06-1760-ag (L)

06-2750-ag (Con)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FOX TELEVISION STATIONS, INC. *et al.,*
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION *et al.,*
Respondents,

NBC UNIVERSAL, INC., *et al.,*
Intervenors.

On Petition for Review of an Order of the
Federal Communications Commission

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, counsel for *amici* certify that (1) none of *amici* have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in any *amici*.

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IDENTITY AND INTEREST OF AMICI CURIAE

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

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

All parties have consented to the filing of this brief.

ARGUMENT

As the petitioners and intervenors persuasively argue, broadcast indecency law is rife with First Amendment and other constitutional and statutory problems.

For all of the reasons advanced by petitioners, *amici* believe that this Court should overturn the Federal Communication Commission's indecency decisions on appeal. As detailed below, *amici* believe there are a range of additional reasons and arguments why the Commission's indecency determinations should not stand.

I. THE COMMISSION'S RELIANCE ON COMPLAINT COUNT AND ITS FLAWED "CONTEMPORARY COMMUNITY STANDARDS" ANALYSIS ARE ARBITRARY AND CAPRICIOUS AND VIOLATE THE FIRST AMENDMENT.

The Federal Communications Commission (FCC) has explained and justified its radical expansion of its indecency enforcement based on an asserted increase in the number of complaints it has received about broadcast programming. That increase in complaint count, however, is primarily a result of a concerted manipulation of complaint statistics – in violation of the Administrative Procedure Act (APA) – and does not, in any event, substitute for the required analysis of "community standards." The FCC's treatment of indecency complaints has allowed a "heckler's veto" in violation of the First Amendment, and the Commission's inconsistent and arbitrary analysis of indecency violates both the First Amendment and the APA.

A. The Commission Arbitrarily and Capriciously Relies on Manipulated and Inflated Complaint Data as an Impetus to Act.

The FCC erroneously claims that it has a broad public mandate to boost its enforcement of broadcast standards. The Commission states that there has been

"increasing public unease with the nature of broadcast material" and that, in particular, the public has "become more concerned about the content of television programming" as evidenced by "the number of complaints annually received by the Commission rising from fewer than 50 in 2000 to approximately 1.4 million in 2004." *Omnibus Order* ¶ 1. The Commission claims to have received "hundreds of thousands of complaints alleging that various broadcast television programs aired between February 2002 and March 2005 are indecent, profane, and/or obscene." *Id.* ¶ 2.

This asserted increase in viewer complaints has been the direct impetus for increased FCC action against indecency. Former FCC Chairman Michael Powell testified before Congress in 2004 that the agency was motivated "to sharpen [its] enforcement blade" because of the "rise in the number of complaints at the Commission."[1] A couple months later, Powell stated that "the increase in the Commission's enforcement efforts in this area is a *direct response* to the increase of public complaints."[2] In explaining the *Omnibus Order* on appeal here, current

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

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

FCC Chairman Kevin Martin pointed first to an asserted dramatic growth in the number of complaints.[3]

The Commission's own actions, however, grossly distorted and amplified the count of complaints. A closer review of the FCC's manipulations of the complaints, and the origins of the complaints, suggests that the number of complaints provides little if any information on whether *in fact* the public at large is more or less concerned about alleged indecency on television.

The FCC's reliance on the count figures is inappropriate because the Commission itself manipulated the count of complaints, in two ways. First, during the summer of 2003, the FCC changed how it counted indecency complaints – and apparently *only* indecency complaints – by counting "identically worded form letters or computer-generated electronic complaints" as individual complaints, rather than counting them as a single complaint.[4] The Commission did not make any public announcements about this change in methodology, but a 2003 press release from an advocacy group claimed credit for getting the FCC to change

[3] Statement of Chairman Kevin Martin, *Omnibus Order*, at 68.

[4] Adam Thierer, "Examining the FCC's Complaint-Driven Broadcast Indecency Enforcement Process," Progress and Freedom Foundation, Progress on Point 12.22, 5 (November 2005) (available at http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf).

methodology.[5] *Amici* fully support citizens' First Amendment right to petition the government for a redress of grievances and so do not take issue, as a matter of principle, with the Commission's counting of form complaints as multiple indecency complaints. The Commission cannot, however, rely on such a change in formula to claim an *increase* in complaints.

Even more disturbing is that in early 2004, the FCC began counting individual complaints *multiple times*.[6] Thus, under the rules, if a single individual addresses a single complaint to seven different offices within the FCC (for example, to the Enforcement Bureau, to the Consumer & Governmental Affairs Bureau, and to each of the five Commissioners), the FCC counts that one complaint as *seven* complaints, thereby radically inflating the reported number of complaints received. Thus, a single complaint sent to multiple Commission divisions or offices would be counted more than once. Furthermore, this change in complaint counting *only* applied to broadcast indecency and obscenity complaints.[7]

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[5] Parents Television Council, "FCC Reacting to PTC Demands," Press Release (July 1, 2003), available at http://www.parentstv.org/ptc/publications/release/2003/0701.asp.

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

[7] *Id.*

Beyond the Commission's manipulation of the complaint counts, the FCC's asserted belief that the public is increasingly concerned about indecency has no foundation in light of the fact that the vast majority of all indecency complaints have been generated by a *single* advocacy group. In 2003, 99.8% of complaints were submitted by the Parents Television Council (PTC).[8] As of October of 2004 (and excluding complaints related to Janet Jackson's "wardrobe malfunction" during the Super Bowl halftime show), 99.9% of complaints had been submitted by the PTC that year.[9] And in July 2005, for example, the PTC submitted 23,542 complaints which "account[ed] for *all but five* of the FCC complaints" for that month.[10] The PTC was responsible for the two complaints remaining at issue in the present case (and at least three of the four complaints originally at issue here).[11]

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[8] Todd Shields, "Activists Dominate Content Complaints," *Mediaweek* (December 6, 2004) (available at http://www.parentstv.org/PTC/news/2004/indecency_mediaweek.htm).

[9] *Id.* Another advocacy group – the American Family Association – also participated with the PTC in efforts to generate complaints about the 2004 Super Bowl. *See* American Family Association, "FILE AN OFFICIAL INDECENCY COMPLAINT WITH THE FEDERAL COMMUNICATIONS COMMISSION (FCC) About Jackson's Exposure During Super Bowl Halftime Show!", available at http://www.afa.net/petitions/fcccomplaint.asp.

[10] *Broadcasting & Cable*, "PTC Drives Spike In Smut Gripes" (November 14, 2005) (emphasis added) (available at http://www.broadcastingcable.com/article/CA6283286.html?display=News&referral=SUPP).

[11] The PTC complained of Cher's statement at the 2002 Billboard Music Awards, *Omnibus Order* ¶ 101 n.150; Nicole Richie's statement at the 2003 Billboard Music Awards, *Omnibus Order* ¶ 112 n. 163; and the use of "dick," "dickhead"

Thus, contrary to the repeated rhetoric of the FCC and its Commissioners, there is no evidence in the record whatsoever to support the conclusion that the American public has shown any increased concerns about indecency on television. To the contrary, the facts indicate that a single organization generated almost all of the complaints, and in consultation with that organization the Commission changed its complaint counting methodology to radically inflate the number of complaints. This tells the Commission – and this Court – nothing about the "contemporary community standards" by which an indecency complaint is judged under the FCC's indecency analysis.

The Commission has not articulated any clear methodology for determining community standards (as discussed more fully in the following subsection), but taking what the FCC does say at face value, it appears that the FCC treats the complaint count as significant. The FCC says that it determines "community standards" based in part on "constant interaction with . . . public interest groups, and ordinary citizens." *Order on Remand* ¶ 28. And to emphasize the importance of the complaint count, the Commission devoted the bulk of the first paragraph of the entire *Omnibus Order* to its assertion that a rise in complaints indicates a greater "unease" on the part of the public over indecency. *Omnibus Order* ¶ 1.

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and "bullshit" by "NYPD Blue" characters, *Omnibus Order* ¶ 125; *Order on Remand* ¶ 75 n.220. The FCC does not reveal who complained of "bullshitter" on "The Early Show." *See Omnibus Order* ¶ 137; *Order on Remand* ¶ 68.

Yet the entirety of the asserted increase in complaints flows from the statistical manipulations of the Commission and the advocacy efforts of a single organization. It would be grossly arbitrary and capricious for the Commission to place *any* weight on the count of complaints[12] – yet looking at the first paragraph of the *Omnibus Order* and the Commissioners' statements, the Commission has placed great weight on the trumped up complaint numbers.

To avoid being "arbitrary and capricious," an agency must "articulate a satisfactory explanation for its action." *Motor Vehicle Mfr. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). That explanation must reveal a "rational connection between the facts found and the choice made." *Id*., *citing Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962). The agency must "examine the relevant data" and make an appropriate decision based on that data – the decision cannot "run[] counter to the evidence before the agency." *Id*. An "arbitrary" decision is one "founded on prejudice or preference rather than on reason and fact." Black's Law Dictionary, Second Pocket Edition (2001). By relying on manipulated counts of complaints generated almost entirely by a single organization, the Commission is certainly basing its action on its "prejudice or preference" rather than on any well-founded facts.

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

B. The Commission Wholly Fails to Undertake *Any* Investigation Into or Analysis of "Contemporary Community Standards."

The Commission wholly failed to conduct an investigation into and analysis of what is patently offensive according to "contemporary community standards." Instead, the Commission simply relied on its own "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens." *Order on Remand* ¶ 28. The Administrative Procedures Act requires the FCC to "articulate a satisfactory explanation" for each indecency determination, *see Motor Vehicle Mfr. Ass'n*, 463 U.S. at 43, and by omitting any explanation of how it judged the "community standards," the Commission utterly fails that requirement. Moreover, accepting for the sake of argument the validity of the FCC's indecency authority, a robust and complete community standards analysis is constitutionally required as well, following the lead of obscenity cases like *Miller v. California,* 413 U.S. 15 (1973).[13]

The Supreme Court in *Miller* gave an indication of the type of evidence appropriate to determine "community standards": "an extensive statewide survey" of what content was *in fact* available in the community. *Miller*, 413 U.S. at 31

[13] In light of the Supreme Court's broad rejection of the indecency standard in *Reno v. ACLU*, 521 U.S. 844 (1997), the indecency test itself is open to serious attack. In these comments, however, we confine our discussion to the Commission's flawed implementation of that test.

n.12. The FCC failed to conduct *any* investigation into or analysis of such evidence in this case. The FCC must present some objective and representative evidence of what types of content are available to children in the United States – as opposed to content that is "patently offensive" to the five individual Commissioners.[14]

Even a brief (albeit unscientific) examination of content that already exists in the "community" of minors in American quickly shows the invalidity of the FCC's conclusions about "contemporary community standards." A search of the "Internet Movie Database," for instance, found hundreds of examples of the term

[14] The imperative to look to what is *actually* available in the community to be protected is vital in light of the sometimes unexpected evidence about actual versus publicly expressed preferences about controversial content. For example, in the traditionally conservative Salt Lake City television market, the four most popular shows are "C.S.I.," "C.S.I. Miami," "E.R.," and "Desperate Housewives" – all of which have been designated by the Parents Television Council as among the worst shows on television. The same trend holds in conservative Oklahoma City, where "Desperate Housewives" is more popular than it is in Los Angeles, as well as Kansas City where the show is bigger than it is in New York City. *See* Bill Carter, "Many Who Voted for 'Values' Still Like Their Television Sin," *The New York Times*, November 22, 2004, p. A1; and Frank Rich, "The Great Indecency Hoax," *The New York Times*, November 28, 2004, Section 2, p. 1; Adam Thierer, "Examining the FCC's Complaint-Driven Broadcast Indecency Enforcement Process," Progress and Freedom Foundation, Progress on Point 12.22, 10 (Table 3) (November 2005) (available at http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf). These findings are consistent with the evidence presented in an obscenity trial in the 1990s in Provo, Utah – in that case the defense proved that a range of sexually explicit content was available and acquired in the local community. *See* Terry Neal, "GOP Corporate Donors Cash in on Smut," washingtonpost.com, Dec. 21. 2004 (available at http://www.washingtonpost.com/wp-dyn/articles/A15644-2004Dec21.html).

"bullshit" among "memorable movie quotes."[15] Moreover, among these occurrences, the Motion Picture Association of America has given many of the movies featuring this particular expletive a PG or PG-13 rating.[16] Similarly, occasional uses of the work "fuck" are also common in movies, including movies rated PG-13 and thus available to children across the country.[17] Setting aside the question of whether these ratings are suitable, the fact remains that words that the Commission finds indecent can be found in movies already marketed to and accessible by children in our communities (and widely available in the home over cable and satellite services, and through DVDs).

In the face of this evidence – as one of the Commissioners acknowledged[18] – the Commission cannot rest on an utter lack of any inquiry into what content is in fact already available to children in this country. In the absence of inquiry into and

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[15] *See* The Internet Movie Database (IMDb), http://www.imdb.com (last accessed July 11, 2006).

[16] For example, the IMDb reveals instances of the expletive "bullshit" in *The Abyss* (PG-13), *The Air Up There* (PG), *America's Sweethearts* (PG-13), *Back to the Future II (*PG), *Cocoon* (PG-13), and *Goonies* (PG). The Internet Movie Database, http://www.imdb.com/search (last accessed July 11, 2006).

[17] As indicated in the IMDb, the word "fuck" appears in a broad range of PG-13 movies, including: *Love Affair* ("fuck" spoken by actress Katherine Hepburn), *Gunner Palace* (42 instances of the word "fuck"); *Hero* (11 instances), *The Ringer* (a movie clearly aimed at an under-18 audience). The Internet Movie Database, http://www.imdb.com/search (last accessed Nov. 19, 2006).

[18] Statement of Commissioner Jonathan Adelstein, *Omnibus Order*, at 73.

evidence of community standards, the FCC's indecency holdings violate both the APA and the First Amendment.

C. The Commission's Failure to Undertake the Required Community Standards Analysis Grants a Vocal Minority a "Heckler's Veto."

As the FCC has recognized, the purpose of "community standards" requirement is "to ensure that material is judged neither on the basis of a decisionmaker's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." *Omnibus Order* ¶ 12 n.13 (citation omitted); *see also Miller*, 413 U.S. at 33 ("material . . . will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person – or indeed a totally insensitive one"). Yet by failing to conduct the required community standards analysis and instead relying primarily on a trumped up count of complaints generated by a single advocacy group, the Commission has enabled a "heckler's veto" in violation of the First Amendment. As discussed above, a single advocacy group – the Parents Television Council – has submitted virtually all of the complaints to the FCC in the past few years. By effectively using PTC's views as a substitute for the required community standards analysis, the Commission is impermissibly allowing a vocal minority to stifle speech that is lawful and accepted by a great many viewers.

The Supreme Court recognized over half a century ago that the "heckler's veto" is antithetical to the First Amendment. In *Feiner v. New York*, 340 U.S. 315, 320 (1951), the Court stated that "the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker." According to the Court, "[s]peech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). More recently, the Supreme Court struck down the Communications Decency Act, stating that the "specific person" requirement contained in the statute "would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech . . . ." *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (citation omitted).[19]

In this appeal, a single vocal advocacy organization has prompted, and is driving, the FCC's indecency efforts, and the Commission is enabling the organization to assert a "heckler's veto" over television content. Many of the television shows that are the primary targets of the mass complaint-generation

[19] The First Amendment also shields against tyranny of the majority. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (overturning conviction for burning flag in protest of nuclear war, and stating: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

efforts also happen to be some of the most nation's popular shows,[20] even in the most socially conservative parts of the country.[21] Notwithstanding the personal preferences of the advocacy group that has generated almost all of the complaints to the Commission, the content that is the target of the vast majority of complaints is clearly widely accepted across the country. Rather than capitulating to a determined and outspoken minority of viewers, the Commission must itself undertake an investigation into relevant facts that would establish the appropriate "community standards."

This analysis does not change in the face of the FCC's argument that the allegedly profane words could have been removed from the three television shows without materially altering them. *See Order on Remand* ¶ 17 n.44, ¶ 40 (2003 BMAs); ¶ 65 (2002 BMAs); *Omnibus Order* ¶ 134 ("NYPD Blue"). As one noted commentator explained:

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

[20] Adam Thierer, "Examining the FCC's Complaint-Driven Broadcast Indecency Enforcement Process," Progress and Freedom Foundation, Progress on Point 12.22, 5 (November 2005), at 10 (Table 3) (available at http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf).

[21] *See* Bill Carter, "Many Who Voted for 'Values' Still Like Their Television Sin," *The New York Times*, November 22, 2004, p. A1; and Frank Rich, "The Great Indecency Hoax," *The New York Times*, November 28, 2004, Section 2, p. 1.

> justifications for restricting expression, like paternalistic justifications, are constitutionally disfavored, *even if the restriction does not substantially prevent the communication of a particular idea, viewpoint, or item of information*.

Geoffrey Stone, "Content Regulation and the First Amendment," 25 Wm and Mary L. Review 189, 215-16 (1983) (footnote omitted) (emphasis added). Thus, even if certain "profane" words could be edited from programming without affecting the purpose or message of a show, a particularly offended minority group should not be able to censor the use of such words.

D. The Inconsistency of the Commission's Analysis is Arbitrary and Capricious, and Creates a Chilling Effect In Violation of the First Amendment.

Inherent in the concept of "arbitrary and capricious" is the notion that agency decisions cannot be "guided by unpredictable or impulsive behavior,"[22] or be unreasonably inconsistent with past policy. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 125 S. Ct. 2688, 2699 (2005). The Commission's utterly inconsistent treatment of "non-literal" expletives, however, sets the gold standard for capriciousness.

For example, the Commission in its initial orders declared that words such as "piss" and "ass" were *not* describing sexual or excretory functions while words such as "shit" and "fuck" were so inherently offensive that it did not matter

[22] Black's Law Dictionary, Second Pocket Edition (2001) (definition of "capricious").

whether they described sexual or excretory functions. The Commission held that the phrases "wiping my ass" and "pissed off" were not indecent. *Omnibus Order* ¶ 197. Although acknowledging that "ass" "refer[s] to buttocks, which are sexual and excretory organs," and that "piss" "refers to the act of urination," *Id.* ¶ 196, the Commission concluded that the word "ass" was "used in a nonsexual sense to denigrate or insult the speaker or another character" and that the word "piss" was "used as part of a slang expression that means 'angry.'" *Id.* ¶ 197. Yet, at the same time, the Commission wholly ignores the completely non-sexual and non-literal use of the word "fuck" in Nicole Richie's statement during the 2003 Billboard Music Awards ("It's not so fucking simple"). The FCC asserts that Richie's non-literal use of the word "fucking" for emphasis is not relevant to the indecency analysis. The Commission states, "[A]ny strict dichotomy between [non-literal] 'expletives' and 'descriptions or depictions of sexual or excretory functions' is artificial and does not make sense in light of the fact that an 'expletive's' power to offend often derives from its sexual or excretory meaning." *Order on Remand* ¶ 23. Similarly, with regard to Cher's completely non-sexual and non-literal use of the word "fuck" at the 2002 Billboard Music Awards ("fuck 'em"), the Commission states that "it hardly seems debatable that the word's power to insult and offend derives from it sexual meaning." *Id.* ¶ 58.

Similarly, in considering the show "NYPD Blue,"[23] the FCC in its initial order did not find the word "dickhead" indecent because, though it referenced the male sexual organ, it was not used for their literal meaning; it was simply an "epithet[] intended to denigrate or criticize their subjects." *Omnibus Order* ¶ 127 n.190. Somehow in that same order, however, the Commission reached exactly the opposite conclusion for "bullshit," stating that regardless of whether the word is "used literally or metaphorically, [it] is a vulgar reference to the product of excretory activity." *Id.* ¶ 126. The Commission ignored the fact that the definitions of "dickhead" and "bullshit" are *both* equally divorced from any sexual or excretory origins: "dickhead" is defined by Merriam-Webster as "*usually vulgar*: a stupid or contemptible person," and "bullshit" is defined as "*usually vulgar*: nonsense; *especially*: foolish insolent talk."[24]

As the Supreme Court has made clear, agency action is not arbitrary and capricious if "the agency's path may be reasonably discerned." *Motor Vehicle Mfr. Ass'n*, 463 U.S. at 43, *citing Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). In this case, however, it is impossible to discern a

[23] The Commission did subsequently dismiss the complaint against "NYPD Blue," *Order on Remand* ¶ 77, but this dismissal is based on a technicality, and the Commission did not in anyway step back from its wholly inconsistent treatment of "dickhead" and "bullshit."

[24] Merriam-Webster Online Dictionary, www.m-w.com (last viewed Nov. 19, 2006) (quoting from www.m-w.com/dictionary/dickhead and www.m-w.com/dictionary/bullshit).

clear and understandable distinction showing why "bullshit" is indecent but "dickhead" is not. This internal inconsistency violates the Administrative Procedures Act.

Beyond the APA, the FCC's inconsistency also creates a chilling effect contrary to the First Amendment's guarantee of freedom of expression. If broadcasters cannot predict when the FCC will be forgiving of a non-literal expletive and when it will not, they will be forced to engage in self-censorship to play it safe, thereby foregoing the creation of content that in fact would be legal.[25] This of course hurts the broadcasters and advertisers from a commercial perspective. More importantly, society as a whole is hurt because it loses access to material that is legitimately entertaining, artistic, educational or newsworthy.

II. AS THE VERY FOUNDATION OF THE COMMISSION'S AUTHORITY TO REGULATE BROADCAST TELEVISION CONTENT WITHERS, THE COURT SHOULD NOT UPHOLD THE COMMISSION'S DRAMATIC EXPANSION OF THAT REGULATION.

A. Convergence and New Technology Together Are Challenging the Jurisprudence of Broadcast Regulation.

The delivery of entertainment and news content is undergoing a rapid transformation to a "converged" world where the distinctions between various

[25] *See Laird v. Tatum*, 408 U.S. 1, 12-13 (1972) ("constitutional violations may arise from the deterrent, or 'chilling' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights").

types of content and delivery methods are blurring. At the same time, the ability of parents and caregivers to take direct control of what children are able to watch – including on television – are reshaping how our society can most effectively protect children from inappropriate content. These dual technical developments are, simply put, overtaking the constitutional foundation of the FCC's entire authority to regulate broadcast television, and the jurisprudence that allows greater regulation of broadcast content will wither away over the coming decade. Whether or not the Court overturns that jurisprudence at this time (and it need not do so to rule for petitioners), the on-going evolution of technology should strongly counsel against any expansion of the FCC's regulation of broadcast content.

The First Amendment generally prohibits the regulation of speech based on content, and even "indecent" speech has inherent First Amendment protection. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989); *see also FCC v. Pacifica Found.*, 438 U.S. 726, 746-47 (1978). The Supreme Court has, however, held that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection," and the FCC may legally restrict broadcast content that is "indecent" yet otherwise legal. *Pacifica*, 438 U.S. at 748. This is because, in the Court's view in 1978, "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," and, as a corollary, "broadcasting is uniquely accessible to children, even those too young to

read." *Id*. at 748-49. The particular concern about "pervasiveness" was the fact that when one turns on a broadcast television set, whatever is being broadcast at that moment will appear on the screen (making broadcast "invasive"). *See Reno v. ACLU*, 521 U.S. 844, 869 (1997) (concluding that the Internet is not as "invasive" as broadcast).

The broadcast landscape is, however, rapidly changing, a fact the FCC tries to downplay by citing the Supreme Court's assertion that "[d]espite the growing importance of cable television and alternative technologies, broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population." *Order on Remand* ¶ 49, quoting *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 190 (1997) (internal quotations omitted). However, the Court uttered those words almost 10 years ago.[26] Americans – adults and children alike – are increasingly accessing new video and audio content on the Internet (*e.g.*, Google Video,[27] YouTube,[28] Apple iTunes,[29] podcasts[30]), through

[26] The Commission also cites *Prometheus Radio Project v. FCC*, 373 F.3d 372, 401-02 (3d Cir. 2004), but that case dealt with FCC "restrictions on the common ownership of newspapers and broadcast stations" based on the scarcity of the broadcast medium. *Amici* assert that the "pervasiveness" of broadcast is a wholly different, and increasingly untenable, rationale for regulating the content of otherwise legal speech – not station ownership.

[27] *See* http://video.google.com.

[28] *See* http://www.youtube.com.

[29] *See* http://www.apple.com/itunes/store.

cable and satellite operators (e.g., DirecTV[31], EchoStar's "Dish Network"[32], XM[33] and Sirius[34] satellite radio), and DVD (e.g., Netflix[35]) and video game purchases and rentals. Almost 50% of Americans use the Internet,[36] and 87% of U.S. children ages 12 to 17 use the Internet.[37] The Commission itself recognizes that "almost 86% of households with television subscribe to a cable or satellite service." *Order on Remand* ¶ 49.

Not only are more people accessing video and audio content by other means, broadcast itself is also converging with these new technologies. Individuals can access "broadcast" programming via their cable or satellite subscriptions. Also, network programming is increasingly available on the Internet. For example, entire episodes of popular ABC shows like "Lost" and "Grey's Anatomy" can be viewed

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[30] A "podcast" is an audio or video file, usually in MP3 format, made for download to a portable player or personal computer. *See* Urban Dictionary's definitions of "podcast", http://www.urbandictionary.com/define.php?term=podcast.

[31] *See* http://www.directv.com.

[32] *See* http://www.dishnetwork.com.

[33] *See* http://www.xmradio.com.

[34] *See* http://www.sirius.com.

[35] *See* http://www.netflix.com.

[36] Pew Internet & American Life Project, "Internet Penetration and Impact" (April 2006) at 3 (stating that about 147 million adults use the Internet) (available at http://www.pewinternet.org/pdfs/PIP_Internet_Impact.pdf).

[37] Pew Internet & American Life Project, "Teens and Technology: Youth Are Leading the Transition to a Fully Wired and Mobile Nation" (July 27, 2005) at i (available at http://www.pewinternet.org/pdfs/PIP_Teens_Tech_July2005web.pdf).

on the network's website for free.[38] The other major networks (CBS, NBC, Fox) have similar offerings.[39] Network shows and other broadcast programming are also available on websites like Google Video, YouTube and iTunes. Although it is true that some Americans still rely on broadcast signals for their video programming, it is undeniable that the status quo is quickly changing.

Not only are new technologies changing the way people access video and audio programming, new (and newly improved) "user empowerment" technologies are allowing individuals to exercise freedom of choice and guard themselves or their children against content they deem undesirable. The most critical development for this case is the "V-chip," which has been installed in all 13-inch or larger televisions manufactured since 2000, and which allows parents to block certain broadcast content based on a series of ratings.[40]

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[38] *See* ABC.com Full Episode Player (available at http://dynamic.abc.go.com/streaming/landing).

[39] *See* CBS website (http://www.cbs.com), NBC website (http://www.nbc.com) and Fox's video link (http://www.myspace.com/fox).

[40] The ratings system offers the following age-based designations:

"TV-Y" – All Children
"TV-Y7" – Directed to Children Age 7 and Older
"TV-Y7 (FV)" – Directed to Older Children Due to Fantasy Violence
"TV-G" – General Audience
"TV-PG" – Parental Guidance Suggested
"TV-14" – Parents Strongly Cautioned
"TV-MA" – Mature Audience Only

Beyond the V-chip, there is a range of additional new technologies that allow parents to control the viewing of content that historically has been delivered by broadcast.[41] Cable and satellite TV controls offer robust parental controls. Cable and satellite TV set-top boxes offer locking functions for individual channels so that children can't access the channels or programs without a password. Parental controls are usually just one button-click away on most cable and satellite remote controls. Personal video recorders (PVRs) offer even greater control over viewing.

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

"D" – Suggestive Dialogue
"L" – Coarse Language
"S" – Sexual Situations
"V" – Violence
"FV" – Fantasy Violence

See http://www.tvguidelines.org/ratings.asp. These ratings are found at the beginning of programs, on on-screen menus and interactive guides, and in local newspaper or TV Guide listings.

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

And specialized remote controls exist to restrict children to only channels approved by the parents.[42]

And in the Internet context – into which video entertainment is inexorably moving – there is a huge and growing range of technology tools available to parents who want to control what their children can access. Internet Service Providers like America Online have parental control features,[43] and numerous software filtering and other tools are detailed at sites such as www.GetNetWise.org.

The emergence of these technological solutions has a direct impact on the legal underpinnings of the Commission's authority to regulate broadcast content. Although the goal of protecting children is without question a valid goal, the government may only "regulate the content of constitutionally protected speech [e.g., indecency] in order to promote a compelling interest if it chooses the *least restrictive means* to further the articulated interest." *Sable*, 492 U.S. at 126 (emphasis added). In both the cable and Internet context, the Supreme Court has squarely endorsed the use of technology as a less restrictive means to further a governmental objective. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 877 (1997) (noting significance of "user based" alternatives to governmental regulation of speech on

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[42] *See* http://www.weeremote.com.

[43] *See* AOL Safety and Security Center, http://daol.aol.com/safetycenter/parentalcontrols.

the Internet); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (for cable television).

The legal significance of user empowerment technologies as less restrictive alternatives is not diminished because they must be applied by parents (as with the V-chip). The Supreme Court in *Playboy* held that governmental efforts to promote voluntary efforts by parents to protect their children from sexual content are a less restrictive alternative to blocking mandated by statute. *Playboy*, 529 U.S. at 827. In that case, the Court held that a statute that required cable companies to scramble sexually explicit programming was unconstitutional in light of the less restrictive alternative of governmental promotion of voluntary blocking of the signal upon requests of parents. *Id*. at 822. As the Court observed, "targeted blocking [initiated by parents] enables the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners." *Id*. at 815. And the Court noted,

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

Id. at 824.

Taken together, the convergence of communications media and the development of a broad range of technology to "empower" parents to protect their

children as they see fit is rapidly eliminating any remaining justification for enhanced governmental regulation of broadcast content. Parents are able – if they choose – to exert extensive control over what video content their children view in the home, undercutting any argument that the government in general – and the FCC in particular – should impose its value judgments on American homes.

B. Parents Have Been Empowered to Create and Enforce Their Own "Household Standard" to Determine Acceptable Media Content in the Home.

Parents have a diversity of tools – starting with the V-Chip – with which to guide their children's development and viewing habits. The FCC attempts, without adequate foundation,[44] to attack the effectiveness of the V-Chip. *See Order on Remand* ¶ 51 n.159. But because of the diversity of available tools, even if there was relatively low V-Chip usage rates among U.S. households, that would not reflect any failure of parental controls. In fact, just the opposite is the case. The majority of American homes now rely on many alternative technologies and methods to filter or block unwanted programming. Many families may prefer to use any of a range of alternative technological controls at their disposal rather than the V-chip. This is especially the case for 86% of U.S. households subscribing to

[44] *Amici* strongly agree with the points made by the NBC Intervenors to rebut the FCC's critique of the V-Chip. *See* Brief For Intervenors NBC Universal, Inc. and NBC Telemundo License Co., at 60-63 (filed Nov. 22, 2006).

cable or satellite television systems – which offer more robust filtering and blocking capabilities than the V-Chip.

Moreover, many households forgo technological controls altogether and instead rely on household media consumption rules. Parents employ a wide variety of household media consumption rules. Some of these can be quite formal in the sense that parents make the rules clear and enforce them routinely in the home over a long period of time. Other media consumption rules can be fairly informal, however, and be enforced on a more selective basis. Regardless, most parents enforce such guidelines. A 2003 Kaiser Family Foundation survey found that "Almost all parents say they have some type of rules about their children's use of media."[45] And a 2006 Kaiser survey of families with infants and preschoolers revealed that 85 percent of those parents who let their children watch TV at that age have rules about what their child can and cannot watch.[46] Sixty-three percent of those parents say they enforce those rules all of the time. About the same percentage of parents said they had similar rules for video game and computer usage.

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[45] *Zero to Six: Electronic Media in the Lives of Infants, Toddlers and Preschoolers*, Kaiser Family Foundation, Fall 2003, p. 9, available at http://www.kff.org/entmedia/entmedia102803pkg.cfm.

[46] *The Media Family: Electronic Media in the Lives of Infants, Toddlers, Preschoolers and Their Parents*, Kaiser Family Foundation, May 2006, p. 20.

In other words, the V-Chip is just one tool or strategy that households can use to control television programming in their homes. Alternative technological controls or informal household media rules complement the V-Chip and sometimes even supplant it. With this diversity of tools and methods, families now have the ability to construct and enforce their own "household standard" for acceptable media content in their homes. For content that is lawful – as is all of the content at issue here – the government does not have a compelling interest in imposing any "community standard" that is stricter or different than the individual "household standards" that each family can create and enforce.

CONCLUSION

As the broadcast medium becomes less relevant, and as video entertainment moves to media that have robust parental controls (such as cable and the Internet), the entire constitutional foundation for any enhanced governmental authority over otherwise lawful content is diminishing. Not only are new and varied media technologies being developed, their convergence with broadcast makes the "pervasiveness" rationale increasingly irrelevant. The rise of new user empowerment technologies, available for traditional broadcast as well as other video and audio media, justifies a shift away from government regulation to a more user-centric model that respects individual choice and encourages personal responsibility – and, critically, still protects children. In this context, *amici* urge

this Court to tread carefully and to not permit any significant expansion of broadcast indecency regulation by the FCC. To that end, the FCC's indecency holdings must be set aside as violations of the First Amendment the Administrative Procedure Act. The Court should overturn the decisions on appeal.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,616 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word X for Macs Service Release 1 in 14 point Times New Roman type style.

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John B. Morris, Jr.

November 29, 2006

ANTI-VIRUS CERTIFICATION FORM

In accordance with Local Rule 32, I certify that that the PDF version of this amicus brief – submitted in this case as an e-mail attachment to <briefs@ca2.uscourts.gov> – was scanned for viruses using the Kapersky Lab Anti-Virus File Scanner, available at http://www.kaspersky.com/scanforvirus, and that no viruses were detected.

/s/ John B. Morris, Jr.

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November 29, 2006

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2006, ten copies of the foregoing amicus brief were filed with the Clerk of the Court by overnight delivery service for next-day delivery, an electronic copy was e-mailed to each of the listed addressees, and two copies were delivered by hand delivery or shipped by commercial carrier for next-day delivery upon the following:

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