No. 08-0841-ag(L)

Nos. 08-1424-ag (CON), 08-1781-ag (CON), 08-1966-ag (CON)

IN THE

United States Court of Appeals for the Second Circuit

ABC, INC., KTRK TELEVISION, INC., WLS TELEVISION, INC., CITADEL COMMUNICATIONS, LLC, WKRN, G.P., YOUNG BROADCASTING OF GREEN BAY, INC., WKOW TELEVISION INC., WSIL-TV, INC., ABC TELEVISION AFFILIATES ASSOCIATION, CEDAR RAPIDS TELEVISION COMPANY, CENTEX TELEVISION LIMITED PARTNERSHIP, CHANNEL 12 OF BEAUMONT INCORPORATED, DUHAMEL BROADCASTING ENTERPRISES, GRAY TELEVISION LICENSE, INCORPORATED, KATC COMMUNICATIONS, INCORPORATED, KATV LLC, KDNL LICENSEE LLC, KETV HEARST-ARGYLE TELEVISION INCORPORATED, KLTV/KTRE LICENSE SUBSIDIARY LLC, KSTP-TV LLC, KSWO TELEVISION COMPANY INCORPORATED, KTBS INCORPORATED, KTUL LLC, KVUE TELEVISION INCORPORATED, MCGRAW-HILL BROADCASTING COMPANY INCORPORATED, MEDIA GENERAL COMMUNICATIONS HOLDINGS LLC, MISSION BROADCASTING INCORPORATED, MISSISSIPPI BROADCASTING PARTNERS, NEW YORK TIMES MANAGEMENT SERVICES, NEXSTAR BROADCASTING INCORPORATED, NPG OF TEXAS, L.P., OHIO/OKLAHOMA HEARST-ARGYLE TELEVISION INC., PIEDMONT TELEVISION OF HUNTSVILLE LICENSE LLC, PIEDMONT TELEVISION OF SPRINGFIELD LICENSE LLC, POLLACK/BELZ COMMUNICATION COMPANY, INC., POST-NEWSWEEK STATIONS SAN ANTONIO INC., SCRIPPS HOWARD BROADCASTING CO., SOUTHERN BROADCASTING INC., TENNESSEE BROADCASTING PARTNERS, TRIBUNE TELEVISION NEW ORLEANS INC., WAPT HEARST-ARGYLE TELEVISION INC., WDIO-TV LLC, WEAR LICENSEE LLC, WFAA-TV INC., WISN HEARST-ARGYLE TELEVISION INC., *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, *Respondents*.

FOX TELEVISION STATIONS, INC., NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., CBS BROADCASTING, INC., *Intervenors*,

CENTER FOR CREATIVE VOICES IN MEDIA, FUTURE OF MUSIC COALITION, *Amicus Curiae.*

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

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Respondents' brief underscores the Commission's unpredictable, ever-shifting approach to broadcast indecency. Indeed, the brief gives little indication that the Commission accepts that it is bound by fundamental administrative-law principles, much less by the restraint that the First Amendment requires. According to respondents, the five Commissioners in Washington have such expertise in discerning the nation's community standards that courts must defer to their judgments; every case that comes before the Commission is different in some fashion, so there is no way (or need) for it meaningfully to distinguish one case from another (much less for a court to review its attempt to do so); and the Commission can establish that it properly applied its multi-factor indecency test simply by stating that it gave one factor consideration, or that another factor is not dispositive, without providing any meaningful justification of how its factors actually govern the case at hand.

The Court should reject the Commission's attempt to evade meaningful judicial review and should instead return to first principles, which require reversal of the Forfeiture Order. An agency must adhere to its own regulations and standards, apply them consistently, and acknowledge and explain departures from prior practice. The Commission has flouted all of these mandates. It has adopted a two-part test for determining indecency, for the specific purpose of giving guidance in an area with constitutional implications, but then ignored the test's

plain meaning. It has also applied the test inconsistently and refused to acknowledge (let alone explain) its resulting departures from precedent. Similar Commission behavior recently led both this Court and the Third Circuit to deem other indecency determinations arbitrary and capricious. *See CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008); *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008). The same result is warranted here.

The Constitution also requires the Commission to act with restraint and in accordance with clear rules when imposing sanctions for a broadcast's content. The Forfeiture Order does not comply with these requirements. It sanctions brief and non-sexual nudity—content that has never qualified as constitutionally indecent—even though readily available technologies enabled parents to block the broadcast. Moreover, the Order applies an indecency standard with wording that the Supreme Court has already deemed unconstitutionally vague, and that has been applied in a way that, far from clarifying matters, has made the meaning of "indecent" harder to ascertain. This Court has already explained that the Commission's indecency regime raises serious constitutional concerns, *Fox*, 489

F.3d at 462-466—concerns reiterated here—and respondents offer no persuasive response.[1]

I. THE FORFEITURE ORDER IS ARBITRARY AND CAPRICIOUS

A. Buttocks Are Not A "Sexual Or Excretory Organ"

Under the Commission's longstanding test, material cannot be indecent unless it describes or depicts sexual or excretory organs or activities. Respondents do not suggest (and the Commission has never suggested) that the scene at issue here depicted sexual or excretory *activity*. Thus, the indecency determination must be overturned unless buttocks are a "sexual or excretory organ." They are not.

1. The Commission is bound to follow its own indecency test. Respondents (Br. 19 & n.3) adopt a divide-and-conquer strategy to the Commission's threshold requirement, discussing "sexual" and "excretory" in the text while relegating the crucial word "organ" to a footnote. Respondents' desire to avoid the word "organ" is understandable; indeed, the footnoted definition they proffer—"bodily parts performing a particular function or cooperating in a particular activity," Br. 19 n.3—validates ABC's view that buttocks are not a sexual or excretory organ. In common parlance and in dictionary definitions, buttocks are merely the fleshy part of the rump. *See* ABC Br. 14-15. They play no

[1] ABC's opening brief stated (at 1) that the forfeiture in this case was levied against three ABC-owned stations and forty-two affiliates. The correct numbers are two and forty-three, respectively.

role in reproduction and excretion—the "particular function[s]" and "particular activit[ies]" (Resp. Br. 19 n.3) specified by the adjectives "sexual" and "excretory"—and hence are not a sexual or excretory organ. Nor does the fact that buttocks are "a functioning part of the human body" (*id.*) make them an "organ" (any more than hair or fingernails), and certainly not a "sexual or excretory organ," the only kind of organ covered by the Commission's threshold test.

Respondents next argue (Br. 19) that adhering to the ordinary meaning of "sexual or excretory organs" would serve "no reasonable purpose." To the contrary, adherence to the phrase's ordinary meaning is not only reasonable, but also essential to avoid the chilling effect that would result from allowing the Commission to disregard the plain meaning of the terms it chose for its indecency test. *See* ABC Br. 19. The Commission chose those terms to give notice of what would (and would not) be considered indecent in the future—and to resolve litigation that raised serious constitutional concerns about the Commission's indecency enforcement, *see Industry Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999, 8016 n.23 (2001) (hereafter *Indecency Policy Statement*). Although respondents now argue (Br. 20) that "[t]echnical physiological definitions have little place in [an indecency] inquiry, because patent offensiveness involves a social—not a medico-anatomical—analysis," they cannot

be allowed simply to ignore the Commission's chosen language. If physiological terms were unwarranted, the Commission should not have adopted them; having done so, it may not disregard them or distort them beyond recognition. *See, e.g.*, *Service v. Dulles*, 354 U.S. 363, 388 (1957) ("While … the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, … having done so he could not … proceed without regard to them."); *Blassingame v. Sec'y of Navy*, 866 F.2d 556, 560 (2d Cir. 1989) ("[A]n agency … must scrupulously observe its own rules, regulations, and procedures.").

Respondents further argue (Br. 21, 22) that honoring the Commission's own language would yield "absurd" or "bizarre" results, raising the specter of "the airwaves [being] 'filled with naked buttocks and breasts during daytime and prime time hours.'" Br. 22 (quoting Forfeiture Order ¶ 10). This assertion rings hollow, however, given that broadcasters have never "filled" the airwaves with buttocks or other nudity between 10 pm and 6 am, when the indecency rules do not apply, *see* 47 C.F.R. § 73.3999(b). More fundamentally, if the Commission believes that the first prong of its indecency test is underinclusive, it can promulgate a revised test that actually encompasses the body parts the agency apparently desires to regulate.[2] Whether such a test would be constitutional and consistent with the indecency

[2] For example, the Commission could replace "sexual or excretory organs" with "genitals, anus, buttocks, pubic hair, or breasts."

statute could then be tested in court. The Commission's ability to promulgate a test that actually covers what the agency evidently intends to reach underscores the impermissibility of its current, chilling approach. *See Reno v. ACLU*, 521 U.S. 844, 874 (1997).[3]

Respondents' reasoning is ultimately that any part of the human body that is "associated with sexual arousal" can be considered a "sexual organ." Br. 19. Given the infinite variety of human sexuality, this approach has no limits and would expand the Commission's indecency enforcement well beyond the proper reach of the statute or constitutional limits.[4] The Commission chose the "sexual or

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[3] Respondents state that ABC's argument would logically extend to breasts, even though "tits" was "one of the words the Commission found [in *Pacifica*] referred to excretory or sexual activities or organs." Br. 21-22 (internal quotation marks omitted). Pacifica, however, raised no objection on appeal to the Commission's finding regarding any of the words. *See Pacifica Found. v. FCC*, 556 F.2d 9, 36-37 (D.C. Cir. 1977) (Leventhal, J., dissenting). Moreover, Judge Leventhal, whose dissenting vote was vindicated by the Supreme Court, observed that it was "not clear why the word 'tit' is in the FCC's Index, because it is neither a sexual nor excretory organ. The fact that Mr. Carlin included it in his list of the verboten does not mean that the FCC must adopt his position." *Id.* at 37 n.16. Moreover, breasts, unlike buttocks, are organs, and they undergo a physiological change during sexual arousal. In any event, the indecency determination here was not premised on breasts—and none of Carlin's seven words, of course, related to buttocks.

[4] *See, e.g.*, William Shakespeare, *Sonnet 130* ("My mistress' eyes are nothing like the sun; Coral is far more red than her lips' red[.]"); Richard Lovelace, *To Amarantha, That She Would Dishevel Her Hair* ("Amarantha sweet and fair,/Ah, braid no more that shining hair!/As my curious hand or eye/Hovering round thee, let it fly!"); Pablo Neruda, *Your Feet* ("When I cannot look at your face/I look at your feet./Your feet of arched bone,/your hard little feet.").

excretory organ" test to avoid these concerns. It should be required to adhere to (or formally revise) that test now.

2. Before this broadcast, the Commission had never deemed buttocks to be a "sexual or excretory organ" under its threshold indecency test. Respondents assert the contrary, but none of the pre-broadcast cases they cite supports their position. As ABC's opening brief explained (at 15), *Rubber City Radio Group*, 17 F.C.C.R. 14745 (2002), involved dialogue about "simulated anal sodomy with an infant," *id.* at 14747 (¶ 7). Thus, the decision's mention of "a child's excretory organ," *id.* (¶ 6), referred to the anus, not buttocks. The same is true of the other decisions respondents cite (not one of which was cited in the Forfeiture Order): The dialogue in *Enforcement Bureau Letter Ruling on KLOU(FM), St. Louis*, 2001 WL 102218 (F.C.C. Feb. 8, 2001)—an unpublished decision—allegedly referred to a wallet being "stuffed up the ass of a dead guy," *id.* at *1. The dialogue in *Letter to Gregory P. Barber*, 5 F.C.C.R. 3821 (1990), similarly alluded to anal penetration, *see id.* at 3822. Because the episode here neither depicted nor described the anus, these cases cannot save the forfeiture.

As for *Letter to Mel Karmazin*, 9 F.C.C.R. 1746 (1994), *vacated pursuant to settlement, Sagittarius Broad. Corp.*, 10 F.C.C.R. 12245 (1995), that case involved extended raunchy radio talk that the Commission asserted, without differentiation, "describes sexual and excretory activities and organs," 9 F.C.C.R. at 1746. But

Karmazin could not help respondents even had it not been vacated, because the dialogue contained other references to sexual and excretory organs, including one use of an unmistakable euphemism for penis (a sexual and excretory organ). *See id.* at 1749. As the Commission never specified what rendered the dialogue potentially indecent, the decision provided no notice that the references to buttocks did so. Respondents thus cite *no* case predating the broadcast here that would have alerted ABC to the Commission's novel interpretation of "sexual or excretory organs."

3. Respondents plead finally (Br. 22-23) for deference. But "deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). There is nothing ambiguous about the phrase "sexual or excretory organs." Hence, "[t]o defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.*; *see also Oteze Fowlkes v. Adamec*, 432 F.3d 90, 96 (2d Cir. 2005). Moreover, as noted, serious constitutional problems arise when the Commission disregards the plain meaning of the terms that it chose. *See supra* pages 4-5; ABC Br. 19. Courts have refused to defer to agency interpretations that threaten constitutional rights. *See AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003); *cf. FEC v. LaRouche Campaign*, 817 F.2d 233, 234 (2d Cir. 1987) (per curiam) ("[D]ifferent considerations come into play when a case …

implicates first amendment concerns. In that circumstance the usual deference to the administration agency is not appropriate[.]"). None of the cases respondents cite in urging deference, by contrast, involves an agency interpretation that implicated constitutional protections.

B. The Broadcast Was Not Patently Offensive

For a broadcast to be indecent, it must not only depict or describe sexual organs, but also do so in a patently offensive manner. *E.g., WPBN/WTOM License Subsidiary, Inc.*, 15 F.C.C.R. 1838, 1840-1841 (¶ 9) (2000). Respondents fail to provide a persuasive defense of the Commission's conclusion that the depiction of buttocks in this case was patently offensive. Moreover, their explanation of how the Commission reached its decision here—each factor of the test being given "some" weight in an opaque way—shows that the Commission's indecency regime has drifted into utter unpredictability.

1. One factor of the Commission's patently-offensive test examines whether the sexual organs or activities were dwelled on or repeated at length. *See Indecency Policy Statement*, 16 F.C.C.R. at 8003 (¶ 10). As ABC stated in its opening brief (at 20), the two brief shots of nude buttocks here cannot be considered "dwelling" or "repeating at length" under any reasonable understanding of those terms. Respondents' first answer (Br. 25-26) is that *other* factors suffice to support the indecency finding, thereby suggesting that this factor plays no role

in the Commission's decisionmaking. Respondents then retreat to the Forfeiture Order's half-hearted statement that this factor provides "'some support for a finding of indecency'" and, without elaboration, label that statement "reasonabl[e]." Br. 26-27 (quoting Forfeiture Order ¶ 15). In short, respondents recognize this point as a severe weakness, and to avoid it, they argue that the weakness is irrelevant because the Commission's decision does not require precise, logical support.

2. As to the second "patent-offensiveness" factor, respondents assert that the scene was "shocking, pandering, or titillating" because it is "fundamentally 'voyeuristic'" and "salacious" in that viewers "can observe an actress disrobing in preparation for a shower." Br. 27 (quoting Forfeiture Order ¶ 16). That simply adds adjectives; respondents can point to nothing in the scene that has any overt or covert sexual or excretory aspect. Although respondents contend (Br. 27) that "showing the boy's shocked face" is "designed to underscore that the actress is unclothed," they acknowledge (Br. 28) that "the scene does not depict any sexual response in the child." Indeed, both characters in the scene conduct themselves in an entirely non-sexual fashion. Respondents' position ultimately reduces to the contention that displaying an attractive woman's buttocks—even in a brief non-sexual manner within a serious dramatic context—is inherently "shocking, pandering, or titillating." To argue that a scene is indecent because some viewers

might find images sexually appealing (even if the images are non-sexual) pushes the indecency test much farther than ever before. *See* ABC Br. 23-24.[5]

3. Respondents next dispute ABC's argument (Br. 25) that the Forfeiture Order "[a]ll [b]ut [i]gnored" several factors the Commission has relied on in other cases—including *NYPD Blue*'s status as an acclaimed, award-winning program; the fact that the depictions were related to a broader, non-sexual storyline; ABC's use of a parental advisory and V-chip ratings; and the need to defer to reasonable artistic judgments. But respondents merely point (Br. 27) to the Forfeiture Order's cursory acknowledgments of these factors. Respondents do not address its failure to articulate why these factors did not render the material here not indecent—as they did in other cases, *see* ABC Br. 27-28—beyond the conclusory assertion that

[5] Respondents also assert (Br. 28) that ABC's position would leave the Commission "powerless" to punish depictions of people "who are completely naked working at an office, going grocery shopping, or engaging in other day-to-day tasks so long as they were not were not performing sexualized or excretory functions." That is preposterous. ABC has never suggested that "performing sexualized or excretory functions" is required; its brief simply demonstrated (at 23-24) that under the Commission's own precedent material satisfies the "shocking, pandering, or titillating" factor only if, in context, it is sexualized or has excretory connotations—a point respondents appear to recognize in their strained attempts to characterize the scene at issue as "salacious." Respondents also ignore the fact that the patent-offensiveness test has several parts—a point they elsewhere find convenient to emphasize, since it allows the Commission to elide deficiencies in one part with perceived strengths in another. Depictions of naked people working or shopping could certainly fall within the Commission's indecency test if they included "graphic and explicit" "depictions of sexual or excretory organs" that were "dwelled on or repeated at length" and, in context, portrayed in a manner that could be deemed patently offensive within Commission precedent. Obviously, that speculative scenario is not remotely presented here.

"[i]n context and on balance" (Forfeiture Order ¶ 18) they were outweighed by other considerations. That failure is the crux of ABC's argument (*see* ABC Br. 27), yet respondents do not answer the point, instead lapsing into empty rhetoric, *see, e.g.*, Br. 29 (*NYPD Blue*'s merit "cannot immunize it from federal broadcast indecency regulation"); Br. 31 ("ABC cannot exercise its artistic judgment in violation of federal law.").

Respondents do assert (Br. 32) that "even where, as here, the complained-of scene follows relatively closely upon the" parental advisory, viewers may "come upon the scene without having been alerted to it." But that did not prevent the Commission from relying on similar advisories in denying complaints in other cases—cases respondents ignore in their discussion even though ABC cited them (ABC Br. 30). Respondents also (Br. 32) criticize ABC's advisory for having been "formulated in general terms," using the phrase "partial nudity" rather than specifying "an adult woman's naked buttocks." Again, however, that is equally true of the advisories the Commission treated differently in other cases, and the Commission has never before suggested that detailed description of potentially indecent material is required in a parental advisory. (Indeed, an advisory that a broadcast featured "an adult woman's naked buttocks" might have the opposite of the intended effect—and under the Commission's reasoning, would itself describe sexual or excretory organs.)

C. The Forfeiture Order Is Inconsistent With Commission Precedent

1. ABC's opening brief explained (at 31-37) how the Forfeiture Order is inconsistent with prior Commission decisions. Respondents discuss most of that precedent only in a footnote (Br. 36 n.13), and as to one of the broadcasts (*America's Funniest Home Videos*) respondents merely describe it. Respondents do make actual arguments regarding other cases, but these arguments rest on distinctions that are wholly disconnected from the Commission's indecency test. For example, respondents' only answer regarding *Saving Private Ryan* (Br. 36 n.13) is that that film contained "vulgar language, not images of sexual or excretory organs." That does not meaningfully distinguish the case, because the Commission's indecency test treats images and language alike. *See CBS*, 535 F.3d at 188 (concluding after extended analysis that at least until 2004, "the Commission's entire [indecency] regulatory scheme treated broadcasted images and words interchangeably"). Similarly, the only distinction respondents offer for the episodes of *Will and Grace* and *Two and a Half Men* addressed in ABC's brief (at 23-24) is that "[n]either … involved nudity." Resp. Br. 36 n.13. This too is a non-distinction, because nudity is neither necessary nor sufficient under the Commission's indecency test (and precedent) to render material indecent.

Respondents' arguments make clear that the Commission, in policing broadcast indecency, does not deem it necessary to treat similar cases similarly and

different cases differently. The Commission's approach, rather, is that every case is different, and so any case can be distinguished from another with a statement that one broadcast involved feature X whereas another did not (or not so much), or that factor Y (one of many to be considered) was more important in one broadcast than another, and the Commission's judgment to that effect is "reasonable." Thus, respondents ignore the myriad examples in ABC's opening brief (*e.g.*, at 21, 23-24, 27-28) of the Commission applying parts of its test differently here than in other cases, evidently believing that differential application of the patent-offensiveness factors is permissible as long as the Commission can point to *something* that might justify disparate ultimate outcomes. That is unsustainable. The patent-offensiveness factors serve to cabin the Commission's discretion and inform broadcasters and producers about what constitutes indecency, thereby mitigating the vagueness inherent in the term "patently offensive." If each factor is not applied consistently, then the vagueness becomes intolerable even if the Commission later finds some genuine but unrelated distinction between broadcasts (which, as explained above, respondents do not even do here).

2. Respondents offer a different argument regarding perhaps the starkest example of inconsistent precedent, the rejection of an indecency complaint against a broadcast of *Catch-22*, which included extended rear and frontal nudity. *See* ABC Br. 21, 34. Respondents make no serious argument that that denial is

consistent with the decision here. Nor do they argue that the *Catch-22* decision was incorrect. Rather, they seek refuge in a regulation providing that unpublished decisions "may not be … cited as precedent, except against persons who have actual notice of the document … or by such persons against the Commission." 47 C.F.R. § 0.445(e).

That regulation cannot help respondents. As ABC explained (Br. 33), it has actual notice of the *Catch-22* decision, and thus is authorized by the regulation to cite the decision against the Commission. Respondents assert (Br. 35) that the regulation requires notice prior to the underlying conduct. But that assertion is foreclosed by the regulation's plain language, which allows citation by those who "have"—not "had"—actual notice. ABC's reading is also more consistent with the regulation's purpose, which is not to permit inconsistent agency decisionmaking but rather to prevent regulated entities from being sanctioned for conduct they could not reasonably have known was proscribed. Indeed, there is "no earthly reason why the mere fact of nonpublication should permit an agency to take a view of the law in one case that is flatly contrary to the view it set out in earlier (yet contemporary) cases." *Davila-Bardales v. INS*, 27 F.3d 1, 5-6 (1st Cir. 1994).[6]

[6] Respondents insist that ABC cannot advance its interpretation of the regulation because that interpretation was "not presented to the Commission." Br. 35 n.12 (citing 47 U.S.C. § 405(a)). In fact, it is respondents that may not offer their novel interpretation, because it was not offered in the Forfeiture Order. *See, e.g.*, *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 61 (2d Cir. 2003); *see also* A-200 to

Respondents also rely (Br. 36) on the D.C. Circuit's statement that "an agency is not bound by unchallenged staff decisions." *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008). Even if such a default rule exists, however—and respondents not only cite no authority from this Court or the Supreme Court to that effect, but also decline to note that D.C. Circuit case law is itself inconsistent on the point, *see id.* (citing *Northampton Media Assocs. v. FCC*, 941 F.2d 1214, 1216 (D.C. Cir. 1991))—that rule is inapplicable when an agency expressly adopts another approach, because then the agency is bound to follow its policy, *see, e.g.*, *Blassingame*, 866 F.2d at 560. That is what the Commission has done with § 0.445—a regulation not discussed in *Comcast* (or any pertinent decision of which ABC is aware).[7]

* * *

Respondents' arguments largely boil down to the assertion (Br. 36-37) that each case is "fact-specific" and each Commission ruling "contextual." But context and varying facts do not excuse the Commission's failure to apply its indecency

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A-201, A-207 to A-209 (ABC NAL opposition, repeatedly citing *Catch-22*). That aside, "application of section 405's exhaustion requirement would serve no purpose in this case" because "by its arguments before this Court, the Commission has made clear that it" would have rejected ABC's interpretation. *Conn. Dep't of Pub. Util. Control v. FCC*, 78 F.3d 842, 849 (2d Cir. 1996) (alteration and internal quotation marks omitted).

[7] Respondents' argument is also hypocritical given that elsewhere in their brief (at 17), they *rely* on apparently unchallenged staff decisions.

test consistently, or to offer reasoned explanations (grounded in the indecency test) for disparate rulings in similar—sometimes strikingly similar—circumstances. Respondents' position amounts to a call for unchecked discretion. That call should be rejected.

II. THE FORFEITURE ORDER VIOLATES THE CONSTITUTION

A. The Forfeiture Order Is The Product Of An Unconstitutionally Vague Indecency Standard

The Commission's claim for deference to every judgment it makes in the realm of indecency not only raises serious administrative-law concerns, but also highlights the problem of unconstitutional vagueness that ABC identified in its opening brief (at 43-50), and that this Court warned of last year, *see Fox*, 489 F.3d at 464. Issuing that warning, this Court noted that *Reno v. ACLU* held unconstitutionally vague an internet indecency provision with language materially identical to the Commission's test. *Fox*, 489 F.3d at 464. This Court also pointed to the many inconsistencies in the Commission's recent indecency decisions, indicating that as applied, the test may create "an undue chilling effect on free speech." *Id*. at 463. Respondents' brief does nothing to assuage these concerns.

1. Respondents' answer to *Reno* (Br. 48-49) amounts to a contention that while a restriction on speech that "depicts or describes in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" is unconstitutionally vague in the internet context, the Supreme Court

condones the use of a materially identical standard in the broadcast context. The Supreme Court, however, has never endorsed the wording of the Commission's indecency test, and thus neither this Court nor the Commission can ignore *Reno*'s holding. And respondents fail to explain how a standard could be unconstitutionally vague when applied to one medium but sufficiently precise when applied to another; either a standard provides sufficient notice and clarity or it does not.

FCC v. Pacifica Foundation, 438 U.S. 726 (1978), the Supreme Court's only decision on the constitutionality of broadcast indecency regulation, never addressed vagueness. Furthermore, when reconsidering the initial order under review in *Pacifica*, the Commission limited its holding to the "specific factual context" at issue: the mid-afternoon broadcast of the Carlin monologue. *Id*. at 734. The *Pacifica* Court accordingly considered only whether the Commission could "proscribe this particular broadcast," *id*. at 742 (plurality opinion), entertaining no vagueness challenge (or any other) to the standards articulated in the initial order. Moreover, because Pacifica neither contested that the monologue was "patently offensive" nor denied that it described sexual or excretory activities or organs, the Court had no occasion to consider the meaning of these terms. *Id.* at 739 (opinion of the Court).

Reno also gives no support to the Commission's position. To be sure, *Reno* "distinguished" *Pacifica*. Resp. Br. 49. Yet while *Reno* noted that the internet-indecency provisions under consideration and the *Pacifica* Order had key differences relevant to other constitutional questions, on the subject of vagueness, *Pacifica* contained no holding to distinguish. *Reno* itself makes this clear, explaining that Pacifica had raised just "two constitutional attacks": first that the initial *Pacifica* Order's construction of § 1464 was facially overbroad—an argument the *Pacifica* Court declined to address, *see* 438 U.S. at 742 (plurality opinion)—and second that the First Amendment forbids any regulation of non-obscene broadcasts. *Reno*, 521 U.S. at 866; *see also id*. (noting Pacifica's failure to challenge the finding that broadcast was patently offensive, and explaining that Pacifica's statutory argument about the definition of indecency concerned only whether indecency must entail prurient appeal); *id.* at 870 (noting *Pacifica*'s "emphatically narrow holding"). *Reno* is the *only* case in which the Supreme Court has considered whether a restriction on speech that "depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," *id*. at 860, is precise enough to be constitutional.[8] *Reno*'s holding thus controls the vagueness question here.[9]

[8] Suggesting that indecency is incapable of "a perfectly precise" definition, the Commission argues (Br. 50-51) that indecency is a subject on which some regulatory vagueness must be tolerated. The contention that any inherent

2. Even if *Reno* had distinguished *Pacifica* with regard to vagueness, the Court obviously would not have accounted for the substantial additional vagueness that the Commission's wildly inconsistent post-*Reno* decisions have introduced.

As discussed, while the Commission has articulated three factors to be considered under the "patently offensive" part of its indecency test, *see Indecency Policy Statement*, 16 F.C.C.R. at 8003 (¶ 10), it not only reaches inconsistent results when considering individual factors but also adjusts the weight of each factor and considers other factors in an unpredictable and seemingly outcome-driven manner, enabling it to reach whatever result it wants with respect to a given broadcast. *See supra* pages 13-14; ABC Br. 20-37, 45. And with its decision in this case, the Commission has taken the facially clear language of the indecency test's first part—the requirement that material describe or depict sexual or excretory activities or organs—and obscured that language by suggesting that the

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vagueness in the concept of indecency justifies the current formulation of the indecency test, however, is foreclosed by *Reno*. To the extent that *Dial Information Services Corp. of New York v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), upheld a similarly-worded definition of indecency against a vagueness challenge, that decision has been superseded by *Reno*.

[9] Respondents observe (Br. 49) that *Reno* involved a criminal statute whereas the Commission enforces the indecency statute in administrative proceedings (although it can also be enforced through criminal prosecution). That fact weighs against the Commission. In a prosecution under the provisions at issue in *Reno*, the requirement that words or images be found "patently offensive" beyond a reasonable doubt would have limited punishment to cases where offensiveness was obvious and unquestionable.

words will not be given their plain meaning. *See supra* pages 3-4. Thus, although respondents (Br. 50) point to the Commission's "elaboration of the indecency standard" as having "reduced any vagueness inherent" in it, the reverse is true.[10]

B. The Brief, Non-Sexual Nudity In This Episode Is Not Constitutionally Indecent

The Commission cannot regulate broadcast content simply because it has labeled the speech indecent. Rather, the broadcast must be *constitutionally* indecent—it must be of such a nature that the government has a compelling interest in restricting its availability to minors. The category of constitutionally indecent speech includes only those words or images with the actual capacity to seriously threaten the "physical and psychological well-being of minors." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Respondents have still offered no argument as to how the brief, non-sexual depiction of nude buttocks in this broadcast could fall into that category.

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[10] Respondents assert (Br. 52) that the Commission's reliance on "community standards" in determining indecency is not unduly subjective or vague because it develops its conception of "community standards" "through constant interaction with lawmakers … public interest groups and ordinary citizens," among others That only highlights the absence of constraints on the Commission's subjectivity and underscores the degree to which its determinations can be influenced by politicians and activist groups—such as the group that generated *en masse* all of the form complaints in this case (none of which references buttocks or even states that the complainant viewed the broadcast). Contrary to respondents' assertion (Br. 37), ABC's opening brief (at 49 n.16) challenged the sufficiency of these complaints.

To show that the brief display of buttocks here may be proscribed within constitutional limits, respondents (Br. 47) point only to *Pacifica*—which involved a twelve-minute barrage of expletives—noting that there the Supreme Court never explicitly found an inadequate government interest in suppression of briefly broadcast words or images. The concurring Justices made clear, however, that the Court's decision "does not speak to cases" involving such brief material, 438 U.S. at 760 (Powell, J., concurring in part and in the judgment), strongly suggesting that the government lacks an interest sufficient to suppress it. Respondents also assert (Br. 47) that "*Pacifica* involved spoken words," and that images have a "greater impact" on the viewer. Yet nothing in *Pacifica* indicates that the Court's concern about restricting broadcast of isolated words would not extend to restrictions on broadcasts containing briefly-transmitted images.[11]

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[11] Respondents likewise highlight the D.C. Circuit's decision in *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc) (*ACT III*). Yet *ACT III*, like earlier D.C. Circuit decisions on which it rested, addressed only the facial constitutionality of the Commission's indecency test, and the court upheld the test only in reliance on the Commission's history of restrained enforcement and explicit commitment to continue that restraint, *see Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 n.14 (D.C. Cir. 1988). The *ACT* decisions thus do not speak to the constitutionality of restricting a broadcast that, like this *NYPD Blue* episode, contains only brief, non-sexual nudity. The decisions, moreover, pre-date the widespread commercial availability of technologies for content-based blocking of television broadcasts, and thus do not speak to whether the Constitution tolerates restricting broadcast of blockable programs. *See infra* pages 24-26.

In fact, no Supreme Court decision suggests that the government's authority to regulate "indecent" speech would extend so far as to encompass the brief and non-sexual depiction of buttocks here. To the contrary, the Court has tolerated indecency restrictions only when limited types of material were at issue, such as pornographic "'girlie' magazines," *Ginsberg v. New York*, 390 U.S. 629, 631 (1968); "sexually explicit adult programming," *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 811 (2000); and "material that would be offensive enough" to be obscene "*but for* the fact that the material also has 'serious literary, artistic, political or scientific value' or nonprurient purposes," *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 752 (1996). Indeed, striking down an ordinance that barred outdoor theaters from exhibiting films containing nudity, the Court rejected the idea that displays of nudity are inherently harmful to children and hence subject to regulation. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975).[12]

The scene at issue here bears no resemblance to situations in which the Supreme Court has suggested the government may restrict "indecent" speech. The

[12] Respondents argue (Br. 46) that the Forfeiture Order advances two government interests, both related to minors: supporting parental supervision of what their children watch and, independently, "safeguarding" the "well-being" of children from "indecent" material. To the extent respondents suggest that the Commission has an interest in overriding parents' decisions that their children need not be shielded from material it deems indecent, that interest would be constitutionally illegitimate. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57 (2000) (parents have a fundamental right to decide how to rear their children).

Commission's conclusion that this scene may never be shown on broadcast television between 6 am and 10 pm cannot "be justified" by any "governmental interest pertaining to minors." *Erznoznik*, 422 U.S. at 213.

C. Blocking Technologies Like The V-Chip Independently Render The Forfeiture Here Unconstitutional

In *Fox*, this Court observed that blocking technologies may "obviate the constitutional legitimacy of the FCC's" oversight over broadcast indecency. 489 F.3d at 466. ABC's opening brief (at 50-55) explained that, as the broadcast at issue could have been blocked by parents using such technologies, the forfeitures imposed cannot stand. Respondents answer (Br. 57-58) by rehashing the Forfeiture Order's complaints about these technologies. Yet as ABC already explained, these complaints are inadequate to support the Commission's content-based regulation.

The Supreme Court has made clear that, to constitute an effective alternative to restriction of speech at its source, a blocking technology need not be universally employed or understood, and may be something that parents must take affirmative steps to purchase or install. Thus, in striking down restrictions on indecent speech in other media, the Court has repeatedly identified, as constitutionally preferred, alternatives technologies that were available for parental purchase without a finding that they were widely used. *See Denver Area*, 518 U.S. at 758 (cable lockbox); *Ashcroft v. ACLU*, 542 U.S. 656, 667-670 (2004) (filtering software);

Reno, 521 U.S. at 877 (filtering software that was not even widely available yet). Whether or not most households had acquired televisions or cable boxes with V-chips when this *NYPD Blue* episode aired in 2003 (*see* Resp. Br. 54), those technologies were widely available to parents who wished to use them. It is also irrelevant that some parents may have been unaware of these technologies or how to use them (*see* Resp. Br. 55); the Supreme Court has twice rejected the argument that a blocking technology is ineffective because viewers do not yet know of it or how to use it. *Playboy*, 529 U.S. at 816; *Denver Area*, 518 U.S. at 758-759. To the contrary, the Court has explained that when viewers do not know of a device or how to use it, the proper remedy is more information, not banning transmission of indecent materials the device could block. *Denver Area*, 518 U.S. at 758-759.

Respondents also note (Br. 55) that not all broadcasts have ratings that work with these technologies, and that some programs may be inaccurately rated. But this *NYPD Blue* episode was accurately rated and coded for blocking; any TV programmed to block TV-14 content would not have received this broadcast. Respondents complain (*id.*) that "the content-descriptors in ABC's ratings" never signaled that the episode might "contain[] images of a naked woman's buttocks." Yet respondents cannot seriously suggest that a technology is an ineffective alternative to speech regulation merely because it does not accommodate minute gradations about what material will be blocked. Indeed, the Supreme Court has

relied upon less-refined technological instruments in the past. *See, e.g.*, *Sable*, 492 U.S. at 128 (citing possibility of requiring credit-card payment or use of access code in striking ban on indecent "dial-a-porn" messages).

Any parent who wanted to block this episode of *NYPD Blue* could have done so. The Constitution therefore did not permit the Commission to punish ABC for broadcasting it before 10 pm.

D. While The Forfeiture Order Is Unconstitutional Under Any Appropriate Level Of Scrutiny, Strict Scrutiny Applies

The discussion above establishes that the Forfeiture Order would be unconstitutional even if respondents were correct (Br. 44-45) that intermediate scrutiny applies in this case. But respondents are incorrect. As this Court noted in *Fox*, "[o]utside the broadcasting context, the Supreme Court has consistently applied strict scrutiny to indecency regulations." 489 F.3d at 464 (citing *Playboy*, 529 U.S. at 811-813; *Sable*, 492 U.S. at 126; and *Reno*, 521 U.S. at 868); *see also* Resp. Br. 44 (acknowledging that content-based speech restrictions generally must pass strict scrutiny). Moreover, as respondents acknowledge, the D.C. Circuit has held that strict scrutiny applies to restrictions on indecency in the broadcast media. Resp. Br. 45 n.16 (citing *ACT III*, 58 F.3d at 660).

Opposing application of strict scrutiny, respondents note (Br. 44-45) that the *Pacifica* Court stated—in 1978—that broadcasting was then a uniquely pervasive medium and one uniquely accessible to children. 438 U.S. at 748-749. Moreover,

some regulation of broadcast content has been justified on the ground that the broadcast spectrum is a "scarce and valuable national resource." *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376 (1984).

But as this Court noted in *Fox*, "it is [now] increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children." 489 F.3d at 465. ABC's opening brief explained (at 57-59) how the rise of cable, satellite, and other media in the years since *Pacifica* renders obsolete the notion that broadcasting is uniquely pervasive or accessible to children. Although respondents incant the language of *Pacifica*, they fail to recognize that *Pacifica* addressed a specific factual context that no longer prevails after thirty years of marketplace and technological change. Nothing in *Pacifica* suggests that its legal conclusions would apply to the broadcast media today.

It has likewise become difficult to describe broadcasting as a medium marked by scarcity. The Commission itself recognized this more than twenty years ago, explaining that it "no longer believe[s] that there is scarcity in the number of broadcast outlets available to the public," and that accordingly "the constitutional principles applicable to the printed press" should apply to broadcasting. *Complaint of Syracuse Peace Council Against Television Station WTVH*, 2 F.C.C.R. 5043, 5053, 5054 (¶¶ 65, 74) (1987). Although the Commission later asserted that these statements were "dicta," *Repeal or Modification of the Personal Attack & Political*

Editorial Rules, 15 F.C.C.R. 19973, 19979 (¶ 17) (2000), it cannot avoid its factual finding.

Today, there are far more broadcast channels than existed when the Supreme Court referred to the scarcity rationale in 1969. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387-389 (1969). Then, there were 7411 over-the-air broadcasting stations in the U.S. *See* John W. Berresford, FCC Media Bureau Staff Research Paper: *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed* 12-13 (2005). Today there are 15,882. *Broadcast Station Totals as of June 30, 2008* (Sept. 19, 2008), *available at* hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-285458A1.pdf. Broadcasting opportunities will expand further with the February 2009 switch to all-digital transmission, which will permit every broadcaster to deliver up to four channels of content per allocated channel of spectrum. *See Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 293-294 (D.C. Cir. 2003).

In any event, the Supreme Court has never cited the scarcity rationale as a justification for regulations restricting broadcasters' speech—as opposed to rules requiring broadcasters to make room for additional speech, *see Red Lion*, 395 U.S. at 392-396; *League of Women Voters*, 468 U.S. at 378 n.12, or ensuring that broadcasters can operate free of interference, *see Prayze FM v. FCC*, 214 F.3d 245, 252-253 (2d Cir. 2000). As the Commission has recognized, the Court did

not rely on the scarcity rationale in *Pacifica*. *Infinity Broad. Corp.*, 3 F.C.C.R. 930, 930 n.11 (1987). Moreover, the Commission itself has "expressly rejected" scarcity as a supporting rationale for indecency enforcement. *Id.*; *see also Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 (¶ 15) (1987). In sum, the scarcity rationale has never supported a constitutional distinction between broadcast indecency regulation and other indecency regulation, and it certainly cannot do so now.

CONCLUSION

The Forfeiture Order should be set aside.

Respectfully submitted.

s/ Daniel S. Volchok

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Reply Brief for Petitioners ABC, Inc.; KTRK Television, Inc.; and WLS Television, Inc. complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) in that, according to the word-count function of the word-processing program in which it was prepared (Microsoft Word), it contains 7,000 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii).

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ANTI-VIRUS CERTIFICATION

I certify that on this 19th day of September, 2008, I scanned the pdf version of the foregoing Reply Brief for Petitioners ABC, Inc.; KTRK Television, Inc.; and WLS Television, Inc., and that no viruses were detected during that scan.

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CERTIFICATE OF SERVICE

I certify that on this 19th day of September, 2008, I caused a pdf version and two paper copies of the foregoing Reply Brief for Petitioners ABC, Inc.; KTRK Television, Inc.; and WLS Television, Inc. to be sent via electronic mail and overnight delivery service to the following individuals:

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