

*In the*

**United States Court of Appeals  
for the Second Circuit**

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FOX TELEVISION STATIONS, INC.,  
WLS TELEVISION, INC.,  
KTRK TELEVISION, INC.,  
KMBC HEARST-ARGYLE TELEVISION, INC.,  
ABC, INC.,  
CBS BROADCASTING, INC.,

*Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION  
and UNITED STATES OF AMERICA,

*Respondent,*

NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO.,  
NBC TELEVISION AFFILIATES, FBC TELEVISION AFFILIATES  
ASSOCIATION, CBS TELEVISION NETWORK AFFILIATES,  
CENTER FOR THE CREATIVE COMMUNITY, INC., DOING BUSINESS AS  
CENTER FOR CREATIVE VOICES IN MEDIA, INC.,  
ABC TELEVISION AFFILIATES ASSOCIATION,

*Intervenors*

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

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**BRIEF FOR AMICUS CURIAE PARENTS TELEVISION COUNCIL IN  
SUPPORT OF FEDERAL COMMUNICATIONS COMMISSION AND  
AFFIRMANCE**

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*Complaints Against Various Broadcasters Licensees Regarding Their Airing  
of the “Golden Globe Awards,” Memorandum Opinion and Order*, 19  
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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure Rule 26.1, proposed *amicus curiae*, Parents Television Council (PTC), respectfully submits this corporate disclosure statement.

PTC does not have a parent company and no publicly held company owns 10% or more of stock in PTC.

### **STATEMENT OF THE ISSUE**

Whether the Federal Communications Commission (FCC) decision in *In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCCRcd 2664 (2006) (“*Omnibus Order*”), on remand \_\_\_ FCCRcd \_\_ (2006), at Sections III A and III B of the *Omnibus Order*, correctly states the law as it relates to indecent and profane material.

### **INTEREST OF AMICUS CURIAE**

Pursuant to Federal Rules of Appellate Practice Rule 29, proposed *amicus curiae*, PTC, is submitting simultaneously with this brief its Motion for Leave to File Brief *Amicus Curiae*, in support of the FCC, in the above-styled Petition for Review of an Order of the Federal Communications Commission. PTC has not sought leave from the parties to file this brief as an *amicus curiae*.

PTC is a corporation qualified under United States Internal Revenue Code Section 501(c)(3) as a charitable, non-profit, non-stock research and education foundation dedicated to improving the content of entertainment programming with emphasis on prime time television. PTC is supported by charitable contributions from its members and supporters residing throughout the United States.

PTC was founded in 1995 to ensure that children are not constantly assaulted by sex, violence and profanity on television and in other media. PTC's national grassroots organization has 1.1 million members across the United States, and works with television producers, broadcasters, networks and sponsors in an effort to stem the flow of harmful and negative messages targeted at children. Central to PTC's mission is working with elected and appointed government officials and agencies to enforce broadcast decency standards, including the filing of complaints with the FCC and prosecuting such complaints at the agency and in the Federal Courts of the United States.

By this brief, PTC seeks to maintain the integrity of the FCC decision in *In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664 (2006) (“*Omnibus Order*”), on remand \_\_\_ FCC Rcd \_\_\_ (2006), as that decision relates to Sections

III A and III B of the *Omnibus Order*<sup>1</sup>. This matter is an issue of high public importance to the American public, and of utmost importance to the mission and exempt function of the PTC. Reversal of Sections IIIA and IIIB of the *Omnibus Orders*, as urged by Petitioners, would undercut the interests of the members of the PTC. The FCC cannot and should not allow the public airwaves and community standards to be assaulted by those who are allowed to use the public spectrum for free. In Sections IIIA and IIIB of the *Omnibus Orders*, the FCC has taken affirmative steps for decency, preservation of the public airwaves and community standards.

On behalf of its 1.1 million members across the United States, PTC respectfully submits this brief as *amicus curiae* in support of the FCC and its finding that the broadcasts at issue in Sections IIIA and IIIB of the *Omnibus Orders* were, indeed, indecent.

The following national grassroots organizations, for themselves and on behalf of their respective members, have represented to PTC that they agree and adopt this brief as *amicus curiae*, as a fair and accurate reflection of their position on this critical matter: Focus on the Family, Concerned Women for America, Citizens for Community Values, American Family Association of Michigan, and the Illinois Family Institute. Together,

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<sup>1</sup> PTC does not address, nor does it endorse or support, the FCC's decision to vacate, deny and dismiss other parts of the *Omnibus Order* concerning "The Early Show" and "NYPD Blue."

the PTC and the these organizations and their several million members and constituents, present to the Court the thoughts, concerns, and the point of view of the American public – the true and rightful owners of the broadcast airwaves, and in whose interest the FCC is chartered by Congress to act

## **ARGUMENT**

### Summary Argument

PTC presents this brief to the Court without the aid of high-brow law firms or big-name attorneys, such as the petitioners and intervenors (Petitions and Intervenors, respectively) in this case have employed. Unlike the corporate conglomerate Petitioners, the general public cannot afford such representation. But unlike the Petitioners, PTC's plea to the Court comes not from corporate special interests but directly from the citizens of our nation, the owners of the public airwaves. We beseech the Court to consider this modest plea as it weighs the legal questions before it.

PTC urges the Court to uphold the FCC's rulings that the broadcasts at issue were indecent. In virtually every community in America, the so-called "F-Word" and "S-Word" are patently offensive as measured by contemporary community standards for the broadcast medium. This is true whether the words are used as a noun, a verb, or as an intensifier. And it is

equally true whether the words are used one time in a sentence, or ten times in a sentence.

The Petitioners – corporations which are licensed by the FCC to use our airwaves for the public interest – are doing everything they can to subvert the broadcast indecency law. If there were even a hint of a reasonable intent to comply with the law, this case would not be here before the Court.

#### The Logic and Reason Behind the Indecency Law

The right to deliver a broadcast into a person's home is not synonymous with our cherished First Amendment right to Free Speech. There are critical similarities, and there must be. But the two are not identical.

The broadcast airwaves are public property. Broadcasters borrow the airwaves – for free – and are able to earn many billions of dollars in revenue every year. In exchange for the ability to use our public property for free, broadcasters agree to serve the public interest and to abide by the terms of a broadcast license. As part of that agreement, they promise not to broadcast indecent material between 6am and 10pm, because children are likely to be in the audience.

The broadcast indecency law does not prohibit the airing of indecent material; it only puts a time restriction on it. That is fair, given that the broadcast airwaves are owned by the American public, including children and families. It also includes people who have no children, or have no interest or concern about indecency. So Congress and the FCC rightfully allotted times of the day when indecent and profane material could air, and times of the day when it could not air.

In the case of the two Billboard Award broadcasts, both aired before 10:00 pm, and both were actually viewed by millions of children. All the broadcasters had to do in order to fully comply with the law was to air these programs later in the evening – after 10:00 pm – or to ‘bleep’ profane words. But as they have done in the past, they chose instead not to abide by the law.

### The Sense of the Nation

The public supports the notion of a reasonable time/place/manner restriction for indecency on the public airwaves. The degree of the public support was prominently displayed in Washington earlier this year when the Congress voted overwhelmingly to increase the financial penalty for broadcasters who violate the indecency law. The indecency fine legislation passed *unanimously* in the United States Senate,

and by a margin of 379-35 in the House; and the President signed the measure into law.

Why did the Congress feel such intense public pressure to act? Because the public was fed up with the filth being poured into their homes on a daily basis; fed up with more and more graphic and gratuitous material airing at earlier and earlier times of the day; and fed up with the fact that their children could no longer do something as simple as to sit and watch TV by themselves.

#### The Need for Guidance

There is one thing that all the parties to this case can agree on: the government's involvement in this issue is the option of absolute last resort. But sadly, we have reached a point where we must turn to the government for help. That is because, in an attempt to exploit the public airwaves, many broadcasters have decided that responsible corporate behavior can be ignored, and some do not care whom they hurt in the process.

PTC appreciates that "indecent" can be difficult at times to define, especially when using a national community standard. People would likely hear more profanity in 20 minutes at a New York City taxi stand than they would hear over the course of an entire year in most communities in the

United States. So a clear line can be tough to draw. But just because it is difficult does not mean the FCC should not make a good faith attempt to establish that line.

In fact, had the FCC been dealing with this issue straightforwardly and more proactively, rather than ignoring the issue for years until a fed-up public prodded a fed-up Congress, there would be more understanding and more certainty for broadcasters and for the public. Both sides – broadcasters and the public – deserve more certainty.

If the FCC had ruled on the merits of each of the thousands of complaints which were in essence plea-bargained away in the recent and various FCC Consent Decrees, both the broadcasters and the public would have better guidance about what is or is not indecent. Now, guidance is precisely what the FCC attempted, and precisely what has occurred, with the *Omnibus Orders* at issue. No fines were levied and no broadcast licenses were jeopardized, but the FCC gave guidance.

Petitioners complain that the FCC is deviating from a pattern of “time honored restraint.” Sadly for the public, what that really means is that, for years, there was a near-zero enforcement of the indecency law. There is nothing time-honored about ignoring the law. Violators knew they would not be punished, and their repeated disregard for the law turned into a sense of

entitlement never to be held to the law. So nearly three years ago – after the “Bono” decision – the FCC put broadcasters on notice regarding such patently offensive profanity. *Complaints Against Various Broadcasters Licensees Regarding Their Airing of the “Golden Globe Awards,” Memorandum Opinion and Order*, 19 FCCRcd 4975 (2004).

### The Indecency Complaint Process

The reality, even today, is that most Americans do not know that there is a broadcast decency law. And for the vast majority of Americans who do know the law exists, they are unaware that it is up to them to register a complaint in order for the law to be enforced.

Much has been made of the “source” of indecency complaints, and in particular the computerized complaint filing procedures now available to the public. Regardless of whether a complaint comes directly from a television viewer or a radio listener to the FCC, or whether the complaint comes from a member of the public through an anti-indecency group’s website via the internet to the FCC, the critical fact is that each complaint comes from a real person; a member of the public; a part-owner of the public airwaves who is concerned about broadcast decency and wants the law enforced. In the same way that no government agency would place a diminished value on the concerns of members of the local “Neighborhood

Watch” for placing too many calls to the police when they felt a crime was being committed, the Petitioners and Intervenors should not be allowed to diminish the complaints which prompted this matter before the Court.

Whether a person filing an indecency complaint actually saw an indecent broadcast or not is of no consequence. If the law was broken, the law was broken. If a man has a strong opinion on the issue of abortion, does his opinion not count because he will never suffer an abortion himself? Of course not. If a member of an environmental advocacy group sends an email to her public servants over oil drilling in the Arctic National Wildlife Refuge, should her voice not count because she does not live in or near the Wildlife Refuge? Of course not. And with the issue of broadcast indecency, every man, woman and child in America is personally impacted – either directly or indirectly.

#### Errant Assertions by the Petitioning Broadcasters

Some of the Petitioners assert that broadcast indecency enforcement would interfere with their ability to air live or real-time broadcasts. This is wholly untrue, and we urge the Court to see its fallacy. A 5-second delay does not interfere with the broadcast experience. Already, when a viewer watches a so-called “live” broadcast (such as a sporting event) at home on TV, it can take between 5-10 seconds for the signal to

travel from the stadium to the viewer's home, and if the broadcast is being viewed on a High Definition television screen, it can take even longer for the video to be displayed. "Instantaneous" viewing is a fiction. By faithfully implementing a simple 5-second delay, broadcasters could bleep or mute any indecent content.

A number of Petitioners claim that there are technology solutions which provide a less-restrictive means to address broadcast indecency. But these so-called solutions are a sham, and we urge the Court to see through them as well. The much-touted v-chip would not have prevented the two broadcasts at issue in this case from being viewed by children.

Recall that when the v-chip was first adopted over a decade ago, the broadcast networks decried it as a tool for censorship and a threat to their revenue streams. The broadcasters were bound and determined not to let a v-chip become an effective tool. Yet today these same broadcasters who publicly voiced such disdain for the v-chip now claim it as a panacea. They do so because the v-chip can be manipulated.

The v-chip relies on a ratings system in order to function properly. In a recent analysis, the PTC found that television program ratings are arbitrary, capricious and inaccurate – inaccurate in fact up to 60%-80%

of the time. And ratings were not just inconsistent across the various television networks, but individual networks actually rated similar content differently.

One reason why the rating system is unreliable is that the networks themselves rate their own programs. The advertisers, who are the networks' true customers, often choose not to sponsor sexually charged or otherwise indecent programming, so the networks face a financial conflict-of-interest to rate programs accurately. The general result is that the networks rate a program inaccurately, and by doing so they keep the advertisers' money. Both the public and the advertisers lose, and the v-chip as a solution is rendered useless.

The Court has received briefs which assert that the indecency law interferes with artistic or creative expression. This claim is utter rubbish. In today's 500-channel universe, and with new and emerging digital distribution outlets, the creators of entertainment programming are free to produce whatever they want and reach a near-universal commercial audience.

Take for example Petitioner NBC: In addition to its two broadcast television networks (NBC and Telemundo), NBC/Universal owns all or part of 20 cable networks. That means that every day NBC can air 528

hours of television programming. Of their 528 hours of daily programming, the broadcast decency laws apply only to 32 hours – roughly six percent (6%) of their total programming. So NBC can legally provide indecent and offensive material for up to 496 hours each and every day – nearly 94% of its program schedule. NBC/Universal can also exhibit unlimited indecent content through its internet distribution sources, through Pay Per View, through home video and DVDs, and, as it has done for decades, through its motion pictures in movie theaters across the country.

Many broadcasters claim they must be indecent in order to remain competitive with cable television. This is wholly untrue. In spite of the dramatic technical and economic developments in the broadcasting and cable television marketplace since the *Pacifica* decision (*FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)), broadcast television remains today a uniquely pervasive medium. According to the Nielsen ratings service, last year the most-watched TV programs were all on broadcast television. In fact 485 out of the top-rated 495 programs aired on broadcast TV rather than cable.

## **CONCLUSION**

On behalf of the American public – the true owners of the public airwaves – we urge the Court to respect the authority granted to the

FCC by Congress at 47 C.F.R. §151 and 47 C.F.R. §0.111(a) (7), and we urge the Court to uphold the broadcast indecency rulings against the “F-word” and the “S-word” which aired before 10:00 pm when children were likely in – and in fact comprised a substantial part of – the viewing audience. For all the reasons set forth above, PTC respectfully submits that this Court should affirm the FCC’s *Omnibus Order*, as it relates to Section IIIA and IIIB of that Order.

Respectfully Submitted,  
PARENTS TELEVISION COUNCIL,  
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## **DECLARATION OF COMPLIANCE**

Robert R. Sparks, Jr., Esquire hereby declares, pursuant to 28 U.S.C. §1746, that the following is true and correct:

1. The foregoing complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32 (a)(7)(B) because the number of words in the brief is less than 3,500 words, excluding the parts of the brief exempted by of Federal Rules of Appellate Procedure 32 (a)(7)(B)(iii);  
and
2. The foregoing complies with the typeface and typestyle requirements of Federal Rules of Appellate Procedure 32 (a)(5) and 32(a)(6) because this brief has been prepared in a proportional spaced typeface using MS Word in 14-point Times New Roman type.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12<sup>th</sup> day of December, 2006.

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Robert R. Sparks, Jr.

**CERTIFICATE OF VIRUS PROTECTION COMPLIANCE**

I hereby certify that this brief complies with the protection requirement for briefs in digital format of Local Rule 32(a)(1)(E) because the Portable Document Format (PDF) of the brief has been scanned for viruses and no virus has been detected.

Executed this 12<sup>th</sup> day of December, 2006.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing Motion for Leave to File an Amicus Curiae Brief, and attached Brief, was served by United States Mail, first class postage prepaid, upon the parties listed on the attached Service List this \_\_\_ day of December, 2006.

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