2008 WL 2367226 (U.S.) (Appellate Brief)
Supreme Court of the United States.

FEDERAL COMMUNICATIONS COMMISSION, et al., Petitioners,
v.
FOX TELEVISION STATIONS, INC., et al., Respondents.

No. 07-582.
June 9, 2008.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

Brief of Amicus Curiae Center for Constitutional Jurisprudence In Support of Petitioners

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*i QUESTION PRESENTED

Whether the court of appeals erred in striking down the Federal Communications Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language," 18 U.S.C. §1464; see 47 C.F.R. 73.3999, when the expletives are not repeated.

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*1 INTEREST OF AMICUS CURIAE [1]

The Center for Constitutional Jurisprudence is an educational, litigation and advocacy program in constitutional law and jurisprudence located at Chapman University School of Law. Founded in 1999 as the public interest litigation arm of The Claremont Institute for the Study of Statesmanship and Political Philosophy, the Center provides legal representation and litigation support through the work of students and attorneys in cases of constitutional significance, advancing through its strategic litigation the Institute's mission of restoring "the principles of the American Founding to their rightful and preeminent authority in our national life."

SUMMARY OF ARGUMENT

The Federal Communications Commission has discovered, based on its own investigations and complaints from the public, that there has been an increase in the use of expletives and indecent language in the programming of licensed broadcasters. In response to these facts, and pursuant to its legal duty to implement the statutory ban on broadcast indecency in 18 U.S.C. §1464, the Commission has properly *2 revised its policies and enforcement protocols to provide for administrative action against those who broadcast single instances of indecent language in addition to the administrative actions already authorized against those who broadcast indecent language repeatedly in a single program.

Contrary to the holding of the plurality in the Court of Appeals decision below, this stronger enforcement of the law against broadcast indecency is a reasonable response to changed circumstances and the practices of broadcasters permitting increased use of indecent language in their programming and not an arbitrary change of policy. It is reasonable for the Commission to consider indecent language across the broadcast spectrum and not only repeated usage in single programs. This would be a proper exercise of the discretionary authority of the Commission even if it were only a revision of its practices and not a response to changed circumstances.

The regulations of the Commission permit indecent language to be broadcast without restraint for eight hours every night so that people are not denied access to this form of expression, which is also readily available through alternative channels of communication such as the Internet and cable television.

The Commission has also acted reasonably in taking the context of indecent language into account rather than attempting to impose a blanket ban on all indecent expression, as the plurality opinion below would require. Considering language according to its usage and in its context is a necessary and constitutionally accepted practice concerning sexually oriented and offensive speech, whether used spontaneously ***3** by people interviewed during live news programs, or in programming addressing language and cultural issues, or, for example, in the protection of otherwise obscene expression if its found to have serious literary, artistic, political or scientific value. Making such distinctions in context is as necessary and proper a judgment for regulatory officials as it is for judges. Use of such contextual standards does not render the law or the Commission's administrative regulations unconstitutionally vague or overbroad.

ARGUMENT

Section 1464 of Title 18 of the United States Code provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." This statutory mandate is enforced by the Federal Communications Commission. ("FCC" or "Commission") through regulations and adjudications. Concern for First Amendment principles of freedom of speech and the statutory ban against regulatory censorship[2] has led the Commission to enforce the statutory prohibition against indecent broadcast speech narrowly, by limiting the time of enforcement to daytime and evening hours only, for example, or by taking into account the context of the indecent expression, exempting expletives that are broadcast during live ***4** news interviews or that are "integral" to an artistic expression. The Commission previously had a policy of not taking enforcement action against broadcast licensees responsible for isolated, non-repetitive incidents of broadcasting indecent speech - so-called "fleeting expletives." - but the increasingly common use of expletives and offensive language in programming broadcast by FCC-licensed radio and television stations led the Commission to reconsider its enforcement policies and procedures concerning "indecent" speech,[3] in fulfillment of its duty to implement the prohibition against broadcast indecency mandated by Section 1464. At issue in the present case is the decision of the FCC to hold broadcast licensees responsible for "fleeting expletives."

The Court of Appeals below ruled that the revised broadcast indecency regulations promulgated by the FCC violate the Administrative Procedures Act, finding that the regulations are unreasonable, arbitrary and capricious. *Fox Television Stations, Inc. v. FCC,* 489 F.3d 444, 454-462 (2d Cir. 2007). Far from being unreasonable, arbitrary and capricious, the FCC's new regulations are a perfectly reasonable, ***5** and constitutionally permissible, response to the new reality that indecent expression is more and more being broadcast throughout the day, even when not repeated during single program broadcasts

This case raises constitutional concerns for freedom of expression as well as regulatory issues, but a full First Amendment analysis of the Commission's revised rules for indecent broadcast speech is not appropriate at this stage of the litigation, since the Court of Appeals plurality opinion expressly declined to rule on the merits of the constitutional arguments[4] and the petition for review filed by the FCC and accepted for hearing by the Supreme Court states its limited issue in terms solely pertaining to regulatory authority. Nevertheless, some First Amendment principles bear on the scope of the Commission's exercise of its regulatory authority and should be acknowledged even in this limited context, and it should be noted also that although the Court of Appeals plurality declared that it was not deciding the constitutional issues, its opinion addresses the First Amendment elements of the case in considerable detail, in support of its administrative law ruling. *Fox Television Stations,* 489 F.3d, at 462-466.

***6 I. Stronger Administrative Enforcement of the Ban Against Broadcast Indecency is a Reasonable Exercise of FCC Regulatory Authority in the Face of Increasingly Common Use of Indecent Language Over the Public Airwaves.**

Until the new FCC regulations that are the subject of this litigation were adopted, the FCC narrowly enforced the statutory ban against indecent broadcast speech by targeting only incidents of indecent expression repeated during a single broadcast program, not single, isolated instances of "fleeting expletive." The premise for this narrow enforcement was that use of such language by licensed broadcasters was an occasional, unintentional phenomenon, sufficiently rare that it could be controlled by restricting only repetitive use of such language in a single entertainment program. Because the use of indecent language has become increasingly common throughout the broadcast day, however, it has become increasingly clear that the old premise is not longer true. Accordingly, the FCC adopted new regulations to respond to the new circumstances and thereby better enforce the statutory ban on the broadcast of indecent language.

The plurality opinion of the Court of Appeals in this action objected to the change of policy of the FCC to include enforcement against non-repetitive, "fleeting expletives" on the ground that there was no "reasoned basis justifying the Commission's new rule." *Fox Television Stations,* 489 F.3d, at 458. Specifically, the plurality rejected the judgment of the Commission that "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces ***7** viewers (including children) to take 'the first blow.' " *Id.* (quoting *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8,* 2005, Remand Order, ¶25, FCC 06-166 (Nov. 6, 2006)).

The phrase, "Taking the first blow," is from *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978),[5] in which Justice Stevens, writing for the Court, described the impact of indecent broadcast speech as follows:

Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. *To 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.* One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

Pacifica, 438 U.S., at 748-749 (emphasis added). The concurring opinion of Justice Powell, joined by Justice Blackmun, offered the same assault analogy to describe indecent expression broadcast into the home:

> ***8** A second difference, not without relevance, is that broadcasting - unlike most other forms of communication - comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds. *Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before, they turn away, a different order of values obtains in the home* …. The Commission also was entitled to give this factor appropriate weight in the circumstances of the instant case.

Pacifica, 438 U.S., at 759 (Powell, J., concurring in part and concurring in the judgment) (emphasis added).

Contrary to this Court's decision in *Pacifica*, the plurality in the Court of Appeals below asserted that listeners and viewers of indecent broadcast speech are not entitled to protection against a "first blow" of offensiveness, not based on an evidentiary or legal finding of its own that the "first blow" phenomenon of verbal assault does not exist, but rather based on the simple fact that the FCC did not take enforcement actions against isolated incidents of indecent speech "for the nearly thirty years" between *Pacifica* and its current rule-making. The plurality could not see any justification for the regulatory change:

More problematic, however, is that the "first blow" theory bears no rational connection to the Commission's actual policy regarding fleeting expletives. As the FCC itself stressed ***9** during oral argument in this case, the Commission does

not take the position that any occurrence of an expletive is indecent or profane under its rules. For example, although "there is no outright news exemption from our indecency rules," Remand Order, at ¶ 71, the Commission will apparently excuse an expletive when it occurs during a "bona fide news interview."

Fox Television Stations, 489 F.3d, at 458.

But the "first blow" rationale against having to absorb the initial impact of hearing unwanted indecent speech clearly has a rational basis. Pre-recorded entertainment programming, commercials, professional on-air speakers and hosts of call-in programs with typical 7-second delay broadcasting equipment and microphone "kill" buttons all can be trained in practices to avoid the broadcast of indecent speech over the public airwaves. It is rational to protect listeners and viewers from calculated and premeditated "first blow" verbal assaults from such people and their programs, especially since the past failure of the FCC to respond effectively to individual incidents of broadcast indecency following *Pacifica* evidently emboldened broadcasters and led some to engage more freely in repetitive but discontinuous verbal assaults throughout their broadcast programming.

On the other hand, it is also rational to overlook spontaneous expletives by people being interviewed during live news coverage. Such individuals are typically not trained professionals, their language is integral to the live news event being reported, and ***10** they cannot control whether their comments will be aired on repeated in subsequent broadcasts.

It would likewise be rational to overlook or to treat lightly an occasional, unintentional slip-up by a professional broadcaster, precisely because the "first blow" then is not like a deliberate assault but more like someone accidentally stumbling and bumping into you on the street. You have no reason to expect the culprit to get up and bump into you again and again, so you call it an accident, he or she apologizes, and the incident goes no further. But if the same broadcast licensees do constantly bump into innocent people with their indecent language, not by stumbling in their speech but by intending to assault their unsuspecting listeners and viewers, then they should be held responsible for their misconduct and deliberate violations of the statutory ban.

It is also rational to recognize the context of speech and the circumstances surrounding broadcasts in which expletives or other indecent language may occur in forms that are integral to the programming content and that have redeeming social value. The law already makes such contextual distinctions concerning speech containing references to sexual and excretory topics, which are the focus of the FCC indecency regulations and the enforcement action at issue. Context and usage make a difference. For example, sexually explicit language that is otherwise obscene and unprotected is not deemed to be legally obscene, and receives constitutional protection, when, taken in context and as a whole, it exhibits "serious literary, artistic, political or scientific value." *Miller v. California,* 413 U.S. 15, 23-24 (1973).

***11** An apparent pattern of increased repetition of indecent language in broadcasting justifies the FCC regulations at issue. The FCC deals with licensees and their whole gamut of broadcasting content, not just with isolated programs, and it is reasonable for the FCC to modify its regulations and their enforcement to adjust to the changing patterns and frequency of broadcast indecency.

II. The FCC Time-of-Airing Constraint on Broadcast Indecency Demonstrates a Reasonable Exercise of Agency Discretion in the Adoption of Time, Place and Manner Regulations That Leave Open Adequate Alternative Channels of Communication.

Under current FCC regulations, indecent speech is not constrained or prohibited during nighttime broadcasts. FCC regulations enforce the ban against indecent language only during the hours of 6:00 a.m. to 10:00 p.m., in part to protect children from inadvertent exposure to detrimental moral influences that are not age appropriate. 47 C.F.R. §73.3999(b).

But for eight (8) hours out of every 24-hour day, from 10:00 p.m. to 6:00 a.m., indecent speech can be broadcast without regulatory restraint.

In *Pacifica Foundation,* this Court implicitly upheld time-shifting of indecent speech to the night-time hours as a proper exercise of authority by the Commission and consistent with First Amendment principles. The decision in *Pacifica* was premised on acceptance of the statement of the Commission that it "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children ***12** most likely would not be exposed to it." *Pacifica,* 438 U.S., at 733 (quoting *In the Matter of a 'Petition for Clarification or Reconsideration' of a Citizen's Complaint against Pacifica Foundation, Station WBAI(FM), New York, N.Y.,* 59 F.C.C.2d 892 (1976)). This Court expressly refused to hold that broadcast of the Carlin monologue would be indecent if broadcast in the "late evening," *id.,* at 750 n. 28, and the opinion made repeated references to the importance of the fact that its decision was based on the program "as broadcast," *id.,* at 732, 734, 735, and specifically that the indecent broadcast was aired in the "afternoon," *id.,* at 729, 738, 739, 747.

The concurring opinion of Justice Powell similarly emphasized the time-shifting nature of the Commission's regulatory action approved by this Court.

> The issue, however, is whether the Commission may impose civil sanctions on a licensee radio station for broadcasting the monologue at two o'clock in the afternoon. The Commission's primary concern was to prevent the broadcast from reaching the ears of unsupervised children who were likely to be in the audience at that hour. In essence, the Commission sought to "channel" the monologue to hours when the fewest unsupervised children would be exposed to it. See 56 F.C.C.2d, at 98. In my view, this consideration provides strong support for the Commission's holding.

Pacifica, 438 U.S., at 757 (Powell, J., concurring in part and concurring in the judgment).

***13** By accepting the time-shifting nature of the Commission's adjudication, this Court in *Pacifica* avoided having to address the more substantive constitutional question of whether a total ban on indecent broadcasting would violate the First Amendment. *Compare Action for Children's Television v. F.C.C.,* 932 F.2d 1504, 1508-1509 (D.C. Cir. 1991) ("ACT II") (holding that the "safe harbor" for broadcast of indecent speech outside the 6:00 a.m. to 10:00 p.m. time period is constitutionally required under the First Amendment).

The FCC time regulations at issue here advance free speech and First Amendment interests by leaving open adequate channels of communication for indecent speech during the alternative broadcast time periods and by alternative media, such as the Internet and paid cable television.

This Court has not applied a strict scrutiny standard of review when analyzing content-based regulations in the context of radio and television broadcasting. As Justice Brennan, writing for the Court, noted in *FCC v. League of Women Voters:*

> [B]ecause broadcast regulation involves unique considerations, our cases have not followed precisely the same approach that we have applied to other media and have never gone so far as to demand that such regulations serve "compelling" governmental interests.

FCC v. League of Women Voters, 468 U.S. 364, 376 (1984). Instead of strict scrutiny, this court used an intermediate standard of review, analyzing whether the speech restriction at issue, editorializing by ***14** broadcast licensees, was "narrowly tailored to further a substantial governmental interest." 468 U.S., at 380.

The speech in *League of Women Voters* was highly valued constitutionally [6] - the right to speak out editorially on matters of public interest - but it received only intermediate scrutiny review because it was in the context of broadcasting. Indecent speech, by contrast, is considered by this Court to be of very low value constitutionally and entitled only to minimal protection, [7] because of the unique features of the broadcast media:

Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern ***15** to the Commission as well as parents is the first point regarding the use of radio by children.

Pacifica, 438 U.S., at 731 n.2 (citations and quotation marks omitted).

"[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Id.,* at 748. After all, radio and television broadcasters require a government license, a limitation on free speech that would be unconstitutional in almost any other context.

In *Pacifica,* this Court treated the FCC's broadcast indecency time-shifting requirement as a reasonable content-neutral time, place and manner regulation, even though the regulation is marginally content-based, triggered by the indecent language. This Court found that the reason for the regulation was to not to censor speech but to prevent a "nuisance," and that the cause of the nuisance was that the indecent speech at issue was being broadcast at the wrong time, the daytime, and in the wrong place, the home, where children may be present:
The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote a "nuisance may be ***16** merely a right thing in the wrong place - like a pig in the parlor instead of the barnyard."

Pacifica, 438 U.S., at 750 (emphasis added, footnote and citation omitted). On the basis of this analysis, the Court upheld the regulatory power of the FCC over indecent speech. *Id.*

Similar concerns about the impact of speech (its "secondary effects") rather than its content, even though the speech causing the undesirable social effects is identified by its content, [8] were held to justify reasonable time, place and manner regulations in *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 47-50 (1986). "[T]he government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated." *Id,* at 50.

Recognition of the existence of alternative channels of communication supported the FCC time-of-airing restrictions on indecent speech in *Pacifica* as well:

> The Commission's action does not by any means reduce adults to hearing only what is fit for children. Adults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words. ***17** In fact, the Commission has not unequivocally closed even broadcasting to speech of this sort ….

Pacifica, 438 U.S., at 750, n.28 (citation omitted). Likewise, Justice Powell, joined by Justice Blackmun, noted in his concurring opinion that:

> The Commission's holding does not prevent willing adults from purchasing Carlin's record, from attending his performances, or, indeed, from reading the transcript reprinted as an appendix to the Court's opinion. On its face, it does not prevent respondent Pacifica Foundation from broadcasting the monologue during late evening hours when fewer children are likely to be in the audience, nor from broadcasting discussions of the contemporary use of language at any time during the day.

Pacifica, 438 U.S., at 760 (Powell, J., concurring in part and concurring in the judgment).

The expansion of cable television, the alternative media and the Internet make the alternative channels of communication argument even stronger today.

III. Distinguishing Speech Based on Context Is Consistent with the Authority of the Commission and Does Not Violate First Amendment Principles Against Vagueness or Overbreadth.

The Court of Appeals plurality opinion found the FCC indecent language regulations to be irrational, arbitrary and capricious in part on the ground that ***18** all expletives and indecent expression are not equally prohibited *See Fox Television Stations,* 489 F.3d, at 458 ("[T]he Commission does not take the position that any occurrence of an expletive is indecent or profane under its rules").

The FCC exempts "bona fide news interview[s]" and, as the Fox Television Stations plurality opinion notes, even the indecent language at the core of this case, from the Billboard Music Awards shows, could be re-broadcast in a news program about this FCC litigation and that re-broadcast, as news, would not violate the FCC regulations. [9] The FCC also does not treat as indecent language otherwise objectionable when its use is "integral" to the work presented, such as in the broadcast of the war movie "Saving Private Ryan." *Id.* [10]

This artificial all-or-nothing contention by the Court of Appeals plurality actually would mean that all indecent speech must be permitted, because the alternative, of permitting no indecent speech under any circumstances, would almost certainly be unconstitutional. *See, e.g., ACT II,* 932 F.2d, at 1508-1509.

***19** Context and usage are valid and important considerations to take into account constitutionally. As noted, sexually explicit expression that appeals to the prurient interest, that is patently offensive by contemporary community standards and that is declared to be illegal under applicable state law may, because of its context and usage, nevertheless be held to be constitutionally protected and not obscene, if it is found to have serious literary, artistic, political or scientific value. *Miller,* 413 U.S., at 15, 23, 24.

Not only may potentially obscene sexual content achieve constitutional protection if it is found to have serious literary, artistic, political or scientific value, but the same sexual content may be obscene in one context yet constitutionally protected in another, according to different local community standards, that is, according to its geographical and cultural context. "There is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others." *Sable Communications of California, Inc. v. F.C.C.,* 492 U.S. 115, 125-126 (1989).

Context has always been recognized as being a factor in determining whether speech is constitutionally protected or not, as this Court noted nearly a century ago in *Schenck v. United States:*

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most ***20** stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Schenck v. United States, 249 U.S. 47, 52 (1919) (citations omitted).

The vagueness and overbreadth arguments turn on the erroneous contention that treating the same language as indecent in one context but not in another necessarily means that a person cannot know what the law requires (that is, the regulation is vague) or the law is prohibiting speech in some contexts that it protects in others (that is, the regulation is overbroad).

In *Action for Children's Television v. F.C.C.,* 852 F.2d 1332 (D.C.Cir. 1988) ("ACT I"), the Court of Appeals reviewed an earlier expansion by the FCC of its enforcement authority over broadcast indecency, and in an opinion written by then Circuit Court Judge Ruth Bader Ginsberg, the Court upheld the FCC's case-by-case, contextual approach to broadcast indecency against challenges of vagueness and overbreadth.

***21** First, the Court held that this Court's decision in *Pacifica* had already addressed and rejected the broadcasters' vagueness claim:

> The generic definition of indecency now employed by the FCC is virtually the same definition the Commission articulated in the order reviewed by the Supreme Court in the *Pacifica* case. However, the Court did not address, specifically, whether the FCC's definition was on its face unconstitutionally vague. The Court did hold the Carlin monologue indecent within the meaning of section 1464. We infer from this holding that the Court 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."

ACT I, 852 F.2d, at 1338-1339.

Second, the demand of the opponents of the broadcast indecency regulations in *ACT I* was that to avoid unconstitutional overbreadth, the FCC had to provide a blanket exception for material that uses indecent language but that has "serious merit," 852 F.2d, at 1339, that is, to require the FCC to consider content and context, the very factors that the opinion below now claims cause overbreadth. The difference is that in *ACT I* the opponents wanted a rule that any expression that has serious merit must be exempted from the broadcast indecency standards for all times and places, whereas the FCC then, as now, asserted that contextual factors, such as the time of day, the presence of children, and similar concerns, impact whether a given form of expression is indecent. ***22** The Court upheld the FCC's contextual approach:

> Some material that has significant social value may contain language and descriptions as offensive, from the perspective of parental control over children's exposure, as material lacking such value. Since the overall value of a work will not necessarily alter the impact of certain words or phrases on children, the FCC's approach is permissible under controlling case law: merit is properly treated as a factor in determining whether material is patently offensive, but it does not render such material per se not indecent.

ACT I, 852 F.2d, at 1340.

The analysis of the vagueness and overbreadth challenges to the Commission's regulatory authority over broadcast indecency in *ACT I* remains sound and supports the petition of the Commission in this action.

*23 CONCLUSION

The Federal Communications Commission has acted within its authority, pursuant to its statutory duty and consistent with constitutional principles in responding to the rising trend of broadcast indecency by its licensees, and the contrary decision of the Court of Appeals should be reversed.

Footnotes

1 The Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been previously filed or are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae,* its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief other than a grant for printing costs only from another *amicus,* the Alliance Defense Fund, with whom this brief was coordinated to avoid duplication of coverage.

2 "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U.S.C. §326.

3 "The Commission has regulated the broadcast of indecent programming for decades, and our authority in this area has long been upheld as constitutional by the U.S. Supreme Court. During the last few years, however, we have witnessed increasing public unease with the nature of broadcast material …. [¶] In these decisions, we address hundreds of thousands of complaints alleging that various broadcast television programs aired between February 2002 and March 2005 are indecent, profane, and/or obscene." *In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005* (Omnibus Order), 21 F.C.C.R. 2664, ¶¶ 1-2 (2006).

4 " 'A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.' *Lyng v. N.W. Indian Cemetery Protective Ass'n,* 485 U.S. 439, 445, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988). Thus, we refrain from deciding the various constitutional challenges to the Remand Order raised by the Networks." *Fox Television Stations,* 489 F.3d, at 462.

5 *Pacifica* involved a Commission adjudication rather than a rule-making procedure. The Supreme Court upheld the finding of the Commission that the radio broadcast of a recording of George Carlin's "Filthy Words" monologue in the afternoon violated the statutory ban in 18 U.S.C. §1464 against broadcast indecency. 438 U.S., at 734.

6 "[T]he restriction … is specifically directed at a form of speech - namely, the expression of editorial opinion - that lies at the heart of First Amendment protection." *League of Women Voters,* 468 U.S., at 381.

7 "[T]he Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, *they surely lie at the periphery of First Amendment concern." Pacifica,* 438 U.S., at 743 (emphasis added).

8 "Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, *even though the determination of whether a particular film fits that characterization turns on the nature of its content,* we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures." *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 71-72 (1976) (emphasis added).

9 "The Commission even conceded that a re-broadcast of precisely the same offending clips from the two Billboard Music Award programs for the purpose of providing background information on this case would not result in any action by the FCC, even though in those circumstances viewers would be subjected to the same 'first blow' that resulted from the original airing of this material." *Fox Television Stations,* 489 F.3d, at 458.

10 *In the Matter of Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 F.C.C.R. 4507 (2005).

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