agreements that retain and multiply the effect for years on end.

In that connection, it is noteworthy that neither an LOI nor an NAL, much less an informal inquiry, is immediately reviewable in court, meaning that broadcasters are left at the mercy of the Commission until there is final administrative action on a pending indecency complaint. In some instances – including pending petitions for reconsideration of the very *Golden Globe* order referenced in the Public Notice – final administrative action from the Commission has been completely withheld for more than eight years, thereby barring Fox and other broadcasters from obtaining judicial review in court.[121]

Second, unlike the scheme in *ACT IV*, the Commission today uses the mere pendency of indecency complaints to impose regulatory consequences in other contexts, including the refusal to grant license renewals.[122] Most notably, Fox currently has at least four broadcast license renewal applications from the last renewal cycle that remain pending because of unresolved indecency complaints. At least three of those pending renewals are being held because of petitions to deny based on nothing other than allegations of indecency associated with the 2003 "Billboard Awards Show" – the very program that the Supreme Court has now definitively ruled

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Broad., 593 F.2d at 1116 ("notice of inquiry" serves as "official pressure[]" that can chill speech).

120 *See ACT IV*, 59 F.3d at 1259–60.

121 *Golden Globe*, 19 FCC Rcd. 4975; *see also* Petition for Reconsideration, File No. EB-03-IH-0110 (filed April 19, 2004); Joint Petition for a Stay, File No. EB-03-IH-0110 (filed June 18, 2004).

122 *ACT IV*, 59 F.3d at 1260–62; *see also Bantam Books*, 372 U.S. at 69–72.

cannot be the subject of Commission enforcement.[123] One other broadcast license renewal is subject to a vague "enforcement hold," but Fox has no information to even suggest what that enforcement hold might be based upon. At this point, indecency complaints are causing some of these renewal applications – which have been pending for more than 8 years – to fall one "lap" behind, as the licensee's *next* renewal application has already been filed before the last one has been granted. This unconstitutional practice is having systemic effects: former Commissioner McDowell has noted that at one point there were "more than 300 license renewal applications that have remained pending in light" of a backlog of indecency complaints.[124] Significantly, this backlog has intensified because the FCC has exploited tolling agreements to artificially prolong the window of time that otherwise would limit its ability to keep cases alive. But for these tolling agreements, any backlog normally would dissipate automatically with the passage of time.

The Commission is using the pendency of indecency complaints in other contexts as well. For example, even in the absence of a final determination that a particular broadcast program is indecent, the Commission has taken the position that it may use the "facts underlying" any non-final NAL against a licensee in any renewal, forfeiture, transfer or other administrative proceeding.[125] While the *Forfeiture Policy Statement* specifically addresses non-final NALs, the policy the Commission has articulated could apply equally to an unadjudicated indecency complaint that has not yet reached the NAL stage.

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123 *Fox II*, 132 S. Ct. at 2315.

124 *See* Press Release, FCC, Statement of FCC Commissioner Robert M. McDowell on the United States Supreme Court's Decision In *FCC* v. *Fox Television Stations, Inc.* (June 21, 2012), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-314761A1.pdf.

125 *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd. 17087, 17103, ¶ 34 (1997) ("*Forfeiture Policy Statement*").

These are precisely the sorts of tactics that the D.C. Circuit identified as factors that would tip the Commission's enforcement scheme into an unconstitutional system of informal censorship.[126] Indeed, the D.C. Circuit warned that prompt and efficient adjudication of indecency complaints is necessary to prevent the Commission from relying on erroneous decisions in subsequent cases, resulting in an unconstitutional piling up of bad decisions that "beget others."[127] But the Commission's current practice of using unadjudicated indecency complaints to hold up license renewals and other transactions has precisely that effect.

Third, the Commission has not developed a consistent body of case law under its enforcement regime that can offer guidance to broadcasters on what material will be determined indecent.[128] Quite the opposite. As thoroughly chronicled above, courts have recognized that the Commission's indecency enforcement standards have produced conflicting results that fail to give broadcasters constitutionally required fair notice of what will be found indecent. Accordingly, only a return to a restrained approach – highlighted by a more objective review – could possible satisfy the D.C. Circuit's mandate that the Commission cease and desist from its penchant for inconsistency. The FCC must stop treating similar content different for indiscernible reasons, or even for no apparent reasons at all.

Beyond the intellectual somersaults that have characterized the FCC's substantive approach to indecency, the Commission has flip-flopped just as dangerously with regard to its enforcement tactics. As part of its change in 2004 toward a more aggressive indecency enforcement regime, the FCC massively multiplied the potential indecency fines by treating each network affiliate's broadcast of the same network program as a separate violation of § 1464. At

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126 *ACT IV*, 59 F.3d at 1261.

127 *Id.* at 1259–60.

128 *Id.* at 1261.

one point, the Commission even proposed to fine separately every single affiliate in the country that aired an allegedly indecent program, without regard to whether each station was the subject of a complaint.[129] These Commission practices have led to some of the largest proposed fines in the Commission's history.[130] The potential fine level increased tenfold in 2006, when Congress increased the statutory maximum forfeiture to $325,000 per violation.[131] Given the new statutory maximum indecency fine, a single instance of alleged "indecency" on a single network program could in theory result in total forfeitures that exceed $65 million.[132] More recently, the Commission has reined in its use of multiple fines to reach only those network affiliates against whom a viewer complaint has been filed.[133] Today, however, no broadcaster possibly could

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129 *See Complaints Against Various Licensees Regarding Their Broad. of the Fox Television Network Program "Married By America" on Apr. 7, 2003*, 19 FCC Rcd. 20191, 20196, ¶¶ 1, 16 (2004) ("*Married by America NAL*") (initially seeking to fine each of Fox's 169 affiliates); *Super Bowl Forfeiture Order*, 21 FCC Rcd. at 2760, 2778, ¶¶ 1, 37 ($550,000 total forfeiture by imposing the then-maximum penalty of $27,500 on each of CBS's 20 owned-and-operated stations); *Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broad. of the Program "NYPD Blue,"* 23 FCC Rcd. 3147, 3169, ¶¶ 1, 54 (2008) (imposing $27,500 penalty on each of 44 stations, for a total forfeiture of $1,210,000); *see also Fox Television Stations* v. *FCC*, 613 F.3d at 329 ("The FCC's policy has now changed and we would be hard pressed to characterize it as 'restrained.'").

130 *See, e.g.*, *Married By America NAL*, 19 FCC Rcd. at 20196, ¶¶ 1, 15–16 ($1.2 million); *Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004, Broad. of the Super Bowl XXXVIII Halftime Show*, 19 FCC Rcd. 19230, 19236–41, ¶¶ 16–25 (2004) ("*Super Bowl NAL*") ($550,000); *Clear Channel Broadcast Licenses, Inc.*, 19 FCC Rcd. 1768, 1778–80, ¶¶ 19–23 (2004) ($755,000); *Clear Channel Broadcast Licenses, Inc.*, 19 FCC Rcd. 6773, 6780, ¶¶ 17–18 (2004) ($495,000); *AMFM Radio Licenses, L.L.C.*, 19 FCC Rcd. 5005, 5011, ¶ 14 (2004) ($247,500).

131 *See* 47 U.S.C. § 503(b)(2)(C); Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006) (increasing the maximum fine from $32,500 per occurrence to $325,000).

132 In addition to huge forfeitures, the Commission also has threatened license revocation for "serious multiple violations" of the indecency regulations. *Golden Globe*, 19 FCC Rcd. at 4984, ¶ 17. While the FCC has yet to impose what amounts to an indecency death penalty on a broadcaster, as noted above, it has delayed the routine renewal of broadcast licensees on account of pending indecency complaints.

133 *See Married By America Forfeiture Order*, 23 FCC Rcd. at 3224, 3228, ¶¶ 5, 18.

know whether the FCC might revert to a regime in which it sanctions every affiliate when there is a widespread, national campaign against a particular program.

Moreover, much of the FCC's indecency law remains secret. Notwithstanding the Commission's repeated emphasis on transparency,[134] basic information about indecency complaints remains utterly opaque – including when they are filed, whether they remain pending, and how they are disposed of. Fox frequently asks for copies of complaints when it receives a Commission inquiry, but in the rare instance in which the Commission actually discloses a complaint, it redacts certain identifying information that makes it difficult – if not impossible – to determine the complaint's validity under the Commission's announced standards. For example, Fox does not always know what program content has prompted those complaints or what individual licensees or network affiliates are subject to the complaints. Moreover, Fox and other broadcasters are not notified when the Commission actually does dismiss a complaint. In some instances, Fox may be able to obtain a copy of an informal dismissal that is issued to an individual complainant, but it generally has no access to these dispositions. Thus, the very Commission rulings that could provide valuable guidance to broadcasters about the boundaries of the FCC's indecency policies are relegated to a body of unpublished, secret law that

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134 *See, e.g.*, *Comment Sought on Benefits and Burdens of Requiring Commenters to File Cited Materials in Rulemaking Proceedings as Further Reform to Enhance Record-Based Decisionmaking*, Public Notice, 26 FCC Rcd. 16166, 16167 (2011) ("*Transparency*, robust public participation, and informed decision-making are key values that the Commission and its staff strive to uphold in all proceedings.") (emphasis added); Press Release, FCC, FCC Takes First Step to Modernize Television Broadcast Public Inspection Files (Oct. 27, 2011), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-310696A1.pdf ("The FCC's action today is consistent with the government-wide effort to increase *transparency*") (emphasis added); *Amendment of the Commission's* Ex Parte *Rules and Other Procedural Rules*, 26 FCC Rcd. 4517, 4524, ¶ 32 (2011) ("We are amending our rules to promote openness and *transparency* in our decision-making process.") (emphasis added); *see also Prepared Remarks of FCC Acting Chairwoman Mignon L. Clyburn*, 2013 WL 2250332 (May 21, 2013) ("to keep the agency moving in the right direction … requires … openness and transparency").

broadcasters cannot consult to help them comply with § 1464. As the courts increasingly have concluded, the Commission's attempts to expand the scope of the indecency ban have left its standards hopelessly ambiguous and unconstitutionally vague.[135]

Fourth, and most significantly, the Commission's current enforcement scheme is chilling speech that is protected by the First Amendment, causing speakers "of reasonable fortitude to censor [themselves] in order to conform with an unconstitutional standard."[136] Fox – which all would agree is a speaker of reasonable fortitude – has chosen to avoid certain types of speech in the face of the threat of indecency fines. The sheer volume of pending complaints chills Fox's speech, because the more complaints that remain pending, the more likely it is that the Commission will pluck out one or more of them for investigation and potentially massive fines. In fact, the FCC threatened this very result in the *Public Notice*.[137]

Compounding the chilling threat, the Commission also has failed to abide by its own *Indecency Policy Statement* and initiated indecency investigations without *bona fide* viewer complaints, relying instead on form complaints generated by online filing campaigns. These campaigns often result in a flood of indecency complaints being filed at the FCC – many or all from individuals that did not even watch the program at issue – via automated, web-based forms.[138] All of this creates a significant administrative asymmetry: it takes almost no time or cost for web-based campaigns to instigate numerous complaints about a vast array of broadcasts, but each individual complaint imposes significant burdens on the Commission's limited

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135 *See, e.g.*, *Fox II*, 132 S. Ct. at 2307.

136 *ACT IV*, 59 F.3d at 1260–61.

137 *See Public Notice*, at 1.

138 Make, *supra*, at 111 (noting Parents Television Council "encourages members to file complaints on shows the group believes violated indecency rules" and acknowledging that a "complaint [is] filed by members at the group's behest").

enforcement resources to process, evaluate, and act on every one of them. Worse, these complaints are often based upon complainants' manifestly inaccurate descriptions of the content of programs.[139] Rather than dismiss these facially deficient complaints before broadcasters ever learn of them, as required under the Commission's stated policies,[140] the Bureau has instead used these complaints to issue LOIs or to make other informal inquiries about broadcast content. Partly as a result, over the last several years, Fox has received at least 12 LOIs and approximately 40 other informal inquiries from Bureau staff relating to indecency complaints. Fox understands that it is hardly unique in these regards.

Ultimately, the steady stream of investigations and the potential for draconian fines if a broadcast is found to be indecent leave broadcasters with no real choice but to censor themselves. The threat of penalties means that the mere existence of numerous unresolved indecency complaints creates a substantial chilling effect on speech. These potential sanctions, coupled with the Commission's approach to indecency forfeitures, often make broadcasters feel compelled to stop broadcasting a program once an LOI or other inquiry has been issued, so as to avoid further penalties – even if the program does not in fact contain any actionably indecent material or is otherwise protected by the First Amendment. For instance, Fox frequently declines to rerun a program or else makes edits prior to re-broadcast or sale into syndication even when it receives just an inquiry from the Commission, because the potential liability for an additional broadcast of the program is simply too great. Pending and unresolved indecency complaints

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139 For example, a complaint that led to an LOI against the program "Beyond Twisted" that aired on Fox station KMSP-TV alleged that the program displayed "full female frontal nudity." As Fox's response to the LOI pointed out, however, the woman depicted on the program was at all times wearing underwear or a bathing suit; there was absolutely no nudity displayed. *See* Letter from Joseph M. Di Scipio, Vice President, Fox Television Stations, Inc., to Marlene H. Dortch, Secretary, FCC, File No. EB-09-IH-2077 (dated Feb. 25, 2010).

140 *See Indecency Policy Statement* at 8015, ¶ 25.

similarly shape broadcasters' judgments about what new content to air, even in the absence of any final Commission determination. All of this is to say nothing about speakers with less fortitude, who often take an even more cautious approach and refuse to broadcast content that is obviously deserving of First Amendment protection, as described above.

For all of these reasons, the Commission's current regime has become an informal scheme of censorship that systematically violates Fox's constitutional rights.

CONCLUSION

In sum, the Commission should finally cease its indefensible efforts to enforce broadcast indecency rules. The steady advances in video technology, and corresponding shifts in consumer viewing habits, have eradicated any justification that may once have existed for subjecting broadcasters to less First Amendment protection than other media. Moreover, in the years since *Pacifica*, the FCC has wandered down a labyrinthine path of contradictory actions that have chilled content creators' protected speech while depriving broadcasters of any discernible notice of what constitutes unlawful behavior. If the Commission insists on maintaining oversight of indecency, it must return to its historic, restrained approach and provide broadcast licensees with substantial editorial discretion. The Commission also must also dismiss the remaining backlog of pending indecency cases, given the Supreme Court's clear directive in *Fox II* that broadcasters are entitled to clear prior notice of indecency standards before being subjected to enforcement actions.

Respectfully submitted,

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June 19, 2013