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

In the Matter of	)	
	)	
Commission Policy	)	GN Docket No. 13-86
Regarding Indecency Enforcement	)	

COMMENTS OF CBS CORPORATION

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SUMMARY

In issuing the *Public Notice* that began this proceeding, the Commission announced the wholesale dismissal of more than one million indecency complaints, constituting 70 percent of its then-existing backlog. Beyond general references to factors such as the statute of limitations and unspecified Commission precedent, no reasons were given for the dismissal of these complaints. Indeed, insofar as we are aware, neither the complainants nor the broadcasters in these cases have been advised of the complaints' disposition.

In the meantime, largely because of these same indecency complaints, the Commission has not acted on scores of license renewal applications filed more than eight years ago, regarding license terms that stretch back as far as sixteen years. This state of affairs is hardly calculated to breed respect for the administrative process, either among the subjects of regulation or advocates of stricter indecency enforcement. The need for reform is obvious.

The current disarray in the Commission's indecency enforcement has its roots, we believe, in the zero-tolerance approach adopted by the FCC in *Golden Globes* and subsequent cases. The Commission's strict liability regime has encouraged the filing of hundreds of thousands of indecency complaints that have overwhelmed the Commission's ability to deal with them rationally, transparently and within a reasonable time frame. More restrained enforcement is necessary if any order is to be brought to the chaotic state of indecency regulation.

The key to more restrained enforcement, we think, is for the Commission permanently to adopt the approach that the *Notice* says is already being followed on an interim basis pending the issuance of a new Commission statement of policy – that is, that enforcement action will be taken only in the most egregious cases. As to what may constitute an "egregious" broadcast, the difficulty is less in the definition than in a more restrained application.

Thus in its 2001 *Industry Guidance*, the Commission set forth the criteria it used to identify actionable indecency – that is, "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." The Commission named three factors it considered in deciding whether particular material was of this character: (1) the explicitness or graphic nature of the material in question; (2) whether the material dwelled on or repeated at length descriptions of sexual or excretory organs or activities; and (3) whether the material appeared intended to pander or titillate, or to be presented for its shock value. In citing with approval several instances in which even the strongest of expletives were found to be not actionably indecent, the Commission again stressed the importance of repetition in determining whether particular material was actionably indecent.

It seems clear, then, that the starting point of more restrained indecency enforcement should be a return to the Commission's pre-*Golden Globes* policy – which it followed for more than a quarter century – of not taking action with respect to the broadcast of fleeting expletives. Neither the Commission's decision reprimanding WBAI-FM for administering a "verbal shock treatment" to an early-afternoon radio audience in the form of George Carlin's "Filthy Words" monologue, nor the Supreme Court's decision upholding the Commission's authority to do so, envisioned the FCC as policing the airwaves for every stray expletive that might be uttered by anyone during a live broadcast. Nor should scripted programming be treated differently. A government agency should not be distinguishing between the isolated use of the word "bulls**t" in a police drama and much stronger language in the broadcast of an Academy Award winning movie or CBS's Peabody Award-winning documentary about the events of September 11 (which some CBS affiliates declined to air because of concerns about profanity used by fire-fighters depicted in the documentary's live footage of the events). The Commission's former policy of taking no action with regard to fleeting expletives worked well enough for more than a quarter century, without making gutter language the commonplace vernacular of broadcast television. The Commission should return to it.

After soliciting comment on whether the Commission should return to its pre-*Golden Globes* policy with regard to fleeting expletives, the *Notice* asks whether the Commission should "treat isolated (non-sexual) nudity the same as . . . isolated expletives[.]" We think it clear that a glimpse of nudity should be treated no differently than an isolated swear word. The results of a contrary, zero-tolerance approach are evident from the experience of the 2004 Super Bowl, when the exposure of a female breast for a fraction of a second during the half-time show was followed by Commission and court proceedings not concluded for eight years – despite the fact that the Commission never produced a scintilla of evidence that anyone responsible for the broadcast knew that the infamous "wardrobe malfunction" would occur.

An appropriately restrained policy regarding indecency enforcement will also require the Commission to resist the temptation – and political pressures – to act as the ultimate arbiter of whether a program has been too frank in its discussion or depiction of sexuality. The FCC should not undertake the impossible task of adjudging, in the absence of any extrinsic evidence, whether the *suggestion* of sexual activity in a television program goes beyond what "community standards" will tolerate. Any attempt to do so will inevitably lead to irreconcilable decisions of the kind that have recently come to characterize the FCC's indecency enforcement.

In sum, the Commission should proceed against alleged broadcast indecency only in the most egregious cases – that is, where the elements of graphic explicitness, "dwelling or repetition," and a context evincing a lack of serious purpose are all present. If few television programs suggest themselves as meeting this standard, that is as it should be. The FCC must always bear in mind that speech protected by the First Amendment is at issue, and that the salutary goal of assisting parents in limiting the risk that their children will be exposed to material they would judge inappropriate for them cannot be pursued with such single-mindedness as to "to reduce the adult population to . . . only what is fit for children."

Indeed, in attempting to regulate broadcast "indecency," the Commission walks a precarious constitutional tightrope to be traversed only with the greatest care. Although the FCC cannot eliminate the significant tensions that will inevitably exist between the First Amendment and any indecency enforcement regime, it is incumbent on the Commission to attempt to minimize those tensions. Because the application of the indecency statute to non-obscene broadcast speech is subject to serious constitutional attack on multiple grounds, it will inevitably be struck down in the absence of Commission restraint.

Thus the wild inconsistency of the Commission's decisions in this area virtually guarantees that, in the absence of rationalization, the agency's indecency enforcement will fail to meet minimum due process requirements, as did the FCC rulings at issue in *Fox Television Stations*. Further, in today's communications landscape, the broadcast media are no longer "uniquely" pervasive and accessible to children, the factors that were central to the Supreme Court's decision in *FCC v. Pacifica Foundation* to uphold the Commission's authority to regulate non-obscene speech. Finally, the advent of blocking technologies that provide a less restrictive means of shielding children from inappropriate material on television raise grave doubt as to the feasibility of devising any enforcement policy that will pass First Amendment muster.

Recognizing that the FCC has no authority to instruct the Congress and the courts on constitutional law, CBS does not ask in these comments that the Commission wrestle with the ultimate issue of whether indecency enforcement is compatible with the First Amendment in today's media landscape. We do suggest that the Commission consider these issues in crafting the particulars of its indecency enforcement regime. Doing so will not only limit its intrusion on the First Amendment rights of broadcasters, but will best serve the congressional purpose of preserving some area for FCC regulation of constitutionally-protected, non-obscene, but "indecent" speech in the broadcast media, by ensuring that any ultimate Supreme Court decision on the issue will be made on the most defensible facts.

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COMMENTS OF CBS CORPORATION

CBS Corporation ("CBS") hereby respectfully responds to the Commission's request for comment[1] on the indecency enforcement policies it should follow after the Supreme Court's decision in *FCC v. Fox Television Stations, Inc.,* 132 S. Ct. 2307 (2012).

INTRODUCTION AND OVERVIEW

In issuing the *Public Notice* that began this proceeding, the Commission announced the wholesale dismissal of more than one million indecency complaints, constituting 70 percent of its then-existing backlog. Beyond general references to factors such as the statute of limitations and unspecified Commission precedent, no reasons were given for the dismissal of these complaints. Indeed, insofar as we are aware, neither the complainants nor the broadcasters in these cases have been advised of the complaints' disposition.

In the meantime, largely because of these same indecency complaints, the Commission has not acted on scores of license renewal applications filed more than eight years ago, regarding license terms that stretch back as far as sixteen years. In the case of CBS, of the four full power television stations for

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[1] *See, Public Notice*, GN Docket No. 13-86, 2013 FCC Lexis 1236 (released April 12013) (hereafter "*Notice*").

which it has so far filed renewal applications in the present cycle, three have yet to receive grants for the license terms that expired eight years ago.[2]

This situation, we believe, is attributable to the Commission's adoption of an overly aggressive, zero-tolerance enforcement approach that has encouraged the filing of hundreds of thousands of indecency complaints that have overwhelmed the Commission's ability to deal with them rationally, transparently and within a reasonable time frame. It is a state of affairs hardly calculated to breed respect for the administrative process, either among the subjects of regulation or advocates of stricter indecency enforcement. The need for reform is obvious.

To be clear, CBS believes that the Commission's experience in attempting to articulate an enforcement standard that may be applied with sufficient clarity and consistency to meet constitutional due process requirements, together with the advent of blocking technologies that provide a less restrictive means of shielding children from inappropriate material, raise grave doubt as to the feasibility of devising an enforcement policy that will pass First Amendment muster. At the same time, we recognize that the Commission will likely consider it inappropriate to declare itself constitutionally disabled from enforcing, against anything other than legal "obscenity," a statute enacted by Congress that expressly proscribes the broadcast of "indecent" content.

In these circumstances, we think the *Notice*'s suggestion that the Commission may return to a restrained enforcement policy akin to the one it followed from its 1975 decision in *Pacifica Foundation*[3]

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2 The exception is WJZ-TV Baltimore, which had its renewal application granted on February 10, 2005, prior to the Commission's issuance of a Forfeiture Order, on March 15, 2006, regarding the CBS Television Network's broadcast of the 2004 Super Bowl, an order ultimately thrown out by the United States Court of Appeals for the Third Circuit. *See*, *CBS Corporation v. FCC*, 663 F.3d 122 (3rd Cir.), *cert. denied,* 132 S. Ct. 2677 (2012).

3 *Citizen's Complaint Against Pacifica Foundation Station WBAI (FM)*, 56 F.C.C.2d 94 (1975), *aff'd sub nom. FCC v. Pacifica Foundation,* 438 U.S. 726 (1978).

until its 2004 adoption of a strict liability approach in *Golden Globes,*[4] holds the promise of minimizing constitutional tensions, avoiding the new accumulation of an unseemly backlog of indecency complaints, and rationalizing an area of Commission enforcement that is now in complete disarray.

The key to more restrained enforcement, we think, is for the Commission permanently to adopt the approach that the *Notice* says is already being followed on an interim basis pending the issuance of a new Commission statement of policy – that is, that enforcement action will be taken only in the most egregious cases. As to what may constitute an "egregious" broadcast, the difficulty is less in the definition than in a more restrained application.

Thus in its 2001 *Industry Guidance*, the Commission set forth the criteria it used to identify actionable indecency – that is, "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." The Commission named three factors it considered in deciding whether particular material was of this character:

> (1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value*.[5]

In citing with approval several instances in which even the strongest of expletives were found to be not actionably indecent,[6] the Commission again stressed the repetition factor:

> Repetition of and persistent focus on sexual or excretory material have been cited consistently as factors that exacerbate the

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4 *In re Complaints against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards Program,"* 19 FCC Rcd 4975 (2004) (hereafter "*Golden Globes*").

5 *In the Matter of Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, 8003 (2001) (italics in the original).

6 *Id.* at 8009 (¶18).

> potential offensiveness of broadcasts. In contrast, where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency.[7]

It seems clear, then, that the starting point of more restrained indecency enforcement should be a return to the Commission's pre-*Golden Globes* policy – which it followed for more than a quarter century – of not taking action with respect to the broadcast of fleeting expletives. Neither the Commission's decision reprimanding WBAI-FM for administering a "verbal shock treatment" to an early-afternoon radio audience in the form of George Carlin's "Filthy Words" monologue, nor the Supreme Court's decision upholding the Commission's authority to do so, envisioned the FCC as policing the airwaves for every stray expletive that might be uttered by anyone during a live broadcast. Nor should scripted programming be treated differently; in this country, it should not be the job of a government agency to say whether a television drama depicting a tough New York City detective uttering the word "bulls**t" is an intolerable offense against public morals.

After soliciting comment on whether the Commission should return to its pre-*Golden Globes* policy with regard to fleeting expletives, the *Notice* asks whether the Commission should "treat isolated (non-sexual) nudity the same as . . . isolated expletives[.]" We think it clear that a glimpse of nudity should be treated no differently than an isolated swear word. The results of a contrary, zero-tolerance approach are evident from the experience of the 2004 Super Bowl, when the exposure of a female breast for a fraction of a second during the half-time show was followed by Commission and court proceedings not concluded for eight years – despite the fact that the Commission never produced a scintilla of evidence that anyone responsible for the broadcast knew that the infamous "wardrobe malfunction" would occur.

That these changes to Commission policy should be made seems to us obvious. But an appropriately restrained policy regarding indecency enforcement will also require the Commission to

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[7] *Id.* at 8008.

resist the temptation – and political pressures – to act as the ultimate arbiter of whether a program has been too frank in its discussion or depiction of sexuality. As a general matter, it will have to defer to the judgments of those responsible for program standards at the television networks and broadcast stations.

We respectfully submit that the Commission has no other realistic choice. The United States is a vast country populated by an endlessly diverse citizenry with widely disparate sensibilities and beliefs. Condemnation of what will seem to be wanton licentiousness to large numbers of reasonable people will strike equal numbers as prudery and censorship. While there may be a point at which there is an overwhelming commonality of opinion, for the Commission to try to speak for "community standards" in the kinds of cases that have caused so much controversy – and to do so with legally sustainable consistency – has proved and will prove to be a fool's errand.

The Commission should recognize, as it has in other contexts, that in attempting to regulate broadcast "indecency" it walks a precarious constitutional tightrope[8] to be traversed only with the greatest care. Its overriding goal in formulating an enforcement policy in the wake of *Fox Television Stations* should be to minimize the constitutional issues that any enforcement will inevitably entail. In addition, it should seek to limit litigation, conserve its limited resources and avoid the growth of another enormous – and discreditable – indecency backlog.

For the purpose of emphasizing the radical departure represented by *Golden Globes* and subsequent decisions from decades of Commission precedent – and the extent of the FCC's authority upheld by the Supreme Court in *Pacifica* – we begin the discussion below with an abbreviated review of the history of indecency enforcement. We then discuss the powerful lines of constitutional attack that would confront an aggressive Commission enforcement policy were it again challenged in court, and which therefore counsel a more restrained approach. Finally, we provide some additional detail as to the

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8 *Cf. Banzhaf v. FCC*, 405 F.2d 1082, 1095 (D.C. Cir. 1968), *cert. denied sub nom Tobacco Institute, Inc. v. FCC*, 396 U.S. 842 (1969).

posture we recommend that the Commission adopt, and stress the importance of the Commission's implementing a more transparent and expeditious process for handling complaints in this area.

DISCUSSION

1. Background: The Commission's Regulation of Indecency

Although the FCC's regulation of broadcast indecency has become the subject of intense litigation and debate relatively recently, the prohibition on the utterance of any "obscene, indecent, or profane language by means of radio communication" traces back to the Radio Act of 1927.[9] Yet despite the prohibition's existence since the earliest days of broadcast regulation, it was not until the 1970s that the FCC first sanctioned any licensee for broadcast indecency. Indeed, the FCC's ruling in what became the landmark *Pacifica* case was only the Commission's second pronouncement on the subject.[10]

Insofar as it concerned the broadcast of expletives,[11] the facts in *Pacifica* were the diametric opposite of those in *Fox Television Stations.* The latter case involved two instances in which isolated

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[9] Thus Section 29 of the Act provided:

> Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

The prohibition was enacted in the same form in the Communications Act of 1934. In 1948, in connection with the revision of the Criminal Code to include provisions that had previously been located in other statutes, the indecency provision was removed from the Communications Act and re-enacted as Section 1464 of Title 18. *See, FCC v. Pacifica Foundation, supra,* 438 U.S. at 738.

[10] The first instance of Commission indecency enforcement was apparently its issuance of a notice of apparently liability in connection with the use of the words "f**k" and "s**t" during a pre-recorded broadcast interview. *See, Complaint Against Pacifica Foundation Station WBAI (FM),* 56 FCC 2d 94 (1975) (subsequent history omitted) (hereafter "*FCC Pacifica Decision*"), *citing Eastern Educational Radio (WUHY-FM)*, 24 FCC 2d 408 (1970).

[11] The FCC rulings against Fox Television Stations for the broadcast of unscripted expletives on two live awards programs were considered by the Supreme Court together with a Notice of Apparent Liability

expletives were broadcast when they were unexpectedly uttered by participants in live broadcasts. In *Pacifica*, the Commission stressed that George Carlin's "patently offensive" language had been "repeated over and over" and was "deliberately broadcast."[12]

Even those circumstances were insufficient, in the view of the United States Court of Appeals for the D.C. Circuit, to sustain the FCC's finding against constitutional and statutory attack.[13] But in a 5-4 decision, the Supreme Court reversed. Writing for the majority, Justice Stevens found it "appropriate . . . to emphasize the narrowness of our holding," which "[had] not decided that an occasional expletive . . . would justify any sanction."[14] The point was echoed in a concurring opinion by Justice Powell, joined by Justice Blackmun, which underscored that the Court's decision did not "speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here."[15] Noting that the Commission's order was limited to the specific facts before it, Justice Powell made clear that his vote to uphold the FCC's authority was grounded in the expectation that the FCC would "proceed cautiously, as it has in the past."[16]

Until its decision in *Golden Globes*, the Commission's approach to indecency regulation was fully consistent with the expectation that underlay the Supreme Court's *Pacifica* holding. Indeed, in dismissing a petition to deny the license renewal application of a Boston television station based in part

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issued against ABC owned and affiliated stations in connection with an *NYPD Blue* episode that included a bathroom scene in which a woman's nude buttocks was seen for seven seconds.

12 *FCC Pacifica Decision, supra*, 56 FCC 2d at 99.

13 *Pacifica Foundation v. FCC,* 556 F.2d 9 (D.C. Cir. 1977), *rev'd,* 438 U.S. 726 (1978).

14 *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978) (hereafter "*Pacifica*").

15 *Id.* at 760-61 (Powell, J., concurring).

16 *Id.* at 761, n.4 (Powell, J., concurring).

on its broadcast of allegedly indecent material, the Commission expressly articulated the limits that it perceived the Court had placed on its authority:

> The Supreme Court's decision in *FCC v. Pacifica Foundation* . . . affords this Commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station. We intend strictly to observe the narrowness of the *Pacifica* holding. In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the "indecent" words in question. The opinion of the Court specifically stated that it was not ruling that "an occasional expletive... would justify any sanction . . ." Further, Justice Powell's concurring opinion emphasized the fact that the language there in issue had been "repeated over and over as a sort of verbal shock treatment." He specifically distinguished "the verbal shock treatment [in *Pacifica*]" from "the isolated use of a potentially offensive word in the course of a radio broadcast."[17]

The Commission's restrained enforcement approach – which as a practical matter was to take no action unless words similar or identical to those in the Carlin monologue were used repeatedly for their "shock value"[18] – resulted in no enforcement actions between 1978 and 1987. Then, in three simultaneously issued decisions, the Commission made clear that the use of specific words was not necessary for a broadcast to be found actionably indecent if it nonetheless depicted sexual or excretory activities or organs in a manner "patently offensive" for the broadcast media.[19] Significantly, though, the Commission noted that "[i]f a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a

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17 *Application of WGBH Educational Foundation*, 69 F.C.C.2d 1250, 1254 (1978).

18 *In re In the Matters of Infinity Broadcasting Corporation of Pennsylvania (WYSP (FM)); Pacifica Foundation, Inc. (KPFK-FM); and Regents of the University of California (KCSB-FM)*, 3 FCC Rcd 930 (1987).

19 *Pacifica Foundation, Inc.*, 2 FCC Rcd 2698 (1987) (KPFK-FM); *The Regents of the University of California*, 2 FCC Rcd 2703 (1987) (KCSB-FM); *Infinity Broadcasting Corp. of Pennsylvania*, 2 FCC Rcd 2705 (1987) (WYSP (FM)).

requisite to a finding of indecency."[20] The requirement of "deliberate and repetitive use" when a charge of indecency rested on the use of expletives alone was repeatedly reaffirmed by the Commission. See, e.g., *In re Application of WGBH Educational Foundation,* 69 F.C.C.2d 1250, n.6 (1978) (single use of an expletive in a program that aired at 5:30pm "should not call for us to act under the holding of Pacifica"); *In re Regents of the University of California,* 2 F.C.C. Rcd. 2703, at ¶ 3 (1987) ("Speech that is indecent must involve more than an isolated use of an offensive word."); *L.M. Communications of S.C., Inc.,* 7 F.C.C. Rcd. 1595, 1595 (1992) (finding a single utterance of the word "f**k" not indecent because it was a "fleeting and isolated utterance which, within the context of live and spontaneous programming, does not warrant a Commission sanction"); *In re Application of Lincoln Dweller, Renewal of the License of Stations KPRL(AM) and KDDB(FM),* 8 F.C.C. Rcd. 2582, 2585 (1993) (The "use of a single expletive" did not warrant further review "in light of the isolated and accidental nature of the broadcast."); *Letter from Charles W. Kelley,* EB-01-IH-0639/DJB (Nov. 14, 2001) (broadcast of baseball player's use of "motherf***er" during a playoff game not indecent); *Letter from Charles W. Kelley,* EB-01-IH-0046/RBP (May 4, 2001) (broadcast of a football player's use of "motherf***er" during the introduction ceremonies of the Super Bowl not indecent).

Against this background, the Commission's 2004 decision in *Golden Globes*[21] was nothing less than an abrupt – and radical – departure from three decades of Commission precedent. That case involved the performer Bono's spontaneous declaration, during a live broadcast of the Golden Globe Awards, that winning the prize for "Best Original Song" was "really f**king brilliant, really, really great." There was obviously nothing remotely sexual in Bono's excited utterance; equally obviously, there was no meaningful fault on the part of the broadcaster, NBC, in failing to anticipate and prevent the

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20 *Pacifica Foundation, Inc.*, 2 FCC Rcd 2698, 2699 (1987).

21 *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975 (2004) (hereafter "*Golden Globes*").

airing of the expletive.[22] Nonetheless, the full Commission reversed the Enforcement Bureau's ruling that Bono's "fleeting and isolated" use of an expletive was not indecent, holding that "any use of [F-Word] . . . , in any context, inherently has a sexual connotation." As for the long line of cases holding that the utterance of a single expletive did not amount to indecency, the FCC simply announced that they were "no longer good law."[23]

Subsequent Commission decisions reinforced its new zero tolerance approach. In a 2006 ruling ultimately reversed by the U.S. Court of Appeals for the Third Circuit, the FCC found CBS liable for a $550,000 forfeiture as a result of the unscripted exposure, for nine-sixteenths of a second, of a female performer's breast during the half-time show at the 2004 Super Bowl.[24] At the same time, the Commission issued an omnibus order finding four television programs to have violated the indecency statute, despite the fleeting nature of the offending material.[25] Consolidated appeals from portions of that order, and an NAL issued against ABC for an episode of *NYPD Blue* which included a seven second bathroom scene in which a woman's nude buttocks was seen, ultimately led to the Supreme Court's 2012 decision in *Fox Television Stations.* Although the United States Court of Appeals for the Second Circuit found the Commission's post-*Golden Globes* indecency rulings to be so pervasively inconsistent and

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22 The Commission's decision averred that "NBC and other licensees were on notice that an award presenter or recipient might use offensive language during the live broadcast" and that "NBC . . . could have . . . delay[ed] the broadcast for a period of time sufficient for them to effectively bleep the offending word." But as we discuss at pages 20-22, *infra,* whether to broadcast an event live as it happens or on a delayed basis is an editorial judgment that the Commission may not constitutionally penalize.

23 *Golden Globes, supra,* 19 FCC Rcd at 4980.

24 *In re Complaints Against Various TV Licensees Concerning Their February 1, 2004 of the Super Bowl Half-Time Show, Forfeiture Order*, 21 FCC Rcd 2760 (2006), *recon. denied,* 21 FCC Rcd 6653 (2006); *vacated and remanded by CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008), *vacated and remanded to Court of Appeals by* 556 U.S. 1218 (2009); CBS *Corp. v. FCC*, 663 F.3d 122 (3d Cir. 2011) (opinion on remand granting petition for review), cert denied, 132 S. Ct. 2677 (2012).

25 *In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664 (2006) (hereafter "*Omnibus Order*").

arbitrary as to require the FCC's entire scheme of indecency enforcement to be struck down as unconstitutionally vague, the Supreme Court found narrower grounds sufficient, holding that as a matter of due process broadcasters could not be penalized for fleeting material that prior Commission policy had not suggested would be held indecent.

As we have indicated, we do not believe the FCC can eliminate the significant tensions that will inevitably exist between the First Amendment and any indecency enforcement regime. It is incumbent on the Commission, however, to attempt to minimize those tensions and bring some order to its efforts to implement Section 1464. Given the constitutional vulnerabilities of that statute, which we now discuss, the aggressive approach to broadcast indecency adopted by the Commission in 2004 cannot be sustained.

2. The FCC's Enforcement of the Indecency Statute is Subject to Multiple Constitutional Infirmities.

There are multiple grounds on which the application of the indecency statute to non-obscene broadcast speech is subject to constitutional attack. All of them raise serious questions concerning the sustainability of Commission regulation in this area and therefore strongly militate for restrained enforcement. We briefly discuss a number of them below.

A. The FCC's Current Indecency Regime is Constitutionally Unsustainable Because it is Unintelligible.

There is no more fundamental requirement of due process than that the law be sufficiently clear that a person of ordinary intelligence is able to discern what is prohibited. In *Fox Television Stations*, the Supreme Court held that the FCC's enforcement regime as to the broadcast of fleeting expletives and nudity failed to meet that standard. CBS respectfully submits that the inconsistency – and attendant incomprehensibility – of the Commission's decisions in this area is largely attributable to its having taken on the role of ultimate arbiter of the artistic merit and social importance of broadcast programming. With millions of dollars in fines in the balance, the FCC has become the decider of when a broadcast is sufficiently "good" and "serious" for nudity and curse words to be forgiven, rather than harshly punished.

The Commission cannot be expected, should not want, and ultimately will not be permitted by the courts, to continue in that role.

The impossibility of the role the Commission has tried to play is reflected in the contradictions of its decisions. Dialogue containing expletives such as "f**k," "s**t," and "bulls**t" has been held acceptable in a fictional film drama about the D-Day invasion and its aftermath, but similar language was found to be indecent in a PBS documentary about blues musicians.[26] Frontal nudity in the film *Schindler's List* was held not to be indecent,[27] but a brief (and dramatically relevant) glimpse of a woman's buttocks in *NYPD Blue* was condemned and heavy fines imposed. And while this brief and entirely non-sexual scene was found to be to be actionably "explicit," other programs in which actual sexual activity was simulated or strongly suggested were held insufficiently "graphic" to warrant further proceedings.[28] With respect, these decisions are so utterly inconsistent as to clearly warrant a finding of arbitrariness.

B. Broadcasting is no longer uniquely pervasive and accessible to children.

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26 *Compare, Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 FCC Rcd 4507, 4512-14 (2005) (profanity used in fictional film about World War II soldiers "realistically reflect[s] [their] strong human reactions to . . . [the] unspeakable conditions and the peril in which they find themselves" . . . . Deleting all of such language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience . . . .") and *Omnibus Order, supra,* 21 FCC Rcd at 2683-87 (¶¶ 72-78) (finding eight instances of profanity in a two hour PBS documentary actionably indecent, despite licensee's explanation that intent was to "provide a window into [the world of the individuals being interviewed] with their own words," because the Commission found the realism not "essential to the nature of an artistic or educational work").

27 *See, WPBN/WTOM License Subsidiary, Inc.,* 15 FCC Rcd 1838 (2000).

28 Thus in *KSAZ Licensee*, 19 FCC Rcd. 15999 (2004).the full Commission held that the broadcast of a scene from the NBC program *Will and Grace*, "in which '[a] woman photographer passionately kissed [a] woman author and then humped her," to be "not sufficiently explicit or graphic to be indecent." Similarly, in *Complaint Against Various Broadcast Licensees*, 19 FCC Rcd. 15995 (2004).the Commission rejected an indecency complaint against an episode of *Buffy the Vampire Slayer* in which the characters were alleged to have engaged in simulated sexual intercourse. The Commission acknowledged that the episode contained a scene "depicting Buffy kissing and straddling Spike shortly after fighting with him," but found that the scene was not "sufficiently graphic or explicit to be deemed indecent."

Observing that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection," the Supreme Court majority in *Pacifica* found two distinctions between broadcasting and other media to be relevant to indecency regulation:

> First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.
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> . . . .
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> Second, broadcasting is uniquely accessible to children, even those too young to read. . . . The ease with which children may obtain access to broadcast material . . . amply justif[ies] special treatment of indecent broadcasting.

Whatever the merits of this rationale in 1978, time and technology have deprived it of all vitality. Today, upwards of eighty-five percent of all television homes subscribe to pay television.[29] Even apart from premium channels, which regularly present "R" rated movies and original programming in which expletives and very explicit depiction of sexual activity are commonplace, basic cable programming is not meaningfully distinguishable from broadcast in this regard. Indeed, as former FCC Chairman Kevin Martin has observed, "programming that broadcast networks reject because of concerns about content may end up on competing basic cable networks, and radio personalities that we have fined for indecency violations just move to satellite radio."[30] And, as far back as 1995, Chief Judge Edwards of the D.C.

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29 *See, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 24 FCC Rcd 542, 546 (¶ 8) (2009).

30 This reality caused Commissioner Martin to conclude that "[i]n a world in which more than 85% of homes receive their television programming from cable and satellite providers, we need a comprehensive solution." *Protecting Children From Violent and Indecent Programming: Hearing Before the Senate Comm. on Commerce, Science and Transportation,* 108th Cong. 5-6 (2004)(statement of Kevin J. Martin, FCC Commissioner), *cited by,* Robert Corn-Revere, *Can Broadcast Indecency Regulations be Extended to Cable Television and Satellite Radio,* 30 Southern Illinois University Law Journal 243, 244 (2006).

Circuit found it difficult "to comprehend the distinction that is drawn between *broadcast* and *cable* television, with broadcast stations having reduced First Amendment rights even though cable is concededly much more responsible for the showing of indecent programming."[31] That distinction is even harder to grasp today.

Nor is "spectrum scarcity," the traditional rationale for affording lesser First Amendment protection to broadcasters, equal to the task in the present context. Thus, although the fact that there are more would-be broadcasters than there are available frequencies has been held to permit the government "to place limited content restraints, and impose certain affirmative obligations on licensees," the FCC is forbidden from "engag[ing] in 'censorship' or ... interfer[ing] with the [broadcasters'] right of free speech."[32] Indeed, the Commission itself has stated that spectrum scarcity does not provide a sufficient

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31 *Action for Children's Television v. FCC,* 59 F.3d 1249, 1263 (D.C. Cir. 1995) (Edwards, C.J., concurring) (emphasis in the original).

32 *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 638, 650 (1994). *See also, Community Services Broadcasting of Mid-America, Inc., supra* ("While the scarcity of the broadcast spectrum may justify enhanced government regulation over access to that spectrum . . . . spectrum scarcity cannot be invoked to support a government attempt to penalize or suppress speech."); *Pacifica Foundation v. FCC*, 556 F.2d 9 (D.C. Cir 1977), *rev'd on other grounds*, 438 U.S. 726 (1978) (Bazelon, J., concurring) ("[A]lthough [spectrum] scarcity has justified *increasing* the diversity of speakers and speech, it has never been held to justify censorship.") (emphasis in the original).

While the scarcity doctrine could in no event justify the disparate treatment of broadcasting here in issue, we note that the theory has increasingly been the subject of intense criticism "[e]ven in its heartland application," *i.e.,* the imposition of affirmative "public interest" obligations on broadcasters. *See Time Warner Entertainment Co. L.P. v. FCC,* 93 F.3d 957 (D.C. Cir. 1996), *reh. en banc denied*, 105 F.3d 723, 724 (1997) (Williams, J., dissenting from denial of rehearing en banc). In addition to a slew of other critics, Justice Thomas has strongly opined that spectrum scarcity as a basis for broadcast regulation (as well as the Supreme Court's decision in *Pacifica*) ought to be reexamined. After questioning whether the doctrine could provide a constitutional rationale for limiting the First Amendment rights of broadcasters under any factual circumstances, Justice Thomas noted:

> [E]ven if this Court's disfavored treatment of broadcasters under the First Amendment could have been justified at the time of *Red Lion* and *Pacifica*, dramatic technological advances have eviscerated the factual assumptions underlying those decisions. Broadcast spectrum is significantly less scarce than it was 40 years ago. . . . And the trend should continue with broadcast television's imminent switch from analog to digital transmission, which will allow the FCC to stack broadcast channels right beside one another along the spectrum, and

basis for indecency regulation.[33]

That broadcast and cable television cannot be meaningfully distinguished for purposes of indecency regulation has implications for its constitutionality under both the First Amendment and the "equal protection" standard imposed on the federal government through the "due process" clause of the Fifth Amendment.[34] The critical question under the equal protection standard is "whether there is an appropriate governmental interest suitably furthered by the differential treatment" at issue.[35] Where the classification drawn is not inherently suspect and no fundamental rights are affected, it is normally sufficient if the government interest is legitimate and the classification rationally related to that interest.[36]

> ultimately utilize significantly less than the 400 MHz of spectrum the analog system absorbs today.

Fox Television Stations, Inc. v. FCC, 556 U.S. 502, 533 (2009) (Thomas, J., concurring) (quotation marks and citation omitted) (hereafter "*Fox Television Stations I*"). *See also Tribune Company v. FCC,* 133 F.3d 61, 68 (D.C. Cir. 1998) ("[i]t may well be that . . . the FCC would be thought arbitrary and capricious if it refused to reconsider its [broadcast-newspaper cross-ownership] rule in light of persuasive evidence that the scarcity rationale is no longer tenable"); *Action for Children's Television v. FCC,* 58 F.3d 654, 675 (1995), *cert. denied sub nom. Pacifica Foundation v. FCC,* 516 U.S. 1043 (1996) (Edwards, C.J., dissenting) (spectrum scarcity is an "indefensible notion" and "today . . . the nation enjoys a proliferation of broadcast stations, and should the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum"); id. at 684 (Wald, J., dissenting) ("Technical assumptions about the uniqueness of broadcast . . . have changed significantly in recent years."); *Telecommunications Research and Action Center v. FCC,* 801 F.2d 501, 508 n.4 (D.C. Cir. 1986), *cert. denied,* 482 U.S. 919 (1987) ("Broadcast frequencies are much less scarce now than when the scarcity rationale first arose in [1943].").

33 *See, In the Matter of Infinity Broadcasting Corporation of Pennsylvania,* 2 FCC Rcd 2705, note 7 (1987) ("[W]e no longer consider the argument of spectrum scarcity to provide a sufficient basis for [indecency] regulation.").

34 *See, Bolling v. Sharpe,* 347 U.S. 497 (1954).

35 *Police Department of Chicago v. Mosley,* 408 U.S. 92, 95 (1972).

36 *See, Ferguson v. Skrupa,* 372 U.S. 726 (1963); *Williamson v. Lee Optical Company,* 348 U.S. 483 (1955).

However, where fundamental rights are involved, the government interest must be "substantial" and the classification "narrowly tailored" to serve that interest.[37]

There can be no doubt that sanctioning speech that is concededly entitled to First Amendment protection[38] because it is presented on broadcast television implicates fundamental constitutional rights. Accordingly, in the event of any constitutional challenge to the Commission's enforcement of Section 1464 on equal protection grounds, "strict scrutiny" of the regulation under the equal protection standard would be appropriate. It is at the least highly dubious that the distinction between broadcast and cable television could survive such scrutiny for the purpose of regulating television indecency. As the United States Court of Appeals for the D.C Circuit has observed, "a governmental interest, no matter how substantial in and of itself, cannot serve to justify a statutory classification when the interest is not in fact one which is truly furthered by the statute."[39] And it would appear futile to try to protect children from inappropriate material by proscribing it on broadcast television when the same material is left freely available on an adjacent cable channel.

For the same reason – i.e., that the statutory scheme is significantly under-inclusive – it is doubtful that the Commission's indecency regulation could withstand First Amendment scrutiny. Thus a regulation that encroaches on First Amendment rights "may not be sustained if it provides only ineffective or remote support for the government's purpose."[40] This means that the governmental interest in question must be advanced by a regulatory scheme which is rational "when evaluated . . . in [its] entire[ty] . . . rather than in isolation";[41] if the regulations in question are so internally inconsistent as to

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37 *Police Department of Chicago v. Mosley, supra,* 408 U.S. at 99, 101; *Community Services Broadcasting of Mid-America, Inc.,* 593 F.2d 1102 (D.C. Cir. 1978) (en banc).

38 *See, Sable Communications of California v. FCC,* 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment").

39 *Community Services Broadcasting of Mid-America, Inc., supra,* 593 F.2d at 1123.

40 *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 564 (1980).

41 *Greater New Orleans Broadcasters Association v. United States,* 527 U.S. 173, 180 (1999).

be incapable of meaningfully advancing the objectives sought to be promoted, even incidental burdens on speech will not be tolerated.[42]

When the *Pacifica* Court found broadcast television and radio to be "uniquely accessible to children" in 1978, fewer than eighteen percent of television households subscribed to cable television.[43] Home Box Office was a "fledgling" service that had launched a mere three years earlier,[44] and satellite-delivered basic cable networks had just begun to proliferate. As late as 1984, barely more than 35 percent of cable subscribers had access to more than 30 channels;[45] by 2007, the average television household received approximately 118[46] Thus, the day when a child watching television was almost certain to be watching *broadcast* television has long since passed. The continued constitutionality of a regulation intended to protect children from indecency in the audio-visual media that omits cable television – acknowledged to be at least as "pervasive"[47] as broadcasting – is subject to serious doubt.

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42 *See, e.g., Greater New Orleans Broadcasters Association v. United States, supra,* 527 U.S. at 193 (federal statute prohibiting broadcast advertising of casinos could not be sustained as advancing a substantial state interest in limiting the social ills associated with gambling, where statute permitted such advertising of casinos owned by Indian tribes; restriction invalidated based on the "overall irrationality of the Government's regulatory scheme"); *Rubin v. Coors Brewing Co.,* 514 U.S. 476 (1995) (provision of the Federal Alcohol Administration Act prohibiting the disclosure of the alcohol content of beer on labels invalidated as failing to directly advance government interest in preventing "strength wars" among beer manufacturers, where such disclosure could be made in advertising unless prohibited by state law).

43 *See,* http://www.tvhistory.tv/Cable_Households_77-99.JPG

44 Federal Communications Commission, "Wired, Zapped, and Beamed, 1960's through 1980's," available at http://transition.fcc.gov/omd/history/tv/1960-1989.html

45 Television and Cable Factbook, No. 52, Cable Services Volume at 1726.

46 SNL Kagan, "Nielsen: Record number of channels for average US home," June 9, 2008.

47 Notably, four Justices of the Supreme Court have joined an opinion expressing the view that "[c]able television broadcasting, including access channel broadcasting, is as "accessible to children" as over-the-air broadcasting, if not more so. *Denver Area Educational Telecommunications Consortium v. FCC,* 518 U.S. 727, 744 (1996) (Part II of Opinion by Justice Bryer, in which Justices Stevens, O'Connor and Souter joined). Justice Thomas as well has observed that "traditional broadcast television and radio are no longer the 'uniquely pervasive' media forms they once were," since "[f]or most consumers, traditional broadcast media programming is now bundled with cable or satellite services," and "[b]roadcast and other video

C. V-Chip Technology Provides a Less Restrictive Alternative to Indecency Regulation.

In *United States v. Playboy Entertainment Group, Inc.,*[48] the Supreme Court invalidated on First Amendment grounds a federal statute intended to address the perceived problem of "signal bleed" on cable channels predominantly devoted to sexually-oriented programming. "Signal bleed" occurs when imperfect scrambling of a television signal causes certain portions of the video or audio to be discernible for a brief period. Out of concern that signal bleed would result in unsupervised children in non-subscribing households seeing or hearing portions of the explicit programming, Congress adopted Section 505 of the Telecommunications Act of 1996, which required cable television operators who provided channels primarily dedicated to sexually-oriented programming to (1) fully scramble those channels or (2) limit transmission of the channels to the hours between 10 p.m. and 6 a.m.

Playboy Entertainment Group, which provided channels of sexual programming to cable operators, brought suit in federal court seeking declaratory and injunctive relief. Following a full trial, a three-judge District Court found that most cable operators had "no practical choice but to curtail [the targeted] programming during the [regulated] sixteen hours or risk the penalties imposed . . . if any audio or video signal bleed occurred during [those] times," and held that the statute unconstitutionally abridged First Amendment rights.

Acknowledging that legitimate grounds for regulation existed, the Supreme Court nonetheless affirmed on the ground that the government's interest in shielding children from sexually explicit material

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programming is also widely available over the Internet." *Fox Television Stations I, supra,* 556 U.S. at 533-34 (Thomas, J., concurring); *see also Fox Television Stations v. FCC,* 613 F.3d 317 (2d Cir. 2010), *vacated by* 132 S.Ct. 2307 (2012) ("The past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus. Cable television is almost as pervasive as broadcast . . . and most viewers can alternate between broadcast and non-broadcast channels with a click of their remote control.").

[48] 529 U.S. 803 (2000).

could have been achieved by the less restrictive means of requiring that sexually-oriented channels be fully blocked at a subscriber's request. The Court distinguished *Pacifica*, finding that the ability of cable systems to block programming on a household-by-household basis was a critical difference between cable and broadcast television for this purpose:

> The option to block reduces the likelihood, so concerning to the Court in *Pacifica* . . . that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem. The corollary, of course, is that targeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners . . . . Simply put, targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.[49]

Whatever the case when *Playboy Enterprises* was decided in 2000, it is now clear that effective blocking technology exists for broadcast no less than cable television. Under regulations adopted by the FCC pursuant to the 1996 Telecommunications Act,[50] every television with a 13 inch or larger picture screen manufactured or sold in the United States after January 1, 2000 is required to incorporate "V-chip" technology designed to enable viewers to block display of programs assigned certain ratings, assigned in accordance with standardized criteria, that are transmitted with the broadcast signal. The constitutional significance of the V-chip for the Commission's indecency regulation was not lost on the Second Circuit in *Fox Television Stations v. FCC, supra*. While the court's opinion was vacated given the Supreme Court's narrower disposition of the case, its reasoning has not been vitiated:

> [T] here now exists a way to block programs that contain indecent speech in a way that was not possible in 1978. In fact, the existence of technology that allowed for household-by-household blocking of "unwanted" cable channels was one of the principle distinctions between cable television and broadcast media drawn by the Supreme Court in *Playboy*. . . . We can

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49 *Id.* at 815.

50 *See*, 47 USC § 303(x).

> think of no reason why this rationale for applying strict scrutiny in the case of cable television would not apply with equal force to broadcast television in light of the V-chip technology that is now available.[51]

The existence of less restrictive means to achieve the government interest in preventing children from viewing "indecent" material is yet another hurdle that the Commission's indecency policy would have to surmount in order to have any chance of being sustained in the face of a future court challenge.

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The issue of whether the Commission can, in the media landscape of 2013, exercise any authority over "indecent" material on television and radio is probably ultimately destined to be decided by the courts. If it is to be presented on facts that will allow a meaningful exploration of the salient issues, rather than leading to an inevitable result, the Commission's enforcement policies will have to be rationalized. We turn now to a discussion of how that might be done.

3. What Enforcement Policy Should the Commission Adopt?

Since the Commission is not vested with the authority to declare acts of Congress unconstitutional, or to interpret them in ways that are clearly inconsistent with congressional intent, the Commission's goal should be to adopt policies that are clear, which minimize conflict with the First Amendment, and which will allow summary disposition of the overwhelming majority of indecency complaints. CBS has these suggestions as to steps the Commission should take in this direction.

A. Unscripted Expletives and Nudity in Live Programming Should Not be Actionable.

This is the most obvious policy the Commission should adopt. Sanctioning broadcasters for unanticipated occurrences in live programs is not only unjust, but clearly unconstitutional.

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[51] *Fox Television Stations v. FCC, supra,* 613 F.3d at 326-27.

The Supreme Court has long held that imposing liability for speech without fault cannot be reconciled with the First Amendment. As the Court stated in *Gertz v. Robert Welch, Inc.*, "[o]ur decisions recognize that a rule of strict liability [for defamation] . . . may lead to intolerable self-censorship."[52] If the First Amendment cannot tolerate the imposition of strict liability for the publication of falsehoods that may have a grievous effect on an individual's reputation, it cannot possibly accept punishment without fault for a licensee's unintentional airing of an isolated expletive during the broadcast of a live event. The same is true for the handful of incidents in the history of broadcasting akin to the notorious "wardrobe malfunction" during the 2004 Super Bowl.

The Commission's position that broadcasters "can easily ensure that they are not subject to [such liability by] adopt[ing] and successfully implement[ing] a delay/bleeping system for live broadcasts"[53] does not address the constitutional problem raised here. The decision of whether or not to tape delay a live event is the essence of editorial judgment.[54] As such, it is insulated by the First Amendment from government interference, coercion or penalty.

Thus in *Miami Herald Publishing Company v. Tornillo,*[55] the Supreme Court held unconstitutional a Florida statute that required a newspaper to print the reply of a political candidate

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52 418 U.S. 323, 340-41 (1974) (citation omitted).

53 *Golden Globe Awards, supra,* 19 FCC Rcd 4975 at ¶17.

54 The significance of a broadcast's being live *as it happens* cannot be minimized. It was an important element of the excitement -- and sometimes the unpredictability -- of many of the classic programs that were seen during television's early days, now viewed by some as its "Golden Age." When a news conference with President Clinton on a visit to China was televised live, it created something of a public sensation for the very reason that the Chinese authorities permitted a broadcast that they had no opportunity to censor. *See,* Terrence Hunt, "Debate Has Them All Talking," *The Daily Telegraph* (Sydney, Australia), June 29, 1998 at 23. And can anyone doubt that a broadcaster's decision to tape delay a major sports event by even 10 or 15 seconds -- let alone the longer period that would be required to provide absolute assurance against the inadvertent airing of visually inappropriate material -- would provoke a storm of public protest? As these examples show, there can be no denying that a decision to go live with the broadcast of an event, or to show it on a tape delay basis, is a fundamental editorial decision.

55 418 U.S. 241, 258 (1975); *see also Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998); *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 124-25 (1973).

whom it had criticized. Rejecting the argument that the Florida statute did not prevent a newspaper from publishing anything it wished, the Court noted that the right-to-reply law operated "as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter." Governmental restraints, the Court explained,

> need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print.[56]

In like manner, this Commission cannot, consistent with the First Amendment, command a broadcast licensee to incur the time and personnel costs of installing and utilizing a tape delay system as the price for being able to broadcast a sports event, or any other program, on a live basis. Such a policy unquestionably violates the First Amendment, and the Commission should take the opportunity of this proceeding to disown it.[57]

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[56] 418 U.S. at 257. The line of cases upholding certain limited regulation of broadcast content, beginning with the Supreme Court's decision in *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969), does not detract from the relevance of *Tornillo* in the present context, even assuming the continued validity of the "spectrum scarcity" rationale for such regulation. (*But see, e.g., Time Warner Entertainment Co. v. FCC,* 105 F.3d 723, 724 n. 2 (D.C. Cir. 1997) (five members of evenly divided D.C. Circuit question whether the scarcity rationale "[ever] made sense").) As the Court explained in *FCC v. League of Women Voters,* 468 U.S. 364, 377-78 (1984), while the scarcity of frequencies available for broadcasting, and the concomitant need for government licensing, has been held to justify certain regulation of broadcasting that "has never been allowed with respect to the print media," broadcasters are nonetheless "entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public [duties]." (Citations and internal quotations omitted.) The Court's decision in *Tornillo* therefore cannot be ignored in considering the constitutionality of the FCC's imposition of a penalty (contingent on circumstances beyond the broadcaster's control) for its editorial decision to present a particular program in a particular manner (e.g., to broadcast a live event without delay).

[57] Parenthetically, we note that, quite apart from constitutional issues, there is no delay system that can completely guarantee that neither an expletive nor an inappropriate image will ever be broadcast. Inevitable lapses of attention and limits on the acuteness of eyesight – in other words, human error – make perfection an unachievable goal. Even in taped programs, something will occasionally be missed by the most vigilant standards editors. *See, e.g.,* John Eggerton, "PTC Complains About Survivor Episode . . . [that] featured brief glimpse of a contestant's penis," *Broadcasting & Cable*, September 30, 2008 (available at http://www.broadcastingcable.com/article/115675-PTC_Complains_About_Survivor_Episode.php).

B. The Commission Should Not Second-Guess the Editorial and Artistic Judgments of Broadcasters; Rather it Should Reserve Indecency Enforcement for the Most Egregious Cases.

The above discussion does not mean, of course, that the Commission should initiate enforcement proceedings based on the fleeting utterance of an expletive, or a brief glimpse of nudity, in a *scripted* program. A government agency should not be distinguishing between the isolated use of the word "bulls**t" in a police drama and much stronger language in the broadcast of an Academy Award winning movie or CBS's Peabody Award-winning documentary about the events of September 11 (which some CBS affiliates declined to air because of concerns about the risk of an FCC-imposed indecency penalty based on profanity used by fire-fighters depicted in the documentary's live footage of the events).[58] The

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Indeed, although CBS makes extraordinary efforts to avoid any inappropriate language from being aired, there are those who might argue – including some of impeccable rectitude – that the utterance of an isolated expletive, even in a venue likely to be frequented by children, might occasionally be viewed with some tolerance. *See,* Elizabeth Titus, "FCC Chairman Julius Genachowski tweets on David Ortiz f-bomb," *Politico*, April 20, 2013 (available at http://www.politico.com/story/2013/04/fcc-julius-genachowski-david-ortiz-twitter-90376.html).

58 The refusal of some CBS affiliates to air this award-winning film was only one example of the chilling effect of the Commission's stepped-up indecency enforcement cited by the Court of Appeals in *Fox Television Stations*:

> For instance, several CBS affiliates declined to air the Peabody Award-winning "9/11" documentary, which contains real audio footage -- including occasional expletives -- of firefighters in the World Trade Center on September 11th. Although the documentary had previously aired twice without complaint, following the Golden Globes Order affiliates could no longer be sure whether the expletives contained in the documentary could be found indecent. See Larry Neumeister, "Some CBS Affiliates Worry over 9/11 Show," Associated Press, Sept. 3, 2006. In yet another example, a radio station cancelled a planned reading of Tom Wolfe's novel I Am Charlotte Simmons, based on a single complaint it received about the "adult" language in the book, because the station feared FCC action. When the program was reinstated two weeks later, the station decided that it could only safely air the program during the "safe harbor" period.
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> The record contains other examples of local stations that have forgone live programming in order to avoid fines. For instance, Phoenix TV stations 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 to express their grief. A station in Moosic, Pennsylvania submitted an affidavit stating that in the wake of the FCC's new policy, it had decided to no longer provide live, direct-to-air coverage of news events "unless they affect matters of public safety or convenience." If the FCC's policy is allowed to remain in

Commission's former policy of taking no action with regard to fleeting expletives or nudity[59] worked well enough for more than a quarter century, without making gutter language the commonplace vernacular of broadcast television. The Commission should return to it.

By the same token, the FCC should not undertake the impossible task of adjudging, in the absence of any extrinsic evidence, whether the *suggestion* of sexual activity in a television program goes beyond what "community standards" will tolerate. Any attempt to do so will inevitably lead to more irreconcilable decisions of the kind discussed above. The FCC should proceed against alleged broadcast indecency only in the most egregious cases – that is, where the elements of graphic explicitness, "dwelling or repetition," and a context evincing a lack of serious purpose are all present. If few television programs suggest themselves as meeting this standard, that is as it should be.[60] The FCC must always bear in mind that speech protected by the First Amendment is at issue, and that the salutary goal of assisting parents in limiting the risk that their children will be exposed to material they would judge inappropriate for them cannot be pursued with such single-mindedness as to "to reduce the adult population to . . . only what is fit for children."[61]

As we have made clear throughout, we cannot say whether a more restrained Commission policy would pass constitutional muster, or that CBS might not, in an appropriate case challenge it. But such a

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> 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.

Fox Television Stations v. FCC, 613 F.3d 317, 334-35 (2d Cir. 2010), *vacated by* 132 S. Ct. 2307 (2012).

59 In connection with CBS's petition for review of the forfeiture assessed by the Commission in connection with the 2004 Super Bowl half-time show, the FCC contended that its policy not to take action against fleeting expletives did not extend to images. The U.S. Court of Appeals for the Third Circuit rejected that assertion. *CBS Corp. v. FCC, supra,* 663 F.3d 122

60 The adoption of such a standard, would not, however, be tantamount to the abandonment of all indecency enforcement. The annals of the FCC's indecency decisions are not without instances in which all of these elements could reasonably have been found to be present.

61 *Butler* v. *Michigan*, 352 U.S. 380, 383-84 (1957).

policy would at least present the issues of the government's authority in this area in a form capable of meaningful resolution.

4. Transparent and Expeditious Decision-Making is an Essential Requisite to Constitutional Indecency Enforcement

At the outset of these comments, we noted the unconscionable delays that have characterized the Commission's handling of indecency complaints. As we have pointed out, this tends to bring the agency's processes into disrepute, but it does more: Allowing claims that trench on First Amendment rights to remain unresolved for years on end unconstitutionally chills the exercise of those rights.

In *Action for Children's Television v. FCC,* [62] plaintiffs challenged the FCC's indecency enforcement scheme on the ground that its delays in imposing forfeiture orders after the issuance of an NAL unconstitutionally deprived broadcasters of prompt judicial review of preliminary Commission indecency determinations. While "agree[ing] . . . that some of the Commission's procedures are troubling," in a split decision the Court of Appeals affirmed, "o[n] the record before us," the trial court's grant of summary judgment for the FCC.[63] The court noted, however, that

> [a]lthough the appellants have failed to show that the Commission's administration of the statute is unconstitutional, we cannot fail to acknowledge that the agency's practices could give rise to some of the evils that the appellants claim are already at hand.[64]

Those "evils" have now eventuated, since the record of FCC delay before the court in *ACT* cannot be compared to that more recently compiled by the Commission. Thus the *ACT* court found, with respect to forfeiture orders than had then been issued by the FCC since its stepped-up enforcement began in 1987, that "it took from two to 23 months--and an average of approximately nine months--for the FCC to make its decision." In an "extreme case," the court found, "a broadcaster could wait as long as six or seven

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62 59 F.3d 1249 (D.C. Cir. 1995) (hereafter "*ACT*").

63 *Id.* at 1262

64 *Id.* at 1254.

years from the time a program was aired until its first opportunity for judicial review of the Commission's decision that the material was indecent."

Compared to the time it now takes for the Commission to resolve an indecency complaint – if, indeed, it is ever resolved at all – the cases cited by the *ACT* court were handled with warp speed. As we have noted, it is now not uncommon for indecency complaints to remain pending without resolution for the entire length of a broadcast station's eight-year license term. As for the "extreme case" in which a broadcaster which is the subject of an NAL has to "wait as long as six or seven years . . . for judicial review," the situation has not improved. Indeed, the Commission's processing delays are such that, while a broadcaster may avoid paying a forfeiture due to the expiration of the statute of limitations for enforcing a fine, that eventuality would also mean that it could *never* obtain review by a court of the FCC's indecency determination.

Thus, the Commission may assess a forfeiture under Section 503(b) (4) of the Communications Act[65] after a licensee has had an opportunity to respond to a notice of apparent liability. If the licensee does not pay the forfeiture, it may be recovered after trial *de novo* in a civil suit brought by the Department of Justice in federal district court.[66] As a practical matter, a licensee can obtain judicial review of a Commission indecency determination only in the context of such a court action to enforce a Commission forfeiture order.[67]

The consequences of Commission processing delays for this statutory scheme are illustrated by the proceedings initiated by the Commission against ABC owned and affiliated stations concerning the February 25, 2003 episode of *NYPD Blue*, which aired at 9 pm in the Central and Mountain Time Zones, and included a scene that showed a woman's nude buttocks for seven seconds and the side of her breast

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65 47 USC § 503(b) (4).

66 47 USC § 504.

67 Section 503(b) (3) of the Act provides an alternate route for enforcement of a forfeiture, but in practice it is not used by the Commission. Under Section 503(b), a forfeiture may be imposed after a hearing before an administrative law judge, whose determination is reviewable in the Court of Appeals pursuant to 47 USC § 402. Under this provision, the forfeiture may be also enforced in U.S. District Court, but in such an action the validity of the final order imposing the penalty is not subject to review. *See*, 47 USC § 503(b) (3) (B).

for a moment. In the scene, the woman is about to take a shower when a young boy, playing the son of her boyfriend, unexpectedly enters the bathroom and a moment of awkwardness ensues. Having received complaints about the program (one assumes shortly after the broadcast), the Enforcement Bureau, almost a year later, sent ABC a Letter of Inquiry on February 4, 2004, to which ABC responded on February 17, 2004.[68]

Almost four years later, on January 25, 2008, the Commission issued a notice of apparent liability.[69] ABC and many of its affiliates filed oppositions to the NAL on February 11, 2008.[70] On February 19, 2008, *one week* before the running of the statute of limitations, the Commission released its forfeiture order. The United States failed to file an enforcement action within that time period, and the statute consequently ran.[71]

From one perspective, this was a happy result for ABC and its affiliates. On this basis alone, and even without the court decisions that ultimately vacated the Commission's forfeiture order, they would have been spared paying the $27,500 per-station fine that the FCC had assessed. Moreover, since payment could not be enforced, the forfeiture order effectively became a nullity for all purposes.[72] But, most emphatically, this is not a case of "no harm, no foul."

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68 *See generally, In the Matter of Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue," Forfeiture Order*, 23 FCC Rcd 3147 (2008), *vacated and remanded sub nom. FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307 (2012).

69 *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) (subsequent history omitted).

70 *Id.* at Appendix B.

71 *See,* 28 USC § 2462 (action for the enforcement "of any civil fine, penalty, or forfeiture . . . shall not be entertained unless commenced within five years from the date when the claim first accrued"); *ACT, supra,* 59 F.3d at 1254 ("Although the issue has never been litigated, we assume that the general five-year period of limitations on forfeiture proceedings . . . would effectively prevent the Government from filing a civil action more than five years after the indecent material was aired." (Ginsburg, J.).

72 Thus, 47 USC § 504(c) provides:

> In any case where the Commission issues a [NAL] looking toward the imposition of a forfeiture under this chapter, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has

Thus ABC and its affiliates never had – and given the grounds of the Supreme Court's decision in *Fox Television Stations* never will have – an opportunity for judicial review of their contentions that the FCC's finding of indecency was erroneous and indeed unconstitutional. In making future editorial decisions, therefore, they – and other broadcasters – will have to either conform to the Commission's view of what the indecency statute proscribes, or risk new NALs assessing millions in fines. This sort of regulation by uncertainty and intimidation is not permitted by the First Amendment. *See, Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, (1963); *Freedman v. Maryland,* 380 U.S. 51, 58-59 (1965) ("only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression."). And the same holds true, although to a lesser extent, when the Commission does not issue an NAL, but allows indecency complaints to sit in licensee files for years without action.

The Commission's procedures for dealing with indecency complaints are in urgent need of reform. What is required is simple: expeditious, written decisions, dismissing or sustaining complaints so that licensees will know what the Commission believes is required of them, and have the opportunity to seek judicial review where appropriate. The adoption of a substantive standard along the lines we have suggested, which will allow for the summary dismissal of many complaints, would help in meeting this standard. In any case, however it should – it must – be achievable. As the *ACT* court observed:

> Certainly nothing in the statutes or regulations prevents the Commission from issuing a NAL, imposing a forfeiture, and if need be referring a case to the Department of Justice all within a period of time short enough virtually to eliminate any concern with delay. The whole course could probably be run in most cases within, say, 90 days. No case of this type is very complex; each turns simply upon whether a certain broadcast was indecent. Indeed, under the Commission's own internal guidelines, after a broadcaster has had 30 days to respond to the NAL, the target for imposing a forfeiture is only 60 more days. If the FCC met this goal and then allowed the broadcaster to stipulate that it will not pay unless ordered by a district court to

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been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.

> do so, then judicial review could begin almost immediately. . . . [W]e are aware of no reason why the Commission could not, in principle, act with such dispatch. Reducing delay would also cabin the Commission's opportunity to rely upon its own unreviewed forfeiture decisions in setting standards of decency, thereby reducing the tendency for one unconstitutional decision to beget others.[73]

In this sensitive First Amendment area, expeditious and transparent decision-making is the least that should be required.

CONCLUSION

Recognizing that the FCC has no authority to instruct the Congress and the courts on constitutional law, we do not in these comments ask the Commission to wrestle with the ultimate issue of whether indecency enforcement against broadcast, but not cable, television is compatible with the First Amendment in today's media landscape. We do suggest that the Commission consider these issues in crafting the particulars of its indecency enforcement regime. Doing so will not only limit its intrusion on the First Amendment rights of broadcasters, but will best serve the congressional purpose of preserving some area for FCC regulation of constitutionally-protected, non-obscene, but "indecent" speech in the broadcast media, by ensuring that any ultimate Supreme Court decision on the issue will be made on the most defensible facts.

The Commission can realize these ends by returning to the policy it followed for more than a quarter century concerning "fleeting" material, and by a more restrained application of the criteria for indecency determinations that it articulated in its *Industry Guidance*. It need not be concerned that doing so will make of broadcast television some sort of red-light district. That has not happened with respect to the post-10 pm "safe harbor," and it will not happen in daytime, or prime time, if the Commission

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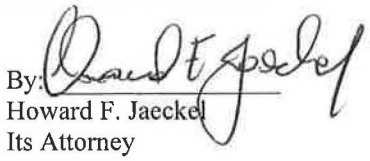
[73] *ACT, supra,* 59 F.3d at 1259-60.

rationalizes its indecency policies.

Respectfully submitted,

CBS CORPORATION



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