06-1760-ag (L)

06-2750-ag (Con)

United States Court of Appeals for the Second Circuit

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

v.

FEDERAL COMMUNICATIONS COMMISSION *et al.,*
Respondents,

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

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

Brief of *Amici Curiae* Brennan Center for Justice, American Civil Liberties Union, New York Civil Liberties Union, National Coalition Against Censorship, First Amendment Project, PEN American Center, American Booksellers Foundation for Free Expression, Writers Guild of America West, Directors Guild of America, Screen Actors Guild, American Federation of Television and Radio Artists, Writers Guild of America East, Minnesota Public Radio|American Public Media, National Federation of Community Broadcasters, Film Arts Foundation, Re:New Media, National Alliance for Media Arts and Culture, International Documentary Association, Working Films, and the Creative Coalition, in Support of Petitioners' Request to Set Aside the FCC's Remand Order

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CORPORATE DISCLOSURE STATEMENT

All of the *amici* organizations are nonprofit corporations which do not issue stock and which are not subsidiaries or affiliates of any publicly owned corporations.

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INTERESTS OF THE *AMICI CURIAE*

The *amici curiae* organizations, representing film and TV producers, community broadcasters, writers, directors, performers, and other broadcast industry employees, and organizations concerned about free expression in broadcasting, file this brief pursuant to F.R.A.P 29. See the Addendum for a description of each organization. All parties have consented to the filing of this brief.

PROCEDURAL BACKGROUND AND RELEVANT FACTS

The Present Challenge to the FCC's Remand Order

Broadcasters filed Petitions for Review of a lengthy ruling issued by the FCC in March 2006 (the "Omnibus Order"). In that ruling, the FCC set out new standards for penalizing "indecency" and "profanity" on the airwaves; then applied these standards to dozens of separate complaints received between 2002 and 2005. The agency found ten broadcasters guilty of indecency and six also guilty of profanity. It imposed monetary penalties against six of the ten. In 17 additional rulings, the FCC found no liability.

The Petitions focused on the four rulings that were unaccompanied by monetary penalties. On November 6, after a remand, the FCC reduced this number to two. But the resolution of these two cases necessarily calls into question the agency's entire censorship scheme, as set out in the Omnibus Order

and reaffirmed in the Remand Order. This brief therefore examines the standards and practices contained in the Remand Order, along with its context and history.

Origins of the "Fleeting Expletives" Rule

In 1978, a narrow majority of the Supreme Court approved the FCC's regulation of indecent speech on the airwaves, at least as applied to the "verbal shock treatment" of a satiric monologue by comedian George Carlin. *FCC v. Pacifica Foundation*, 438 U.S. 726, 757 (1978) (Powell, J., concurring). The agency's definition of indecency, which remains essentially unchanged today, was "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." *Id.* at 732.

In 1987, the FCC expanded its indecency regime to include sexual innuendo or other content that it considered offensive, regardless of whether specific words were used. Two of the three programs condemned under this new "generic" standard were broadcast on noncommercial community radio stations. *New Indecency Enforcement Standards*, 2 FCC Rcd 2726 (1987).[1]

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[1] The new standards were a response to pressure from Morality in Media and other groups to reverse what had been a "laissez faire" approach to indecency regulation. *See* John Crigler & William Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329 (1989).

The agency's indecency enforcement between 1987 and 2003 was unpredictable and sporadic. In 2001, it ruled that the poet and theater artist Sarah Jones's "Your Revolution," broadcast on a noncommercial community station, was indecent. After Jones sued, and just before the FCC's brief was due in this court, the agency reversed itself and decided that the poem was not indecent. *KBOO Foundation*, 18 FCC Rcd 2472 (2003).

A 1995 case presented a constitutional challenge to the agency's indecency enforcement process. The plaintiffs argued that the process functioned as a prior restraint. Although the Court of Appeals rejected the claim, it recognized that "some of the Commission's procedures are troubling," and that "the agency's practices could give rise to some of the evils that the appellants claim are already at hand" – that is, censorship of expression that is not "indecent." *Action for Children's Television v. FCC*, 59 F.3d 1249, 1260, 1262 (D.C. Cir. 1995).

Up to this point, the FCC did not consider "fleeting expletives" to be indecent. It changed its policy after two incidents: the musician Bono's exclamation, "this is really fucking brilliant" at the 2003 Golden Globe Awards ceremony and, a few months later, the singer Janet Jackson's "wardrobe malfunction" at the February 2004 Super Bowl half-time show.

The FCC initially ruled that Bono's exclamation was not indecent because not referring to sexual or excretory activities or organs. *Complaints Against*

Various Licensees Regarding Their Airing of the "Golden Globe Awards," 18 FCC Rcd 19859 (2003). However, a month after the Super Bowl incident, the agency reversed gears and announced that all uses of the words "fuck," even fleeting exclamations, necessarily referred to sex and therefore were presumptively "indecent." They would also now be considered "profane."[2]

The agency reasoned that even though Bono used "fucking" as "an intensifier," not a sexual reference, "given the core meaning of the 'F-word,' any use of that word or a variation, in any context, inherently has a sexual connotation." *Complaints Against Various Licensees Regarding Their Airing of the "Golden Globe Awards,"* 19 FCC Rcd 4975, 4978 (2004). The Commission made this assertion without any citation to evidence. It added that because the "F-word" "invariably invokes a coarse sexual image," it is patently offensive as well; previous agency rulings to the contrary were "no longer good law." *Id.* at 4979-80.

To support its new profanity rule, the FCC relied on *dicta* in a federal case, *Tallman v. U.S.*, 465 F.2d 282 (7th Cir. 1972), which defined profane not according to its usual meaning – "words and phrases that contain an element of blasphemy or divine imprecation" – but more broadly, to include "language so

[2] 18 U.S.C. §1464, the basis of the FCC's authority to censor, bars "obscene, indecent, or profane language by means of radio communication."

grossly offensive to members of the public who actually hear it as to amount to a nuisance." 19 FCC Rcd at 4981.

In 2005, the FCC created an exception to its new fleeting expletives rule for the film *Saving Private Ryan*. Complaints had cited dialogue including "'fuck,' and variations thereof; 'shit,' 'bullshit,' and variations thereof, 'bastard,' and 'hell,'" as well as "Jesus" and "God damn." *Complaints Against Various Licensees Regarding Their Broadcast of the Film "Saving Private Ryan,"* 20 FCC Rcd 4507, 4509 (2005). The agency found that the material, "in context, is not patently offensive and therefore, not indecent," or profane. *Id* at 4510. The reason was that the rough language was "integral to the film's objective of conveying the horrors of war through the eyes of these soldiers," and that deleting or bleeping "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience." *Id.* at 4512-13.

The March 2006 "Omnibus Order"

The agency's sensitivity to "the nature of the artistic work" did not extend, a year later, to its March 2006 Omnibus Order. Now, the Commission condemned a PBS documentary *The Blues*, directed by Martin Scorsese, because of fleeting expletives. Focusing on "the F-word" and "the S-word," the Commission refused to apply the *Saving Private Ryan* exception to *The Blues*

because "we disagree that the use of such language was necessary to express any particular viewpoint," and "we do not believe" that the PBS station that aired the show[3] "has demonstrated that it was essential to the nature of an artistic or educational work … or that the substitution of other language would have materially altered the nature of the work." *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664, 2685-86 (2006) ("Omnibus Order") (SPA 24-25).

The Omnibus Order said that only "in rare contexts" will "language that is presumptively profane" be excused – "where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance." Substituting its judgment for that of Scorsese and PBS, the Commission concluded that the expletives were unnecessary for the artistic or educational message of *The Blues*. *Id.* at 2686[4] (SPA-25-26).

The Omnibus Order addressed dozens of other programs containing coarse language or sexual situations. It decided that "bullshit" (uttered in *The Early Show* and *NYPD Blue*) was profane and indecent; but "dick" and "dickhead"

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[3] KCSM-TV, a community college station in San Mateo, California.

[4] Commissioner Adelstein, in a partial dissent, differed with the other commissioners' artistic judgment, noting that the "coarse language is a part of the culture of the individuals being portrayed," and "if prohibited, would undercut the ability of the filmmaker to convey the reality of the subject of the documentary." *Id.* (Statement of Commissioner Adelstein) (SPA-73).

were not. *Id.* at 2699-2700 (SPA-37-41). Nonexplicit suggestions of teenagers' sexual activity were indecent (in the CBS program *Without a Trace*); but explicit discussions of teen sexual practices on *Oprah* were not. *Id.* at 2705-09 (SPA-47-49); *Complaints Against Various Licensees Concerning Their December 31, 2004 Broadcast of "Without a Trace,"* 21 FCC Rcd 2732 (2006).[5] Fleeting expletives by celebrities at the 2002 and 2003 Billboard Award shows were indecent and profane; expletives on other shows, including "Fuck Cops!" (visible on graffiti), "pissed off," "up yours," "kiss my ass," and "wiping his ass" were not. Omnibus Order, 21 FCC Rcd at 2690-95, 2709-13 (SPA-31-36, 51-56). The agency reiterated that the *Saving Private Ryan* exception would apply only in "rare cases," and that "profanity" was to be judged by the "grossly offensive" standard announced in *Golden Globe*. *Id.* at 2669 (SPA-6-7).

The Remand Order

This court allowed the FCC a 60-day remand to reconsider its rulings against *NYPD Blue, The Early Show*, and the two Billboard Awards shows. The agency responded by dismissing the case against *NYPD Blue* on a technicality; reversing itself on *The Early Show* – now finding no indecency or profanity in its use of the word "bullshitter"; and affirming its rulings against similar fleeting

[5] *Without a Trace* was the subject of a separate ruling issued on the same date as the Omnibus Order.

expletives during the two Billboard programs. The Remand Order fully reaffirmed the expansive new indecency and profanity rules. *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* FCC 06-166, 2006 WL 3207085 (Nov. 6, 2006) (SPA-77-108).

Defending its view that any use of "fuck" or "shit" or a compound of these terms, in any context, necessarily has a sexual or excretory meaning, the agency acknowledged "the difficulty in making the distinction between expletives on the one hand and descriptions or depictions on the other." But it then asserted that "the inquiry into whether a word is used [as] an expletive rather than a description or depiction is wholly artificial" because in any case, "the offensive nature of the 'F-Word' is inherently tied to the term's sexual meaning." *Id.* at *18 (SPA-102).

Although the FCC insisted that uttering "bullshitter" on *The Early Show* had an excretory meaning, it reversed its earlier ruling that the utterance was "patently offensive" and therefore indecent, because, it said, the news interview context required particular sensitivity to First Amendment values. For essentially the same reason, it reversed its finding that *The Early Show* was profane. But, lest broadcasters think that this might represent a standard they could rely upon, the Commission warned: "To be sure, there is no outright news exemption from our indecency rules." *Id.* at *20-21 (SPA-105).

Effects of the FCC's Indecency and Profanity Regime

The censorship regime embodied in the Omnibus Order has had dramatic effects, particularly on noncommercial broadcasters. In a statement filed in the remand proceedings, Thomas Kigin of Minnesota Public Radio ("MPR") and American Public Media ("APM") described a documentary that chronicled "the sounds and voices of the World Trade Center and its surrounding neighborhood." Broadcast uncut in 2002 on dozens of public radio stations, the show included a poem with the word "bullshit." When it was rebroadcast in September 2006, however, APM "felt that it had no choice but to alert its affiliates and to 'bleep' this word" from the poem. MPR Comments, DA 06-1739 (Sept. 21, 2006), Affidavit of Thomas J. Kigin, ¶10 (A-447).

Similarly, PBS bleeped soldiers' language, and with it the reality of war reporting, from the documentaries *A Soldier's Heart*[6] and *Return of the Taliban*[7]; and from Frontline's *The New Asylums*.[8] Language in PBS's *The*

[6] Kara Canty, *FCC'S Punishing Fines Have Chilling Effect on Broadcasters*, BALTIMORE SUN, Oct. 13, 2006, www.freepress.net/news/18315 (visited 10/13/06).

[7] Rebecca Dana, *@$#&% Ken Burns!* NEW YORK OBSERVER, Oct. 2, 2006, www.observer.com/20061002/20061002_Rebecca_Dana_media_nytv.asp (visited 10/30/06).

[8] Louis Wiley, Jr., *Censorship at Work*, CURRENT.ORG, July 2006, www.current.org/fcc/fcc0613indecency.shtml (visited 10/30/06).

Enemy Within was purged even though it documented the particular words used by an informant to threaten a suspect.[9] Rocky Mountain PBS canceled the historical documentary *Marie Antoinette* because of sexually suggestive drawings.[10]

In 2004, the FCC began an investigation of WBEZ radio's broadcast of a documentary, *Movin' Out the Bricks,* which explored the lives of Chicago public housing residents, including one woman who described participating in substance abuse at the projects as getting "fucked up and shit like that." Psychology Professor Timothy Jay submitted an expert statement explaining that in many contexts, "fuck" and "shit" are part of ordinary conversation and have no sexual or excretory connotation. In this case, he said, they were essential to the documentary's authenticity. Timothy Jay, Statement of Expert Opinion, *WBEZ-FM*, No. EB-04-IH-0323, (Sept. 21, 2004).[11]

Broadcasting of literature has also been affected. Niagara Frontier Radio administers a radio reading service for the blind; to date, is has aired more than

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[9] *Id.*

[10] Dick Kreck, *FCC Fear Cancels PBS Airing of "Marie Antoinette,"* DENVER POST, Sept. 26, 2006, www.denverpost.com/entertainment/ci_4394264 (visited 11/13/06).

[11] The WBEZ case is still under investigation. *Amici* will supply a copy of Professor Jay's Statement at the court's request.

150,000 hours of book readings to thousands of visually impaired listeners. It broadcasts through a leased subcarrier of a local FM signal as well as a local ABC affiliate with a wider broadcast range. In 2005, the ABC station removed the program, citing a single complaint about the Tom Wolfe novel *I Am Charlotte Simmons*. When the program was reinstated two weeks later, the station would air it only after 10 p.m., thereby reducing both the hours that visually impaired listeners can enjoy the show, and the size of the listening audience. MPR Comments, Affidavit of Robert Sikorski (A-492-97).

According to an executive at the PBS affiliate in Boston, the station will "probably have to edit references to sexual activities in a coming *Masterpiece Theater* production, 'Casanova.'"[12] PBS similarly has wondered whether to pixilate actress Helen Mirren's mouth as she utters an inaudible "fuck" from the driver's seat in another *Masterpiece Theater* production.[13]

The widely syndicated program *Broadway's Biggest Hits*, with more than 150,000 listeners, faces many dilemmas in the wake of the new indecency and profanity rules. In 2004, stations fearful of FCC punishment were given a sanitized version of a song in the hit musical *A Chorus Line*, which "humorously

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[12] Elizabeth Jenson, *Soldier's Words May Test PBS Guidelines*, NEW YORK TIMES, July 22, 2006, at A13.

[13] Rebecca Dana, *supra* n. 7.

tells of how plastic surgery and improving one's 'tits and ass' can improve one's chances for a job." In the next two years, these concerns resulted in a full review of the playlist and the deletion of "well-known, popular, and culturally and musically significant songs" from such shows as *Les Miserables*, *The Producers*, *Avenue Q*, and *Miss Saigon*. MPR Comments, Affidavit of Stanley Wilkinson (A-469-75).

The FCC's rules stifle countless other literary broadcasts. The website of "Parents Against Bad Books in Schools" lists hundreds of works that it considers unfit for students, and provides links to excerpts. A cursory review of these excerpts reveals at least 32 major literary works that use the word "fuck" or "shit" at least once – often in a nonsexual and nonexcretory context. Among them are Cormac McCarthy's *All the Pretty Horses*, Barbara Kingsolver's *The Bean Trees*, Toni Morrison's *Beloved, The Bluest Eye*, and *Song of Solomon*, James Baldwin's *Go Tell it on the Mountain*, John Steinbeck's *The Grapes of Wrath*, Truman Capote's *In Cold Blood*, Gabriel Garcia Marquez's *One Hundred Years of Solitude*, John Updike's *Rabbit Run*, and Salman Rushdie's *Satanic Verses.*[14]

[14] See Parents Against Bad Books in Schools, www.pabbis.org (visited 11/7/06) for book lists and links to excerpts.

Self-censorship of fiction, drama, history, and journalism is occurring particularly at noncommercial stations that cannot afford to risk massive fines,[15] or even pay the legal fees required to respond to FCC investigations. PBS President Paula Kerger explained: "When you have stations whose operating budgets in some cases are only a couple of million dollars, even frankly the old fines, once you factor in all the legal work and so forth, were daunting. The fines now would put stations out of business."[16] Thomas Kigin agreed: "The prospect of huge fines and the threat of license revocation and/or nonrenewal … have caused MPR/APM to alter the way it makes decisions. … MPR simply cannot risk either huge fines or license revocation …. if it were to guess wrong about what is now acceptable for broadcast." Kigin Affidavit, ¶5 (A-443).

Broadcasters do have the option of consigning potentially at-risk programs to the post-10 p.m. "safe harbor." But this is rarely an adequate substitute for earlier time slots. A letter submission in the FCC's remand proceeding explained one reason: "Live broadcast television is a direct link to the real world around us, and while sometimes unpredictable, is nonetheless one of the

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[15] In 2006, Congress increased the fines for broadcast indecency tenfold, to $325,000 for each violation. Broadcast Indecency Enforcement Act, Pub.L. 109-235, 120 Stat. 491 (2006).

[16] Quoted in Matea Gold, *PBS "War" Battle Plans*, LOS ANGELES TIMES, July 27, 2006, www.freepress.net/news/16755 (visited 11/6/06).

things that continues to bring Americans together to share historic moments." Center for Creative Voices in Media *et al.*, Letter to William Davenport, No. DA 06-1739 (Sept. 21, 2006). Spontaneous news coverage largely happens before 10 p.m.; delay defeats its purpose by denying the public the immediacy of live programming.

Thomas Kigin gave another example of the safe harbor's inadequacy: Southern California Public Radio ("SCPR") has for years broadcast performances at LA Theater Works, typically on Saturday nights at 8 pm – "consistent with when the curtain typically rises on live performances." In 2004, SCPR aired Theater Works' production of *Dinah Was,* a Tony Award-winning play about singer Dinah Washington. "Not surprisingly," Kigin says, "given Ms. Washington's life and times, the play contains various commonplace 'swear' words and sexual expressions." Heightened FCC censorship and the threat of large fines, however, made SCPR nervous. First, it stopped the broadcasts entirely; then, having concluded "that it is neither appropriate nor feasible to edit the performances for language," SCPR moved the broadcasts to 10 p.m. But their future is uncertain, for SCPR and Theater Works agree "that broadcasts at this late hour will attract only a fraction of the former audience for this series of outstanding theatrical events." Kigin Affidavit, ¶8 (A-446).

ARGUMENT

I. THE FCC's POWER TO CENSOR "INDECENCY" AND "PROFANITY" RESTS ON SHAKY LEGAL GROUND

A. The Supreme Court's *Pacifica* Decision was "Emphatically Narrow" and Limited to the Technology Existing at the Time

The 1978 decision in *FCC v. Pacifica* authorized sanctions against the "indecent" speech in George Carlin's satiric "Filthy Words" monologue. The rationale of three justices who joined the plurality opinion in *Pacifica* was that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans"; that "broadcasting is uniquely accessible to children, even those too young to read"; and that "indecent" speech, although constitutionally protected, lies "at the periphery of First Amendment concern." 438 U.S. at 748-49, 743 (plurality opinion).

The majority of the Court disagreed with this relegation of indecency to the constitutional periphery. A concurrence by Justices Powell and Blackmun specifically took issue with the plurality's assertion that courts (or, by inference, administrative agencies) are in a position to determine "which speech protected by the first amendment is most 'valuable' and hence deserving of the most protection." *Id.* at 761 (Powell, J., concurring). Subsequent cases have made clear that "[s]exual expression which is indecent but not obscene is protected by

the First Amendment." *Reno v. ACLU,* 521 U.S. 844, 874 (1997); *Sable Communications v. FCC,* 492 U.S. 115, 126 (1989).

The three-justice plurality in *Pacifica* emphasized "the narrowness of our holding." 438 U.S. at 750. The FCC had issued its order in a "specific factual context" and reserved questions "concerning possible action in other contexts." *Id.* at 734. As examples of the wide range of expression that would not likely be punishable, the plurality suggested "a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction." *Id.* at 750.

Underlying *Pacifica* was a history of lesser First Amendment protection for broadcasting. Government regulation was justified because of the limited capacity of the broadcast spectrum, and the consequent scarcity of licenses. Thus, for example, in 1943, the Supreme Court upheld FCC rules that curbed national networks' market power by prohibiting them from dictating the programming of their affiliated stations. *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943).

Broadcast licenses are still scarce, but this reality only justifies *structural* regulation of the industry, and certain public interest obligations such as equal access for political candidates; it does not justify censorship. If a narrow

majority of the Supreme Court thought otherwise 28 years ago, the "uniquely pervasive" presence of broadcasting that it identified then as a rationale no longer exists. Subsequent cases, most prominently *Reno v. ACLU*, 521 U.S. 844, have also undermined the constitutional legitimacy of the FCC's indecency standard.

B. Today's Technology Negates the "Uniquely Pervasive" Rationale of *Pacifica*

The *Pacifica* plurality's reliance on the "uniquely pervasive" (or invasive) presence of broadcasting is a relic of bygone times. To be sure, broadcasting remains pervasive, but no longer uniquely so, given that about 90% of the nation's households receive *all* their TV programming through one, nonbroadcast distributor (usually either cable or satellite).[17] This convergence of technology eliminates the justification for a government censorship system that is constitutionally off-limits for every other medium. *U.S. v. Playboy Entertainment Group*, 529 U.S. 803 (2000) (government-imposed time-

[17] *Satellite TV Penetration Up Significantly,* CONSUMERAFFAIRS.COM, Aug. 18, 2005, www.consumeraffairs.com/news04/2005/jdpower_satellite.html (visited 11/6/06); see also *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, 2506-07 (2006) (94.2 million out of a total of 109.6 million TV households now receive all their video programming through an "MVPD" [multichannel video programming distributor] – either cable, satellite, or other nonbroadcast technology).

channeling of indecency on cable TV is unconstitutional); *Reno v. ACLU*, 521 U.S. 844 (indecency regulation on the Internet is unconstitutional).

Technological developments since *Pacifica* also make government control unnecessary in those instances where parents wish to shield their children from programming they consider inappropriate. The FCC itself has recognized that v-chips and lockboxes are readily available blocking technologies. *Saving Private Ryan*, 20 FCC Rcd at 4508, nn. 8-9. The Supreme Court, in striking down a time-channeling requirement for "indecency" on cable, held lockboxes and other technologies to be less constitutionally burdensome ways of addressing parental concerns. *Playboy*, 529 U.S. 803.

C. Case Law Since *Pacifica* Establishes that the FCC's Indecency Standard is Unconstitutionally Vague and Overbroad

The Supreme Court has reiterated that *Pacifica* was an "emphatically narrow" decision. *Sable Communications,* 492 U.S. at 127. Nevertheless, Congress used the broad indecency standard in the 1996 Communications Decency Act (the "CDA") to regulate the Internet. Different parts of the CDA barred "indecent" speech (without further definition), and speech that "depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" – *i.e.,* the FCC's indecency test. Striking down the CDA in *Reno v. ACLU*, the Supreme Court critiqued these bans on grounds of both vagueness and overbreadth.

The Court in *Reno* called the CDA "vague" because its prohibitions are not defined. This lack of definition "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno,* 521 U.S. at 871-72. The Court explained the difference between use of the term "patently offensive" in the CDA, where it was unacceptably vague, and in obscenity law, where it is only one part of the overall definition of prohibited speech. The other, more specific parts of the obscenity definition – the requirements that the expression appeal to "the prurient interest," lack serious value, and be "specifically defined by the applicable state law" – cabin the inherent vagueness of "patent offensiveness." *Id.* at 872-74; see *Miller v. California*, 413 U.S. 15, 24 (1973). Without these additional requirements of obscenity law, the CDA's ban on "patently offensive" speech is unduly vague and "presents a greater threat of censoring speech that, in fact, falls outside the [CDA's] scope." 521 U.S. at 874.

The Court struck down the CDA on grounds of overbreadth: "The general, undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornograhic material with serious educational or other value." *Id.* at 877-78. Following the time-honored rule that government cannot reduce the adult population to reading or viewing "only what is fit for children," *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957), the Court noted that there were less

constitutionally burdensome ways to shield youngsters from material that may not be appropriate for them. 521 U.S. at 874-79.

Although *Reno* distinguished *Pacifica* rather than overruling it, the Court left little more than a shell to that fractured and "emphatically narrow" decision. The *Reno* Court's strong disapproval of "indecent" and "patently offensive" as censorship standards apply fully to the present case.

II. THE FCC's "INDECENCY" AND "PROFANITY" SCHEME IS ARBITRARY, CAPRICIOUS, VAGUE, AND OVERBROAD

A. A Rule that Certain Expletives, Regardless of Context, Always Refer to Sexual or Excretory Activities or Organs is Arbitrary, Capricious, and Overbroad

The FCC's attempted distinctions among various common words are arbitrary, capricious, and irrational. Whether "dickhead" or "pissed off" are more or less offensive than "bullshit" is a matter of taste, and the commissioners' efforts to support their particular tastes only demonstrate the arbitrary nature of the enterprise. The Remand Order reversal on the use of "bullshitter" in *The Early Show* further confuses, rather than clarifies, the agency's shifting standards.

The assertion that fleeting expletives – in particular, "fuck," "shit," and their many compounds and variations – always refer to sexual or excretory activities or organs is equally irrational. As the examples from war documentaries, *The*

Blues, and *Movin' Out the Bricks* demonstrate, these terms have many nonsexual and nonexcretory meanings in common discourse.

Scholarship supports this conclusion. Expletives are often used for emphasis and emotive charge, without sexual or excretory meanings; they serve psychological and social purposes and communicate powerful messages. *See* Timothy Jay, WHY WE CURSE (2000).

In his expert statement regarding *Movin' Out the Bricks,* Professor Jay explained that to clean up the language of the woman whose life is a central part of the narrative would "undermine the listeners' understanding of the impact of public housing … If we substitute *inebriated* for *fucked up,* we erase the emotional impact." Jay Expert Statement at 11-12. Among the diverse nonsexual meanings of "fuck" and its compounds, Jay offered the terms "FUBAR" ("fucked up beyond all recognition") and "SNAFU" (U.S. Army slang for "situation normal all fucked up"). Both "refer to a state of confusion and have been in use for over 50 years in American English." *Id.* at 5. These words are learned in childhood and do not come as a shock to most children. *Id.* at 9-10.

The First Amendment protects these expletives in literature and political speech in part because of their emotive power. *Cohen v. California*, 403 U.S. 15, 26 (1971) ("words are often chosen as much for their emotive as their cognitive

force"). The meaning and value of news, art, and educational programming are undermined when government forces broadcasters to censor these words.

The FCC argues in its Remand Order that regardless of whether it is used as an exclamation or in another nonsexual context, "the offensive nature of the 'F-Word' is inherently tied to the term's sexual meaning" (SPA-102). This is a classic example of reasoning backwards from the desired result. First, whether a vulgar word is offensive is a matter of taste. As an empirical fact, it is often merely colloquial, as in *Movin' Out the Bricks.* Second, the agency here confuses part one of its analysis (does the term describe sexual or excretory activities or organs?), with part two (is it "patently offensive"?). Even the FCC acknowledges that highly charged raw language is not always "patently offensive," as in *Saving Private Ryan* or, on remand, *The Early Show*. To use the assumed offensiveness of the word as an argument for its always having a sexual meaning is circular.

The overbreadth of the fleeting expletives rule has already chilled important broadcasts. The Supreme Court has recognized that "[t]here is a potential for extraordinary harm and a serious chill upon protected speech" where prosecution is likely and "only an affirmative defense is available." *Ashcroft v. ACLU*, 542 U.S. 656, 670-71 (2004). Here, the near-total ban on fleeting expletives, with only a narrow exception to be applied at the FCC's discretion,

creates just such a chill. *See also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 237 (2002) ("[t]he overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process").

B. The FCC's Unbridled Discretion in Deciding Whether a Program is "Patently Offensive," and its Second-Guessing of Artistic Necessity, Create an Arbitrary, Capricious, Vague, and Overbroad Censorship Scheme

With its contrasting decisions on *Saving Private Ryan*, *The Blues*, *The Early Show*, and the many other programs at issue in the Omnibus Order, the FCC has established itself as an arbiter of both news value and "artistic necessity." Such role for a government agency is unconstitutional both on First Amendment grounds and as a matter of due process.

It is not the place of government officials to second-guess artistic or editorial judgments. See *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (broadcasters' decisions "should be left to the exercise of journalistic discretion"); *Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241, 256-258 (1974) (protecting newspaper's exercise of editorial judgment); *Winters v. New York*, 333 U.S. 507, 510 (1948) (the "line between the informing and the entertaining is too elusive" to serve as a limit on First Amendment rights). The sole exception to this well-established rule is obscenity law, where the "serious artistic" or other value of a work is part of the three-part test for determining

whether it is constitutionally protected in the first place. *Miller v. California*, 413 U.S. at 24. Once expression *is* constitutionally protected, government officials cannot ban or burden content they dislike based on their assessments of artistic value or necessity.[18]

Ultimately, it is the writer or artist who decides what is artistically necessary in a creative work. The question "What is art?" is one of the oldest in human history. Considering the diverse attempts to define it – from Tolstoy's essay *What is Art?* to the Dada movement's "Anything is art if an artist says it is"[19] – the inherent subjectivity of the task alone makes it inappropriate for a government agency. Certainly, an artistic necessity test that depends on subjective judgments by FCC officials cannot put broadcasters on notice of what is prohibited.

The Commission's disparate treatment of *The Blues* – an educational film that portrays the actual figures who influenced a significant element of America's culture and musical history – and *Saving Private Ryan* – a violent

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[18] To be sure, government makes judgments about artistic value in awarding prizes, *e.g., National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) – a context not relevant here.

[19] LEO TOLSTOY, WHAT IS ART? (1897); MUSEUM OF MODERN ART, THREE GENERATIONS OF TWENTIETH-CENTURY ART (1972) 48 (quoting Marcel Duchamp), *excerpt reprinted at* www.moma.org/collection/browse_results.php?object_id=81631 (visited 11/6/06).

film with fictional characters – reveals the subjectivity and unpredictability of the agency's artistic necessity standard. Although the Commission found variants on "fuck" and "shit" to be indecent in *The Blues*, it absolved the far more frequent use of those words in *Saving Private Ryan* because it thought editing "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience." It is unclear how the Commission could come to a contrary conclusion while applying the same standard to a significantly more realistic and educational film.

The agency's flip-flop on *The Early Show* further illustrates the problem. By changing its mind about its original indecency and profanity ruling but simultaneously warning that "there is no outright news exemption from our indecency rules," the FCC leaves news broadcasters in as much limbo as documentary and feature producers as to when it might find an exception to the fleeting expletives rule.

The FCC has thus assumed unbridled discretion to decide what is editorially or artistically necessary and what is not. Imposing on broadcasters the burden of demonstrating artistic or editorial necessity – as it did in the case of *The Blues* – compounds the injury and raises serious due process concerns. It is difficult to imagine a scheme of highly discretionary government censorship that is more constitutionally infirm under the Supreme Court's precedents. *E.g.*, *Forsyth*

County v. Nationalist Movement, 505 U.S. 123, 133 (1992); *City of Lakewood v. Plain Dealer*, 486 U.S. 750, 758 (1988); *Freedman v. Maryland*, 380 U.S. 51 (1965) (establishing standards for First Amendment due process). This is a classic instance of speakers having to "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford,* 408 U.S. 104, 109 (1972).

C. The FCC's Regulation of "Profanity" Goes Beyond Anything Approved in *Pacifica* and is Unconstitutionally Vague and Overbroad

The FCC's new definition of profanity has scant legal support, brushes aside the religious meaning of the term, and censors far more speech than anything contemplated in *Pacifica*. Black's Law Dictionary tells us: "Profanity is distinguished from mere vulgarity and obscenity by the additional element of irreverence toward or mistreatment of something sacred." BLACK'S LAW DICTIONARY 1246 (8th ed. 2004). This is consistent with the courts' and the Commission's previous understandings of the term. *E.g., Gagliardo v. U.S.*, 366 F.2d 720, 725 (9th Cir. 1966) (the only words used by defendant that "could even remotely" be considered profane were "God damn it"); *Duncan v. U.S.*, 48 F.2d 128, 133-34 (9th Cir. 1931) (profanity is "a branch of the common-law offense of blasphemy … words importing an imprecation of divine vengeance or implying divine condemnation"); *Golden Globe,* 19 FCC Rcd at 4981 ("We

recognize that the Commission's limited case law on profane speech has focused on what is profane in the context of blasphemy").[20]

The FCC relies on one case to support its definition of profanity as language "so grossly offensive as to constitute a nuisance." Omnibus Order, 21 FCC Rcd at 2669, citing *Tallman v. U.S.*, 465 F.2d at 286. This definition was unnecessary to the decision in *Tallman*, which turned on obscenity, and was in any event at odds with governing case law. Its precedential value is nil, and its nuisance rationale was explicitly questioned by the same Circuit Court of Appeals, in *U.S. v. Simpson*, 561 F.2d 53, 58 n.7 (7th Cir. 1977).

Official censorship of profanity has fallen into desuetude for two reasons: its overbreadth and its Establishment Clause implications. See *Plummer v. City of Columbus*, 414 U.S. 2 (1973) (statute banning profanity is unconstitutional unless limited to "fighting words"); *Burstyn v. Wilson*, 343 U.S. 495, 505 (1952) ("it is not the business of government … to suppress real or imagined attacks

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[20] State courts have confirmed the word's essentially religious meaning, *e.g., City of Bellevue v. Lorang*, 992 P.2d 496, 500 (Wash. 2000); *State v. Authelet*, 385 A.2d 642, 644 (R.I., 1978). *See also* WILLIAM SHAKESPEARE, THE TRAGEDY OF ROMEO AND JULIET act 2, sc. 2 (The Pelican Shakespeare, 1960), at 56 ("If I profane with my unworthiest hand/This holy shrine…"). Although looser usage to denote secular coarse language can occasionally be found in judicial decisions, it is as a casual reference, not a holding. *E.g. City of Cincinnati v. Discovery Network*, 507 U.S. 410, 438 (1993) (Blackmun, J., concurring) (parenthetically describing the message in *Cohen v. California* ["Fuck the draft"] as a "profane antiwar slogan").

upon a particular religious doctrine"). The FCC cannot take a word whose definition has traditionally included religious imprecation and make it mean what the agency wants it to mean.

The question arises why the FCC has adopted this unusual definition of profanity, given its large overlap with the indecency prohibition. The most logical explanation is that the profanity test is intended as an alternate regulatory route in case the courts determine that certain expletives do not in fact always refer to sexual or excretory matters. Unlike "indecency," "profanity" does not require a sexual or excretory reference.

But this very absence of a mooring in sexual or excretory subject matter makes the new profanity test even broader and vaguer, and subject to even wider-ranging discretion by government officials, than the indecency definition. Allowing the agency to determine what is "so grossly offensive as to constitute a nuisance" not only strays way beyond anything approved in *Pacifica,* it sets the censor "adrift upon a boundless sea amid a myriad of conflicting currents …, with no charts but those provided by the most vocal and powerful orthodoxies." *Burstyn,* 343 U.S. at 504-05.

The FCC seizes on the *Pacifica* plurality's analogy to the law of nuisance to defend its new definition of profanity. *Golden Globe*, n.37. Merely intoning the

word “nuisance,” however, cannot save a censorship standard that is not only legally incorrect but hopelessly subjective, unpredictable, overbroad, and vague.

D. The Post-10 p.m. Safe Harbor Does Not Save the FCC’s Censorship Scheme

The Supreme Court plurality in *Pacifica* pointed to the post-10 p.m. safe harbor as saving the indecency regime from constitutional infirmity. According to this logic, the FCC is not really reducing the adult broadcast audience to seeing and hearing “only what is fit for children”; it is merely requiring adults to tune in late at night.

There are several reasons why today the safe harbor does not protect the First Amendment rights of broadcasters, producers, writers, performers, and their audiences. First, TV viewing (and hence, advertising revenue) falls significantly after 10 p.m.; radio listening begins to shrink after 6 p.m. and drops to negligible levels by 10.[21] Second, the safe harbor realistically offers only two hours for potentially “indecent” or “profane” programming, since most people are sleeping and not watching TV or listening to the radio from midnight to 6 a.m.

[21] The Nielsen website lists the ten most-watched broadcast TV shows every week. For the week of October 30, 2006, only one of the ten most-watched shows aired at or after 10 p.m. *See* Nielsen Media Research, *Top TV Ratings* (Nov. 10, 2006), www.nielsenmedia.com (visited 11/10/06). For radio, listening peaks around 7 a.m., “remains strong” through 6 p.m., and tapers off after that, with just a tiny fraction of the daytime audience by 10 p.m. ARBITRON, RADIO TODAY (2005 ed.), at 6, www.arbitron.com/downloads/radiotoday05.pdf (visited 11/17/06).

It was not without reason that the D.C. Circuit referred to the safe harbor as "broadcasting Siberia." *Becker v. FCC*, 95 F.3d 75, 84 (D.C. Cir. 1996).

A safe harbor might have made sense under the facts of *Pacifica,* where one "specific broadcast … represented a rather dramatic departure from traditional program content," *Reno*, 521 U.S. at 867. But given the FCC's expanded censorship rules, combined with the pervasiveness of frank language in today's art, literature, news, and documentary programming, there is simply not enough time after 10 p.m. and before midnight to accommodate all the programming that is now endangered. Since there is not enough time, broadcasters will end up purging anything that might conceivably be offensive to a majority of FCC commissioners from most of their shows in order to air them before 10 p.m.[22]

Finally, as the Supreme Court recognized in *Reno*, much programming that might fall within the FCC's concept of "indecent" would have value for some minors. *Reno*, 521 U.S. at 877-78. Books by John Steinbeck and Toni Morrison, documentaries such as *The Blues*, and news coverage that, the agency has warned in its Remand Order, might also be indecent or profane are all examples

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[22] Although time-shifting technologies make it possible to record late night TV programming for viewing at more convenient times, it is questionable how many people take advantage of this option. Certainly, this technological advance has not led broadcasters to begin to airing popular but potentially risky programs late at night; instead, they have self-censored in response to the fleeting expletives rule.

of valuable material that should not be consigned to hours when youngsters are abed.

In *Playboy,* the Supreme Court struck down a safe harbor requirement for sexually explicit material – a narrower category of speech than the indecency and profanity at issue in this case. *Playboy* involved cable TV, which enters the home exactly as broadcast television does for most Americans today. (Indeed, the programming at issue in *Playboy* came into the home uninvited, largely in the form of "signal bleed.") The Court found, however, that time channeling "silences … protected speech for two-thirds of the day. … To prohibit this much speech is a significant restriction of communication between speakers and willing adult listeners, communication which enjoys First Amendment protection. It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree." 529 U.S. at 812.

Thus, whatever the constitutionality of time-channeling in the era of *Pacifica*, it is not adequate today, given the FCC's current censorship scheme, to secure First Amendment rights.

CONCLUSION

The FCC's indecency and profanity rules are constitutionally flawed and should be struck down. Indeed, because the FCC's efforts to regulate in this area have proven to be constitutionally unworkable, the whole indecency and profanity regime should be enjoined. At a minimum, the Remand Order should be vacated in its entirety.

Respectfully submitted,

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ADDENDUM – *AMICI* ORGANIZATIONS

The Brennan Center for Justice at NYU School of Law is a nonpartisan institute dedicated to a vision of effective and inclusive democracy. Through its Free Expression Policy Project, the Brennan Center provides research and advocacy on arts, culture, censorship, and media democracy.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization that has defended free speech principles since its founding in 1920. Of particular relevance here, the ACLU has participated in many of the leading cases challenging the government's efforts to restrict speech on the basis of "indecency," including *FCC v. Pacifica* and *Reno v. ACLU*. **The New York Civil Liberties Union** (NYCLU) is a statewide affiliate of the national ACLU.

The National Coalition Against Censorship (NCAC), founded in 1974, is an alliance of 50 national nonprofit organizations, including religious, educational, professional, artistic, labor and civil rights groups united in the conviction that freedom of thought, inquiry and expression are indispensable to a healthy democracy. The positions advocated by NCAC in this brief do not necessarily reflect the positions of each of its participating organizations.

The First Amendment Project (FAP) is a nonprofit organization dedicated to protecting and promoting freedom of information, expression, and petition. Among FAP's clients are several independent, nonprofit broadcast content-providers that are threatened by the ambiguities and inconsistencies in the FCC's policies and whose ability to report on issues of local and national significance is thus compromised.

PEN American Center (PEN) is an organization of over 2,900 novelists, poets, essayists, translators, playwrights, and editors. As part of International PEN, it and its affiliated organizations are chartered to defend free and open communication within all nations and internationally. American PEN has taken a leading role in attacking rules that limit freedom of expression in this country.

The American Booksellers Foundation for Free Expression (ABFFE) is the bookseller's voice in the fight against censorship. Founded by the American Booksellers Association in 1990, ABFFE's mission is to promote and protect the

free exchange of ideas, particularly those contained in books, by opposing restrictions on the freedom of speech.

Writers Guild of America West (WGAW) is a labor organization and the collective bargaining representative of approximately 11,000 professional writers in the motion picture, television and new media industries. The court's decision will have a direct impact on the WGAW's members as content creators in broadcast television.

The Directors Guild of America (DGA) represents more than 13,400 directors and members of the directorial team working in U.S. cities and abroad. Their creative work is represented in feature films, television, commercials, documentaries, and news. The DGA's mission is to protect the economic and creative rights of directors and the directorial team.

Screen Actors Guild (SAG) represents approximately 120,000 professional actors, many of whom perform on broadcast television and radio, and are thus directly affected by the FCC's censorship system. SAG is committed to protecting the creative rights of its members and enforcing its collective bargaining agreements throughout the world.

The American Federation of Television and Radio Artists, AFL-CIO (AFTRA) is a national labor organization with a membership of over 70,000 professionals working in the news, entertainment, advertising and sound recordings industries. AFTRA's membership includes news reporters, anchors, sportscasters, talk show hosts, announcers, disc jockeys, producers, writers and other on-air and off-air broadcast employees; royalty artists and background singers whose sound recordings are played on radio stations; and other performers on radio and broadcast TV.

The Writers Guild of America, East is a labor union representing professional writers in film, television and radio. Its members write for entertainment, for network and local news operations, for independent stations in major cities, and for any other media production companies which are signatory to Guild agreements. Its members are very concerned about censorship and the impact of the FCC's regulations on artistic freedom and the quality of their work.

Minnesota Public Radio (MPR) is a regional public radio network that serves some 650,000 listeners each week across seven states on 37 public radio stations. In addition, as **American Public Media** (APM), it produces more

nationally distributed news and documentary programming than any other station-based public radio organization, reaching some 14 million people per week.

The National Federation of Community Broadcasters (NFCB) represents over 200 community-oriented radio stations across the United States. Community radio is committed to airing diverse, authentic voices and finds the current FCC indecency regulations inconsistent and overbroad. Since most community radio stations operate on small budgets, they can not afford the fines that can now be charged for an inadvertent broadcast of something that the Commission might decide is indecent or profane, which has a chilling affect on their editorial freedom and ability to serve their communities.

Film Arts Foundation seeks to support the creation and success of independent film and video makers by providing education, comprehensive information, state of the art facilities and equipment, financial support and sponsorship, and exhibition opportunities. Film Arts is a catalyst and advocate for the diverse voices of the independent film community on the West coast and nationally.

Re:New Media supports media artists and advocates on their behalf, connects audiences with independent films and contributes to the media arts field via innovative programs and direct cash support. Re:New Media is interested in this case because the FCC censorship adversely affects the artists it supports and the audiences that want to see their work.

The National Alliance for Media Arts and Culture (NAMAC) is the national service organization for the media arts, providing leadership training and professional development, organizational capacity building support, and original research about the field. With more than 300 member organizations serving an estimated 400,000 film, video, audio, and digital creators, NAMAC has a strong interest in ensuring that language or gestures central to the meaning of film and audio works remain intact and are not eliminated or altered when presented to the public.

International Documentary Association (IDA) was founded in 1982 as a nonprofit membership organization dedicated to supporting the efforts of nonfiction film and video makers throughout the United States and the world; promoting the documentary form; and expanding opportunities for the production, distribution, and exhibition of documentary. The IDA is committed to increasing public appreciation and demand for documentary films, videos,

and television programs across all ethnic, political and socioeconomic boundaries.

Working Films is a national nonprofit organization that provides essential services for independent documentary filmmakers by creating long-term strategies of community engagement for their films. The films address issues of social, economic, environmental, and racial justice; they portray the grittiness and complexity of life, and sometimes contain street language. Almost all of the films have been shown on national broadcast or cable television.

The Creative Coalition (TCC) is the leading nonprofit, nonpartisan social and public advocacy organization of the arts and entertainment community. Founded in 1989 by prominent members of the creative community, TCC is dedicated to educating its members on issues of public importance, primarily the First Amendment, arts advocacy, campaign finance reform and public education.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,973 words, as determined by the Microsoft Word Version 2002 word processing program used to prepare the brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word Version 2002 (10.6818.6817)(SP3) in 14 point Times New Roman type style.

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing brief were served upon the following parties via first class U.S. mail, postage prepaid, at the addresses and on the date that appear below, and that an electronic copy of the brief in PDF format was served on these persons via electronic mail on the same date.

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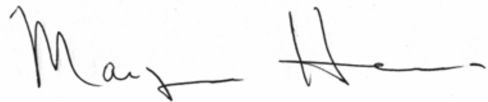

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