

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FEDERAL COMMUNICATIONS :

4 COMMISSION, ET AL., :

5 Petitioners :

6 v. : No. 10-1293

7 FOX TELEVISION STATIONS, :

8 INC., ET AL. :

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10 Washington, D.C.

11 Tuesday, January 10, 2012

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:22 a.m.

16 APPEARANCES:

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19 behalf of Petitioners.

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

22 SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of

23 Respondents ABC, Inc., et al.

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P R O C E E D I N G S

(11:22 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 10-1293, Federal Communications Commission v. Fox Television Stations.

General Verrilli.

ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

ON BEHALF OF THE PETITIONERS

GENERAL VERRILLI: Mr. Chief Justice, and may it please the Court:

In its previous decision in this case, the Court observed that when a broadcast licensee takes a license for the free and exclusive use of a valuable part of the public domain, it also accepts enforceable public obligations. One of those enforceable obligations is the indecency restriction which Congress has instructed the Federal Communications Commission to enforce between the hours of 6:00 a.m. and 10:00 p.m.

Respondents in this case have for years benefited enormously from their free and exclusive use of public spectrum. They argue, however, that neither Congress nor the commission may as a condition of their licenses require that they refrain from broadcasting indecent material when children are most likely to be in the audience.

1 JUSTICE KAGAN: But, General Verrilli, it
2 seems to me that this contract notion of yours can only
3 go so far. I mean, if the idea is just we gave them
4 something, now they have to do whatever we say, you
5 wouldn't accept that. So, the question is why is this
6 condition appropriate when many other conditions would
7 not be appropriate? I mean, tell me if I'm wrong, if
8 you would say all conditions are appropriate. But I --
9 I frankly think you wouldn't.

10 GENERAL VERRILLI: This condition is
11 appropriate, Justice Kagan, because it has been a
12 defining feature of the broadcast medium from its
13 inception in the 1920s in the Radio Act and has
14 continued to be a defining feature of this medium
15 throughout its history. And the argument that my
16 friends on the other side are making here is that that
17 norm, that legally enforceable norm which has been
18 recognized by this Court in *Pacifica* and has been
19 applied since the inception of this medium, needs to be
20 overturned now because circumstances have changed.

21 And I would point out first, if I may,
22 something that --

23 JUSTICE SCALIA: That's one of their
24 arguments. I mean, another one is that you haven't
25 defined it precisely enough, right?

1 GENERAL VERRILLI: Yes, that's true.

2 JUSTICE SCALIA: That's a separate -- really
3 a separate argument.

4 GENERAL VERRILLI: That's certainly true,
5 Justice Scalia, and I will certainly get to vagueness,
6 if I -- if I may just continue on this line.

7 The -- their argument is that circumstances
8 have fundamentally changed. I want to point out at the
9 outset something I think is significant, which is that
10 their argument would sweep away indecency restriction
11 with respect to radio as well as television, and they
12 would sweep that away in the arguments they are making
13 today without making any showing that circumstances have
14 changed at all with respect to the ubiquity of -- or
15 accessibility of radio.

16 And I think if one looks at the FCC orders
17 that this Court cited in its prior decision in this
18 case, one will see that a lot of the most vile and lewd
19 material really is in radio. So, I just want to put
20 that marker down at the beginning here because I do
21 think it is quite important. No showing has been made
22 about radio.

23 JUSTICE KENNEDY: I didn't quite understand
24 that. Today there's a -- there's either a potential or
25 a fact of violent and objectionable broadcasting in

1 radio? I didn't quite -- just to understand your point.

2 GENERAL VERRILLI: Yes. Pacifica itself,
3 Justice Kennedy, was a case about a radio broadcast.

4 JUSTICE KENNEDY: Yes, I understand that.
5 Yes.

6 GENERAL VERRILLI: And the Respondents are
7 arguing in this case that Pacifica ought to be overruled
8 because the circumstances that justified its rule no
9 longer obtain. I want to put a marker in at the outset
10 here with respect to radio, because I do think it's
11 quite important, that they haven't made any argument
12 that those circumstances are any different with respect
13 to radio. It's just as ubiquitous as it was. There
14 isn't even any argument that there's blocking technology
15 available. And I want to make sure, given the kind of
16 vile material that the record demonstrates has been
17 transmitted over time on radio, that the Court focuses
18 on the breadth of the argument that the Respondents are
19 making here.

20 Now, with respect to television, I do think
21 they're making an argument that -- that television
22 broadcasting is no longer uniquely pervasive in the way
23 that it was before. They're not making an argument --
24 but that, if I may, is a very different kind of argument
25 than one would normally get in support of a -- the

1 suggestion that we ought to depart from stare decisis.

2 They're not -- they're not arguing that
3 broadcast television is any less pervasive than it was.
4 If anything, it's probably more pervasive now. They're
5 not arguing that the harms of that pervasiveness no
6 longer exist. What they're arguing is that there are
7 other media that present harms as well and that with
8 respect -- and that because those other media also
9 present harms, the circumstances require a change in the
10 rule with respect to broadcasters.

11 Now, that -- you can I think look at that in
12 one of two ways. You could say either that's an
13 argument that it's futile to continue to impose this
14 restriction on broadcasters. And I think that's what
15 Fox says at page 33 of its brief.

16 Two points in response to that. I think a
17 significant, if not complete, answer was in this Court's
18 prior decision in this case in which it said that the
19 maintenance of a safe haven is actually particularly
20 important in the context of these changes, a broadcast
21 safe haven. And also I do think that the idea of
22 futility in that nature is foreign to our First
23 Amendment jurisprudence.

24 JUSTICE GINSBURG: General Verrilli, I took
25 it from the briefs and what the FCC has been doing that

1 the major objection is that one cannot tell what's
2 indecent and what isn't; that it's FCC, the censor,
3 that's saying "Private Ryan" is okay, "Schindler's List"
4 is okay, but "NYPD Blue" is not. And I do think that
5 that is the major objection, that we have a government
6 agency that is going to make decisions about when nudity
7 is okay and when it isn't. You can't do it in terms of
8 time because "New York" -- the "NYPD" was 7 seconds and
9 another broadcast, "Catch-22," was 40 seconds.

10 So, it's -- it's the appearance of
11 arbitrariness about how the FCC is defining indecency in
12 concrete situations. That I think is the major flaw.

13 GENERAL VERRILLI: Let me turn to that,
14 Justice Ginsburg. The -- two points about that: The
15 first one is that as we read this Court's recent
16 decision in Humanitarian Law Project, the question on
17 the Fifth Amendment analysis of whether there is
18 vagueness and arbitrary enforcement has to be answered
19 by reference to the specific broadcasts at issue here.
20 In other words, was there fair notice with respect to
21 these specific broadcasts?

22 And I will get to that, but I -- but let me
23 first go directly to Your Honor's more significant
24 question. And I think the -- the problem with looking
25 at the case that way is that the lens is focused too

1 narrowly in that there, actually, if you -- when one
2 broadens out the lens and looks at the wide range of
3 decisions that the commission is making about indecency
4 and then broadens it out even further and looks at the
5 wide range of broadcasts that occur, actually the number
6 of broadcasts are -- that have been identified as even
7 raising a question of arbitrariness or inconsistency is
8 a -- is really quite a miniscule fraction. It's even
9 quite a miniscule fraction even with respect to
10 broadcasts that the commission has adjudicated as
11 indecent or not indecent.

12 And, yes, we would concede that there is not
13 perfect clarity in this rule. It's a context-based
14 rule. As we read *Pacifica*, the Court suggested in
15 *Pacifica* that a context-based rule may well be what the
16 Constitution requires here, and that's going to result
17 in some -- something less than absolute precision. But
18 the -- of course, the alternative, I would assume from
19 my friend's perspective, would be worse. The commission
20 could have a list that said never say the following,
21 however many words; never show broadcasting between the
22 hours of 6:00 a.m. -- nudity between the hours of
23 6:00 a.m. and 10:00 p.m.

24 That would be clearer, but it would -- but,
25 in a way, the commission here, I think by following the

1 context-based approach that I think Pacifica suggested
2 was required, is being -- I mean, "punished" is too
3 strong a word, but it's being held against it that it's
4 trying to make reasonable accommodations for First
5 Amendment values.

6 And so, I think when one looks at it both in
7 terms of where the lenses actually ought to be focused
8 here and the fact that the -- the alternative of perfect
9 clarity would reach a less effective accommodation of
10 First Amendment values, then I do think that the
11 commission's position is quite -- quite reasonable and
12 defensible.

13 JUSTICE BREYER: Could you -- could you
14 digress for one minute to help me understand the
15 procedural posture of this case. When it was here last
16 time, we were dealing with an issue called "fleeting
17 expletives," and that was Fox. And the Fox case
18 involved just that. They didn't really, or we didn't,
19 or the Court didn't, attack the 2001 order which is now
20 at issue. And then, without it going back to the
21 commission, the Second Circuit decided it on a ground
22 that sets aside the 2001 order.

23 Now, can we here just decide the fleeting
24 expletive case, because the fleeting expletive case has
25 to do with one subset of applications of the 2001 order

1 and has to do with part 2(2) or something. I mean, it
2 has -- and how you interpret the words "material dwells
3 on or repeats." Now, that I -- that I understand how to
4 get at.

5 The ABC case raises -- doesn't raise
6 fleeting expletives. It wasn't fleeting. And it raises
7 the question of the validity of -- under vagueness
8 grounds, of 2001 industry guidance and how that's been
9 applied. But the Second Circuit didn't deal with that
10 case. It sent it back to the commission.

11 So, has there been a commission decision
12 recently which has reviewed the basic arguments being
13 made here about the validity of the 2001 industry
14 guidance as applied? Has there been such a thing?

15 Alternatively, has there been an appeals
16 court holding on the -- or analysis of the ABC case?

17 GENERAL VERRILLI: I do -- I agree with you,
18 Justice Breyer, (a) that this is a complex procedural
19 posture; (b) that the Court would have some discretion
20 in how it approached and resolved the case.

21 With respect to the ABC case, as I read the
22 commission's orders, which are in the appendix to the
23 petition, it applied the 2001 industry guidance to reach
24 the conclusion that the ABC broadcast was indecent. And
25 then that was -- that -- then ABC appealed that to the

1 Second Circuit --

2 JUSTICE BREYER: Right.

3 GENERAL VERRILLI: -- as I understand it,
4 and that the Second Circuit then found that the -- that
5 the commission had violated the Constitution in reaching
6 that result. It first --

7 JUSTICE BREYER: But they didn't -- they
8 didn't in that case --

9 GENERAL VERRILLI: Right.

10 JUSTICE BREYER: -- and they sent the ABC
11 case back. I see your --

12 GENERAL VERRILLI: They did on -- when it
13 came back, Your Honor, they then -- they disposed of the
14 Fox case with a lengthy opinion --

15 JUSTICE BREYER: Yes.

16 GENERAL VERRILLI: -- and then essentially
17 applied that analysis to the ABC case.

18 JUSTICE BREYER: I see.

19 GENERAL VERRILLI: So, I think in
20 fairness --

21 JUSTICE BREYER: All right. When this ABC
22 case was argued in front of the commission -- I have
23 here about 30 briefs at least, maybe 40, and they are
24 filled with very good arguments. Were those arguments
25 made to the commission in the context of the ABC case?

1 Because as it comes up here, we are -- whereas I thought
2 when we granted cert, quite honestly, that this was Fox
3 coming back, as I've read the brief it isn't at all.

4 This is a new case, nothing to do with what we decided
5 before. This is the case of ABC, period. And it is an
6 attack on the 2001 guidelines, not fleeting expletives.

7 And, therefore, I want to know, at least
8 satisfy myself, that this Fox -- this ABC case has gone
9 through ordinary procedures and, indeed, these arguments
10 have all been made in front of the commission and
11 they've been rejected.

12 GENERAL VERRILLI: So, Justice Breyer, I'm
13 not sure that I can vouch for the proposition that the
14 arguments have all been made in front of the
15 commission --

16 JUSTICE BREYER: I'm not saying every one,
17 but has the essence of these arguments.

18 GENERAL VERRILLI: In fairness, I do think
19 that -- that if one reads the commission's disposition
20 of the -- the ABC case, it is applying the 2001 guidance
21 reaching the conclusion that the broadcast was indecent
22 under the 2001 guidance. ABC paid the fine that it was
23 assessed and then, as it has -- as it can do, then
24 invoked the Hobbs Act, went to the court of appeals to
25 challenge it. And so, I do think -- I do actually think

1 that the issues have been considered by the agency and
2 are before the Court.

3 And I do agree with Your Honor, moving I
4 think more directly to the vagueness point, that there
5 really isn't a vagueness issue left with respect to the
6 fleeting expletives in the -- in the Fox case because
7 the Court said the last time the case was here that
8 there is no problem of arbitrary punishment because
9 there was no forfeiture or any other sanction.

10 ABC is in a different position because they
11 were sanctioned. And so, there is an issue with respect
12 to the question of whether the commission's indecency
13 standards can constitutionally be applied here and
14 whether they're too vague. But I do think, and I do --
15 I would like to spend a minute on that question of
16 whether there is vagueness as applied to the ABC
17 broadcast.

18 Now, the commission's standards in the 2001
19 guidance say that it's essentially a two-part test.
20 First is a subject matter question: Is there a
21 description or depiction of sexual or excretory
22 activities or organs? And then there's a question of
23 whether the depiction or description is patently
24 offensive under community standards for broadcast
25 informed by three factors: whether the expression is

1 explicit, whether the broadcast dwells on it, and
2 whether it's shocking or pandering or titillating.

3 Now, ABC makes an argument with respect to
4 this broadcast that the nudity in the "NYPD Blue"
5 episode is outside of the first subject matter criteria
6 because it didn't have fair notice that buttocks would
7 be considered sexual organs for purposes of application
8 of this -- of this standard.

9 The commission said -- and this is at page
10 137a of the appendix to the petition -- that it's
11 impossible to believe that they didn't think that the
12 naked display of buttocks would bring them within --
13 that weren't -- didn't have fair notice that the naked
14 display of buttocks would bring them within this rule.
15 I'm not sure anything more needs to be said about that.

16 JUSTICE KAGAN: Well, the broader point,
17 General Verrilli, isn't it, is that no matter -- even if
18 you're right that there are many non-vague applications
19 of this commission policy, that there is some amount of
20 uncertainty and ABC finds itself in that area of
21 uncertainty --

22 GENERAL VERRILLI: I don't --

23 JUSTICE KAGAN: -- because it turns out that
24 nudity -- that there really -- sometimes it's allowed as
25 to some body parts, and sometimes it's not allowed; and

1 the commission hadn't really said anything about it for
2 50 years; and the length of time doesn't seem to be
3 what's indicative of anything; the kind of body part
4 doesn't seem to be, with some limits, what's indicative
5 of anything, so that ABC just didn't really know.

6 GENERAL VERRILLI: With respect, Justice
7 Kagan, I really disagree with that characterization of
8 the situation.

9 Moving to the second part of the analysis
10 here, I think it's important to take a half a step back.
11 The fact of the matter is -- and I think everybody, all
12 of us, understand this in our experience -- that nudity
13 on broadcast television is an exceedingly, exceedingly,
14 rare thing at any time of the day and certainly between
15 6:00 a.m. and 10 p.m. It is exceedingly rare, and all
16 of us from our experience know that. And the --

17 JUSTICE GINSBURG: Well, I'm not so sure
18 because the examples were given of -- I guess excerpts
19 from "Private Ryan" and from "Schindler's List" have
20 been on television.

21 GENERAL VERRILLI: Yes, that's true, Justice
22 Ginsburg. But, again, I think that's another issue
23 about where the lens is focused. There have been
24 thousands and thousands and thousands of broadcasts, and
25 the Respondents have identified four in which -- over

1 25 years, in which any nudity has been present.

2 JUSTICE SCALIA: They have their own
3 guidelines that generally prohibit it, don't they?

4 GENERAL VERRILLI: That's certainly true,
5 Justice Scalia. And I do think, in Reno, this Court
6 described the Carlin monologue at issue in Pacifica in
7 the following way: It said that monologue was readily
8 identifiable as indecent because it was a dramatic
9 departure from the customary norms for the broadcast
10 medium. I think the kind of nudity -- and I think if
11 one just looks at the video here and sees it, I -- I
12 think it's hard to disagree with the proposition that
13 that's a dramatic departure from what's the norm for
14 broadcast television.

15 JUSTICE GINSBURG: If they did an excerpt
16 from "Hair," could they televise that?

17 GENERAL VERRILLI: I think it would raise
18 serious questions. I think nudity is going to raise
19 very serious questions, and I think --

20 JUSTICE GINSBURG: In the -- in the opera,
21 in "The Makropulos Case," there's a scene where a woman
22 is seen nude entering a bathtub. And suppose that were
23 shown, that scene from the opera.

24 GENERAL VERRILLI: Well, I don't -- I think,
25 Justice Ginsburg, that in a context-based approach,

1 there's not going to be perfect clarity. We recognize
2 that. But I do think with respect to this broadcast --
3 and that's the question before the Court, whether Fox --
4 excuse me -- whether ABC was on fair notice of whether
5 this broadcast would bring them within the rule.

6 JUSTICE KENNEDY: What -- what you're saying
7 is, is that there is a public value in having a
8 particular segment of the media with different standards
9 than other segments. And forget radio. Let's just talk
10 about television. But -- you know, in the briefs, it
11 says how much -- how many cable stations there are, and
12 you, what do you call it, surf the -- you go through all
13 the channels. And it's not apparent to many people
14 which are broadcast and which are not.

15 But you're saying that there's still a
16 value, an importance, in having a higher standard or
17 different standard for broadcast media on the
18 television. Why is that, when there are so many other
19 options, and -- and when it's not apparent to many
20 viewers which of the two they're watching? Just because
21 it's an important symbol for our society that we aspire
22 to a culture that's not vulgar in -- in a very small
23 segment?

24 GENERAL VERRILLI: Two points in response to
25 that, Justice Kennedy: First, I think the Court's

1 previous decision in this case goes a long way to
2 providing an answer, that yes, it does make a difference
3 to preserve a safe haven where, if parents want to put
4 their kids down in front of the television set at
5 8:00 p.m., they know that there's a segment of what's
6 available that -- where they're not going to have to
7 worry about whether the kids are going to get bombarded
8 with curse words or nudity. And then --

9 JUSTICE KENNEDY: Well, but --

10 JUSTICE KAGAN: But this goes --

11 JUSTICE KENNEDY: But then there's -- and
12 then there's -- and then there's the chip that's
13 available.

14 GENERAL VERRILLI: Right.

15 JUSTICE KENNEDY: And, of course, you ask
16 your 15-year-old, or your 10-year-old, how to turn off
17 the chip. They're the only ones that know how to do it.

18 (Laughter.)

19 GENERAL VERRILLI: Well, and that -- that
20 does point out the problem with the -- with the V-chip.
21 Of course, the V-chip is not new. It's been around for
22 more than a decade, and the -- the broadcasters have
23 tried to encourage uptake. The government has tried to
24 encourage uptake. It hasn't taken.

25 JUSTICE KENNEDY: But is your point is -- is

1 that the chip technology works better if you have this
2 differentiation between broadcast and cable media?

3 GENERAL VERRILLI: No, a different point. I
4 think the -- I want to get to what I think is the
5 fundamental point here, that whatever may be the case
6 with respect to the ability of a viewer to differentiate
7 whether something is a broadcast channel or a cable
8 channel, the reality is that broadcasters are in a
9 different position by virtue of the fact that they have
10 a license from the government that comes with this
11 enforceable public obligation that allows the government
12 to create this safe haven, and that puts them in a
13 different position.

14 JUSTICE KENNEDY: Well, in a way, that's
15 circular. That's what we're here to argue about. I'm
16 asking --

17 GENERAL VERRILLI: Right.

18 JUSTICE KENNEDY: -- is there a functional,
19 a pragmatic, a practical difference between the two?

20 GENERAL VERRILLI: Is there -- well, I'm
21 sorry, Justice Kennedy. The V-chip works with both
22 broadcast and -- and cable transmissions, to the extent
23 it works. The -- what the briefs have pointed out --
24 and I would suggest in particular that the Court look at
25 the brief from the American Academy of Pediatrics, which

1 does a very thorough job in explaining the many ways in
2 which the V-chip has proven to be a deficient
3 technology. A lot of it goes to the inaccuracy and
4 incompleteness of the codes, the labels that -- that the
5 programmers put in to begin with, which have to be there
6 in order for the V-chip to decide what gets through and
7 what doesn't.

8 And I would point out in this very case, for
9 example, with respect to the -- for example, the 2003
10 Billboard Music Award broadcast with the Paris Hilton-
11 Nicole Richie back and forth, one would never have known
12 from the code affixed for the V-chip purpose that that
13 broadcast was going to have those kinds of words in
14 them.

15 JUSTICE ALITO: What will happen when --
16 when we get to the point where -- when there are only a
17 handful of people in the entire country who are still
18 receiving television programs via the airwaves?

19 GENERAL VERRILLI: Well, I do think we're
20 not there now, as we've said in our brief, but --

21 JUSTICE KAGAN: We're almost there, right --
22 10 percent?

23 GENERAL VERRILLI: And I do -- but that I
24 think -- that really makes what I think is one of the
25 most fundamental points here, is that the broadcasters

1 want to have it both ways, right? They -- the spectrum
2 licenses they have are worth billions and billions of
3 dollars. Spectrum is staggeringly, staggeringly scarce,
4 and -- and they're sitting on an enormously valuable
5 resource which they got for free, and then they have a
6 statutory benefit of must-carry, which gets them on
7 cable systems automatically, and a further statutory
8 benefit of preferred channel placement on -- on those --

9 JUSTICE SCALIA: Sign -- sign me up as
10 supporting Justice Kennedy's notion that this has a
11 symbolic value, just as we require a certain modicum of
12 dress for the people that attend this Court and the
13 people that attend other Federal courts. It's a
14 symbolic matter.

15 And if this is -- these are public airwaves,
16 the government is entitled to insist upon a certain
17 modicum of decency. I'm not sure it even has to relate
18 to juveniles, to tell you the truth.

19 GENERAL VERRILLI: And -- and we certainly
20 agree, Justice Scalia, with the point that was made in
21 the Court's previous decision in this case, that -- for
22 example, the words that are in the Fox broadcasts --
23 teachers don't use those words with students. You don't
24 hear those words in churches or synagogues. There are
25 many, many contexts --

1 JUSTICE SCALIA: Well, you do more and more.

2 JUSTICE GINSBURG: You hear them on the
3 street.

4 JUSTICE SCALIA: You do more and more, since
5 there's so --

6 (Laughter.)

7 JUSTICE SCALIA: -- since there's so much of
8 it on.

9 GENERAL VERRILLI: And I do think, if I
10 may --

11 JUSTICE GINSBURG: But you -- you are saying
12 that the standard can still be symbolic, as
13 Justice Scalia said. We want the King's English when --
14 the very children we're talking about, when they go on
15 the street, when they -- their big brother says
16 something to them, it is -- the words that were -- the
17 expletives are in common parlance today. I mean, it
18 is -- I think that children -- that children are not
19 going to be shocked by them the way they might have been
20 a generation ago.

21 GENERAL VERRILLI: Justice Ginsburg, I think
22 something this Court said in its prior decision is -- is
23 right on the mark with respect to this issue, which is
24 it's a question of whether it's portrayed as
25 appropriate. And when it is -- it's one thing when your

1 13-year-old brother is saying it to you or some bully in
2 the schoolyard is saying it to you.

3 It's another when it's presented to you in
4 this medium as an appropriate means of communication.
5 That's true with respect to words, and it's also true
6 with respect to nudity.

7 If I might reserve the balance of my time.

8 CHIEF JUSTICE ROBERTS: Thank you, General.

9 Mr. Phillips.

10 ORAL ARGUMENT OF CARTER G. PHILLIPS

11 ON BEHALF OF RESPONDENTS FOX TELEVISION

12 STATIONS, INC., ET AL.

13 MR. PHILLIPS: Thank you, Mr. Chief Justice,
14 and may it please the Court:

15 I'd like to respond initially to some of
16 General Verrilli's general observations. First of all,
17 he talks about indecency as somehow serving as the core
18 of the overall understanding of the regulatory deal that
19 was made here. And it's difficult for me to accept that
20 notion when there was no effort whatsoever to enforce
21 the -- the standard of indecency between 1927 and 1975.

22 CHIEF JUSTICE ROBERTS: Well, that's because
23 broadcasts didn't commonly have this sort of -- these
24 sorts of words or these sorts of images.

25 MR. PHILLIPS: Well, maybe, maybe not. We

1 don't know. All we know is that for a period of
2 50 years, nothing happened. So, the idea --

3 CHIEF JUSTICE ROBERTS: Well, no, we know.

4 JUSTICE SCALIA: Yes, that's right.

5 CHIEF JUSTICE ROBERTS: I mean, we can -- it
6 was not the case from 1927 till whenever you -- what,
7 1970-something -- that nudity commonly appeared on
8 broadcast television or the various words we're dealing
9 with here commonly appeared. So, it seems a bit much to
10 say, well, they didn't bring any cases for that period.
11 There were no cases to be brought.

12 MR. PHILLIPS: The only point I'm trying to
13 make, Chief Justice, is that if you're talking about
14 this as sort of the core understanding between the
15 parties, it simply played a fairly minor role in the
16 process through the bulk of the regulatory period we're
17 talking about. And, indeed, if you put it in context,
18 this is a statute that prohibits obscenity, profanity,
19 and indecency. And while the FCC spent a lot of time
20 writing about profanity as somehow being offended by
21 what went on in this omnibus order, the commission has
22 completely abandoned that under the circumstances.

23 JUSTICE KAGAN: But how about this,
24 Mr. Phillips: Look, you've been given a privilege, and
25 that gives the government at least somewhat more leeway

1 to impose obligations on you. Not -- can't impose
2 everything, but at least has a bit more leeway. And
3 here we've had something that's very historically
4 grounded. We've had this for decades and decades that
5 the broadcast is -- the broadcaster is treated
6 differently.

7 It seems to work, and it -- it seems to be a
8 good thing that there is some safe haven, even if the
9 old technological bases for that safe haven don't exist
10 anymore.

11 So, why not just keep it as it is?

12 MR. PHILLIPS: Well, first of all, Justice
13 Kagan, it was important to catch the answer to your
14 question when you asked it of General Verrilli, which
15 was you're not saying that we lose all of our First
16 Amendment rights. So, clearly we retain our First
17 Amendment rights.

18 And, under those circumstances, it seems to
19 me you've got this two ways: First of all, the idea
20 that it, quote, "worked" -- it worked perfectly fine
21 from all the way up until 2001, even I would say until
22 2004, when the commission wildly changed its approach.
23 And it's only become dysfunctional since 2004 and, as we
24 sit here today, literally facing thousands and thousands
25 of ginned-up computer-generated complaints that are

1 holding up literally hundreds of TV license renewals, so
2 that the whole system has come to a screeching halt
3 because of the difficulty of trying to resolve these
4 issues.

5 So, to say that the system is working well,
6 it seems to me, at least from the broadcasters'
7 perspective, is to say -- is to suggest that's just not
8 true.

9 JUSTICE ALITO: Well, you want us to
10 overrule a decision of this Court, *Pacifica*.

11 MR. PHILLIPS: Yes, Justice Alito.

12 JUSTICE ALITO: Now, as to radio, what --
13 what has changed?

14 MR. PHILLIPS: Well, I'm not here --

15 JUSTICE ALITO: To justify that? Well,
16 could we hold that the policy is -- is invalid as to --
17 on First Amendment grounds as to TV but not as to radio?

18 MR. PHILLIPS: Absolutely, Your Honor,
19 because there are fundamentally different media, and
20 there are different protections and the circumstances
21 are different, and the Court has recognized that media
22 have to be evaluated individually. But what has
23 happened over the 30 years with respect to the broadcast
24 side of television is a very fundamental change. Cable
25 is now equally pervasive. Cable is now equally

1 accessible to TV, satellite equally accessible to TV.

2 CHIEF JUSTICE ROBERTS: But that -- but that
3 -- that cuts both ways. People who want to watch
4 broadcasts where these words or expose their children to
5 broadcasts where these words are used, where there is
6 nudity, there are 800 channels where they can go for
7 that. All we're asking for, what the Government is
8 asking for, is a few channels where you can say I'm not
9 going to -- they're not going to hear the "S" word, the
10 "F" word. They're not going to see nudity. So, the
11 proliferation of other media, it seems to me, cuts
12 against you.

13 MR. PHILLIPS: Well, it seems to me there
14 are two answers to that: First of all, the notion that
15 one medium operates in a certain way in the exercise of
16 its First Amendment rights can be used as an -- as an
17 explanation for taking away or for -- for restricting
18 the First Amendment rights of another medium is flatly
19 inconsistent with what this Court has said across the
20 board in the First Amendment context. You don't balance
21 off one speaker against another and give one favored
22 status and give another unfavored status.

23 CHIEF JUSTICE ROBERTS: Well, that's your
24 argument there, is that it's not a legitimate objective
25 to have a safe harbor.

1 MR. PHILLIPS: Well, you can get a safe
2 harbor, and, indeed, there are a number of safe harbors
3 that are out there. First of all, there are a ton of
4 cable networks that are aimed exclusively at children.
5 And, you know, there are five, six, eight stations that,
6 I guarantee you, you will see -- where you'll see none
7 of that language.

8 And, second of all, it's always available to
9 the United States Government to decide to hold this --
10 to create its own license for the United States to be a
11 broadcaster and to ensure that the broadcasts of the
12 United States public network exclude anything they want
13 to exclude because that's government speech and is in no
14 way restricted by what the First Amendment would
15 provide.

16 JUSTICE ALITO: Well, if we rule in your
17 favor on the First Amendment grounds, what will people
18 who watch Fox be seeing between 6:00 a.m. and
19 10:00 p.m.? Are they going to be seeing a lot of people
20 parading around in the nude and a stream of expletives?

21 MR. PHILLIPS: Not under the guidelines that
22 the -- that Fox has used consistently from 10:00 p.m.
23 until 6:00 a.m. and candidly that all of the other
24 networks follow.

25 The truth is the advertisers and the

1 audiences that have to be responded to by the networks
2 insist on some measure of restraint, not a measure
3 of restraint --

4 JUSTICE ALITO: So, what will you put on
5 that you are not able to put on now?

6 MR. PHILLIPS: Well, I mean, some of the
7 things that we could at least wonder about is "Saving
8 Private Ryan," "Catch-22," perhaps the beginning of the
9 Olympics. There's a whole slew of questions. I mean,
10 the -- and if you go beyond that and you think about
11 what speech has been chilled, the Tillman memorial
12 service is not broadcast because of fear of what's going
13 to be said there. Football games, basketball games,
14 local news events --

15 JUSTICE BREYER: All right. So, suppose we
16 take that particular line. You didn't argue -- I mean,
17 Fox didn't argue -- Fox was worried about the fleeting
18 expletive policy in Golden Globe. I doubt in Golden
19 Globe, when it was before the commission, they raised
20 all these vagueness challenges to the whole 2001 policy.

21 So, why -- here you've taken a much broader
22 stance now, though you didn't before. I mean, do you
23 want to say anything about what I think is the basic
24 issue that Fox raises? We don't have to overrule
25 Pacifica. What Fox was penalized for was two women on

1 television who basically used a fleeting expletive which
2 seems to be naturally part of their vocabulary.

3 (Laughter.)

4 JUSTICE BREYER: And -- and we're worried
5 about small stations that cannot censor people because
6 they don't know what they're going to say. All right.
7 That was what we wrote, I think in -- in my opinion,
8 anyway. We were worried about that.

9 MR. PHILLIPS: Right.

10 JUSTICE BREYER: Are you abandoning that
11 argument?

12 MR. PHILLIPS: No, no, no, of course not.
13 But you have to realize, Justice Breyer, that what -- I
14 mean, the Second Circuit, because it didn't have
15 available to it sort of what to do precisely with
16 *Pacifica*, tended to focus on the question of vagueness.
17 Vagueness was certainly an argument that we made there,
18 but --

19 JUSTICE BREYER: It's an ABC argument
20 primarily, but you made that argument in the Second
21 Circuit. What I'm fishing with -- you don't have to
22 comment more, but -- is, do we have to reach that
23 argument? Except it's --

24 MR. PHILLIPS: No --

25 JUSTICE BREYER: -- very, very broad --

1 MR. PHILLIPS: No. It's absolutely clear to
2 me that if this Court wants to say no more than we
3 decided the outer limits of the First Amendment in
4 *Pacifica* --

5 JUSTICE BREYER: Yes.

6 MR. PHILLIPS: -- and it goes to the verbal
7 shock treatment that Justice Powell described in a
8 separate opinion, and this doesn't come anywhere near
9 that, and, therefore, this is beyond what the First
10 Amendment provides, the Court could clearly hold that
11 way and --

12 JUSTICE SCALIA: Well, that's not really
13 clear. I mean, if you want us to be really clear, you
14 should ask the FCC to simply outlaw any fleeting use of
15 the "F" word, the "S" word, any -- any shots of any
16 nudity in any movie, buttocks included. That would give
17 you all of the notice that you need. Why don't you
18 propose that? Boy, that's certain as can be.

19 MR. PHILLIPS: Well, our basic argument
20 would then -- I mean, obviously what you'd be taking
21 away is the vagueness argument, but that would just
22 bring you back then, Justice Scalia, to the core
23 *Pacifica* argument and the question of how far can the --
24 how is it permissible to allow the FCC to regulate the
25 broadcast networks on standards that are fundamentally

1 different than cable, the Internet, and every other
2 medium that exists? I -- you know, I'd be perfectly
3 happy if they want to try to adopt those kinds of
4 standards and subject them to the strict scrutiny
5 requirements that this Court applies to every other
6 medium, because the truth is those requirements will not
7 withstand scrutiny under those particular standards.

8 JUSTICE ALITO: Well, broadcast TV is -- is
9 living on borrowed time. It's not going to be long
10 before it goes the way of vinyl records and eight-track
11 tapes.

12 MR. PHILLIPS: I hope that -- I'm sure my
13 client is not thrilled to hear you say that.

14 JUSTICE ALITO: Well, no, I'm sure.

15 (Laughter.)

16 JUSTICE ALITO: I'm sure your clients will
17 continue to make billions of dollars on their programs
18 which are -- which are transmitted by cable and by
19 satellite and by Internet. But the -- to the extent
20 that they're making money from people who are using
21 rabbit ears, that's -- that's disappearing. Do you
22 disagree with that?

23 MR. PHILLIPS: No, I -- it would be -- you
24 know, obviously not, because that's why we're not
25 uniquely accessible or uniquely pervasive.

1 JUSTICE ALITO: Yes. Well, so, why not just
2 let this die a natural death? Or why do you want us to
3 intervene --

4 (Laughter.)

5 MR. PHILLIPS: Well, because -- well, we
6 didn't ask you to intervene, actually. The FCC is the
7 one who asked you to intervene.

8 JUSTICE ALITO: Well, you're asking us to
9 intervene by overruling a prior precedent.

10 MR. PHILLIPS: Well, I'd be -- well, I think
11 once the issue is before the Court, it ought to decide
12 the First Amendment question that's presented here, and
13 the First Amendment question says what can the FCC do
14 under these circumstances?

15 It seems to me there are probably four
16 different ways you can go about it, all of which says
17 what the FCC did here is wrong. You can say *Pacifica* is
18 an exceedingly narrow decision. It goes to the outer
19 limits of what the First Amendment allows the FCC to do.
20 What they've done here is unconstitutional --

21 JUSTICE KENNEDY: But isn't the --

22 MR. PHILLIPS: -- or they shouldn't do that.

23 JUSTICE KENNEDY: -- inevitable consequence,
24 or this precise consequence that you're arguing for on
25 this fleeting expletive portion of this case, that every

1 celebrity or want-to-be celebrity that's interviewed can
2 feel free to use one of these -- one of these words? We
3 will just expect it as a matter of course, if you
4 prevail. Isn't that the necessary consequence of this
5 case?

6 MR. PHILLIPS: Well, that they will use it,
7 perhaps. But that doesn't mean that we wouldn't
8 continue to try to bleep it out as best we could because
9 we have our own standards.

10 JUSTICE KENNEDY: Well, I mean, even you did
11 in this one. You said now remember you're on
12 television, which was just, you know, giving an added
13 incentive for these vulgar comments.

14 MR. PHILLIPS: Well, that was clearly not --
15 I mean, from Fox's perspective, it was not scripted to
16 set it up that way. But, remember, the first -- the
17 first expletive --

18 JUSTICE KENNEDY: But, I mean, isn't it
19 inevitable that this will happen?

20 MR. PHILLIPS: It is inevitable that --
21 well, I think it's inevitable regardless that people are
22 going to continue to use language that they would
23 naturally use. So, yes, I do think you can expect on
24 cable and any other forum in which you have humans
25 speaking that this kind of language will expand.

1 I don't know that it -- and it will probably
2 be the case that in some context, particularly live
3 television, which is really what's placed in jeopardy by
4 this, that you will have less live television because
5 your concern is people will continue to use this
6 language.

7 On a lot of awards shows, I think it's
8 candidly easier to go ahead and -- and bleep this. It's
9 not always -- it's not foolproof, but the stations are
10 committed to doing that. They've all got their
11 standards. And that was applied in this particular
12 case. So, while there may be some marginal increase in
13 it, if you compare it to the use of this language beyond
14 the broadcast context, it's the -- it is just the
15 narrowest of slivers of increase, Justice Kennedy.

16 JUSTICE KAGAN: Do you think that there is a
17 difference between what a person sees on broadcast
18 channels and what a person sees on basic cable? Basic
19 cable now?

20 MR. PHILLIPS: You mean, can the average
21 child understand the difference between the two?

22 JUSTICE KAGAN: In -- no, in content. Is
23 there a difference in content? Because basic cable
24 channels are not restricted by these rules, and I'm just
25 wondering whether you think that there's a difference.

1 Because I -- it has not been apparent to me that there
2 is.

3 MR. PHILLIPS: Well, I mean, in some -- I
4 think it probably depends on which -- which channels you
5 -- you look at, and even in the basic channels, but the
6 -- there's the cartoon that's significantly more adult
7 that's on the cable channels than the cartoons that you
8 might see on the -- on the Fox Television.

9 So, yes, I think there's probably a certain
10 edgierness to it, but that said, it's still clear
11 that -- that as long as you have advertising revenue
12 that drives a significant amount of the decisionmaking
13 here, you're going to have the kind of self-restraint
14 that frankly ought to cause the Court to say we should
15 no -- we no longer need to treat the broadcast medium as
16 the weak sister of -- of the media.

17 And, therefore, they ought to have the same
18 protections that everybody else has, and that they will
19 engage in the same restrained approach to these kinds of
20 issues that newspapers do. I mean, the Post doesn't run
21 the language of the case that's -- that's being argued
22 before it. Cable does. All of those media do. Because
23 there are natural restraints. You don't need the
24 Federal Communications Commission any longer to ensure
25 under these circumstances.

1 If there are --

2 JUSTICE SCALIA: What you acknowledge to be
3 the vulgarity of cable suggests otherwise, doesn't it?

4 MR. PHILLIPS: Well, I'm not suggesting that
5 there's -- there's some kind of wildly different
6 approach. All I'm suggesting is that there -- that, in
7 general, most people who -- who rely upon advertising
8 and have to play to a particular audience in order to
9 make their money is going to -- is going to obviously be
10 restrained.

11 CHIEF JUSTICE ROBERTS: Well, that depends
12 what your audience --

13 MR. PHILLIPS: But, at a minimum,
14 broadcasters will be.

15 CHIEF JUSTICE ROBERTS: It depends what
16 audience you're -- you're trying to get and the
17 demographic. If you're trying to get an audience that
18 is older, maybe you will decide this is what is going to
19 attract them. They don't want sanitized language. They
20 want to hear the -- the -- all those other words. If
21 your target is a much younger audience, maybe that will
22 happen. But the idea that you're -- the problem is
23 going to go away because you're going to be good as you
24 can be, that seems an odd way to analyze First Amendment
25 problems.

1 MR. PHILLIPS: Well, no, I think it ought to
2 go -- it ought to be analyzed the exact opposite, which
3 is that -- that the obligation, the burden, rests on the
4 Federal Communications Commission and Congress to show
5 that there is a real problem that needs to be solved and
6 that this is narrowly tailored to achieve that.

7 Thank you, Mr. Chief Justice.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Mr. Phillips.

10 Mr. Waxman.

11 ORAL ARGUMENT OF SETH P. WAXMAN

12 ON BEHALF OF RESPONDENTS ABC, INC., ET AL.

13 MR. WAXMAN: Mr. Chief Justice, and may it
14 please the Court:

15 When the issue is the content-based
16 regulation of speech, it is the government, not the
17 speaker, that must steer, quote, "far wide of the
18 prohibited zone." That foundational principle is
19 nowhere in evidence in the FCC's current enforcement
20 regime, which not only intrudes into the prohibited zone
21 but also enforces the indecency ban in a starkly
22 inconsistent manner.

23 A regime in which government officials
24 decide years after the fact that 7 seconds of rear
25 nudity in this particular episode of "NYPD Blue" is

1 indecent, but 40 seconds of nudity including full
2 frontal nudity in "Catch-22" is not; that expletives in
3 a documentary about blues musicians is indecent, but
4 even more of those expletives in a fictional movie about
5 World War II is not, is constitutionally intolerable.

6 CHIEF JUSTICE ROBERTS: People understand --
7 what you're -- have demonstrated, I think, is that the
8 context matters. People understand that, including
9 children. When they hear a bad word when someone hits
10 their thumb with a hammer, they understand that's
11 different than having an adult stand in normal
12 conversation and use the words. And it seems to me that
13 your position is saying that the government cannot
14 regulate with an understanding of what takes place in
15 the real world.

16 The government's effort is to try to
17 understand the context. That's why you get a different
18 rule in "Saving Private Ryan" than you get with Paris
19 Hilton and Nicole Richie. And what your argument seems
20 to be is they can't take context into account.

21 MR. WAXMAN: On -- quite the contrary. This
22 Court made clear, in particularly Justice Powell's
23 concurrence in *Pacifica*, that context is all-important.
24 And just look at this case. Despite -- and this goes
25 directly to some of these questions about nudity.

1 Despite decades of denying complaints about televised
2 nudity, the commission chose this case for the first
3 time to sanction nudity on television in a serious drama
4 that had been on for 10 years, that had featured over
5 the --

6 JUSTICE BREYER: This wasn't -- I mean, I --
7 don't know about this instance. It's called "Nude
8 Awakening." It's about the sexual awakening of a child.
9 You ran it, your client, after 10 o'clock on both
10 coasts, and they choose to run it at 9 o'clock for some
11 unknown reason in the Midwest. Maybe they thought -- I
12 don't know, whatever. But the --

13 (Laughter.)

14 MR. WAXMAN: It's not --

15 JUSTICE BREYER: But -- all right. So, my
16 point is what the FCC terribly told you to do was run it
17 1 hour later in the Midwest, just as you did on the
18 coast.

19 MR. WAXMAN: Just --

20 JUSTICE BREYER: And -- and why is that
21 not -- I'm not saying -- taking this point of view, but
22 I'm saying why isn't that just time, manner, and
23 circumstance that puts you to very little trouble and
24 allows everybody to see it and, therefore, is
25 constitutional?

1 MR. WAXMAN: The -- this is not some sort of
2 obscure, unknown reason. This show was run across the
3 country in the last hour of prime time, which happens to
4 be from 9:00 to 10:00 p.m. in the Midwest and Mountain
5 Time zones.

6 JUSTICE BREYER: Because you wanted to make
7 more money from it, I understand that. And maybe people
8 would have been a little bit inconvenienced, but the
9 inconvenience -- they made a judgment that looking at
10 this show is not like "Private Ryan." It's about sexual
11 awakening. They are showing a part of a nude woman.
12 The viewer is supposed to put himself in the position of
13 the boy who's seeing her, and the whole thing was
14 titillating.

15 Now, they might be wrong. There are two
16 sides to that argument. And so, I guess what you're
17 arguing is -- if I were to say, is that a reasonable
18 view? I guess I'd have to say it. But you have to
19 say much -- you're telling me I have to say much more
20 than that.

21 MR. WAXMAN: Well, number -- yes. Number
22 one, it is not a reasonable view for reasons that I'll
23 explain. It was not sexual awakening. This was a
24 portrayal in the context of a story line about the --
25 the difficulties and embarrassments of blended families.

1 This was an exploration of one of the things that
2 happens, which is a little boy stumbles in and watches a
3 woman in the quotidian activity of preparing her morning
4 shower.

5 In any event, the commission for years had
6 been adjudicating complaints about nudity, and I -- I --

7 JUSTICE BREYER: All right.

8 MR. WAXMAN: It is simply untrue -- it is
9 simply untrue that this had never occurred before.
10 "NYPD Blue" itself was in its 10th season. The very
11 first episode, which caused a lot of media attention,
12 included a nude scene of love making. It was the
13 subject of any number of complaints.

14 JUSTICE BREYER: I see where you're going --
15 the question.

16 MR. WAXMAN: Okay.

17 JUSTICE BREYER: Which -- you haven't seen
18 where I'm going. I wanted you to say just exactly what
19 you said, and you did, which I thank you.

20 MR. WAXMAN: You're welcome.

21 (Laughter.)

22 JUSTICE BREYER: And -- and my question,
23 which I've been trying to get so you'd see very
24 precisely what it is, is why don't I just say, if you're
25 right, just what you said? And say this is an instance,

1 case by case, in which, for the reasons, then I quote
2 you, that the First Amendment forbids the application of
3 the guideline to this case. In other words, what I'm
4 driving at is the basic thing that's worrying me here:
5 Does this case in front of us really call for the
6 earthshaking decision that you all have argued for in
7 the -- in the briefs?

8 And that's what I'm trying to figure out,
9 and that's why I am particularly worried about whether
10 or not this whole big argument here was presented to the
11 FCC about whether we have to reach that far. Now do you
12 see where I was trying to get?

13 MR. WAXMAN: I think so.

14 JUSTICE BREYER: All right.

15 MR. WAXMAN: And if not, I -- I hope you'll
16 tell me. First of all, the -- the -- both First
17 Amendment and Fifth Amendment issues were fully argued
18 in front of the commission, and the commission addressed
19 them in its decision in the ABC case.

20 We, of course, didn't ask the -- or suggest
21 to the commission that it should no longer apply
22 *Pacifica* because the factual predicates for more relaxed
23 scrutiny didn't apply, as we didn't in the Second
24 Circuit, because only this Court can reconsider the
25 application of that standard. So, that's an argument

1 we're making here.

2 That argument is not necessary to resolving
3 this case, either on First or Fifth Amendment grounds.
4 This broadcast -- and particularly in light of the
5 ubiquitous V-chip, this broadcast is not actionably
6 indecent under *Pacifica*, number one. With respect to
7 notice or the vagueness of the application to this show,
8 clearly this was a shot out of the blue.

9 The commission cannot identify -- I
10 challenge the commission to identify a single decision
11 of the commission issued before this was broadcast in
12 2003 in which it had sanctioned any display of nudity,
13 and I'm going all the way back to 1978.

14 JUSTICE KENNEDY: By "sanctioned," you mean
15 punished as -- as opposed to "blessed" sanctioned?

16 MR. WAXMAN: Yes, yes, yes. Yes, sanctioned
17 in the "ouch" sense.

18 (Laughter.)

19 JUSTICE SCALIA: How many displays -- how
20 many displays of nudity were there that -- that went
21 unsanctioned?

22 MR. WAXMAN: Well, for -- I don't -- I can't
23 tell you, but I can tell you based on --

24 JUSTICE SCALIA: Yes, well, I mean, if there
25 are very few, it's not a very powerful argument.

1 MR. WAXMAN: Well, I -- I think it's a
2 powerful argument. Let me explain the ones that I know
3 of. 1978, the commission's decision in WGBH, which
4 complained about scenes of explicit nudity in "Monty
5 Python's Flying Circus": Denied. "Catch-22,"
6 40 seconds of nudity, including 10 seconds of full
7 frontal female nudity: Denied.

8 The four or five decisions that we -- that
9 we discuss on page 18 of our brief and that are appended
10 to the merits brief of the ABC affiliates. I can't
11 remember whether it's 12 or 16, but more than a dozen
12 episodes of "NYPD Blue" itself that included displays,
13 graphic displays, of nudity during the prior nine
14 seasons -- complained about and not adjudicated.

15 That is the backdrop against which the --

16 JUSTICE BREYER: I looked and found 17.

17 CHIEF JUSTICE ROBERTS: That's what you
18 found -- that's what you've got over --

19 JUSTICE BREYER: I looked and found --
20 sorry.

21 CHIEF JUSTICE ROBERTS: That's what you've
22 got over 85 years.

23 MR. WAXMAN: Well, first of all, we don't
24 have television broadcasts over 85 years, and since
25 there were no reported decisions of any indecency

1 enforcement until Pacifica, I think it's only fair, as
2 you pointed out yourself, to look at what the commission
3 has been addressing.

4 They're right now -- I mean, you know, I've
5 cited the ones that are the subject of commission
6 decisions. I haven't cited the -- I haven't attempted
7 to hypothesize about all the other instances, but let's
8 just look at what's at stake here because the issue,
9 Justice Breyer, is not just notice to ABC in this case.
10 The question is whether the standards -- the
11 commission's standards as it's currently applying them
12 are so vague and capacious that they not only permit
13 arbitrary action, but they are engaging in arbitrary
14 action.

15 Right now, as -- as Mr. Phillips suggested,
16 the commission has pending before it, which it has not
17 denied for years, complaints about the opening episode
18 of the last Olympics, which included a -- a statue very
19 much like some of the statues that are here in this
20 courtroom, that had bare breasts and buttocks. It -- it
21 has refused to say that its "Catch" -- right over here,
22 Justice Scalia.

23 (Laughter.)

24 MR. WAXMAN: Well, there's a bare buttock
25 there, and there's a bare buttock here. And there may

1 be more that I hadn't seen. But, frankly, I had never
2 focused on it before. But the point --

3 JUSTICE SCALIA: Me neither.

4 (Laughter.)

5 MR. WAXMAN: Could -- could ABC or anybody
6 else rebroadcast the "Roots" series? Could it
7 rebroadcast "Catch-22," which the commission is now here
8 saying, oh, no, no, no, that was just our staff; that
9 wasn't us. In the "Saving Private Ryan" context, where
10 the commission did say as a commission, not actionably
11 indecent.

12 JUSTICE BREYER: But your only conclusion
13 from that is that they can't have any rule.

14 MR. WAXMAN: No.

15 JUSTICE BREYER: That their -- what is -- I
16 looked through the briefs; I don't see what you're --
17 tell me where in these briefs do you suggest what the
18 rule ought to be.

19 MR. WAXMAN: In our brief --

20 JUSTICE BREYER: Yes. All right.

21 MR. WAXMAN: -- we don't suggest what the
22 rule ought --

23 JUSTICE BREYER: Yes.

24 MR. WAXMAN: -- ought to be, because (a)
25 it's not our burden; (b) it's not yours; and (c) there

1 are any number of options.

2 JUSTICE KENNEDY: Well, we -- well, we have
3 to anticipate what the natural results or consequences
4 of our decision will be.

5 MR. WAXMAN: Sure.

6 JUSTICE KENNEDY: As I understand it, the
7 same rules that we apply to obscenity for printed
8 material, under your view, would apply to television.

9 MR. WAXMAN: Well, those rules certainly
10 would apply. And before I --

11 JUSTICE KENNEDY: In other words, if it's --
12 if it's not obscene, you can publish it. Period.

13 MR. WAXMAN: No, no, no, no, no. I'm not
14 suggesting that the indecency proscription in the
15 statute cannot be applied in a constitutional way. I
16 can give you four different --

17 JUSTICE KENNEDY: Well, I thought that was
18 the whole gravamen of your argument.

19 MR. WAXMAN: No. Our -- our arbitrariness
20 argument is that we now have a standard that employs
21 nonexclusive factors that use capacious, vague words
22 that can be balanced any way the commission wants to,
23 without explanation for what all the factors are.

24 JUSTICE ALITO: But isn't that inherent in
25 the context-based approach? Unless you have an approach

1 that says there are certain body parts you can never
2 show, then aren't you going to get into -- isn't someone
3 going to be able to come up and say you had this
4 broadcast and you said that's okay; and this one, you
5 said is not okay?

6 MR. WAXMAN: It certainly is not. And I can
7 offer the Court or perhaps the commission four
8 approaches it could take to reduce the astonishing
9 vagueness of the current --

10 JUSTICE BREYER: Where are they in the
11 briefs? Can you just cite the pages where I will find
12 the alternatives to the present system that don't jump
13 obscenity alone?

14 MR. WAXMAN: I don't know the pages. Let me
15 just -- I can't remember the pages. Let me just outline
16 what I think -- four different things that could
17 ameliorate the vagueness of the current regime.

18 First of all, the FCC could revert back to
19 it's, quote, "emphatically narrow enforcement regime,"
20 which acknowledged, one, that it had to defer to
21 reasonable judgments of the broadcasters, and not
22 exercise the -- an editorial eye looking at camera
23 angles, whether something was or wasn't necessary to the
24 message. Number two --

25 CHIEF JUSTICE ROBERTS: I -- I'm going to

1 let you get all four out. But on that, the reasonable
2 deference to the broadcasters, your policy was not to
3 allow people in the situation of Paris Hilton and Nicole
4 Richie to use those words.

5 MR. WAXMAN: Well, I --

6 CHIEF JUSTICE ROBERTS: So, if they deferred
7 to your reasonable judgment, your friend's reasonable
8 judgment, they would sanction those.

9 MR. WAXMAN: I'm not owning Nicole Richie,
10 and I think the best answer to the Nicole Richie point
11 is that there is a scienter requirement in the statute
12 that, you know, would preclude the application to a
13 good-faith effort. But let me just --

14 CHIEF JUSTICE ROBERTS: Okay. Go on to
15 number two.

16 MR. WAXMAN: I'll just go back. Well, no --
17 there are three parts to number one.

18 (Laughter.)

19 MR. WAXMAN: I'm not -- I'm not being --

20 CHIEF JUSTICE ROBERTS: Your time's -- I
21 think you are.

22 Your time is about to expire. If you want
23 to get your four points out, you'd better move.

24 MR. WAXMAN: Okay. The first one is to
25 revert back to the prior enforcement regime that existed

1 before 2004, which deferred to reasonable judgments, was
2 restricted to material that is not momentary exposure
3 but is dwelled upon, and that, as Pacifica explained,
4 was egregious material akin to depictions of erotic
5 activity.

6 The second thing they could do is make this
7 three-factor test -- or however many factors it is -- a
8 test, not just a nonexclusive list of an infinite number
9 of factors that could or couldn't be balanced in any way
10 the commission wants to.

11 Even if it wants to leave it as factors --
12 and this is number three -- it could at least identify
13 what they are and apply them consistency -- consistently
14 through adjudication that explains why one over-balances
15 the other, which it certainly did not do in this case.

16 And it also could clean up the actual form
17 of the words that it uses, referring, for example, to
18 sexually explicit or excretory activity.

19 Thank you, Mr. Chief Justice.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 General Verrilli, you have 4 minutes
22 remaining.

23 REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR.,

24 ON BEHALF OF THE PETITIONERS

25 GENERAL VERRILLI: Thank you,

1 Mr. Chief Justice.

2 First with respect to the notion of
3 self-restraint on the part of broadcasters, I think a
4 little history is in order here. The commission started
5 with the rule that came out of Pacifica. What it faced
6 in the 1980s, with that being the outer bound of the
7 commission's authority, was the explosion of the shock
8 jock phenomenon, Howard Stern and Bubba the Love Sponge
9 and the rest of it, which didn't use any of the seven
10 words in the Carlin monologue, but which was highly vile
11 and lewd, and it required the commission to make a
12 judgment. Now, that was all advertising-sponsored
13 broadcast. And so, I do think the risk of a race to the
14 bottom is real --

15 JUSTICE KAGAN: General --

16 GENERAL VERRILLI: -- and this history is
17 showing it.

18 JUSTICE KAGAN: I think that the -- that the
19 networks really are saying, well, even -- even if some
20 regulation is permissible, the kind of regulation that
21 the FCC has done here is regulation that gives it
22 complete discretion as to what kind of speech to go
23 after and what not to go after; that it has not tied
24 itself in any way to any kinds of standards. And it's,
25 you know, evident in the notion that this -- the way

1 that this policy seems to work, it's like nobody can use
2 dirty words or nudity except for Steven Spielberg --

3 (Laughter.)

4 JUSTICE KAGAN: -- and that there's a lot of
5 room here for FCC enforcement on the basis of what
6 speech they think is kind of nice and proper and good.
7 And that that's a serious First Amendment issue.

8 GENERAL VERRILLI: I -- well, I disagree.
9 First, that's the lens problem again. We are talking
10 about a tiny, tiny number of the broadcasts that occur
11 in a month, much less a year, much less a decade. So,
12 the idea that there's a significant First Amendment
13 problem that encompasses a wide variety of broadcast
14 expression I just don't think comports with the facts.

15 Second, I do think if one looks at the
16 corpus of decisions that the commission has made about
17 what's indecent and what isn't, I think one can see with
18 respect to the large majority of them, the vast majority
19 of them, that it's clear which side of the line
20 something fell on. Yes, there isn't perfect clarity.
21 There are going to be some hard cases. But they really
22 have identified what is, in the great scheme of things,
23 a trivial number of hard cases.

24 I don't think one can say that this is a
25 situation like Reno in which there's effectively no

1 standard at all. In Reno, this Court distinguished the
2 Pacifica situation eight ways to Sunday, and I think
3 we've identified them in our brief and those are valid.

4 I do think there's a significant problem
5 with thinking about Pacifica as the outer bound of the
6 commission's authority under the First Amendment in
7 addition to the shock jock problem. Of course --

8 JUSTICE GINSBURG: Even though the Justices
9 involved said this is a narrow decision, both Justice
10 Stevens and Justice Powell.

11 GENERAL VERRILLI: Yes, and, Justice
12 Ginsburg, that's true, and the principles the commission
13 continues to apply are narrow principles. This is
14 not -- this is not something that covers a vast array of
15 speech on broadcast. It's a tiny fraction. And so --
16 and I do think if you're talking about Pacifica as the
17 outer bound, the consequences of the shock jocks are
18 fine; the Super Bowl half-time episode with Janet
19 Jackson is fine.

20 You can have as many of these 7-second
21 episodes of "NYPD Blue" as you want. That's all fine.
22 In fact, anything that's -- anything that isn't at
23 that extreme level is fine.

24 JUSTICE GINSBURG: But on the other side,
25 you'd better be careful about calling certain people,

1 certain artists to be interviewed because, even though
2 it's unscripted, there's always a risk they're going to
3 say something they shouldn't say.

4 GENERAL VERRILLI: But I -- a couple answers
5 there. One is the delaying bleeping technology, Justice
6 Ginsburg, and the other one is that there is a scienter
7 requirement under the commission's enforcement authority
8 here. And so, in that situation, it seems highly
9 unlikely you would have the requisite scienter that
10 could lead to a forfeiture.

11 JUSTICE SCALIA: Maybe the third is you
12 shouldn't interview these people.

13 GENERAL VERRILLI: Let me spend, if I could,
14 a minute on the "NYPD Blue" broadcast. The -- ABC
15 hinges a lot on the notion, Justice Breyer, that this is
16 a non-sexualized episode. I mean, I guess one could
17 make up one's own mind looking at the video. The
18 commission decided that that was -- it was essentially
19 voyeurism. The --

20 CHIEF JUSTICE ROBERTS: Finish your
21 sentence, please.

22 GENERAL VERRILLI: Thank you. The little
23 boy walks into the room at the very end of that -- of
24 that segment of nudity, and I do think that fully
25 vindicates the commission's judgment with respect to the

1 nature of that broadcast.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, General,
4 counsel.

5 The case is submitted.

6 (Whereupon, at 12:23 p.m., the case in the
7 above-entitled matter was submitted.)

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