No. 06-3575

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CBS CORPORATION, CBS BROADCASTING INC., CBS TELEVISION STATIONS INC., CBS STATIONS GROUP OF TEXAS L.P., AND KUTV HOLDINGS, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents.

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

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BRIEF OF *AMICI CURIAE* CENTER FOR DEMOCRACY & TECHNOLOGY AND ADAM THIERER, SENIOR FELLOW WITH THE PROGRESS & FREEDOM FOUNDATION ("PFF") AND THE DIRECTOR OF PFF'S CENTER FOR DIGITAL MEDIA FREEDOM

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, counsel for *amici* certify that (1) none of *amici* have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in any *amici*.

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IDENTITY AND INTEREST OF AMICI CURIAE

Amicus curiae Center for Democracy & Technology ("CDT") is a non-profit public interest and Internet policy organization. CDT represents the public's interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy, and individual liberty. CDT's staff has conducted extensive policy research, published academic papers and analyses, and testified before Congress on the impact of content regulations on freedom of expression and the availability of alternative methods, including user-empowerment technology tools, for protecting individuals who use the Internet.

Amicus curiae Adam Thierer is Senior Fellow and Director of the Center for Digital Media Freedom at the Progress & Freedom Foundation ("PFF"). PFF is a market-oriented think tank that studies the digital revolution and its implications for public policy. Its mission is to educate policymakers, opinion leaders and the public about issues associated with technological change, based on a philosophy of limited government, free markets and individual sovereignty.

All parties have consented to the filing of this brief.

ARGUMENT

As the petitioner CBS persuasively argues in its opening brief, broadcast indecency law and its application here are rife with First Amendment and other constitutional and statutory problems. For all of the reasons advanced by petitioner, *amici* believe that this Court should overturn the Federal Communication Commission's indecency decision on appeal. As detailed below, *amici* believe there are a range of additional reasons and arguments why the Commission's indecency determination should not stand.

I. THE COMMISSION'S RELIANCE ON COMPLAINT COUNT AND ITS FLAWED "CONTEMPORARY COMMUNITY STANDARDS" ANALYSIS ARE ARBITRARY AND CAPRICIOUS AND VIOLATE THE FIRST AMENDMENT.

Both in this case and over this past three years more broadly, the FCC has explained and justified the radical expansion of its broadcast indecency enforcement based on an asserted increase in the number of complaints it received about television programming. This increase in complaint count, however, is primarily a result of a concerted manipulation of complaint statistics, and does not in any event substitute for the required analysis of the "community standards." Moreover, the FCC's great focus on indecency complaints has allowed a "heckler's veto" in violation of the First Amendment.

A. The Commission Arbitrarily and Capriciously Relies on Manipulated and Inflated Complaint Data as an Impetus to Act.

The Federal Communication Commission (FCC) cites the "unprecedented number of complaints" it received to justify its $550,000 fine for the fleeting and unintended (at least by CBS) broadcast of Janet Jackson's breast during the February 1, 2004 Super Bowl halftime show.[1] However, the nature and true number of these complaints is at best unclear. More critically, the FCC's action in this case is only one part of a much broader indecency enforcement effort that is largely based on complaint data that has been baldly manipulated by the FCC. The Commission's reliance on manipulated numbers is arbitrary and capricious and thus a violation of the Administrative Procedure Act. The Commission's unjustified expansion of its broadcast indecency enforcement – and thus its deviation from a "restrained" enforcement policy – undermines the narrow constitutional justifications for its regulatory authority.

The Commission has erroneously asserted that it has a broad public mandate to boost its enforcement of broadcast standards, citing an increase in the number of complaints over the past several years. Ten days after the Super Bowl incident at issue here, then-FCC Chairman Michael Powell testified before Congress that the

[1] *In the Matter of Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability for Forfeiture, FCC 04-209, 19 FCC Rcd 19230 (September 22, 2004) ("NAL") ¶ 2.

agency was motivated "to sharpen [its] enforcement blade" because of the "rise in the number of complaints at the Commission."[2] A couple months later, Powell stated that "the increase in the Commission's enforcement efforts in this area is a *direct response* to the increase of public complaints."[3] This alleged increase has been the Commission's impetus to act. However, the Commission grossly distorted and amplified the number of complaints. A close review of the FCC's manipulations of the complaint numbers, and of the origins of the complaints, suggests that the number of complaints provides little if any information on whether *in fact* the public at large is more or less concerned about television indecency.

The FCC's reliance on the complaint figures is inappropriate because the Commission itself manipulated the count of complaints, in two ways. First, during the summer of 2003, the FCC began counting "identically worded form letters or computer-generated electronic complaints" as individual complaints, rather than

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[2] Testimony of Federal Communications Commission Chairman Michael K. Powell Before the House Energy and Commerce Committee, Subcommittee on Telecommunications and the Internet, 2-3 (February 11, 2004) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243802A3.pdf).

[3] Remarks of Michael K. Powell, Chairman, Federal Communications Commission, at the National Association of Broadcasters Convention, Las Vegas Nevada, 1 (April 20, 2004) (emphasis added) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-246876A1.pdf).

counting them as a single complaint.[4] The Commission did not make any public announcements about this change in methodology, but a 2003 press release from the pro-regulatory Parents Television Council claimed credit for getting the FCC to change methodology.[5] *Amici* fully support citizens' First Amendment right to petition the government for a redress of grievances and so do not take issue, as a matter of principle, with the Commission's counting of form complaints as multiple indecency complaints. The Commission cannot, however, rely of such a change in formula to claim an *increase* in complaints.

Second, even more disturbing is that in early 2004 – right around the time of the 2004 Super Bowl – the FCC began counting individual complaints *multiple times*.[6] If an individual addresses a single complaint to seven different offices within the FCC (for example, to the Enforcement Bureau, to the Consumer & Governmental Affairs Bureau, and to each of the five Commissioners), the FCC

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[4] Adam Thierer, "Examining the FCC's Complaint-Driven Broadcast Indecency Enforcement Process," Progress and Freedom Foundation, Progress on Point 12.22, 5 (November 2005) (available at http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf).

[5] Parents Television Council, "FCC Reacting to PTC Demands," Press Release (July 1, 2003) (available at http://www.parentstv.org/ptc/publications/release/2003/0701.asp).

[6] In a 2004 report, the Commission acknowledged that under its new methodology the reported count of complaints may contain "duplicate complaints." Federal Communications Commission, "Quarterly Report on Informal Consumer Inquiries and Complaints Released," First Quarter 2004, 9 n.** (February 11, 2005) (available at http://www.fcc.gov/cgb/quarter/2004qtr1.pdf).

counts that one complaint as *seven* complaints, thereby radically inflating the reported number of complaints received. In other words, a single complaint sent to multiple Commission divisions or offices would be counted more than once. Furthermore, this change in complaint counting *only* applied to broadcast indecency and obscenity complaints.[7]

Beyond the Commission's manipulation of the complaint counts, the FCC asserted belief that the public is increasingly concerned about indecency has no foundation in light of the fact that the vast majority of all indecency complaints have been generated by one or at most two advocacy groups. In 2003, for example, 99.8% of complaints were submitted by the Parents Television Council,[8] and in July 2005 the PTC "account[ed] for *all but five* of the [23,547] FCC complaints" for that month.[9] With regard to the Super Bowl at issue here, the PTC was joined in its efforts to generate FCC complaints by the American Family Association.[10]

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[7] *Id.*

[8] Todd Shields, "Activists Dominate Content Complaints," *Mediaweek* (December 6, 2004) (available at http://www.parentstv.org/PTC/news/2004/indecency_mediaweek.htm).

[9] *Broadcasting & Cable*, "PTC Drives Spike In Smut Gripes" (November 14, 2005) (emphasis added) (available at http://www.broadcastingcable.com/article/CA6283286.html?display=News&referral=SUPP).

[10] American Family Association, "FILE AN OFFICIAL INDECENCY COMPLAINT WITH THE FEDERAL COMMUNICATIONS COMMISSION

Thus, contrary to the repeated rhetoric of the FCC and its Commissioners, there is no evidence in the record whatsoever to support the conclusion that the American public has shown any increased concern about indecency on television. To the contrary, the facts indicate that one or two individual advocacy organizations generated almost all of the complaints, and the Commission arbitrarily and capriciously changed its complaint counting methodology to radically inflate the number of those complaints.

Turning to the specific indecency finding at issue here, the Commission asserts that it received approximately 542,000 complaints about the *Super Bowl* broadcast, *NAL* ¶ 2 n.6, but the validity and significance of that number is in serious doubt. For example, as the FCC acknowledges, some unspecified number of those complaints related to the performances of other artists (P. Diddy, Nelly and Kid Rock), and to the commercials. *NAL* ¶ 2 and n.6-7. More critically, although the Commissioners readily invoke the "542,000" number,[11] they utterly fail to acknowledge the impact of the two distinct manipulations of the complaint counting methodology described above – both of which were implemented either

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(FCC) About Jackson's Exposure During Super Bowl Halftime Show!" (available at http://www.afa.net/petitions/fcccomplaint.asp).

[11] *See* Statement of Chairman Michael K. Powell, *NAL* at 29; Statement of Commissioner Michael J. Copps, Approving in Part, Concurring in Part, *NAL* at 31; Statement of Commissioner Kevin J. Martin, Approving in Part, Concurring in Part, *NAL* at 32; Statement of Commissioner Jonathan S. Adelstein, Approving in Part and Dissenting in Part, *NAL* at 33.

before or at the time of the 2004 Super Bowl. Nor does the Commission acknowledge that the vast majority of the complaints were generated by one or two advocacy organizations. Thus, the asserted volume of complaints does not tell either the FCC or this Court much of anything about how concerned the broader American public was about the 2004 Super Bowl.

The Commission's undue reliance on its complaint tally, and its use of the complaint count as seemingly its primary justification for its unprecedented fine against CBS, is arbitrary and capricious in violation of the APA. To avoid being "arbitrary and capricious," an agency must "articulate a satisfactory explanation for its action." *Motor Vehicle Mfr. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). That explanation must reveal a "rational connection between the facts found and the choice made." *Id*., *citing Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962). The agency must "examine the relevant data" and make an appropriate decision based on that data – the decision cannot "run[] counter to the evidence before the agency." *Id*. An "arbitrary" decision is one "founded on prejudice or preference rather than on reason and fact." Black's Law Dictionary, Second Pocket Edition (2001). By relying on manipulated counts of complaints primarily generated by one or two advocacy organizations, the Commission is basing its action on its "prejudice or preference" rather than on any well-founded facts.

Furthermore, the Commission's unfounded expansion of its broadcast indecency enforcement based on its manipulated complaint numbers is in direct violation of the First Amendment requirement that the FCC may regulate otherwise protected speech only if it "proceed[s] cautiously." *FCC v. Pacifica Foundation*, 438 U.S. 726, 761 n.4 (1987) (Powell, J., concurring). The Commission is hardly following a "restrained" enforcement policy when it aggressively cracks down on television indecency based on inflated complaint numbers. And in any event, the Commission cannot legitimately impose content regulation based on a simple tally of objections. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818, 826 (2000) (the "history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly" and "these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority"); *Board of Regents of the Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (speech cannot be limited by referendum).

B. The Commission Wholly Fails to Undertake Any Investigation Into or Analysis of "Contemporary Community Standards."

Apparently relying solely on its complaint count as a justification for action, *see NAL* ¶ 2, the Commission fails to provide any objective, representative

evidence of what in fact are the "contemporary community standards" applicable to its indecency analysis.

As one FCC Commissioner acknowledges, the FCC makes its indecency findings "without first doing what is necessary to determine the appropriate contemporary community standard."[12] Commissioner Jonathan Adelstein warns that the Commission's odd and arbitrary indecency holdings – including the Super Bowl one at issue in this case – are "certain to strike fear in the hearts of news and documentary makers, and broadcasters that air them, which could chill the future expression of constitutionally protected speech." *Id.* at 27. Yet the Commission's official position rejects this argument. *See Forfeiture Order* ¶ 35 (rejecting "CBS's dire warnings that imposing sanctions in this case will have a chilling effect on live coverage of public events").

Instead of undertaking any effort to determine the "community standard," the Commission instead sticks obstinately to its own assertions of what is indecent. The Commission simply relies on its own "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters,

[12] Statement of Commissioner Jonathan S. Adelstein, Concurring, *In the Matter of Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Forfeiture Order, FCC 06-19, 21 FCC Rcd 2760, 26 (March 15, 2006) ("Forfeiture Order").

public interest groups, and ordinary citizens."[13] The Administrative Procedure Act requires the FCC to "articulate a satisfactory explanation" for each indecency determination, *see Motor Vehicle Mfr. Ass'n*, 463 U.S. at 43, and by omitting a satisfactory explanation of how it judged the "community standards," the Commission utterly fails that requirement. *See also* 5 U.S.C. § 706(2)(A).

Moreover, accepting for the sake of argument the validity of the FCC's indecency authority, a robust and complete community standards analysis is constitutionally required as well, following the lead of obscenity cases like *Miller v. California,* 413 U.S. 15 (1973).[14] The Supreme Court in *Miller* gave an indication of the type of evidence appropriate to determine "community standards": "an extensive statewide survey" of what content was *in fact* available in the community. *Miller*, 413 U.S. at 31 n.12. The FCC must present some objective and representative evidence of what types of content are available to

[13] *Id.* at 26. *See also In the Matter of Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Order on Reconsideration, FCC 06-68, 21 FCC Rcd 6653, (May 31, 2006) ("Recon Order") ¶ 14.

[14] In light of the Supreme Court's broad rejection of the indecency standard in *Reno v. ACLU*, 521 U.S. 844 (1997), the indecency test itself is open to serious attack. In these comments, however, we confine our discussion to the Commission's flawed implementation of that test.

children in the United States – as opposed to content that is "patently offensive" to the five individual Commissioners.[15]

The gross inadequacy of relying on the individual judgments of the five FCC Commissioners is demonstrated in the "fleeting expletives" appeal that is currently pending in the Second Circuit.[16] In that case, the FCC essentially found that single fleeting uses of the words "bullshit" or "fuck" are inherently "indecent." A brief (albeit unscientific) examination of content that already exists in the "community"

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[15] The imperative to look to what is *actually* available in the community to be protected is vital in light of the sometimes unexpected evidence about actual versus publicly expressed preferences about controversial content. For example, in the traditionally conservative Salt Lake City television market, the four most popular shows are "C.S.I.," "C.S.I. Miami," "E.R.," and "Desperate Housewives" – all of which have been designated by the Parents Television Council as among the worst shows on television; the same trend holds in conservative Oklahoma City, where "Desperate Housewives" is more popular than it is in Los Angeles, as well as Kansas City where the show is bigger than it is in New York City. *See* Bill Carter, "Many Who Voted for 'Values' Still Like Their Television Sin," *The New York Times*, November 22, 2004, p. A1; Frank Rich, "The Great Indecency Hoax," *The New York Times*, November 28, 2004, Section 2, p. 1; Adam Thierer, "Examining the FCC's Complaint-Driven Broadcast Indecency Enforcement Process," Progress and Freedom Foundation, Progress on Point 12.22, 10 (Table 3) (November 2005) (available at http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf). These findings are consistent with the evidence presented in an obscenity trial in the 1990s in Provo, Utah – in that case the defense proved that a range of sexually explicit content was available and acquired in the local community. *See* Terry Neal, "GOP Corporate Donors Cash in on Smut," washingtonpost.com, December 21, 2004 (available at http://www.washingtonpost.com/wp-dyn/articles/A15644-2004Dec21.html).

[16] *See In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Order, FCC 06-166, 2006 FCC LEXIS 5969 (November 6, 2006) ("Order on Remand").

of minors in America, however, quickly shows the invalidity of the FCC's conclusions. A search of the "Internet Movie Database," for instance, found hundreds of examples of the term "bullshit" among "memorable movie quotes."[17] Moreover, among these occurrences, the Motion Picture Association of America has given many of the movies featuring this particular expletive a PG or PG-13 rating.[18] Similarly, occasional uses of the work "fuck" are also common in movies, including movies rated PG-13 and thus available to children across the country.[19] Setting aside the question of whether these ratings are suitable, the fact remains that words that the Commission finds indecent can be found in movies already marketed to and accessible by children in our communities (and widely available in the home over cable and satellite services, and through DVDs).

In light of this type of evidence, the Commission cannot rest on its own personal views about what is "indecent." In the absence of inquiry into and

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[17] *See* The Internet Movie Database (IMDb), http://www.imdb.com (last accessed July 11, 2006).

[18] For example, the IMDb reveals instances of the expletive "bullshit" in *The Abyss* (PG-13), *The Air Up There* (PG), *America's Sweethearts* (PG-13), *Back to the Future II* (PG), *Cocoon* (PG-13), and *Goonies* (PG). The Internet Movie Database, http://www.imdb.com/search (last accessed July 11, 2006).

[19] As indicated in the IMDb, the word "fuck" appears in a broad range of PG-13 movies, including: *Love Affair* ("fuck" spoken by actress Katherine Hepburn), *Gunner Palace* (42 instances of the word "fuck"), *Hero* (11 instances), *The Ringer* (a movie clearly aimed at an under-18 audience). The Internet Movie Database, http://www.imdb.com/search (last accessed November 19, 2006).

evidence of community standards, the FCC's indecency holdings violate both the APA and the First Amendment.

C. The Commission's Failure to Undertake the Required Community Standards Analysis Grants a Vocal Minority a "Heckler's Veto."

The purpose of "community standards" requirement is to ensure that "material . . . will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person – or indeed a totally insensitive one." *Miller*, 413 U.S. at 33. Yet by engaging in a broad enforcement campaign against broadcast indecency without first conducting the required community standards analysis – and by relying primarily on a trumped up count of complaints generated by one or two advocacy groups – the Commission has enabled a "heckler's veto" in violation of the First Amendment. As discussed above, a single advocacy group – the Parents Television Council – has submitted virtually all of the complaints to the FCC in the past few years (with the American Family Association pitching in on the 2004 Super Bowl). By effectively using these groups' views as a substitute for the required community standards analysis, the Commission is impermissibly allowing a vocal minority to stifle speech that is lawful and accepted by a great many viewers.

The Supreme Court recognized over half a century ago that the "heckler's veto" is antithetical to the First Amendment. In *Feiner v. New York*, 340 U.S. 315,

320 (1951), the Court stated that "the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker." According to the Court, "[s]peech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). More recently, the Supreme Court struck down the Communications Decency Act, stating that the "specific person" requirement contained in the statute "would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech . . . ." *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (citation omitted).[20]

Notably, much of the television content that is the primary target of the mass complaint-generation efforts also happens to be among the most popular shows in America,[21] even in the most socially conservative parts of this country.[22] Notwithstanding the personal preferences of the advocacy groups that have

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[20] The First Amendment also shields against tyranny of the majority. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (overturning conviction for burning flag in protest of nuclear war, and stating, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

[21] Adam Thierer, "Examining the FCC's Complaint-Driven Broadcast Indecency Enforcement Process," Progress and Freedom Foundation, Progress on Point 12.22, 5 (November 2005), at 10 (Table 3) (available at http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf).

[22] *See* Bill Carter, "Many Who Voted for 'Values' Still Like Their Television Sin," *The New York Times*, November 22, 2004, p. A1; Frank Rich, "The Great Indecency Hoax," *The New York Times*, November 28, 2004, Section 2, p. 1.

generated most of the complaints to the Commission, the content that is the target of the vast majority of complaints is clearly widely accepted across the country. Rather than capitulating to a determined and outspoken minority of viewers, the Commission must itself undertake an investigation into relevant facts that would establish the appropriate "community standards."

In regard to this appeal specifically, the Commission in discussing survey data points out that, for one survey, "17% of respondents answered that they were 'very concerned' about the impact that the Janet Jackson Super Bowl incident had on their own children and that another 14% of respondents were 'somewhat concerned.'" *Recon Order* ¶ 14 n.43. Although the Commission calls this an "astoundingly high level of concern," *id.*, these figures hardly represent any "community standard," and they make clear that the Commission is granting a "heckler's veto" to a vocal minority to block content that did *not* cause concern for the great majority of Americans (accepting for the sake of argument the validity of the underlying study).

II. AS THE VERY FOUNDATION OF THE COMMISSION'S AUTHORITY TO REGULATE BROADCAST TELEVISION CONTENT WITHERS, THE COURT SHOULD NOT UPHOLD THE COMMISSION'S DRAMATIC EXPANSION OF THAT REGULATION.

A. Convergence and New Technology Together Are Challenging the Jurisprudence of Broadcast Regulation.

The delivery of entertainment and news content is undergoing a rapid transformation to a "converged" world where the distinctions between various type of content and delivery methods are blurring. At the same time, the ability of parents and caregivers to take direct control of what children are able to watch – including on television – are reshaping how our society can most effectively protect children from inappropriate content. These dual technical developments are, simply put, overtaking the constitutional foundation of the FCC's entire authority to regulate broadcast television, and the jurisprudence that allows greater regulation of broadcast content will wither away over the coming decade. Whether or not the Court overturns that jurisprudence at this time (and it need not do so to rule for petitioners), the on-going evolution of technology should strongly counsel against any expansion of the FCC's regulation of broadcast content.

The First Amendment generally prohibits the regulation of speech based on content, and even "indecent" speech has inherent First Amendment protection. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989); *see also Pacifica*, 438 U.S. at 746-47. The Supreme Court has, however, held that "of

all forms of communication, it is broadcasting that has received the most limited First Amendment protection," and the FCC may legally restrict broadcast content that is "indecent" yet otherwise legal. *Pacifica*, 438 U.S. at 748. This is because, in the Court's view in 1978, "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," and, as a corollary, "broadcasting is uniquely accessible to children, even those too young to read." *Id*. at 748-49. The particular concern about "pervasiveness" was the fact that when one turns on a broadcast television set, whatever is being broadcast at that moment will appear on the screen (making broadcast "invasive"). *See Reno v. ACLU*, 521 U.S. 844, 869 (1997) (concluding that the Internet is not as "invasive" as broadcast).

The broadcast landscape is, however, rapidly changing. Americans – adults and children alike – are increasingly accessing new video and audio content on the Internet (*e.g.*, Google Video,[23] YouTube,[24] Apple iTunes,[25] podcasts[26]), through cable and satellite operators (*e.g.*, DirecTV[27], EchoStar's "Dish Network"[28], XM[29]

[23] *See* http://video.google.com.

[24] *See* http://www.youtube.com.

[25] *See* http://www.apple.com/itunes/store.

[26] A "podcast" is an audio or video file, usually in MP3 format, made for download to a portable player or personal computer. *See* Urban Dictionary's definitions of "podcast" (http://www.urbandictionary.com/define.php?term=podcast).

[27] *See* http://www.directv.com.

and Sirius[30] satellite radio), DVD (*e.g.*, Netflix[31]) and video game purchases and rentals. Almost 50% of Americans use the Internet,[32] and 87% of U.S. children ages 12 to 17 use the Internet.[33] The Commission itself recognizes that "almost 86% of households with television subscribe to a cable or satellite service."[34]

Not only are more people accessing video and audio content by other means, broadcast itself is also converging with these new technologies. Individuals can access "broadcast" programming via their cable or satellite subscriptions. Also, network programming is increasingly available on the Internet. For example, entire episodes of popular ABC shows like "Lost" and "Grey's Anatomy" can be viewed on the network's website for free.[35] The other major networks (CBS, NBC,

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[28] *See* http://www.dishnetwork.com.

[29] *See* http://www.xmradio.com.

[30] *See* http://www.sirius.com.

[31] *See* http://www.netflix.com.

[32] Pew Internet & American Life Project, "Internet Penetration and Impact" (April 2006) at 3 (stating that about 147 million adults use the Internet) (available at http://www.pewinternet.org/pdfs/PIP_Internet_Impact.pdf).

[33] Pew Internet & American Life Project, "Teens and Technology: Youth Are Leading the Transition to a Fully Wired and Mobile Nation" (July 27, 2005) at i (available at http://www.pewinternet.org/pdfs/PIP_Teens_Tech_July2005web.pdf).

[34] *In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Order, FCC 06-166, 2006 FCC LEXIS 5969 (November 6, 2006) ("Order on Remand") ¶ 49 (currently on appeal to the Second Circuit).

[35] *See* ABC.com Full Episode Player (available at http://dynamic.abc.go.com/streaming/landing).

Fox) have similar offerings.[36] Network shows and other broadcast programming are also available on websites like Google Video, YouTube and iTunes. Although it is true that some Americans still rely on broadcast signals for their video programming, it is undeniable that the status quo is quickly changing.

The significant shift away from broadcast and to the Internet as a source of video entertainment is starkly illustrated by the global "Live 8" concerts in July 2005. All of the Live 8 concert performances were shown on AOL's website at no charge, while portions of the concert were distributed on MTV's cable network and then later broadcast on ABC's network television stations.[37] The ABC broadcast of the concert drew 2.9 million viewers, and the MTV showing netted 1.5 million viewers. But the AOL webcast of the event – which was uncensored and wholly outside of the FCC's jurisdiction – attracted *5 million* unique visitors.[38] And given the demographics of the different media, it is likely that the online viewers were generally younger than those viewing the concerts over broadcast.[39]

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[36] *See* CBS website (http://www.cbs.com), NBC website (http://www.nbc.com) and Fox's video link (http://www.myspace.com/fox).

[37] Annys Shin, "Entertainment Company Created by AOL, XM Radio," *The Washington Post* (July 13, 2005) p. D5 (available at http://www.washingtonpost.com/wp-dyn/content/article/2005/07/12/AR2005071201664.html?nav=rss_business).

[38] *Id.*

[39] Ironically, an advocacy group complained to the FCC that an indecent word was included in the broadcast of the Live 8 concerts. *See*, Parents Television Council, "PTC Files Indecency Complaint Against ABC's Live 8 Concert," Press Release,

Not only are new technologies changing the way people access video and audio programming, new (and newly improved) "user empowerment" technologies are allowing individuals to exercise freedom of choice and guard themselves or their children against content they deem undesirable. The most critical development for this case is the "V-chip," which has been installed in all 13-inch or larger televisions manufactured since 2000, and which allows parents to block certain broadcast content based on a series of ratings.[40]

(July 14, 2005) (available at http://www.parentstv.org/PTC/publications/release/2005/0714.asp). But the concerts reached far more people over the Internet, where children are protected not by unconstitutional government censorship but by parental choice to use technology tools to limit what children can access online.

[40] The ratings system offers the following age-based designations:

"TV-Y" – All Children
"TV-Y7" – Directed to Children Age 7 and Older
"TV-Y7 (FV)" – Directed to Older Children Due to Fantasy Violence
"TV-G" – General Audience
"TV-PG" – Parental Guidance Suggested
"TV-14" – Parents Strongly Cautioned
"TV-MA" – Mature Audience Only

The TV ratings system also uses several specific content descriptors to better inform parents and all viewers about the nature of the content they will be experiencing. These labels include:

"D" – Suggestive Dialogue
"L" – Coarse Language
"S" – Sexual Situations
"V" – Violence
"FV" – Fantasy Violence

Beyond the V-chip, there are several new technologies that allow parents to control the viewing of content that historically has been delivered by broadcast.[41] Cable and satellite TV controls offer robust parental controls, such as set-top boxes that offer locking functions for individual channels so that children cannot access the channels or programs without a password. Parental controls are usually just one button-click away on most cable and satellite remote controls. Personal video recorders (PVRs) offer even greater control over viewing. And specialized remote controls exist to restrict children to only channels approved by the parents.[42]

In the Internet context – into which video entertainment is inexorably moving – there is a huge and growing range of technology tools available to parents who want to control what their children can access. Internet Service Providers like America Online have parental control features,[43] and numerous

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See http://www.tvguidelines.org/ratings.asp. These ratings are found at the beginning of programs, on on-screen menus and interactive guides, and in local newspaper or TV Guide listings.

[41] All of these technologies were extensively detailed in comments filed on remand with the FCC by amicus Adam Thierer. *See* Adam Thierer, "The Current State of Parental Controls (and What it Means For This Debate)," *In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005; Court Remand of Section III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints*, September 21, 2006 (available at http://www.pff.org/issues-pubs/filings/2006/092106thierer_FCC_parentalcontrols.pdf).

[42] *See* Wee Remote, http://www.weeremote.com.

[43] *See* AOL Safety and Security Center, http://daol.aol.com/safetycenter/parentalcontrols.

software filtering and other tools are detailed at sites such as www.GetNetWise.org.

The emergence of these technological solutions has a direct impact on the legal underpinnings of the Commission's authority to regulate broadcast content. Although the goal of protecting children is without question a valid goal, the government may only "regulate the content of constitutionally protected speech [*e.g.*, indecency] in order to promote a compelling interest if it chooses the *least restrictive means* to further the articulated interest." *Sable*, 492 U.S. at 126 (emphasis added). In both the cable and Internet context, the Supreme Court has squarely endorsed the use of technology as a less restrictive means to further a governmental objective. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 877 (1997) (noting significance of "user based" alternatives to governmental regulation of speech on the Internet); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (for cable television).

The legal significance of user empowerment technologies as less restrictive alternatives is not diminished because they must be applied by parents (as with the V-chip). The Supreme Court in *Playboy* held that governmental efforts to promote voluntary efforts by parents to protect their children from sexual content are a less restrictive alternative to blocking mandated by statute. *Playboy*, 529 U.S. at 827. In that case, the Court held that a statute that required cable companies to scramble

sexually explicit programming was unconstitutional in light of the less restrictive alternative of governmental promotion of voluntary blocking of the signal upon requests of parents. *Id*. at 822. As the Court observed, "targeted blocking [initiated by parents] enables the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners." *Id*. at 815. And the Court noted,

> [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.

Id. at 824.

Taken together, the convergence of communications media and the development of a broad range of technology to "empower" parents to protect their children as they see fit is rapidly eliminating any remaining justification for enhanced governmental regulation of broadcast content. Parents are able – if they choose – to exert extensive control over what video content their children view in the home, undercutting any argument that the government in general – and the FCC in particular – should impose its value judgments on American homes.

B. Parents Have Been Empowered to Create and Enforce Their Own "Household Standard" to Determine Acceptable Media Content in the Home.

Parents have a diversity of tools with which to guide their children's development and viewing habits. Because of this diversity, the V-Chip is far from the only – or even the primary – tool used by families. In fact, just the opposite is the case. The majority of American homes now rely on many alternative technologies and methods to filter or block unwanted programming. Many families will forgo V-Chip capabilities in light of the alternative technological controls at their disposal. This is especially the case for 86% of U.S. households subscribing to cable or satellite television systems – which offer more robust filtering and blocking capabilities than the V-Chip.

Moreover, many households forgo technological controls altogether and instead rely on household media consumption rules. Parents employ a wide variety of household media consumption rules. Some of these can be quite formal in the sense that parents make the rules clear and enforce them routinely in the home over a long period of time. Other media consumption rules can be fairly informal, however, and be enforced on a more selective basis. Regardless, most parents enforce such guidelines. A 2003 Kaiser Family Foundation survey found that "Almost all parents say they have some type of rules about their children's use of

media."[44] And a 2006 Kaiser survey of families with infants and preschoolers revealed that 85% of those parents who let their children watch TV at that age have rules about what their child can and cannot watch.[45] Sixty-three percent of those parents say they enforce those rules all of the time. About the same percentage of parents said they had similar rules for video game and computer usage.

In other words, the V-Chip is just one tool or strategy that households can use to control television programming in their homes. Alternative technological controls or informal household media rules complement the V-Chip and sometimes even supplant it. With this diversity of tools, families now have the ability to construct and enforce their own "household standard" for acceptable media content in their homes. For content that is lawful – as is all of the content at issue here – the government does not have a compelling interest in imposing any "community standard" that is stricter or different than the individual "household standards" that each family can create and enforce.

[44] Kaiser Family Foundation, "Zero to Six: Electronic Media in the Lives of Infants, Toddlers and Preschoolers" (Fall 2003) p. 9 (available at http://www.kff.org/entmedia/entmedia102803pkg.cfm).

[45] Kaiser Family Foundation, "The Media Family: Electronic Media in the Lives of Infants, Toddlers, Preschoolers and Their Parents" (May 2006) p. 20 (available at http://www.kff.org/entmedia/entmedia102803pkg.cfm).

CONCLUSION

As the broadcast medium becomes less relevant, and as video entertainment moves to media that have robust parental controls (such as cable and the Internet), the entire constitutional foundation for any enhanced governmental authority over content is diminishing. Not only are new and varied media technologies being developed, their convergence with broadcast makes the "pervasiveness" rationale increasingly irrelevant. The rise of new user empowerment technologies, available for traditional broadcast as well as other video and audio media, justify a shift away from government regulation to a more user-centric model that respects individual choice and encourages personal responsibility – and, critically, still protects children. In this context, *amici* urge this Court to tread carefully and to not permit any significant expansion of broadcast indecency regulation by the FCC. To that end, the FCC's indecency determination about the 2004 Super Bowl must be set aside as a violation of the First Amendment and the Administrative Procedure Act. The Court should overturn the decision on appeal.

Respectfully Submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify counsel for *amici* John B. Morris, Jr., is a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

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November 29, 2006

CERTIFICATE OF WORD COUNT

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief contains 6135 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ John B. Morris, Jr.

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November 29, 2006

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I hereby certify that the text of *amici*'s E-Brief in PDF form and the paper copies are identical. I further certify that the E-Brief was scanned for viruses using the Kapersky Lab Anti-Virus File Scanner, available at http://www.kaspersky.com/scanforvirus, and that no viruses were detected.

/s/ John B. Morris, Jr.

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November 29, 2006

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I hereby certify that on November 29, 2006, ten copies of the foregoing *amicus* brief were filed with the Clerk of the Court by overnight delivery service for next-day delivery, an electronic copy was e-mailed to the Clerk's Office at electronic_briefs@ca3.uscourts.gov and to each of the listed addressees below, and two copies were delivered by hand delivery or shipped by commercial carrier for next-day delivery upon the following:

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