IN THE UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

06-1760-ag

06-2750-ag (Con), 06- 5358-ag (Con)

FOX TELEVISION STATIONS, INC., CBS BROADCASTING INC., WLS TELEVISION, INC., KTRK TELEVISION, INC., KMBC HEARST-ARGYLE TELEVISION, INC., ABC INC.
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA
Respondents,

NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., NBC TELEVISION AFFILLIATES, FBC TELEVISION AFFILIATES ASSOCIATION, CBS TELEVISION NETWORK AFFILIATES, CENTER FOR THE CREATIVE COMMUNITY, INC., DOING BUSINESS AS CENTER FOR CREATIVE VOICES IN MEDIA, INC., ABC TELEVISION AFFILIATES ASSOCIATION,
Intervenors.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES

STATEMENT OF JURISDICTION

The Federal Communications Commission had jurisdiction under 47 U.S.C. § 503 and 5 U.S.C. § 554(e). Fox filed a timely petition for review, and this Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATEMENT OF THE ISSUES

1. Whether the Commission properly determined that Nicole Richie's comments during the prime-time broadcast of the 2003 *Billboard Music Awards* – "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." – were indecent and profane.

2. Whether the Commission properly determined that Cher's comments during the prime-time broadcast of the 2002 *Billboard Music Awards* – "I've also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck 'em." – were indecent and profane.

STATEMENT OF THE CASE

While receiving an award during the Fox Television Network's prime-time broadcast of the 2002 *Billboard Music Awards*, Cher, the entertainer, made the following statement: "I've also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck 'em." The next year, while presenting an award during Fox's prime-time broadcast of the same awards show, Nicole Richie, a star on Fox's program *The Simple Life*, asked, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." The Commission concluded that these comments were indecent and profane as broadcast in violation of federal law, but it imposed no sanction. Fox petitioned for review.

STATEMENT OF FACTS

I. The Communications Act and Regulation of Broadcast Indecency

The Communications Act of 1934 is designed "to maintain the control of the United States over all the channels of radio transmission" by "provid[ing] for the use of such channels" under licenses that are granted "for limited periods of time," 47 U.S.C. § 301, and that are issued and renewed only upon a finding by the FCC that "the public interest, convenience, and necessity" will thereby be served. 47 U.S.C. §§ 309(a), (k)(1)(A). A broadcast licensee is "granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (quotation marks omitted). In this respect, "[t]he licensee is in many ways a 'trustee' for the public in the operation of his channel." *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 478 (2d Cir. 1971).

Among a licensee's public-interest obligations is its duty not to transmit indecent or profane material during times of the day when children are likely to be in the audience. *See Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 4 FCC Rcd 8358 ¶ 2 (1989). To enforce this obligation, the Communications Act of 1934 included a specific prohibition on the broadcast of "any obscene, indecent, or profane language." Pub. L. No. 73-416, § 326, 48 Stat. 1091, now codified in relevant part at 18 U.S.C. § 1464.

A. *Pacifica*

In *FCC v. Pacifica Foundation*, the Supreme Court upheld the constitutionality of the Commission's interpretation and enforcement of the prohibition against broadcast indecency. 438 U.S. 726 (1978). That case involved a New York City radio station's afternoon broadcast of a monologue by the comedian George Carlin containing a series of highly vulgar words. *See id.* at 729-30. The Commission had concluded that the program violated Section 1464: the agency explained that while not obscene, the broadcast was indecent in that it "'describe[d], in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.'" *Citizen's Complaint Against Pacifica Found. Station WBAI (FM)*, 56 FCC 2d 94, 98 (1975).

The Supreme Court held that regulating the broadcast of indecency was consistent with the First Amendment, noting that "each medium of expression presents special First Amendment problems" and that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica,* 438 U.S. at 748. The Court concluded that the government's interest in safeguarding "the well-being of its youth and in supporting parents' claim to authority in their own household," combined with the

"ease with which children may obtain access to broadcast material," justified the regulation of broadcast indecency. *See id.* at 749-50 (quotation marks omitted).

In addition to affirming the Commission's general authority, the Court upheld its finding that Carlin's monologue was indecent. In reaching this conclusion, the Court rebuffed the broadcasters' attempt to broaden its review to include abstract questions and the Commission's application of its indecency policies in other proceedings. *See id.* at 734-35. Instead, the Court reviewed only the Commission's determination that broadcast of the Carlin monologue was indecent and found "no basis for disagreeing with [the agency's] conclusion that indecent language was used in this broadcast." *Id.* at 741. The Court also held that the Communications Act's prohibition on "censorship" was "inapplicable" to the simultaneously enacted prohibition on indecency. *Id.* at 738 (citing 47 U.S.C. § 326).

B. Subsequent Regulatory Developments

For a number of years after *Pacifica*, the Commission limited the exercise of its authority to regulate indecent broadcasts to the seven words used in the Carlin monologue. *See New Indecency Enforcement Standards to Be Applied to All Broadcast & Amateur Radio Licensees*, 2 FCC Rcd 2726, 2726 (1987). In a series of orders released in 1987, however, the Commission found that this limited enforcement policy was "unduly narrow as a matter of law and inconsistent with

our enforcement responsibilities under Section 1464." *Infinity Broad. Corp.*, 3 FCC Rcd 930 ¶ 5 (1987) ("*Infinity Reconsideration Order*"). The Commission explained that the prior policy's exclusive focus "on specific words . . . made neither legal nor policy sense," since it meant that "material that portrayed sexual or excretory activities or organs in as patently offensive a manner as the earlier Carlin monologue – and, consequently, of concern with respect to its exposure to children – would have been permissible to broadcast simply because it avoided certain words." *Id*. The Commission consequently chose to abandon its exclusive focus on the seven words and to apply instead the generic definition of indecency upheld in *Pacifica*, *i.e.*, "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Id.* ¶ 2.

The D.C. Circuit upheld the Commission's decision to move beyond its narrow, post-*Pacifica* enforcement policies. *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1338 (D.C. Cir. 1988) (R.B. Ginsburg, J.) ("*ACT I*") 1991). "Short of the thesis that *only* the seven dirty words are properly designated indecent . . . some more expansive definition must be attempted," the court concluded, and "[n]o reasonable formulation tighter than the one the Commission has announced has been suggested." *Id.*

In its 1987 orders, the Commission also reiterated its prior suggestion that it would permit indecent broadcasts at those hours of the night "when it is reasonable to expect that it is late enough to ensure that the risk of children in the audience is minimized." *See Infinity Reconsideration Order*, 3 FCC Rcd at 937 ¶ 27 n.47. After an attempt by Congress to require the Commission to enforce the broadcast indecency restrictions "on a 24 hour per day basis" was struck down as unconstitutional, *see Action for Children's Television v. FCC*, 932 F.2d 1504, 1509 (D.C. Cir. 1991) ("*ACT II*") (invalidating Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1998)), Congress directed the Commission to promulgate regulations "to prohibit the broadcast[] of indecent programming . . . between 6 a.m. and 10 p.m." by "any public radio station that goes off the air at or before 12 midnight," and "between 6 a.m. and 12 midnight" for all other radio and television stations. *See* Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16, 106 Stat. 949, 953 (1992), 47 U.S.C. § 303 note.

Sitting en banc, the D.C. Circuit upheld the Commission's power to regulate broadcast indecency. *See Action for Children's Television v. FCC*, 58 F.3d 654, 659-67 (D.C. Cir. 1995) (en banc) ("*ACT III*"). Emphasizing "the unique context of the broadcast medium," *id*. at 660, the court recognized two "independent" compelling government interests in regulating broadcast indecency: (i) "supporting parental supervision of what children see and hear on the public airwaves" and (ii)

"the Government's own interest in the well-being of minors." *Id.* at 661-63. The court held that channeling indecent speech to late-night hours was the least restrictive means of furthering these interests. *See id.* at 664-67. Given the "substantially smaller number of children in the audience" during late-night hours, limiting broadcast indecency to those times "reduces children's exposure . . . to a significant degree." *Id.* at 667. At the same time, time-channeling did not "unnecessarily interfere with the ability of adults to watch or listen to such materials" because a large number of adults view television late at night and because they have "many alternative ways of satisfying their tastes at other times." *Id.*

Had it not been for Congress's differential treatment between public stations that go off the air at or before midnight and all other broadcasters, the court would have affirmed the midnight safe harbor. *See ACT III*, 58 F.3d at 664-67. But because Congress did not explain the basis for that distinction, the Court held the narrower safe harbor could not be sustained. *Id.* at 669. The court therefore directed the Commission to "limit its ban on the broadcasting of indecent programs to the period from 6:00 a.m. to 10:00 p.m." *See id*. at 669-70. The Commission accordingly promulgated its current regulation on broadcast indecency, which forbids any "licensee of a radio or television broadcast station" to broadcast "any

material which is indecent" during the hours "between 6 a.m. and 10 p.m." 47 C.F.R. § 73.3999(b).

C. 2001 *Industry Guidance*

The Commission subsequently issued a policy statement "to provide guidance to the broadcast industry regarding [the Commission's] case law interpreting 18 U.S.C. § 1464 and [its] enforcement policies with respect to broadcast indecency." *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999 (2001) ("*Industry Guidance*"). The policy statement laid out in detail the Commission's analytical approach and emphasized that the agency's indecency decisions rested on "two fundamental determinations." *Id.* at 8002 ¶ 7. First, the Commission explained, "the material alleged to be indecent must fall within the subject matter scope of our indecency definition – that is, the material must describe or depict sexual or excretory organs or activities." *Id.* Second, "the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium." *Id.* at 8002 ¶ 8.

The Commission explained that the inquiry into whether material is "patently offensive" requires consideration of its "full context" and is therefore "highly fact-specific." *Id.* at 8002-03 ¶ 9. Nonetheless, the Commission identified

three "principal factors" that were "significant" to the agency's determination whether material is patently offensive:

> (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*.

Id. at 8003 ¶ 10. After listing these factors, the Commission stressed that "[e]ach indecency case presents its own particular mix of these, and possibly other, factors, which must be balanced to ultimately determine whether the material is patently offensive and therefore indecent." *Id.* For example, the Commission noted that "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," but it cautioned that "even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness." *Id.* at 8008-09 ¶¶ 17, 19.

II. Proceedings Below

A. Broadcasts at Issue

(1) The 2002 *Billboard Music Awards*

The singer and actress Cher received an "Artist Achievement Award" at the December 9, 2002 *Billboard Music Awards* show. *See Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 & Mar. 8, 2005*, FCC 06-166, ¶ 56 (Nov. 6, 2006) ("*Remand Order*") (SPA-77). More than 9 million people watched the broadcast, including more than 2.6 million children. *See id.* ¶ 59. When she accepted the award, she said:

> I've had unbelievable support in my life and I've worked really hard. I've had great people to work with. Oh, yeah, you know what? I've also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck 'em. I still have a job and they don't.

Id. ¶ 56. Fox broadcast the *Billboard Music Awards* show, including these remarks by Cher, between 8 p.m. and 10 p.m. Eastern Standard Time. *See id.* ¶ 55. The network used a five-second delay for this broadcast and had a single employee monitoring the show and operating a "delay button" to edit out objectionable material. *Id.* ¶ 32. According to Fox, the employee failed to edit Cher's comment, instead blocking dialogue that came afterwards. *See id.* ¶ 34. The Commission subsequently received complaints about the broadcast. *See id.* ¶ 55.

(2) The 2003 *Billboard Music Awards*

On December 10, 2003, Fox stations again broadcast the *Billboard Music Awards*. The broadcast attracted nearly 10 million viewers, including more than 2.3 million children. *See id.* ¶ 18. Fox used a five-second audio delay for this broadcast and had a single employee in charge of deleting objectionable material – the same system that had failed the year before to block broadcast of Cher's use of the "F-Word." *Id.* ¶ 34.

Paris Hilton and Nicole Richie, stars of the Fox show *The Simple Life*, were selected to present an award. *See Remand Order* ¶ 13. *The Simple Life* was a "reality" show in which Hilton and Richie left their pampered lives in Beverly Hills to live on an Arkansas farm for 30 days. *Id.* ¶ 13 n.27.

Though Richie had a known "penchant for 'bad language,'" *id.*, Fox did not admonish her to avoid inappropriate words or inform her of its broadcast standards before putting her on the air during a live broadcast. *See id.* ¶ 33. On the contrary, Fox provided her with a script that included euphemisms that could easily be replaced with vulgar language. According to the script, Hilton was supposed to say to Richie: "It feels so good to be standing here tonight." (J.A. 531). Richie was supposed to answer: "Yeah – instead of standing in mud and pig crap." *Remand Order* ¶ 31. Richie was then supposed to say: "Have you ever tried to get cow manure out of a Prada purse? It's not so freaking simple." *Id.*

Hilton and Richie modified these lines; the following dialogue was therefore broadcast by Fox stations in the Eastern and Central time zones:

Paris Hilton:	Now Nicole, remember, this is a live show, watch the bad language.
Nicole Richie:	Okay, God.
Paris Hilton:	It feels so good to be standing here tonight.
Nicole Richie:	Yeah, instead of standing in mud and [audio blocked]. Why do they even call it "The Simple Life?" Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.

Id. ¶ 13. As this transcript indicates, Fox obscured the audio when Richie uttered the first vulgarism, but not when she uttered the next two. (The program was aired on a delayed basis in the Mountain and Pacific time zones; Fox deleted all the vulgar language from those broadcasts. *See id.* ¶ 32.)

Both Fox stations and the Commission received numerous complaints about this broadcast. For example, one mother reported that she was watching the show with her children and that after Richie's comment, her son "asked me Mommy what is fucking?" J.A. 913 (Complaint of R. Fench); *see also* J.A. 916 (Complaint of C. Collins-Reyes (mother reporting that her son asked her "what f**king meant" after Richie's statement)). As another mother told the Commission, "[i]t is hard enough to teach your children manners and decent behavior without showing

young adults on the TV using [expletives]." J.A. 917 (Complaint of A. Holmes). A teacher echoed these sentiments:

> I was horrified to learn that some of the young children in the school that I teach in viewed the program. Several of these children are among those children who have social problems and are often in trouble. Is this what our children have to look toward for example on how to live? Would you want your children or grandchildren to mimic these entertainers ?????

Remand Order ¶ 18 n. 48.

B. ***Omnibus Order***

On March 15, 2006, the Commission issued an order addressing indecency complaints regarding the broadcast of the 2002 and 2003 *Billboard Music Awards*, as well as a number of other television programs broadcast between 2002 and 2005. *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664 (2006) ("*Omnibus Order*") (SPA-1).

In the first part of the order, the Commission issued six notices of apparent liability for forfeiture in which it concluded that licensees had broadcast programming that was apparently indecent, profane, or both. *See id.* ¶¶ 22-99. In each of those cases, the relevant licensee is opposing imposition of liability, and those proceedings remain pending at the Commission. In the third part of the

order, the Commission concluded that numerous television programs that had been subject to complaints were *not* indecent or profane. *See id.* ¶¶ 146-232. And in the middle part of the order – Section III.B – the Commission concluded that the Fox broadcasts of the 2002 and 2003 *Billboard Music Awards* – as well as the broadcast by ABC affiliates of eight episodes of *NYPD Blue* and a CBS station's broadcast of *The Early Show* – were indecent and profane, but it proposed no forfeitures because the Commission's decisions at the time of these broadcasts did not make clear they would be actionable. *See id.* ¶¶ 100-145.

CBS, Fox, KMBC Hearst-Argyle Television (licensee of an ABC affiliate), and ABC filed petitions for review of Section III.B of the *Omnibus Order*; NBC, various affiliate organizations, and the Center for Creative Voices in Media intervened in support. After these petitions were filed, several parties complained that the Commission had not given them an appropriate opportunity to defend themselves before issuing its order. *See Remand Order* ¶ 9. Taking account of these concerns, the government asked for – and this Court granted – a remand of the case so that the Commission could solicit the views of the relevant licensees (and others) and issue a new decision on reconsideration. *See Fox Television Stations, Inc. v. FCC*, 06-1760-ag (2d Cir. Sept. 7, 2006).

C. Proceedings on Remand

After the remand, the Commission released a Public Notice soliciting the views of all interested parties. (J.A. 13). It also issued letters of inquiry to the networks regarding the broadcasts at issue and their practices when broadcasting live programming. (J.A. 689-912). After receiving submissions from all parties to this litigation, the Commission issued its order on reconsideration. That order vacated Section III.B of the *Omnibus Order* in its entirety and replaced it with new decisions. *See Remand Order* ¶ 11.

In two of the four cases, the Commission overturned its findings that the programs were indecent and profane.

The Early Show. The December 13, 2004 broadcast of *The Early Show*, a CBS morning news program, reported on the CBS program *Survivor: Vanuatu*. *Id.* ¶ 67. One of the *Early Show*'s hosts interviewed a *Survivor* contestant who referred to a fellow contestant as a "bullshitter." *Id.* In the *Omnibus Order*, the Commission found the broadcast indecent and profane. *Omnibus Order* ¶¶ 137-45. But after considering the arguments of CBS and other parties on remand that the complained-of statement was not indecent or profane in the context of a "news interview," the Commission reversed its conclusion. *See Remand Order* ¶¶ 68-73.

In doing so, the Commission explained that a "long line of Commission precedent" supported the exercise of great caution when addressing indecency

complaints involving news and public-affairs programming. *See id.* ¶ 70. While noting that there was no outright "news exception" to indecency regulation, the Commission said that "the important First Amendment interests at stake" and "the crucial role that context plays in our indecency determinations" counseled that it proceed with "utmost restraint" in this sensitive area. *Id.* ¶ 71. The Commission therefore concluded that the complained-of material, while "coarse" and objectionable to many viewers, was not actionably indecent or profane. *Id.* ¶ 73.

***NYPD Blue*.** The Commission received complaints regarding several *NYPD Blue* episodes broadcast on KMBC-TV in Kansas City, Missouri. *See id.* ¶ 74. In its response to the post-remand letter of inquiry, Hearst (KMBC's licensee), joined by ABC and the ABC affiliates association, argued that the complaints were insufficient to trigger an indecency inquiry under the Commission's enforcement policies because none of the complaints was filed by any person residing within KMBC's service area. *Id.* ¶ 75. After considering Hearst's arguments, the Commission agreed and dismissed the complaints. *Id.* ¶ 77.

The Commission, however, adhered to its prior conclusions that the two *Billboard Music Awards* broadcasts were indecent and profane, but again proposed no sanctions.

2003 *Billboard Music Awards*. The Commission reaffirmed – and Fox did not contest – that Richie's comment – "Have you ever tried to get cow shit out of a

Prada purse? It's not so fucking simple." – fell within the scope of the Commission's indecency definition since "cow shit" referred to excrement. *Id.* ¶ 16. The Commission also concluded that Richie's use of the "F-Word" fell within the definition's subject-matter scope because given that word's "core meaning," any use of it "has a sexual connotation." *Id.* The Commission therefore proceeded to consider whether the comments were patently offensive as measured by contemporary community standards for the broadcast medium, and it concluded that they were. *See id.*

The Commission found that the first and third factors in its contextual analysis – the explicitness of the material and whether it was shocking – clearly weighed in favor of an indecency finding. *Id.* ¶ 17. It then rejected Fox's argument that the supposedly "fleeting and isolated" nature of Richie's remarks made them non-actionable. *See id.* ¶¶ 19 - 27. The Commission acknowledged that before a 2004 change of policy, it had advised licensees that "'[i]f a complaint focuses solely on the use of expletives, we believe that . . . deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency.'" *Id.* ¶ 20 (quoting *Pacifica Foundation, Inc.*, 2 FCC Rcd 2698, 2699 (1987)). But the Commission found that even under that standard the comment would have been actionable. *See id.* ¶ 22. The Commission explained that Richie's "offensive language was 'repeated' in that it included not one but two extremely graphic and

offensive words." *Id*. ¶ 22. Moreover, the Commission found, "there seems to be little doubt that Richie's comments were deliberately uttered and that she planned her comments in advance." *Id*. The Commission also noted that Richie's comments did not consist solely of "expletives" in the sense in which prior decisions had used that term. *Id.* ¶¶ 20, 22. Instead, because Richie used the "S-Word" to describe excrement, the Commission concluded that "'repetitive use' was not required under such circumstances" for her comments to have been actionably indecent even prior to its 2004 change of policy. *Id.* ¶ 22 (*quoting Pacifica Foundation, Inc.*, 2 FCC Rcd 2698, 2699 (1987)).

In addition, the Commission concluded that Richie's remarks were actionable under the change in policy it announced in 2004. *See id.* ¶ 23 (citing *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975, 4980 ¶ 12 (2004) ("*Golden Globe Order*"). The Commission reaffirmed its decision in that order to disavow prior statements that expletives had to be repeated to be actionable but that "descriptions or depictions of sexual or excretory functions" did not. *See id.*; *Golden Globe Order*, 19 FCC Rcd at 4980, ¶ 12. The Commission explained that any strict dichotomy between "expletives" and "descriptions or depictions of sexual or excretory functions" is artificial; that it is often difficult to make the distinction in practice; and that categorically requiring repeated use of expletives in

order to find material indecent is inconsistent with the FCC's "general approach to indecency enforcement, which stresses the critical nature of context." *Remand Order* ¶ 23.

The Commission also rejected Fox's contention that it would be inequitable to hold it responsible for Richie's comments since the awards show was broadcast live and her remarks were not scripted. *See id.* ¶ 31. The Commission noted that Fox had used the very same delay and editing system – without any modifications or improvements – that had failed to edit out Cher's vulgar language during the same award show the year before. *See id.* ¶ 34. The Commission also noted that the script – which called for Richie to use euphemisms such as "pig crap," "cow manure," and "freaking" – was easily modified to include the words Richie chose. *See id.* ¶ 33. This script posed an undue risk, the Commission explained, particularly given Richie's known "penchant for 'bad language.'" *Id.* ¶ 13 n.27.

The Commission also found Richie's remarks to be "profane" in violation of 18 U.S.C. § 1464. *See id.* ¶¶ 40-41. The Commission rejected the contention that "profane" as used in this statute was limited to blasphemy, noting that the word "has long carried" some "non-religious meanings." *Id.* ¶ 41. Among those meanings was the use of "profane" to mean language "'so grossly offensive to members of the public who actually hear it as to amount to a nuisance.'" *Id.* ¶ 41 n.120 (quoting *Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972)). The

Commission concluded that in the context of these broadcasts both the "F-Word" and the "S-Word" were clearly "profane" in this sense of the word. *See id.* ¶ 40.

Finally, the Commission rejected the networks' constitutional arguments. First, it noted that both the Supreme Court (implicitly) and the D.C. Circuit (explicitly) had rejected vagueness challenges to the Commission's indecency definition. *See id.* ¶ 43 (citing *Pacifica*, 438 U.S. at 739, 741, *ACT I*, 852 F.2d at 1339, and *ACT III*, 58 F.3d at 659). Second, it explained why, contrary to the networks' contention, technological and marketplace developments have not undermined the basis for the relaxed level of First Amendment scrutiny of broadcast regulation articulated in *Pacifica*. *See id.* ¶¶ 46-52.

Despite its indecency and profanity findings, the Commission did not initiate forfeiture proceedings because it was acting under a limited remand from this Court. *See id.* ¶ 53. Since the Commission was proposing no forfeiture, it found it unnecessary to determine whether Fox's violation was "willful." *Id.* ¶ 54.

2002 *Billboard Music Awards*. For many of the same reasons, the Commission adhered to its indecency and profanity findings regarding Cher's utterance of the "F-Word" on the 2002 *Billboard Music Awards*. *See id.* ¶¶ 58-65. The Commission noted that Fox argued that it should not be held responsible for Cher's remarks because they were unscripted and because the delay system it was using at the time had not failed previously. *See id.* ¶ 64. The Commission found it

unnecessary to address these arguments, as well as whether Fox's violation of the statute and rule was "willful," because it determined that it would not be equitable to sanction Fox for a different reason: prior to the *Golden Globe Order*, it was "not apparent that Fox could be penalized for Cher's comment." *Id*. ¶ 60.

After the Commission issued its *Remand Order*, Fox filed a new petition for review. CBS and NBC intervened and filed briefs, but both their affiliate associations, which had intervened in the original proceedings in this Court, are no longer participating in the case. In addition, ABC, Hearst, and the ABC affiliate association have declined to participate in the post-remand case because the Commission reversed its indecency determination as to the program they broadcast.[1]

SUMMARY OF ARGUMENT

In the *Remand Order*, the FCC examined two Fox television broadcasts – the 2002 and 2003 *Billboard Music Awards* – and properly found them to be indecent and profane. Fox offers no challenge to much of the Commission's analysis. It makes no effort to show that the statements at issue were consistent

[1] CBS's challenge to the original *Omnibus Order* is moot because the Commission vacated the portion of that order finding a CBS broadcast indecent. *See Remand Order* ¶ 11 (vacating Section III.B. of *Omnibus Order*), ¶¶ 67-73 (reversing indecency and profanity findings as to *The Early Show*). CBS therefore has no remaining basis to file a brief as a petitioner. *See* CBS Br. 2. Respondents do not object to CBS's participation as an intervenor.

with contemporary community standards for the broadcast medium. Nor does it offer any justification – such as artistic necessity – for the use of the "F-Word" and the "S-Word" by Nicole Richie and Cher.

Indeed, Fox has little to say about these broadcasts. Instead, both Fox and the intervenors seek to divert this Court's attention to unrelated issues raised by other FCC orders, many of which are not yet final. The Court should reject Fox's effort to change the subject. As in *Pacifica*, the Commission's order was issued in a specific context, and this order alone is before the Court. The Court lacks jurisdiction to give Fox an advisory opinion on issues that are not presented by the case before it.

To the extent it addresses the issues actually decided in the *Remand Order*, Fox contends that the Commission acted arbitrarily and capriciously by failing to explain a change in its policy with respect to isolated and fleeting expletives. In making this argument, Fox ignores those portions of the order that explicitly acknowledged the Commission's change in course and offered a detailed explanation for it. Fox also contends that the FCC has enforced the indecency prohibition inconsistently, but it cannot identify any similarly situated broadcast that the Commission has found not to be indecent. Fox's critique of the community-standards test fares no better, since the network makes no claim that the gratuitous broadcast of the "F-Word" and the "S-Word" during a nationally

televised prime-time awards show could be consistent with any understanding of community standards for the broadcast medium.

Fox presents two statutory arguments: that the Commission must make a finding of scienter before finding a broadcast indecent, and that "profane" utterances under Section 1464 are limited to blasphemy. But because the Commission imposed no sanction on Fox, it was not required to consider Fox's mental state. And the FCC appropriately adopted the Seventh Circuit's interpretation of "profane" – a construction that, unlike Fox's, makes the statute constitutional.

Finally, the *Remand Order* is consistent with the First Amendment. In *Pacifica*, the Supreme Court rejected constitutional challenges to Section 1464 and the FCC's indecency definition. *Pacifica* remains good law and is controlling here. Fox suggests that the Commission's definition of indecency is unconstitutionally vague. But *Pacifica* endorsed the very same definition, and in any event, Fox cannot raise a vagueness challenge here, since its broadcasts lie far from any zone of uncertainty that might exist at the margins of the indecency standard's application. Nor is Fox correct when it argues that the V-chip is a constitutionally required less-restrictive means of shielding children from broadcast indecency. Regulations of broadcasting are subject only to intermediate

scrutiny, which has no least-restrictive-means requirement. Moreover, the Commission amassed extensive evidence that the V-chip is ineffective.

STANDARD OF REVIEW

The Commission's interpretation of the federal broadcast indecency statutes is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (*Chevron* applies when agency's statutory interpretation results from "relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement" "with the effect of law"); *Pharmaceutical Res. & Mfrs. v. Thompson*, 362 F.3d 817, 821-22 & n.5 (D.C. Cir. 2004).

To the extent Fox challenges the reasonableness of the FCC's actions, the Court must affirm unless the agency's decisions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review is "narrow and particularly deferential," allowing reversal only when there has been a "'clear error of judgment.'" *Environmental Defense v. EPA*, 369 F.3d 193, 201 (2d Cir. 2004).

Finally, when evaluating First Amendment claims regarding broadcasting, the court "must afford great weight to the decisions of Congress and the experience of the Commission." *CBS, Inc. v. DNC*, 412 U.S. 94, 102 (1973).

ARGUMENT

I. THIS CASE INVOLVES JUDICIAL REVIEW OF TWO SPECIFIC AGENCY ADJUDICATIONS.

Though Fox and the intervenors attempt to deflect the Court's focus from the proceedings actually at issue here, this case involves only two FCC adjudications – that Fox's broadcasts of the 2002 and 2003 *Billboard Music Awards* were indecent and profane. Those adjudications, and those adjudications alone, are before the Court.

Tellingly, the networks spend virtually no effort defending Fox's broadcasts or arguing that the Commission erred in determining that they were indecent and profane. Indeed, Fox makes but a single reference in its 58-page brief to the specific comments made by Nicole Richie and Cher at the awards shows. *See* Fox Br. 16. Instead, it devotes its efforts to attacking non-final orders involving other parties, *see, e.g.*, Br. 29-30 (criticizing notice of apparent liability based on multiple expletives in broadcast of *The Blues: Godfathers and Sons*), and raising abstract claims regarding news and sports broadcasts that are far removed from the entertainment programming at issue here, *see* Br. at 48.

NBC and CBS take the same approach. Loath to mention the rulings actually before the Court, they instead criticize the Commission's investigation and initial treatment of a host of unrelated broadcasts. *See, e.g.*, NBC Br. 48-49 (complaining of Commission "inquir[ies]" regarding broadcast of Olympic

volleyball game, Talladega post-race interview, and college football game); CBS Br. 47 n.22 (discussing Commission's treatment of *Without a Trace* and *The Pursuit of D.B. Cooper*). CBS even goes so far as to challenge Commission dispositions in its favor. *See* CBS Br. 46 (criticizing Commission's conclusion that *The Early Show* was *not* indecent). Seeking to flee from the broadcasts at issue in this case, the networks ask this Court to reverse the *Remand Order* on the basis of other issues – presented in other cases – that the Commission has not finally resolved.

Pacifica forecloses the networks' proffered approach. *See FCC v. Pacifica Found.*, 438 U.S. 726, 734-35 (1978). In that case, the networks joined Pacifica in urging the Supreme Court to look beyond the "particular broadcast" at issue and to review instead the Commission's general policies and its application of those policies in other proceedings. *See* Brief for *Amici Curiae* American Broadcasting Companies, Inc., *et al.*, *Pacifica*, 438 U.S. 726 (No. 77-528), at 16, 17, 22, 55. The Court refused. The Commission's *Pacifica* order was "issued in a specific factual context," the Court explained, and it did not resolve issues "concerning possible action in other contexts." 438 U.S. at 734. Any "general statements" by the Commission did not "change the character of its order." *Id.*; *see also Town of Deerfield v. FCC*, 992 F.2d 420, 427 (2d Cir. 1993) ("The mere presence in the decision of general statements that might have applicability to controversies

between other persons does not change the character of an order from one that is essentially adjudicatory to one that is quasi-legislative.").

The *Pacifica* Court held that the principle that courts review "judgments, not statements in opinions" applies with "special force when the statements raise constitutional questions," because it is the "settled practice to avoid the unnecessary decision of such issues." 438 U.S. at 734. And it emphasized that "[h]owever appropriate it may be for an administrative agency to write broadly in an adjudicatory proceeding, federal courts have never been empowered to issue advisory opinions." *Id*. at 735; *accord Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *Marchi v. Board of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 478 (2d Cir. 1999) (declining to decide an "open-ended and indefinite [First Amendment] challenge" to policy that could be applied in a number of "highly fact-specific and, as of yet, hypothetical" situations).

In attempting to use this case as a springboard for mounting a wholesale assault on the federal broadcast indecency statute and regulations, the networks invite this Court to issue a series of advisory opinions on matters not before it. Under *Pacifica*, this Court must decline the invitation.

II. THE COMMISSION PROPERLY CONCLUDED THAT THE STATEMENTS BY NICOLE RICHIE AND CHER WERE INDECENT AND PROFANE.

In evaluating Fox's broadcast of statements by Nicole Richie and Cher, the Commission reasonably exercised its authority to regulate broadcast indecency, an authority specifically upheld by the Supreme Court in *Pacifica*. Fox makes little effort to show that its broadcasts were not indecent or profane under the Commission's analytical framework. Instead, Fox argues that the Commission has acted arbitrarily and capriciously and that its order is inconsistent with various statutes. Neither argument is persuasive.

A. The Commission Correctly Applied the Governing Statutes and Regulation in Evaluating the Broadcasts at Issue Here.

The Commission properly concluded that the statements made by Nicole Richie and Cher during the 2002 and 2003 *Billboard Music Awards* were indecent and profane as broadcast. The Commission explained that Richie's statement – "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." – fell within the scope of the Commission's indecency definition since "cow shit" referred to excrement and since the "F-Word" has a "core" "sexual" meaning. *Remand Order* ¶ 16. For the same reason, Cher's use of the "F-Word" fell within the scope of the indecency definition. *Id.* ¶ 58.

The Commission also concluded that both statements were patently offensive as measured by contemporary community standards for the broadcast medium. *See id.* ¶¶ 17-30; 59-63. Richie's statement, the Commission observed, used "vulgar language" to "convey[] a graphic image of [her] trying to scrape cow excrement out of her designer hand bag," and the "F-Word" used by both Richie and Cher "is one of the most vulgar, graphic, and explicit words for sexual activity in the English language." *Id.* ¶¶ 17, 59. The Commission also found that both statements were shocking in the context of a prime-time music awards show and, additionally, that Richie's statements were presented in a pandering manner, as shown by Paris Hilton's tongue-in-cheek reminder to Richie to "watch the bad language." *Id.* ¶¶ 17, 59.

The Commission found that the statements' relative brevity was not dispositive under the circumstances. *Id.* ¶ 27. In Richie's case, the Commission found that this was so even under the Commission's pre-*Golden Globe* policy, which had no "fleeting" exception when vulgar language was used in its core sexual or excretory senses – like Richie's use of the "S-Word" to describe excrement – and which proscribed "repeated" and "deliberate" use of vulgarities such as Richie's. *See id.* ¶ 20, 22. In any event, the Commission noted that its *Golden Globe* decision stated expressly that the "mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that

is otherwise patently offensive to the broadcast medium is not indecent." *Remand Order*, ¶ 23 (quoting *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975, 4980 ¶ 12 (2004) ("*Golden Globe Order*")). Both comments were clearly actionable under that policy. In addition, the Commission concluded that the entertainers' uses of the "F-Word" and "S-Word" were "profane" in that these are "vulgar and coarse" words that are "so grossly offensive to members of the public who actually hear it as to amount to a nuisance." *Id.* ¶ 40 (quoting *Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972)).

B. The *Remand Order* Is Not Arbitrary or Capricious.

Fox does not challenge key aspects of the Commission's indecency analysis. It does not dispute the Commission's findings that the language used here was explicit. *See Remand Order* ¶¶ 17, 59. It does not contest that the language was shocking, particularly in the context of a prime-time awards show. *See id.* ¶¶ 17, 59. And it does not offer any justification – such as artistic necessity – for the use of the "F-Word" and "S-Word" during these broadcasts, or claim that their use was consistent with community standards for the broadcast medium.

Instead, Fox contends that the Commission's application of its indecency enforcement policy to reach "isolated or fleeting" utterances constituted an

unacknowledged and unexplained change in policy in violation of the Administrative Procedure Act. It further argues that the Commission has been inconsistent in its enforcement of federal broadcast indecency prohibitions, and that the community-standards test is arbitrary. And NBC appears to argue that the "F-Word" is never indecent when used as an "intensifier." None of these contentions has merit.

(1) The Commission acknowledged that it had changed its policy and explained why it did.

Fox argues (Br. 20-25; *see also* NBC Br. at 39-42) that the Commission has acted arbitrarily and capriciously by changing its policy with respect to the treatment of isolated and fleeting expletives. It is well settled, however, that "an agency is free to change course" so long as it gives a "reasoned explanation" for doing so. *New York Council, Ass'n of Civilian Technicians v. FLRA*, 757 F.2d 502, 508 (2d Cir. 1985); *see also National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 125 S. Ct. 2688, 2699-2700 (2005) ("[I]f the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating.'").

According to Fox (Br. 20), the Commission "refuses even to acknowledge" that the *Golden Globe Order* represented a departure from Commission precedent holding that the isolated or fleeting use of expletives would not make a broadcast

actionably indecent. In addition, Fox contends, the Commission "has not even attempted to justify" the new policy. *Id*. Neither of these assertions is correct.

In the *Golden Globe Order*, the Commission made clear that it was changing course with respect to the treatment of isolated expletives. After noting that "prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' . . . are not indecent or would not be acted upon," the Commission "conclude[d] that any such interpretation is no longer good law." *Golden Globe Order* ¶ 12. The Commission further stated: "We now depart from . . . any similar cases holding that isolated or fleeting use of the 'F-Word' or a variant thereof in situations such as this is not indecent." *Id*. Instead, "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Id*.

In the *Remand Order*, the Commission elaborated on its statements in the *Golden Globe Order*, and it discussed the history of its treatment of isolated expletives at some length. *See Remand Order* ¶¶ 20-22. It explained that prior decisions had used the term "expletives" to mean "words such as the 'F-Word' or the 'S-Word' used outside of their core sexual or excretory meanings," and that those decisions had treated expletives differently from literal "descriptions of sexual or excretory functions." *Id*. ¶ 20. Specifically, decisions preceding the

Golden Globe Order had stated that, in the absence of descriptions of sexual or excretory functions, "deliberate and repetitive use" of expletives "in a patently offensive manner [was] a requisite to a finding of indecency." *Id*. ¶¶ 20, 21 and nn. 50, 53, 55. In discussing these decisions, the Commission observed that most had been issued by an FCC Bureau, and that those issued by the Commission itself had not been made in the context of "evaluating an actual program" and could therefore be described as dicta. *Id.* ¶ 21. It then explained that the *Golden Globe Order* had "overturned the Bureau-level decisions holding that an isolated expletive could not be indecent and disavowed our 1987 dicta on which those decisions were based." *Remand Order* ¶ 21. It went on to state that those decisions were "seriously flawed" and were "appropriately disavowed" in the *Golden Globe Order*. *Id.* ¶ 23.

Thus, Fox is incorrect when it argues (Br. 22) – without citation to any Commission order – that the Commission has "assert[ed] that the *Golden Globe Order* and the *Remand Order* do not actually represent any change in policy at all." On the contrary, the Commission could hardly have been clearer in acknowledging its change in course – both in the *Golden Globe Order* ("We now depart from" various prior orders, which are "no longer good law") and in the *Remand Order* (the Commission's "seriously flawed" prior orders are "appropriately disavowed").

Fox further errs in contending (Br. 22-23) – again without citation to any Commission order – that the Commission believes that "punishing isolated and fleeting expletives is perfectly consistent with its previous decisions." Nothing in the *Remand Order* supports this proposition. To be sure, the Commission did explain that the specific language at issue in the 2003 *Billboard Music Awards* was indecent even under the pre–*Golden Globe* policy. That broadcast involved the deliberate and repeated use of offensive words, one of which explicitly described excrement, and therefore it would not have been treated as an isolated use of "expletives" even before the *Golden Globe Order*. *Remand Order* ¶ 22. This does not mean that there was no change in policy, only that the new policy and the old policy led to the same result in one particular case. And Fox makes no effort to dispute the Commission's conclusion that Nicole Richie's language in the 2003 *Billboard Music Awards* would have been indecent under pre–*Golden Globe* precedent. *Cf. Cioffi v. Averill Park Central School Dist. Board of Ed.*, 444 F.3d 158, 169 (2d Cir. 2006) (argument not included in opening brief is waived).

Fox also overlooks the Commission's treatment of the 2002 *Billboard Music Awards* in the *Remand Order*. There, the Commission acknowledged its change in policy not only in words but also through its actions, by declining to impose a forfeiture. Specifically, the Commission refrained from imposing a forfeiture

because it recognized that "it was not apparent that Fox could be penalized for Cher's comment at the time it was broadcast." *Id*. ¶ 60, *see also id.* ¶ 64.

Nor is Fox correct when it argues that the Commission failed to explain its new policy. In fact, the Commission devoted several paragraphs of the *Remand Order* to this very issue. Quoting *Pacifica*'s statement that "[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow," it reasoned that "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow.'" *Id.* ¶ 25 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978)). And it noted that a *per se* exemption for isolated expletives would allow broadcasters to air expletives "at all hours of a day so long as they did so one at a time." *Id.* ¶ 25.

The Commission also noted the difficulties in applying the pre–*Golden Globe* policy. Though "expletives" had to be repeated to be indecent, "descriptions or depictions of sexual or excretory functions" did not. *Id.* ¶ 23 (quoting *Pacifica Found.*, 2 FCC Rcd 2698, 2699 (1987)). As the Commission observed, this distinction makes little sense, because an expletive is offensive precisely because of its implicit "sexual or excretory" meaning, and it is often difficult to determine whether a word is used "as an expletive or as a literal description of sexual or excretory functions." *Remand Order* ¶ 23. And the

Commission pointed out that "categorically requiring repeated use of expletives in order to find material indecent is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context" and therefore counsels against a *per se* rule. *Id.*

In short, Fox's claim that the Commission "has not even attempted to provide the necessary explanation" (Br. 22) simply ignores the relevant portions of the *Remand Order*.

(2) The Commission's findings regarding Nicole Richie and Cher are consistent with its disposition of other cases.

Fox (Br. 25-32), joined by NBC (Br. 39-42), also contends that the indecency enforcement regime is arbitrary and capricious because the Commission's decisions are "irreconcilable." This arguments ignores the fact that "context is all-important" in indecency determinations, requiring the Commission to consider "a host of variables" in each case. *Pacifica*, 438 U.S. at 750. To prevail on this claim, Fox must therefore demonstrate that the Commission has found comments materially similar to those uttered by Nicole Richie and Cher, made in materially similar contexts, not to be indecent. *See Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 242 (D.C. Cir. 1997). Fox falls far short of carrying that burden.

Fox claims that the Commission's conclusion that the statements in the 2002 and 2003 *Billboard Music Awards* broadcasts were indecent is inconsistent with the agency's decision that the vulgar language used in the film *Saving Private Ryan* did not make its broadcast indecent. Fox Br. 26-27 (citing *Complaints Against Various Television Licensees Regarding Their Broad. On Nov. 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 FCC Rcd 4507 (2005) ("*Saving Private Ryan Order*")). But as the Commission has explained, the vulgar language in *Saving Private Ryan* was not "in any way intended or used to pander, titillate or shock," nor was it "gratuitous." *Saving Private Ryan Order*, 20 FCC Rcd at 4512 ¶ 14. Instead, it was "integral to the film's objective of conveying the horrors of war." *Id.* at 4512-13 ¶ 14. In reaching this conclusion, the Commission credited the licensee's claim that the language in question was "[e]ssential" to the story being told, and that deleting it "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers." *Id.* at 4512-13 ¶ 14; *see also Pacifica*, 438 U.S. at 750 (language must be considered in "context").

Here, by contrast, Fox makes no effort – and made no effort before the Commission – to defend the language used by Richie and Cher as essential or integral to any artistic (or other) message. *Remand Order* ¶ 17 & n.44, ¶ 40, ¶ 59 & n. 191, ¶ 65. Neither does Fox contest the Commission's determination that the

comments made by Richie and Cher were shocking. In short, the language uttered at the 2002 and 2003 *Billboard Music Awards* was concededly gratuitous, and neither Richie nor Cher is similarly situated to the soldiers portrayed in *Saving Private Ryan*.

Fox wrongly suggests (Br. 30) that the Commission's conclusion rested on its view that "the 'Billboard Music Awards' simply are not culturally important enough to merit protection." The Commission made no such judgment. Instead, it simply noted that Fox had offered no justification for the relevant comments; it made no finding about the awards broadcasts in general.

Moving even further afield, Fox claims inconsistency between the *Saving Private Ryan Order* and a non-final determination regarding *The Blues: Godfathers and Sons*, on the ground that "in some cases the perceived merit of the material . . . saves [a] broadcast[] from a finding of patent offensiveness but not others." Fox Br. 29; *see also* CBS Br. 47 & n.22. Neither of those cases is before the Court, so any purported inconsistency between the Commission's fact-intensive evaluations of the broadcasts at issue is relevant here. This is especially true because the alleged inconsistency – on the role of artistic necessity in the patent-offensiveness analysis – is inapposite in a case such as this one where there is no claim to artistic necessity at all. In any event, the Commission's tentative conclusions regarding *The Blues* are embodied in a preliminary notice of apparent

liability. In any final decision in that case, the Commission will have the opportunity to consider whether the tentative findings are consistent with those in the *Saving Private Ryan Order*. *See Remand Order* ¶ 30 n.86.

Similarly, NBC claims inconsistency between two orders not part of this case: the *Saving Private Ryan Order* and a notice of apparent liability arising out of the broadcast of an "extremely graphic" depiction of "a woman being savagely attacked and raped" (*Omnibus Order* ¶ 36) in the film *Con El Corazón En La Mano*. *See* NBC Br. 40-41. Again, the proceeding involving *Con El Corazón* is still pending, and the Commission will be able to consider NBC's arguments before issuing a final decision. And the chief purported inconsistency – in the treatment of accurate television ratings when considering whether a broadcast is indecent – is not at issue here, since there is no dispute that the ratings for both *Billboard Music Awards* broadcasts were *not* accurate, because they did not give parents fair warning of the language that would be aired. *See Remand Order* ¶ 18 & n.47; ¶ 59 & n.190.

Finally, Fox (Br. 26 n.19), joined by NBC (Br. 30 n.2), contends that the Commission's treatment of the "F-Word" is inconsistent with decisions concluding that "dick," "ass," and "crap" in certain contexts were not indecent. However, the Commission concluded – and Fox does not dispute – that "the 'F-Word' is one of the most vulgar, graphic, and explicit words for sexual activity in the English

language." *Remand Order* ¶ 17. The "F-Word" (but not the others identified by Fox) was among Carlin's "seven words," *Pacifica*, 438 U.S. at 753 (Appendix), and the major networks all have rules against its broadcast even during the late-night hours when the Commission's regulations do not apply, *Remand Order* ¶ 29. By contrast, many network shows include "dick," "ass," and "crap" and derivative words, so the networks' own practices recognize a difference in the offensiveness of these words. *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 FCC Rcd 1920, 1922-26 ¶¶ 6-8 (2005); *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 FCC Rcd 1931, 1933-38 ¶¶ 6-8 (2005).

(3) The Commission properly assessed the patent offensiveness of these broadcasts against community standards for the broadcast medium.

Fox (Br. 27), joined by CBS (Br. 39-43), contends that the "'community standard' test is wholly undefined and arbitrary," but neither network makes any attempt to dispute the Commission's determination that the gratuitous broadcast of the "F-Word" and the "S-Word" during a nationally televised prime-time awards show is inconsistent with community standards for the broadcast medium, however

defined. Their claim is therefore entirely abstract and has no bearing on the decisions actually before the Court.

In any event, petitioners are foreclosed by precedent from challenging the Commission's community-standards formulation. This part of the indecency analysis dates from *Pacifica*, and the Supreme Court implicitly approved that analysis when it affirmed the Commission's application of its indecency definition to the Carlin monologue. *See* 56 FCC 2d at 98 ¶ 11 (defining indecent material as that which subjects "children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs"); 438 U.S. at 742; *see also Action for Children's Television v. FCC*, 852 F.2d 1332, 1338 (D.C. Cir. 1988) ("*ACT I*") ("No reasonable formulation tighter" than the Commission's generic definition of indecency "has been suggested in this review proceeding.").

Nor is the Commission's community-standards formulation "wholly undefined," as Fox contends. Fox Br. 27. In the 2001 *Industry Guidance*, the Commission explained that it evaluates patent offensiveness by examining three contextual factors in light of contemporary community standards for the broadcast medium. *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 ¶ 10 (2001); *see* p. 9-10, *supra*. CBS criticizes the Commission for its

focus on context in weighing these factors to decide whether a particular broadcast is patently offensive under community standards for the broadcast medium. *See* CBS Br. 44-45. It ignores, however, that this approach was dictated by the Supreme Court in *Pacifica*. The Court there noted that the Commission's authority to regulate broadcast indecency "rested entirely on a nuisance rationale under which context is all-important" and that this "concept requires consideration of a host of variables." 438 U.S. at 750; *see also Shea v. Reno*, 930 F. Supp. 916, 936 (S.D.N.Y. 1996) (Cabranes, C.J., for three-judge district court) ("[A]ssessment of a work's context has always been a component of indecency analysis regardless of the medium; the incorporation of the phrase 'in context' merely follows the approach of *Pacifica* and later cases.").

Fox claims that the *Industry Guidance's* three-part test for gauging patent offensiveness "has become meaningless" because "[b]roadcasts involving isolated or fleeting expletives would rarely, if ever, satisfy the three-part test." Fox Br. 28. In Fox's view, each of the three factors is an independent requirement that must be satisfied before a broadcast may be found indecent. This claim misunderstands the nature of the patent-offensiveness inquiry: it involves not a mechanical exercise in box-checking, but a balancing of these and other factors in which "the overall context . . . is critical." *See Industry Guidance*, 16 FCC Rcd at 8003 ¶ 10. Fox's claim also ignores the Commission's longstanding caution that "even relatively

fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness." *Id.* at 8009 ¶ 19.

In gauging contemporary community standards, the Commission relies not on its own "subjective views" (Fox Br. 27), but rather on its knowledge of the industry and its interactions with lawmakers, broadcasters, public-interest groups, and the public at large. *See Remand Order* ¶ 28 (quoting *Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 ¶ 12 (2004)). Contrary to the suggestion of *amicus* Center for Democracy & Technology (at 7), the Commission did not in this case (and has not in any other) relied on the number of complaints received in assessing whether a broadcast is patently offensive under contemporary community standards. Nor is it necessary, as CBS contends (Br. 40), for the Commission to apply a mechanical "measure" to determine what the community thinks. In its *Pacifica* decision, the Commission cited no external evidence of community standards. *See* 56 FCC 2d at 98 ¶ 11. In fact, the Commission's approach to discerning community standards parallels that used in obscenity cases, where the jury is instructed to rely on its own knowledge of community standards in determining whether material is patently offensive. *See Smith v. United States*, 431 U.S. 291, 305 (1977) ("contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community"). There is no requirement

that the jury (or judge in a bench trial) be provided with external evidence, such as expert testimony. *See United States v. Wild*, 422 F.2d 34, 35-36 (2d Cir. 1969); *United States v. Various Articles of Obscene Merchandise, Schedule No. 1769*, 600 F.2d 394, 406 (2d Cir. 1979).

In all events, in this case the Commission supplemented its knowledge of community standards by undertaking a detailed examination of the networks' own practices. For example, in the Mountain and Pacific time zones, where Fox showed the awards ceremony on tape delay, it edited out Richie's comments. *See Remand Order* ¶ 29. And with rare exceptions not applicable here, none of the major networks allows the "F-Word" or the "S-Word" to be broadcast even after 10 p.m., when indecency rules do not apply. *Id.* Contrary to Fox's contention (Br. 30-31), the Commission did not treat these practices as a legal concession that the material in question here was actionably indecent. Rather, it viewed the major networks' unanimity on this point as powerful confirmatory evidence bolstering its factual understanding of contemporary community standards for the broadcast medium. *See id.*

(4) The "F-Word" is covered by the indecency definition even when used as an "intensifier."

NBC alone appears to contend (Br. 28-33) that it is *always* permissible to broadcast the "F-Word" when it is used as an "intensifier." In NBC's view, when

the "F-Word" is used in this particular way, it falls completely outside the scope of the Commission's indecency definition. If accepted, this theory would allow a licensee to broadcast the "F-Word" deliberately and repeatedly, during the middle of the day, so long as it was used as an "intensifier." The Commission properly rejected this absurd result.

Instead, recognizing that the F-Word's power to "intensify" "derives from its implicit sexual meaning," *Remand Order*, ¶ 16, the Commission reasonably determined that the "F-Word" has a "core" sexual meaning and that "any use of that word has a sexual connotation even if the word is not used literally." *Id.*; *see also* Richard A. Spears, *Forbidden American English* 72 (1990) (listing first definition of "fuck" as "to copulate [with] someone" but noting that the word is "[t]aboo in all senses"). Although NBC also disputes the Commission's conclusion that the "S-Word" has "an inherently excretory connotation," NBC Br. at 32 n.3, that conclusion is not at issue here since there is no dispute that Richie used the word in its excretory sense.

C. Fox's Statutory Arguments Lack Merit.

Fox also argues that the Commission erred because it did not make a finding of scienter, and that it misinterpreted the term "profane" in Section 1464. Fox is wrong on both points.

(1) The Commission was not required to consider scienter.

Fox (Br. 37-42), joined by CBS (Br. 27-28), contends that a finding of scienter is required to establish a violation of Section 1464 and that the absence of such a finding here requires reversal of the Commission's indecency finding. This argument rests on a fundamental misunderstanding of both the nature of the proceedings below and the Commission's civil enforcement authority.

The Commission had no occasion to consider Fox's state of mind because it proposed no forfeiture for these broadcasts and made clear that it would take no adverse action against Fox for having aired them. *See Remand Order* ¶¶ 53, 66. It conducted contextual analyses of actual broadcasts in order to provide "guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard." *Omnibus Order* ¶ 2. The aim of its order was to elucidate what it was about these two broadcasts that made them indecent, not to make fact-specific inquiries into the mental state of individual broadcasters. That latter inquiry would be relevant only if an enforcement sanction were to be proposed. *See* 47 U.S.C. § 503(b)(1). In any indecency forfeiture proceeding, the Commission must establish not only that the material in question was indecent but also that the required state of mind existed. It was unnecessary to make the latter finding in this order.

Fox's argument also misapprehends the nature of the Commission's civil enforcement authority. Section 503 of the Communications Act authorizes the Commission to impose forfeitures on anyone who "violated any provision of section . . . 1464," 47 U.S.C. § 503(b)(1)(D), *or* on anyone who "*willfully* or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter," *id.* § 503(b)(1)(B) (emphasis added).

Among the regulations enforceable through subsection (B) is 47 C.F.R. § 73.3999, which proscribes broadcast of "material which is indecent" between 6 a.m. and 10 p.m. Here, the Commission found that Fox violated Section 73.3999 but found it unnecessary to decide whether the violation was "willful[]" since it was not proposing a forfeiture. 47 U.S.C. § 503(b)(1)(B); *see Remand Order* ¶ 54, ¶66 n.206. There is no need to read an intent element into Section 73.3999 because Congress has already supplied one – willfulness – that must be satisfied before a violation of this regulation can be sanctioned. *See* 47 U.S.C. § 503(b)(1)(B).

In a footnote, Fox contends (Br. 41 n.24) that if the Commission could simply "restate the ban on indecency as an FCC rule" it would disrupt Congress's statutory design in Section 503. But Section 73.3999 is hardly a circumvention of congressional intent, since it was promulgated at the express instruction of

Congress. *See* Public Telecommunications Act of 1992, Pub. L. 102-356, § 16(a), 106 Stat. 949, 47 U.S.C. § 303 note. Fox claims (Br. 41 n.24) that "Congress required the FCC to enact the rule solely to establish the times of day that the § 1464 indecency ban would be enforced." This is both wrong and beside the point. First, the Public Telecommunications Act of 1992 used language different from Section 1464, so it did not contemplate a mere restatement of the statute. *Compare* Public Telecommunications Act of 1992 § 16(a) (directing the Commission to issue a regulation on "indecent *programming*" (emphasis added)) *with* 18 U.S.C. § 1464 (prohibiting "utter[ing]" of "indecent . . . language"). Second, no matter what Congress's intent in directing the promulgation of Section 73.3999, it remains a "regulation" of the Commission and is therefore enforceable under the plain language of Section 503(b)(1)(B).

The Commission has sensibly concluded that the same willfulness requirement that is a condition precedent to sanctioning a violation of Section 73.3999 also applies to enforcement of Section 1464. *See Remand Order* ¶ 54. Borrowing the willfulness requirement used elsewhere in Section 503 for purely civil applications of Section 1464 establishes symmetry among the Commission's civil enforcement provisions and makes it unnecessary to divine what level of intent a court would require in a criminal prosecution under Section 1464.

The Commission's approach is the same as that used by the Supreme Court in *Pacifica*. The Court there noted that Section 503 "incorporate[s] § 1464, a criminal statute," but held that "the validity of the civil sanctions is not linked to the validity of the criminal penalty." 438 U.S. at 739 n.13. This was so because of the codification history of the provision. *See id.* As originally enacted, the broadcast indecency statute was a freestanding prohibition within the Communications Act; it was enforced through civil and criminal mechanisms found in other provisions. *See id.*; *see* Communications Act of 1934 § 326, Pub. L. No. 73-416, § 326, 48 Stat. 1091 ("No person . . . shall utter any obscene, indecent, or profane language by means of radio communication."). When Congress codified criminal statutes in Title 18 in 1948, it placed the ban on broadcast indecency there and combined it with the criminal enforcement provision, leaving civil enforcement mechanisms with the rest of the Communications Act in Title 47. *See Pacifica*, 438 U.S. at 739 n.13.

Pacifica held that the 1948 recodification of the statute in Title 18 did not produce any "substantive" change. *Id.* Thus, contrary to Fox's suggestion (Br. 38), the recodification did not "effectively incorporate[] the *scienter* standard into the FCC's forfeiture authority." *Pacifica* squarely forecloses Fox's claim regarding the relationship between Section 1464 and the civil forfeiture provisions. Nor is Fox correct when it claims (Br. 39) that this portion of *Pacifica* addressed

only "whether criminal enforcement of § 1464 indecency violations would be constitutional." In fact, the relevant statement appears in a section of the opinion addressing "statutory question[s]," and it does not once mention the First Amendment. 438 U.S. at 738. Under *Pacifica*, a court reviewing a civil application of Section 1464 "need not consider *any question* relating to the possible application of § 1464 as a criminal statute." 438 U.S. at 739 n.13 (emphasis added).

Pacifica's approach is hardly surprising, for it is consistent with the Supreme Court's treatment of other statutes that allow for both civil and criminal enforcement. For example, the Court has held that different levels of intent are required for criminal prosecutions under the Sherman Act and for civil actions under that statute. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 426 & n.13 (1978). As the First Circuit has explained, "centuries of Anglo-American legal tradition instruct that criminal liability ordinarily should be premised on malevolent intent, whereas civil liability, to which less stigma and milder consequences commonly attach, often requires a lesser showing of intent." *United States v. Nippon Paper Indus. Co. Ltd.*, 109 F.3d 1, 7 (1st Cir. 1997) (citation omitted).

Finally, because the Commission cannot impose forfeiture liability for a violation of Sections 73.3999 or 1464 without a finding of willfulness, its civil

enforcement authority does not allow for strict liability and therefore presents no First Amendment problem. *Cf.* Fox Br. 37-38, 40-41; CBS Br. 27-28.

(2) The Commission properly interpreted the statutory prohibition on "profane" utterances.

The Commission correctly determined that the language used by Richie and Cher was also "profane" within the meaning of Section 1464. In reaching this conclusion, the Commission adopted the Seventh Circuit's definition of "profane" language as "coarse language 'so grossly offensive to members of the public who actually hear it as to amount to a nuisance.'" *Remand Order* ¶ 40 (quoting *Tallman*, 465 F.2d at 286); *id.* ¶ 65. The Commission concluded that both the "F-Word" and the "S-Word" fell within this definition and noted that Fox had not argued that use of those words in the context of the broadcasts at issue was necessary to any artistic or other message. *See id.* ¶¶ 40, 65.

Fox (Br. 32), joined by NBC (Br. 33-39) and CBS (Br. 29-30), contends that Section 1464's prohibition on broadcast of "profane" language is a "dead letter" because it embodies only a restriction on blasphemy – a restriction that would plainly violate the First Amendment's religion clauses. In its eagerness to turn this Act of Congress into a historical curiosity, Fox ignores two basic interpretive principles: first, that the Court is "required" to construe the statute "to avoid constitutional difficulties wherever possible," *Able v. United States*, 88 F.3d 1280,

1298 (2d Cir. 1996), and, second, that an agency's interpretation of a statute it administers deserves deference under *Chevron*. Contrary to Fox's suggestion (Br. 35-36), the Commission's interpretation of Section 1464 is entitled to deference because that statute was enacted as part of the Communications Act, and courts "apply the *Chevron* framework to the Commission's interpretation of the Communications Act," *Brand X*, 125 S. Ct. at 2699. The later recodification of Section 1464 into Title 18 had no "substantive" meaning, *Pacifica*, 438 U.S. at 739 n.13, and therefore does not affect the applicability of *Chevron*. *Accord* NBC Br. 33-38 (Commission's interpretation of Section 1464 reviewed under *Chevron*).

The relevant question, therefore, is not whether blasphemy was among the original targets of the ban on broadcast of "profane" utterances – it was – but rather whether the provision is *also* amenable to the Commission's saving interpretation – it is. *See Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 558 (2d Cir. 1988) ("[W]e must construe the statute to avoid constitutional problems if it is susceptible to such a limiting construction."). This is hardly surprising, for, as the Supreme Court has observed, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

That the Seventh Circuit in *Tallman* has construed the statute in the same way as the Commission clearly demonstrates that it is susceptible to this meaning and must therefore be construed to reflect it. *See Carlin Communications*, 837 F.2d at 558. *Tallman*'s interpretation of "profane" utterances also refutes Fox's contention (Br. 35) that the term's meaning had become "fixed" to mean only blasphemous. This interpretation in *Tallman* was not dictum, *cf. id.* at 36, because it was necessary to the court's rejection of the defendant's facial challenge to Section 1464. And while *Tallman* cited – without discussing – the decisions of other courts that had construed the prohibition on broadcast profanity to cover blasphemy, it did not adopt their view, *cf.* Fox Br. 36, instead concluding that the term applied to "personally reviling epithets" and "grossly offensive" language. 465 F.2d at 286. Consistent with this interpretation of "profane" language, the Commission explained in the *Remand Order* that the word "profane" "has long carried a variety of meanings, including non-religious meanings." *Remand Order* ¶ 41 (citing dictionary definitions and judicial decisions).

Fox correctly notes (Br. 34) that, in 1976, the Commission suggested that Congress repeal the prohibition on "profane" broadcasts. Tellingly, Congress chose not to do so. On the contrary, as discussed below, it has recently embraced the Commission's interpretation of the term. Congress's actions are highly relevant in construing the statute. As the Supreme Court has explained, "[w]here a

statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." *West Virginia University Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) ("At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings.").

In 2006 – after the Commission in the *Golden Globe Order* had adopted the Seventh Circuit's understanding of profanity – Congress increased penalties for broadcast of "obscene, indecent, or *profane* language." Pub. L. No. 109-235, 120 Stat. 491, 47 U.S.C. § 609 note (emphasis added). It cannot seriously be suggested that the Congress of 2006 was targeting blasphemy; a court should "not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988). Instead, Congress had in mind just the kind of language at issue in this case. In fact, a committee report explaining the legislation cited the comments by Nicole Richie at the 2003 *Billboard Music Awards* as an "example[]" that "highlighted the need for stronger penalties for broadcast [of] obscenity, indecency and *profanity*." H.R. Rep. No. 109-5, at 2

(2005) (emphasis added). The Commission's interpretation of "profane" is fully consistent with this congressional understanding.

Finally, CBS contends (Br. 29 & n.13) that regulation of profanity is unconstitutional because "the Supreme Court has repeatedly struck down laws that attempt to regulate profane, vulgar or otherwise offensive language." None of those cases involved broadcasting, however, and the Supreme Court explained in *Pacifica* that this makes all the difference: "Words that are commonplace in one setting are shocking in another." 438 U.S. at 747 (plurality); *see also id.* at 762 (Powell, J., concurring) ("The result turns . . . on the unique characteristics of the broadcast media . . . ."). In fact, the Seventh Circuit, which interpreted the prohibition on broadcast of "profane" utterances the same way as the Commission, upheld Section 1464 against a First Amendment challenge. 465 F.2d at 286.

III. THE *REMAND ORDER* IS CONSTITUTIONAL.

A. The *Order* Is an Appropriate Exercise of the FCC's Power to Regulate Indecency and Profanity on the Airwaves.

The Supreme Court in *Pacifica* settled that the First Amendment does not prevent the FCC from regulating indecent broadcasting. 438 U.S. 726 (1978); *see also Action for Children's Television v. FCC*, 58 F.3d 654, 656-70 (D.C. Cir. 1995) (en banc) ("*ACT III*"). *Pacifica*'s constitutional holding remains good law, and it binds this Court.

(1) Broadcast speech has only limited First Amendment protection.

"[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica*, 438 U.S. at 748. Not only have the broadcast media "established a uniquely pervasive presence in the lives of all Americans," but "[p]atently 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." *Id.* at 748. Moreover, "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 749. Unlike indecent material sold in bookstores and movie theaters, for example, indecent speech broadcast over the air may not "be withheld from the young without restricting the expression at its source." *Id.*; *see also id.* at 758-59 (Powell, J., concurring) (broadcasters "cannot reach willing adults without reaching children.").

Outside the broadcast arena, a restriction on the content of protected speech will generally be upheld only if it satisfies strict First Amendment scrutiny – that is, if the restriction furthers a "compelling" government interest and is the "least restrictive means" to further that interest. *See Sable Communications of Calif., Inc.*, v. *FCC*, 492 U.S. 115, 126 (1989). But contrary to Fox's contention (Fox Br.

49-50; *see also* CBS Br. 14; *but see* NBC Br. 43), government restrictions on broadcast speech are not subject to this exacting standard.

Instead, regulation of the broadcast spectrum – a "scarce and valuable national resource" – "involves unique considerations." *FCC v. League of Women Voters of Calif.*, 468 U.S. 364, 376 (1984). Because "there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969). Rather, "[a] licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'" *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981). As a result, even where regulation of broadcast speech that "lies at the heart of First Amendment protection" is concerned, the government's interest need only be "substantial" and the restriction need only be "narrowly tailored" to further that interest – not the least restrictive available. *League of Women Voters*, 468 U.S. at 380, 381; *accord Prayze FM v. FCC*, 214 F.3d 245, 252 (2d Cir. 2000). Although (contrary to this authority) the D.C. Circuit in *ACT III* stated that it was applying strict scrutiny in affirming indecency regulations, it stressed that in doing so it had "take[n] into account the unique context of the broadcast medium." *ACT III*, 58 F.3d at 660.

If the passage of years had lessened the force of these precedents (Fox Br. 56 n.36), it would be up to the Supreme Court to say so. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). But in fact, the Court has reaffirmed that, "[d]espite the growing importance of cable television and alternative technologies, 'broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.'" *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 190 (1997) ("*Turner II*"). Though broadcast television is "but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression." *Id.* at 194. It remains "properly subject to more regulation than is generally permissible under the First Amendment." *ACT III*, 58 F.3d at 660.

The *Remand Order* also demonstrated the continuing pervasiveness of broadcast television. *See* ¶¶ 49-50; *see also* NBC Br. 54 (broadcast television remains "important, and its programs are watched by millions of Americans"). As the Commission noted, in 2003, 98.2% of households had at least one television. *See Remand Order* ¶ 49. And while almost 86% of households with television subscribe to a cable or satellite service, that still leaves millions of households that rely exclusively on over-the-air broadcasting. *See id.* In addition, almost half of direct-broadcast-satellite subscribers receive their broadcast channels by traditional

means, and many subscribers to cable and satellite still rely on broadcast for some of the televisions in their homes. *See id*. All told, there are an estimated 73 million broadcast-only television sets in American households. *See id*. Moreover, as the Commission observed, the bare number of cable and satellite service subscribers does not reflect the large disparity in viewership that still exists between broadcast and cable television programs. *See id.* ¶ 50.

The broadcast media also remain uniquely accessible to children. Two-thirds of children aged 8 to 18 have a television set in their bedrooms, and nearly half of those sets do not have cable or satellite connections. *See id.* ¶ 49. Parents who subscribe to cable exercise some choice in their selection of a package of channels, and they may avoid subscribing to some channels showing programs that, in their judgment, are inappropriate for children. Indeed, upon the request of a subscriber, cable providers are required by statute to "fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it." 47 U.S.C. § 560 (2000); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). In contrast, as the D.C. Circuit has observed, "broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters." *ACT III*, 58 F.3d at 660. As a result, members of the broadcast audience, unlike consumers of audio and video programming distributed by other means, "are confronted without warning with

offensive material." *Id*. In short, *Pacifica*'s premises remain as valid today as they were in 1978.

(2) The government's interests are substantial.

It cannot reasonably be disputed that the government has a substantial – or, indeed, "compelling" – "interest in protecting the physical and psychological well-being of minors," nor that this interest "extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable*, 492 U.S. at 126. The government's interests in the "well-being of its youth" and in supporting "parent's claims to authority in their own household" can justify "the regulation of otherwise protected expression." *Pacifica*, 438 U.S. at 749; *see also Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 555 (2d Cir. 1988) ("The interest in protecting minors from salacious matter is no doubt quite compelling"); *Dial Information Servs. Corp. of N.Y. v. Thornburgh*, 938 F.2d 1535, 1541 (2d Cir. 1991). Just as clearly, "the Government has a compelling interest in protecting children under the age of 18 from exposure to indecent broadcasts." *ACT III*, 58 F.3d at 656.

The government's "interest in protecting the well-being, tranquility, and privacy of the home" is an additional interest "of the highest order in a free and civilized society." *Frisby v. Schultz*, 487 U.S. 474, 484 (1988). Indeed, the

Supreme Court has "repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom." *Id.* at 485; *see also Rowan v. United States Post Office Department*, 397 U.S. 728, 738 (1970) ("That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere"); *Hill v. Colorado*, 530 U.S. 703, 717 (2000) ("The right to avoid unwelcome speech has special force in the privacy of the home.").

The networks suggest that regulating isolated and fleeting expletives does not promote these interests. CBS even argues (Br. 15) that the *Remand Order*'s application of the Commission's indecency and profanity enforcement policies to fleeting and isolated utterances "is unconstitutional under *Pacifica*." In fact, *Pacifica* reserved this issue, and the opinion for the Court expressly disavowed any intention to decide whether "an occasional expletive," such as that in "a conversation between a cab driver and a dispatcher," or "a telecast of an Elizabethan comedy," would be sanctionable. 438 U.S. at 750. Nor is there any reason to suppose that the *Pacifica* Court would have held – as CBS seems to argue – that the Constitution creates a categorical exemption for all "fleeting and isolated" utterances. Under such a rule, broadcasters could gratuitously broadcast any number of highly offensive sexual or excretory terms in the middle of the afternoon, so long as they did so one at a time. *See Remand Order* ¶ 25.

Fox contends (Br. 54) that the Commission has failed to show that preventing "isolated or fleeting exposure" to offensive language "actually protects children" from harm. But "the Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech"; moreover, the government's interests extend to protecting children from exposure to materials that would "impair[] [their] *ethical* and *moral* development." *ACT III*, 58 F.3d at 661-62 (citation omitted). The dangers to the development of children posed by indecency and profanity do not abate simply because an indecent or profane phrase is not repeated at length – Fox's broadcasts of the *Billboard Music Awards*, like Pacifica's broadcast of Carlin's monologue, "could have enlarged a child's vocabulary in an instant." 438 U.S. at 749; *see*, *e.g.*, J.A. 913 (Complaint of R. Fench) ("Mommy what is fucking?").

Nor is broadcast indecency regulation "quixotic" (Fox Br. 55), simply because children may be exposed to offensive words from other sources, and in other places. This was equally true when *Pacifica* was decided. But as Judge Leventhal then observed, whether or not children are likely to hear these words elsewhere, "it makes a difference whether they hear them in certain places, such as the locker room or gutter, or at certain times, that do not identify general acceptability." *Pacifica Foundation v. FCC*, 556 F.2d 9, 34 (D.C. Cir. 1977)

(Leventhal, J., dissenting); *see also* J.A. 917 (Complaint of A. Holmes) ("It is hard enough to teach your children manners and decent behavior without showing young adults on the TV using [expletives].").

(3) The indecency rules are narrowly tailored.

The regulatory regime governing the broadcast of indecent and profane matter is narrowly tailored to advancing the government's compelling interests in shielding children and protecting the privacy of the home from indecent speech, while at the same time allowing reasonable access to adults who desire to view or listen to such material. The Commission's rules implementing 18 U.S.C. § 1464 – and Section 16(a) of the Public Telecommunications Act of 1992 – prohibit radio or television stations from broadcasting indecent material "on any day between 6 a.m. and 10 p.m.," 47 C.F.R. § 73.3999(b), thus providing some assurance to parents that programs broadcast during that time will be safe for their children to view. The same time-of-day limitations apply to the broadcast of profanity. *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975, 4981 ¶ 14 (2004) ("*Golden Globe Order*"). By channeling indecent and profane broadcasting to times of day in which fewer children are in the audience, but which nonetheless remain accessible to adult viewers and listeners, the Commission permissibly advances the

government's interests "without unduly infringing on the adult population's right to see and hear indecent material." *ACT III*, 58 F.3d at 665.

Even apart from late-night viewing, adults who wish to view indecent or profane material "will have no difficulty in doing so through the use of subscription and pay-per-view cable channels, delayed-access viewing using VCR equipment, and the rental or purchase of readily available audio and video cassettes." *Id*. at 663; *cf. Pacifica*, 438 U.S. at 750 n.28 ("Adults who feel the need [to hear Carlin's monologue] may purchase tapes and records or go to theaters and nightclubs to hear these words."). In addition, "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication," since "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language." *Pacifica*, 438 U.S. at 743 n.18 (plurality opinion). Whatever small burdens on adult access to indecent or profane broadcasting remain, it is "entirely appropriate that the marginal convenience of some adults be made to yield to the imperative needs of the young." *ACT III*, 58 F.3d at 667.

B. The Broadcast Indecency Regime Is Not Unconstitutionally Vague.

Fox argues that the Commission's broadcast indecency regime is unconstitutionally vague. Fox Br. 43-49; *see* NBC Br. 43-46. That contention is foreclosed by precedent and, in any event, has no application to this case.

This Court has recognized that the Commission's rules rest on a definition of indecency that "passed muster" in the Supreme Court's decision in *Pacifica*. *Dial Information Servs.*, 938 F.2d at 1541 (rejecting vagueness challenge to law prohibiting "indecent" telephone messages); *accord Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 874-75 (9th Cir. 1991). As the D.C. Circuit has explained, the FCC's definition of indecency "is virtually the same definition the Commission articulated in the order reviewed by the Supreme Court in the *Pacifica* case," so when the Supreme Court "h[e]ld the Carlin monologue indecent," it necessarily signaled that it "did not regard the term 'indecent' as so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988) ("*ACT I*") (citation omitted); *accord Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) ("*ACT II*"); *ACT III*, 58 F.3d at 659 (both reaffirming rejection of vagueness challenge). Fox contends (Br. 44 n.26) that the Commission "cannot rely" on the D.C. Circuit's holding, which was "expressly based" on a restrained

enforcement policy. But in discussing vagueness, the D.C. Circuit simply relied on *Pacifica*; it did not mention the Commission's enforcement policy at all. *See* 852 F.2d at 1338-39. Moreover, the D.C. Circuit again rejected a vagueness challenge to the Commission's indecency standard in its en banc decision in *ACT III*, and it once again drew no connection between that holding and the agency's enforcement policies. *See* 58 F.3d at 659. Likewise, the Commission's enforcement of the statute's prohibition against profane broadcasting – which addresses grossly offensive vulgar sexual or excretory terms that amount to a nuisance, *see Omnibus Order* ¶ 17 – rests on the same constitutional footing.

To escape the force of the precedent foreclosing its vagueness challenge, Fox relies (Br. 43-45) on the Supreme Court's decision in *Reno v. ACLU*, which invalidated a statute regulating indecency on the Internet. 521 U.S. 844 (1997). But the Supreme Court in *Reno* expressly distinguished *Pacifica*, for three reasons. First, the Court noted that the Commission is "an agency that [has] been regulating radio stations for decades," and that the Commission's regulations simply "designate when – rather than whether – it would be permissible" to air indecent material. *Id.* at 867. The statute in *Reno*, in contrast, was not administered by an expert agency, and it contained "broad categorical prohibitions" that were "not limited to particular times." *Id*. Second, *Reno* involved a criminal statute, whereas the Commission has no power to impose criminal sanctions for indecent

broadcasts. *See id*. at 867, 872. Third, unlike the Internet, the broadcast medium has traditionally "received the most limited First Amendment protection." *Id*. at 867; *see also id*. at 868 (acknowledging the precedent recognizing the "special justifications for regulation of the broadcast media that are not applicable to other speakers").

Fox erroneously contends (Br. 45) that the *Reno* Court distinguished *Pacifica* on "a different issue," but the opinion makes clear that the *Reno* Court was addressing the government's argument that *Pacifica* supported the constitutionality of the Internet indecency statute in all respects. *Id*. at 864. Thus, far from casting doubt on *Pacifica*'s vagueness holding, *Reno* recognizes its continuing validity.

In any event, Fox's vagueness challenge to the Commission's broadcast indecency regime has no application to this case, which concerns the gratuitous utterance of the "F-Word" and the "S-Word" by Nicole Richie and Cher during two nationally televised prime-time awards programs. "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 495 (1982); *see Perez v. Hoblock*, 368 F.3d 166, 175-77 (2d Cir. 2004); *cf. Brache v. County of Westchester*, 658 F.2d 47, 53-54 (2d Cir. 1981). The Commission has long imposed sanctions on the broadcast of

precisely such language under its authority to enforce 18 U.S.C. 1464, *see*, *e.g.*, *WUHY-FM, Eastern Educational Radio*, 24 FCC 2d 408, 415 ¶ 17 (1970), and it made clear in the *Golden Globe Order* that the "mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent," 19 FCC Rcd at 4980 ¶ 12. Indeed, the "F-Word" and the "S-Word" are two of the most prominent examples in the words listed in the Carlin monologue, which was found indecent in *Pacifica*. *See* 438 U.S. at 751-55.

To be sure, "imagination can conjure up hypothetical cases in which the meaning of [statutory] terms will be in nice question." *Hill v. Colorado*, 530 U.S. 703, 733 (2000). But "[t]he FCC is not to be faulted simply because ingenuity can imagine borderline cases where a conscientious licensee might have fair doubt whether his communications were banned or not." *Lafayette Radio Electronics Corp. v. FCC*, 345 F.2d 278, 281-82 (2d Cir. 1965).

Moreover, since *Pacifica* was decided, the Commission has adopted administrative guidance that serves to further "narrow potentially vague or arbitrary interpretations" of its rules. *See Flipside*, 455 U.S. at 504. As we have explained, *see* p. 9-10, *supra*, this guidance identifies the factors that the FCC will examine in making indecency determinations, and it gives further content to the definition of indecency under 18 U.S.C. § 1464. Likewise, the Commission has

provided substantial guidance on the method by which it will evaluate whether broadcast speech is actionably profane. *See Remand Order* ¶ 40.

The Commission's elaborations of the indecency and profanity standards have reduced any vagueness inherent in the statute. *Cf. K-S Pharms., Inc. v. American Home Prods. Corp.*, 962 F.2d 728, 732 (7th Cir. 1992) (noting that "specificity may be created through the process of construction," and that "[c]larity via interpretation is enough even when the law affects political speech"). To the extent that there is residual uncertainty, the Commission has further addressed concerns of "fair notice," *Flipside*, 455 U.S. at 498, by declining to sanction broadcasters in cases where "it was not clear at the time that broadcasters could be punished for the kind of comment at issue," *Remand Order* ¶ 64.

Finally, "[t]he degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment." *Flipside*, 455 U.S. at 498. And as the Supreme Court has recognized, "[t]here are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision." *Smith v. Goguen*, 415 U.S. 566, 581 (1974). Thus, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989).

In the end, "[a] concept like 'indecent'" – or profane – "is not verifiable as a concept of hard science." *Pacifica Found. v. FCC*, 556 F.2d 9, 33 (D.C. Cir. 1977) (Leventhal, J., dissenting). Given the variety of formulations afforded by human language and the critical role of context in the analysis, a perfectly precise description of indecency or profanity is unattainable – at least if protection against patently offensive broadcasts is not to be circumvented by any radio "shock jock" – or "potty-mouthed" awards presenter – with a thesaurus. *See Remand Order* ¶ 13 n.27. Certainly petitioners have suggested no "better language" that could "effectively . . . carry out" Congress's purposes. *See United States v. Petrillo*, 332 U.S. 1, 7 (1947). Because the Commission's formulation "is sufficiently defined to provide guidance to the person of ordinary intelligence in the conduct of his affairs," it satisfies the Constitution. *Dial Information Servs.*, 938 F.2d at 1541 (quotation marks omitted).

C. The V-chip Is Not an Adequate Less-Restrictive Alternative.

Fox also contends (Br. 51-54) that regulation of broadcast indecency and profanity cannot survive First Amendment scrutiny because the V-chip is a constitutionally required less-restrictive alternative that permits parents to shield their children from broadcast indecency. This argument rests on flawed legal premises. First, "the Government has an independent and compelling interest in

preventing minors from being exposed to indecent broadcasts," separate and apart from facilitating parental supervision of children's viewing. *ACT III*, 58 F.3d at 663. Second, regulations of broadcasting are subject only to intermediate scrutiny, *see League of Women Voters*, 468 U.S. at 380, and under that standard, "a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 662 (1994). Instead, "[s]o long as the means chosen are not substantially broader than necessary . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less speech-restrictive alternative." *Turner II*, 520 U.S. at 218.

In any event, even under strict scrutiny, the proffered less-restrictive alternative "must be effective" in furthering the government's goals, *Dial Information. Servs*., 938 F.2d at 1542. Additionally, the court reviews an agency's finding that a proffered alternative is not effective only to determine whether that finding is supported by "substantial evidence." *Information Providers' Coalition*, 928 F.2d at 872, 873-74. Here, it is undisputed that the V-chip would not have been "effective" at all in preventing a child's exposure to the indecent language used by Nicole Richie and Cher. The two broadcasts in question were misrated, so even a parent with full knowledge of the V-chip and the television rating system

seeking to use those tools to shield her child from this kind of language would have been unable to do so. *See Remand Order* ¶ 18 & n.47; ¶ 59 & n.190.

Moreover, though the V-chip provides parents with "some ability to control their children's access to broadcast programming," the Commission found that this ability is too limited in practice for the technology to serve as an effective alternative to regulation. *Remand Order* ¶ 51. The evidence goes beyond a demonstration that the V-chip is not "a perfect solution" (Fox Br. 53 n.35); it shows that the V-chip "simply does not do the job of shielding minors" from the broadcast of material that is indecent or profane, *Dial Information Servs.*, 938 F.2d at 1542. Because it does not effectively further the government's compelling interests, it cannot be a less-restrictive alternative.

The Commission identified several serious limitations on the effectiveness of the V-chip. Most of the televisions currently in use have no V-chip capability at all, and "most parents who have a television set with a V-chip are unaware of its existence or do not know how to use it." *Remand Order* ¶ 51; *see also* "TVFAX, TV Watch 'Exposes' V-chip Critics," *Broadcasting & Cable*, July 8, 2005. Moreover, a V-chip is of little use when the rating does not reflect the material that is broadcast. Studies demonstrate that the inaccurate ratings for the 2002 and 2003 *Billboard Music Awards* are far from an isolated problems, and that V-chip "content descriptors actually identify only a small minority of the full range of

violence, sex, and adult language found on television." *Id.* ¶ 51 n.162. Inaccurate ratings are so common that a 2004 study found more coarse language broadcast during TV-PG programs than during those rated TV-14, just the opposite of what these age-based ratings would lead a viewer to believe. *See id*. Finally, even if V-chip content descriptors were accurately applied, they would not assist the majority of parents because they are not sufficiently understood. *See id*.

Fox does not even attempt to carry its burden of demonstrating that any of the Commission's findings regarding the V-chip's ineffectiveness in practice or the misleading nature of the rating given to the shows at issue in this case are not supported by substantial evidence. *See Information Providers' Coalition*, 928 F.2d at 872. Instead, Fox contends (Br. 53-54) that the Commission's 1998 declaration that the voluntary ratings rules were "acceptable" and "in compliance with the specific requirements of Section 551(e)," *see Implementation of Section 551 of the Telecommunications Act of 1996, Video Programming Ratings*, Report and Order, 13 FCC Rcd 8232, 8233 ¶ 2 (1998), precludes the Commission from reexamining the issue. *See also* NBC Br. 62; CBS Br. 33-34. But the Commission in 1998 simply approved the ratings "rules"; it did not make any determination as to the sufficiency of their application. *Id*. On the contrary, the Commission emphasized that "to be useful, the rating system must be applied in a consistent and accurate manner," and that the industry had committed "to independent scientific research

and evaluation of the rating system once the [V]-chip is in place." *Id*. at 8243 ¶ 22. It expressed its expectation "that the research and evaluation of the rating system, once the system has been in use, will allow for adjustments and improvements," and it "view[ed] this commitment as an important element in the proposal" before it. *Id*. In short, the Commission in 1998 simply granted the industry's request to "give the rating system a fair chance to work," *id*. at 8246 ¶ 32; it did not commit itself to turn a blind eye to the substantial evidence, accumulated since then, that the V-chip has proved ineffective in practice.

D. The *Remand Order* Does Not Unduly Chill Speech.

Finally, citing a host of broadcasts having nothing to do with this case, Fox contends that the broadcast indecency enforcement framework established by Congress and implemented by the Commission unduly chills protected expression. *See* Fox Br. 47-49; NBC Br. 48-52; CBS Br. 49-51. These arguments have no application to the *Remand Order*, which held only that the broadcast of gratuitous vulgarities in a nationally televised awards show may be found indecent and profane. Fox makes no effort to defend the use of vulgarities at the 2002 and 2003 *Billboard Music Awards* shows. Instead of focusing on the case before the Court, Fox contends, for example (Br. 48), that the *Remand Order* threatens live news programming. This claim is particularly wide of the mark, since the *Remand*

Order actually embodies the Commission's determination that it would *not* proceed against CBS for its broadcast of vulgar language during *The Early Show* in light of its commitment to acting with "the utmost restraint" in evaluating "complaints involving news programming." *Remand Order*, ¶ 71; *see also id.* ¶ 36 n.102 (stressing that Commission's indecency findings did "not involve breaking news or sports programming"). Fox's claim of chill is also undermined by the Commission's practice of declining to sanction broadcasters in cases where "it was not clear at the time that broadcasters could be punished for the kind of comment at issue." *Id.* § 64.

Fox breathlessly asserts (Br. 3) that the order under review marks "the end of truly live television." That claim ignores the Commission's findings on precisely this point. The Commission was careful to point out that "[t]his case does *not* involve breaking news coverage that Fox and other broadcasters have traditionally presented in so-called 'real-time.'" *Remand Order* ¶ 36 (emphasis added). Such news coverage was the subject of the Commission's post-*Pacifica* statement (made in response to concerns raised by the Radio-Television News Directors Association) that it would be inequitable to hold licensees responsible for material broadcast during live coverage of "public events" that were not subject to "journalistic editing." *Petition for Clarification or Reconsideration of a Citizen's Complaint against Pacifica Foundation, Station WBAI(FM), New York*, 59 FCC 2d

892, ¶ 4 n.1 (1976); *see also id.* (the Commission "trus[s] that . . . a licensee will exercise judgment, responsibility, and sensitivity to the community's needs, interests and tastes" during such live coverage).

Instead, this case involves an entertainment awards show broadcast, which Fox (consistent with all the networks' practices when broadcasting awards shows) aired on a one-hour or three-hour delay to large parts of the country. *See id.* Even in the Eastern Time Zone, where Fox broadcasts entertainment awards shows "live," it has been using delay technology for years, starting well before the Commission's *Golden Globe Order*. *See id.* ¶ 38. Fox's professed concerns about live broadcasting have no application to the facts of this case.

Nor does the Broadcast Indecency Enforcement Act – which increased the statutory maximum for indecency fines – materially alter the constitutional calculus. Pub. L. No. 109-235, 120 Stat. 491 (2006) (codified at 47 U.S.C. § 503(b)(2)(C)(ii)). *See* Fox Br. 49. The Commission did not impose a fine in this case. Furthermore, it stated that while the Act would allow it "to impose appropriate fines in egregious cases," it did *not* believe "that a case similar to the '2003 Billboard Music Awards' arising in the future would merit the maximum fine," and it emphasized that it would "continue to follow a restrained enforcement policy in imposing forfeitures." *Remand Order*, ¶ 53 n. 167. In fact, the Commission has yet to propose a fine for any broadcast with "fleeting" expletives.

In any event, nothing in the Constitution precludes the government from imposing penalties that are sufficient to deter violations of law, even where expression is concerned. So long as the underlying prohibition comports with the Constitution, the fact that the penalty for its violation may be robust does not pose a problem under the First Amendment. *See Alexander v. United States*, 509 U.S. 544, 555-58 (1993).

* * * * *

The Commission properly found that Fox's broadcasts of the 2002 and 2003 *Billboard Music Awards* were indecent and profane. As we have set forth, the conclusions were amply explained, were well within the Commission's longstanding statutory authority to regulate broadcast indecency, and comported with constitutional requirements. Fox and the intervenors make no attempt to challenge the Commission's determination on its merits. Their efforts to have this Court overturn the Commission's indecency rulings in other cases and other contexts are beside the point and in any event unavailing. This Court should uphold the Commission's reasonable assessment that contemporary community standards for the broadcast medium, however loosely viewed, simply do not permit entertainers gratuitously to utter the "F-Word" and the "S-Word" in awards shows broadcast on national television at a time when substantial numbers of children are certain to be in the viewing audience.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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December 6, 2006

IN THE UNITED STATES COURT OF
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FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA RESPONDENTS	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7) and this Court's order dated December 5, 2006, I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 17,842 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman.

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I, Joseph R. Palmore, certify that I have scanned for viruses the PDF version of the Respondents' Brief that was submitted in this case as an email attachment to briefs@ca2.uscourts.gov and that no viruses were detected. I conducted the scan using Norton Antivirus Corporate Edition, version 12/5/2006 rev. 49.

/s/ Joseph R. Palmore
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December 6, 2006