

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*.

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

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CORPORATE DISCLOSURE STATEMENT

ABC, Inc. is an indirect, wholly owned subsidiary of The Walt Disney Company, a publicly traded corporation.

KTRK Television, Inc., and WLS Television, Inc. are indirect, wholly owned subsidiaries of ABC, Inc.

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JURISDICTIONAL STATEMENT

Petitioners seek review of a February 19, 2008, final order of the Federal Communications Commission entitled *Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program “NYPD Blue,”* 23 F.C.C.R. 3147 (2008) (hereafter Forfeiture Order), *reprinted at* Special Appendix, SPA-1 to SPA-33. The Commission had jurisdiction under 47 U.S.C. § 503(b); this Court has jurisdiction under 28 U.S.C. § 2342(1) and § 2344, and 47 U.S.C. § 402(a). ABC, Inc. and two subsidiaries petitioned for review on February 21, *see* A-703 to A-707, the same day that ABC rendered the Forfeiture Order immediately appealable by paying, under protest, the nearly \$1.24 million in total fines that the Order imposed on three ABC-owned stations and forty-two affiliated stations, *see AT&T Corp. v. FCC*, 323 F.3d 1081, 1085 (D.C. Cir. 2003). Venue is proper under 28 U.S.C. § 2343 because New York City is ABC’s principal place of business. (More detail on the consolidated cases appears in the brief for the ABC affiliates.)

ISSUE PRESENTED

In this case the FCC ruled that an episode of the ABC Television Network’s award-winning drama *NYPD Blue* was “indecent” because it briefly showed a woman’s buttocks in a non-sexual context. The question presented is whether that

determination—and the resulting fines of nearly \$1.24 million—violate the Administrative Procedure Act or the First and Fifth Amendments.

STATEMENT OF THE CASE

On January 25, 2008, the Commission issued a Notice of Apparent Liability (NAL) charging that fifty-two television stations affiliated with or owned and operated by ABC had violated 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 by broadcasting indecent material on February 25, 2003. *See* A-126 to A-141. The material consisted of an episode of *NYPD Blue* during which a woman’s buttocks were shown for approximately seven seconds. ABC and several affiliates submitted timely oppositions to the NAL. *See* A-183 to A-702. On February 19, 2008, the FCC approved the NAL’s indecency determination as to forty-five of the stations and imposed the then-maximum forfeiture of \$27,500 against each. *See* Forfeiture Order ¶¶ 51-52; *see also id.* ¶¶ 23 n.75, 34 (canceling NAL on procedural grounds as to seven stations). Two days later, ABC paid the forfeiture for all stations and filed a timely petition for review in this Court. *See* A-703 to A-707.

STATEMENT OF FACTS

A. Statutory And Regulatory Background

Under 18 U.S.C. § 1464, it is a criminal offense to broadcast any “indecent[] or profane language.” Courts have long recognized that § 1464 presents serious

First Amendment concerns insofar as it reaches indecent but non-obscene material. In light of this concern, the Supreme Court first guided the Commission to pursue a restrained enforcement policy in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), which involved a Commission determination that a broadcast of a twelve-minute monologue by the comedian George Carlin—in which seven “Filthy Words” were “repeated over and over as a sort of verbal shock treatment,” *id.* at 757 (Powell, J., concurring in part and concurring in the judgment)—was indecent. Although the Court upheld the Commission’s authority to regulate broadcast indecency, it “emphasize[d] the narrowness of [its] holding.” *Id.* at 750. Justices Powell and Blackmun, whose votes were necessary to uphold the Commission, made clear that the Court was not giving the FCC “unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect” audiences from “momentary exposure to it in their homes.” *Id.* at 759-760.

The Commission initially followed *Pacifica*’s guidance on the need for restraint. Indeed, for almost a decade the Commission restricted its indecency enforcement to programming containing one or more of Carlin’s “Filthy Words.” Even when it expanded the scope of its enforcement in 1987, *see Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 (¶ 12) (1987), *aff’d*, *Infinity Broad. Corp. of Pa.*, 3 F.C.C.R. 930 (1987), *aff’d in part and rev’d in part*, *Action for Children’s*

Television v. FCC, 852 F.2d 1322 (D.C. Cir. 1988) (hereafter *ACT I*), the Commission emphasized that “the First Amendment dictate[s] a careful and restrained approach” to regulation of broadcast indecency, *Infinity Broad. Corp. of Pa.*, 2 F.C.C.R. 2705, 2705 (¶ 6) (1987), *aff’d*, *Infinity Broad. Corp. of Pa.*, 3 F.C.C.R. 930, *aff’d in part and rev’d in part*, *ACT I*, 852 F.2d 1322.

When the D.C. Circuit denied a facial challenge to the Commission’s extension of its indecency enforcement beyond the seven “Filthy Words,” the court reiterated that the First Amendment requires a “restrained enforcement policy.” *ACT I*, 852 F.2d at 1340 n.14. The court also noted the Commission’s assurances “at oral argument[] that it will continue to give weight to reasonable licensee judgments when deciding whether to impose sanctions in a particular case.” *Id.* The Commission did so for many years. *See, e.g., 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, 8000 (¶ 3) (2001) (hereafter *Indecency Policy Statement*). As explained below, that is no longer true: The Commission’s indecency-enforcement regime can no longer be characterized as “restrained.”

B. The Broadcast In This Case

This case involves an FCC determination that an episode of *NYPD Blue* was indecent because it showed a woman’s buttocks for seven seconds in a non-sexual

context. *NYPD Blue*, which featured the lives of New York City police detectives, aired on the ABC Television Network from 1993 to 2005. Forfeiture Order ¶ 2. The show was one of the most acclaimed and respected dramas in television history, garnering twenty Emmy awards, four Golden Globes, and two Peabodys, among other accolades. See Academy of Television Arts & Sciences, www.emmys.org/awards/awardsearch.php; HFPA—Awards Search, www.goldenglobes.org/browse/film/24682; The Peabody Awards, www.peabody.uga.edu/winners/search.php. Key to the show’s success was its realistic portrayal of the dangers and difficulties faced by its characters in their professional and personal lives. See, e.g., The Peabody Awards, www.peabody.uga.edu/winners/search.php (1996 Peabody award citation, lauding the show for “provid[ing] gritty and realistic insight into the dilemmas and tragedies which daily confront those who spend their lives in law enforcement”).

To achieve this compelling realism, the show regularly employed rough, even coarse language; dramatic depictions of street violence; and mature themes, plotlines, and visual elements, including occasional nudity. To inform parents (and other viewers) about the nature of the material being broadcast, ABC began almost every episode with a prominent visual and verbal advisory about the episode’s content. Moreover, after the TV Parental Guideline ratings were adopted in 1997 in a collaboration between broadcasters and public-interest advocates, ABC gave

each episode a TV-14 rating. Episodes were subsequently given appropriate descriptors as well (language, violence, etc.), and eventually were coded to allow blocking with the V-chip, a device that permits selective blocking of television broadcasts, *see infra* note 10.

The episode at issue here was broadcast on February 25, 2003, during the last hour of primetime television—from 10 to 11 pm in the Eastern and Pacific time zones and from 9 to 10 pm in the Central and Mountain time zones.

Forfeiture Order ¶ 2. Like many episodes, it explored the personal life of a leading character, Detective Andy Sipowicz. As the show’s regular viewers knew, Sipowicz’s wife had been murdered several seasons earlier, leaving Sipowicz alone to raise their young son Theo. Sipowicz subsequently became romantically involved with another detective, Connie McDowell. As their relationship developed, the two often worried about its effect on Theo, a theme addressed in multiple episodes. Shortly before the episode at issue here, Sipowicz and Theo moved into McDowell’s apartment.

The broadcast began with a full-screen, eight-second visual and audio advisory stating that: “THIS POLICE DRAMA CONTAINS ADULT LANGUAGE AND PARTIAL NUDITY. VIEWER DISCRETION IS

ADVISED.”¹ The advisory and the opening frames of the program also displayed a TV-14(DLV) rating. The advisory was followed by a 30-second recap of prior episodes and then immediately by the scene at issue.

The scene begins with McDowell entering her bathroom to take a shower. Like anyone preparing to shower, she turns on the water and disrobes. Moments later, Theo, first shown waking up and getting out of bed, opens the bathroom door unaware that McDowell is inside. Both characters are startled and embarrassed. McDowell covers herself with her arms, and Theo quickly retreats, closing the door as he apologizes.

To convey vividly the embarrassment this encounter caused, the scene briefly depicts McDowell naked from behind and the side (hence the prominent advisory about partial nudity). In two shots before Theo opens the bathroom door, McDowell’s buttocks are fully visible for five seconds and partly visible for an additional two seconds. McDowell’s pubic area is never shown, and her breasts are visible only from the side or otherwise obscured. (McDowell is shown briefly from the front after Theo opens the door, but her breasts and pubic area are obscured from view first by Theo’s body and then by McDowell’s arms as she

¹ As authority for the factual assertions in this and the following two paragraphs, petitioners rely on the DVD copy of the episode that has been submitted as part of the Joint Appendix.

covers herself.) At no point in the scene does either character engage in sexual or excretory activity, or display any sexual interest.²

Almost a year after the episode aired, FCC staff sent ABC a letter of inquiry stating that the episode had been the subject of unspecified and undisclosed indecency complaints. *See* A-26 to A-31. ABC promptly sent the Commission a tape and transcript of the episode, along with letters explaining why the episode contained no indecent material. *See* A-32 to A-125.

Four years later the Commission issued the NAL, stating that the brief, non-sexual depiction of McDowell’s buttocks was indecent. *See* A-126 to A-141. The Commission reaffirmed that determination in the Forfeiture Order, imposing fines totaling nearly \$1.24 million.

SUMMARY OF ARGUMENT

The Commission’s indecency determination contravenes both the Administrative Procedure Act and the Constitution.

A. The Commission was able to conclude that the episode was indecent only by misapplying its longstanding indecency test. First, the Commission concluded that the episode depicted “sexual or excretory organs”—the test’s threshold requirement—because the scene included shots of a woman’s buttocks.

² During the scene’s taping, the actress playing McDowell wore opaque fabric over her pubic area and parts of her breasts, obscuring them from the actor who played Theo. Both the actor’s mother and a certified studio teacher/welfare worker were present during the rehearsal and filming of the relevant portions of the scene.

But buttocks are not a sexual or excretory organ, or indeed an organ at all. The Forfeiture Order’s response to this point amounts to an assertion that the Commission can disregard the plain meaning of the terms *it* chose for its indecency test. That approach would chill protected expression by leaving broadcasters without any way to know what is and is not permitted.

Equally arbitrary and capricious is the Commission’s ruling that the broadcast was “patently offensive under contemporary community standards”—the second prong of the Commission’s indecency test. Although buttocks were shown for only seven seconds in an hour-long drama, the Commission asserted that a key factor in its analysis—“whether the material *dwells on or repeats at length* de[pic]tions of sexual or excretory organs,” *Indecency Policy Statement*, 16 F.C.C.R. at 8003 (¶ 10)—supported a determination of indecency. This conclusion drains the words of the Commission’s test of meaning, and conflicts with prior FCC decisions. Likewise, the Commission departed both from its precedent and from a meaningfully limited interpretation of its test in concluding that the scene was “shocking, pandering, or titillating” even though it was devoid of sexual or excretory connotations. The Commission also failed to account adequately for context, a factor it has long deemed critical. Specifically, the Commission brushed aside the fact that *NYPD Blue* was a highly acclaimed series and that the scene was part of a serious, non-sexual storyline, reflecting a reasonable creative judgment

that a brief use of nudity would add realism and power. And—in yet another departure from its precedent—the FCC shrugged off the fact that ABC used a prominent advisory as well as a program rating and V-chip encoding to inform parents about the episode’s content and enable them to block its viewing by their children. Finally, although the oppositions to the NAL noted the myriad ways in which the indecency determination departed from FCC precedent, the Commission impermissibly failed to account for those departures.

B. The Forfeiture Order also violates the First and Fifth Amendments. The Constitution requires the Commission to act with restraint when policing the content of broadcasts. This constitutionally required restraint entails, among other things, not second-guessing a broadcaster’s reasonable creative judgment to include brief, non-sexual nudity in the context of a serious, non-sexual storyline. The Commission failed to exercise this required restraint here.

The Commission’s decision to punish this nudity accentuates the already-serious chilling effect caused by the vagueness of the Commission’s indecency standard. That standard—and the “patently offensive as measured by contemporary community standards” prong, in particular—allows the Commission too much discretion to determine which speech will incur forfeitures, and thus requires broadcasters to avoid protected speech for fear the Commission might later decide that the speech was indecent. In *Reno v. ACLU*, 521 U.S. 844 (1997),

the Supreme Court struck down a materially identical indecency standard because it “lack[ed] the precision that the First Amendment requires when a statute regulates the content of speech,” *id.* at 874. Pointing to *Reno*, this Court recently expressed “skeptic[ism]” that the Commission’s standard could withstand a vagueness challenge. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 464 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008). That skepticism was well-founded.

In addition, the episode here could have been blocked by recent, readily available technologies—such as the V-chip—that enable television owners to filter out programs based on content. The Supreme Court has held that similar technologies render government-imposed restrictions on blockable communications unjustifiable.

The Forfeiture Order fails any level of scrutiny applicable to the content-based restriction of constitutionally protected speech. Application of strict scrutiny, however, is appropriate. Content-based restrictions on “indecent” speech in other media receive strict scrutiny, *Fox*, 489 F.3d at 464, and broadcast television today does not differ from other media in any way relevant to the constitutionality of indecency regulation.

ARGUMENT

I. STANDARD OF REVIEW

Under the Administrative Procedure Act, “agency action must be set aside if [it] was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’ or if the action failed to meet ... constitutional requirements.” *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) (quoting 5 U.S.C. § 706(2) (1964 ed., Supp. V)). “[A]gency action will be set aside as arbitrary and capricious if the agency fails to provide a reasoned explanation for its decision,” *Fox*, 489 F.3d at 457, including “[w]here an agency departs from established precedent without a reasoned explanation,” *Transmission Agency v. FERC*, 495 F.3d 663, 671 (D.C. Cir. 2007).

ABC’s constitutional challenge is reviewed de novo. *See Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1313 (D.C. Cir. 1988).

II. THE FCC’S INDECENCY DETERMINATION IS ARBITRARY AND CAPRICIOUS

A. Proper Application Of The Commission’s Indecency Test Demonstrates That The Episode At Issue Was Not Indecent

The Commission’s conclusion that an hour-long episode of *NYPD Blue* was indecent because it included seven seconds of bare buttocks in a non-sexual context cannot be reconciled with any proper application of the Commission’s longstanding indecency test. That test involves “at least two fundamental determinations. First, the material alleged to be indecent must ... describe or

depict sexual or excretory organs or activities.” *Indecency Policy Statement*, 16 F.C.C.R. at 8002 (¶ 7). As explained below, buttocks are not a sexual or excretory organ—or, indeed, an organ at all. “Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.” *Id.* (¶ 8). “In determining whether material is patently offensive, the *full context* in which the material appeared is critically important.” *Id.* (¶ 9). The episode at issue here does not meet this part of the Commission’s test either—as demonstrated by three factors that the Commission has repeatedly looked to in evaluating patent offensiveness: (1) the explicitness or graphic nature of the depictions of sexual or excretory organs; (2) whether those depictions are dwelled upon or repeated at length; and (3) whether the material panders to, titillates, or shocks the audience. *See id.* at 8003 (¶ 10).

1. The Broadcast Did Not Depict “Sexual Or Excretory Organs”

ABC’s broadcast does not meet even the threshold requirement for broadcast indecency, namely that the material “describe or depict sexual or excretory organs or activities.” *Indecency Policy Statement*, 16 F.C.C.R. at 8002 (¶ 7). The Commission has never suggested that the episode featured sexual or excretory activities—and it plainly did not. Rather, the Commission’s conclusion that the threshold indecency requirement was met here rested entirely on the notion that buttocks are a sexual or excretory organ. *See, e.g.,* Forfeiture Order ¶ 7 (“[T]he

programming ... depicts sexual and excretory organs, specifically, an adult woman's buttocks.”). But buttocks are not a sexual or excretory organ. The indecency determination therefore cannot stand.

The terms “sexual organ” and “excretory organ” each has a clear and indisputable meaning. Sexual organs play a role in reproduction; excretory organs remove waste products from the body. *See, e.g., Webster's Third New Int'l Dictionary (Unabridged)* 2082 (2002) (defining “sexual organ” as “[a]n organ of the reproductive system”); *Mosby's Dictionary of Medicine, Nursing & Health Professions* 687 (7th ed. 2006) (defining “excretory organ” as “an organ that is concerned primarily with the production and discharge of body wastes”).

Buttocks—“the fleshy parts on which a person sits,” “the seat of the body,” and the “rump,” *Merriam-Webster's Collegiate Dictionary* 156 (10th ed. 1993)—play no role in reproduction or excretion. *See State v. Fly*, 501 S.E.2d 656, 659 (N.C. 1998) (“[T]he phrase ‘private parts’ includes the external organs of sex and excretion.... [B]uttocks are not private parts within the meaning of the statute.” (emphasis omitted)).³ Indeed, buttocks are not an organ at all. An organ is “[a]

³ *See also G&B of Jacksonville, Inc. v. Florida*, 362 So. 2d 951, 956 (Fla. Dist. Ct. App. 1978) (“[E]xposure of the ... buttocks ... do[es] not constitute exposure of the sexual organ.”); *State v. Young*, 781 S.W.2d 212, 216 (Mo. Ct. App. 1989) (“The term ‘sexual organ’ includes the external genitalia (the vagina and the penis).”). Reinforcing the point, statutes routinely distinguish buttocks from sexual organs. *See, e.g., Ward v. County of Orange*, 217 F.3d 1350, 1354 n.3 (11th Cir. 2000).

differentiated structure ...in an animal ... adapted for the performance of some specific function.” *Webster’s Third* at 1589. Unlike genitalia, which perform the function of reproduction, buttocks perform no specific function in humans, and certainly not a sexual or excretory function.

Notably, the Forfeiture Order acknowledges (¶ 8) that buttocks are “not physiologically necessary to procreation or excretion.” But it asserts: (1) that the Commission has “consistently” and “in many cases” deemed buttocks to be a sexual or excretory organ, *id.*; (2) that “it is appropriate to interpret these terms not in a medical sense but rather in the sense of organs that are closely associated with sexuality or excretion,” *id.* (¶ 9); and (3) that petitioners “offer no legal or public policy reason for their argument,” *id.* (¶ 10). None of these justifications for the Commission’s disregard of the plain meaning of its threshold indecency requirement withstands scrutiny.

a. In support of the assertion that the Commission has deemed buttocks to be a sexual or excretory organ “in many cases,” the Forfeiture Order (¶ 8 n.28) cites just three decisions. Only one predates the broadcast at issue here. And in that case the Commission considered radio dialogue that dealt with sexual activity, specifically “a sadistic act of simulated anal sodomy with an infant,” *Rubber City Radio Group*, 17 F.C.C.R. 14745, 14747 (¶ 7) (2002). The case thus did not deal with the mere depiction of a sexual or excretory organ, and indeed never even

mentioned the word buttocks. The Forfeiture Order therefore fails to cite *any* case predating the broadcast at issue that would have alerted ABC that “sexual or excretory organs” encompasses buttocks.

Nor do the two later decisions cited by the Forfeiture Order show that the Commission has “consistently” deemed buttocks to be a sexual or excretory organ (assuming that post-broadcast decisions are even relevant to the analysis). In *Entercom Kansas City License, LLC*, 19 F.C.C.R. 25011 (2004), the Commission stated that “comments about ... genitalia, buttocks and breasts[] describe or depict sexual or excretory organs,” *id.* at 25014 (¶ 7). Because genitalia are sexual organs, it is true that comments about “genitalia, buttocks *and* breasts” describe “sexual or excretory organs.” But that does not demonstrate that the Commission regarded buttocks alone to be a sexual or excretory organ.

Not until 2006 did the Commission state that “buttocks ... are sexual and excretory organs.” *See Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 F.C.C.R. 2664, 2681 (¶ 62) (2006) (hereafter *Omnibus Order*), *vacated in part and remanded, Fox*, 489 F.3d 444. Even then, however, it offered no elaboration or analysis to support that conclusory assertion—advanced in the context of a highly sexualized music video that the Commission found met the threshold indecency requirement in any event because “[t]he lyrics ... refer to sexual activity.” *Omnibus Order*, 21 F.C.C.R. at 2681

(¶ 62); *see also id.* (¶ 63) (“The segment depicts simulated sexual intercourse and contains lyrics that graphically and explicitly describe sexual activities[.]”).

The Commission did cite two cases to support its novel interpretation, but neither provides any support. In *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000), the Supreme Court rejected a constitutional challenge to an ordinance banning public nudity. That decision has no bearing on whether buttocks are a sexual or excretory organ. In *Loce v. Time Warner Entertainment Advance/Newhouse Partnership*, 191 F.3d 256 (2d Cir. 1999), this Court held that a broadcaster could reasonably conclude that certain material “depicted sexual activities *or* organs” because the material included (among other things) “simulated acts of sex and masturbation” in addition to “close-up camera shots of unclothed breasts and buttocks,” *id.* at 269. *Loce* nowhere states that buttocks are a sexual or excretory organ.⁴

In short, although the Commission insists that it has deemed buttocks a sexual or excretory organ “consistently” and “in many cases,” it cites only one case in which it actually took that position—a case that offered no analysis to bolster its conclusion, cited irrelevant cases in support, and did not address the argument presented here. Moreover, the case post-dated the broadcast at issue here, raising

⁴ Although the Commission cited *Erie* and *Loce* in the NAL here (¶ 11 n.23), it abandoned any reliance on them in the Forfeiture Order after the NAL oppositions explained why each was inapposite. *See* A-198 to A-200, A-297 to A-303.

significant ex post facto concerns given that the Commission imposed substantial monetary fines, unlike in recent cases that involved acknowledged policy changes. *See, e.g., Fox*, 489 F.3d at 452.

b. The Commission also declares that it “do[es] not think a technical physiological definition is appropriate.” Forfeiture Order ¶ 9. But it was the FCC that chose the terms of the indecency test. If the Commission did not believe that a “technical physiological definition” was appropriate, it should not have used physiological terms. Having done so, it cannot fault broadcasters for relying on those terms’ ordinary, universal meaning.

Nor can the Commission be allowed to punish broadcasters by inventing a new interpretation of “sexual or excretory organs”—namely “organs that are closely associated with sexuality or excretion and that are typically kept covered because their public exposure is considered socially inappropriate and shocking,” Forfeiture Order ¶ 9—that has no foundation whatsoever in physiology, common usage, or precedent. ABC had no notice of that interpretation when it broadcast the episode at issue here, and hence due process prohibits any sanction. *See, e.g., High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 607 (D.C. Cir. 2002). Moreover, buttocks do not even satisfy the Commission’s new threshold test, because (as noted above) they are not organs at all. Even under the Commission’s odd

interpretation of its test, then, there is no basis for deeming the broadcast here indecent.⁵

c. Finally, the Commission appears oblivious to the constitutional concerns its position raises. The First and Fifth Amendments do not permit the FCC to promulgate a vague indecency test, because the vagueness would “unquestionably silence[] some speakers whose messages would be entitled to constitutional protection.” *Reno*, 521 U.S. at 874. But the result is precisely the same if, as here, the Commission promulgates a clear standard (depictions of sexual or excretory organs) but then ignores that standard by deeming material (a depiction of buttocks) that falls outside its plain meaning to be indecent. In both situations, broadcasters do not know what is and is not permitted, and thus will inevitably engage in self-censorship by declining to broadcast protected material in order to avoid FCC sanctions—including, as here, substantial monetary penalties.⁶

⁵ The Forfeiture Order also states (¶ 8) that buttocks “are widely associated with sexual arousal.” But many body parts are “widely associated with sexual arousal,” including legs, lips, and hair; presumably the FCC would not contend that they too are “sexual organs,” or that showing them could in itself be indecent.

⁶ The Commission recognized this problem long ago, stating in its *Pacifica* order that “to avoid the error of overbreadth, it is important to make it explicit whom we are protecting *and from what.*” *Citizen’s Complaint Against Pacifica Found. Station WBAI (FM)*, 56 F.C.C.2d 94, 98 (¶ 11) (1975) (emphasis added).

2. The Broadcast Was Not Patently Offensive

The material in question also was not indecent because it was not “patently offensive as measured by contemporary community standards.” A proper application of the Commission’s patent-offensiveness test (*see supra* pages 12-13) makes this clear.

a. The Broadcast Did Not “Dwell Upon” Or “Repeat At Length” Any Depiction Of Sexual Or Excretory Organs

One factor the Commission has consistently considered in evaluating whether a broadcast is “patently offensive” is “whether the material *dwells on or repeats at length* de[pic]tions of sexual or excretory organs.” *Indecency Policy Statement*, 16 F.C.C.R. at 8003 (¶ 10); *accord*, NAL ¶ 5. The broadcast here did neither. Buttocks were visible for only seven seconds, and fully visible for only five seconds—not “dwelled upon” or “repeated at length” under any reasonable definition, particularly in the context of an hour-long program. *Compare, e.g., Omnibus Order*, 21 F.C.C.R. at 2677 (¶ 47) (sexual depictions dwelled upon where nudity persisted “throughout much of the segment in question, which lasts more than fifteen minutes”). Were it otherwise, this factor would be little more than an enabler of indecency determinations—something the Commission could use in almost every case to sanction broadcasters.

Besides being unsustainable on its own terms, that result cannot be squared with Commission precedent. For example, in the *Omnibus Order* the Commission,

addressing an episode of *America's Funniest Home Videos* that showed an infant's buttocks for eight seconds, cited the depiction's "brevity" in deeming the material not indecent. 21 F.C.C.R. at 2719 (¶ 226). In the same order, the Commission denied an indecency complaint against a football program after deeming it "relevant that the [allegedly indecent] images ... appear for only a few seconds." *Id.* (¶ 229). The Commission took a similar approach regarding a broadcast of the film *Catch-22*, a black comedy about military service during World War II. Although the film included more than ten seconds of full frontal female nudity and more than thirty seconds of a full depiction of male buttocks, the Commission relied on the depictions' brevity in deeming the broadcast not indecent. *See* Letter from Norman Goldstein to David Molina, FCC File No. 97110028 (May 26, 1999) (hereafter *Catch-22 Letter*) (Addendum). The Commission's "dwelling" analysis in those decisions was correct, and they cannot be reconciled with its conclusion here that the seven-second duration of the depictions weighs in favor of an indecency finding rather than against it.

Notably, unlike the NAL (¶ 13), the Forfeiture Order does not even assert that the broadcast "dwells upon" McDowell's buttocks. Rather, it contends (¶ 15) that "the disputed scene includes repeated shots of a woman's naked buttocks." But the relevant issue is not repetition per se, as the Order implies, but "whether the material dwells on or repeats *at length* de[pic]tions of sexual or excretory

organs.” *Indecency Policy Statement*, 16 F.C.C.R. at 8003 (¶ 10) (other emphasis omitted). Here there was no repetition at length (nor does the Forfeiture Order say otherwise), as the scene includes only two depictions that *together* total seven seconds. Properly applied, this factor weighs against rather than in favor of deeming the broadcast indecent.

b. The Depiction Was Not Shocking, Pandering, Or Titillating

Another factor the Commission considers in applying its patently offensive test is “whether the material panders to, titillates, or shocks the audience.” *Omnibus Order*, 21 F.C.C.R. at 2668 (¶ 13). This factor also militates against a determination that the episode was indecent.

The scene at issue is utterly devoid of any sexual or excretory connotation beyond the fact that buttocks were depicted—a fact that is clearly insufficient under Commission precedent, which repeatedly emphasizes that even “full frontal nudity is not *per se* indecent.” *E.g.*, *Indecency Policy Statement*, 16 F.C.C.R. at 8012 (¶ 21) (citing *WPBN/WTOM License Subsidiary, Inc.*, 15 F.C.C.R. 1838 (¶ 11) (2000) (hereafter *Schindler’s List*)). Neither McDowell nor Theo engages in sexual or excretory activity, nor does either display sexual excitement or act in a sexually suggestive manner. McDowell is merely shown preparing to shower before leaving for work, a daily endeavor for most people and one devoid of sexual or excretory connotations. And Theo is shown getting out of bed and walking to

the bathroom first thing in the morning, another commonplace, non-sexual experience. When Theo opens the door and sees McDowell, both characters exhibit only embarrassment.

The Forfeiture Order acknowledges (§ 16) that “the scene does not depict any sexual response in the child.” It suggests, however, that Theo’s presence “serves to heighten the shocking nature of the scene’s depiction of [McDowell’s] nudity.” *Id.* That assertion is untenable. First, the word “heighten” implies that there was something “shocking” about the depictions independent of Theo’s opening of the bathroom door. But the Commission never explains what that something is. More fundamentally, material cannot be deemed patently offensive simply because it is “shocking” in some generic sense of the word; rather, material must shock in some way related to sex or excretion. Otherwise the Commission’s test would know few bounds, because countless depictions or descriptions can be “shocking” in a general sense. Indeed, the scene here was *intended* to be “shocking” in a non-sexual sense, deliberately showing both characters with “shocked” expressions in order to help viewers appreciate the surprise and embarrassment that McDowell and Theo experience.

Commission precedent makes clear that material is “shocking, pandering, or titillating” only if it is sexualized or has excretory connotations. For example, the Commission concluded that an episode of *Will & Grace* showing a man and

woman touching and adjusting another woman's clothed breasts as she prepared for a date was not shocking, pandering, or titillating because "the touching of the breasts is not portrayed in a sexualized manner, and does not appear to elicit any sexual response from Grace." *Omnibus Order*, 21 F.C.C.R. at 2702 (¶ 158).

Similarly, the Commission explained that the depiction of an infant's buttocks on *America's Funniest Home Videos* was not shocking, pandering, or titillating because it was "not sexualized in any manner whatsoever." *Id.* at 2719 (¶ 226).

The Commission likewise concluded that a scene in the show *Two and a Half Men* that involved a female doctor performing a hernia examination on a man (parts of which were not actually depicted), along with "mildly suggestive remarks to the doctor during the examination," was not shocking, pandering, or titillating because "the exam [wa]s not eroticized." *Id.* at 2703 (¶ 162). And while the depiction of naked concentration camp prisoners in *Schindler's List* was certainly "shocking," it was also devoid of sexual or excretory connotations, and thus the Commission upheld a staff ruling that the broadcast was not "shocking" for indecency purposes. *See* 15 F.C.C.R. at 1840 (¶ 6).⁷

⁷ That material must shock in some way related to sex or excretion is demonstrated not only by Commission precedent but also by the juxtaposition of "shocking" with "pandering" and "titillating," words with unmistakable sexual connotation. *See, e.g., Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps," and courts thus "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words.").

The conceded absence in the scene here of any sexual activity or excitement leaves the Commission with nothing on which to base its conclusion under this factor other than its assertion that the scene involves “an attractive woman disrobing as she prepares to step into the shower.” Forfeiture Order ¶ 16. The Commission asserts that this constitutes titillation. *See id.* But invocation of that vague and highly subjective term in the absence of any showing of sexualized or lewd activity amounts to an unacknowledged change in the Commission’s longstanding rule that nudity is not per se indecent; the rule now is evidently that nudity is not per se indecent unless the person depicted is “attractive” (in which case it is per se titillating). Putting aside that the FCC cannot change policies without explanation, what a viewer (or a Commissioner) may find attractive or titillating is the ultimate in subjectivity, and hence a wholly inappropriate basis for government regulation.

c. The Commission All But Ignored Context, A Factor It Has Long Deemed “Critical”

As just demonstrated, proper application of the Commission’s patent-offensiveness test makes clear that even if the scene is viewed in isolation, the Commission’s own criteria militate against—not in favor of—an indecency determination.⁸ The scene should not be viewed in isolation, however. To the

⁸ As to the remaining factor—whether the depiction was “graphic and explicit”—the Forfeiture Order states (¶ 13) that the issue “is whether the visual

contrary, as the Commission has repeatedly made clear, “the overall context of the broadcast in which the disputed material appeared is critical.” *Indecency Policy Statement*, 16 F.C.C.R. at 8003 (¶ 10); *see also id.* at 8012 (¶ 21) (“[T]he ‘full context’ of the nudity is controlling.”).⁹ Here, contextual factors reinforce the conclusion that the depictions were not indecent.

First, *NYPD Blue* was a long-running program that garnered numerous writing, directing, and acting awards. In fact, the show—which was hugely popular throughout its twelve-year run and was deemed “the gold standard of one-hour dramas” by *TV Guide* (Sept. 6, 1997)—won twenty Emmy awards, as well as four Golden Globe awards, two Peabody awards, and numerous other accolades, *see supra* page 5. These signal accomplishments are relevant because “merit is properly treated as a factor in determining whether material is patently offensive.” *ACT I*, 852 F.2d at 1340.

Second, the scene at issue was related to a broad storyline of the show—the impact on Theo of the romantic relationship between his father and McDowell, and (more generally) the difficulties that adults with children often encounter upon

depiction of the sexual or excretory organ is clear and unmistakable.” That is not a standard the Commission has consistently applied, however. For example, the Commission deemed a depiction of an infant’s buttocks on *America’s Funniest Home Videos* to be only “marginally explicit” even though the buttocks were clearly visible. *Omnibus Order*, 21 F.C.C.R. at 2718 (¶ 226).

⁹ The Supreme Court suggested in *Pacifica* that consideration of context was crucial, and perhaps required. *See* 438 U.S. at 750-751.

moving in together. The scene portrayed one such difficulty—one undoubtedly familiar to many viewers—namely, the awkwardness and embarrassment that result when a child unintentionally walks in on a naked adult. It was certainly a reasonable artistic and creative judgment by the episode’s creators and ABC that the brief depictions of McDowell’s buttocks helped convey those feelings to viewers more realistically and powerfully.

The Commission has often stressed that “the *full context* in which the material appeared is critically important.” *Indecency Policy Statement*, 16 F.C.C.R. at 8002 (¶ 9). Yet the Forfeiture Order gives virtually no consideration to the contextual factors discussed above, paying them lip service but then brushing them aside (¶ 18) with no explanation except that “[i]n context and on balance” they are outweighed. That non-analysis is unacceptable; the Commission was required to explain why the “critically important” full context, *Indecency Policy Statement*, 16 F.C.C.R. at 8002 (¶ 9), deserved so little weight here. *See, e.g., Fox*, 489 F.3d at 457 (“[A]gency action will be set aside as arbitrary and capricious if the agency fails to provide a reasoned explanation for its decision.”).

The Commission’s dismissal of context is also irreconcilable with precedent. For example, the broadcasts of both *Schindler’s List* and *Catch-22* contained much more sustained nudity than the episode here—and, in the case of *Catch-22*, nudity with sexual connotations. *See infra* pages 34, 36. Yet in evaluating those

broadcasts, the Commission deferred to the artistic judgment to include frontal and rear nudity, deeming the nudity not patently offensive when considered in context. *See Catch-22 Letter* (nudity not indecent “in [the] context of a full[-]length drama, the primary theme of which was the horrors of war”); *Schindler’s List*, 15 F.C.C.R. at 1842 (¶ 13) (nudity not indecent in “the full context of its presentation” and in light of the film’s subject matter). Likewise, in denying indecency complaints against a broadcast of the film *Saving Private Ryan*, which graphically depicted the horrors of World War II combat, the Commission genuinely took account of context, including the fact that the movie had won numerous awards. *Complaints Against Various Television Licensees Regarding Their Broad. on Nov. 11, 2004, of the ABC Television Network’s Presentation of the Film “Saving Private Ryan,”* 20 F.C.C.R. 4507, 4507 (¶ 2) & n.3 (2005) (hereafter *Saving Private Ryan*). It also deferred to the broadcasters’ artistic judgment that “[d]eleting all of [the expletives] or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers.” *Id.* at 4513 (¶ 14).

Precisely the same is true here. The reasonable artistic judgment of *NYPD Blue*’s broadcasters was that the depiction of the awkwardness and embarrassment felt by Theo and McDowell would have lost much of its power without the seven seconds in question. Nonetheless, the Commission took a radically different

approach here than in other cases. That is impermissible: Although members of the Commission may personally prefer realistic explorations of World War II to realistic explorations of the lives of New York’s police officers, “[t]he Commission’s role in overseeing program content is very limited,” *Complaints Against Various Television Station Licensees Regarding the ABC Television Network’s Nov. 15, 2004, Broad. of “Monday Night Football,”* 20 F.C.C.R. 5481, 5482 (¶ 4) (2005), and *NYPD Blue* is entitled to the same deference to artistic judgments that these other award-winning broadcasts received.

3. The Commission Improperly Dismissed ABC’s Use Of A Prominent Parental Advisory, Ratings, And V-Chip Coding

Yet another factor undermines the Commission’s conclusion that the broadcast was indecent: ABC took concrete steps to advise parents of the content of the program and to enable them to prevent their children from viewing the program if they so chose. The episode began with a prominent visual and verbal advisory that lasted eight seconds—longer than the depictions of buttocks—and stated that “THIS POLICE DRAMA CONTAINS ADULT LANGUAGE AND PARTIAL NUDITY. VIEWER DISCRETION IS ADVISED.” Moreover, during the advisory, as well as at the beginning of the program itself, an on-screen icon

disclosed the episode's rating of TV-14(DLV). Finally, the episode was coded to allow viewers to block the program using the V-chip or similar technology.¹⁰

In dismissing indecency complaints against broadcasts of *Schindler's List* and *Saving Private Ryan*, the Commission emphasized similar affirmative steps by those films' broadcasters to inform and empower parental choice. *See Schindler's List*, 15 F.C.C.R. at 1842 (¶ 13); *Saving Private Ryan*, 20 F.C.C.R. at 4513 (¶ 15). Use of advisories and rating codes, the Commission said in *Saving Private Ryan*, alerted parents to the fact that the film was "not intended as family entertainment," 20 F.C.C.R. at 4513 (¶ 15), and meant that "parents had ample warning that this film contained material that might be unsuitable for children and could have exercised their own judgment about the suitability of [it] for their children," *id.* Furthermore, "[i]n addition to serving as a warning, the presence of [rating] codes allows parents to lock out the telecast on sets equipped with the V-chip." *Id.* at 4508 n.9.

¹⁰ The V-chip is a device—required since 2000 to be included in all new television sets over 13 inches—that allows viewers to block undesired programs. *See* FCC V-Chip, www.fcc.gov/vchip. The chip operates in conjunction with the TV Parental Guidelines rating system, which provides information about the content of programs. *Id.* Programs are rated based on age-appropriateness (using a designation ranging from "TV-Y" for children's shows to "TV-MA" for adult programming), as well as on whether they contain particular types of content, such as "intense violence (V)" or "strong coarse language (L)." *Id.* The ratings are embedded in television signals and the V-chip detects them, enabling users to block programming by age-appropriateness, content-type, or both. *Id.*

The Forfeiture Order (¶ 18) acknowledged that ABC’s use of the advisory and rating were “relevant and weigh[] against a finding of indecency.” But then it asserted, without elaboration, that “[i]n context and on balance,” the broadcast was nonetheless indecent. *Id.* Again, such cursory treatment is insufficient; the Commission must provide a reasoned explanation for its decision. *See, e.g., Massachusetts v. EPA*, 127 S. Ct. 1438, 1463 (2007).¹¹ Moreover, the Commission’s determination suggests that it considers a seven-second, non-sexual and non-excretory depiction of buttocks to be so far outside the bounds of decency that even the “critical” contextual factors discussed above, combined with the use of parental advisories, program rating, and V-chip coding, cannot render the material not indecent. That implication is indefensible.

B. The Commission Failed To Explain Its Departures From Precedent

The Commission’s indecency determination is arbitrary and capricious not only under the plain language of the terms of the Commission’s indecency test (as shown in Part A), but also because it reflects an unexplained—indeed

¹¹ In the NAL—though not the Forfeiture Order—the Commission stated that “warnings are not necessarily effective because the audience is constantly changing stations.” NAL ¶ 16. But the advisory in this case appeared almost immediately before the scene at issue; only a 30-second recap of prior episodes separated the two. It is thus highly unlikely that anyone would have viewed the scene without viewing the advisory. *See Saving Private Ryan*, 20 F.C.C.R. at 4508, 4513 (¶¶ 3, 15-16) (repeatedly noting that advisories were given not only at the beginning of the broadcast but also after each commercial break, an approach that similarly made inadvertent exposure to mature material unlikely).

unacknowledged—departure from numerous past Commission decisions.

Although the oppositions to the NAL highlighted these departures, the Forfeiture Order completely ignores several of the departures, and offers unpersuasive rationales for the others. Moreover, the Commission denies that anything has changed. Whereas in the fleeting-expletives case presented in *Fox*, the Commission at least forthrightly acknowledged that it had changed its interpretation of the governing standard, here it doggedly asserts that its determination reflects nothing more than consistent application of a longstanding regime. That assertion is untenable, and the Commission's failure to account for precedent is impermissible.

To begin with, the Commission makes no attempt whatsoever to explain how its decision here is consistent with its treatment of the following broadcasts, which were cited by ABC or its affiliates in opposing the NAL:

- An episode of *America's Funniest Home Videos* depicting an infant's buttocks, which the Commission concluded was: 1) only "marginally explicit" even though the buttocks were clearly visible; 2) not dwelled upon even though the buttocks were depicted for longer than in this case; and 3) not pandering, shocking or titillating solely because it was "not sexualized in any manner whatsoever." *Omnibus Order*, 21 F.C.C.R. at 2718-2719 (¶ 226).
- An episode of *Family Guy* that included repeated references to (and use of euphemisms for) characters' penises, in the context of "a father's concern that he is not as well-endowed as his son." *Omnibus Order*, 21 F.C.C.R. at 2713 (¶200). The Commission concluded that the descriptions were not "used to pander, titillate, or shock" solely because "the episode at issue addresses the father's feelings of inferiority, and the topic is presented in an

indirect, humorous manner, without the use of graphic or explicit details.”
Id. at 2714 (¶ 204).

- The film *Austin Powers: The Spy Who Shagged Me*, which includes an unobstructed side view and a barely obstructed full view of the protagonist’s buttocks (along with barely obstructed views of his genitals). *Complaints by Parents Television Council Against Various Broad. Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 F.C.C.R. 1920, 1923 (¶ 6(g)), 1927 (¶ 9) (2004).

The Commission may not ignore precedent in this fashion. *See, e.g., N.Y. Pub.*

Interest Research Group, Inc. v. Johnson, 427 F.3d 172, 182 (2d Cir. 2005)

(“[A]gency action is arbitrary and capricious if it departs from agency precedent without explanation.”).

The Forfeiture Order does address other decisions cited in the NAL oppositions, but its explanations are wholly inadequate. As to *Catch-22*, for example, the Order says only (¶ 17 n.55) that the Commission “need not address” that case because it was an unpublished staff decision. But the regulation the Commission cites for the proposition that it is free to ignore unpublished decisions expressly permits reliance on such decisions “against persons who have actual notice of the document in question *or by such persons against the Commission.*” 47 C.F.R. § 0.445(e) (emphasis added). ABC has “actual notice” of the *Catch-22* decision and is thus entitled to use it against the Commission. This is as it should be: The regulation is intended to protect private parties from being sanctioned for conduct that they could not reasonably have known was prohibited. It is not a

license for the Commission to engage in inconsistent decisionmaking. *See, e.g., Saint Fort v. Ashcroft*, 329 F.3d 191, 204 n.9 (1st Cir. 2003) (“[T]he fact that the prior BIA precedent was unpublished does not remove it from review for arbitrariness when the agency changes course.”); *cf.* 5 U.S.C. § 552(a)(2) (requiring publication or actual notice of an agency order before it may be used “against a party *other than an agency*” (emphasis added)).

That inconsistent decisionmaking is afoot here is indisputable: *Catch-22* includes both a scene in which buttocks are shown for thirty seconds and a fantasy scene containing eleven seconds of full frontal female nudity. These depictions were no less “clear and unmistakable” than those in this case, they lasted significantly longer than the depictions here, and (in the fantasy scene, where a woman disrobes and beckons to the protagonist to swim to her) they had clear sexual overtones. Yet the Commission deemed the depictions in *Catch-22* (which it labeled “very brief”) not indecent “in [the] context of a full length drama, the primary theme of which was the horrors of war.” *Catch-22 Letter*. That conclusion was correct, but it is irreconcilable with the indecency determination here, and the Commission’s silence as to the stark inconsistency is impermissible.

Also inadequate is the FCC’s discussion of the episode of *Will & Grace* discussed above. *See supra* pages 23-24. The Forfeiture Order brushes that case aside (¶ 17) on the ground that it involved no nudity, but that misses the point.

ABC cited the case not because the ultimate determination differed from that here, but rather because it reveals the FCC's inconsistent application of the third patent-offensiveness factor: whether the broadcast was shocking, pandering, or titillating. The Commission excused *Will & Grace* under this factor because the episode "addresses the anxiety associated with a first date and Grace's friends' efforts to lend assistance" and because "the touching of the breasts is not portrayed in a sexualized manner, and does not appear to elicit any sexual response from Grace." *Omnibus Order*, 21 F.C.C.R. at 2702 (¶ 158). That analysis is equally applicable here: The episode addresses the difficulties that adults with children encounter when they move in together, "a topic that is not shocking, pandering, or titillating," and the buttocks are "not portrayed in a sexualized manner, and do[] not appear to elicit any sexual response from" anyone. The Commission offers no explanation for this varying application of the third patent-offensiveness factor.

As to *Saving Private Ryan*, the Forfeiture Order (¶ 17 n.54) declares it "entirely unremarkable" that that film's use of expletives would not be deemed shocking, pandering, or titillating whereas the scene at issue here would be. But in defending the latter conclusion, the Commission tellingly describes the scene simply as "a woman disrobing to reveal her naked buttocks," *i.e.*, without pointing to anything in the scene that connoted sex or excrement. In other words, the Commission defends its view that the scene here was shocking, pandering, or

titillating merely by noting that it involved nudity. Given the Forfeiture Order's proximate proclamation (§ 17 n.55) that nudity is not per se indecent, that explanation is insufficient.

Finally, the Forfeiture Order addresses *Schindler's List* by saying (§ 17) that the nudity in that case was not pandering or titillating. But the nudity in each broadcast was devoid of sexual or excretory connotations and was an important component of a larger, serious, and non-sexual storyline. Moreover, both works are critically acclaimed and award-winning, and both broadcasts were accompanied by parental advisories. To the extent there is any difference between the two, other than the specific subject matter that each involved—which is not a proper concern of the Commission's given that neither broadcast's subject matter was sexual or excretory—it is that the depictions in *Schindler's List* not only included full frontal nudity as well as buttocks, but also lasted approximately fifteen times longer than the depictions here (and also appeared in two separate scenes). Yet the Commission found the broadcast here indecent and the broadcast of *Schindler's List* not. The latter finding was correct. Given the similarities, the same result was required here, and the Commission cannot wave away the inconsistency by blithely asserting that the nudity in *Schindler's List* was not pandering or titillating.

In sum, the Commission has failed to explain the numerous conflicts between its decision in this case and its prior decisions. The Forfeiture Order should therefore be set aside. *See, e.g., Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (“[A]n agency changing its course ... is obligated to supply a reasoned analysis for the change beyond that which may be required ... in the first instance.”).

III. THE IMPOSITION OF FORFEITURES FOR THIS BROADCAST VIOLATES THE CONSTITUTION

The forfeitures imposed here violate the First and Fifth Amendments. The Commission cannot constitutionally claim the power to determine *ex post*, and entirely on the basis of subjective factors, that even brief, non-sexual nudity in serious broadcasts is actionably indecent.

To conclude that the Commission’s action in this case was unconstitutional, this Court need not consider whether § 1464 is facially unconstitutional or overrule *Pacifica*.¹² Indeed, it is the Commission that has broken faith with *Pacifica* by disregarding the narrowness of *Pacifica*’s holding and rejecting the restrained enforcement policy *Pacifica* demanded. Moreover, as this Court suggested in *Fox*, *see* 489 F.3d at 462-466, the Commission’s indecency regime is constitutionally

¹² Because even *Pacifica* was not based on the “scarcity” rationale supporting other broadcast regulations, *see* 438 U.S. at 770 n.4 (Brennan, J., dissenting), this case likewise does not involve the continuing validity of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

flawed in light of post-*Pacifica* developments, including the vagueness of the standards and tests articulated by the FCC since *Pacifica*; the Commission's inconsistent, arbitrary, and subjective application of those standards in recent years; the development of new blocking technologies like the V-chip; and the dramatic rise in non-broadcast media that deliver video programming to the home.

As this Court has noted, “*all* speech covered by the FCC’s indecency policy is fully protected by the First Amendment,” *Fox*, 489 F.3d at 462, and the forfeitures imposed here fail any level of constitutional scrutiny applicable to content-based restrictions on fully protected speech—be it strict scrutiny, which should apply, or so-called intermediate scrutiny. The Forfeiture Order applies an impermissibly vague standard in an arbitrary and subjective manner that is inconsistent with previous agency guidance and precedent, casting an unacceptably broad chill on protected speech. Accordingly, it fails under both the First Amendment and Due Process Clause. *See Reno*, 521 U.S. at 870; *United States v. Williams*, 128 S. Ct 1830, 1834-1835 (2008); *Fox*, 489 F.3d at 463-464. Moreover, to survive even intermediate First Amendment scrutiny, a speech restriction must be narrowly tailored to achieve a government interest of substantial importance. *See FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984). The Commission has not even attempted to articulate how suppression of this brief depiction of buttocks would advance such an interest. And because this

broadcast could readily have been blocked by parents who did not wish their children to view it, the Commission’s imposition of forfeitures is utterly inconsistent with any notion of “tailoring.”

A. *Pacifica* Does Not Support The Forfeitures

The Commission appears to believe that *Pacifica*, by upholding regulation of indecent-but-not-obscene broadcasts, also supports the conclusion that a seven-second, non-sexual display of buttocks as part of a serious storyline in a highly acclaimed program may constitutionally lead to a forfeiture. This reading of *Pacifica* is far too broad.

Pacifica did not give the Commission “unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect” audiences from “momentary exposure to it in their homes.” *See Pacifica*, 438 U.S. at 759-760 (Powell, J., concurring in part and concurring in the judgment). Indeed, as the D.C. Circuit later noted, the Commission’s *Pacifica* briefing emphasized that the conclusion that the Carlin monologue was indecent was not only fact-specific, but also “carried with it the limiting condition[] of certain words repeated over and over.” *See ACT I*, 852 F.2d at 1337. Both the plurality and concurrence in *Pacifica* accordingly made clear that the Court’s ruling involved a “narrow” category of expression: the seven “Filthy Words,” “repeated over and over as a sort of verbal shock treatment.” 438 U.S. at 757

(concurrence); *see also id.* at 742, 744 (plurality noting fact-specific nature of ruling and case's extreme facts).

Although the *Pacifica* Court did not rule explicitly on the permissibility of suppressing broadcasts with brief depictions of nudity or fleeting expletives, it left little doubt that deeming such transmissions actionably indecent would be constitutionally troubling. *See* 438 U.S. at 760-761 (Powell, J., concurring in part and concurring in the judgment) (explaining that the Court's ruling was not meant to authorize regulation of the "isolated use of a potentially offensive word ... as distinguished from the verbal shock treatment administered by the respondent"). This is particularly true, *Pacifica* indicates, in the context of a broadcast with serious merit. *See id.* at 750 & n.29.

Subsequent decisions bear out this point. In *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), the Supreme Court refused to presume that children's ability to see fleeting nudity due to signal-bleed on cable systems constituted a sufficiently serious problem to justify a speech restriction. The "First Amendment requires a more careful assessment and characterization of an evil" before the government may restrict the transmission of "instances as fleeting as an image [of nudity] appearing on a screen for just a few seconds." *Id.* at 819. And the Commission's own pre-2003 precedent reflects a clear conviction that the First Amendment would not let the Commission sanction brief nudity or

expletives. *See, e.g., Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 F.C.C.R. 4975, 4980 n.31 (2004) (hereafter *Golden Globes*) (recognizing that even when the Commission expanded the scope of its indecency definition in 1987, it continued to hold that the “isolated use of expletives was not indecent”); *WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1251 (¶ 2), 1254 (¶ 10) (1978) (rejecting an indecency complaint brought against a station for programs that rely “primarily on scatology, immodesty, vulgarity, nudity, profanity and sacrilege” for humor; recognizing that “the Commission’s [*Pacifica*] opinion, as approved by the Court, relied in part on the repetitive occurrence of the ‘indecent’ words in question”; and noting Justice Powell’s explanation that duration and repetition distinguished this “shock treatment” from “the isolated use of a potentially offensive word”).

Pacifica suggested that the Commission had not unconstitutionally chilled protected speech because its orders did not indicate it would (or could) second-guess reasonable broadcaster decisions about briefly-transmitted content forming part of a serious program. *See* 438 U.S. at 742-744 (plurality) (noting that the Commission’s order was limited to a specific factual context involving extreme speech, and explaining that the order would chill only broadcasts of “patently offensive references to excretory and sexual organs and activities”); *id.* at 761 n.4 (Powell, J., concurring in part and concurring in the judgment) (finding no

unconstitutional chilling effect because the Commission’s holding was limited to the extreme facts of the case and the Commission had pursued a policy of restrained enforcement). Reviewing the Commission’s decision to expand its enforcement beyond the seven words in the Carlin monologue, the D.C. Circuit likewise noted that the Commission’s restrained enforcement policy would temper the chilling effect of the Commission’s indecency standard, *ACT I*, 852 F.2d at 1340 n.14, which the court described as “less than precise,” *id.* at 1342. The court further noted the Commission’s recognition of the need “to give weight to reasonable licensee judgments.” *Id.* at 1340 n.14.

The forfeitures in this case violate First Amendment principles as outlined in *Pacifica*, which made clear that serious merit must be given real weight, and sharply distinguished between brief content and unrelenting repetition. The Forfeiture Order creates the very overbreadth-related chill that *Pacifica* and *ACT I* suggested the Commission’s previous decisions did not—signaling that, although certain programs the Commission likes may escape sanction, forfeiture is entirely possible for those it does not—even (as this case demonstrates) for a brief non-sexual depiction of buttocks in a critically acclaimed program.

Notably, although the Commission justifies indecency enforcement on the ground that it is preventing minors from viewing harmful programming against their parents’ wishes, *see, e.g., ACT I*, 852 F.2d at 1343-1344 & n.20, the

Forfeiture Order makes no attempt to explain how that interest might be constitutionally sufficient in the context of this broadcast, which involves only brief, non-sexual nudity as well as a serious theme; carried a prominent parental advisory; and was encoded to be blocked with a V-chip. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995) (even under intermediate scrutiny, the government must show that a speech restriction directly advances a substantial government interest); *League of Women Voters*, 468 U.S. at 380, 396 (requiring speech restriction to support substantial government interest). Nor is it at all clear that such an explanation is possible. The Commission has certainly failed to explain how the interest might be sufficient here, when it was not in the context of the broadcasts of *Catch-22* and *Schindler's List*. *Compare Fox*, 489 F.3d at 458-459 (noting a similar Commission failure to explain how the broadcast of fleeting expletives in certain programs was more harmful to children than their inclusion in others).¹³

B. As Applied Here And In Other Recent Decisions, The FCC's Indecency Standard Is Unconstitutionally Vague And Subjective

In *Fox*, this Court expressed concern “that the FCC’s indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally

¹³ Notably, no complaint received by the Commission about this program alleged that the depiction of buttocks in this program harmed a minor, or even that any minor viewed the program. Indeed, as explained in the brief for intervenors Fox Television Stations, et al. (at 13-16), the depiction of buttocks in the program was not even the subject of any of the complaints.

vague.” 489 F.3d at 463. The Court pointed in particular to the second prong of the Commission’s indecency test: whether material is “patently offensive as measured by contemporary community standards.” *Id.* “We can understand,” this Court explained after noting some of the Commission’s recent decisions, “why the Networks argue that” the Commission’s indecency test “fails to provide the clarity required by the Constitution, creates an undue chilling effect on free speech, and requires broadcasters to ‘steer far wider of the unlawful zone.’” *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). This Court’s concern was well-founded, and the constitutional problems the Court identified require that the forfeitures here be set aside.¹⁴

Vague, content-based speech restrictions both violate due process, *Williams*, 128 S. Ct. at 1834-1835, and “raise[] special First Amendment concerns because of [their] obvious chilling effect on free speech,” *Reno*, 521 U.S. at 870, 871-872. Speech regulations must convey clearly what is and is not allowed, so that speakers need not resort to guesswork and self-censorship to avoid running afoul of the legal prohibition. *Id.*; *see also NAACP v. Button*, 371 U.S. 415, 438 (1963) (“Precision of regulation must be the touchstone” whenever First Amendment rights are at stake.); *Gooding v. Wilson*, 405 U.S. 518, 527-528 (1972).

¹⁴ The chilling effect, moreover, is vastly greater now that the per-station maximum forfeiture has increased more than tenfold, to \$325,000. *See Broadcast Decency Enforcement Act of 2005*, Pub. L. No. 109-235, §2, 120 Stat. 491 (2006).

Far from meeting this requirement, the Commission's indecency test affords it virtually boundless discretion to determine after the fact whether particular speech is indecent or not. Indeed, in *Fox* this Court pointed to glaring inconsistencies in the determinations made under this standard about whether various programs using expletives were indecent. *See* 489 F.3d at 463. The Commission's recent determinations about whether nudity makes a program indecent are no easier to reconcile; in fact, they create an even more serious chill because, unlike in the case of expletives, where the Commission at least acknowledged that it had made a change in policy, here the Commission denies it, insisting that the sanctions imposed in this case are entirely consistent with its longstanding test and precedent. Left with little guidance in assessing whether the Commission will deem indecent even brief, non-sexual nudity in service of an important storyline, broadcasters seeking to avoid forfeitures have little choice but to cut their speech in hope of meeting whatever may be the Commission's fashion when it gets around to reviewing any complaints.

The Commission's vague standard and criteria—combined with its recent aggressiveness and inconsistency in enforcing them—are causing broadcasters to do precisely that. For example, after the *Golden Globes* order, numerous ABC-affiliated stations declined to show *Saving Private Ryan* for fear they would face indecency fines, *Communications Daily*, Nov. 12, 2004; only later did the

Commission rule that broadcasts of the film were not indecent, *see* 20 F.C.C.R. 4507. Similarly, after the *Omnibus Order*, the Public Broadcasting Service announced a series of restrictions on programming to avoid any risk that stations would incur Commission fines. Weiss, *PBS Toughens Policy on Cursing in Its Shows*, *Boston Globe*, June 17, 2006, at E3. These restrictions came in addition to changes that public broadcasters made to their programming after *Golden Globes*. For instance, one broadcaster edited a hint of cleavage from the *American Experience* documentary “Emma Goldman,” while PBS edited certain expletives from a program featuring readings and dramatizations of the poetry of renowned writer Piri Thomas. *See* Pet. for Reconsideration, *Golden Globes*, File No. EB-03-IH-0110 (Apr. 19, 2004), at 20, *available at* http://www.fcc.gov/eb/broadcast/Pleadings/Indecent_Recon.pdf.

The Supreme Court has already underscored the dangers to free speech posed by the Commission’s indecency standard. As this Court noted in *Fox*, the Supreme Court in *Reno* “struck down as unconstitutionally vague a similarly worded indecency regulation of the Internet.” 489 F.3d at 463. *Reno* involved the Communications Decency Act, which banned Internet distribution of material that “in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.” 47 U.S.C. § 223(d)(1) (2003). The Supreme Court held that this standard “lacks the

precision that the First Amendment requires when a statute regulates the content of speech,” 521 U.S. at 874, noting particular concern with “the vagueness inherent in the open-ended term ‘patently offensive,’” *id.* at 873.

As this Court observed, “[b]ecause *Reno* holds that” an almost-identically worded indecency regulation is “unconstitutionally vague,” there is reason to be “skeptical that the FCC’s ... indecency test” is constitutional. *Fox*, 489 F.3d at 464. Yet the Forfeiture Order offers little response to *Reno*. In essence, it does nothing more than assert (§ 41) that “*Reno* expressly distinguished *Pacifica*” and thus “recognizes its continuing vitality.” But *Reno* did not distinguish *Pacifica* on the subject of vagueness. *Reno* simply explained that the rationales *Pacifica* identified—in 1978—for special First Amendment treatment of broadcast indecency regulation did not apply to the Internet. *See* 521 U.S. at 866-870.¹⁵

To be sure, in an effort to settle litigation the Commission once provided some elaboration on how patent offensiveness will be assessed. *See Indecency Policy Statement*, 16 F.C.C.R. 7999. But as the fine levied in this case reveals, that elaboration yields scant guidance. This and other recent decisions make clear that the Commission will, in a seemingly arbitrary fashion, adjust the weight it gives to each of the three patent-offensiveness factors, and either heavily weight or ignore other, undefined contextual considerations. In the end, broadcasters know only

¹⁵ As discussed below, *Reno* never suggested that these rationales continue to justify lesser scrutiny for broadcast indecency regulation.

that broadcasts will be deemed “indecent” when at least three Commissioners find them “patently offensive.”

This Court also observed in *Fox* that the Commission’s indecency test “raises the separate constitutional question of whether it permits the FCC to sanction speech based on its subjective view of the merit of that speech.” 489 F.3d at 464. In light of the Commission’s recent indecency decisions, this question can only be answered in the affirmative. The contradiction in the Commission’s decisions—for example, concluding that the brief rear nudity here was indecent but that the lengthier rear and full frontal nudity in *Catch 22* and *Schindler’s List* was not—strongly suggests that the Commission’s indecency determinations are based on Commissioners’ subjective views of a program’s merits (or even their personal tastes).

One prime source of subjectivity is the Commission’s assertion that determinations as to “whether material is patently offensive” are to be made by applying “contemporary community standards for the ‘broadcast medium.’” *See, e.g.,* Forfeiture Order ¶ 44. The Commission has said that this standard “is not a local one and does not encompass any particular geographic area,” *Indecency Policy Statement*, 16 F.C.C.R. at 8002 (¶ 8), but instead is the standard “of an average broadcast listener or viewer,” Forfeiture Order ¶ 42. The Commission, however, has never identified any objective data or criteria upon which it bases its

assessment of the “average broadcast listener or viewer.” Moreover, the Commission stated here that it bases assessments of community standards on information gleaned from “interaction with lawmakers, ... broadcasters, ... interest groups and ... citizens.” *Id.* (citing *Infinity Radio License, Inc.*, 19 F.C.C.R. 16959 (2004)). Far from showing that the Commission’s assessments of community standards are objective, this amounts to an acknowledgement that indecency determinations are subject to political pressure.¹⁶

In response to the argument that the Commission’s indecency standard, as applied, is vague and subjective, the Forfeiture Order cites *Pacifica*, asserting (§ 40) that there “the Supreme Court had no difficulty applying” a standard that was “essentially the same” as the one here. The *Pacifica* Court, however, entertained no vagueness challenge (or indeed any challenge at all) to the standards articulated in the Commission’s initial *Pacifica* Order; 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. 438 U.S. at 739. And while *Pacifica* argued that the monologue was not “indecent” for purposes of § 1464, it based this point on the

¹⁶ Indeed, as the ABC affiliates document in their brief (at 48-55), this entire proceeding originated with interest-group pressure. All of the complaints the FCC received were mass-generated by Internet appeals from a single advocacy group. None of the complaints, moreover, states that the complainant had even watched the program.

assertion that indecency necessarily entails prurient appeal. The plurality rejected this assertion without suggesting that “indecent” has any specific meaning.

The Forfeiture Order also notes (§ 40) that *ACT I* upheld the Commission’s indecency test two decades ago. But *ACT I* upheld the Commission’s generic standard against a facial challenge only, and did so in reliance on the Commission’s history of and commitment to restraint. *See* 852 F.2d at 1340 n.14. Like the *Pacifica* Court, the court in *ACT I* obviously had no occasion to consider the standard as elaborated and applied in the Commission’s recent aggressive, contradictory decisions. In any event, *ACT I*—like *Pacifica* and other D.C. Circuit decisions relying on *ACT I*—preceded *Reno*.¹⁷

C. Technological And Legal Developments Since *Pacifica* Underscore The Unconstitutionality Of The Forfeitures Imposed Here

The Commission has consistently sought to justify its regulation of broadcast indecency by invoking the risk that children might inadvertently encounter programming with sexual or excretory themes that their parents do not want them to see. *See supra* pages 42-43. Today, the V-chip and other widely

¹⁷ When presented with a renewed vagueness challenge to the Commission’s indecency standard, the D.C. Circuit ruled that “[o]ur holding in *ACT I* precludes us from now finding the Commission’s generic definition of indecency to be unconstitutionally vague.” *Action for Children’s Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) (hereafter *ACT II*). Four years later the court rejected another vagueness challenge to the Commission’s standard in reliance on *ACT II*. *See Action for Children’s Television v. FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995) (en banc) (hereafter *ACT III*).

(indeed, soon universally) available blocking technologies dramatically reduce this risk for television broadcasts. Those technologies, which could have blocked the encoded broadcast at issue here, constitute a far less restrictive and more targeted way to prevent undesired viewing by children. The Forfeiture Order accordingly cannot qualify even as narrowly tailored to achieve its purpose—let alone as the least restrictive alternative.

V-chips and other blocking technologies are now widely available. Since 2000, new televisions with a screen larger than 13 inches have included a V-chip. *Technical Requirements To Enable Blocking of Video Programming Based on Program Ratings*, 13 F.C.C.R. 11248 (1998); 47 U.S.C. §§ 303(x), 330(c); 47 C.F.R. § 15.120(b). The Commission has noted estimates that as of July 2005, 119 million of the 280 million televisions in America had a V-chip. *Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broad. of the Super Bowl XXXVIII Halftime Show*, 21 F.C.C.R. 6653, 6667 n.123 (2006) (order on reconsideration). The number of U.S. televisions with V-chips is far higher today. Additionally, 86 percent of households subscribe to cable or satellite television systems, *Complaints Regarding Various Television Broad. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 F.C.C.R. 13299, 13318 (¶ 49) (2006) (hereafter *Omnibus Remand Order*), *vacated in part and remanded, Fox*, 489 F.3d 444, each of which enables parents to block programming using the same ratings system that

works with V-chips, or to block channels altogether. Moreover, in February 2009, analog television broadcasts will cease and broadcasters will transmit only digital signals. *See* Digital Television Transition & Pub. Safety Act of 2005, Pub. L. No. 109-171, § 3002(b), 120 Stat. 4, 21 (2006). To receive television after that, consumers will need either to have a digital receiver or a set-top converter, both of which will include a V-chip, or to subscribe to a cable or satellite system. Thus, just months from now, every functioning television in the country will have blocking technology.

In a series of post-*Pacifica* decisions, the Supreme Court has been clear about the constitutional significance of such technologies. For instance, in *Playboy* the Court held that because parents could ask cable operators to block channels to avoid indecent images occasionally appearing as a result of signal bleed, a daytime ban on indecent cable programming—justified by reference to the potential for children to see the images through signal bleed—could not be sustained:

[T]argeted blocking ... support[s] parental authority without affecting the First Amendment interests of speakers and willing listeners
[T]he Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.

529 U.S. at 815. Four years later, in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), the Court pointed to filtering software in upholding a preliminary injunction against a law regulating online indecency. “[F]ilters,” the Court explained, “impose

selective restrictions on speech at the receiving end, not universal restrictions at the source.” *Id.* at 667.

Other post-*Pacifica* decisions employ similar reasoning. *See Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (invalidating ban on indecent telephone messages because untested technologies had the potential to prevent most—though not all—minors from gaining access, while allowing communication with willing adult listeners); *Reno*, 521 U.S. at 877-879 (pointing to filtering software in striking down a prohibition on indecent Internet communications available to minors). In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), the Court, striking down a congressional attempt to require channeling of indecent cable programming, noted that a parent could either ask the cable operator to block “any, or all, programs on any channel to which he or she does not wish to subscribe,” *id.* at 756, or purchase a lockbox that would prevent the “viewing of a particular cable service during periods selected by the subscriber,” *id.* at 758. The Court pointed specifically to the V-chip as the type of alternative that renders a content-based ban invalid. *See id.* at 756.

Both Congress and the Commission have found the V-chip effective at protecting children from mature material. *See* Telecomm. Act of 1996, Pub. L. No. 104-104, § 551(a)(9), 110 Stat. 56, 140 (V-chip is “a nonintrusive and narrowly

tailored means of achieving th[e] compelling governmental interest” in promoting parental authority”); *Implementation of Section 551 of the Telecomm. Act of 1996*, 13 F.C.C.R. 8232, 8243 (¶ 24) (1998) (“The *TV Parental Guidelines*, used in conjunction with the v-chip technology, will give parents the tools they need to limit the exposure of their children to video programming that they believe is inappropriate.”). Congress’s judgment, in particular, “gravely weaken[s]” the Commission’s rationale for enforcing its indecency standard against broadcasts that could have been blocked, for its implementation of a less-restrictive measure “amply demonstrates that the [challenged speech restriction] is not crafted with sufficient precision to withstand First Amendment scrutiny.” *Boos v. Barry*, 485 U.S. 312, 329 (1988).

The Commission has failed to adjust its indecency enforcement to account for the V-chip and other blocking technologies. The Forfeiture Order asserts (¶ 47) that many televisions do not have a V-chip, but that is legally irrelevant (even putting aside the fact that, as discussed, blocking technologies will soon be universal). Technologies the Supreme Court has relied on in striking indecency regulations required far more parental initiative than those relevant here—and, sometimes, a financial investment. For instance, parents must obtain and install filtering software, which the Court relied upon in *Ashcroft*. They likewise had to request and pay for the lockbox cited in *Denver Area*. 518 U.S. at 758.

Sometimes, the technologies on which the Court relied were not even available for purchase, as are the relevant technologies here. The filtering software identified in *Reno*, for example, was not yet widely available. *See* 521 U.S. at 877. Likewise, in *Sable*, the Court relied on the untested possibility that companies would be able to successfully verify callers' ages using technologies such as access codes and scramblers. *See* 492 U.S. at 128-131. The fact that some parents might need to purchase a device or even a new television to block broadcast content—which they will need to do in any event by February 2009, when all television broadcasts will be digital—does not permit a conclusion that blocking technology is not a constitutionally preferable alternative.

The Forfeiture Order also asserts (¶ 47) that many parents are unaware their TVs have V-chips or of how to use the technology. The Supreme Court rejected identical arguments in both *Playboy*, *see* 529 U.S. at 816, and *Denver Area*, *see* 518 U.S. at 758-759. As the Court explained in *Denver Area*, when customers 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. *See id.* The Forfeiture Order also observes (¶ 47) that some broadcasts are unrated or may be inaccurately rated. This point, however, cannot justify the Commission's imposition of forfeitures on broadcasts that, like this *NYPD Blue* episode, were accurately rated.

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

This Court noted in *Fox* that “there is some tension in the law regarding the appropriate level” of heightened scrutiny to apply to regulation of broadcast indecency. 489 F.3d at 464. Under any appropriate level of constitutional scrutiny, however, the forfeitures imposed here must be struck down. The Forfeiture Order’s vagueness and subjectivity render it unconstitutional regardless of whether strict or intermediate scrutiny applies. *See id.* at 462-463. Moreover, the forfeiture here neither advances a substantial government interest, *League of Women Voters*, 468 U.S. at 380, nor avoids “eliminat[ing] [] more than the exact source of the ‘evil’ it seeks to remedy,” *Frisby v. Schultz*, 487 U.S. 474, 485 (1988), as it must to survive even intermediate scrutiny. The Commission has not even attempted to explain how its interest in preventing minors from viewing broadcasts without parental permission might, in the context of this broadcast, be sufficient to justify suppression. And because parents could block this broadcast using readily available technologies, the Forfeiture Order needlessly suppresses vast quantities of speech. Consequently, it cannot qualify as narrowly tailored.

Although the Forfeiture Order fails even intermediate scrutiny, strict scrutiny is applicable. 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). Moreover, the D.C. Circuit has concluded that strict scrutiny applies to broadcast indecency regulations—though with the caveat that such scrutiny should account for the “unique context” of broadcasting. *ACT III*, 58 F.3d at 660. Even the Commission has acknowledged that speech restrictions must be the “least restrictive means to further [a government] interest,” and that the D.C. Circuit had “made clear that the FCC had to identify ... compelling government interests” and “explain how [its] regulations [a]re narrowly tailored to further” them. *Indecency Policy Statement*, 16 F.C.C.R. at 8000, 8001 (¶¶ 3, 5.)

Post-*Pacifica* changes in the media marketplace make clear that there is no longer any reason why government regulation of broadcast indecency should receive more forgiving constitutional treatment. In 1978, the *Pacifica* Court reasoned that the First Amendment tolerated greater regulation of indecency in broadcasting than in other media because broadcasting at that time was “uniquely pervasive” and “uniquely accessible to children.” 438 U.S. at 748-749. As this Court noted in *Fox*, however, “it is [now] increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children.” 489 F.3d at 465.

When *Pacifica* was decided, over-the-air television was, for most Americans, the only source of in-home video programming. The dramatic growth

since then of cable television and satellite-video systems, and of non-broadcast video-program networks, has radically altered the video programming available in American homes. As noted above, *see supra* page 51, 86 percent of American households now subscribe to cable or satellite television services. These services bring vast numbers of channels into the home alongside traditional broadcast channels. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 628 (1994); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 F.C.C.R. 2503, 2506 (¶ 8) (2006) (hereafter *Annual Assessment*). Indeed, the typical cable or satellite system offers many more non-broadcast than broadcast channels.¹⁸

Other video programming, moreover, is equally accessible to children. Broadcast programming and programming from cable or satellite networks sit side-by-side on the cable or satellite lineup, a mere click of the remote away from each other. Now that the V-chip is readily available, parents can control the flow of broadcast content into the home just as easily as they can control their children's access to cable and satellite programming. With respect to "how parents and children view television programming, and how pervasive and intrusive that

¹⁸ In 2005 there were 531 satellite-delivered national non-broadcast video program networks and 96 regional non-broadcast networks. *Annual Assessment*, 21 F.C.C.R. at 2509-2510 (¶¶ 21-22).

programming is[,] ... cable and broadcast television differ little, if at all.” *Denver Area*, 518 U.S. at 748.

In addition, many children have access to the Internet, an increasingly important source of video programming in the home. See U.S. Dep’t of Educ., NCES Issue Brief, Oct. 2005, *available at* nces.ed.gov/pubs2005/2005111rev.pdf (noting that as of 2003, 23% of nursery school children, 32% of kindergarteners, and 80% of high school students used the Internet). As discussed, the Supreme Court has repeatedly rejected Internet indecency regulations on constitutional grounds, and no indecency regulations apply to cable or satellite programming.

While recognizing broad changes in the technological landscape and their potential impact on constitutional analysis of the Commission’s indecency enforcement efforts, this Court, pointing to *Reno* and *Pacifica*, suggested in *Fox* that it would nonetheless give broadcast indecency regulation reduced scrutiny in light of Supreme Court precedent. 489 F.3d at 465. *Reno* and *Pacifica*, however, do not dictate that result. *Pacifica* suggested that regulation of indecency in a medium that is *uniquely* pervasive and *uniquely* accessible to children should receive reduced First Amendment scrutiny; as explained above, broadcasting no longer has those qualities. Application of strict scrutiny to regulation of indecency on contemporary broadcast television is therefore the result that is *consistent* with *Pacifica*. Nor does anything in *Reno* call for a contrary conclusion. Far from

suggesting that broadcasting remained unique in any way relevant to the constitutionality of indecency regulation, the *Reno* Court noted only that the factors justifying reduced scrutiny for broadcast indecency regulation at the time of *Pacifica* did not exist in 1997 with respect to the Internet. *See* 521 U.S. at 867-870. And even if the Court *had* suggested that broadcasting remained unique in any relevant way, the decade since *Reno* has seen both cable and satellite programming and blocking technologies like the V-chip become far more widely available, thereby rendering the broadcast media even less uniquely pervasive or uniquely accessible to children than in 1997.

CONCLUSION

The Forfeiture Order should be set aside.

Respectfully submitted.

s/ Seth P. Waxman

Dated: June 20, 2008

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing 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) in that, according to the word-count function of the word-processing program in which it was prepared (Microsoft Word), it contains 14,000 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii).

s/ Daniel S. Volchok
Daniel S. Volchok

CERTIFICATE OF SERVICE

I certify that on this 20th day of June, 2008, I caused a pdf version and two paper copies of the foregoing Brief for Petitioners ABC, Inc.; KTRK Television, Inc.; and WLS Television, Inc. to be sent via electronic mail and overnight delivery service to each of the following individuals:

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ANTI-VIRUS CERTIFICATION

I certify that on this 20th day of June, 2008, I scanned the pdf version of the foregoing Brief for Petitioners ABC, Inc.; KTRK Television, Inc.; and WLS Television, Inc., and that no viruses were detected during that scan.

s/ Daniel S. Volchok
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ADDENDUM



Federal Communications Commission
Washington, D.C. 20554

MAY 26 1999

1800C1-TRW
97110028

Mr. David Molina
9892 Rot Springs Drive
Huntington Beach, CA 92646

Dear Mr. Molina:

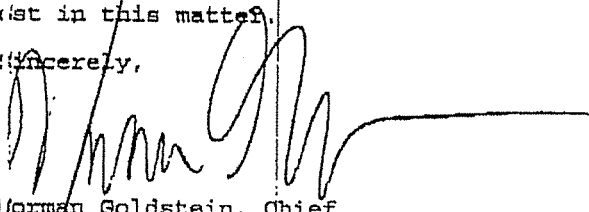
This is in response to your complaint alleging that television station KCET, Los Angeles, CA, broadcast indecent material on October 25, 1997, between 9 p.m. and 11 p.m. In support of your complaint you submitted a video tape of the movie "Catch 22."

Under Section 503 of the Communications Act and Section 1464 of the U.S. Criminal Code, the Commission has authority to take action against the broadcast of indecent material. Recent cases reflect the Commission's ongoing commitment to enforce the statutory indecency prohibition where actionable violations occur. In determining whether a particular complaint can be acted upon, however, we are obliged to comply with the legal standards set out in this area by the courts. See, e.g., FCC v. Pacifica Foundation, 438 U.S. 726 (1978). Under these standards, indecent material has been defined as that which, in context, depicts or describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. Subject matter alone does not render material indecent.

We have thoroughly reviewed your complaint and supporting material. Nudity itself is not per se indecent. Rather, the Commission must consider the context in which allegedly indecent material is presented. Here, the segment of the movie which included nudity was very brief and appeared in context of a full length drama, the primary theme of which was the horrors of war. Such material does not, in our view, rise to the level of patent offensiveness as to render the broadcast actionably indecent. Accordingly, while we recognize that the material may be offensive to some, we cannot find the necessary legal basis for further Commission action. The enclosure discusses the law with respect to indecent broadcasts and our enforcement procedures.

We appreciate your interest in this matter.

Sincerely,


Norman Goldstein, Chief
Complaints and Political Programming Branch
Enforcement Division
Mass Media Bureau

Enclosure

cc: Theodore D. Frank, Esq.
Arnold & Porter