

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

In the Matter of  
FCC Seeks Comment on Adopting ) GN Docket No. 13-86  
Egregious Cases Policy )

#### REPLY COMMENTS OF MORALITY IN MEDIA, INC.

Morality in Media hereby submits comments to rebut those of the broadcast TV networks and their supporters submitted in response to FCC proposed indecency enforcement policy outlined in Docket 13-86.

The sum and substance of comments by the broadcast TV networks and their supporters, National Association of Broadcasters, etc. is that the two most recent U. S. Supreme Court decisions on decency, FCC v. Fox TV Stations, Inc., 556 U.S. 502, (2009) Fox I,? and FCC v. Fox TV Stations, Inc., 132 S. Ct. 2307 (2012) ?Fox II,? should be re-litigated. Else why would these entities make the same arguments that failed to carry sway with the U. S. Supreme Court in these two decisions?

In its comments to the Commission, Fox TV complains that enforcing decency standards on TV is contrary to the First Amendment and unconstitutionally vague. If that were the case, Fox would have had much to celebrate in its two High Court namesakes. Yet the Fox II Court heard these same arguments but refused to overturn the key court decision upholding the constitutionality of decency enforcement, FCC v. Pacifica Foundation, 438 U.S. 726 (1978). In its recent comments to the Commission, Fox TV says FCC v. Pacifica Foundation is ?built on sand.? If so, why was Fox II decided with by unanimous decision?

Comments from CBS differed only slightly from those of Fox TV. Still it makes clear that the U. S. Supreme Court reading of the Constitution is not in sync with its creative department. CBS urges that its artistic judgments about what is appropriate to dump into or homes should not be second-guessed. It pretends to not understand the term ?indecency,? that current FCC enforcement policy on indecency is ?unintelligible.? To become educated perhaps the lawyers at CBS should read through the more than 100,000 comments in of the American public filed in GN Docket No. 13-86 opposing more indecency and profanity on TV and radio.

## RIGHT TO DECENCY

The American public has a right to decency on broadcast TV and radio. This is a right continually undermined by TV networks and by the lack of enforcement of decency standards by the FCC itself.

The U. S. Supreme Court decision on broadcast indecency in *FCC v. Fox Television, Inc.*, (June 21, 2012) (*Fox II*), again settled the debate on whether TV networks have a right to distribute indecent material into our homes without our consent. The U. S. Congress prohibited such activity and the high Court first upheld that prohibition decades ago. To obtain their licenses to broadcast, networks pledge to act in the "public interest," but for years, they have abandoned that pledge to promote their own morbid interest in indecency.

Even a modest survey of the Founding Fathers' understanding of liberty reveals that liberty simply does not, and cannot, exist without moral restraint. George Washington knew this truth: "Religion and morality are the essential pillars of civil society." As did John Adams, who explained, "[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion . . . Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." Finally, Benjamin Rush best summarizes this essential truth: "Without virtue there can be no liberty."

Thus, the regulation of indecency on broadcast media sits well with our Founder's notions of free speech. They did not approve the First Amendment as a free-for-all speech protection clause. U.S. Supreme Court Justice Frank Murphy clearly explained this in the seminal case, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942):

[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Thus, while the First Amendment protects offensive and indecent speech at times, the amendment's application differs according to the situation. Speech rights are often bumping up against other rights, as well as governmental interests, that may, or may not, take precedent. When there is friction, an analysis must take place. Harvard Professor and First Amendment scholar, Zechariah Chafee, Jr., explained:

[Punishing indecency and obscenity] is a very different matter from punishing words because they express ideas thought to cause future danger to the state . . . [P]roperly limited, they fall outside the protection of the free speech clause . . . [P]rofanity [and] indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step towards truth, which is clearly outweighed by the social interest in order, morality, the training of the young and the peace of mind of those who hear and see.

Indecent and offensive speech does not get the First Amendment's full protection in all contexts when more important societal interests take precedent over the vulgar. For instance, in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the reigning Supreme Court case for indecency in broadcast media, the Court held that the "right to be left alone" in the sanctity and privacy of the home outweighs a broadcaster's desire to air indecent content. This "right to be left alone" was called, "the most comprehensive of rights and the right most valued by civilized men," by Supreme Court Justice Brandeis in 1928. The Supreme Court declined the invitation to overturn this right in *Fox*.

The more than 100,000 negative responses to the FCC's April 1, 2013 proposed changes to its decency enforcement standard as well as the 1.5 million complaints, and counting, piled up in the FCC's mailbox are evidence that many Americans do not want indecent content coming into their homes. To force the citizens of this country to put up with vulgar and indecent content in their homes and against their will, especially when degenerate and immature content can be found in endless other media outlets, is no one's constitutional right. Vice should not take precedent over virtue in the land of liberty.

Those who oppose indecency enforcement often incorrectly cite Supreme Court cases, *Reno v. ACLU* and *US v. Playboy*, in support of their position. However, in *Reno*, a case about Internet speech rather than broadcast speech, the Court merely held that the government could not criminalize "indecent transmission[s]" and "patently offensive display[s]" when it failed to define those terms, implying that if the terms were defined to satisfy the "fair notice" doctrine, the government's interest in protecting children and the moral fiber of the people could take priority. The Court also noted that a broad, sweeping criminalization of indecent content would not be acceptable as long as a less-restrictive means of achieving the same goals could reasonably be employed. This was also the same basic holding of *Playboy*, a cable television speech case. Thus, neither *Reno* nor *Playboy* supports the claim that indecent speech is a cove of protection from government regulation within the First Amendment.

Chief Justice Roberts' concurrence in the Supreme Court's denial of certiorari for the Janet Jackson "wardrobe malfunction" case (*FCC v. CBS Corporation*, at 2 (June 29, 2012)) further solidifies the

Court's approval and support of broadcast media regulation. Chief Justice Roberts stated, "It is now clear that the brevity of an indecent broadcast—be it word or image—cannot immunize it from FCC censure." This is in-line with long-held Supreme Court jurisprudence, as Justice Souter pointed out in *Hill v. Colorado* in 2000:

Concern about employing the power of the State to suppress discussion of a subject or a point of view is not, however, raised in the same way when a law addresses not the content of speech but the circumstances of its delivery. The right to express unpopular views does not necessarily immunize a speaker from liability for resorting to otherwise impermissible behavior meant to shock members of the speaker's audience, or to guarantee their attention. Unless regulation limited to the details of a speaker's delivery results in removing a subject or viewpoint from effective discourse (or otherwise fails to advance a significant public interest in a way narrowly fitted to that objective), a reasonable restriction intended to affect only the time, place, or manner of speaking is perfectly valid.

The federal government's power to regulate indecent speech in broadcast media is reasonable. It is only regulating broadcast media, not cable, satellite, or the Internet, and the government does not have the authority to edit material beforehand, but can only assert criminal fines after the fact.

Do we really want a society where "anything goes" in our own homes, without our control? The number of people choosing broadcast television over cable is rising. Recent data released in 2012 from a study by GfK Media revealed that the number of Americans relying solely on broadcast television rose from 46 million to 54 million in the prior year. While that choice is influenced by multiple factors, including the current downturn in the economy, decency of content is also a large factor - especially for parents. It's quite clear that many millions of American citizens are frustrated with the current state of broadcast content, concerned for not only their children, but for their own ability to watch television without indecent assault.

We do, in fact, have a right to be free from the harms and offenses of indecency in our homes. Just as we do not expect someone to be standing in our living rooms when we get home, shouting the f-word or taking their clothes off, Americans should not be burdened with wondering whether or not that same person will be on their television screen when they turn on the TV. Some television content should be available and acceptable to all, including families, but if the government cannot regulate indecent content on broadcast television, it will not be. It is not the American people's problem that broadcast networks lack the imagination and creativity to successfully compete with cable without displaying nudity, sex and profanity.

## CONCLUSION

The reasonable and justified "right to decency" is as real as the 1.5 million complaints from the

American people and the long history of jurisprudence that supports it. Since a right is only so good as its enforcement, the FCC must begin aggressively enforcing the federal decency law and stop the foolish exercise of undermining it with proposals that would allow more indecency and profanity.

Respectfully submitted,

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