No.

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, PETITIONERS

v.

ABC, INC., ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in invalidating a finding by the Federal Communications Commission (FCC) that a broadcast including expletives was indecent within the meaning of statutory and regulatory prohibitions on indecent broadcasts, on the ground that the FCC's context-based approach to determining indecency is unconstitutionally vague in its entirety.

2. Whether the court of appeals erred in invalidating a finding by the FCC that a broadcast including nudity was indecent within the meaning of statutory and regulatory prohibitions on indecent broadcasts, on the ground that the FCC's context-based approach to determining indecency is unconstitutionally vague in its entirety.

PARTIES TO THE PROCEEDING

Petitioners are the Federal Communications Commission and the United States of America.

The following respondents were petitioners in the court of appeals in *Fox Televisions Stations* v. *FCC* (App., *infra*, 1a-34a): Fox Television Stations, Inc., CBS Broadcasting Inc., WLS Television, Inc., KTRK Television, Inc., KMBC Hearst-Argyle Television, Inc., and ABC Inc.

The following respondents were intervenors in the court of appeals in *Fox Televisions Stations* v. *FCC*: NBC Universal, Inc., NBC Telemundo License Co., NBC Television Affiliates, FBC Television Affiliates Association, CBS Television Network Affiliates, Center for the Creative Community, Inc., doing business as Center for Creative Voices in Media, Inc., and ABC Television Affiliates Association.

The following respondents were petitioners in the court of appeals in *ABC, Inc.* v. *FCC* (App., *infra*, 118a-125a): 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, Me-

dia 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., and WISN Hearst-Argyle Television Inc.

The following respondents were intervenors in the court of appeals in *ABC, Inc.* v. *FCC*: Fox Television Stations, Inc., NBC Universal, Inc., NBC Telemundo License Co., and CBS Broadcasting, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, regulation and rule:

Miscellaneous:

Miscellaneous—Continued: Page

Blank Page

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Federal Communications Commission and the United States, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals in *Fox Television Stations, Inc.* v. *FCC* (App., *infra*, 1a-34a) is reported at 613 F.3d 317. The order of the Federal Communications

Commission under review in *Fox* (App., *infra*, 35a-115a) is reported at 21 F.C.C.R. 13,299. The opinion of the court of appeals in *ABC, Inc.* v. *FCC* (App., *infra*, 118a-125a) is not published in the *Federal Reporter* but is available at 2011 WL 9307. The order of the Federal Communications Commission under review in *ABC* (App., *infra*, 126a-214a) is reported at 23 F.C.C.R. 3147.

JURISDICTION

The judgment of the court of appeals in *Fox* was entered on July 13, 2010. A petition for rehearing was denied on November 22, 2010 (App., *infra*, 116a). On February 10, 2011, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari in *Fox* to and including March 22, 2011. On March 10, 2011, Justice Ginsburg further extended the time within which to file a petition for a writ of certiorari in *Fox* to and including April 21, 2011. The judgment of the court of appeals in *ABC* was entered on January 4, 2011. On March 25, 2011, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari in *ABC* to and including May 4, 2011. The jurisdiction of this Court in both *Fox* and *ABC* is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant statutory and regulatory provisions are set out in an appendix to this petition. App., *infra*, 263a-267a.

STATEMENT

1. Under 18 U.S.C. 1464, it is unlawful to "utter[] any obscene, indecent, or profane language by means of radio communication." Section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106

Stat. 954, directs that "[t]he Federal Communications Commission [FCC or Commission] shall promulgate regulations to prohibit the broadcasting of indecent programming" during specified hours of the day. The Commission has implemented those statutory provisions by adopting regulations that prohibit broadcast licensees from airing "any material which is obscene" or, "on any day between 6 a.m. and 10 p.m.[,] any material which is indecent." 47 C.F.R. 73.3999; see *Action for Children's Television* v. *FCC*, 58 F.3d 654, 669-670 (D.C. Cir. 1995) (en banc) (*ACT III*), cert. denied, 516 U.S. 1043 (1996). The Commission is authorized to enforce Section 1464 and its indecency regulation by, *inter alia*, imposing civil forfeitures, 47 U.S.C. 503(b)(1)(B) and (D), or taking account of violations during license renewal proceedings, see 47 U.S.C. 307, 309(k).

2. In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) (*Pacifica*), this Court upheld the FCC's application of the same "definition of indecent speech that [the FCC] uses to this day." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1806 (2009) (*Fox*). At issue in *Pacifica* was the midday radio broadcast of George Carlin's "Filthy Words" monologue, which included repeated use of expletives. Responding to a listener complaint, the Commission determined that the broadcast of the Carlin monologue violated Section 1464 under a "concept of 'indecent' [that] is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience." *Pacifica*, 438 U.S. at 731-732 (quoting *In re Citizen's Complaint Against Pacifica Found. Station*

WBAI(FM), New York, N.Y., 56 F.C.C. 2d 94, 98 (1975) (*Citizen's Complaint*). This Court concluded that the FCC's application of its definition of indecency to the Carlin monologue "as broadcast" did not violate the First Amendment. *Id.* at 735, 750-751.

The Court observed in *Pacifica* that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans" because "material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." 438 U.S. at 748. The Court further observed that, because "broadcasting is uniquely accessible to children," indecent language can "enlarge[] a child's vocabulary in an instant." *Id.* at 749. The Court concluded that "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression" when that expression is disseminated through broadcast media. *Ibid.* (quoting *Ginsberg* v. *New York*, 390 U.S. 629, 639, 640 (1968)).

The Court in *Pacifica* emphasized that, under the nuisance rationale on which the Commission's decision rested, "context is all-important." 438 U.S. at 750; see *id.* at 742 (plurality opinion) ("indecency is largely a function of context"). The Court explained in particular that the "concept" of indecency used by the FCC "requires consideration of a host of variables," such as the "content of the program in which the language is used" and its effect on "the composition of the audience." *Id.* at 750.

3. For several years after *Pacifica*, the Commission followed an enforcement policy under which only "delib-

erate, repetitive use of the seven words actually contained in the George Carlin monologue" would be deemed actionably indecent. *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 12 (1987). In 1987, the Commission concluded that its post-*Pacifica* policy was "unduly narrow as a matter of law and inconsistent with [its] enforcement responsibilities under Section 1464." *In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, 930 ¶ 5 (1987) (*Infinity Order*). The Commission therefore announced that, in determining whether a particular broadcast was indecent, it would instead use the "generic definition of indecency" articulated in its 1975 *Pacifica* order. *Ibid.* The Commission stated that, in determining whether particular material met that definition, it would consider, *inter alia*, whether the words or depictions used are "vulgar" or "shocking," whether the broadcast of such material is isolated or fleeting, the character of the audience, and the merit of the complained-of program as it relates to the broadcast's patent offensiveness. *Id.* at 932 ¶ 16 (footnotes omitted). The Commission declined, however, to develop a "comprehensive index or thesaurus of indecent words or pictorial depictions" of patently offensive material, explaining that it would be impossible "to construct a definitive list that would be both comprehensive and not overinclusive in the abstract, without reference to the specific context." *Id.* at 932 ¶ 14.

In 1988, the D.C. Circuit upheld the Commission's decision to move away from a policy focused exclusively on the list of words from the Carlin monologue and to instead make indecency determinations based on its generic definition of indecency. See *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (*ACT I*) (R.B. Ginsburg, J.). The petitioners in *ACT I* argued that the

Commission had failed adequately to explain its policy change. The court of appeals rejected that argument, stating that unless "*only* the seven dirty words are properly designated indecent[,] * * * some more expansive definition must be attempted" and "[n]o reasonable formulation tighter than the one the Commission has announced has been suggested." *Id.* at 1338.

The court in *ACT I* also rejected the contention that the Commission's definition of indecency was unconstitutionally vague. Observing that the "generic definition of indecency now employed by the FCC is virtually the same definition the Commission articulated" in *Pacifica*, and that this Court in *Pacifica* had held "the Carlin monologue indecent within the meaning of section 1464," the court "infer[red]" that "the term 'indecent' [is not] so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" 852 F.2d at 1338-1339 (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)). The court reaffirmed that holding in addressing two later challenges to FCC indecency enforcement. See *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) (*ACT II*) ("We have already considered and rejected a vagueness challenge to the Commission's definition of indecency."), cert. denied, 503 U.S. 913, 914 (1992); *ACT III*, 58 F.3d at 659 ("[W]e dismiss petitioners' vagueness challenge as meritless.").

4. In 2001, the Commission issued a policy statement "to provide guidance * * * regarding [its] case law interpreting 18 U.S.C. § 1464 and [its] enforcement policies with respect to broadcast indecency." *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999, 7999 ¶ 1

(2001) (*Industry Guidance*). That policy statement made clear that "[i]ndecency findings involve at least two fundamental determinations." *Id.* at 8002 ¶ 7. First, the material at issue "must fall within the subject matter scope of [the] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities." *Ibid.* Second, "the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at 8002 ¶ 8 (emphasis omitted).

The FCC's policy statement explained that the determination whether a broadcast is "patently offensive" turns on the "full context" in which the material is broadcast and is therefore "highly fact-specific." *Industry Guidance*, 16 F.C.C.R. at 8002-8003 ¶ 9 (emphasis omitted). The statement identified three "principal factors" that guide the analysis of patent offensiveness:

> (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; [and] (3) whether the material appears to pander or is used to titillate, [and] whether the material appears to have been presented for its shock value.

Id. at 8003 ¶ 10 (emphasis omitted).

4. In January 2003, the NBC network aired a live broadcast of the Golden Globe Awards. In accepting an award, the rock singer Bono exclaimed, "This is really, really f***ing brilliant. Really, really great." *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4976 n.4 (2004) (*Golden Globe*

Awards Order). The Commission concluded that Bono's remark was indecent even though his use of the F-Word was not "sustained or repeated." *Id.* at 4980 ¶ 12. In explaining that conclusion, the Commission acknowledged that it was departing from prior agency decisions holding that "isolated or fleeting use[s] of the 'F-Word' or a variant thereof in situations such as this [are] not indecent," and it made clear that such cases "are not good law to that extent." *Ibid.* Under its revised policy, the Commission explained, "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Ibid.* The Commission did not impose a sanction in the *Golden Globe Awards Order*, however, because the use of isolated expletives had not been proscribed by agency precedent at the time the broadcast occurred. *Id.* at 4981 ¶ 15.

5. The *Fox* case arises out of two broadcasts that aired before the Commission released the *Golden Globe Awards Order*. On December 9, 2002, Fox broadcast the 2002 Billboard Music Awards beginning at 8 p.m. Eastern Standard Time. During that broadcast, the entertainer Cher received an "Artist Achievement Award." In her acceptance speech, she stated: "I've had great people to work with. Oh, yeah, you know what? I've also had critics for the last 40 years saying that I was on my way out every year. Right. So f*** 'em. I still have a job and they don't." App., *infra*, 89a.

Approximately one year later, on December 10, 2003, Fox again broadcast the Billboard Music Awards, which aired between 8 p.m. and 10 p.m. Eastern Standard Time. Nicole Richie and Paris Hilton, the stars of Fox's program "The Simple Life," presented one of the awards

that night. During their presentation, they engaged in the following exchange:

> Paris Hilton: Now Nicole, remember, this is a live show, watch the bad language.
>
> Nicole Richie: Okay, God.
>
> Paris Hilton: It feels so good to be standing here tonight.
>
> Nicole Richie: Yeah, instead of standing in mud and [audio blocked]. Why do they even call it "The Simple Life?" Have you ever tried to get cow s*** out of a Prada purse? It's not so f***ing simple.

App, *infra*, 42a-44a.

a. Following the two Billboard Music Awards broadcasts, the Commission received numerous complaints from viewers, and the agency issued an order concluding that both broadcasts contained "indecent" language as prohibited by 18 U.S.C. 1464 and the Commission's indecency regulation. *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664, 2665 ¶ 2 (2006) (*Omnibus Order*). The Commission did not impose any sanction because it concluded that, as in the *Golden Globe Awards* case, broadcast licensees did not have notice at the time of the broadcasts of the Commission's revised policy regarding the airing of isolated expletives.

After a voluntary remand from the Second Circuit (where petitions for review by Fox and other broadcasters had been consolidated), the Commission vacated the relevant portions of the *Omnibus Order* and substituted the order under review in *Fox*. App., *infra*, 35a-

115a. In that order, the Commission reaffirmed its conclusion that Fox's airing of the 2002 and 2003 Billboard Music Awards violated the prohibitions against the broadcast of indecent material. Applying the framework set out in its *Industry Guidance*, the Commission concluded that the expletives aired during the Billboard Music Awards were sexual or excretory references that fell within the subject-matter scope of the Commission's indecency policy. The Commission noted that Ms. Richie's use of the S-Word referred to excrement. *Id.* at 46a-47a. In addition, the Commission explained that the F-Word (used by both Ms. Richie and Cher) inherently "has a sexual connotation even if the word is not used literally" because "the word's power to 'intensify' and offend derives from its implicit sexual meaning." *Id.* at 47a-48a, 90a-91a (footnote omitted).

The Commission further concluded that both broadcasts were "patently offensive." The Commission found that the language used was not only graphic and shocking, particularly in the context of nationally televised awards programs viewed by substantial numbers of children, but also gratuitous. In that regard, the Commission noted that Fox had not argued that the expletives at issue "had any artistic merit or [were] necessary to convey any message." App., *infra*, 48a-49a & n.44, 91a-92a & n.191. The Commission adhered to its prior decision not to impose any sanction on Fox for the broadcasts. See *id.* at 85a-86a, 97a.

c. A divided panel of the court of appeals vacated the Commission's order and remanded the case to the agency for further proceedings. *Fox Television Stations, Inc.* v. *FCC*, 489 F.3d 444 (2d Cir. 2007), rev'd, 129 S. Ct. 1800 (2009). The court concluded that the Commission's change of policy with regard to isolated expletives

was "arbitrary and capricious under the Administrative Procedure Act" because the agency had "failed to articulate a reasoned basis" for the shift. *Id.* at 447. In addition, the court of appeals in dicta made a number of "observations" questioning the constitutionality of the Commission's "'fleeting expletive' regime." *Id.* at 462.

d. This Court reversed. *Fox*, *supra*. Noting that "Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission," 129 S. Ct. at 1813, the Court found that "the agency's reasons for expanding the scope of its enforcement activity were entirely rational," *id.* at 1812.

The Court emphasized that "the Commission's decision to look at the patent offensiveness of even isolated uses of sexual and excretory words" conformed to "the context-based approach" that the Court had "sanctioned in *Pacifica*." *Fox*, 129 S. Ct. at 1812. The Court rejected the broadcasters' argument that the Commission's contextual analysis gives the agency "unbridled discretion," noting that its decision in *Pacifica* "approved Commission regulation based on a nuisance rationale under which context is all-important." *Id.* at 1815 (internal quotation marks and citation omitted). The Court explained that "[t]he agency's decision to retain some discretion does not render arbitrary or capricious its regulation of the deliberate and shocking uses of offensive language at the award shows under review—shows that were expected to (and did) draw the attention of millions of children." *Id.* at 1814. The Court found that "[t]he Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so

as to give conscientious parents a relatively safe haven for their children." *Id.* at 1819. Because "[t]he Second Circuit did not definitively rule on the constitutionality of the Commission's orders," this Court "decline[d] to address the constitutional questions" and remanded the case to the court of appeals for further proceedings. *Ibid.*

e. On remand, the court of appeals did not limit its inquiry to the constitutionality of the Commission's isolated-expletives policy as applied to Fox's broadcasts of the 2002 and 2003 Billboard Music Awards. Instead, the court held that the "FCC's indecency policy is unconstitutional" in its entirety "because it is impermissibly vague." App., *infra*, 18a. The court therefore "grant-[ed] the petition for review and vacate[d]," not just "the FCC's order," but the entire "indecency policy underlying it." *Id.* at 2a.

In finding the Commission's policy unconstitutionally vague, the court of appeals did not understand itself to be constrained by *Pacifica*. The court observed that the decision in *Pacifica* had not expressly addressed vagueness, and it viewed this Court's decision as being "predicated on the FCC's [prior] 'restrained' enforcement policy." App., *infra*, 22a. For the same reason, the court of appeals declined to follow the decisions in the *Action for Children's Television* cases, in which the D.C. Circuit had repeatedly rejected vagueness challenges to the FCC's definition of indecent broadcasting. *Id.* at 22a n.8. "[T]o the extent the *ACT* cases held that a vagueness challenge was precluded by *Pacifica*," the court stated, "we are not bound by the DC Circuit and do not find it persuasive." *Ibid.*

The court of appeals did not question the FCC's determination that the words used in the Billboard Music

Awards shows—variants of the F-Word and the S-Word—are indecent in the context in which they were broadcast. The court understood "the FCC's current policy" to establish a "presumptive prohibition" on the use of the two words unless their use is "demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance," or the words are uttered in the course of a "*bona fide* news" program. App., *infra*, 25a-26a (quoting *Omnibus Order*, 21 F.C.C.R. at 2686 ¶ 82). The court of appeals found, however, that the policy is unconstitutionally vague because "broadcasters are left to guess whether an expletive will be deemed 'integral' to a program or whether the FCC will consider a particular broadcast a '*bona fide* news interview.'" *Id.* at 27a. In reaching that conclusion, the court focused on what it perceived as disparate results reached in a series of FCC decisions addressing complaints about the use of indecent language in broadcast programs. *Id.* at 26a-29a.

The court of appeals recognized that the FCC had adopted a contextual approach to indecency, rather than a rigid rule prohibiting specified words, in part "because [the Commission] recognized that an outright ban on certain words would raise grave First Amendment concerns." App., *infra*, 27a. The court also acknowledged that because "[t]he English language is rife with creative ways of depicting sexual or excretory organs or activities * * * even if the FCC were able to provide a complete list of all such expressions, new offensive and indecent words are invented every day." *Id.* at 24a. In the court's view, however, the "flexibility" provided by the Commission's post-1987 policy "results in a standard that even the FCC cannot articulate or apply consis-

tently." *Id.* at 27a. On that basis, the court of appeals "str[uck] down the FCC's indecency policy" in its entirety. *Id.* at 34a.

6. The *ABC* case arises out of a February 25, 2003, broadcast, at 9:00 p.m. in the Central and Mountain time zones, of an episode of the television show *NYPD Blue* entitled *Nude Awakening*.[1] The show opens with "a woman wearing a robe * * * entering a bathroom, closing the door, and then briefly looking at herself in a mirror hanging above a sink." App., *infra*, 223a. "With her back to the camera," the woman "removes her robe, thereby revealing the side of one of her breasts and a full view of her back." *Ibid.* "The camera shot includes a full view of her buttocks and her upper legs as she leans across the sink to hang up her robe." *Ibid.* As she walks from the mirror to the shower, "a small portion of the side of one of her breasts is visible," and "her buttocks are visible from the side." *Ibid.*

The camera then shifts to show a young boy getting out of bed and walking toward the bathroom, at which point "[t]he camera cuts back to the woman, who is now shown standing naked in front of the shower, her back to the camera." App., *infra*, 223a-224a. The camera first shows the woman "naked from the back, from the top of her head to her waist." *Id.* at 224a. "[T]he camera then pans down to a shot of her buttocks, lingers for a moment, and then pans up her back." *Ibid.* Next, the boy is shown opening the bathroom door. *Ibid.* As he does so, the woman "quickly turns to face" him. *Ibid.* "The camera initially focuses on the woman's face but then cuts to a shot taken from behind and through her

[1] A recording of this episode, which was part of the record before the court of appeals, has been filed with the Clerk.

legs, which serve to frame the boy's face as he looks at her." *Ibid.*

The camera immediately shifts to "a front view of the woman's upper torso," although a "full view of her breasts is obscured * * * by a silhouette of the boy's head and ears." App., *infra*, 224a. "After the boy backs out of the bathroom and shuts the door," the woman is shown "facing the door, with one arm and hand covering her breasts and the other hand covering her pubic area." *Ibid.* "The scene ends with the boy's voice, heard through the closed door, saying 'sorry,'" to which "the woman while looking embarrassed, responds, 'It's okay. No problem.'" *Ibid.*

a. After issuing a letter of inquiry and a notice of apparent liability, the FCC in 2008 imposed an indecency forfeiture of $27,500 on each of several ABC-network-owned or -affiliated television stations. App., *infra*, 126a-214a. Applying the framework set out in its *Industry Guidance*, including the longstanding agency definition of indecency that this Court approved in *Pacifica*, the Commission first concluded that the depiction of an adult woman's naked buttocks in the episode constituted a depiction of sexual or excretory organs and thus fell within the subject-matter scope of the Commission's indecency policy. *Id.* at 132a-137a. The Commission then determined that "in context and on balance, the complained-of material is patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at 138a.

In explaining its determination that the relevant broadcast material was patently offensive, the Commission observed that the episode contained a "close range," "fully visible" view of the actress's unclothed buttocks that was "sufficiently graphic and explicit to support an

indecency finding." *Id.* at 140a. The Commission further explained that camera shots of the woman's buttocks were "repeated" within the scene, which "focuses on her nudity." *Id.* at 142a. Finally, the Commission determined that the scene was "pandering, titillating, and shocking." *Id.* at 143a. The FCC explained that the scene placed the audience in the "voyeuristic position" of observing a naked woman preparing to shower, and that the manner in which the scene was shot "highlights the salacious aspect of the scene." *Id.* at 144a. The Commission also found that "subsequent camera shots of the boy's shocked face from between the woman's legs, and of her naked, partially-obscured upper torso from behind his head" contributed to the scene's "titillating and shocking nature." *Id.* at 144a. The Commission accordingly concluded that the *NYPD Blue* episode was "actionably indecent." *Id.* at 149a.

b. ABC and its affiliates sought review of the *Forfeiture Order* in the Second Circuit. On January 4, 2011, after denying the government's rehearing petition in *Fox*, the court of appeals issued a summary order in *ABC* vacating the Commission's order imposing the forfeitures. The court concluded that "there is no significant distinction between this case and *Fox*" because "[a]lthough this case involves scripted nudity, the case turns on an application of the same context-based indecency test that *Fox* found 'impermissibly vague.'" App., *infra*, 124a (citation omitted). As in *Fox*, the court of appeals did not address the question whether, on the facts of the case, the broadcasters had constitutionally sufficient notice that the relevant *NYPD Blue* episode was indecent. Rather, the court of appeals viewed the *ABC* case as controlled by the court's prior conclusion in *Fox* that the Commission's indecency policy is facially

unconstitutional. See *ibid.* ("*Fox*'s determination that the FCC's indecency policy is unconstitutionally vague binds this panel."). The court accordingly vacated the *Forfeiture Order* without addressing any of the other administrative-law or constitutional challenges raised by the *ABC* petitioners. *Id.* at 124a-125a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in "strik[ing] down" the Commission's "indecency policy" in *Fox* and then in applying that decision in *ABC*. App., *infra*, 34a, 124a-125a. Review of both decisions is warranted because they conflict with decisions of this Court and the D.C. Circuit, and because they effectively preclude the FCC from performing its statutory obligation to enforce prohibitions on broadcast indecency.

The court of appeals' decisions conflict with *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), in which this Court recognized that context is an "all-important" component of an effective and constitutional indecency regime. *Id.* at 750. While this Court held in *Pacifica* that the FCC's consideration of context was critical to the constitutionality of the indecency enforcement regime, the court of appeals found in these cases that the very same feature rendered the Commission's policy unconstitutionally vague. The Second Circuit's rulings also conflict with the D.C. Circuit's decisions in the *Action for Children's Television* cases, which held that *Pacifica* forecloses a vagueness challenge to the Commission's context-based indecency policy.

In addition, the court of appeals' approach is inconsistent with *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) (*HLP*). That decision requires a court to focus its vagueness inquiry on the facts of the

case at hand, rather than on other applications not before the court. Notwithstanding that directive, the court of appeals failed entirely to ask whether Fox or ABC lacked adequate notice that the particular broadcasts at issue here would be considered indecent, instead examining other FCC orders involving different broadcasts.

Finally, the court's decisions—which involve both indecent expletives in live programming (*Fox*) and images of adult nudity in a scripted show (*ABC*)—preclude the FCC from carrying out its statutory responsibility to ensure that broadcasters honor their longstanding public interest obligation not to air indecent material. To comply with the court's vagueness determination, the Commission apparently would be required to sacrifice the "flexibility" that the court of appeals found unconstitutional, App., *infra*, 25a, and instead attempt to implement hard-and-fast rules prohibiting certain words and images with no meaningful consideration of context. Such a policy would be easily circumvented, however, and it would raise serious First Amendment problems of its own. If left to stand, the court of appeals' decisions would leave the FCC with no effective means to implement its longstanding statutory authority over indecent broadcasting.

I. THE COURT OF APPEALS' RULINGS CONFLICT WITH DECISIONS OF THIS COURT AND THE D.C. CIRCUIT

A. In upholding the FCC's determination that the Carlin monologue was indecent, this Court in *Pacifica* recognized that the Commission's order "rested entirely on a nuisance rationale under which context is all-important." 438 U.S. at 750. Indeed, as the plurality portion of the opinion stressed, "indecency is largely a function of context" and "cannot be adequately judged in the ab-

stract." *Id.* at 742. Because this understanding of indecency "requires consideration of a host of variables," the Court explained, "a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy," or "a prime-time recitation of Geoffrey Chaucer's Miller's Tale," need not necessarily be treated like the Carlin monologue even if "an occasional expletive" were broadcast. *Id.* at 750 & n.29; see *id.* at 747 (plurality opinion of Stevens, J.) ("the constitutional protection accorded to a communication containing * * * patently offensive sexual and excretory language need not be the same in every context"). In *Fox*, this Court affirmed that "the Commission's decision to look at the patent offensiveness of even isolated uses of sexual and excretory words" conformed to "the context-based approach" that the Court had "sanctioned in *Pacifica*." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1812 (2009); see *id.* at 1815 ("we have previously approved Commission regulation based 'on a nuisance rationale under which context is all-important'") (quoting *Pacifica*, 438 U.S. at 750).

The Court in *Pacifica* did not suggest that the Commission's context-based approach rendered the FCC's broadcast indecency policy unconstitutionally vague. Nor did the Court suggest that the Commission's definition of indecency—which then, as now, applied to "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs," 438 U.S. at 732 (citing *In re Citizen's Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y.*, 56 F.C.C. 2d 94, 98 (1975))—is unconstitutionally imprecise. The Court's statement that it found "no basis for disagreeing with the Commission's

conclusion that indecent language was used in [the] broadcast," *id.* at 741, further indicates that the Commission's standard did not "fail[] to provide" the Court with meaningful guidance on "what [was] prohibited," *United States* v. *Williams*, 553 U.S. 285, 304 (2008).

The Second Circuit concluded in *Fox* that *Pacifica* was not controlling because it thought *Pacifica* was predicated on a "'restrained' enforcement policy," which the court of appeals understood the FCC to have since abandoned. App., *infra*, 22a. But this Court has "never held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expletives *may not* be forbidden." *Fox*, 129 S. Ct. at 1815. In any event, the court of appeals' vagueness analysis is largely untethered to the relevant change in the Commission's indecency policy. The Commission's determination that "isolated" or "fleeting" expletives may be actionably indecent did not render the regulatory regime less determinate than it had been previously. Rather, the court of appeals held that the Commission's broadcast indecency policy is unconstitutionally vague because it gives the Commission too much "flexibility," and results in "a standard that * * * the FCC cannot articulate or apply consistently." App., *infra*, 27a. What the court below considered undue flexibility, however, is simply analysis of context—a longstanding feature of FCC indecency regulation that the Court in *Pacifica* viewed as a *virtue* of the Commission's approach.

Although the court of appeals faulted the Commission for not having "discernible standards by which individual contexts are judged," App., *infra*, 30a, the Commission's *Industry Guidance* in fact provides such standards. And even before the FCC issued that guidance, the D.C. Circuit noted that unless "*only* the seven dirty

words are properly designated indecent[,] * * * some more expansive definition must be attempted," and that "[n]o reasonable formulation tighter than the one the Commission has announced has been suggested." *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1338 (1991) (R.B. Ginsburg, J.). The court of appeals in this case did not identify any "tighter" definition of indecency by which the Commission could have provided clearer guidance to broadcasters while preserving consideration of the overall context in which particular words and images appear.

B. The court of appeals' decisions also conflict with the D.C. Circuit's decisions in the *Action for Children's Television* cases. As the D.C. Circuit explained in *ACT I*, "[t]he generic definition of indecency * * * employed by the FCC" after 1987 "is virtually the same definition the Commission articulated in the order reviewed by the Supreme Court in the *Pacifica* case." 852 F.2d at 1338. The D.C. Circuit "infer[red] from [*Pacifica*'s] holding that the Court did not regard the term indecent as so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* at 1339 (internal quotation marks and citation omitted); see *ibid.* ("acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge" is "implicit in *Pacifica*"); *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) ("the Supreme Court's decision in *Pacifica* dispelled any vagueness concerns attending the [FCC's] definition"); *Action for Children's Television* v. *FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995) (en banc) (dismissing vagueness challenges as "meritless"), cert. denied, 516 U.S. 1043 (1996).

The court below distinguished the D.C. Circuit's decisions on the ground that the court in *ACT I* "relied specifically on the FCC's restrained policy in reaching its decision." App., *infra*, 22a n.8. But the statement in *ACT I* to which the Second Circuit alluded referred only to the Commission's (still existing) policy of "giv[ing] weight to reasonable licensee judgments when deciding whether to impose sanctions." 852 F.2d at 1340 n.14. That statement was made only to support the D.C. Circuit's conclusion that the Commission's generic indecency definition "is not vulnerable to the charge that it is substantially overbroad," *id.* at 1340; it did not qualify the D.C. Circuit's vagueness analysis, which rested entirely on its understanding of *Pacifica*'s holding, see *id.* at 1338-1339. The FCC decisions following the *Action for Children's Television* cases—including the 2001 *Industry Guidance*—have further clarified the manner in which the Commission will apply its longstanding definition of indecency. The intervening FCC decisions on which the court of appeals relied therefore provide no basis for rejecting the D.C. Circuit's repeated findings that the Commission's indecency policy is not unconstitutionally vague.

The court of appeals also stated that "to the extent the *ACT* cases held that a vagueness challenge was precluded by *Pacifica*, we are not bound by the DC Circuit and do not find it persuasive." App., *infra*, 22a n.8. Review is warranted to resolve that conflict in the courts of appeals.

C. Finally, the court of appeals' opinion in *Fox* (which the court applied in *ABC*) conflicts with this

Court's decision in *HLP*, *supra*.[2] The Court in *HLP* made clear that courts must evaluate vagueness claims based on "the particular facts at issue." 130 S. Ct. at 2719. That ruling rests on the well-settled proposition that "'[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Ibid.* (quoting *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)); see *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 58-61 (1976) (declining to reach facial vagueness challenges to ordinances where the ordinances "unquestionably" applied to the litigants' own conduct); see *Pacifica*, 438 U.S. at 735 (focusing review on ruling that Carlin monologue was indecent "as broadcast"). The Court in *HLP* explained that this "rule makes no exception for conduct in the form of speech." 130 S. Ct. at 2719.

Under *HLP*, the court of appeals should have addressed the constitutionality of the Commission's indecency policy as applied to the facts of the actual broadcasts before it. If the court had done so, it would have rejected the vagueness challenges even if it thought the FCC's policy might be vague as applied to other broadcasts. Fox could not reasonably have believed (and has never claimed) that the gratuitous utterance of the F-Word and the S-Word comport with the community standards for the relevant broadcast medium, see *Pacifica*, 438 U.S. at 751 (noting Carlin's observation that the words are among those "you couldn't say on the public * * * airwaves"); see also *In re WUHY-FM*,

[2] The government brought *HLP* to the court of appeals' attention in a supplemental filing in the *Fox* case. In a footnote, the court of appeals in *Fox* dismissed the decision as "inapposite" on the ground that it arose in a "different procedural posture." App., *infra*, 30a n.9.

Eastern Educ. Radio, 24 F.C.C. 2d 408, 415 ¶ 17 (1970) (fining radio station for airing gratuitous utterances of the F-Word and S-Word in interview). Indeed, the network edited out the F- and S-Words when the awards shows were broadcast on tape delay in later time zones. App., *infra*, 61a, 94a.

The court of appeals in *Fox*, however, did not determine whether the Commission's indecency policy was unconstitutionally vague as applied to the facts of that case (*i.e.*, to the airing of those words during live awards shows with millions of children in the audience). Rather, to determine whether the Commission's policy provides adequate guidance "by which broadcasters can accurately predict" indecency determinations "in the future," App., *infra*, 22a, 24a, the court examined Commission indecency determinations involving different words and phrases, *id.* at 23a-24a ("pissed off," "dick" and "dickhead"), and starkly different contexts, *id.* at 26a (broadcast of the movie "Saving Private Ryan"), *id.* at 29a (documentary on "The Blues"). And by "strik[ing] down the FCC's indecency policy" in its entirety, *id.* at 34a, the court invalidated its application to even the most graphic broadcasts, see, *e.g.*, *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999, 8004 ¶ 13 (2001) (graphic discussion of oral sex); *id.* at 8009 ¶ 19 (explicit joke about rape of a baby); *In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, 934 (1987) (extended narrative regarding anal sex).

The court of appeals in *ABC* likewise did not address whether the Commission's indecency policy was vague as applied to ABC's broadcast of scripted adult nudity. Instead, the court vacated the indecency sanction

against ABC based solely on its antecedent holding in *Fox* that the Commission's policy was facially vague. App., *infra*, 120a. Thus, under the Second Circuit's decisions, a broadcaster can evade liability for its indecent broadcasts even when the material at issue is "plainly prohibited" by the FCC's indecency policy (*HLP*, 130 S. Ct. at 2721), based solely on a claim that the policy may be vague "as applied to the conduct of others," *id.* at 2709 (internal quotation marks and citation omitted). The court of appeals' failure to adhere to the vagueness principles set forth in *HLP* warrants this Court's review.

II. THE COMMISSION'S INDECENCY POLICY IS NOT UNCONSTITUTIONALLY VAGUE

A statute or rule is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, 553 U.S. at 304. Because "we can never expect mathematical certainty from our language," *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972), "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," *Williams*, 553 U.S. at 304 (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 794 (1989)). Moreover, "[t]here are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision." *Smith* v. *Goguen*, 415 U.S. 566, 581 (1974); see *Pacifica Found.* v. *FCC*, 556 F.2d 9, 33 (D.C. Cir. 1977) (Leventhal, J., dissenting) ("[a] concept like 'indecent' is not verifiable as a concept of hard science"), rev'd, 438 U.S. 726 (1978).

By prohibiting the broadcast of "obscene, indecent, or profane language," 18 U.S.C. 1464, and by directing the FCC to "promulgate regulations to prohibit the broadcasting of indecent programming" during specified hours of the day, Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16, 106 Stat. 954, Congress recognized that a wide variety of material, not easily specified in advance, could transgress the reasonable standards of behavior applicable to broadcasters. The Commission clarified its understanding of the statutory terms when, in a definition that this Court approved in *Pacifica*, it identified indecency as material that describes "in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." See *Citizen's Complaint*, 56 F.C.C. 2d 98 ¶ 11.

In the 33 years since *Pacifica* was decided, the Commission has further elaborated on its enforcement policy by issuing numerous decisions applying its indecency analysis to specific factual situations. See *Industry Guidance*, 16 F.C.C.R. at 8004-8015 (collecting and summarizing decisions); see also, *e.g.*, *In re Complaints By Parents Television Council Against Various Broad. Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 F.C.C.R. 1931 (2005) (denying 15 separate indecency complaints). The agency's continued explanation and application of its indecency standards serve to further "narrow potentially vague or arbitrary interpretations" of its rules and of the statute. See *Hoffman Estates*, 455 U.S. at 504; see also *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 575 (1973) (rejecting vagueness challenge in light of "the longstanding interpretations of the statute by the agency charged with its interpretation and en-

forcement"). The Commission has provided further protection against unfair surprise by declining to sanction broadcasters in cases (such as *Fox*) where it was not clear at the time of the broadcast that the FCC regarded the pertinent material as indecent. *E.g.*, App., *infra*, 95a. And broadcasters that remain unsure whether particular material is covered can escape any risk of sanction by airing the material during the safe harbor after 10 p.m. See 47 C.F.R. 73.3999(b). These balanced rules have operated effectively for years to protect minors while providing adequate guidance to broadcasters.

Even apart from its error in going beyond the facts of *Fox* and *ABC*, the court of appeals had no sound basis for concluding that the Commission's indecency policy, as embodied in its 2001 *Industry Guidance*, failed to give "person[s] of ordinary intelligence" in the highly sophisticated broadcast industry "fair notice of what is prohibited." *Williams*, 553 U.S. at 304. Although the court acknowledged that "[i]t is the language of the rule * * * that determines whether a law or regulation is impermissibly vague" (App., *infra*, 21a), it did not focus on the guidance provided by the Commission's indecency definition. Instead, the court relied on what it considered to be inconsistent outcomes in a handful of indecency orders to conclude that "broadcasters have no way of knowing what the FCC will find offensive." App., *infra*, 34a; see *id.* at 23a-24a (different outcomes with regard to the use of different expletives gives broadcasters insufficient notice of how the Commission will apply its factors); *id.* at 26a ("little rhyme or reason" to Commission ruling that isolated expletive in Golden Globe

Awards was indecent while repeated use of F-Word and S-Word in "Saving Private Ryan" was not).[3]

The court of appeals ignored the settled principle that "the mere fact that close cases can be envisioned" does not render a statute (or an agency policy) unconstitutionally vague because "[c]lose cases can be imagined under virtually any statute." *Williams*, 553 U.S. at 305-306. Thus, an agency enforcement policy cannot be "automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within [its] language." *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963). At bottom, the court of appeals' vagueness analysis reflects a fundamental rejection of the contextual approach to indecency that the Court upheld in *Pacifica*, under which different circumstances can (unsurprisingly) produce different outcomes. Taking account of context does not establish "a standardless regime of unbridled discre-

[3] In concluding that the FCC's context-driven, case-by-case approach to indecency "is not arbitrary or capricious," this Court in *Fox* specifically noted that contextual considerations supported the Commission's different treatment of expletives in the movie "Saving Private Ryan." 129 S. Ct. at 1814. The Court observed in particular that "[t]he frightening suspense and the graphic violence in the movie could well dissuade the most vulnerable from watching and would put parents on notice of potentially objectionable material." *Ibid.* (citation omitted). The Court concluded that "[t]he agency's decision to retain some discretion does not render arbitrary or capricious its regulation of the deliberate and shocking uses of offensive language at the award shows under review—shows that were expected to (and did) draw the attention of millions of children." *Ibid.* Yet, even after this Court in *Fox* unequivocally rejected the broadcasters' invocation of "Saving Private Ryan" as "supposed evidence of the Commission's inconsistency," *ibid.*, the court of appeals on remand adhered to its prior view that the FCC's treatment of that film could not be reconciled with FCC decisions concerning other broadcasts. See App., *infra*, 26a-27a.

tion." *Fox*, 129 S. Ct. at 1815. Nor does it otherwise render the Commission's indecency enforcement policy unconstitutionally vague.

III. THE ADVERSE CONSEQUENCES OF THE COURT OF APPEALS' DECISIONS ARE SWEEPING AND UNAVOIDABLE

In "strik[ing] down the FCC's indecency policy," App., *infra*, 34a, and in later finding that its holding in *Fox* eviscerates all subsequently-reviewed indecency determinations, *id.* at 124a, the court of appeals has overturned the basic framework under which the Commission implements the longstanding statutory and regulatory prohibitions on indecent broadcasting. Indeed, as the decision in *ABC* shows, the Second Circuit's vagueness holding is not confined to particular uses of offensive language, but extends to every other context, including scripted displays of adult nudity. The court of appeals has effectively suspended the Commission's ability to fulfill its statutory indecency enforcement responsibilities unless and until the agency can adopt a new policy that surmounts the court of appeals' vagueness rulings. Accordingly, broadcasters may well believe that they have been freed of the public-interest obligation not to air indecent programming that they assumed when they were originally "granted the free and exclusive use of a limited and valuable part of the public domain." *Fox*, 129 S. Ct. at 1806 (quoting *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395 (1981)).

In the concluding paragraph of its opinion in *Fox*, the Second Circuit purported to limit the scope of its decision by stating: "We do not suggest that the FCC could not create a constitutional policy. We hold only that the FCC's current policy fails constitutional scrutiny."

App., *infra*, 34a. But while the court of appeals condemned the purported absence of "discernible standards" in the Commission's current policy, *id.* at 30a, the court itself identified no alternative definition of actionable indecency that would provide the requisite clarity without creating countervailing practical and constitutional difficulties. See *ACT I*, 852 F.2d at 1338 (upholding FCC's generic indecency definition and observing that "[n]o reasonable formulation tighter than the one the Commission has announced has been suggested").

Addressing the court of appeals' concerns by establishing a list of prohibited words is not a realistic option. As the Commission explained in 1987 when it abandoned that approach and adopted its contextual analysis, "[t]here is no way to construct a definitive list that would be both comprehensive and not over-inclusive in the abstract, without reference to the specific context." *Infinity Order*, 3 F.C.C.R. at 932 ¶ 14. The court of appeals itself recognized that while such an approach would have "the advantage of providing broadcasters with a clear list of words that [are] prohibited," App., *infra*, 24a, it would "mean[] that some indecent speech that did not employ [those] words [would] slip[] through the cracks," *ibid.*

As the court of appeals acknowledged, moreover, "an outright ban on certain words would raise grave First Amendment concerns." App., *infra*, 27a. Such an inflexible prohibition, even if limited to the most graphic expletives or images, would preclude the airing of valuable broadcast material. See *In re Complaints Against Various Television Licensees Regarding Their Broad. on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 F.C.C.R. 4507, 4513 ¶ 16 (2005) (concluding that broad-

cast of film "Saving Private Ryan," while containing numerous expletives, was not patently offensive in light of its "overall context"); *In re WPBN/WTOM License Subsidiary, Inc.*, 15 F.C.C.R. 1838, 1840, 1842 ¶¶ 9, 13 (2000) (concluding that broadcast of film "Schindler's List" containing "adult frontal nudity" was not patently offensive "based on the full context of its presentation"). A mechanical prohibition of specified broadcast material would also be inconsistent with the context-based approach this Court upheld in *Pacifica*, see 438 U.S. at 750, and such an approach would be difficult (if not impossible) to apply to indecent images.

In sum, the court of appeals' decisions preclude the Commission from effectively implementing statutory restrictions on broadcast indecency that the agency has enforced since its creation in 1934. That extraordinary hobbling of the Commission's enforcement efforts warrants this Court's review.[4]

[4] The government is filing a single petition for a writ of certiorari because the court of appeals' judgments in *Fox* and *ABC* "involve identical or closely related questions." Sup. Ct. R. 12.4. Indeed, the court of appeals concluded that its disposition of *ABC* was controlled by its decision in *Fox* on the ground that "there [was] no significant distinction" between the two cases. App., *infra*, 124a. While the Court could appropriately grant certiorari only in *Fox* (the first question presented) and hold *ABC* (the second question presented), we believe the better course is to grant review of both judgments. The two cases present distinct contexts: *Fox* involves expletives in live programming, and *ABC* involves images of adult nudity in a scripted show. Simultaneous review of both judgments would thus allow the Court to evaluate how the FCC's indecency rules apply in different settings. This would be especially warranted given the court of appeals' decision to "strike down" the Commission's "indecency policy" in its entirety, *id.* at 34a, and with respect to all its applications, *id.* at 124a-125a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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