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.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS CENTER FOR CREATIVE VOICES IN MEDIA AND THE FUTURE OF MUSIC COALITION

*Andrew Jay Schwartzman
Chrystiane B. Pereira
Media Access Project
1625 K Street, NW
Suite 1000
Washington, DC 20006
(202) 232-4300
andys@mediaaccess.org

November 3, 2011

* Counsel of Record

QUESTION PRESENTED

Whether the court of appeals properly determined that the Federal Communications Commission's (FCC) context-based indecency policy is unconstitutionally vague and accordingly unenforceable.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Center for Creative Voices in Media and Future of Music Coalition (jointly "Center") respectfully submit this corporate disclosure statement. The Center of Creative Voices in Media does not have a parent company and no publicly held company owns 10 percent or more of stock therein. The Future of Music Coalition does not have a parent company and no publicly held company owns 10 percent or more of stock therein.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES-Continued

Page

TABLE OF AUTHORITIES-Continued

Page

Statute

TABLE OF AUTHORITIES-Continued

Page

Administrative Orders

TABLE OF AUTHORITIES-Continued

Page

Other Authorities

TABLE OF AUTHORITIES-Continued

Page

TABLE OF AUTHORITIES-Continued

Page

TABLE OF AUTHORITIES-Continued

Page

STATEMENT

Respondent Center for Creative Voices in Media ("CCV") is an organization dedicated to protecting and promoting the interests of its constituents, who create and provide artistic content to broadcast programs. CCV's Board of Advisors includes writers, producers, actors, authors, and other creative professionals. CCV seeks to safeguard and enrich the vitality and diversity of our nation's democracy and culture, by educating legislators, regulators, the press, and the public on the significant social benefits the American people will realize when our nation's media environment nurtures and supports independent, original, diverse, and creative voices.

Future of Music Coalition ("FMC") is a national nonprofit organization that works to nurture a diverse musical culture where artists flourish, are compensated fairly for their work, and where fans can find the music they want. Founded in June 2000 by musicians, artist advocates, technologists and legal experts, FMC works to ensure that musicians have a voice in the issues that affect their livelihood. FMC's work is rooted in the real-world experiences and ambitions of working musicians, whose perspectives are often overlooked in policy debates. Guided by a firm conviction that public policy has real impact on the lives of both musicians and fans, FMC advocates for a balanced approach to music in the digital age — one that reflects the interests of all stakeholders, and not just the powerful few. FMC has been a strong proponent of development of community-based, low-power FM radio stations that support local and regional music tastes often ignored by large, group-owned stations. It has been an active

participant in FCC proceedings concerning limits on broadcast ownership, taking the position that concentration of media ownership has restricted program format diversity. Like CCV, FMC has filed comments supporting limits on broadcast ownership as a means of promoting diversity[1] and participated in the FCC's "localism" docket.[2]

Creators such as those represented by CCV and FMC are at the forefront of creating and delivering speech. These writers, directors and musicians work under the pressure of deadlines, financial constraints and stiff indecency penalties hinging upon their prognostics as to the likelihood their particular use of a particular phrase is so "demonstrably essential to the nature of an artistic work" as to constitute the "rare case" in which "profan[ity] will not be found to be profane."[3] The inhibiting environment thus

---

[1] FMC has submitted several detailed analyses to the FCC showing a relationship between group ownership and the loss of diversity in radio music formats. *See*, *e.g.*, Future of Music Coalition, "Do Radio Companies Offer More Variety When They Exceed the Local Ownership Cap?" http://futureofmusic.org/filing/fmc-comments-filed-fcc-broadcast-ownership-proceeding.

See Prometheus Radio Project v. FCC, 373 F.3d 372, 432 (3d Cir. 2004) (citing FMC comments).

[2] These comments may be viewed at

http://futureofmusic.org/files/FMClocalismreplycomments08.pdf (FMC comments); and

http://www.creativevoices.us/cgi-upload/news/news_article/LocalismCommentsApril2008.pdf (CCV comments).

[3] *Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCCRcd 2664, 2670, ¶19 (2006) ("*Omnibus Order*") (JA 52).

created directly interferes with the process of artistic and creative expression which lies at the heart of what the First Amendment was designed to protect. This chilling effect is most pronounced upon non-commercial and other small stations, especially the low-power FM stations FMC has fought to create.[4]

Generally, Petitioners' brief misleadingly presumes the Commission's policy only affects large, network-owned, television stations, simply because it has affected ABC and Fox. That presumption is incorrect.[5] Contrary to Petitioners' suggestion, not all licensees are "highly sophisticated entities" with "personnel and internal rules dedicated to compliance with" the FCC's indecency standard.[6] Thousands of radio and TV stations lack those entities' history in dealing with the Commission, through which sophistication with its methods may be borne, and have nowhere near equivalent resources or staff.

---

[4] S*ee FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S.Ct 1800, 1835-38 (2009) (Breyer, J., dissenting) (addressing "likelihood that smaller independent broadcasters, including many public service broadcasters,...would reduce local coverage, indeed cancel coverage, of many public events....").

[5] ABC owns 10 television stations, per its disclosure at http://corporate.disney.go.com/corporate/overview.html. Fox owns 27 television stations. *See* http://www.newscorp.com/operations/tvstations.html. They represent a small subset of the 30,643 total broadcast stations per the FCC's count as of March 31, 2011. FCC News, Broadcast Station Totals as of Mar. 31, 2011 (rel. May 6, 2011), at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC306575A1.pdf. Per the same release, there were 1,774 full-power TV stations, 2,172 low-power TV stations and 14,729 full-power radio stations on the air, plus 859 low-power FM stations.

[6] *See* Pet'r's Br. at 19-20.

Indeed, most community-based, low-power radio stations operate entirely with volunteers.[7] FMC also works to promote niche formats and regional music formats on smaller radio stations throughout the US, where new and cutting edge music that never has been vetted by a large record label's legal team is likely to appear.

Alongside these radio stations there are hundreds of full-power and more than 2,000 low-power television stations. While a not insignificant portion of smaller stations are operated by large group owners with resources and staff – which is not to concede that the Commission's indecency standards are sufficiently precise – a vast number have tiny staffs, no lawyers and limited resources. Those stations have no possible way to address a policy, enforcement of which leaves mystifying clouds of words behind for prognostication.

The vague and confusing nature of the FCC's actions has resulted in uncertainty as to what constitutes "indecent" programming. Petitioners go so far as to argue that those left uncertain simply should choose to remain indefinitely confused by stuffing any and all potentially implicated programming between the hours of 10 p.m. and 6 a.m. when a regulatory safe harbor would leave any questions up

---

[7] *See* Comments of Prometheus Radio Project, Future of Music Coalition, United Church of Christ, Office of Communication, Inc., In the Matter of Creation of a Low-Power Radio Service, Docket No. 99-25, Sept. 6, 2011, at 4-5 (noting difficulties of grassroots groups in even navigating the LPFM application process, using volunteers and, on occasion, volunteering attorneys). *Available* at http://fjallfoss.fcc.gov/ecfs/document/view?id=7021707649.

in the air.[8] But this is not a working model for creators competing for a limited audience and increasingly limited financial support. It is even less appropriate in the context of radio, where several hundred songs may be broadcast in a single day.

The Commission's action in this and other cases has affected the output of creators in a manner that the Court did not intend or sanction in *FCC v. Pacifica Found.,* 438 U.S. 726 (1978). For example, licenlicensees have mandated that creators edit their programming simply as a precautionary measure—the inevitable tendency to err on the side of caution means that the impact of the Commission's action is often broader than its plain language would suggest. In other cases, licensees have flatly refused to air certain programming for fear of being subject to complaints of indecency.[9]

Without coherent and consistent guidelines as to what constitutes indecent programming, creators are literally at a loss for words. Each keystroke comes under pressure of speculation as to how far creativity and expression can reach before prompting a complaint. The Commission's decisions, therefore, have resulted in a palpable chill on free speech.

The Commission's indecency enforcement also limits the source material for artists. Most artists

---

[8] *See* Pet'r's Br. at 20.

[9] *See* Brief for *Amici Curiae* Public Broadcasters in Support of Respondents, *FCC v. Fox, et al.*, No. 07-582, Aug. 2008, at 12-16 (listing and discussing several such examples), 25 ("FCC's current policy has had a profound chilling effect on [*amici's*] programming by preventing them from airing unedited versions of many programs for fear of massive liability.").

consume television and radio with a heightened interest in observing and building upon the work of other creators in their industry. Thus, a critical aspect of the creative process is to have access to diverse programming, which enables and fosters further creative expression. None of this is to say that recreational television and radio viewing, of which creators also partake, warrants less protection. Creators and their public, as individual viewers and listeners, are entitled to expect a diversity of creative expression. The current indecency regime also fails by preventing viewers and listeners from receiving access to protected speech and expression.

SUMMARY OF ARGUMENT

I. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), provides the rationale for the Commission's indecency regulations. *Pacifica* directly addressed the constitutionality of indecency regulations without reliance on *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 376 (1969) or its associated "scarcity rationale," *id.* at 390. Consistent with that Court's explicit rejection of the FCC's attempt to offer the *Red Lion* scarcity rationale as any basis for indecency regulations, the line of precedent associated with *Pacifica* is about censorship and suppression of indecency.[10] This is in stark contrast to *Red Lion*, which is designed to promote more speech, and its progeny.[11]

---

[10] *See, e.g., Denver Area Educ. Tellecomm. Consortium v. FCC*, 518 U.S. 727, 743-47 (1996) (Breyer, J., plurality); *Action for Children's Television*, 58 F.3d 654, 660 (D.C. Cir. 1995) (*en banc*).

[11] *See* Brief in Opposition of Intervenors Center for Creative Voices in Media and The Future of Music Coalition, On Petition for a Writ of Certiorari, No. 10-1293, May 23, 2011, at 3-4

The *Pacifica* court properly rejected the FCC's attempt to offer *Red Lion* as any basis for indecency regulations, and the precedent for broadcast indecency remains *Pacifica*, and not *Red Lion*. Because this case presents the narrow question of the constitutionality of broadcast indecency regulations designed for censorship and suppression, *Pacifica*, and not *Red Lion*, is apposite.

II. The FCC's "indecency" findings at issue in this case relied on application of an unconstitutionally vague, context-based policy. The Commission's current indecency policy cannot be reconciled with *Pacifica*. Nothing in *Pacifica* authorizes the FCC's new, hard line on indecent speech, and its holding most certainly did not approve restrictions on fleeting and isolated images or words. Justices Powell and Blackmun, who cast the decisive votes in *Pacifica*, stated an understanding that no chilling effect would be had upon broadcasters from its sanction of repeated use of expletives because the FCC would "proceed cautiously, as it ha[d] in the past."[12] The FCC today, as exemplified by the applications at issue in this case, is not proceeding cautiously as it runs roughshod over free expression protections and chills speech.

III. The Court should avoid entertaining other parties' invitations to evaluate *Red Lion* or its rationale in the context of this unrelated proceeding. The *Red Lion* rationale is irrelevant to this case, as it was

---

(discussing *Red Lion* line of cases). *See also* Brief of *Amici Curiae* Yale Law School Information Society, et al., 10-1293, at 8-9, 15-16, 17-23, 27-29 ("Yale Br.") (more fully analyzing same line and its associated impact).

[12] *Pacifica*, 438 U.S. at 761 n.4.

to *Pacifica*. The *Red Lion* line of cases relate to a broader discourse-*promoting* body aimed, for example, at structuring the media so as to ensure the widest dissemination by diverse sources (*e.g.* spectrum policy rules, ownership limits, universal service mandates). The principles of *Red Lion* repeatedly have been reaffirmed by this Court and lower courts. Thus questioning *Red Lion*, even in *dicta*, in the context of a proceeding that does not rely upon the scarcity rationale, could render unconstitutional the many discourse-promoting statutes and regulations it has served to support, throwing media, Internet and spectrum policy into chaos.

ARGUMENT

The Court of Appeals properly invalidated the "indecency" findings at issue, which relied on application of an unconstitutionally vague, context-based policy. Respondents respectfully request that this Court maintain the distinction between the *Red Lion* and *Pacifica* line of cases by holding that the FCC's actions are unconstitutional under *Pacifica*. Neither the Court of Appeals nor the FCC revisited or relied upon *Red Lion*, respectively, in reaching their differing decisions. Nevertheless, for the first time in this litigation, the government, as if to recognize that *Pacifica* provides no coverage for the stupefying chill that the current FCC indecency regime inflicts upon protected expression, attempts to frame this case around fundamental questions about the sources of authority for broadcast regulation. In so doing, it seeks support for the Commission's actions from the unrelated, inapposite *Red Lion* decision.[13]

---

[13] *See* Pet'r's Br. at 42-44 (describing scarcity, *inter alia*, as rationale for limited First Amendment scrutiny of a require-

No manner of argument can change the fact that *Red Lion* and its underlying rationales are irrelevant to this case. While the Court may wish to review the factual premises underlying *Pacifica*, despite the fact that it need not do so to properly decide this case, such reconsideration could only have a minimal impact, limited to broadcast outlets. By contrast, questioning *Red Lion* could undermine current and forward-looking laws, and cast doubt on every spectrum license. Arguably, this is precisely what ABC seeks to do when diverting the Court's attention to its opinion that *Red Lion* would be "untenable today" and broadly arguing that the Court subject all "content-based restrictions on broadcasters' expression" to strict scrutiny.[14] Yet all *Red Lion* can be here is a red herring. When, if ever, a proceeding before this Court actually relies upon the scarcity rationale, then those interested parties properly will have the opportunity to brief its factual underpinnings and relevance. Until then, the Court should not entertain the invitation of any party to this unrelated case to address *Red Lion*.

I. NOTHING IN *PACIFICA* AUTHORIZES THE FCC'S NEW INDECENCY POLICY.

The FCC's indecency policy as articulated in the orders under review is unconstitutionally vague in violation of the First Amendment and the due

---

ment that licensees "accept content-based restrictions that could not be imposed on other communications media.").

[14] Brief in Opp'n of ABC, Inc. et al., On Petition for a Writ of Certiorari, No. 10-1293, May 23, 2011, at 30, 32. *See also* Yale Br., at 9-10.

process clause of the Fifth Amendment and cannot be sustained by reliance on *Pacifica*.

A. *PACIFICA* WAS A NARROW RULING PROCEEDING FROM THE EXPECTATION THAT THE COMMISSION WOULD TREAD CAUTIOUSLY.

Pacifica directly addressed the constitutionality of indecency regulations without reliance on *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 376 (1969), or its associated "scarcity rationale," *id.* at 390.

In *Pacifica* the Supreme Court ruled only that the particular program "as broadcast" was indecent.[15] Justices Powell and Blackmun, two of the five members of the Court's majority, rejected the broadcaster's overbreadth challenge to the FCC's indecency definition based on the understanding that "the Commission may be expected to proceed cautiously as it has in the past."[16] Significantly, the Powell concurrence made plain that *Pacifica* did not proscribe regulation against "isolated use of a potentially offensive word," *id.* at 760-61.

One of the factors leading to the Court's narrow affirmance of the FCC appears to have been the opinion of Judge Leventhal in the decision below. Leventhal, a highly respected jurist who dissented and opined that the only issue before him was the

---

[15] 438 U.S. at 734. *See also id.* at 742 ("Our review is limited to the question of whether the Commission has the authority to proscribe this particular broadcast….").

[16] *Id.* at 761-62 n.4 (Powell, J., joined by Blackmun, J., concurring) (contemplating further that the policy would not create "an undue 'chilling' effect on broadcasters' exercise of their rights.").

narrow question of the reasonableness of the FCC's treatment of an afternoon broadcast of the Carlin monologue, was repeatedly referenced by Justices Blackmun and Powell in conference.[17] Justice Blackmun noted that "the FCC's order was not a very good one, and [Judge] Leventhal tried to save it. I came out with him."[18] The Conference Notes also report that Justice Stevens, who authored the majority opinion, opined the Court "should also accept the FCC representation that Leventhal correctly read its order."[19]

Consistent with the Court's intent, many at the time understood the decision to narrowly justify a restrained form of broadcast indecency regulation. For example, when supporting the decision in an editorial, the *Washington Post* noted that neither Justice Stevens nor Justice Powell suggested "that the FCC should require that the occasional dirty word be bleeped out or that programming should always be aimed only at family audiences."[20] Throwing more weight behind this public perception,

---

[17] Angela Campbell, *Pacifica Reconsidered: Implications for the Current Controversy Over Broadcast Indecency*, 63 FED. COMM. L.J. 195, 256-57 (2010).

[18] *The Supreme Court in Conference (1940-1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions* 373 (Del Dickson ed., 2001). *See also* Campbell, *Pacifica Reconsidered*, 63 FED. COMM. L.J. at 230, n. 248 (discussing same). Campbell adds that Justice Powell voiced his agreement with Leventhal's decision to "construe what the decision is as narrowly as possible." *Id.* n. 249.

[19] *Id.*

[20] *See* Campbell, *Pacifica Reconsidered*, 63 FED. COMM. L.J. at 243 n.339 (citing Editorial, "Seven Naughty Words," WASH. POST, Jul. 7, 1978, at A18.).

Commissioner Abbott Washburn, who had been on the FCC when it issued the Pacifica Declaratory Order, assured his audience in a subsequent speech to the Federal Communications Bar Association that the Commission would not go "on a regulatory spree as a consequence."[21]

In manner underscoring its disinclination to distort *Pacifica*, the FCC sought to immediately allay public concerns with clear indication that it would tread very carefully in its regulation of indecent speech to avoid violating the First Amendment. According to the chief of staff to then-FCC Chairman Charles D. Ferris, Frank Lloyd, Ferris instructed him to "find the first possible indecency complaint that comes in and make it clear that that case will never reoccur at the FCC."[22] The Commission picked a case against a Boston public TV station, which rendition of Molly Bloom's soliloquy in *Ulysses* had all the seven dirty words in it. In a unanimous decision in that station's favor, the Commission stated its intention to "construe the *Pacifica* holding consistent with the paramount importance we attach to encouraging free-ranging programming and editorial discretion by broadcasters."[23]

---

[21] Abbott Washburn, FCC Commissioner, "Luncheon Address Before the Federal Communications Bar Association, Washington, D.C.: Indecency and the Law in Broadcasting," Mar. 7, 1979. *See also* Campbell, *Pacifica Reconsidered*, 63 FED. COMM. L.J. n.68 (noting that Washburn sent a copy of the speech to Justice Blackmun, who filed it in the *Pacifica* case files.).

[22] Campbell, *Pacifica Reconsidered*, 63 FED. COMM. L.J. at 243-44, n.341.

[23] *WGHB Educational Foundation, Memorandum Opinion and Order*, 69 FCC2d 1250, ¶10-11 (1978).

In a subsequent speech, Chairman Ferris predicted that "[t]he particular set of circumstances in the Pacifica case is about as likely to occur again as Halley's Comet"[24]; and for the next 10 years, the FCC made it look as if this would be the case.[25] Observing the FCC's deference to reasonable licensee judgments, the D.C. Circuit rejected an overbreadth challenge to the Commission's definition of indecency. *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 n.14 (D.C. Cir. 1988) (hereinafter "*ACT*"). Then-Judge Ruth Bader Ginsburg authored the court's opinion, reasoning that "the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy." *Id.* Like the Supreme Court in *Pacifica*, the D.C. Circuit in *ACT* did not contemplate, much less sanction, a new FCC regime based on the Commission's own highly subjective judgment of "contextual" factors.

The Commission's noteworthy restraint remained evident in its subsequent dismissal of a complaint regarding broadcast of NPR's *All Things Considered*

---

[24] Campbell, *Pacifica Reconsidered*, 63 FED. COMM. L.J. at 244 n.347. As if to explain why *Pacifica* would be rare, Chairman Ferris also noted that the FCC was "far more dedicated to the First Amendment premise that broadcasters should air controversial programming than [] worried about an occasional four-letter word." Charles Ferris, Chairman, FCC, Address Before the New England Broad. Assn'n, at 8 (Jul. 21, 1978).

[25] *See* Lilli Levi, *The FCC's Regulation of Indecency*, 7 FIRST REPORTS 1, 2, 13 (2008) (commenting on the FCC's avowed restraint and early reassurances to broadcasters) (cited in Campbell, 63 FED. COMM. L.J. n. 363). *See also Fox TV Stations, Inc. v. FCC*, 489 F.3d 444, 448-51 (2d Cir. 2007) (describing the evolution of the Commission's indecency regime).

program including a wiretapped telephone call where gangster John Gotti uttered 10 variations of the word "fuck" in rapid succession. *Peter Branton*, 6 FCCRcd 610 (1991), *rev. dismissed sub nom. Branton v. FCC*, 993 F.2d 906 (D.C. Cir. 1993). With *Branton*, the Commission took the opportunity to reaffirm its "traditional" "reluctan[ce] to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming," *id.*, signaling that the Courts could continue to rule deferentially.

B. THE FCC'S IMPERMISSIBLY VAGUE NEW POLICY HAS HAD A CHILLING EFFECT.

Today, the *Branton* decision is a relic of a bygone era. As the present case makes plain, restraint and editorial deference no longer characterize the Commission's indecency enforcement, which is rather akin to a "regulatory spree." The FCC has replaced a policy of reluctance to curb or chill the expression of broadcast licensees and creators with a standardless and largely meaningless framework, which cannot be reconciled with *Pacifica*, or with the First Amendment.[26]

---

[26] *See*, *e.g.*, *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) (construing the term "patently offensive," noting that vagueness of content-based regulation raises "special First Amendment concerns because of its obvious chilling effect on free speech."). *See also Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (striking down ordinance imposing public speaking fee determined by government official; holding licensing schemes that provide regulator with power to suppress speech without meaningful standards limiting its discretion are unconstitutional).

The Commission has sought to regulate broadcast indecency, which is permissible under *Pacifica*. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 1812 (2009). But its policy shift impermissibly has cast a nebulous "context" cloud in the determination of whether given content violates the FCC's indecency regulations. Nowhere in *Pacifica* did the Court suggest the Commission could distinguish among programming based on the merits of the surrounding content or the identity of the speaker. Elsewhere, the Court has held that the First Amendment cannot countenance standards as flimsy as these, which allow "*post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria," "making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988).

Ignoring legal precedent and its own earlier decisions, the Commission now opts to leave broadcasters and artists to decipher what will be "indecent" with no guidance at all. Sampling from the FCC's approach, creators may glean that *expletives* may *not* be indecent when uttered by (1) actors depicting soldiers in the heat of battle[27] or (2) entertainers on programs that feature news content,[28] yet

---

[27] *In re Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 FCCRcd 4507, ¶4 (2005) ("*Saving Private Ryan Order*").

[28] *In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCCRcd 13,299, ¶¶ 9, 70-73 (2006) ("*Remand Order*") (reversing course to "defer to

likely *are* impermissibly "indecent" when uttered by (1) actors in the heat of life-and-death police activities,[29] (2) entertainers at live awards show programs,[30] or (3) actual blues producers and hip-hop artists in a documentary.[31] The last guidepost, given in response to Martin Scorsese's documentary "The Blues: Godfathers and Sons," regarding blues music in Chicago, is particularly remarkable because the Commission concluded the language was indecent partly because "many of the expletives in the broadcast are not used by blues performers," but instead by hip-hop performers and a leading record producer.[32] Though the "licensee may have been under the good faith belief that the use of [] expletives served a legitimate informational purpose," and "may have had some communicative purpose," the Commission allowed, nevertheless it failed to "demonstrate that [the use of expletives] was essential to the nature of

---

CBS's plausible characterization of its own programming" in fleeting expletive use during interview with reality show contestant airing during "The Early Show" program).

[29] *Omnibus Order* ¶¶130, 134 (JA 117-119).

[30] *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Award" Program*, 19 FCCRcd 4975, ¶¶8, 12 (2004) ("*Golden Globes Awards Order*").

[31] *Omnibus Order* ¶¶72-86 (JA 84-94). In this portion of the *Omnibus Order* not later vacated, the Commission held that San Mateo County Community College District broadcast of Martin Scorsese's documentary "The Blues: Godfathers and Sons," which concerned the growth of blues music in Chicago, on a noncommercial station was actionably indecent, and issued Notice of Apparent Liability for Forfeiture.

[32] *Id.* at ¶77 (JA 88). *See also* Brief for *Amici Curiae* Public Broadcasters in Support of Respondents, *FCC v. Fox, et al.*, No. 07-582, Aug. 2008, at 10-11 (discussing same).

an artistic or educational work or essential to informing viewers on a matter of public importance."[33] If the FCC's decision regarding "The Blues" is guide to anything, it is to deciding the unconstitutionality of the policy it reflects, which hinges on "esthetic and moral judgments about art and literature" that "are for the individual to make, not for the Government to decree." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000).

For individual artists and broadcasters seeking to make judgments about content, the Commission's decisions not only fail to guide but constitute a blindfold, and a muzzle.

As this Court earlier cautioned, uncertainty prompts citizens to "steer far wider of the unlawful zone…than if the boundaries of the forbidden areas were clearly marked."[34] The FCC's expansion of its policy far past what *Pacifica* contemplated violates the First Amendment by chilling creators and broadcasters, and shielding the public, from authentic program offerings. The Commission's extremist approach threatens to damage the quality of programming and prevent realistic portraits of many persons, subjects and situations. By abandoning restraint and crossing the line into arbitrary and unconstitutional agency action, the Commission profoundly impacts artists seeking to express themselves as creatively as possible. Already, the Commission's shift in indecency policy has prohibited

---

[33] *Id.* at ¶82 (JA 90-91).

[34] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (also noting that "where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit exercise of [those] freedoms.").

a "substantial" amount of protected speech, "judged in relation to [its] plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

In response to the FCC's new hard line, the National Association of Broadcasters earlier drew this Court's attention to the many broadcasters who "have been strong-armed into consent decrees that mandate substantial self-censorship even when there is only a *preliminary* suggestion that indecent material may have been broadcast."[35] For example, 66 out of a total of 225 ABC affiliate stations declined to air the November 11, 2004 network broadcast of "Saving Private Ryan" following the FCC's release of the *Golden Globe Awards Order*,[36] despite the fact that the Enforcement Bureau previously had held that an unedited broadcast of the same film did not violate indecency regulations.[37]

The FCC's policy shift also has chilled news reporting across the country. New York station WNET cut an image of graffiti that read "Fuck America" from video shot in Baku, Azerbaijan for its series addressing the United States' challenge in maintaining a stable supply of oil. Despite the fact that intense hostility to the United States was crucial to the program's message, the station was too uncertain about the FCC's policy to risk its inclusion.[38] Simi-

---

[35] Brief for *Amici Curiae* National Association of Broadcasters and Radio Television News Directors Association in Support of Respondents, *FCC v. Fox, et al.*, No. 07-582, Aug. 8, 2008, at 3 ("NAB 2008 Br.").

[36] *Id.* at 20.

[37] *Saving Private Ryan Order*," 20 FCCRcd 4507, ¶4.

[38] Brief for *Amici Curiae* Public Broadcasters in Support of Respondents, *FCC v. Fox, et al.*, No. 07-582, Aug. 2008, at 14

larly crucial content was withheld from the American public when, due to the soldiers' explicit language, PBS affiliates rejected broadcast footage from Iraq.[39]

Likewise, out of an overabundance of caution, some broadcasters refused to air a Peabody Award-winning documentary of the September 11 attacks, while others censored or delayed Ken Burns' World War II documentary "The War," because the fourteen-hour film series contained four expletives.[40] Liability concerns prompted other stations to edit a documentary about President George H.W. Bush, which narration repeated a conversation in which President Lyndon Johnson advised President Bush (then a member of the House) to run for Senate because "the difference between being the member of the Senate and a member of the House is the difference between chicken salad and chicken shit."[41]

Frontline took a scalpel to its documentary "The Soldier's Heart," which reported U.S. soldiers' difficulties in seeking treatment for post traumatic stress disorder while serving in Iraq, only to be chastised by the Commission for not taking an ax. Its producer excised the word "fucking" from a segment in which a

---

("PBS Br."). *See also* NAB 2008 Br. at 24, n. 15. (reporting that television stations in Phoenix, Arizona cut away from live coverage of a former NFL star and Army Ranger, Pat Tillman, who was killed in combat operations in Afghanistan, as his brother twice stated that he was "fucking dead.").

[39] NAB 2008 Br. at 25, n. 17.

[40] *Id.* at 21-22, n.8, n.10.

[41] PBS Br. at 13 (discussing this example among several others.).

veterans' advocate revealed a soldier suffering from PTSD was called a "fucking pussy" by superiors seeking to set an example discouraging other sufferers. This prompted an FCC Letter of Inquiry regarding inclusion of "pussy."[42] Such a letter would be particularly persuasive in the editorial departments of struggling stations given the FCC's decision to combine its policy shift with a ten-fold hike in the dollar figure for the maximum monetary forfeiture for uttering a single expletive – from $32,500 to $325,000 per station.[43]

Caution is the only option for those independent broadcasters who wish to remain viable in difficult economic times. The Commission fined the San Mateo County Community College District $15,000 for airing *The Blues* with fleeting expletive use by actual blues producers and hip-hop artists.[44] The independent Aerco Broadcasting Company fared even worse, being slapped with a $220,000 fine for showing racy Spanish-language music videos.[45] While producers of Fox's "Prison Break" may have the luxury of "hir[ing] a Spanish language consultant after it was learned that Spanish words that were completely acceptable when spoken by a Puerto Rican character might mean something different in

---

[42] *See* PBS Br. at 14-15.

[43] *See* Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006).

[44] *Omnibus Order* ¶86 (JA 94).

[45] *Omnibus Order* ¶237 (JA 173).

another Hispanic culture,"[46] independent producers struggling for program carriage may not.

In an effort to avoid hefty fines for inadvertent slips, one broadcaster spent approximately $200,000 to outfit its 24 stations with delay technology to censor live programming.[47] As budgets tighten, stations may choose to stop airing any live programming. Per PBS's calculus in 2008, the new maximum forfeiture meant that if all (then 356) of its member stations carried a broadcast containing a single expletive, their exposure would be more than $115 million, which was then nearly a third of the total federal support for public broadcasting.[48] Such a price-tag renders it reasonable for 80% of PBS affiliates to reject broadcast footage from the time leading up to Iraqi elections and the battle of Fallujah because soldiers used explicit language.[49]

While penalties are levied on licensees, their economic consequences flow downstream to creators and performers, some of whom have been forced to indemnify their employers.[50] As if that were not

---

[46] Decl. of Nicole A. Bernard on Behalf of Fox Television Stations, Inc., In the Matter of Remand of Section III.B of the Commission's Mar. 15, 2006 *Omnibus Order* Resolving Numerous Broadcast Television Indecency Complaints, Sept. 20, 2006, at 4 (JA 284).

[47] *See* NAB 2008 Br. at 26, n. 19.

[48] Brief for *Amici Curiae* Public Broadcasters in Support of Respondents, *FCC v. Fox, et al.*, No. 07-582, Aug. 2008, at 12.

[49] Letter from Jim Dyke, Executive Dir., TV Watch to FCC, Sept. 21, 2006, Exh. A, at 3 (JA 279).

[50] *See*, *e.g.*, Frank Ahrens, "Six-Figure Fines for Four-Letter Words Worry Broadcasters," WASH. POST, July 11, 2006, 2006 WLNR 11941250.

enough deterrent, the Commission further has abused its narrow indecency powers by extracting consent decrees reaching deeply into the employment practices of broadcasters. *In re Clear Channel Commc'ns Inc.*, 19 FCCRcd. 10,800, 10,886 (2004), for example, involved a consent decree requiring a broadcaster to ferret employees "materially participating" in the broadcasting of allegedly indecent content and in certain instances discipline on-air talent with remedial "significant time delay[s] – up to five minutes," or fire them altogether.

II. *RED LION* IS INAPPOSITE AND IRRELEVANT.

Attempting to gain a foot where an inch is in play, some broadcasters rail against the FCC's ability to structure spectrum licenses by arguing that this case puts at issue *Red Lion*'s "scarcity rationale."[51] The Government, whether in response or attempting to salvage an indecency regime that would be unconstitutional under *Pacifica*, tosses in its own attempt to frame this case as fundamentally questioning its sources of broadcast regulatory authority by suggesting *Red Lion* could preserve the policy at issue here.[52] With these arguments, both sides stretch the facts well beyond this case. The Court should follow its practice of rejecting calls for "formulat[ing] a rule of constitutional law broader

---

[51] Brief in Opp'n of Fox, *et al.*, On Petition for a Writ of Certiorari, No. 10-1293, May 23, 2011, at 27; Brief in Opp'n of ABC, Inc., et al., On Petition for a Writ of Certiorari, No. 10-1293, May 23, 2011, at 30, 32.

[52] Pet'r's Br. 42-44.

than is required by the precise facts to which it is to be applied."[53]

The Court's inquiry properly should assess the facts and justifications behind the FCC's indecency regulations rather than examine unrelated issues of spectrum policy. This case presents the narrow question of the constitutionality of broadcast indecency regulations designed for censorship and sup-suppression, rendering *Red Lion* inapposite and irrelevant. The FCC acknowledged the same when it relied on *Pacifica*, not *Red Lion*, in its *Omnibus Order*, its *Golden Globes Order*, and its *Remand Order*. As Justice Breyer noted in his earlier dissent, with respect to a similarly belated attempt by the Government to save the FCC from itself, the Court here "must consider the lawfulness of an agency's decision on the basis of the reasons the agency gave, not on the basis of those it *might have* given. *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 [] (1947).[54] And the FCC did not make this claim. Hence, we cannot take it into account and need not evaluate its merits."[55] When the FCC did attempt to list scarcity as

---

[53] *See Kremens v. Bartley*, 431 U.S. 119, 136 (1977).

[54] *Chenery* held that when presented an administrative agency decision, a reviewing court may only affirm the decision based on grounds invoked by the agency. "If those grounds are inadequate or improper," the Court continued, "the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency." *Id.* at 196.

[55] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 1838-39 (2009) (Breyer, J., dissenting) (rejecting the Solicitor General's attempt to defend the policy at issue by referencing the indecency statute's prohibition on the broadcast of any indecent language, and arguing its goal is to eliminate

one of its bases for authority for indecency, in *Pacifica*, this Court explicitly rejected its argument that the *Red Lion* scarcity rationale had any bearing.[56] So should it do here, in the event it rejects disposing of this argument swiftly through application of the *Chenery* Doctrine.

A. THIS COURT AND THE FCC HAVE ACKNOWLEDGED *RED LION* HAS NO BEARING ON INDECENCY REGULATION.

This case is about indecency regulations, a concept not discussed or even alluded to in *Red Lion*. Indeed, in his otherwise stinging dissent in *Pacifica*, Justice Brennan commended the other opinions' rejection of scarcity as a basis for indecency regulation.[57] "The opinions…rightly refrain from relying on the notion of 'spectrum scarcity' to support their result," he noted; for "although scarcity has justified increasing the diversity of speakers and speech, it has never been held to justify censorship."[58]

As it was with *Pacifica*, *Red Lion* has no bearing on the current case, because that Court sought to

---

nuisance, which even fleeting use of expletives can constitute) ("The Solicitor General adds that the statutory word "any" indicates that Congress did not intend a safe-harbor for a fleeting use of that language. The fatal flaw in this argument, however, lies in the fact that the Solicitor General and not the agency has made it.").

[56] *Pacifica*, 438 U.S. at 731, n.2. The Court disregarded that basis and rested its decision on the FCC's three other bases. *Compare id. with id.* at 748-51.

[57] *Id.* at 770, n.4.

[58] *Id.* (citations and internal quotations omitted).

expand access to broadcast frequencies to a wider swath of people than just incumbent broadcasters, whereas here this Court addresses the attempt to *inhibit* what is capable of being broadcast. *Red Lion* revolved around an individual who felt he had been personally attacked during a broadcast by the Red Lion Broadcasting Company and demanded free reply time to defend himself and state his position, 395 U.S. at 371-72. It was not about a broadcast containing indecent content or an attempt to regulate indecent content on broadcast frequencies. In recognition of *Red Lion*'s irrelevance to indecency regulation, in 1987, the Commission explicitly abandoned scarcity as a justification for indecency regulation,[59] and its abandonment continued with the Orders at issue in this case.

B. THE GOVERNMENT INTERESTS FURTHERED IN INDECENCY CASES DIFFER FROM THOSE IN *RED LION* CASES.

It is not only the facts of *Red Lion* that prevent the case from application to indecency regulation. In every aspect, *Red Lion* stands for the principle of providing broader access to broadcast frequencies.

The Court in *Red Lion* observed the government's stated interest to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," in light of "the right of the public to receive suitable access to social, political, esthetic, moral, and other

---

[59] *Pacifica Found., Inc.*, 2FCCRcd 2698, 2699, *aff'd on recon.*, *Infinity Broadcasting Corp. of Pa.*, 3 FCCRcd 930 n.11 (1987), *aff'd in part, rev'd in part on other grounds*, *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

ideas and experiences," which "may not constitutionally be abridged." 395 U.S. at 390. This is starkly different from, and unrelated to, the government's interests in indecency regulations, which relate to protecting children from patently offensive content and ensuring an individual's privacy in her home.[60]

With that speech-promoting interest in mind, *Red Lion* favors protecting and encouraging wider access to broadcast frequencies by allowing for "those unable without government assistance to gain access to those frequencies for expression of their views." 395 U.S. at 401. To that end, that Court took into account "the scarcity of broadcast frequencies," the government's "role in allocating" frequencies, and the "legitimate claims" of other "potential users." *Id.* at 400-01. In so doing, the Court applied a "less rigorous standard of First Amendment scrutiny,"[61] which several circuit courts since have described as "rational basis,"[62] and which this Court since has applied to uphold laws or regulations that are "a reasonable means" of "promoting the public interest in diversified mass communications."[63]

As a means of promoting that public interest, this Court has endorsed attempts to foster diverse infor-

---

[60] *See generally Pacifica*, 438 U.S. at 748-49.

[61] *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637 (1994) ("*Turner I*").

[62] *See, e.g.*, *Prometheus Radio Project v. FCC*, 373 F.3d 372, 401-02 (3d Cir. 2004); *Sinclair Broad. Group, Inc. v. FCC,* 284 F.3d 148, 167 (D.C. Cir. 2002); *Fox TV Stations v. FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002).

[63] *See FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 802 (1978) ("*FCC v. NCCB*").

mation sources in cases involving broadcasting,[64] cable,[65] and newspapers,[66] and has upheld lower courts endorsing diverse information sources through telephone networks.[67] In the seminal case *Turner Broadcasting System v. FCC* ("*Turner I*"), the Court held that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[68]

Red Lion's focus on spectrum allocation is inapposite to that here. Here, the Government's concern is akin to that in *Pacifica*, which elucidated the rationales of pervasiveness, intrusiveness, and accessibility to children to justify the regulation of broadcasters' indecent speech.[69] The rationales used in *Pacifica* are perfectly suited for analysis of this case; whereas, the rationales used in *Red Lion* have no applicability to indecency regulations, as the Court acknowledged in *Pacifica*, *supra*.

---

[64] *See, e.g., CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

[65] *Turner I*, 512 U.S. at 663; *United States v. Midwest Video Corp.*, 406 U.S. 649, 668, n.27 (1972) (plurality opinion).

[66] *See*, *e.g.*, *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *see also FCC v. NCCB*, 436 U.S. 775, 799 (1978) (upholding limitation on newspaper/broadcast cross-ownership).

[67] *See United States v. AT&T*, 552 F. Supp 131, 183-86 (D.D.C. 1982), *aff'd sub nom*, *Maryland v. United States*, 460 U.S. 1001 (1983).

[68] *Turner I*, 512 U.S. at 663; *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 190, 227 (Breyer, J., concurring) ("*Turner II*").

[69] For a fuller discussion of the differing lines of precedent governing the constitutionality of these two different sets of governmental actions, *see generally* Yale Br. at 8-25.

In cases of broadcast regulation, courts have been able to determine whether the government is attempting to target and suppress particular views and particular content, applying a heightened scrutiny for suppressing editorializing,[70] commercial speech,[71] and indecency.[72] Were *Red Lion* nevertheless ripe for revisitation, broadcasters could bring the appropriate case. This is not that.

C. REVISITING *RED LION* WOULD CREATE A HOST OF PROBLEMS AND SOLVE NONE.

Respondents believe that the FCC's policies do not pass muster under *Pacifica*. Were this Court, however, to find *Pacifica*'s reconsideration expedient, the broader regulatory landscape would see limited effects. Until recently, the FCC has been cautious in policing indecency; thus revisiting *Pacifica* at most would affect indecency regulation in broadcast media, and upset a plurality opinion regarding cable basic-tier programming.[73] No case relying on *Pacifica* has explicitly applied a standard other than strict scrutiny; as such its reconsideration to provide

---

[70] *See FCC v. League of Women Voters of California*, 468 U.S. 364, 376 (1984).

[71] *See, e.g., Greater New Orleans Broadcasting Ass'n v. FCC*, 527 U.S. 173 (1999).

[72] *See Action for Children's Television v. FCC*, 58 F.3d at 660.

[73] *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 743-47 (1996) (Breyer, J., plurality) (not announcing a standard, but merely reasoning by analogy to *Pacifica*).

broadcasters greater breathing room on indecency likely would minimally impact other regulation.[74]

Revisiting *Red Lion* is another matter. *Red Lion* continues to serve as bedrock for valuable telecommunications policy. As a result, casting doubt upon *Red Lion*'s scarcity rationale affects the infrastructure for diverse and informed public debate on issues central to self-governance.[75] Questioning *Red Lion*, even in *dicta*, in a proceeding that does not rely upon the scarcity rationale, could upset the many discourse-promoting regulations it has served to support, throwing media, Internet and spectrum policy into chaos.[76]

With its associated line of cases,[77] *Red Lion* remains precedent for three major classes of statutes and regulations, all of which differ from indecency regulations. The constitutionality of each of them would be jeopardized were *Red Lion* altered.

---

[74] *See*, *e.g.*, *Action for Children's Television v. FCC*, 58 F.3d at 661 (applying "strict scrutiny to [broadcast indecency regulation] regardless of the medium affected by them," while asserting that the Court's "assessment…must necessarily take into account the unique context of the broadcast medium."). Dissenters agreed with respect to the application of strict scrutiny, *see id.* at 670 (Edwards, J., dissenting) (requiring "least restrictive means…"). *See also id.* at 684 (Wald, J., joined by Tatel J. and Rogers, J.) (indecency regulation "must be narrowly tailored to a compelling government interest.").

[75] *See generally* Yale Br. at 16-23.

[76] *See also id.* at 26-29 (arguing same).

[77] *See*, *e.g.*, *FCC v. Nat'l Citizens Comm. For Broad.*, 436 U.S. 775 (1978); *NBC v. United States*, 319 U.S. 190, 213 (1943); *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

First, *Red Lion* structures the media so as to ensure the widest dissemination by diverse sources. In this connection, *Red Lion* is the authority for rules relating to the structure and ownership of media and telecommunications. Specifically, altering its holding would effectively overrule *FCC v. NCCB*, which upheld the FCC's newspaper/broadcast cross-ownership rules, 47 CFR §73.3555(d), against constitutional challenge. [78] Moreover, *Red Lion* serves as basis for two other ownership statutes:

- Sections 202(b)-(c) of the Telecommunications Act of 1996, which impose ownership limits on TV and radio holdings.[79]

and

- 47 USC §335, which requires direct broadcast satellites to set aside at least four percent of their channel capacity for noncommercial, educational and informational programming.

Separately, *Red Lion* is a principal justification for must-carry statutes, including 47 USC §§532-533, which were upheld in *Turner I*, and lends the rationale for supporting the Satellite Television Extension and Localism Act of 2010, P.L. 111-151, which governs the retransmission of local TV broad-

---

[78] *FCC v. NCCB*, 436 U.S. at 802 (broadcasting ownership limitations are reasonable means to of "promoting the public interest in diversified mass communications; thus they do not violate the First Amendment rights of those who will not be denied broadcast licenses pursuant to them."). *See also Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

[79] Related, questioning *Red Lion* also could invalidate 47 CFR §73.3556, which sets a limit on the duplication of programming on commonly-owned stations.

cast programming on direct broadcast satellites.[80] Another structural category affected by *Red Lion* involves build-out[81] and universal service mandates effectuated through the licensing process.[82]

Second, *Red Lion* provides the foundation for laws promoting an informed electorate, including by ensuring political, educational and noncommercial programming.[83] In this respect, *Red Lion* served as a

---

[80] An earlier version of this statute was upheld by the Fourth Circuit in *Satellite Broadcasting and Communications Association v. FCC*, 275 F.3d 337. *See id.* at 356 ("Congress enacted the carry one, carry all rule to 'preserve free television for those not served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources." (quoting H.R. Conf Rep. Nol. 106-464 at 101 (1999).)

[81] Because of *Red Lion*, the FCC can routinely impose build-out requirements on wireless licensees, *see*, *e.g.*, Service Rules for the 698-746, 747-762 And 777-792 Mhz Bands, WT Docket No. 06-150, 23 FCCRcd 8047, 8053-54 (2008), without facing First Amendment challenges like the ones raised by cable operators against similar build-out laws, *see*, *e.g.*, *Century Federal, Inc. v. City of Palo Alto*, 719 F.Supp. 1552, 1554 (N.D. Cal. 1987) (striking down cable build-out rules).

[82] *See FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 360 (1958). *See also* Amendment of Section 3.606 of Comm'n's Rules & Regulations, Sixth Report & Order, 41 FCC 148, 167 (1952) (providing as the first three priorities of allocation: "(1) To provide at least one television service to all parts of the United States. (2) To provide each community with at least one television broadcast station. (3) To provide a choice of at least two television services to all parts of the United States.").

[83] The constitutional vitality of numerous other statutes and other regulations depends on scarcity. These include the Commercial Advertisement Loudness Mitigation ("CALM") Act, Pub. L. No. 111-311, 124 Stat. 3294 (2010) (codified at 47 USC § 621)(limiting the volume of TV commercials); The Twenty-First Century Communications and Video Accessibility Act of 2010,

basis for implementation of campaign disclosure requirements. With *Red Lion* could go the constitutionality of

- 47 USC §312(a)(7), as upheld in *CBS, Inc. v. FCC*,[84] affording federal candidates with a right of "reasonable access" to broadcast air time;
- 47 USC §315(a), the so-called "equal time" right for candidates for public office;
- 47 USC §315(b), which gives candidates the right to a discounted rate for air time;
- 47 USC §335(a), which applies public interest "equal time" and "reasonable access" provisions to direct broadcast satellites; and
- The Children's Television Act of 1990, 47 USC §§ 303a-303b, which mandates the carriage of minimum amounts of informational and educational programming for children.[85]

Pub. L. No. 111-260, 124 Stat. 2751, §202(b) (2010) (requiring video descriptions to assist the visually impaired); 47 CFR §73.1206 (notice that a telephone conversation is being broadcast); 47 CFR §73.1210 (limiting dual language broadcasts in Puerto Rico); and 47 CFR §73.1216 (regulating licensee-conducted contests).

[84] *CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

[85] Children's Television Programming, 11 FCCRcd 10660, 10729-34 (1996) (implementing The Children's Television Act of 1990). An accompanying Senate Report analyzed the constitutional issues and concluded the Act was constitutional under *Red Lion*. S. Rep. No. 227, 101st Cong., 1st Sess. 17 (1989).

Third, there is no reason to throw into doubt every single one of the tens of thousands of spectrum licenses conferred by the FCC or held by government, while reviewing a case limited to a few debatable television broadcasts.

The licensing process, including marine, wireless telephony, aviation and other services depends on *Red Lion* and scarcity, as it is *Red Lion* that allows the government to balance competing rights to the radio spectrum to promote First Amendment goals.[86] With respect to spectrum (unlike in parks, print journals or the Internet), the government can license because of *Red Lion* and the "scarcity rationale." Absent that precedent, spectrum would become yet another forum in which the government neither can silence the millions of Americans lacking a license[87] nor license speakers.[88] Without *Red Lion*, every pirate radio station would stand on the same ground from a First Amendment standpoint as every licensed broadcaster. In fact, questioning *Red Lion* could undermine every spectrum license held by a private or government party.

Without the scarcity rationale, under *Forsyth*, the government would be forced to defend each license under strict scrutiny, and likely would fail repeatedly against arguments that valuable spectrum is

---

[86] *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102-03, 110 (1973).

[87] *Cf. Red Lion*, 395 U.S. at 389 ("[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused.").

[88] *See, e.g.*, *Hague v. CIO*, 307 U.S. 496 (1939); *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992).

being misallocated to television broadcasting and the vast "white spaces" designed to protect unwatched signals.[89]

Another potential result of questioning *Red Lion* in this case would be ceding *Red Lion*'s ground to the intermediate scrutiny of *Turner Broadcasting System v. FCC*.[90] Through a narrow tailoring requirement, *Turner* protects incumbent speakers at the expense of others. Therefore, unlike under *Red Lion*, under *Turner*, the government can promote the widest dissemination of diverse and antagonistic sources only if the "burden" on an incumbent speaker is relatively minimal.[91] As a result, under *Turner*'s intermediate scrutiny, lower courts have held national and vertical cable ownership limits to be impermissible under the First Amendment,[92] and similarly invalidated common carriage rules applied to telephone video service.[93]

---

[89] *See* Sascha D. Meinrath & Michael Calabrese, "Unlicensed 'White Space Device' Operations on the TV Band and the Myth of Harmful Interference," Mar. 2008, http://www.newamerica.net/files/WSDBackgrounder.pdf. See *also Yale Br.* at 27-28, n.59 (discussing same).

[90] *Turner I*, 512 U.S. 622 (1994); *Turner II*, 520 U.S. 180 (1997).

[91] *See Turner I*, 512 U.S. at 662-63.

[92] *Time Warner Ent. Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001); *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009).

[93] *Chesapeake & Potomac Telephone Co. v. United States*, 42 F.3d 181 (4th Cir. 1994). This Court granted *cert.*, 515 U.S. 1157 (1995), and heard oral arguments, after which the President signed the Telecommunications Act of 1996 into law. The Act repealed Section 533(b), allowing LECs to provide local cable service if they complied with a series of regulatory measures. Thereafter, the Court instructed the Fourth Circuit

If *Turner* applied to spectrum, incessant constitutional litigation would ensue. Every decision regarding the allocation, licensing, unlicensing, band clearing and conditioning spectrum for any purpose would be subject to attack. Likely, applying *Turner* to spectrum would mean overturning diversifying rules and ensuring the narrowest diversity of sources for Americans, at the expense of competition and democracy.

Finally, another reason not to revisit *Red Lion*'s scarcity rationale is the simple fact that it remains valid. *Red Lion* makes plain that the scarcity to which the Court referred was determined by demand:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government form

---

to reconsider the case and determine whether it had become moot, 516 U.S. 415 (1996). Nevertheless, the earlier opinion illustrates potential ramifications of the standard's application absent *Red Lion*.

> making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.[94]

Thus, the proper question is not how many outlets there are, or how many outlets are technologically feasible, but how great the demand is for the available spectrum in light of the regulatory scheme.

Presently the demand is great. Spectrum scarcity is frequently stressed by FCC Chairman Genachowski, and President Obama included spectrum auctions in his recent jobs plan.[95] In recent remarks, Steve Largent, President of CTIA, the International Association for the Wireless Telecommunications Industry, noted that implicit in the growing subscriber numbers is "a catch, and it's a big one. …We have to get more spectrum," or the U.S. faces "one heck of a traffic jam."[96] Those representing the interests of TV stations, on the other hand, argue that the wireless carriers' "inability to work together

---

[94] *Red Lion*, 395 U.S. at 388-89.

[95] *See* Brief in Opposition of Intervenors Center for Creative Voices in Media and The Future of Music Coalition, On Petition for a Writ of Certiorari, No. 10-1293, May 23, 2011, at 5-7 (discussing Chairman's remarks regarding "demand for spectrum [] dramatically outstripping supply," and "spectrum crunch [due to] demand from all consumers in the U.S. compared to aggregate supply of spectrum."). *See also* Gautham Nagesh, "Pressure Mounts on Supercommittee to Tackle Spectrum," The Hill: Hillicon Valley, Oct. 16, 2011. *Available* at http://thehill.com/blogs/hillicon-valley/technology/187813-pressure-mounts-on-supercommittee-to-tackle-spectrum.

[96] "AT&T/T-Mobile Barely Mentioned as CTIA Fall Shows Starts," COMM. DAILY, Oct. 12, 2011.

and roll out advanced networks has led to the false 'wireless crunch.'"[97] That argument only underscores the fact that everyone wants spectrum, regardless of the validity of any given claim to it.

Though the Commission has yet to devise a mechanism for appeasing the competing demands of wireless companies and broadcasters for spectrum, the Congressional Budget Office recently estimated that Commission-held incentive auctions, in addition to other spectrum auctions, could raise as much as 23.3 billion for the Treasury over the next several years.[98] Citing estimates that spectrum auctions could raise $30 billion in bids from carriers, Mr. Largent affirmed his constituency's serious interest: "I don't know of many industries that are eager to step up and write checks like that to the government, but we are."

Whether more spectrum is needed for other uses, or whether instead the special privileges given to broadcast licensees should be taken away, may be up for debate, earlier assessments notwithstanding. But these questions only emphasize the extent to which this case fails to present a record on which this Court can assess the validity of *Red Lion*'s scarcity rationale.

---

[97] *See*, *e.g.*, "Comm. Daily Notebook," COMM. DAILY, Oct. 12, 2011, at 14.

[98] Paul Barbagallo, "CBO Estimates $15.8B in Savings From Incentive Auctions, Spectrum Fees," Bureau of National Affairs, Oct. 13, 2011. *Available* at http://www.bna.com/cbo-estimates-158b-n12884903858/.

CONCLUSION

Applying *Pacifica*, the Court should strike down the FCC's unconstitutionally vague indecency policy. Upon reassessing the basis for limited constitutional scrutiny of broadcast indecency regulation, the Court may choose to strike down *Pacifica*'s limitations on speech. But in any event this Court need not, and should not, question *Red Lion* or its scarcity rationale, which are not explored in the opinions below and irrelevant to this case.

Respectfully submitted,

*ANDREW JAY SCHWARTZMAN
CHRYSTIANE B. PEREIRA
MEDIA ACCESS PROJECT
1625 K STREET, NW
SUITE 1000
WASHINGTON, DC 20006
(202) 232-4300

November 3, 2011

*Counsel of Record