No. 10-1293

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

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

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

AMICI CURIAE BRIEF OF THE PENNSYLVANIA CENTER FOR THE FIRST AMENDMENT AND THE MARION B. BRECHNER FIRST AMENDMENT PROJECT IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

The Pennsylvania Center for the First Amendment ("PaCFA") was established by The Pennsylvania State University to promote awareness and understanding of the principles of free expression to the scholarly community, the media and the general public. Directed by attorney Robert D. Richards, the PaCFA's members publish books and scholarly articles on First Amendment topics. The PaCFA regularly tracks issues related to free expression, and research generated from those projects is presented at national conferences and in law journals.

The Marion B. Brechner First Amendment Project ("Project") is a nonprofit, non-partisan organization located at the University of Florida in Gainesville, Florida. Directed by attorney Clay Calvert, the Project is dedicated to contemporary issues of freedom of expression, including current issues affecting freedom of information and access to information, freedom of speech, freedom of press, freedom of petition and freedom of thought.

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[1] Pursuant to S. Ct. R. 37.6, the *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Federal Communications Commission (hereinafter "FCC" or "Commission") historically reserved its indecency policy enforcement for only the most extreme broadcasts. Programs that contained repeated offensive language or dwelled upon sexually explicit themes were subject to FCC sanctions – and then only if audience members complained and if the Commission agreed the broadcasts reached a certain level of explicitness and shock value. This Court ratified the Commission's authority in 1978 to act in this regard, consistent with the Constitution, but it cautioned the FCC to use its powers sparingly to protect children and unwitting adults from exposure to a barrage of unwelcome material.

Indeed, shielding children from language the FCC finds inappropriate for young ears has been the government's paramount concern from the outset of this regulatory enforcement. For more than four decades, the cases decided by the FCC have factored in how accessible broadcast technology is to children and how the offending content could reach that segment of the audience by a simple turn of the dial.

In recent years, the Commission veered away from imposing indecency regulations solely on shows that dwell upon or repeat material that is more suited for adults in favor of a new enforcement regime that also punishes the unscripted and unexpected – or fleeting – expletive. This new policy raises significant First Amendment concerns, which render it fatally flawed under the Constitution.

If the impetus behind indecency regulations is the protection of children, as the FCC has made clear throughout history, then the current regulatory structure is fatally underinclusive and cannot survive a constitutional challenge. The Commission has been consistent, in practice, to carve out exemptions for bona fide news and public affairs broadcasts from indecency proscriptions and even has protected entertainment shows and movies where the otherwise indecent content is pivotal to the artistic sensitivity of the program.

On the one hand, that helps the Commission avoid an intractable First Amendment challenge that the government has strayed too far into editorial discretion and content decisions. On the other hand, it creates a gaping exception that swallows both the viability and alleged purpose of the rule. If children actually are harmed by exposure to indecent language – *amici* illustrate in Part II there is, in fact, absolutely no causal evidence of any harm whatsoever – then it should not matter if they heard that language during a newscast interview or in artful TV movie dialogue. It is the language itself, rather than its distribution vehicle, that purports to be harmful. That very point raises another constitutional infirmity.

The Commission has long supposed that a child's exposure to indecent language is harmful, yet it has never required any evidence that this truly is the case. In fact, as *amici* argue in Part II, there is no evidence of harm to minors caused by hearing an isolated or fleeting broadcast expletive. That is highly problematic – indeed, fatal – because in its last term, this Court endorsed a much more demanding standard of harm causation when the government alleges that

particular content is injurious to minors. In *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011), the Court refused to accept California's position that minors' exposure to video game violence was harmful to their psychological and physiological development, absent any direct proof that such exposure *causes* harm. The majority warned that "ambiguous proof will not suffice." *Id.* at 2739. In the instant case, the record is devoid of *even* ambiguous proof.

For decades, the Commission has operated upon a mere supposition that exposure to indecent language somehow harms a child. Under the standard articulated by this Court in *Brown*, supposition alone is not constitutionally sufficient. The *Brown* Court rejected social science evidence that pointed only toward a correlation between exposure to video game violence and subsequent harm and made abundantly clear that only causal evidence of harm will suffice when a First Amendment interest is at stake.

In the instant case, the FCC has not demonstrated even a direct correlation of harm, yet alone the required threshold of causation. If no proof can be shown that a child's exposure to protracted and repeated instances of indecent language is detrimental, then it is inconceivable that a momentary exposure to a fleeting expletive will result in any harmful effects. If the government wishes to maintain that position, it must provide causal evidence to survive this constitutional challenge. A hunch theory of harm must not be allowed to trump the First Amendment right of free speech.

ARGUMENT

I. The Federal Communications Commission's Rationale for Its Broadcast Indecency Policy Raises Serious Constitutional Issues and is Contradicted by Its Current Enforcement Regime

This part has two sections. Section A illustrates how the FCC's current indecency enforcement regime strays too far from its long-time justification for punishing broadcasters airing indecent content. Section B then demonstrates how the FCC's *de facto* indecency exemptions provided to news and artistic expression – setting aside the definitional problems associated with the categories, such as how news is defined – fly squarely in the face of what the FCC has long touted as the underlying rationale for broadcast indecency policy, namely, the protection of children.

A. The FCC's Underlying Rationale for Punishing Broadcasters for Indecent Content Pivots on Shielding Minors from the Repeated Use of Expletives, Not Isolated Instances of Fleeting of Expletives

For much of its history, the FCC limited its enforcement of broadcast indecency policies to the most egregious cases using repeated expletives. Beginning in the 1970s, the FCC stepped up its policing of the airwaves when the use of indecent language was so pervasive in a particular broadcast as to raise concerns from listeners. In January 1970, for instance, Jerry Garcia, leader of the rock band "The Grateful Dead," recorded an interview in a hotel room with two representatives of a Philadelphia radio

station. When the 50-minute interview aired, Garcia's "comments were frequently interspersed with the words 'f - - k' and 's - - t,' used as adjectives, or simply as an introductory expletive or substitute for the phrase, et cetera." *WUHY-FM, E. Educ. Radio,* 24 F.C.C.2d 408, 409, ¶ 3 (1970).

Although the FCC emphasized, in its Notice of Apparent Liability, "the licensee's right to present provocative or unpopular programming which may offend some listeners," the sheer frequency of the verbal barrage in this interview brought about, on the part of the Commission, "a duty to act to prevent the widespread use on broadcast outlets of such expressions." *Id*. at 410, ¶ 6-7. Central to the FCC's analysis was the fact that, although stations have target audiences, many who are not the intended listeners "may also see or hear portions of the broadcast," and "in that audience are very large numbers of children." *Id*. at 411, ¶ 8. By its very nature, a broadcast program "comes directly into the home and frequently without any advance warning of its content." *Id.* The Commission recognized the practice of what today is often called "channel surfing," or as the FCC then described it: "Millions daily turn the dial from station to station." *Id.*

In fact, the notion that listeners might come across offensive language and, as a result, change their media consumption habits, greatly troubled the Commission, which wrote: "Very substantial numbers would either curtail using radio or would restrict their use to but a few channels or frequencies, abandoning the present practice of turning the dial to find some appealing program." *Id.* The chances of listeners accidentally coming across offensive language on the broadcast

airwaves are greatly enhanced, of course, when that language permeates the program in question. The odds, in contrast, are minimal when a channel surfer flips through an hour-long program involving an isolated expletive.

Again, it was the youngsters in the audience that prompted special attention, as the FCC noted, "[n]o one would could ever know, in home or car listening when he or his children would encounter what he would regard as the most vile expressions serving no purpose but to shock, to pander to sensationalism." *Id.*

Five years later, the Commission lamented that "the problem has not abated and the standards set forth apparently have failed to resolve the issue." *Citizens Complaint Against Pacifica Found. Station WBAI (FM), New York, N.Y.,* 56 F.C.C.2d 94 (1975). This time the culprit was another popular cultural figure, comedian George Carlin, and his so-called "Filthy Words" monologue. A listener, while driving his car during the middle of the afternoon, heard the broadcast, which included the words, "cocksucker," "fuck," "cunt" and "shit." *Id.* at 95, ¶ 3. The listener noted in his complaint to the FCC that "[a]ny child could have been turning the dial, and tuned in to that garbage." *Id.* His complaint went on to report that "Incidentally, my young son was with me when I heard the above…" *Id.*

The fact that a child was listening to the station was anything but incidental to the FCC's resolution to the case. The Commission spelled out four considerations as to why "[b]roadcasting requires special treatment" *Id*. at 97, ¶9:

> (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference (citation omitted); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children (footnote omitted). *Id.*

Indeed, bookending the references to children in the audience clearly telegraphed the Commission's rationale for ruling against the Pacifica Foundation. The Commission's declaratory order stressed that "it is important to make it explicit whom we are protecting and from what. As previously indicated, the most troubling part of this problem has to do with the exposure of children to language which most parents regard as inappropriate for them to hear." *Id.* at 98, ¶ 11. Moreover, the analysis of what is considered "indecent," according to the FCC, revolves around this very issue. As the Commission observed,

> the concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, at times of the day when there is a reasonable risk that

> children may be in the audience. *Id.* (footnote omitted).

When the case ultimately reached the U.S. Supreme Court, the issue essentially was narrowed to the facts of the case, and the question became "whether the First Amendment denies the government any power to restrict the public broadcast of indecent language in any circumstances." *FCC v. Pacifica Foundation*, 438 U.S. 726, 744 (1978). As the Court went on to suggest, "For if the government has any such power, this was an appropriate occasion for its exercise." *Id.* Indeed, the Court found the FCC had that authority and exercised it appropriately in this case. Two points were critical to the Court's ruling in *Pacifica* and merit some elaboration.

First, the Court focused on the pervasive nature of broadcasting and noted that it enters into the privacy of the home. For that reason, special considerations have to be given to what might be an unwanted guest, as the Court observed:

> Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place. *Id.* at 748-749 (footnote omitted).

Second, as the FCC had done in previous decisions, the Court honed in on the fact that children were in the audience, noting that "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 749. The Court suggested that exposure to such language could result in detrimental effects, writing: "Although Cohen's written message[2] might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant." *Id.*

The Court concluded, importantly, by emphasizing "the narrowness of our holding." *Id.* at 750. For instance, in discussing "the telecast of an Elizabethan comedy," the Court specifically observed that it had "not decided that an occasional expletive…would justify any sanction." *Id.*

Indeed, both the Jerry Garcia and George Carlin broadcasts involved the repeated use of indecent language where the odds of a channel-surfing child hearing and learning such language is greatly exacerbated. To the extent that the FCC's traditional rationale for protecting minors is grounded largely in protecting minors from offensive language, that rationale is severely undermined by targeting programs that involve only fleeting expletives where

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[2] The reference here is to Paul Robert Cohen, the petitioner in *Cohen v. California*, 403 U.S. 15 (1971) who, during the height of the Viet Nam War, walked into a Los Angeles, Calif. courthouse sporting a jacket that contained the message, "Fuck the Draft." The Court ruled in his favor on First Amendment grounds and famously uttered that "it is nevertheless often true that one man's vulgarity is another's lyric." *Id.* at 25.

the odds of a child accidentally hearing and learning such language are greatly reduced.

B. Exceptions to the FCC's Broadcast Indecency Policy Contradict the FCC's Own Rationale of Protecting Minors and Render the Current Policy Fatally Underinclusive

Shortly after the FCC released its declaratory order in *Pacifica*, the Radio Television News Directors Association (RTNDA) sought clarification from the Commission as to what effect the ruling would have on "the broadcasting of indecent words which might otherwise be reported as part of a bona fide news or public affairs program." *Petition for Clarification or Reconsideration of a Citizen's Complaint Against Pacifica Found., Station WBAI (FM), New York, N.Y.*, 59 F.C.C.2d 892, ¶ 3 (1976). Specifically, the RTNDA raised the possibility of voice and video actualities of "angry political demonstrations and even more structured political debate, interviews and conversations." *Id.*

The news directors organization was rightfully concerned that the FCC's *Pacifica* ruling would "cause licensees to censor programming and this would 'not only have a deleterious impact on accurate and insightful reporting in sporadic incidents, but would tend to impact over the long run most heavily on news coverage of those persons who, for whatever reason…, regularly and publicly use language which a majority of the public considers to be indecent.'" *Id.* at 893, ¶ 3.

The Commission sought to alleviate the fears of broadcasters by saying its *Pacifica* order "was issued

in a specific factual context" and that it shared "petitioner's concerns that we must take no action which would inhibit broadcast journalism." *Id.,* ¶ 4. In a footnote, the Commission addressed the RTNDA's concern that "in some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing." *Id.,* n. 1. The FCC opined that "[u]nder these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language." *Id.*

And, once again, the Commission reiterated the bottom-line rationale for its policy, writing, "By our order we sought primarily to protect young children from sexually explicit language." *Id.* at 893, ¶ 4. In fact, the Commission had hinted at that approach in its early decision regarding the Jerry Garcia interview. In that decision, the FCC noted that the issue presented did "not involve presentation of a work of art or on-the-spot coverage of a bona fide news event." *WUHY-FM,* 24 F.C.C.2d at 410, ¶ 6.

Herein lies an inherent and illogical contradiction that continues to threaten underlying First Amendment principles. On the one hand, the Commission has steadfastly adhered to its position that the protection of children is paramount. In a subsequent case, coincidentally also involving the Pacifica Foundation, the Commission observed that the

> physical separability of adults from children, however, is generally not available in broadcasting. Broadcast material is available to anyone who has a radio or television. Accordingly, the only effective means of

> restricting the access of minors to indecent programming is to channel such programming to a time during which there is not a reasonable risk that children may be in the audience. *Pacifica Found., Inc., d/b/a Pacifica Radio, Los Angeles, Calif.,* 2 F.C.C.R 2698, 2699 ¶15 (1987).

On the other hand, the Commission's longstanding practice has been to exempt bona fide news programs and artistic expression from the indecency prohibitions. This practice was evidenced most recently in two cases presented to the Commission on indecency complaints. One involved "The Early Show," a CBS network morning news and interview program, and the other concerned the broadcast of the acclaimed motion picture, "Saving Private Ryan" by several ABC Television affiliates.

In the "The Early Show" case, a viewer filed a complaint against CBS affiliate KDKA-TV, in Pittsburgh, Pa. During a live interview with Twila Tanner, a cast member of the CBS show "Survivor: Vanuatu," she "described a fellow contestant this way: "I knew he was a bullshitter from Day One." *Complaints Regarding Various Television Broadcasts Between February 2, 2002 & March 8, 2005,* 21 F.C.C.R. 2664, 2698, ¶137, n.199 (2006). In its initial ruling in the case, the FCC found that "the broadcast of the 'S-Word,' under the circumstances presented here, [was] vulgar, graphic and explicit." *Id.,* ¶139. Moreover, because the offensive content was aired outside the "safe harbor," i.e., between 6:00 a.m. and 10:00 p.m., "there is a reasonable risk that children may have been in the audience and the broadcast is legally actionable." *Id.,* ¶ 142.

Later that same year, however, the Commission reversed its ruling on "The Early Show." *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* FCC Docket No. 06-166 (Nov. 6, 2006). Noting that, although "there is no outright news exemption from our indecency rules…in light of the important First Amendment interests at stake as well as the crucial role that context plays in our indecency determinations, it is imperative that we proceed with the utmost restraint when it comes to news programming." *Id.* at 29, ¶71 (footnote omitted). Recognizing that it had not given "appropriate weight to the nature of the programming at issue (i.e., news programming)" in its earlier order, the Commission denied the complaint. *Id.* at 30, ¶¶ 72 & 73.

In the complaints against ABC affiliates for airing the award-winning film "Saving Private Ryan," some viewers were upset with language of the soldiers' dialogue, which included "'fuck' and its variations; 'hell'; 'ass' and 'asshole'; 'crap'; 'son of a bitch'; 'bastard'; 'shit' and its variations, including 'bullshit' and 'shitty'; 'prick'; and 'pee.'" *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4512, ¶ 13 (2005). Despite the fact that such language could easily trigger the indecency rules in other contexts, the FCC found that "[t]he expletives uttered by these men as these events unfolded realistically reflect the soldiers' strong human reactions to, and, often, revulsion at, those unspeakable conditions and the peril in which they find themselves." *Id.,* ¶ 14.

In commenting on the artistic integrity of the film, the Commission observed: "Deleting all of such language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers." *Id.* at 4513, ¶ 14.

Thus, while the Commission might not agree that there is an officially recognized exemption from indecency rules for news and public affairs broadcasts or artistic works of expression, it has, in practice, long shielded such broadcasts from indecency findings. That practice is consistent with the Constitution and, to that end, the Commission has recognized that "the First Amendment is a critical constitutional limitation that demands, in such determinations, we proceed cautiously and with appropriate restraint." *Id*. at 4510, ¶ 6.

What strains the Constitution, as well as logic, however, is the fact that the *de facto* exemptions provided to news and artistic expression – setting aside the definitional problems associated with the categories – fly squarely in the face of what the FCC has long touted as the underlying rationale for broadcast indecency policy, namely, the protection of children. Those news programs, public affairs interviews and works of artistic expression often air during a time when there is a "reasonable risk" that children will be in the audience. Consequently, the hypothetical first grader that worried Justice Stevens in *Pacifica* could just as easily have his vocabulary enlarged by hearing indecent language during a local newscast as he could by listening to George Carlin's monologue. *Pacifica,* 438 U.S. at 749.

The foundation upon which the Commission has stood for more than four decades – the deep concern that children are harmed by repeatedly hearing indecent language – crumbles when the FCC is willing to permit such language in certain programs despite the fact that children may be in the audience or, at the very least, channel surfing by when the offending remarks are made. Last term, Justice Scalia, writing for the majority in *Brown v. Entertainment Merchants Association,* made a similar observation with respect to California's statute restricting minors' access to violent video games. 131 S. Ct. 2729 (2011).

In that case, the state of California maintained that violent video games were psychologically and physiologically harmful to the minors who played them. Nonetheless, the statute that lawmakers crafted included an exception – one that rendered it "seriously underinclusive," according to the majority, which wrote: "The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it's OK." *Id.* at 2740. In the area of indecency regulation, the FCC has, for decades, adhered to the position that a child's exposure to indecent language in broadcasts is harmful to him or her. Yet, the Commission is "perfectly willing" to expose the child to that harmful language, as long as it is aired in the context of a newscast or a particularly artful television program. As the *Brown* majority concluded with respect to this analogous provision in the California statute, "That is not how one addresses a serious social problem." *Id.*

The Commission cannot have it both ways. If exposure to indecent language truly is harmful in the

broadcast context – an argument addressed and refuted in the next part of this Brief – then it is no less harmful when heard in the context of a newscast, news interview or artistically created program. Because restrictions on those latter categories would fail to survive the hurdles imposed by the First Amendment, the broadcast indecency rules are constitutionally flawed.

II. The Government Lacks Proof of Any Harm to Minors Caused by Hearing Fleeting Expletives on the Broadcast Medium, and Its Indecency Enforcement Regime Provides an Underinclusive Remedy for Curing Any Harm, Even If It Did Exist

The standard of judicial review in this case is controlled by the Court's 2011 ruling in *Brown v. Entertainment Merchants Association, supra*. *Brown*, as in the matter now before the Court, involved a content-based regulation of expression that was ostensibly designed to shield minors from speech that allegedly would somehow harm them.

In applying the strict scrutiny standard of judicial review, the Court in *Brown* wrote that the government must initially "identify an 'actual problem' in need of solving" and then demonstrate that "the curtailment of free speech must be actually necessary to the solution." *Brown*, *supra* at 2738. This represents what one commentator has called a two-step evidentiary and causation process, in which the government must first prove the existence of a harm caused by speech and then prove that the harm will be substantially ameliorated or eliminated by the government's statutory remedy. See Clay Calvert, *The Two-Step*

Evidentiary and Causation Quandary for Medium-Specific Laws Targeting Sexual and Violent Content: First Proving Harm and Injury to Silence Speech, then Proving Redress and Rehabilitation Through Censorship, 60 Fed. Comm. L.J. 157 (2008). The Court in *Brown* aptly dubbed this a "demanding standard." *Brown*, *supra* at 2738. More importantly, it opined that "ambiguous proof will not suffice." *Id.* at 2739.

In *Brown*, the state of California offered numerous studies purporting to show harm to minors caused by playing violent video games, yet the Court determined that California's "evidence is not compelling." *Id.* Emphasizing the critical difference in social science between the concepts of correlation and causation, the Court wrote that California's studies "do not prove that violent video games *cause* minors to *act* aggressively." *Id.* (emphasis in original). Justice Scalia wrote for the Court that "[t]hey show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children's feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game." *Id.*

In the instant case, the government cannot prove causation of any harm to minors from hearing fleeting expletives. That may be because, as one professor of psychology who has studied the issue writes, "there is little good research evidence of harm." Timothy Jay, *Do Offensive Words Harm People?*, 15 Psychol. Pub. Pol'y & L. 81, 96 (2009). The same professor who made that observation also points out that in this Court's seminal indecency ruling in *FCC v. Pacifica Foundation*, its decision was "based on the Justices' folk knowledge of offensiveness but not on any

scientific evidence of harm from indecent speech. The offensiveness of indecent speech was sufficient to restrict indecent speech in *Pacifica*, but offensiveness is not a sufficient basis in cases involving sexual harassment or hate speech. There is no psychological evidence of harm from fleeting expletives." *Id.* at 92. In fact, there may be multiple benefits from using swear words. See Clay Calvert & Matthew D. Bunker, *Free Speech, Fleeting Expletives, and the Causation Quagmire: Was Justice Scalia Wrong in Fox Television Stations?*, 47 San Diego L. Rev. 737, 753 (2010) (addressing the benefits of swearing).

Even if children learn an expletive from hearing it on television, there is no proof that they are harmed by learning it or that they will, in fact, use it in their own vocabulary. See Calvert & Bunker, *supra* at 751 ("although children conceivably might learn a new expletive from watching and listening to a television program, especially given 'the well-documented ability of preschoolers to learn vocabulary incidentally,' this does not necessarily mean that they will start using that word or saying it as a regular part of their vocabulary" because "social cognitive theory suggests that 'outcome expectancies' will influence whether a behavior is enacted"). As two legal commentators recently wrote:

> [I]f the only alleged harm is the mere use of expletives by minors, is it not the prerogative of parents – not the government – to either praise or punish their children's use of language? Indeed, some parents may not object to their children using expletives, just as they also might not object to allowing their minors to hear an occasional expletive on a television

> program rather than shielding them in an expletive-free, televised bubble that does not reflect the growing use of profanity in the real world.

Calvert & Bunker, *supra* at 752.

In 2009, Justice Antonin Scalia asserted that "[p]rogramming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives." *FCC v. Fox Television Stations, Inc*., 129 S. Ct. 1800, 1813 (2009). This overlooks the critical difference between learning a word and using that word. Psychology Professor Timothy Jay points out in a recent article on swearing that "[w]e first internalize taboos at a personal level. Indeed, *we learn not to use them when we are punished by caregivers.*" Timothy Jay, *The Utility and Ubiquity of Taboo Words*, 4 Persp. on Psychol. Sci. 153, 153 (2009) (emphasis added).

Parents have the responsibility, not the government, to tell their children what language is and is not appropriate to use. A child will be deterred from using a word if his or her parents make it clear that the use of that word is wrong and that the child will be punished for using it.

Learning a new word does not cause emotional, psychological or physical harm to a child. It may be, then, that the only real harm caused by fleeting expletives is the potentially awkward moment a parent faces when explaining to a child what a particular curse word means and then, presumably, instructing the minor not to use that word (if, of course, the parent believes its usage is inappropriate).

The possibility that this may make parental authority over a minor's vocabulary slightly more difficult is an insufficient reason for censorship, as "the government cannot silence protected speech by wrapping itself in the cloak of parental authority." *Interactive Digital Software Association v. St. Louis County*, 329 F.3d 954, 960 (8th Cir. 2003).

Assuming *arguendo* that the government can demonstrate causation of harm caused by exposure to fleeting expletives in the broadcast medium, the FCC's current indecency-enforcement regime provides an underinclusive and ineffective way of addressing any such harm. The Court wrote in *Brown* that "California's legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." *Brown*, *supra* at 723 – 724.

The FCC's current indecency-enforcement regime represents a seriously underinclusive means of alleviating any harm to minors caused by expletives. Regardless of the words a child hears on broadcast television or radio, a child will still be exposed to profanity on the playground, at school, in the movies, in video games and in songs downloaded from the Internet. As one psychology professor recently observed, "profanity is a ubiquitous feature in human life." Richard Beck, *Profanity: The Gnostic Affront of the Seven Words You Can Never Say on Television*, 37 J. of Psychol. & Theology 294, 294 (2009). See James D. Ivory et al., *Good Clean Fun? A Content Analysis of Profanity in Video Games and Its Prevalence across*

Game Systems and Ratings, 12 CyberPsychology & Behav. 457, 459 (2009) ("all types of profanity" were found to be "relatively abundant" in video games rated M for Mature).

CONCLUSION

Amici respectfully urge this Court to affirm the Court of Appeals' judgment in favor of Respondents FOX Television Stations, Inc., et al.

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