

**Comments of
TechFreedom, Center for Democracy & Technology,
Public Knowledge, & Electronic Frontier Foundation**

on

**Broadcast Indecency Policy
GN Docket No. 13-86**

Our organizations often differ significantly on many important questions facing the FCC. But we joined together in late 2011 in an *amicus* brief urging the Supreme Court to strike down once and for all the FCC's indecency regulations as a relic of a bygone era when Americans had few choices for video programming, and little control over the content they allowed into their homes.¹ Those days have passed. Broadcasting is no longer the cultural force it once was—or an "intruder in the home." While the government's efforts to censor the content of broadcast speakers have always been constitutionally suspect, they were understandable given the technology and marketplace of the day. But now, restricting the First Amendment rights of broadcast speakers is neither sound policy nor constitutionally defensible.²

In *Fox v. FCC*, the Supreme Court struck down the FCC's confused and inconsistent regulations in this area as unconstitutionally vague and procedurally flawed.³ This was simply the latest chapter in litigation that has dragged on for nearly eight years at enormous cost, leaving the broadcast industry in needless uncertainty, and leaving unresolved the key First Amendment question: does broadcast speech merit less protection under the First Amendment than do other media?

Right now, broadcasters have no certainty as to the law. A recent example will serve to highlight this: Former FCC Chairman Julius Genachowski was certainly right to decline to take enforcement action against broadcasters who aired Red Sox star player David Ortiz's remark, after the Boston Marathon bombing, that "This is our fucking city, and nobody is going to dictate our freedom." But the applicability of the law should not depend on an FCC Commissioner's judgment of whether someone "spoke from his heart," as Chairman Genachowski tweeted

¹ Brief of the CATO Institute, Center for Democracy & Technology, Electronic Frontier Foundation, Public Knowledge, and TechFreedom as Amicus Curiae, *FCC v. Fox Television Stations*, 132 S.Ct 2307 (2012), available at http://www.wired.com/images_blogs/threatlevel/2011/11/fox_indecency_amicus.pdf. See also Berin Szoka, Time for the Supreme Court to End FCC Indecency Censorship, *Huffington Post* (Jan. 11, 2012), http://www.huffingtonpost.com/berin-szoka/fcc-indecency-censorship-_b_1200015.html. 2 The Supreme Court has generally held that obscenity is not protected speech. *Roth v. United States*, 354 U.S. 476 (1957). According to this reasoning, the First Amendment simply does not apply to obscenity. However, the FCC policies in question here do not deal with obscenity, but with indecency—a category of speech protected by the First Amendment but which has historically been subject to much attempted regulation.

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³ *FCC v. Fox Television Stations*, 132 S.Ct 2307, 2308 (2012).

shortly after the incident.⁴ Whatever the FCC's rules of indecency are, they should be clear, and should not bend and shift to reflect the popular mood or in response to current events. The First Amendment—part of the freedom Ortiz so strongly defended—demands no less.

The Commission's proposal that it will only address "egregious" incidents of indecency is a step in the right direction, and its recent dismissal of more than a million unmeritorious complaints against broadcasters demonstrates a renewed attention to the First Amendment rights of broadcast speakers. But this is not enough. When formulating any indecency policies, the Commission must recognize that massive, transformative change in the media landscape severely undercuts the traditional arguments for limiting broadcasters' First Amendment rights.

The Constitutional basis for any broadcast indecency rules is shaky. Indeed, when the courts finally confront the key First Amendment questions at issue here, they will likely find that there is no longer any constitutional basis for any form of indecency censorship at all; the factual predicate on which the Supreme Court's 1978 *Pacifica* decision, and thus indecency regulation, rests, has long since disappeared. None of the three constitutional justifications for indecency regulation remain valid (if, indeed, they ever were):

1. **Pervasiveness.** While broadcasting once may have been "uniquely pervasive," today it competes with a variety of other media sources, and operates in a radically transformed technological environment. Many children and adults spend far more time with the Internet, social media, and cable programming than they do with broadcast television.
2. **Invasiveness.** While once people may have had only a few choices of video programming, and limited control, today viewers have an abundance of choice and a control. Indeed, we live in an increasingly on-demand world where people no longer have to let media passively into their homes: instead, they watch what they want to watch and nothing else. Parents have a wide variety of options for implementing their values in controlling the media their children consume in the home and on their mobile devices. What Justice Kennedy said in 2000 about such controls has come true to a far greater degree than he or anyone else could then have envisioned: "Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us."⁵
3. **Scarcity.** Arguments regarding the scarcity of the airwaves or the scarcity (or lack thereof) of platforms for speech are not relevant to the question of the constitutionality of the FCC's broadcast indecency policy. Scarcity was not a rationale for broadcast indecency regulation in *Pacifica*, which relied on the medium's invasiveness and unique accessibility to children, and should not be raised as a novel justification for censorship of broadcast content.

In short, we believe that it is simply a matter of time before the Supreme Court strikes down indecency regulation once and for all. In the meantime, we urge the Commission to do as little harm as possible to First Amendment values by quickly issuing a new enforcement policy that provides clarity and predictability to broadcasters and that also allows for clean adjudication of the applicability of *Pacifica* in the digital era. While this weighty question is being resolved,

⁴ Elizabeth Titus, FCC Chairman Julius Genachowski Tweets on David Ortiz F-bomb, Politico (Apr. 20, 2013), <http://www.politico.com/story/2013/04/fcc-julius-genachowski-david-ortiz-twitter-90376.html>.

⁵ *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000).

broadcast speakers, like all speakers, should not have to defend themselves against vague and subjective accusations.

We take no position on whether it would be better for the Commission to adopt prescriptive rules or address alleged incidents of indecency on a case-by-case basis. In either event, those who would restrict speech bear the burden of making a convincing legal, constitutional, and factual case why a given restriction is permissible. That means narrowly tailoring indecency censorship to meet a compelling government interest and showing why less restrictive alternatives like user empowerment through parental control tools and technologies, and education about such empowerment, are inadequate to satisfy government's interest. We urge the FCC to remember the Supreme Court's admonition: "[I]t is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act."⁶

Over-the-air broadcasting faces significant challenges from new media and increasing demands for spectrum. Its future depends in part on choices made by Congress and at the FCC. New technologies are challenging the business model of broadcasting, and some broadcasters are changing their business models in response. But basic First Amendment protections are not policy "levers" to be used to accomplish other goals. Whatever the future of broadcasting might be, there is no question that broadcasters have the same First Amendment rights as other speakers.

⁶ *Playboy*, 529 U.S. at 824.