

No. 10-1293

In the Supreme Court of the United States

Federal Communications Commission, *et al.*,
Petitioners,

v.

Fox Television Stations, Inc. *et al.*, *Respondents.*

Federal Communications Commission, *et al.*,
Petitioners,

v.

ABC, Inc. *et al.*, *Respondents.*

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

**MOTION FOR LEAVE TO FILE BRIEF OF
AMICUS CURIAE AND BRIEF OF *AMICUS
CURIAE* PARENTS TELEVISION COUNCIL IN
SUPPORT OF PETITIONERS**

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**MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE IN SUPPORT OF
PETITIONERS**

Pursuant to this Court's Rule 37.1, Parents Television Council respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioners.

Written consent to the filing of this brief has been granted by counsel for Petitioners, and Counsel for Respondents and Intervenors, ABC, Inc., ABC Television Affiliates Association, KMBC Hearst-Argyle Television, Inc., KTRK Television, Inc., WLS Television, Inc., Citadel Communications, LLC, Fox Television Stations, Inc., WKOW Television, Inc., WSIL-TV, Inc., Young Broadcasting of Green Bay, Inc., Center for Creative Community, Inc. and Future of Music Coalition. Counsel for Respondents and Intervenors NBC Telemundo License Co., NBC Television Affiliates and CBS Broadcasting, Inc., did not respond to amicus's request for consent, necessitating the filing of this motion.

Dated: May 18, 2011.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

Parents Television Council (PTC) is a nonprofit, nonpartisan, grassroots organization dedicated to improving the content of entertainment programming, with an emphasis on prime time television. Founded in 1995, PTC is funded by contributions from its 1.1 million members and other supporters throughout the United States. It works with television producers, broadcasters and sponsors in an effort to stem the increasing tide of harmful messages targeted at children.

PTC has encouraged elected and appointed government officials and agencies to enforce broadcast decency standards that exist in statute and regulation, and it has encouraged its members and others to file complaints with the FCC about broadcasts they believe violate the indecency law, including the broadcasts at issue in this case. Many of the complaints filed with the FCC about the broadcasts at issue in these cases came from PTC members. PTC participated as *amicus curiae* in the Second Circuit proceedings below.

¹ As required by Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* states that all parties except NBC Telemundo License Co., NBC Televisions Affiliates and CBS Broadcasting, Inc. have consented in writing to the filing of this brief, and PTC has provided notice of filing of this brief to all parties as required by Supreme Court Rule 37.2.

STATEMENT OF THE CASE

PTC adopts the Petitioner's Statement.

INTRODUCTION AND ARGUMENT SUMMARY

The question squarely before the Court is whether the FCC's 2001 enforcement policy, as applied to these and other cases, passes constitutional muster. *Amicus* PTC urges the Court to grant certiorari not only to validate the FCC's challenged enforcement regime, but to make clear the Court's holding in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) and Section 1464 are still good law, and not quaint outliers overtaken by new times.

This Court has observed in another context that "broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population." *Turner Broadcasting*, 512 U.S. 622, 663 (1994) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)). As we show below, that is still true today.

The Court has also held that one who has been granted a license to broadcast over scarce public airwaves serves in a sense as a fiduciary for the public. *FCC v. League of Women Voters of California*, 468 U.S. 364, 377 (1984). The Court must decide in this case if that is still true today.

The broadcasters have exploited the uncertainty created by their multi-year contest of the FCC's efforts to police their broadcasts under the law by airing increasingly edgy fare on broadcast television. The coarser content shown on basic cable prefigures what the broadcasters will air on the public airways if the Second Circuit's decisions are allowed to stand.

Argument

The Court Should Grant Certiorari and Make Clear that the Congressional Intent to Regulate a Portion of the Content on Broadcast Television During a Portion of the Broadcast Day is Still a Legitimate Goal and is Not Unconstitutional

1. In *Pacifica*, the Court held that because of the broadcast media's pervasive scope, intrusive nature and accessibility to children, the FCC could constitutionally regulate the broadcast of indecent material.

Broadcast television is *still* a uniquely pervasive influence in America, and it *remains* uniquely accessible to children, bombarding viewers of all ages in the privacy of their own home. The National Association of Broadcasters (NAB) has addressed those very points. Only last month, at a NAB convention in Las Vegas, Nevada, NAB President and former Oregon Senator Gordon Smith observed that some 43 million Americans depend solely on over-the-air signals for television, and that

90 of the top 100 primetime television programs are on broadcast television, not cable.²

2. A public broadcaster's fiduciary duty to use the public airwaves for the public good is not a relic of a gentler time. It is still the law, as even the broadcasters acknowledge.

The public airways are owned by the public and licensed to the broadcasters, in return for which the broadcasters are to use them in accordance with the law – including Section 1464. The broadcasters want to use the airwaves as they see fit, unencumbered by the indecency statute. At the Las Vegas convention mentioned above, the NAB's President rightly noted that “Broadcasters have a unique identity. We are important voices in our local communities. We live where we broadcast, and we reflect the values of those communities, large and small across the country. . . . Broadcasting keeps our citizens connected to our communities and gives those communities coherence. That is a *public good* that we provide. The enduring value of broadcasting is not something that policymakers should take lightly” (emphasis added). *See* Press Release at n.1, above. Programming of the kind at issue in these cases hardly discharges the public good required of broadcasters by this Court, *see FCC v. League of Women Voters of California, supra*, and recognized by the NAB's President.

² *See* Sen. Smith's remarks in his press release at <http://www.nabshow.com/2011/newsRoom/pressRelease.asp?id=2506>.

3. The broadcasters have taken advantage of the uncertainty created by the litigation of these cases by broadcasting racier fare.

After the Second Circuit rendered its decision in *Fox, Amicus* PTC conducted a longitudinal study comparing the first two weeks of the 2010 season's primetime programming with the same period in 2005, comparing the volume and harshness of profanity occurring on broadcast television. *Habitat for Profanity: Broadcast TV's Sharp Increase in Foul Language* ("the Report")³. In the Report, PTC tested the truth of the assertion by Andrew Schwartzman of the Media Access Project that "There's no question that [the 2nd Circuit's] decision is going to mean more [explicit content] . . . they're already getting much more aggressive about trying to get stuff in." Report at 2.

PTC found that:

- The use of profanity on prime-time broadcast entertainment programming increased 69.3% from 2005 to 2010;
- The largest increases were found in the use of what the Report referred to as the "harshest profanities," and in explicit references to genitalia and bodily functions;

³ PTC's complete report, with data, results and analysis can be found at <http://www.parentstv.org/PTC/publications/reports/2010ProfanityStudy/study.pdf>.

- The greatest increase in the use of the harshest profanities occurred in the 8:00 p.m to 9 p.m ET time period, which is also known as the Family Hour;
- Use of the word “fuck,” whether bleeped or muted, increased from 11 instances in 2005 to 276 instances in 2010 – including a ten-fold increase in the use of that word during Family Hour. Use of the word “shit” was used in bleeped or muted form 11 times in 2005; by 2010 it was used 95 times. That count does not include the coy use of “shit” in the title of the CBS show, *##! My Dad Says*, or NBC’s scripted, unbleeped use of the word in a recent broadcast of *30 Rock*. Report at 3.
- Use of the word “balls” to refer to male genitalia increased 200%, use of the word “screw” increased 121%, and use of the word “boobs” in reference to breasts increased 90%.
Id.

The Report notes that “A 69% increase in scripted profanity on pre-planned, filmed entertainment is not equivalent to a couple slips of the tongue during live events. The statistics above demonstrate that use of such language by the networks is both *deliberate and pervasive*” (emphasis added) *Id.* at 4).

4. The findings in PTC's Report foreshadow the future of broadcast television if the Court does not act in these cases and uphold the FCC's enforcement regime.

The Court need not guess what the broadcasters will do with broadcast television programming if the Second Circuit's holding in *Fox* is left undisturbed. The future is now on basic cable television.

PTC published a November 2004 report entitled, *Basic Cable Awash in Raunch: A content analysis of expanded basic cables Original Prime-Time series*.⁴ There, PTC compiled a 16-page manuscript of dialog and stage directions culled from basic cable television programming on the air at the time. The 2004 programming had it all: all seven dirty words discussed in *Pacifica*, and graphic sexual content, including explicit dialog, strippers, nudity, masturbation and oral sex.

By 2008, it was worse. That year, PTC released another study of basic cable fare, *Children Assaulted by Sex, Violence, Drugs and Explicit Language on BET and MTV*,⁵ conducted in conjunction with Enough is Enough – a campaign protesting the commercialization and marketing of negative and derogatory images of black men and

⁴ PTC's 2004 report can be found at <http://www.parentstv.org/PTC/publications/reports/2004cablestudy/print.pdf>

⁵ The 2008 report can be found at <http://www.parentstv.org/PTC/news/release/2008/0410.asp>.

women in the entertainment industry, sponsored by Citizens for Change, Inc.⁶ PTC's study analyzed adult content airing on BET's Rap City and 106 & Park and on MTV's Sucker Free on MTV for a two-week period in December 2007 during afternoon or early evening hours when children were at home after school, and in March 2008. The latter period showed even higher levels of adult content in March 2008 than in December 2007. For example, PTC found:

- 746 sexually explicit scenes or lyrical references in the 27.5 hours of analyzed programming from the December study period for an average of 27 instances per hour, or one instance every 2.2 minutes. Sexual content was even more common in the March test period, with an average 40 instances per hour, or one instance every 90 seconds;
- 475 uses of explicit language and obscene gestures in December for an average of 17 instances per hour, or one instance every 3.5 minutes, and 495 uses of explicit language and obscene gestures in March, for an average of 35 instances per hour, or one instance every 1.7 minutes.

Much of the seedy content now on basic cable could not be aired on broadcast television prior to the Second Circuit's holding in *Fox*. But that is not true anymore and the broadcasters are pushing the

⁶ www.enoughisenoughcampaign.com

limits already. For example, CBS announced on May 12, 2011 that it plans to air in the Fall *The Playboy Club*, a series in which some of its actors have signed contracts that include a provision requiring them to shoot nude scenes, as necessary. According to press reports, “nudity” includes “simulated sex acts” as well.⁷

Conclusion

This case is about whether Section 1464 is to have any vitality in affecting what broadcasters send into American homes, or whether the indecency law and regulations are a polite fiction to be ignored. The Second Circuit’s decisions in *Fox* and *ABC* have effectively struck down Section 1464 without explicitly saying so. If that statute is truly unconstitutional – and PTC contends that it is not – it is for this Court to say so. It is not a proper role for the Second Circuit to purport to strike down the FCC’s recent enforcement scheme when the practical effect of such a ruling is to undo completely any hope of enforcement anywhere of Section 1464.

⁷ *New York Post*, April 1, 2011; http://www.nypost.com/p/entertainment/tv/bare_bunny_gXMYN5xEiIGo7DOZlbDhgN. As of the writing of this brief, it is not clear that CBS intends to broadcast nude scenes on broadcast television.

For the reasons we have set out above, this Court should review and overturn the Second Circuit in both *Fox* and *ABC*.

Respectfully Submitted,

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