

No. 07-582

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IN THE  
**Supreme Court of the United States**

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FEDERAL COMMUNICATIONS COMMISSION, ET AL.,  
*Petitioners,*

v.

FOX TELEVISION STATIONS, INC., ET AL.,  
*Respondents.*

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

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BRIEF OF *AMICI CURIAE*  
CENTER FOR DEMOCRACY & TECHNOLOGY  
AND ADAM THIERER, SENIOR FELLOW WITH  
THE PROGRESS & FREEDOM FOUNDATION  
(PFF) AND THE DIRECTOR OF PFF'S CENTER  
FOR DIGITAL MEDIA FREEDOM  
IN SUPPORT OF RESPONDENTS

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## **INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amicus curiae* Center for Democracy & Technology (CDT) is a non-profit public interest and Internet policy organization. CDT represents the public's interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy, and individual liberty. CDT's staff has conducted extensive policy research, published academic papers, and testified before Congress on the impact of content regulations on freedom of expression and the availability of alternative methods, including user empowerment technology tools, for protecting individuals who use the Internet.

*Amicus curiae* Adam Thierer is Senior Fellow and Director of the Center for Digital Media Freedom at the Progress & Freedom Foundation (PFF). PFF is a market-oriented think tank that studies the digital revolution and its implications for public policy. Its mission is to educate policymakers, opinion leaders and the public about issues associated with technological change, based on a philosophy of limited government, free markets and individual sovereignty.

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<sup>1</sup> The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

## INTRODUCTION AND SUMMARY OF ARGUMENT

*Amici* urge this Court to affirm the Second Circuit’s decision holding that the Federal Communications Commission (FCC) violated the Administrative Procedure Act’s (APA) prohibition against “arbitrary and capricious” agency action<sup>2</sup> when the Commission began sanctioning “fleeting expletives” without articulating a reasoned basis for this significant change in its broadcast indecency enforcement policy. In this brief, *amici* address three reasons the Second Circuit should be affirmed, the first relating to the vanishing constitutional underpinnings for any FCC regulation of broadcast indecency, the second relating to the FCC’s gross manipulation of the complaints it received to create a justification for increased indecency enforcement, and the third relating to the FCC’s inconsistent analysis of what is “indecent”:

I. In considering the APA issues, *amici* respectfully submit that this Court must also consider the larger context of the modern media environment, which starkly calls into question the FCC’s underlying constitutional authority—based on *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)—to regulate speech that, when communicated via any medium other than broadcast, is fully protected by the First Amendment. Petitioners here defend the FCC’s actions based on and with reference to *Pacifica*, *see* Pet. Br. at 24-26,

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<sup>2</sup> Under the Administrative Procedure Act, a reviewing court must “hold unlawful and set aside agency action, findings, and conclusions” if the court finds them to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)A).

31-32, yet the factual and legal underpinnings of that decision are withering.

*Pacifica* is based on an archaic and static understanding of the facts about broadcast television. The state of media and technology today directly challenges this Court’s assumption—an assumption etched into precedent 30 years ago—that broadcast is a unique medium deserving something less than full First Amendment protection, and therefore “indecent” broadcast content can appropriately be regulated by the government. As the Second Circuit observed, “technological advances may obviate the constitutional legitimacy of the FCC’s robust oversight.” Pet. App. at 43a. Such technological advances include the dramatic increase in the availability of “user empowerment” tools, and the proliferation and convergence of various entertainment and communications media. And critically, as media technologies converge, the full First Amendment protection afforded the Internet in *Reno v. ACLU*, 521 U.S. 844 (1997), should control the Court’s analysis of content regulation in the converged environment.

This Court can affirm the court below without reaching the substantive issues surrounding *Pacifica* and the rationales underlying modern FCC indecency enforcement. If, however, the Court does speak to those issues, it is vital that it recognize the radical changes that have taken place since *Pacifica* was handed down three decades ago and how those changes have completely undercut the logic of that decision. *Pacifica*’s “pervasiveness” doctrine, with its “intruder-in-the-home” logic, now represents a legal relic of a bygone media and regulatory era.

**II.** The FCC before coming to this Court—and *amici* in support of the FCC in this Court—justified the radical expansion of FCC indecency enforcement based on an asserted increase in the number of complaints it received about broadcast programming. That increase, however, is primarily a result of a concerted manipulation of complaint statistics—in violation of the APA—and does not, in any event, substitute for the constitutionally required analysis of “community standards.” Moreover, the FCC’s treatment of indecency complaints from a vocal minority group has allowed a “heckler’s veto” in violation of the First Amendment.

**III.** The FCC’s inconsistent and arbitrary analysis of what is “indecent” violates both the First Amendment and the APA. By regulating similar terms quite differently, the FCC fails to provide speakers with clear policy guidance, as is statutorily and constitutionally required.

## ARGUMENT

### **I. ADVANCES IN MEDIA TECHNOLOGY OBVIATE THE NEED FOR HEAVY-HANDED GOVERNMENTAL REGULATION OF BROADCAST INDECENCY.**

Technology is transforming how society receives information and entertainment, and it is also transforming how First Amendment principles apply to content delivery.

#### **A. Strict Scrutiny Must Be Applied to the FCC’s Regulation of Indecency Because Broadcast Is No Longer an Uncontrollable “Intruder” Into the Home That Is Easily Accessible By Children.**

As the Second Circuit noted below, “[o]utside the broadcasting context, the Supreme Court has consistently applied strict scrutiny to indecency regulations.” Pet. App. at 39a. The First Amendment generally prohibits the regulation of speech based on content, and even “indecent” speech has inherent First Amendment protection. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). But in *Pacifica* this Court—without expressly adopting a less-than-strict level of scrutiny—appeared to afford a lower level, holding that “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection,” and thus the FCC may legally censor broadcast content that is indecent yet otherwise legal. *Pacifica*, 438 U.S. at 748. In applying a lower First Amendment standard, the *Pacifica* Court upheld the Commission’s assertion that George Carlin’s “Filthy Words” monologue was actionably indecent.

The *Pacifica* Court justified such limited First Amendment protection by what it understood as the “unique” two-pronged nature of broadcast at the time: broadcast 1) was a “pervasive” and uncontrollable medium that intruded into the privacy of the home, and 2) was easily accessible by children. *Id.* at 748-50. *See also Reno*, 521 U.S. at 869 (concluding that the Internet is not “invasive,” contrasting *Pacifica*). The particular concern about the “pervasiveness” or “invasiveness” of broadcast was the fact that when one turns on a television or radio, whatever is being broadcast at that moment, including that which might be indecent or offensive, will be seen or heard.

But that was 1978. Three decades later, technological advances are rapidly undermining these two factual assumptions that form the basis of the FCC’s legal authority to censor broadcast indecency. “User empowerment” tools for television, such as the V-Chip and digital video recorders (DVRs), enable parents to control what television content “enters” the home. Beyond technological tools, household usage rules help families interact with television and other media in ways that reflect their personal values. These developments diminish any significant reason to place broadcast speech in a separate category deserving something less than maximum First Amendment protection.

In the modern media environment, strict scrutiny should be applied to the FCC’s regulation of indecent content transmitted via broadcast television. As the Second Circuit stated, “it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television.” Pet. App. at 40a-41a.

*Amici* respectfully submit that the time is rapidly approaching for this Court to find that broadcast, like the Internet and other means of mass communication, “is entitled to the highest protection from government intrusion” and that there is no longer a factual “basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.” *Reno*, 521 U.S. at 863, 870 (analyzing the state of technology in deciding what level of scrutiny to apply to the Internet).

The application of strict scrutiny would lead to the conclusion that the FCC’s regulatory regime cannot pass constitutional muster—that its censorship of broadcast indecency is not narrowly tailored to serve a compelling government interest (*i.e.*, protecting children from unsavory content) because there are other less restrictive means (*i.e.*, user empowerment tools) to achieve this goal. *See Sable*, 492 U.S. at 126.

**B. User Empowerment Tools for Broadcast Television Enable Parents to Control What Television Content “Enters” the Home and Are Thus Least Restrictive Means to Shield Children From Unwanted Content.**

Parents have a variety of technological tools, including the V-Chip<sup>3</sup> and digital video recorders (DVRs), with which

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<sup>3</sup> The V-Chip has been installed in all 13-inch or larger televisions manufactured since 2000 and allows parents to block certain broadcast content based on a series of ratings. The ratings system offers the following age-based designations:

“TV-Y” – All Children

“TV-Y7” – Directed to Children Age 7 and Older

“TV-Y7 (FV)” – Directed to Older Children Due to Fantasy Violence

“TV-G” – General Audience

to guide their children’s development and television viewing habits. The FCC and *amici* in support of Petitioners have attempted, without adequate foundation, to attack the effectiveness of the V-Chip. *See* Pet. App. at 109a n.159.<sup>4</sup> However, the legal significance of user empowerment technologies as less restrictive alternatives to government regulation is not diminished because they must be applied by parents (as with the V-Chip), or some parents choose not to use them, or they are not perfect at all times.

This Court has held that governmental action to promote voluntary efforts by parents to protect their children from sexual content is a less restrictive alternative to blocking mandated by statute. *See, e.g., U.S. v. Playboy Entertainment Group*, 529 U.S. 803, 827 (2000). In *Playboy*, the Court held that a statute requiring cable companies to scramble sexually explicit programming was unconstitutional in light of the less restrictive alternative of governmental promotion of voluntary blocking of the signal upon requests by parents. *Id.* at 822. As the Court observed, “targeted

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“TV-PG” – Parental Guidance Suggested

“TV-14” – Parents Strongly Cautioned

“TV-MA” – Mature Audience Only

The TV ratings system also uses several specific content descriptors to better inform parents and all viewers about the nature of the content they will be experiencing. These labels include:

“D” – Suggestive Dialogue

“L” – Coarse Language

“S” – Sexual Situations

“V” – Violence

“FV” – Fantasy Violence

*See* <http://www.tvguidelines.org/ratings.htm>. These ratings are displayed prominently at the beginning of programs, in on-screen menus and interactive guides, and in local newspaper or TV Guide listings.

<sup>4</sup> *See also* Brief of *Amicus* Decency Enforcement Center for Television, at 34-35; Brief of *Amici* American Academy of Pediatrics, *et al.*, at 17.

blocking [initiated by parents] enables the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners.” *Id.* at 815. The Court noted,

[I]t is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.

*Id.* at 824.<sup>5</sup>

Beyond the V-Chip, many American homes now rely on a variety of alternative technologies and methods to filter or block unwanted broadcast programming. This is especially the case for 86% of U.S. households subscribing to cable or satellite television systems (discussed *infra* Part I.C.1.), which offer more robust filtering and blocking capabilities than the V-Chip. Pet. App. at 106a-107a.<sup>6</sup> In the decades since *Pacifica*, market forces have produced a range of more effective solutions than the government-mandated V-Chip.

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<sup>5</sup> In overturning another content regulation statute—the Child Online Protection Act (COPA)—the Third Circuit Court of Appeals followed this Court’s lead and held that Internet content filters are both more effective and less restrictive than COPA. *American Civil Liberties Union v. Mukasey*, No. 07-2539, at 49-50 (3d Cir. July 22, 2008). The appeals court emphasized that “filters are more flexible than COPA because parents can tailor them to their own values and needs and to the age and maturity of their children and thus use an appropriate flexible approach differing from COPA’s ‘one size fits all’ approach.” *Id.* at 49.

<sup>6</sup> Indeed, it was these user controls that led the *Playboy* Court to find “a key difference between cable television and the broadcasting media,” and to apply strict scrutiny. *Playboy*, 529 U.S. at 815.

The critical development in this regard has been the rapid rise of viewer empowerment technologies such as VCRs, DVD players, digital video recorders (DVRs), and video on demand (VOD) services. These technologies give parents the ability to accumulate libraries of preferred programming for their children and determine exactly when that programming will be viewed. Using these tools, households can tailor media consumption to their specific needs and values. Parents can amass libraries of programming they believe is educational, enriching, and appropriate for their children, and only allow them to view it when they feel it is appropriate—in sharp contrast to the “invasiveness” of broadcast television at the time *Pacifica* was decided in 1978. Indeed, these new technologies are so effective in empowering parents that one *amicus* supporting the government in this case proudly (and in light of its *amicus* brief, ironically) tells its members that “[w]ith TiVo KidZone and the PTC *you’ll never have to worry again* about what your children are watching on TV.”<sup>7</sup>

Ownership of these viewer empowerment tools is rapidly increasing as their costs plummet. The Consumer Electronics Association (CEA) estimates that 85% of U.S. households

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<sup>7</sup> On its website, the Parents Television Council boldly proclaims:

Finding family-friendly programming has never been easier. With TiVo KidZone, PTC-recommended programming is always at your fingertips. With TiVo KidZone and the PTC *you’ll never have to worry again* about what your children are watching on TV.

<http://www.parentstv.org/store/default.asp> (emphasis added). The PTC also touts other user empowerment tools such as SkyAngel, Clear Play, and Power Cop. The strong endorsement of a range of technology solutions is in stark contrast to the PTC’s assertion to this Court. See Brief of *Amicus* Parents Television Council, at 13 (“the technology available does not work”).

have at least one VCR, down from a high of 91% in 2005. The number of VCRs in homes is declining steadily as consumers replace them with DVD players and DVD recorders; 83% of households have at least one DVD player, up from 13% in 2000.<sup>8</sup>

DVRs and VOD are experiencing similar growth. According to market research, more than one in five U.S. households now has a DVR, up from about one in every 13 households just two years ago, and approximately 50% of all homes will likely have a DVR by 2011.<sup>9</sup> Meanwhile, “nearly 90% of U.S. digital cable subscribers had access to VOD, and 46% of all basic cable customers were offered the service” as of March 2007.<sup>10</sup> And Pike & Fischer estimates that each home will be watching nearly two hours of on-demand content nightly by the end of 2012.<sup>11</sup>

Soon, almost any family that wants these technologies—unimaginable in 1978—will find them within their reach. The CEA estimated that in 2008 the average price of VCRs will fall to \$46 and DVD players to \$90, approximately a 27% price drop for both technologies since 2003, and that the average price of DVRs will fall to \$160

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<sup>8</sup> Consumer Electronics Association, U.S. Consumer Sales and Forecasts, 2003-2008 (July 2007).

<sup>9</sup> Leichtman Research Group, “DVRs Now In Over One of Every Five U.S. Households” (Aug. 21, 2007), <http://www.leichtmanresearch.com/press/082107release.html>.

<sup>10</sup> SNL Kagan, “VOD Availability Grows with Digital Platform,” VOD & ITV Investor, No. 106 (May 30, 2007), at 6, [www.snl.com/products/samples/media\\_comm/kvi/sample1.pdf](http://www.snl.com/products/samples/media_comm/kvi/sample1.pdf).

<sup>11</sup> Scott Sleek, “Video on Demand Usage: Projections and Implications,” Pike & Fischer (Oct. 2007), <http://www.broadbandadvisoryservices.com/researchReportsBriefsInd.asp?repld=541>.

this year.<sup>12</sup> Already, TiVo's most popular DVR is just \$99.99, down significantly from their top-of-the-line DVRs, which were selling for well over \$1,000 a few years ago. In light of the hundreds (even thousands) of dollars families spend to bring television sets in the home, the expense of these parental control tools seem quite reasonable in comparison. Moreover, most video service providers now offer DVR functionality bundled into their cable and satellite set-top boxes.

Beyond the V-Chip and DVR technology, there are a variety of other technologies that allow parents to control the viewing of content historically delivered by broadcast.<sup>13</sup> Cable and satellite television offer robust parental controls: set-top boxes offer locking functions for individual channels, preventing children from accessing the channels or programs without a password,<sup>14</sup> and parental controls are also usually just one button-click away on most cable and satellite remote controls.<sup>15</sup> Specialized remote controls can also limit

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<sup>12</sup> Consumer Electronics Association, U.S. Consumer Sales and Forecasts, 2003-2008 (July 2007).

<sup>13</sup> All of these technologies were extensively detailed in comments filed on remand with the FCC by *amicus* Adam Thierer. See Adam Thierer, "The Current State of Parental Controls (and What it Means For This Debate)," *In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005; Court Remand of Section III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints* (Sept. 21, 2006), [http://www.pff.org/issues-pubs/filings/2006/092106thierer\\_FCC\\_parentalcontrols.pdf](http://www.pff.org/issues-pubs/filings/2006/092106thierer_FCC_parentalcontrols.pdf).

<sup>14</sup> A comprehensive survey of the content controls that cable television providers make available to their subscribers can be found on the "Control Your TV" website of the National Cable and Telecommunications Association. See <http://controlyourtv.org/>

<sup>15</sup> A new industry sponsored campaign entitled "The TV Boss," <http://www.thetvboss.org/>, offers easy-to-understand tutorials explaining how to program the V-Chip or cable and satellite set-top box controls.

children to channels approved by the parents.<sup>16</sup> Independent screening tools like TVGuardian offers a “Foul Language Filter” that can filter out profanity (even from broadcast signals) based on closed captioning.<sup>17</sup>

Moreover, many households feel that they can forgo technological controls altogether and instead rely on household media consumption rules.<sup>18</sup> Some of these can be “formal” in the sense that parents make the rules clear and enforce them routinely in the home over a long period of time. Other media consumption rules can be fairly informal, however, and be enforced on a more selective basis. Regardless, most parents enforce such guidelines. A 2003 Kaiser Family Foundation survey found that “[a]lmost all parents say they have some type of rules about their children’s use of media.”<sup>19</sup> A 2006 Kaiser survey of families

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As part of the effort, several public service announcements and other advertisements have aired or been published reminding parents that these capabilities are at their disposal.

<sup>16</sup> See <http://weemote.com/>.

<sup>17</sup> See <http://tvguardian.com/>.

<sup>18</sup> Other courts have recognized that this is also the case in other contexts. As the Third Circuit Court of Appeals recently noted in the latest COPA appeal:

Though we recognize that some of those parents may be indifferent to what their children see, others may have decided to use other methods to protect their children—such as by placing the family computer in the living room, instead of their children’s bedroom—or trust that their children will voluntarily avoid harmful material on the Internet. Studies have shown that the primary reason that parents do not use filters is that they think they are unnecessary because they trust their children and do not see a need to block content.

*American Civil Liberties Union v. Mukasey*, No. 07-2539, at 49-50 (3d Cir. July 22, 2008).

<sup>19</sup> Kaiser Family Foundation, *Zero to Six: Electronic Media in the Lives of Infants, Toddlers and Preschoolers*, at 9 (Oct. 28, 2003), <http://www.kff.org/entmedia/entmedia102803pkg.cfm>.

with infants and preschoolers revealed that 85% of those parents who let their children watch TV at that age have rules about what their child can and cannot watch. And 63% of those parents say they enforce those rules all of the time.<sup>20</sup> About the same percentage of parents said they had similar rules for video game and computer usage.<sup>21</sup>

This research demonstrates that the V-Chip is merely one tool or strategy that households can use to control broadcast television programming in their homes. There is a mosaic of parental control tools and methods families can use—as they see fit and in various combinations—to deal with household media exposure and consumption. With this diversity of tools and methods, families now have the ability to construct and enforce their own “household standard” for acceptable media content in their homes. And this is consistent with

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<sup>20</sup> Kaiser Family Foundation, *The Media Family: Electronic Media in the Lives of Infants, Toddlers, Preschoolers and Their Parents*, at 20 (May 24, 2006), <http://www.kff.org/entmedia/7500.cfm>.

<sup>21</sup> Similarly, the U.S. Census Bureau recently released data on child-parent interaction illustrating how the use of household media rules appears to be growing, stating that “Parents are taking a more active role in the lives of their children than they did 10 years ago.” Specifically, parents are crafting more TV rules for their children today than they were in the past. The Census Bureau report measured how many families imposed three specific types of household media rules: restrictions on the type of programming allowed, the number of hours watched, and time and day viewing was allowed. It found the percentage of families imposing all three types of rules rose from 1994 to 2004 for the three different age groups surveyed: enforcement in families with children 3 to 5 years of age rose from 54% to 64.7%, 6 to 11 years of age rose from 60.3% to 70.5%, and 12 to 17 years of age rose from 40.2% to 46.7%. U.S. Census Bureau, “Parents More Active in Raising Their Children; More Children Get Television Restrictions” (Oct. 31, 2007), <http://www.census.gov/Press-Release/www/releases/archives/children/010850.html>.

what the Second Circuit called “a notional pillar of free speech—namely, choice.” Pet. App. at 41a.

Both technological and non-technological user empowerment tools have changed the media landscape such that broadcast can no longer be considered an uncontrollable “intruder” into the home that is easily accessible by children, and thus is deserving of less than maximum First Amendment protection. The core factual assumptions that underlie *Pacifica*’s lower level of First Amendment protection are no longer valid. In their stead, this Court should follow the standard strict scrutiny jurisprudence applicable to content-based regulations of speech.

**C. As Modern Communications Technologies Converge, Any Remaining Foundation for *Pacifica* Is Being Eliminated.**

In 1978, when *Pacifica* was decided, there really were only two ways to deliver content to the masses: via broadcast (radio and TV) and via paper (newspapers, magazines, etc.). Thirty years later, however, the proliferation of new media technologies is radically transforming how entertainment and news content gets delivered. We are in the midst of a “converged” world where distinctions among various types of content and delivery methods are rapidly blurring. At the same time, parents have a strong and growing ability to take direct control of what media their children access (on television, as discussed *supra* Part I.B., and in new media as briefly discussed *infra* Part I.C.3.). These changes are reshaping how our society can most effectively protect children from inappropriate content.

These dual technological developments raise the question of whether in an age of convergence it is appropriate to apply

different legal standards to the same content delivered via different media. *Amici* submit that it is becoming less and less reasonable to call out broadcast as a “unique” medium where otherwise fully protected speech may be censored by the government. With broadcast television being just one of the myriad of ways that people can access lawful content (including indecent content), it no longer makes sense from a constitutional or policy perspective to give broadcast speech less First Amendment protection.

As the Second Circuit opined below, the “FCC’s arguments . . . must be evaluated in the context of today’s realities. The proliferation of satellite and cable television channels—not to mention internet-based video outlets—has begun to erode the ‘uniqueness’ of broadcast media.” Pet. App. at 43a. And critically, as First Amendment jurisprudence adjusts to the converged environment, the full constitutional protection afforded in *Reno v. ACLU* (relating to the Internet) is the appropriate analysis to apply to converged media. As discussed *supra* Part I.A., *Pacifica* is no longer valid in the broadcast context, and it should have no relevance whatsoever in the converged environment.

### ***1. New Technologies Are Transforming Society.***

The proliferation of new technologies is rapidly changing the media landscape, a fact the FCC tried to downplay by citing this Court’s assertion 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.” Pet. App. at 106a, quoting *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 190 (1997) (internal quotations omitted).

However, more than 10 years have passed since the Court uttered those words. In that time, the media environment has changed profoundly: Americans—adults and children alike—are increasingly accessing new video and audio content on the Internet (*e.g.*, YouTube, Apple iTunes, and podcasts<sup>22</sup>), through cable and satellite operators (*e.g.*, DirecTV, EchoStar’s “Dish Network,” and XM and Sirius satellite radio), and DVD (*e.g.*, Netflix) and video game purchases and rentals. Almost half of Americans use the Internet, and 87% of U.S. children ages 12 to 17 use the Internet.<sup>23</sup> The Commission itself recognizes that “almost 86% of households with television subscribe to a cable or satellite service.” Pet. App. at 106a-107a.

## ***2. New Technologies Are Subsuming Broadcast.***

Not only are more people accessing video and audio content by other means, broadcast itself is converging with these new media technologies. Individuals can now access “broadcast” programming via their cable and satellite subscriptions. In addition, network programming is increasingly available on the Internet. For example, entire episodes of popular network shows like “Lost” and “Grey’s Anatomy” can be viewed on the networks’ websites for

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<sup>22</sup> A “podcast” is an audio or video file, usually in MP3 format, made for download to a portable player or personal computer. See Definition of “p o d c a s t,” U r b a n D i c t i o n a r y , <http://www.urbandictionary.com/define.php?term=podcast>.

<sup>23</sup> See Mary Madden, *Internet Penetration and Impact*, Pew Internet & American Life Project, at 3-4 (April 2006), [http://www.pewinternet.org/pdfs/PIP\\_Internet\\_Impact.pdf](http://www.pewinternet.org/pdfs/PIP_Internet_Impact.pdf); Amanda Lenhart, Mary Madden, Paul Hitlin, *Teens and Technology: Youth Are Leading the Transition to a Fully Wired and Mobile Nation*, Pew Internet & American Life Project, at i (July 27, 2005), [http://www.pewinternet.org/pdfs/PIP\\_Teens\\_Tech\\_July2005web.pdf](http://www.pewinternet.org/pdfs/PIP_Teens_Tech_July2005web.pdf).

free.<sup>24</sup> Indeed, broadcasters are now sometimes posting their content online *prior* to its release on broadcast platforms. For example, in March 2005, NBC debuted its sitcom “The Office” on the Internet a week before the show premiered on network television.<sup>25</sup>

Network shows and other broadcast programming are also available on websites such as iTunes and YouTube. Furthermore, many broadcast programs can be downloaded through video game consoles,<sup>26</sup> and complete seasons of most broadcast shows are available for rental or purchase on DVD shortly after the TV season comes to a close. Although some Americans do still rely on over-the-air broadcast signals for video programming, that is changing and consumers are increasingly accessing broadcast content via multiple non-broadcast platforms.

To the extent that concerns about “children in the audience” remain a motivation for FCC regulation of broadcast content, it is important to note that it is often children who are *leading* the shift away from broadcast to the variety of new (and largely unregulated) media outlets and technologies such as Internet websites, blogs, social networking services, iPods, MP3 players and other mobile devices, and cable and satellite networks. And, when children

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<sup>24</sup> See ABC.com Full Episode Player, <http://dynamic.abc.go.com/streaming/landing>; CBS, <http://www.cbs.com/video/>; NBC, <http://www.nbc.com/Video/>; and Fox’s “Primetime on myspace,” <http://profile.myspace.com/index.cfm?fuseaction=user.viewprofile&friendid=281211598>.

<sup>25</sup> Anne Becker, “NBC’s *Office* Gets Web Broadcast,” *Broadcasting & Cable* (March 16, 2005), <http://www.broadcastingcable.com/article/CA511340.html>.

<sup>26</sup> Elizabeth Gillespie, “Microsoft to Offer TV Shows, Movies Through Xbox Live,” *USA Today* (Nov. 7, 2006), [http://www.usatoday.com/tech/products/services/2006-11-07-xbox-download\\_x.htm](http://www.usatoday.com/tech/products/services/2006-11-07-xbox-download_x.htm).

do consume broadcast content, it is increasingly through these non-broadcast platforms.<sup>27</sup>

### ***3. Converging Media Technologies Offer a Myriad of User Empowerment Tools to Control Access to Unwanted Content.***

Not only are new technologies changing the way people access video and audio programming, new (and newly improved) user empowerment tools are allowing individuals to exercise unprecedented freedom of choice and to guard themselves and their children against content they deem undesirable in this “converged” world.

In the Internet context—into which video programming is inexorably moving—there is a huge and growing number of technology tools available to parents who want to control what content their children access. Internet Service Providers such as America Online have parental control features,<sup>28</sup> and numerous software filtering and other tools are detailed at websites such as [www.GetNetWise.org](http://www.GetNetWise.org). Parental controls are also being bundled into the leading operating systems provided by Microsoft and Apple.<sup>29</sup> Falling computer storage costs mean it is easier than ever to archive preferred media content on computer systems—and thus increasingly

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<sup>27</sup> Amanda Lenhart, Mary Madden, Paul Hitlin, *Teens and Technology: Youth are Leading the Transition to a Fully Wired and Mobile Nation*, Pew Internet & American Life Project, at vi (July 27, 2005), [http://www.pewinternet.org/PPF/r/162/report\\_display.asp](http://www.pewinternet.org/PPF/r/162/report_display.asp).

<sup>28</sup> AOL Safety and Security Center, <http://daol.aol.com/safetycenter/parentalcontrols>.

<sup>29</sup> Microsoft’s Windows Vista parental controls, <http://www.microsoft.com/windows/windows-vista/features/parental-controls.aspx?tabid=1&catid=5>; Apple’s OS X Leopard parental controls, <http://www.apple.com/macosex/features/parentalcontrols.html>.

the personal computer can replace, or supplement, the television.<sup>30</sup>

***4. In the Converged World, All Content Delivery Warrants Full First Amendment Protection.***

As the Court considers the APA questions raised in this case, the Court should consider the larger context in which the FCC's efforts to regulate broadcast indecency exist. Whether or not the Court takes this opportunity to declare that *Pacifica* is dead, it is surely dying. The emergence of parental control tools for both broadcast and new media has a direct impact on the legal underpinnings of the FCC's authority to regulate broadcast content.

Although the goal of protecting children is without question a valid goal, the government may only "regulate the content of constitutionally protected speech [*e.g.*, indecency] in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable*, 492 U.S. at 126. In both the cable and Internet contexts, applying strict scrutiny, this Court has squarely endorsed the use of technology as a less restrictive means to further a governmental objective. *See, e.g., Reno*, 521 U.S. at 877 (noting significance of "user based" alternatives to governmental regulation of speech on the Internet); *Playboy*, 529 U.S. at 814-15 (noting the same for cable television). As traditional "broadcast" content moves onto the converged network, technology is making *Pacifica*, with its lower level of First Amendment protection, obsolete.

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<sup>30</sup> Melissa J. Perenson, "The Hard Drive Turns 50," *PC World* (Sept. 13, 2006), [http://www.pcworld.com/article/127104/the\\_hard\\_drive\\_turns\\_50.html](http://www.pcworld.com/article/127104/the_hard_drive_turns_50.html).

## **II. THE FCC’S RELIANCE ON COMPLAINT COUNT AND ITS FLAWED “CONTEMPORARY COMMUNITY STANDARDS” ANALYSIS VIOLATE THE APA AND FIRST AMENDMENT.**

Beyond the APA considerations that are the focus of the Second Circuit’s holding below, and the concerns about *Pacifica* discussed above, the FCC’s actions on review are further flawed because of the blatant manipulation of and reliance on “complaints” to justify Commission action. The FCC’s reliance on manipulated complaint figures and its failure to make a proper “community standards” determination violate both the APA and the First Amendment.

### **A. The FCC Arbitrarily and Capriciously Relied on Manipulated and Inflated Complaint Data as an Impetus to Act.**

Relying on past formal and informal statements by the FCC, some *amici* argue that the Commission has a broad public mandate to boost its enforcement of broadcast standards because it has received “hundreds of thousands of complaints alleging that various broadcast television programs . . . are indecent, profane, and/or obscene.”<sup>31</sup> This asserted increase in viewer complaints has been the direct impetus for increased FCC action against indecency.

Former FCC Chairman Michael Powell testified before Congress in 2004 that the agency was motivated “to sharpen [its] enforcement blade” because of the “rise in the number of

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<sup>31</sup> See Brief of *Amicus* Center for Constitutional Jurisprudence, at 4-5, citing *Jt. App.* at 27, ¶2.

complaints at the Commission.”<sup>32</sup> Powell subsequently stated that “the increase in the Commission’s enforcement efforts in this area is *a direct response* to the increase of public complaints.”<sup>33</sup> In explaining the Omnibus Order on appeal here, current FCC Chairman Kevin Martin pointed first to an asserted dramatic growth in the number of complaints.<sup>34</sup>

The FCC’s reliance on an asserted increase in complaints is inappropriate because the Commission itself manipulated the count of complaints in two ways. First, during the summer of 2003, the FCC changed how it counted indecency complaints—and apparently only *indecency* complaints—by counting “identically worded form letters or computer-generated electronic complaints” as individual complaints, rather than counting them as a single complaint.<sup>35</sup> The Commission did not make any public announcements about this change in methodology, but a 2003 press release from a pro-regulatory advocacy group claimed credit for getting the FCC to change its methodology.<sup>36</sup> *Amici* fully support

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<sup>32</sup> Testimony of Federal Communications Commission Chairman Michael K. Powell Before the House Energy and Commerce Committee, Subcommittee on Telecommunications and the Internet, at 2-3 (Feb. 11, 2004), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-243802A3.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243802A3.pdf).

<sup>33</sup> Remarks of Michael K. Powell, Chairman, Federal Communications Commission, at the National Association of Broadcasters Convention, Las Vegas Nevada, at 1 (April 20, 2004) (emphasis added), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-246876A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-246876A1.pdf).

<sup>34</sup> Statement of Chairman Kevin Martin, *Jt. App.* at 163.

<sup>35</sup> See Adam Thierer, “Examining the FCC’s Complaint-Driven Broadcast Indecency Enforcement Process,” Progress & Freedom Foundation, Progress on Point 12.22, at 5 (Nov. 2005), <http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf>.

<sup>36</sup> Parents Television Council, “FCC Reacting to PTC Demands,” Press Release (July 1, 2003), <http://web.archive.org/web/>

citizens' First Amendment right to petition the government for a redress of grievances and so do not take issue, as a matter of principle, with the Commission's counting of form complaints as multiple indecency complaints (so long as the FCC does not single out *indecency* complaints to inflate in this manner, as the FCC did here). The Commission cannot, however, rely on such a change in formula to claim a *true* increase in complaints.

Second, and more egregiously, in early 2004 the FCC began counting individual complaints *multiple times*.<sup>37</sup> Thus, if a single individual addressed a single complaint to seven different offices within the FCC (*e.g.*, Enforcement Bureau, Consumer & Governmental Affairs Bureau, and the five Commissioners), the FCC counted that one complaint as *seven different* complaints, thereby radically inflating the reported number of complaints received. This change in complaint counting only applied to broadcast indecency and obscenity complaints.<sup>38</sup>

Although the appropriateness of the FCC's manipulation of the indecency complaint counts (to the exclusion of the other types of complaints) is not squarely before this Court because it was not addressed below, this Court should be highly skeptical of any assertions by the Petitioners and their *amici* that there is a high level of national outrage about

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[20030802090628/http://www.parentstv.org/ptc/publications/release/2003/0701.asp](http://www.parentstv.org/ptc/publications/release/2003/0701.asp).

<sup>37</sup> In a 2004 report, the FCC acknowledged that under its new methodology the reported count of complaints may contain "duplicate complaints." Federal Communications Commission, "Quarterly Report on Informal Consumer Inquiries and Complaints Released," First Quarter 2004, 9 n.\*\* (Feb. 11, 2005), <http://www.fcc.gov/cgb/quarter/2004qtr1.pdf>.

<sup>38</sup> *Id.*

broadcast indecency.<sup>39</sup> To the contrary, as discussed *infra* Part II.B., it appears far more likely that the “community” is much more accepting of indecent content than the FCC would like to admit.

**B. The Commission Failed to Undertake Any Investigation Into “Contemporary Community Standards,” and Instead Arbitrarily and Capriciously Relied on Its Manipulated Indecency Complaint Count.**

The Commission did not articulate any clear methodology for determining the “contemporary community standards” for “patent offensiveness” by which it judges an indecency complaint. Rather, it simply determined community standards based in part on “constant interaction with . . . public interest groups, and ordinary citizens.” Pet. App. at 86a. But, taking what the FCC has said at face value, it appears that the FCC treated its manipulated complaint count as significant: the Commission devoted the bulk of the first paragraph of its Omnibus Order to its assertion that a rise in complaints indicates a greater “unease” on the part of the public over indecency. Jt. App. at 26.

There is no credible evidence, however, to support the conclusion that the American public has shown any increased concerns about indecency on television. To the contrary, the facts discussed *infra* Part II.C. indicate that a single organization generated almost all of the complaints, and that

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<sup>39</sup> In the related legal challenge to the “fleeting” visual image of Janet Jackson’s breast at the Super Bowl, the Third Circuit Court of Appeals noted similar allegations about the FCC’s manipulation of complaint counts. See *CBS Corp. v. FCC*, No. 06-3575, at 7 n.2 (3d Cir. July 21, 2008) (noting that record is “unclear on the actual number of complaints received from unorganized, individual viewers”).

organization urged the FCC to change its complaint counting methodology to radically inflate the number of indecency complaints.

To avoid being “arbitrary and capricious” under the APA, an agency must “articulate a satisfactory explanation for its action.”<sup>40</sup> That explanation must reveal a “rational connection between the facts found and the choice made.”<sup>41</sup> The agency must “examine the relevant data” and make an appropriate decision based on that data—the decision cannot “run[] counter to the evidence before the agency.”<sup>42</sup> By relying on manipulated counts of complaints generated almost entirely by a single organization, the Commission failed to live up to these requirements.

Other than apparently relying on inflated complaint data, the Commission wholly failed to conduct an investigation into and analysis of what is “patently offensive” according to “contemporary community standards,” as required by the First Amendment. *See Miller v. California*, 413 U.S. 15 (1973). Instead, the Commission simply relied on its own “collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens.” Pet. App. at 86a. This “collective experience” fails to meet constitutional standards.

The *Miller* Court gave an indication of the type of evidence appropriate to determine “community standards”: “an extensive statewide survey” of what content is *in fact*

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<sup>40</sup> *Motor Vehicle Mfr. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>41</sup> *Id.*, citing *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962).

<sup>42</sup> *Id.*

available in the community. *Miller*, 413 U.S. at 31 n.12. The FCC, however, failed to conduct any investigation into such evidence in this case. The FCC must present some objective and representative evidence of what types of content are available to children in the United States—as opposed to content that is “patently offensive” to the five individual Commissioners themselves.<sup>43</sup>

A brief (albeit unscientific) examination of content that already exists in the “community” of media consumers (including minors) in America quickly shows a much more lenient national standard of “patent offensiveness” than the FCC asserts. The “Internet Movie Database,” for instance, cites hundreds of examples of the term “bullshit” among

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<sup>43</sup> The imperative to look to what is actually available in the community to be protected is vital in light of the sometimes unexpected evidence about actual versus publicly expressed preferences about controversial content. For example, in the traditionally conservative Salt Lake City television market, the four most popular shows are “C.S.I.,” “C.S.I. Miami,” “E.R.,” and “Desperate Housewives”—all of which have been designated by the Parents Television Council as among the worst shows on television. The same trend holds in conservative Oklahoma City, where “Desperate Housewives” is more popular than it is in Los Angeles, as well as Kansas City where the show is bigger than it is in New York City. See Bill Carter, “Many Who Voted for ‘Values’ Still Like Their Television Sin,” *New York Times* (Nov. 22, 2004) <http://www.nytimes.com/2004/11/22/business/media/22tube.html>; Frank Rich, “The Great Indecency Hoax,” *New York Times*, (Nov. 28, 2004), <http://www.nytimes.com/2004/11/28/arts/28rich.html>; Adam Thierer, “Examining the FCC’s Complaint-Driven Broadcast Indecency Enforcement Process,” Progress & Freedom Foundation, Progress on Point 12.22, at 10 (Table 3) (Nov. 2005), <http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf>. These findings are consistent with the evidence presented in an obscenity trial in the 1990s in Provo, Utah—in that case the defense proved that a range of sexually explicit content was available and acquired in the local community. See Terry Neal, “GOP Corporate Donors Cash in on Smut,” *washingtonpost.com* (Dec. 21, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A15644-2004Dec21.html>.

“memorable movie quotes.” And among these occurrences, the Motion Picture Association of America (MPAA) has given many of the movies featuring this particular expletive a PG or PG-13 rating.<sup>44</sup> Occasional uses of the word “fuck” are also common in movies, including movies rated PG-13 and thus available to children across the country.<sup>45</sup> Setting aside the question of whether these ratings are suitable, the Commission seems to have ignored the fact that words it finds indecent can be found in movies already marketed to and accessible by children in our communities (and widely available in the home over cable and satellite services, and on DVDs).

In the face of this evidence—as one of the Commissioners acknowledged<sup>46</sup>—the FCC cannot rest on an utter lack of inquiry into what content is in fact already available to children in this country. In the absence of inquiry into and evidence of actual community standards, the FCC’s indecency rulings violate both the APA and the First Amendment.

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<sup>44</sup> For example, the IMDb reveals instances of the expletive “bullshit” in *The Abyss* (PG-13), *The Air Up There* (PG), *America’s Sweethearts* (PG-13), *Back to the Future II* (PG), *Cocoon* (PG-13), and *Goonies* (PG). See The Internet Movie Database, <http://www.imdb.com/Find?select=Quotes&for=bullshit>.

<sup>45</sup> As indicated in the IMDb, the word “fuck” appears in a broad range of PG-13 movies, including: *Love Affair* (“fuck” spoken by actress Katherine Hepburn), *Gunner Palace* (42 instances of the word “fuck”); *Hero* (11 instances), *The Ringer* (a movie clearly aimed at an under-18 audience). See The Internet Movie Database, <http://www.imdb.com/Find?select=Quotes&for=fuck>.

<sup>46</sup> See Statement of Commissioner Jonathan Adelstein, Jt. App. at 172.

**C. The FCC’s Manipulation of Complaints and Its Failure to Assess the Actual Community Standards Grants a Vocal Minority a “Heckler’s Veto.”**

The Commission’s manipulation of the complaint counts, discussed *supra* Part II.A., grossly inflates the seeming expression of concern that (if appropriately counted) the complaints might reflect. But the situation is greatly aggravated because the vast majority of indecency complaints were generated by *a single advocacy group*.<sup>47</sup> In 2003, 99.8% of indecency complaints were submitted by the Parents Television Council (PTC). As of October of 2004 (and excluding complaints related to Janet Jackson’s “wardrobe malfunction” during the Super Bowl halftime show), 99.9% of complaints had been submitted by the PTC that year.<sup>48</sup> In July 2005, the PTC submitted 23,542 complaints which “account[ed] for *all but five* of the FCC complaints” for that month.<sup>49</sup> The PTC was responsible for the two complaints remaining at issue in the present case

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<sup>47</sup> See Todd Shields, “Activists Dominate Content Complaints,” *Mediaweek* (Dec. 6, 2004), [http://web.archive.org/web/20041214162512/http://www.parentstv.org/PTC/news/2004/indecency\\_mediaweek.htm](http://web.archive.org/web/20041214162512/http://www.parentstv.org/PTC/news/2004/indecency_mediaweek.htm).

<sup>48</sup> *Id.* Another advocacy group also participated with the PTC in efforts to generate complaints about the 2004 Super Bowl. See American Family Association, “File An Official Indecency Complaint With The Federal Communications Commission (FCC) About Jackson’s Exposure During Super Bowl Halftime Show!,” <http://www.afa.net/petitions/fcccomplaint.asp>.

<sup>49</sup> *Broadcasting & Cable*, “PTC Drives Spike In Smut Grips” (Nov. 14, 2005) (emphasis added), <http://www.broadcastingcable.com/article/CA6283286.html?display=News&referral=SUPP>.

(and at least three of the four complaints originally at issue here).<sup>50</sup>

By failing to conduct the required community standards analysis and instead relying primarily on an inflated count of complaints generated by a single advocacy group, the Commission has enabled a “heckler’s veto” in violation of the First Amendment. This Court recognized over half a century ago that the “heckler’s veto” is antithetical to the First Amendment, stating that “the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker.” *Feiner v. New York*, 340 U.S. 315, 320 (1951). This Court in *Miller* stated that material “must be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one.” 413 U.S. at 33. More recently, this Court struck down the Communications Decency Act, stating that one component of the statute “would confer broad powers of censorship, in the form of a ‘heckler’s veto,’ upon any opponent of indecent speech . . . .” *Reno*, 521 U.S. at 880 (citation omitted).<sup>51</sup>

Although the FCC acknowledges the inappropriateness of allowing a “particularly sensitive group” to suppress lawful expression, *Jt. App.* at 33 n.13, the Commission has done just

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<sup>50</sup> The PTC complained of Cher’s statement at the 2002 Billboard Music Awards, *Jt. App.* at 86 n.150; Nicole Richie’s statement at the 2003 Billboard Music Awards, *Jt. App.* at 91 n.163; and the use of “dick,” “dickhead” and “bullshit” by “NYPD Blue” characters, *Jt. App.* at 98-99; *Pet. App.* at 129a n.220. The FCC does not reveal who complained of “bullshitter” on “The Early Show.” *Jt. App.* at 105; *Pet. App.* at 125a-126a.

<sup>51</sup> The First Amendment also shields against tyranny of the majority. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

that, allowing a single advocacy group to drive its entire indecency enforcement process. By effectively using a single group's views as a substitute for the required community standards analysis, the Commission is impermissibly allowing a vocal minority to stifle speech that is lawful and accepted by a great many viewers. Many of the television shows that are the primary targets of the group's mass complaint-generation efforts also happen to be some of the nation's most popular shows, even in the most socially conservative parts of the country.<sup>52</sup> Rather than capitulating to a determined and outspoken minority of viewers, the Commission must itself undertake an investigation into relevant facts that would establish the appropriate "community standards."

The "heckler's veto" analysis does not change in the face of the FCC's argument that the allegedly profane words could have been removed from the three television shows without materially altering them. *See* Pet. App. at 76a n.44, 98a-99a (2003 BMAs), 123a (2002 BMAs); Jt. App. at 103 ("NYPD Blue"). As one noted commentator explained:

The Court's reluctance to accept the "heckler's veto," and its refusal to permit one group of citizens effectively to "censor" the expression of others because they dislike or are prepared violently to oppose their ideas, seem well-grounded in the central precepts of the first amendment. Thus, "intolerance-based" justifications for restricting expression, like paternalistic justifications, are constitutionally

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<sup>52</sup> Adam Thierer, "Examining the FCC's Complaint-Driven Broadcast Indecency Enforcement Process," Progress & Freedom Foundation, Progress on Point 12.22, at 10 (Table 3), (Nov. 2005), <http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf>.

disfavored, *even if the restriction does not substantially prevent the communication of a particular idea, viewpoint, or item of information.*<sup>53</sup>

Thus, even if certain “profane” words could be edited from programming without affecting the purpose or message of a show, a particularly offended minority group should not be able to censor the use of such words.

### **III. THE INCONSISTENCY OF THE COMMISSION’S ANALYSIS OF NON-LITERAL EXPLETIVES IS ARBITRARY AND CAPRICIOUS UNDER THE APA, AND CREATES A CHILLING EFFECT IN VIOLATION OF THE FIRST AMENDMENT.**

Inherent in the concept of “arbitrary and capricious” is the notion that agency decisions cannot be “guided by unpredictable or impulsive behavior,”<sup>54</sup> or be unreasonably inconsistent with past policy. *See Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967, 981 (2005). The Commission’s utterly inconsistent treatment of “non-literal” expletives, however, sets the gold standard for capriciousness.

For example, the Commission in its initial orders declared that words such as “piss” and “ass” do not describe sexual or excretory functions while words such as “shit” and “fuck” are so inherently offensive that it does not matter whether they are intended to describe sexual or excretory

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<sup>53</sup> Geoffrey Stone, “Content Regulation and the First Amendment,” 25 Wm. & Mary L. Rev. 189, 215-16 (1983) (footnote omitted) (emphasis added).

<sup>54</sup> Black’s Law Dictionary, Second Pocket Edition (2001) (definition of “capricious”).

functions. The FCC held that the phrases “fire her ass” and “pissed off” were not indecent. Jt. App. at 138. The Commission acknowledged that “ass” “refer[s] to buttocks, which are sexual and excretory organs,” and that “piss” “refers to the act of urination,” *id.* at 137-38, but concluded that the words were not used literally: the word “ass” was “used in a nonsexual sense to denigrate or insult the speaker or another character” and that the word “piss” was “used as part of a slang expression that means ‘angry.’” *Id.* at 138.

Yet the Commission wholly ignored the completely non-sexual and non-literal use of the word “fuck” in Nicole Richie’s statement during the 2003 Billboard Music Awards (“It’s not so fucking simple”). The FCC asserted that Richie’s non-literal use of the word “fucking” for emphasis was not relevant to the indecency analysis. The Commission stated that “any strict dichotomy between [non-literal] ‘expletives’ and ‘descriptions or depictions of sexual or excretory functions’ is artificial and does not make sense in light of the fact that an ‘expletive’s’ power to offend often derives from its sexual or excretory meaning.” Pet. App. at 82a-83a.

With regard to Cher’s completely non-sexual and non-literal use of the word “fuck” at the 2002 Billboard Music Awards (“fuck ‘em”), the Commission stated that “it hardly seems debatable that the word’s power to insult and offend derives from its sexual meaning.” *Id.* at 117a-118a.

And in considering the show “NYPD Blue,”<sup>55</sup> the FCC in its initial order did not find the word “dickhead” indecent

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<sup>55</sup> The Commission did subsequently dismiss the complaint against “NYPD Blue,” Pet. App. at 131a, but this dismissal is based on a

because, even though it referenced the male sexual organ, it was not used for its literal meaning; it was simply an “epithet[] intended to denigrate or criticize their subjects.” Jt. App. at 101 n.190.

Somehow in that same order the Commission reached exactly the opposite conclusion for “bullshit,” stating that regardless of whether the word is “used literally or metaphorically, [it] is a vulgar reference to the product of excretory activity.” *Id.* 100. The Commission ignored the fact that the definitions of “dickhead” and “bullshit” are both equally divorced from any sexual or excretory origins: “dickhead” is defined by Merriam-Webster as “usually vulgar: a stupid or contemptible person,” and “bullshit” is defined as “usually vulgar: nonsense; especially: foolish insolent talk.”<sup>56</sup>

As this Court has made clear, agency action is not arbitrary and capricious if “the agency’s path may be reasonably discerned.” *Motor Vehicle Mfr. Ass’n*, 463 U.S. at 43 (citation omitted). It is impossible to discern, however a clear and understandable distinction showing why “bullshit” is indecent but “dickhead” is not. This internal inconsistency violates the Administrative Procedure Act.

Beyond the APA, the FCC’s inconsistency also creates a chilling effect contrary to the First Amendment’s guarantee of freedom of speech. If broadcasters cannot predict when the FCC will be forgiving of a non-literal expletive and when it will not, they will be forced to engage in self-censorship to

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technicality, and the Commission did not in anyway step back from its wholly inconsistent treatment of “dickhead” and “bullshit.”

<sup>56</sup> Merriam-Webster Online Dictionary, <http://www.m-w.com/dictionary/dickhead>, <http://www.m-w.com/dictionary/bullshit>.

play it safe, thereby foregoing the creation of content that in fact would be legal.<sup>57</sup> This, of course, can hurt the broadcasters and advertisers commercially. More importantly, society as a whole is hurt because it loses access to material that is legitimately entertaining, artistic, educational or newsworthy.

### CONCLUSION

Justice Brennan noted, writing in dissent in *Pacifica*, “there lurks in today’s decision a potential for ‘[reducing] the adult population . . . to [hearing] only what is fit for children,’” and he expressed his uncertainty “that such faith in the Commission is warranted.” *Pacifica*, 438 U.S. at 769 (citation omitted). Although the Commission did initially (and for more than two decades) exercise its authority with caution, it is now trying to dramatically expand its regulation of broadcast content by censoring “fleeting expletives” at the same time the very foundation of its regulatory authority is radically contracting. Whether or not Justice Brennan’s fears were justified 30 years ago, they are today.

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<sup>57</sup> See *Laird v. Tatum*, 408 U.S. 1, 12-13 (1972) (“constitutional violations may arise from the deterrent, or ‘chilling’ effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights”).

*Amici* respectfully urge this Court to affirm the judgment below, and hold that *Pacifica* will not be a First Amendment guidepost for the converged network of the 21<sup>st</sup> century.

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