No. 10-1293

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL., PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

ABC, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The FCC's indecency policy is consistent with the Fifth and First Amendments, both as applied to the broadcasts at issue in this case and generally. Respondents' contrary arguments misconstrue this Court's precedents and reflect an audacious attempt to overturn Congress's longstanding judgment, upon which generations of parents have relied, that children should be protected from indecent material on the public airwaves.

I. THE COMMISSION'S INDECENCY DETERMINATIONS ARE CONSISTENT WITH THE FIFTH AMENDMENT

A. The FCC's Indecency Policy Is Not Unconstitutionally Vague As Applied To The Broadcasts At Issue Here

A party raising a vagueness challenge must demonstrate that the challenged "statute is vague as applied to the particular facts at issue." *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2718-2719 (2010) (*HLP*) (citing *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)). The orders under review in this case made indecency determinations with respect to three particular broadcasts. Accordingly, "the focus of [the Court's] review must be" on the constitutionality of those particular determinations, *FCC* v. *Pacifica Found.*, 438 U.S. 726, 734-735 (1978) (*Pacifica*) (citation omitted), rather than on other adjudications not before the Court. See Gov't Br. 24-26.

1. Fox makes no effort at all to demonstrate that the FCC's indecency policy was vague as applied to its two broadcasts, which involved concededly gratuitous uses of the F-Word and S-Word during prime-time awards shows with millions of children in the audience. Indeed, when the broadcasts were aired in later time zones, Fox blocked the expletives, which are generally proscribed by its own broadcast standards and which have long been a focus of the FCC's indecency-enforcement efforts. See Gov't Br. 27-31. Fox contends that past Commission orders involving those words could not have alerted it that the Billboard Music Awards broadcasts would be considered indecent because the prior orders involved the "repeated[]" use of the expletives. Fox Br. 54. That observation is correct but irrelevant. This Court has already held that "the agency's decision not to impose any forfei-

ture or other sanction [on Fox] precludes any argument that it is arbitrarily punishing parties without notice of the potential consequences of their action." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009) (*Fox*); see Gov't Br. 28 n.3.[1]

While acknowledging that its own standards "generally do not permit" broadcast of the F-Word or S-Word, Fox contends that those standards are "irrelevant to the vagueness analysis." Fox Br. 54; see Gov't Br. 28. Contrary to Fox's suggestion, the government's argument is not that Fox's "own editorial standards" establish the "legal boundary" of what it may broadcast (Fox Br. 54-55). Rather, those standards undermine Fox's vagueness claim by providing highly probative evidence of "contemporary community standards for the broadcast medium," a concept at the core of the FCC's indecency definition. Pet. App. 61a; cf. *Parker* v. *Levy*, 417 U.S. 733, 754 (1974) ("[F]urther content" to permissible speech regulation "may be supplied even in * * * areas [of uncertainty] by less formalized custom and usage.") (citation omitted).

Fox further contends that the government "do[es] not contest the Second Circuit's holding that the FCC's new indecency policy permits discriminatory enforcement, and [the government's] arguments centered on *HLP* are irrelevant to that holding." Fox Br. 51. That contention is doubly incorrect. First, contrary to Fox's suggestion (Fox Br. 42), the Second Circuit did not make two inde-

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[1] The CBS and NBC affiliates dispute the premise that the Commission did not sanction Fox, contending, *inter alia*, that the agency might "us[e] its findings to justify enhanced penalties in the event of future violations." CBS & NBC Affiliates Br. 17. The Commission stated, however, that it "will not consider the broadcast to have an adverse impact upon * * * licensees as part of the renewal process *or in any other context*." Pet. App. 86a (emphasis added); see *id.* at 97a (same).

pendent vagueness holdings. Instead, the court of appeals addressed one question: "whether the FCC's indecency policy provides a discernible standard by which broadcasters can accurately predict what speech is prohibited." Pet. App. 22a; see *Gonzales* v. *Carhart*, 550 U.S. 124, 150 (2007) (noting that same statutory elements that provided fair notice "establish[ed] minimal guidelines to govern law enforcement") (quoting *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974)). To be sure, the court believed that one adverse consequence of the purported vagueness of the FCC's indecency standards was "the risk that such standards will be enforced in a discriminatory manner." Pet. App. 28a. The court did not suggest, however, that this consequence was an independent ground for finding the Commission's policy unconstitutionally vague.

Second, a party whose conduct is clearly covered by a challenged law cannot evade the rule reaffirmed in *HLP* simply by packaging its claim as one of potential discriminatory enforcement. The Court in *HLP* made clear that the rule regarding as-applied vagueness challenges applies to both:

> "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." We consider whether a statute is vague as applied to the particular facts at issue, for "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."

130 S. Ct. at 2718-2719 (quoting *United States* v. *Williams*, 553 U.S. 285, 304 (2008), and *Hoffman Estates*, 455 U.S. at 495).

2. Unlike Fox, ABC and its affiliates attempt to demonstrate that the FCC's indecency policy was unconstitutionally vague as applied to their own broadcast. Those arguments reduce to the contention that the Commission could not sanction the NYPD Blue episode because it had not previously sanctioned one exactly like it. That standard, if adopted, would cripple the FCC's ability to respond to the varied forms that broadcast indecency can take. See *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1337-1338 (D.C. Cir. 1988) (R.B. Ginsburg, J.) (*ACT I*) (affirming FCC's decision to apply its generic definition of indecency to varied content, rather than limiting enforcement to the previously sanctioned Carlin words). The proper standard is whether a broadcaster of "ordinary intelligence" would have had "fair notice" that the nude bathroom scene in the *Nude Awakening* episode would be considered indecent. See *HLP*, 130 S. Ct. at 2718. That standard was satisfied in this case. See Gov't Br. 31-32.

ABC contends that it had insufficient notice that "non-sexualized" nudity could be indecent. ABC Br. 19-21. But see Pet. App. 143a ("The viewer is placed in the voyeuristic position of viewing an attractive woman disrobing as she prepares to step into the shower."). More than 30 years ago, however, this Court in *Pacifica* explicitly rejected the contention that only material with "prurient" appeal could be considered indecent. 438 U.S. at 741. The Court explained that "the normal definition of 'indecent' merely refers to noncomformance with accepted standards of morality," and the Commission has long said that "the televising of nudes" may qualify. *Id.*

at 740, 741 n.16 (quoting *Enbanc Programing Inquiry*, 44 F.C.C. 2303, 2307 (1960)).

ABC and its affiliates also contend that the Commission's indecency finding was inconsistent with unpublished staff letters in which longer displays of nudity were found not to be indecent. See ABC Br. 18-19; ABC Affiliates Br. 37-39. The Commission's analysis in this case, however, was not based on a conclusion that the nudity was lengthy. To the contrary, the agency "concede[d] that a longer scene or additional depictions of nudity throughout the episode would weigh more heavily in favor of an indecency finding." Pet. App. 142a. Rather, the agency based its indecency determination on findings that the nudity was "graphic and explicit," *id.* at 140a; that "repeated" camera shots of the actress's buttocks had "focuse[d] on her nudity," *id.* at 142a; and that the scene was "pandering, titillating, and shocking," in part because it placed viewers in a "voyeuristic" position, *id.* at 143a. In any event, respondents do not contend that they knew about (much less relied upon) those unpublished and conclusory staff letters, and the Commission has made clear that such letters have no precedential effect. See 47 C.F.R. 0.445(e); see also *Independent Ins. Agents of Am., Inc.* v. *Ludwig*, 997 F.2d 958, 962 (D.C. Cir. 1993) ("In 'the real world of agency practice,' informal unpublished letters 'should not engender reliance.'") (quoting *Malkan FM Assocs.* v. *FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991)).

ABC further contends that it lacked notice that the warning it aired at the outset of the broadcast would not immunize it from an indecency finding. ABC Br. 22-23. Although the Commission "agree[d] with ABC that the parental advisory and rating at the beginning of the program is relevant and weighs against a finding of inde-

cency," Pet. App. 148a, the Commission has never held that such warnings will, by themselves, preclude an indecency finding. Indeed, the broadcast at issue in *Pacifica* included such a warning, 438 U.S. at 730, but the Court nonetheless upheld the Commission's indecency determination, recognizing that "prior warnings cannot completely protect the listener or viewer from unexpected program content," *id.* at 748.[2]

B. The FCC's Indecency Policy Is Not Unconstitutionally Vague On Its Face

The FCC's generic definition of indecency—"language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs," *Pacifica*, 438 U.S. at 732 (citation omitted)—is the same one whose application the Court upheld in *Pacifica*. See *Fox*, 129 S. Ct. at 1806; *ACT I*, 852 F.2d at 1339. Since *Pacifica*, the agency has further clarified that definition in a detailed industry guidance document that includes numerous illustrative examples.

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[2] ABC and its affiliates further contend that the NYPD Blue episode fell outside the agency's indecency definition because buttocks are not a "sexual or excretory organ." ABC Br. 15; ABC Affiliates Br. 31-32. That contention is insubstantial. Rather than relying on technical medical definitions, the Commission reasonably applies a commonsense understanding of these terms, grounded in contemporary community standards for the broadcast medium. See Pet. App. 135a. Under that approach, the buttocks, "though not physiologically necessary to procreation or excretion, are widely associated with sexual arousal[,] closely associated by most people with excretory activities," and not generally displayed in public. *Id.* at 133a; see *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 283 n.* (2000) (upholding ordinance banning public nudity, defined to include showing the "buttocks with less than a fully opaque covering").

See *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999 (2001) (*Industry Guidance*).

In that guidance, the Commission explained that "[i]ndecency findings involve at least two fundamental determinations." 16 F.C.C.R. at 8002 ¶ 7. First, the material "must fall within the subject matter scope of [the] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities." *Ibid.* (citation omitted). Second, "the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at 8002 ¶ 8 (emphasis omitted). Although that second inquiry is "highly fact-specific," *id.* at 8002 ¶ 9, the agency has identified three "principal factors" that guide its analysis: the "explicitness" of the material; whether the broadcast "dwells on or repeats at length" the material; and "whether the material appears to pander or is used to titillate, [and] whether the material appears to have been presented for its shock value." *Id.* at 8003 ¶ 10 (emphasis omitted). The generic definition of indecency that was upheld in *Pacifica* and *ACT I*, as supplemented by the detailed discussion in the *Industry Guidance*, is not vague on its face.

Fox's fundamental contention is that the FCC's indecency policy must be vague "as applied" to the Billboard Music Awards broadcasts because that policy is vague in *all* its applications. Fox Br. 53 (quoting *Goguen*, 415 U.S. at 578). To prevail on that facial vagueness challenge, Fox must show that the "provision is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is

specified at all.'" *Parker*, 417 U.S. at 755 (quoting *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971)); see Fox Br. 53 (acknowledging this is standard for its facial vagueness claim). The FCC's indecency policy is "subject to no such sweeping condemnation." *Parker*, 417 U.S. at 755.

To demonstrate that the FCC's indecency policy has prescribed "no standard of conduct * * * at all" (*Parker*, 417 U.S. at 755), respondents would have to show that it was uncertain whether that policy would cover the Carlin monologue. Respondents likewise would have to demonstrate that it is unclear whether the policy proscribes shock-jock and other broadcasts that the Commission has previously found indecent based on their explicit and extended discussion of sexual acts. See Gov't Br. 6 (providing examples). Respondents' inability to make, or even attempt, such showings dooms their facial vagueness challenge.

Respondents contend that in *Reno* v. *ACLU*, 521 U.S. 844 (1997), "this Court struck down as unconstitutionally vague a 'definition of indecency [that] was almost identical to the Commission's definition." Fox Br. 40 (quoting Pet. App. 21a); see ABC Br. 13. That is incorrect. The two indecency prohibitions at issue in *Reno*, which were set forth in the Communications Decency Act of 1996 (CDA), 47 U.S.C. 223(a) and (d), were not "almost identical" to the Commission's indecency rule. One of the CDA prohibitions applied simply to "indecent" communications without "any textual embellishment at all." 521 U.S. at 871 n.35. The other covered Internet content that was "patently offensive as measured by contemporary community standards," without any medium-based qualification or further elucidation by a regulatory body. *Id.* at 860. By contrast, the Commission's definition rests

on longstanding, medium-based norms (contemporary community standards *for the broadcast medium*), and the *Industry Guidance* provides additional definition and explains in detail how the Commission applies it. See pp. 7-8, *supra*.

Far from equating the prohibitions, the Court in *Reno* expressly distinguished the CDA provisions it found unconstitutional from the indecency regime at issue here. The Court emphasized that the FCC has "been regulating radio stations for decades" and that in *Pacifica* the Commission had "targeted a specific broadcast that represented a rather dramatic departure from traditional program content." *Reno*, 521 U.S. at 867. The Court further explained that there was no such "traditional program content" on the Internet because "[n]either before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry." *Id.* at 868-869.

The Court in *Reno* also noted two other critical distinctions between broadcast regulation and the CDA's regulation of the Internet. First, because the Commission's indecency policy does not apply to materials broadcast after 10 p.m., it merely "designate[s] when—rather than whether—it would be permissible to air" indecent material. 521 U.S. at 867; see 47 C.F.R. 73.3999(b). The CDA prohibitions, by contrast, were "not limited to particular times." *Reno*, 521 U.S. at 867. For that reason, in any case where the application of the relevant laws to particular materials was unclear, the CDA prohibitions were far more likely than the FCC's indecency regime to induce potential disseminators to withhold borderline materials altogether. Second, the CDA imposed criminal sanctions of "up to two years in prison for each act of

violation." *Id.* at 867, 872. By contrast, the Commission is not authorized to impose criminal liability on broadcasters, and the Court's holding in *Pacifica* was limited to civil enforcement of the prohibition on indecent broadcasts. See *id.* at 867 (citing *Pacifica*, 438 U.S. at 750); see also *Hoffman Estates*, 455 U.S. at 498-499 ("The Court has * * * expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."); *Pacifica*, 438 U.S. at 739 n.13.

II. THE COMMISSION'S INDECENCY DETERMINATIONS ARE CONSISTENT WITH THE FIRST AMENDMENT

A. As Applied To The Broadcasts At Issue In This Case, The Commission's Indecency Policy Is Consistent With The First Amendment

1. This Court "ha[s] never held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expletives *may not* be forbidden." *Fox*, 129 S. Ct. at 1815. Fox nevertheless contends that the First Amendment permits regulation of (at most) "verbal shock treatment" and "graphic sexual material that [is] overtly pornographic." Fox Br. 27, 28 (quoting *Pacifica*, 438 U.S. at 757 (Powell, J., concurring)); see ABC Br. 38-39. That contention reflects an unduly narrow understanding of the rationale for the Commission's indecency regime.

"Congress has made the determination that indecent material is harmful to children," and the government interest in protecting children from such material is the same here as it was in *Pacifica*. *Fox*, 129 S. Ct. at 1813; see *ibid.* ("There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of

them."). The *Pacifica* Court's observation that the Carlin monologue "could have enlarged a child's vocabulary in an instant," 438 U.S. at 749, is equally true of Fox's broadcasts. "Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives." *Fox*, 129 S. Ct. at 1813.

2. ABC contends that the First Amendment bars the imposition of any sanction for its broadcast of the bathroom scene in *Nude Awakening* because viewing that scene would not harm children. ABC Br. 39. The presence or absence of such harm is inherently uncertain, however, because "[o]ne cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency." *Fox*, 129 S. Ct. at 1813. This Court has recognized that children's reactions to nude images may be different from adults', and that the government therefore has a legitimate interest in keeping such images from them. In *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Court upheld a criminal conviction for selling to children a "girlie" magazine containing "pictures which depicted female 'nudity,'" including "the showing of . . . female . . . buttocks with less than a full opaque covering." *Id.* at 632-633 (citation omitted). While recognizing that such material was not obscene as to adults, *id.* at 634, the Court held that the government had a legitimate interest in preventing its dissemination to children because such material could "impair[] the ethical and moral development of our youth," *id.* at 641 (citation omitted).

The same interest is implicated here. "[T]he normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." *Pacifica*, 438

U.S. at 740. In our society, appearing nude in front of strangers—including showing one's buttocks—contravenes such standards, especially when children are present. Cf. *Ginsberg*, 390 U.S. at 643 n.10 ("[O]penly permit[ting]" children to view pornographic images "implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval—another potent influence on the developing ego.") (citation omitted).

B. Regulation Of Broadcast Indecency Does Not Violate The First Amendment

The network respondents ask this Court to overrule *Pacifica* and invalidate all broadcast indecency regulation. See Fox Br. 17-26; ABC Br. 48-56. Other respondents, including groups representing affiliates of three of the broadcast networks, pointedly decline to embrace that sweeping argument. See ABC Affiliates Br. 17, 26 n.26; CBS & NBC Affiliates Br. 29. The network respondents have not met the demanding standard required for this Court to overrule one of its precedents. See Gov't Br. 41.

1. Without broadcast-indecency regulation, "[a]nything that could be sold at a newsstand"—or shown on premium cable channels or made available on the Internet—could be aired on broadcast television in the middle of the afternoon. *Pacifica*, 438 U.S. at 744 n.19 (plurality op.). Such broadcasts could include the Carlin monologue, as well as material with "explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles." *In re Infinity Broad. Corp. of Pa.*, 3 F.C.C.R. 930, 932 ¶ 20 (1987); see Gov't Br. 6. Fox contends that "there

is no evidence for this alarmist prediction," Fox Br. 25; see ABC Br. 57, but the examples the government cites are not hypotheticals—they come from actual programs that broadcasters have aired even with indecency regulation in place. The inference that more such broadcasts would occur in the *absence* of indecency regulation is a matter of common sense.

Indeed, amicus National Association of Broadcasters candidly acknowledges that it supports relaxation of broadcast indecency regulation so that broadcasters can better compete against "cable and satellite providers [who] are [currently] able to offer their viewers content that broadcasters simply cannot." NAB Br. 33; see *Fox Television Stations, Inc.* v. *FCC*, 489 F.3d 444, 472 (2d Cir. 2007) (Leval, J., dissenting) ("[T]he regulated networks compete for audience with the unregulated cable channels, which increasingly make liberal use of their freedom to fill programming with * * * expletives."), rev'd, 129 S. Ct. 1800 (2009); Student Press Law Ctr. Amicus Br. 31-34 (college radio stations eager for end to indecency regulation so that they can play songs with expletives during the day).

2. The network respondents emphasize that fewer households now view video programming by means of broadcast than was the case at the time of *Pacifica*. See Fox Br. 18-21; ABC Br. 51-53. Yet television broadcast programming has retained its dominance despite the proliferation of different ways of accessing it. See Gov't Br. 45. Moreover, millions of Americans still live in broadcast-only households, see *id.* at 44-45, and low-income children are disproportionately represented in that group, see American Acad. of Pediatrics Amicus Br. 16 (AAP Amicus Br.) ("[W]hile 98% of children under age

eight in households with incomes of $30,000 or less have a television, only 53% have cable.").

The rise of alternative, unregulated platforms for video programming has, if anything, strengthened the need for broadcast-indecency regulation. Because of "the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable," the need remains for "more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children." *Fox*, 129 S. Ct. at 1819. At the same time, the rise of those alternative platforms has dramatically reduced the burden of broadcast-indecency regulation on those adults who wish to produce or view indecent programming, see Gov't Br. 48-49, just as the widespread availability of digital video recording devices that permit time-shifted viewing (Fox Br. 23 n.11) has materially reduced the burden of requiring indecent material to be broadcast after 10 p.m.[3]

Fox questions why broadcasters should be "single[d] out * * * as a 'safe haven' from among an abundance of substitutes." Fox Br. 38 (emphasis omitted); see ABC

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[3] Fox mischaracterizes the FCC's indecency rule as a "content-based ban." Br. 24. Instead, it is a time-channeling rule that requires only that indecent material be shown after 10 p.m. By contrast, a number of the decisions on which the network respondents rely, see, *e.g.*, *Erznozik* v. *City of Jacksonville*, 422 U.S. 205 (1975), cited in Fox Br. 29-30, addressed flat prohibitions. "*Pacifica* is readily distinguishable" from those cases, "most obviously because it did not involve a total ban on broadcasting indecent material," and because those cases, unlike *Pacifica*, did not rest on "the 'unique' attributes of broadcasting." *Sable Commc'ns, Inc.* v. *FCC*, 492 U.S. 115, 127 (1989). The fact that the Commission cannot impose forfeiture liability unless a violation is willful, see Pet. App. 86a, 97a n.206, 182a, further ameliorates First Amendment concerns. Cf. *Mishkin* v. *New York*, 383 U.S. 502, 510-511 (1966).

Br. 56. The answer is that broadcasters, from the very inception of the medium, have been granted highly favorable regulatory treatment and have compensated the public for that treatment by taking licenses subject to enforceable public-interest obligations. See *Fox*, 129 S. Ct. at 1806. Unlike speakers in other media, broadcasters exploit an extraordinarily valuable public resource without charge to reach their audience—a resource for which other categories of speakers must pay billions of dollars. Although the public asks for relatively little in return, broadcasters' responsibilities when using the public airwaves include the obligation not to broadcast indecent material during the portion of the day (*i.e.*, before 10 p.m.) when children are most likely to be in the audience.

In its basic form, this obligation has been in place since the beginning of broadcasting in the 1920s, and it is one of the medium's defining features. See Gov't Br. 52-53.[4] In questioning whether adherence to that obliga-

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[4] Fox contends that "neither broadcasters nor the public has any vested 'understanding' or 'expectations' concerning the FCC's *current*, expanded enforcement policy." Fox Br. 38. That observation is beside the point, however, because Fox asks the Court to invalidate *all* broadcast-indecency enforcement, not just the Commission's current policies. Fox Br. 17-26. Fox also points out (Br. 38) that nonlicensees could in theory be subject to liability for violating the Commission's indecency regime. But the Commission may impose a forfeiture against a nonlicensee only if the nonlicensee receives a "citation of the violation charged," is "given a reasonable opportunity for a personal interview with an official of the Commission," and again "engages in [the] conduct." 47 U.S.C. 503(b)(5). The Commission has not used that elaborate statutory procedure in broadcast-indecency cases, instead imposing forfeitures only on broadcast licensees. To the extent that enforcement of the Commission's indecency regime might raise distinct First Amendment concerns in a case involving a nonlicensee, those

tion is actually a traditional feature of the broadcast medium, ABC states that until the 1970s, "there was almost no actual regulation" of broadcasts specifically identified as indecent. ABC Br. 57. But that is simply because broadcasters complied with their public-interest obligation not to air indecent material.[5]

Fox contends that this "grand bargain" has not previously been identified as a basis for indecency regulation. Fox Br. 35. But the Court's prior decision in this very case drew the connection:

> Twenty-seven years ago we said that "[a] licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." One of the burdens that licensees shoulder is the indecency ban.

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concerns can be addressed on an as-applied basis if such a case ever arises.

[5] The long history of broadcast-indecency regulation is among the reasons that *Brown* v. *Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), which respondents repeatedly invoke (*e.g.*, Fox Br. 16), is inapposite. That decision recognized that even a "novel restriction on content" may survive First Amendment scrutiny if it is "part of a long * * * tradition of proscription." 131 S. Ct. at 2734; see *id.* at 2736 (stressing absence of "a longstanding tradition in this country of specially restricting children's access to depictions of violence"). In addition, *Brown* involved privately sold video games, which the Court analogized to books for constitutional purposes, see *id.* at 2736-2737 & n.4, and whose dissemination does not depend on any form of government assistance. By contrast, broadcasting over the public airwaves implicates "special justifications for regulation * * * not applicable to other speakers," including "the scarcity of available frequencies," *Reno*, 521 U.S. at 868, and the consequent need for a governmental role in allocating the available spectrum.

Fox, 129 S. Ct. at 1806 (quoting *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395 (1981)) (paragraph break omitted). And while the Commission at one point declined to rely on spectrum scarcity to support indecency regulation, see Fox Br. 36 & n.19 (citing *In re Infinity Broad. Corp. of Pa.*, 2 F.C.C.R. 2705, 2707 ¶ 7 n.7 (1987)), the Commission later said that among the "special justifications" for broadcast indecency regulation are "the history of extensive government regulation of the broadcast medium" and "the scarcity of available frequencies at its inception," *Industry Guidance*, 16 F.C.C.R. at 8000 ¶ 4 & n.9 (quoting *Reno*, 521 U.S. at 868, which in turn cited *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) and *Pacifica*).

Fox also contends that the "scarcity doctrine has no continuing validity, if it ever did." Fox Br. 36. But "the unique physical limitations of the broadcast medium" have not changed over time. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 637 (1994) (*Turner I*). To the contrary, the demand for spectrum increases every year, as does the difficulty of the decisions about how spectrum should be allocated to best serve the public interest. And it remains true today that "if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals." *Ibid.* The feasibility of broadcasting therefore continues to depend on the "establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters." *Id.* at 638.

Although there are "more than twice as many over-the-air broadcast stations than there were 40 years ago," Fox Br. 37, each of those stations enjoys an exclusive license to public spectrum that others cannot legally use.

"[T]he proper question is not how many outlets there are, or how many outlets are technologically feasible, but how great the demand is for the available spectrum in light of the regulatory scheme." Center for Creative Voices et al. Br. 36. The continuing high demand is demonstrated by estimates of how many billions of dollars could be raised if the spectrum broadcasters presently use without charge were auctioned for use by others, such as wireless Internet providers. See *id.* at 36-37; see generally Congressional Budget Office Cost Estimate, *S. 911, Public Safety Spectrum & Wireless Innovation Act* (July 20, 2011). And the growth of new, nonbroadcast media platforms, Fox Br. 37, says nothing about the scarcity of broadcast spectrum itself.

Fox's observation that all "economic goods are scarce" (Fox Br. 37) likewise does not advance respondents' argument. Where scarcity results from economic factors (as in the newspaper industry), and no need exists for government to choose among would-be speakers, the fact of scarcity alone cannot justify content-based regulation that would otherwise violate the First Amendment. The salient feature of the broadcast medium, by contrast, is that the government must select among would-be participants seeking to exploit this uniquely public resource, and must enforce prohibitions on the use of spectrum by those who are not selected, in order for the medium to function at all. As especially privileged beneficiaries of those selection and enforcement mechanisms, respondents may reasonably be required to accept public-interest obligations that could not constitutionally be imposed on persons who speak without government assistance.

2. The network respondents also contend that *Pacifica* should be overruled because broadcast televi-

sion is no longer "uniquely accessible to children." Fox Br. 21; see ABC Br. 51-55. That contention lacks merit.

The network respondents assert that "cable, satellite, [and] telephone-company-provided television services" now have "the same accessibility to children * * * as broadcast television." ABC Br. 51; see Fox Br. 21-22. This argument is misconceived. Because the alternative services to which respondents refer are available only by subscription, their accessibility to children depends on an affirmative act by a parent or guardian beyond the initial procurement of a television. Broadcasting, by contrast, comes into the home without subscription, and "[u]nlike cable subscribers, who are offered such options as 'pay-per-view' channels, broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters." *Action for Children's Television* v. *FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc), cert. denied, 516 U.S. 1043 (1996). Allocating valuable spectrum to broadcasting services helps to provide all Americans with access to news, public affairs, and cultural programming without their having to subscribe to alternative (and often expensive) services. See *Turner I*, 512 U.S. at 663. Requiring conscientious parents to cut their families off from television programming in its entirety (by not purchasing a television or an antenna) in order to avoid indecent material is fundamentally at odds with that longstanding policy objective.

In arguing that broadcast programming is no longer uniquely accessible to children, the network respondents also rely on the availability of "V-Chip" blocking technology. Fox Br. 22; ABC Br. 54. The V-Chip, however, has not materially diminished "[t]he ease with which children may obtain access to broadcast material." *Pacifica*, 438 U.S. at 750. Indeed, even under strict scrutiny (which is

inapplicable here, see Pet. App. 14a[6]), a proffered less-restrictive alternative must be "at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno*, 521 U.S. at 874; see *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000) (*Playboy*) (government may defend content-based speech restriction when it "prove[s] that [a less-restrictive] alternative will be ineffective to achieve its goals").

As the American Academy of Pediatrics explains in detail, "[e]xperience has shown that the V-Chip and its underlying ratings scheme have not and cannot provide an effective tool for protecting children from inappropriate content." AAP Amicus Br. 16; see Gov't Br. 49-51; *In re Implementation of the Child Safe Viewing Act*, Report, 24 F.C.C.R. 11,413, 11,420 ¶ 14 (2009). Many parents are unaware of the V-Chip, and even those who know about it find it difficult, if not impossible, to use. See AAP Amicus Br. 21-22. In *Playboy*, the Court held that, where a proffered less-restrictive alternative could be "effective" "if publicized," it could not be deemed ineffective simply because lack of publicity had prevented its widespread use. 529 U.S. at 816. "In contrast" to the situation in *Playboy*, "the V-Chip has been heavily pro-

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[6] ABC contends (Br. 41-48) that the availability of the V-Chip means that, even if *Pacifica* is not overruled, the constitutionality of indecency regulation "must, at a minimum, be reconsidered as to blockable programs." Under the intermediate scrutiny that applies to broadcast-indecency regulation under *Pacifica* (Pet. App. 14a), however, "a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner I*, 512 U.S. at 662. Instead, "[s]o long as the means chosen are not substantially broader than necessary * * * the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 218 (1997) (citation omitted).

moted for over a decade," AAP Amicus Br. 24, and the technology has still proved ineffective.

Moreover, many programs are not rated at all, and even for rated programs, a recent study found that "only 5% of parents felt that television ratings were always accurate." AAP Amicus Br. at 22. Indeed, "[s]tudies have shown that many programs are not accurately rated and that a large amount of objectionable content reaches children." *Id.* at 24-25. The problem of inaccurate ratings—along with the failure of the industry to do anything about it, see *id.* at 27—has led not to a "modest gap" in the rating scheme (*Brown* v. *Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011)), but to its wholesale unreliability as an alternative to indecency regulation.[7]

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For the foregoing reasons and those stated in the government's opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

DECEMBER 2011

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[7] While the network respondents' arguments for invalidating indecency regulation for television broadcasting fail for the reasons discussed above, the network respondents do not even attempt to explain why such regulation is infirm as applied to radio. Radio broadcasting remains uniquely pervasive and uniquely accessible to children, see Gov't Br. 44, 46 n.5, and there is no V-Chip for radio.