No. 11-1240

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

CBS CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Communications Commission acted arbitrarily and capriciously under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, in determining that a widely viewed television broadcast of public nudity fell within federal prohibitions on broadcast indecency.

PARTIES TO THE PROCEEDING

Petitioners are the Federal Communications Commission and the United States of America.

Respondents are CBS Corporation, CBS Broadcasting, Inc., CBS Television Stations, Inc., CBS Stations Group of Texas L.P., and KUTV Holdings, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Federal Communications Commission and the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-111a) is reported at 663 F.3d 122. The orders of the Federal Communications Commission (App., *infra*, 112a-151a, 152a-212a) are reported at 21 F.C.C.R. 6653 and 21 F.C.C.R. 2760, respectively.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 2011. A petition for rehearing was denied on January 18, 2012 (App., *infra*, 213a-214a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant statutory and regulatory provisions are set out in the appendix to this petition. App., *infra*, 215a-218a.

STATEMENT

1. a. Federal law has long prohibited the broadcast of "obscene, indecent, or profane language by means of radio communication." 18 U.S.C. 1464. In 1992, Congress supplemented that prohibition by directing the Federal Communications Commission (FCC or Commission) to "promulgate regulations to prohibit the broadcasting of indecent programming" during certain times of the day. Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 954; see *Action for Children's Television* v. *FCC*, 58 F.3d 654, 669-670 (D.C. Cir. 1995) (en banc), cert. denied, 516 U.S. 1043 (1996). The FCC's rules currently prohibit licensees of radio and television stations from broadcasting "any material which is indecent" between the hours of "6 a.m. and 10 p.m." 47 C.F.R. 73.3999(b). The Commission does not regulate indecent broadcasts outside that time period. The FCC has authority to enforce the broadcast-indecency prohibition by, *inter alia*, imposing civil forfeitures, see 47 U.S.C. 503(b)(1)(B); 47 U.S.C. 503(b)(1)(D) (Supp. IV 2010), or taking violations into account during license-renewal proceedings, see 47 U.S.C. 307; 47 U.S.C. 309(k).

b. In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), the FCC applied its indecency regime to a mid-day radio broadcast of George Carlin's monologue "Filthy Words." Responding to a listener complaint, the Commission determined that the broadcast violated Section 1464. *Id.* at 730-732. This Court held that the Commission's enforcement action was consistent with the First Amendment. *Id.* at 748-750.

c. For several years after *Pacifica*, the FCC enforced the indecency prohibition only against "material that closely resembled the George Carlin monologue," that is, material that "involved the repeated use, for shock value, of words similar or identical to those" used by Carlin. *Infinity Broad. Corp. of Pa.*, 3 F.C.C.R. 930, 930 ¶ 4 (1987) (*Infinity Reconsideration Order*). In 1987, however, the Commission determined that such a "highly restricted enforcement standard * * * was unduly narrow as a matter of law" because it "focus[ed] exclusively on specific words rather than the generic definition of indecency." *Id.* at 930 ¶ 5. Accordingly, the Commission concluded that, in enforcing Section 1464, it would apply the generic indecency test articulated in *Pacifica*, that is, whether the material "describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, when there is a reasonable risk that children may be in the audience." *Id.* at 930 ¶¶ 2, 5 (quoting *Citizen's Complaint Against Pacifica Found. Station WBAI (FM)*, 56 F.C.C.2d 94, 98 ¶ 11 (1975)).

In making that change, the Commission recognized that "the question of whether material is patently offensive requires careful consideration of context." *Infinity Reconsideration Order*, 3 F.C.C.R. at 932 ¶ 16. Despite

its renewed emphasis on context, the Commission stated that "[i]f a complaint focuses solely on the use of expletives, * * * deliberate and repetitive use * * * is a requisite to a finding of indecency." *Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 13 (1987). In contrast, the Commission explained, when offensive material "goes beyond the use of expletives" and involves "the description or depiction of sexual or excretory functions," "repetition of specific words or phrases is not necessarily an element critical to a determination of indecency." *Ibid.*

d. In 2001, the Commission issued a policy statement to provide further guidance concerning its enforcement of the statutory indecency standard. *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999 (*Industry Guidance*). In that statement, the Commission explained that it applies a two-part test to determine whether a broadcast is indecent. First, the material at issue "must fall within the subject matter scope of [the] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities." *Id.* at 8002 ¶ 7. Second, "the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium." *Id.* at 8002 ¶ 8.

The Commission's policy statement reiterated that whether a broadcast is "patently offensive" turns on "the *full context*" in which the material is broadcast and is therefore "highly fact-specific." *Industry Guidance*, 16 F.C.C.R. at 8002-8003 ¶ 9. The Commission identified three "principal factors" that are "significant" in evaluating patent offensiveness:

> (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or

> activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; [and] (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.

Id. at 8003 ¶ 10 (emphases omitted).

The Commission stressed that "[e]ach indecency case presents its own particular mix of these, and possibly other, factors, which must be balanced to ultimately determine whether the material is patently offensive and therefore indecent." *Industry Guidance*, 16 F.C.C.R. at 8003 ¶ 10. For example, with respect to the second factor, the Commission noted that "[r]epetition of and persistent focus on sexual or excretory material" may "exacerbate the potential offensiveness of broadcasts," but emphasized that "even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness." *Id.* at 8008-8009 ¶¶ 17, 19.

e. In 2004, the Commission changed its policy concerning isolated expletives. The previous year, NBC had presented a live broadcast of the Golden Globe Awards. The FCC determined that the broadcast was indecent based on language used by the rock singer Bono when accepting an award. *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975 (*Golden Globe Awards Order*). It disavowed, as "no longer good law," "prior Commission and staff action" that had "indicated that isolated or fleeting broadcasts of the 'F-Word' * * * are not indecent or would not be acted upon." *Id.* at 4980 ¶ 12. The FCC stated "that the mere fact that specific words or phrases are not sustained or

repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Ibid.*

2. a. Two years later, the FCC applied the new policy articulated in the *Golden Globes Awards Order* when it concluded that two broadcasts of the Billboard Music Awards that included isolated uses of indecent language were indecent. *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005*, 21 F.C.C.R. 13,299 (2006) (*Remand Order*). The Commission reaffirmed that the fleeting nature of an utterance does not by itself preclude a finding of indecency, reasoning that "categorically requiring repeated use of expletives in order to find material indecent" would be "inconsistent with our general approach to indecency enforcement" and its "stress[] [on] the critical nature of context." *Id.* at 13,308 ¶ 23. The Second Circuit granted petitions for review and vacated that order, concluding that the Commission had violated the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, because it had failed to provide an adequate explanation for its change in policy. *Fox Television Stations, Inc.* v. *FCC*, 489 F.3d 444 (2007), rev'd, 556 U.S. 502 (2009).

b. This Court reversed. *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (*Fox I*). The Court explained that "the Commission's decision to look at the patent offensiveness of even isolated uses of sexual or excretory words" conformed to "the context-based approach" that the Court had "sanctioned in *Pacifica*." *Id.* at 517. In expanding indecency enforcement in 1987 beyond the "seven dirty words," the Court explained, the FCC had "preserved a distinction between literal and nonliteral (or 'expletive') uses of evocative language." *Id.* at 508 (quoting *Pacifica Found.*, 2 F.C.C.R.

at 2699 ¶ 13). Under that expanded policy, "each literal 'description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive,'" but "'deliberate and repetitive use . . . is a requisite to a finding of indecency' when a complaint focuses solely on the use of nonliteral expletives." *Ibid.* The Court held that the Commission had adequately justified its decision to "step away from its old regime where nonrepetitive use of an expletive was *per se* nonactionable because that was 'at odds with the Commission's overall enforcement policy.'" *Id.* at 518 (quoting *Remand Order*, 21 F.C.C.R. at 13,308 ¶ 23).

c. After the Court remanded *Fox* to the Second Circuit for a decision on the broadcasters' constitutional claims, that court invalidated the Commission's entire indecency policy as unconstitutionally vague. See *Fox Television Stations, Inc.* v. *FCC*, 613 F.3d 317 (2010), cert. granted, No. 10-1293 (argued Jan. 10, 2012).

3. a. In a separate administrative proceeding, the Commission found indecent a February 25, 2003, broadcast of an episode of the television show *NYPD Blue*, in which an actress's nude buttocks were displayed. After receiving viewer complaints and issuing a notice of apparent liability regarding the program, the Commission imposed indecency forfeitures on several stations owned or affiliated with ABC. *Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broad. of the Program "NYPD Blue,"* 23 F.C.C.R. 3147 (2008). Applying the framework set out in its 2001 *Industry Guidance*, the Commission first concluded that the depiction of an adult woman's naked buttocks in the program constituted a depiction of sexual or excretory organs and thus fell within the subject-matter scope of the Commission's indecency policy. *Id.* at 3149-3151

¶¶ 7-11. The Commission next determined that, "in context and on balance, the complained-of material is patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at 3152 ¶ 12. In particular, the Commission noted that the program contained a "close range," "fully visible" view of the actress's unclothed buttocks that was "sufficiently graphic and explicit to support an indecency finding." *Id.* ¶ 13.

b. After ABC and its affiliates sought review of the forfeiture order in the Second Circuit, the court of appeals issued a summary order vacating the Commission's order. *ABC, Inc.* v. *FCC*, 404 Fed. Appx. 530 (2011), cert. granted, No. 10-1293 (argued Jan. 10, 2012). The court concluded that "there is no significant distinction between this case and *Fox*" because "[a]lthough this case involves scripted nudity, the case turns on an application of the same context-based indecency test that" the court of appeals in *Fox* had "found 'impermissibly vague.'" *Id.* at 535.

4. This Court granted the government's petition for a writ of certiorari in *Fox* and *ABC*, see *FCC* v. *Fox Television Stations, Inc.*, 131 S. Ct. 3065 (2011), and it heard argument in the combined cases on January 10, 2012.

5. a. The present case arises from the February 1, 2004, broadcast of the Super Bowl XXXVIII halftime show. The 2004 Super Bowl was the most-watched Super Bowl up to that time and was the highest-rated program of the 2003-2004 television season (among children of all ages as well as adults). App., *infra*, 113a, 142a. For the finale of the halftime show, at approximately 8:30 p.m. eastern standard time, Janet Jackson performed a duet with Justin Timberlake entitled "Rock

Your Body." *Id.* at 153a-154a, 156a-157a. At the close of the performance, while singing, "gonna have you naked by the end of this song," Timberlake pulled off the right portion of Jackson's bustier, exposing her breast to the television audience. *Id.* at 156a-157a.

The Commission received "an unprecedented number" of complaints about the broadcast. *Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004, Broad. of the XXXVIII Super Bowl Halftime Show*, 19 F.C.C.R. 19,230, 19,231 ¶ 2 (2004). After considering CBS's submissions in response to an FCC letter inquiring about the incident, the Commission issued a notice of apparent liability, concluding that CBS had apparently violated the federal restrictions on broadcast indecency, and proposing a total forfeiture of $550,000 against the television stations that the network owned and operated. *Id.* at 19,240 ¶ 24.

b. After receiving CBS's opposition to the notice of apparent liability, the Commission reaffirmed its tentative conclusions in a forfeiture order. App., *infra*, 152a-212a. The Commission first found that the material fell within the subject-matter scope of its indecency definition because the broadcast of an "exposed female breast" depicted a sexual organ. *Id.* at 162a. The Commission then determined, applying its three-factor contextual analysis, that the material was patently offensive as measured by contemporary community standards for the broadcast medium. *Id.* at 162a-168a.

First, the Commission concluded that the material was graphic and explicit. App., *infra*, 163a-165a. Stating that "a scene showing nude sexual organs is graphic and explicit if the nudity is readily discernible," the Commission found that the image of Jackson's breast was "clear and recognizable to the average viewer." *Id.*

at 163a-164a. The Commission further found that the explicitness of the image was reinforced by the presence of Jackson and Timberlake (the show's headline performers) in the center of the screen and by the fact that Timberlake's dramatic action in tearing off Jackson's bustier drew the viewer's attention to what was exposed. *Id.* at 164a.

Second, the Commission concluded that the broadcast of Jackson's exposed breast was shocking and pandering. It noted that the exposure occurred just as Timberlake sang "gonna have you naked by the end of this song" and after "repeated references to sexual activities" and sexually suggestive choreography. App., *infra*, 167a. The display was particularly "shocking to the viewing audience," the Commission stated, because it occurred "during a prime time broadcast of a sporting event that was marketed as family entertainment and contained no warning that it would include nudity." *Ibid.*

Third, although Jackson's breast was displayed only briefly, the Commission concluded that the "brevity" of the exposure alone did not compel the conclusion that the broadcast was not indecent. App., *infra*, 165a-166a. Rather, the FCC determined, that factor was outweighed by the explicitness and shocking nature of the exposure. *Id.* at 168a.

c. CBS filed a petition for reconsideration. On reconsideration, the Commission reaffirmed its conclusion that the broadcast was indecent and that a forfeiture was appropriate. App., *infra*, 112a-151a.

d. The court of appeals vacated and remanded the Commission's order upholding the forfeiture. 535 F.3d 167 (2008).

The court of appeals held that the Commission's order violated the Administrative Procedure Act because it constituted an unexplained departure from what the court understood to be a prior FCC policy exempting "isolated or fleeting material" from "the scope of actionable indecency." 535 F.3d at 174. The FCC acknowledged that from 1987 to 2004 it had recognized an exception to liability for non-repeated or "fleeting" *expletives*. *Id*. at 188. The agency contended, however, that the exception had never extended to "fleeting *images*." *Ibid*. (emphasis added). The court of appeals rejected that characterization of prior FCC policy as against "the balance of the evidence." *Ibid*. Reviewing the FCC's precedents, the court held that "the Commission's exception for fleeting material" had "treated images and words alike." *Ibid*.

The court of appeals stated that its analysis was not affected by the Commission's 2004 *Golden Globe Awards Order*, in which the Commission had disavowed its prior exception to indecency enforcement for "isolated or fleeting broadcasts of the 'F-word.'" *Golden Globe Awards Order*, 19 F.C.C.R. at 4980 ¶ 12. The court concluded that the *Golden Globe Awards Order* represented the "first time the Commission distinguished between formats of broadcast material or singled out any one category of material for special treatment under its fleeting material policy." 535 F.3d at 181. The court construed the order to modify the FCC's prior policies in only a limited way, "by excising only one category of fleeting material—fleeting *expletives*." *Ibid*. (emphasis added). In the court's view, the *Golden Globe Awards Order* had left in effect "a residual policy on other categories of fleeting material—including all broadcast content other than expletives." *Ibid*.

e. The government petitioned for certiorari, arguing that the court of appeals had erred by relying on a supposed "fleeting images" exemption to indecency enforcement that in fact did not exist. Instead, the government explained, the exception abolished in 2004 had applied only to fleeting expletives. Noting the overlapping issues in this case and *Fox*—including the fact that both cases involve the contours of the Commission's broadcast indecency policies as applied to offensive material that is isolated or fleeting—the government argued that the Court should hold the petition for certiorari pending its disposition of *Fox*. Pet. at 13-14, *FCC* v. *CBS Corp.*, 556 U.S. 1218 (No. 08-653). After this Court in *Fox I* reversed the Second Circuit's APA ruling, it granted the petition in this case, vacated the Third Circuit's judgment, and remanded the case for reconsideration in light of *Fox I*. 556 U.S. 1218 (2009) (No. 08-653).

f. On remand, a divided panel of the Third Circuit concluded that "*Fox* confirms our previous ruling in this case." App., *infra*, 2a. The majority acknowledged this Court's statement in *Fox I* that, under the Commission's prior indecency regime, "each literal 'description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive,' but * * * 'deliberate and repetitive use . . . is a requisite to a finding of indecency' *when a complaint focuses solely on the use of nonliteral expletives*." *Id.* at 15a-16a (quoting *Fox I*, 556 U.S. at 508) (emphasis added). The majority concluded, however, that this portion of *Fox I* was "neither reasoning nor holding," but "mere characterization." *Id.* at 16a. Concluding that *Fox I* "does not alter our reasoning or initial resolution of the case," the majority readopted—virtually word for

word—the court of appeals' prior opinion on the issue. *Id.* at 22a; see *id.* at 23a-60a.[1]

g. Judge Scirica, the author of the panel's prior opinion, dissented from the court of appeals' disposition of the case on remand. Judge Scirica concluded that this "Court's intervening decision" in *Fox I* "requires us to revise our prior APA holding." App., *infra*, 63a. He explained that the decision in *Fox I* "contradicts and undermines our previous holding that FCC enforcement policy embodied a general exemption for all fleeting material." *Id.* at 85a-86a. In Judge Scirica's view, this Court in *Fox I* "identifie[d] contextual analysis as the default policy for all broadcast content, with the narrow exception of nonliteral expletives." *Id.* at 86a. Rather than vacate the Commission's indecency determination without remand, Judge Scirica would have vacated and remanded the FCC orders on review for the Commission to consider whether CBS's conduct met "the proper *mens rea* standard" for imposition of a forfeiture. *Id.* at 110a.

h. On January 18, 2012, the court of appeals denied the government's petition for rehearing en banc, with three judges dissenting. App., *infra*, 213a-214a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in overturning the Commission's determination that CBS's broadcast of the 2004 Super Bowl halftime show violated federal indecency prohibitions. In concluding that the FCC's order

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[1] The Third Circuit's prior opinion had contained a lengthy discussion of the scienter required for a broadcast indecency forfeiture. 535 F.3d at 189-209. The panel declined to re-adopt that discussion, concluding that it was no longer necessary to the disposition of the case. See App., *infra*, 22a.

reflected an unexplained departure from the agency's prior precedent, the court relied on a supposed "fleeting images" exemption from indecency enforcement. As the Commission explained below, no such exemption has ever existed. Rather, the exception to liability for fleeting indecent matter that the FCC adopted in 1987 (but later eliminated) applied only to isolated *expletives*—not images or visual material. By adhering to a misconception of the Commission's policies on broadcast indecency —despite the FCC's contrary explanation, the support for that explanation in agency precedent, and this Court's decision in *Fox I*—the court of appeals contravened settled principles governing the deference due to an administrative agency's reasonable understanding of its own decisions.

The respondents in *FCC* v. *Fox Television Stations, Inc.*, No. 10-1293 (argued Jan. 10, 2012) (*Fox II*), have asserted a fair-notice challenge to the FCC's imposition of a forfeiture for the broadcast of nudity that the broadcasters in that case characterize as brief. The Court's resolution of that fair-notice claim in *Fox II* may shed light on the proper understanding of the pertinent regulatory history. The Court should therefore hold this petition for *Fox II* and then dispose of the petition as appropriate in light of its decision in that case.

1. The court of appeals misconstrued the FCC's policies on broadcast indecency and contravened settled principles governing the deference due to an administrative agency's reasonable understanding of its own precedent. An agency's interpretation of its own regulations is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Likewise, "[a]n agency's interpretation of its own precedent is en-

titled to deference" and must be upheld if "reasonable." *Boca Airport, Inc.* v. *FAA*, 389 F.3d 185, 190 (D.C. Cir. 2004) (brackets in original) (quoting *Cassell* v. *FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998)).

The Commission explained below that its indecency rules and policies never included a "fleeting nudity" exception to indecency liability. The FCC's explanation of its own regulatory approach is well supported by the agency' prior guidance and decisions, as well as by the commonsense distinction between words and images. More than two decades ago, the Commission explained that "deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency" only when "a complaint focuses solely on the use of expletives." *Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 13 (1987). By contrast, "[w]hen a complaint goes beyond the use of expletives, * * * repetition of specific words or phrases is not necessarily an element critical to a determination of indecency." *Ibid.* Accordingly, the FCC stated, "speech involving the description *or depiction* of sexual or excretory functions must be examined in context to determine whether it is patently offensive." *Ibid.* (emphasis added).

Those statements made clear that, under the Commission's then-existing policy, repetition was essential to a finding of indecency only where expletives were concerned. An image, however, is not an expletive, and it necessarily "involv[es] * * * depiction." *Pacifica Found., Inc.*, 2 F.C.C.R. at 2699 ¶ 13. The Commission's 1987 *Pacifica* decision therefore gave broadcasters notice that the exception to the broadcast indecency regime for isolated expletives did not extend to isolated indecent images. Because the general policy of contextual indecency analysis applied to both visual depictions

and verbal descriptions of sexual or excretory functions, such depictions and descriptions could be found indecent even if they were not repeated or extended.

This Court's decision in *Fox I* further demonstrates the reasonableness of the Commission's understanding of its own indecency policy, and the error in the court of appeals' contrary interpretation. As the Court explained, when the Commission expanded its indecency policy in 1987 beyond the "seven dirty words," the agency "preserved a distinction between literal and nonliteral (or 'expletive') uses of evocative language." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 508 (2009). Under that approach, "each literal 'description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive,'" while "deliberate and repetitive use" would be "a requisite to a finding of indecency" only when a complaint focuses solely on the use of nonliteral expletives. *Ibid.* (quoting *Pacifica Found.*, 2 F.C.C.R. at 2699 ¶ 13). Relying on that understanding of the Commission's policy, the Court upheld as reasonable the agency's decision to eliminate the exception for fleeting expletives. As the Court explained, "[t]he Commission could rationally decide it needed to step away from its old regime where nonrepetitive use of an expletive was *per se* nonactionable because that was at odds with the Commission's overall enforcement policy." *Id.* at 1813 (internal quotation marks and citation omitted).

Thus, as Judge Scirica observed in dissent below, *Fox I* "compels the conclusion that the fleeting exemption was limited to a particular type of words" and did not apply to images. App., *infra*, 63a. If (as the court of appeals majority found) the FCC had historically recognized an exception for fleeting nudity, elimination of the

fleeting-expletives exception could not have conformed the Commission's treatment of expletives with the agency's "overall enforcement policy." *Fox I*, 556 U.S. at 518 (citation omitted). The decision below is therefore "irreconcilable with the reasoning by which the Supreme Court upheld the FCC orders" in *Fox I*. App., *infra*, 89a (Scirica, J., dissenting).

2. The Court's decision in *Fox II* may shed light on the proper resolution of this case. This petition therefore should be held for *Fox II* and then disposed of as appropriate in light of the Court's decision.

As explained above, one of the broadcasts at issue in *Fox II* involved a visual depiction of nude female buttocks. In addressing the vagueness challenge raised by the plaintiffs and endorsed by the Second Circuit, the government has argued, *inter alia*, that ABC had fair notice that the pertinent *NYPD Blue* episode was indecent. Gov't Br. at 24-26, 31-32, *Fox II*, *supra* (No. 10-1293). The respondents in *Fox II*, by contrast, have argued that Commission precedent did not provide ABC with adequate notice that what they characterize as the "brief" display of nudity in the *NYPD Blue* episode would be considered indecent. See ABC Br. at 17-22, 24-26, *Fox II*, *supra* (No. 10-1293); ABC Affiliates' Br. at 34-39, *Fox II*, *supra* (No. 10-1293). Respondent ABC Affiliates Association specifically contends that "prior to the *NYPD Blue Notice* [of apparent liability], broadcasters had no reason to believe that the broadcast of brief, non-sexual nudity would be found indecent." ABC Affiliates Br. at 35, *Fox II*, *supra* (No. 10-1293).

In resolving the parties' dispute concerning the adequacy of the notice given to regulated parties, the Court in *Fox II* may analyze the history of the Commission's indecency enforcement policy, in the contexts of both

expletives and images. In particular, the Court may consider the guidance available to ABC at the time it broadcast the nude images in the *NYPD Blue* episode, including whether the network had notice that the program would be evaluated under the Commission's general contextual approach to indecency enforcement, and the applicability (if any) of the agency's supposed exception for fleeting images. The Court's analysis of the fair-notice claims in *Fox II* thus could bear directly on the correctness of the Third Circuit's decision in this case. For these reasons, this petition should be held pending the Court's decision in *Fox II* and then disposed of as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *FCC* v. *Fox Television Stations, Inc.*, No. 10-1293 (argued Jan. 10, 2012), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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APRIL 2012

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3575

CBS CORPORATION; CBS BROADCASTING INC.;
CBS TELEVISIONSTATIONS INC.; CBS STATIONS
GROUP OF TEXAS L.P.; AND KUTV HOLDINGS, INC.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA, RESPONDENTS

Argued: Sept. 11, 2007
Decided: July 21, 2008

Certiorari Granted, Judgment Vacated and Remanded
from the Supreme Court of the United States
May 4, 2009

Argued on Remand from the
Supreme Court of the United States
Feb. 23, 2010

Before: SCIRICA, RENDELL and FUENTES, *Circuit Judges*

(Opinion Filed Nov. 2, 2011)

OPINION OF THE COURT

RENDELL, Circuit Judge.

This matter comes before us on remand from the United States Supreme Court in light of its ruling in *F.C.C. v. Fox Television Stations, Inc.,* 556 U.S. 502, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009). This case, like *Fox,* involves a tightening of the Federal Communications Commission's standards for the broadcast of fleeting indecent material. *Fox* concerned the FCC's decision to abandon its safe harbor for expletives that are not repeated; this case considers the FCC's departure from its earlier policy exempting fleeting images from the scope of actionable indecency. While we can understand the Supreme Court's desire that we re-examine our holdings in light of its opinion in *Fox*—since both involve the FCC's policy regarding "fleeting material"—in Part A of this opinion we conclude that, if anything, *Fox* confirms our previous ruling in this case and that we should readopt our earlier analysis and holding that the Commission acted arbitrarily in this case. *See CBS Corp. v. F.C.C.,* 535 F.3d 167 (3d Cir. 2008), *vacated by F.C.C. v. CBS Corp.,* — U.S. —, 129 S. Ct. 2176, 173 L. Ed. 2d 1153 (2009). Accordingly, in Part B of this opinion we again set forth our reasoning and conclusion that the FCC failed to acknowledge that its order in this case reflected a policy change and improperly imposed a penalty on CBS for violating a previously unannounced policy. *See id.* at 188-89. We have reconsidered certain other aspects of our previous opinion and will not re-

mand, but, instead, will rule in Part B that CBS's petition for review is granted in toto.

Part A: Our Prior Opinion and the Impact of Fox

I.

The treatment of fleeting indecency over the airwaves has been the subject of much consideration by the FCC and the courts over the last thirty years. This case involves a February 1, 2004 incident: the exposure, for nine-sixteenths of one second, of Janet Jackson's bare right breast during the live halftime performance of the National Football League's Super Bowl XXXVIII.[1] The FCC issued a forfeiture order against CBS in March 2006, imposing a penalty of $550,000. *See In re Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show,* 21 F.C.C.R. 2760 (2006) ("*Forfeiture Order*"). We described the FCC's reasoning in our previous opinion:

> Affirming its preliminary findings, the Commission concluded the Halftime Show broadcast was indecent because it depicted a sexual organ and violated "contemporary community standards for the broadcast medium." *Id.* at ¶ 10. In making this determination, the FCC relied on a contextual analysis to find the broadcast of Jackson's exposed breast was: (1) graphic and explicit, (2) shocking and pandering, and (3) fleeting. *Id.* at ¶ 14. It further concluded that the brevity of the image was outweighed by the other two factors. *Id.* The standard applied by the Commission is derived from its 2001 policy statement set-

[1] Our original opinion in this matter provided additional factual and procedural background. *See CBS Corp.,* 535 F. 3d at 171-74.

> ting forth a two-part test for indecency: (1) "the material must describe or depict sexual or excretory organs or activities," and (2) it must be "patently offensive as measured by contemporary community standards for the broadcast medium." *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency,* 16 F.C.C.R. 7999, 8002 ¶¶ 7-8 (2001) (emphasis in original). . . .
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> Additionally, the FCC determined CBS's actions in broadcasting the indecent image were "willful" and therefore sanctionable by a monetary forfeiture under 47 U.S.C. § 503(b)(1). *See Forfeiture Order* at ¶ 15.

CBS Corp., 535 F.3d at 172. CBS sought reconsideration under 47 C.F.R. § 1.106, which the FCC denied. *See In re Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show,* 21 F.C.C.R. 6653 (2006). Neither of these two orders acknowledged, much less explained, any change in the FCC's enforcement policy for fleeting indecent images.

CBS filed a petition for review in our Court, contending that the FCC's ruling that the fleeting nude image was actionable indecency constituted a change in policy, and its application to CBS was, therefore, arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. Specifically, CBS urged that, before the incident in question, FCC policy provided that the "isolated use of expletives in broadcasts did not constitute actionable indecency under 18 U.S.C. § 1464." *CBS Corp.,* 535 F.3d at 176 (citing *See In re Application*

of Pacifica Found., 95 F.C.C. 2d 750, 1983 WL 182971 (1983)).

The FCC defended its actions on the basis that its earlier fleeting-material policy applied only to fleeting utterances and did not extend to fleeting images.[2] We rejected this contention:

> During a span of nearly three decades, the Commission frequently declined to find broadcast programming indecent, its restraint punctuated only by a few occasions where programming contained indecent material so pervasive as to amount to "shock treatment" for the audience. Throughout this period, the Commission consistently explained that isolated or fleeting material did not fall within the scope of actionable indecency. At the time the Halftime Show was broadcasted by CBS, the FCC's policy on fleeting material was still in effect. The FCC contends its restrained policy applied only to fleeting utterances —specifically, fleeting expletives—and did not extend to fleeting images. But a review of the Commission's enforcement history reveals that its policy on fleeting material was never so limited. The FCC's present distinction between words and images for purposes of determining indecency represents a departure from its prior policy.

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[2] The FCC abandoned its "restrained enforcement policy for fleeting broadcast material," at least as it applied to fleeting expletives, in its March 2004 order in *In re Complaints Against Various Broadcast Licensees Regarding the Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975 (2004) ("*Golden Globes*"). *See CBS Corp.*, 535 F.3d at 180. Because that policy change post-dated the February 2004 broadcast at issue in this case, it cannot serve as the basis for the penalty imposed on CBS. *See id.* at 180–81.

Id. at 174-75.

Reviewing in detail the progression of FCC rulings leading up to the present, we could not find the distinction advocated by the FCC. Indeed, we could only reach the opposite conclusion:

> [T]he balance of the evidence weighs heavily against the FCC's contention that its restrained enforcement policy for fleeting material extended only to fleeting words and not to fleeting images. As detailed, the Commission's entire regulatory scheme treated broadcasted images and words interchangeably for purposes of determining indecency. Therefore, it follows that the Commission's exception for fleeting material under that regulatory scheme likewise treated images and words alike. Three decades of FCC action support this conclusion.
>
> Accordingly, we find the FCC's conclusion on this issue, even as an interpretation of its own policies and precedent, "counter to the evidence before the agency" and "so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Id. at 188 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)).

Thus, we found that the ruling in this case represented a departure from prior policy that required an explanation:

> The Commission's determination that CBS's broadcast of a nine-sixteenths of one second glimpse of a bare female breast was actionably indecent evi-

> denced the agency's departure from its prior policy. Its orders constituted the announcement of a policy change—that fleeting images would no longer be excluded from the scope of actionable indecency. . . . [A]n agency cannot ignore a substantial diversion from its prior policies. *See Ramaprakash v. FAA,* 346 F.3d 1121, 1124 (D.C. Cir. 2003) (agency must "provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored"). As the Supreme Court explained in *State Farm,* an agency must be afforded great latitude to change its policies, but it must justify its actions by articulating a reasoned analysis behind the change. . . .

CBS Corp., 535 F.3d at 181-82 (citing *State Farm,* 463 U.S. at 42-43, 103 S. Ct. 2856).

We then noted that in *Fox Television Stations, Inc. v. F.C.C.,* the United States Court of Appeals for the Second Circuit had analyzed under *State Farm* the FCC's change in its fleeting-expletive policy (announced in its *Golden Globes* order, after the 2004 Halftime Show broadcast at issue here) and had "rejected the agency's proffered rationale as 'disconnected from the actual policy implemented by the Commission.'" *Id.* at 183 (quoting 489 F.3d 444, 459 n. 8 (2d Cir. 2007), *rev'd, Fox,* 129 S. Ct. 1800). We then distinguished the FCC's actions in *Fox* from its order in this case:

> There, as Judge Leval noted in dissent, the FCC provided an explanation for changing its policy on fleeting expletives. The critical question splitting the court was whether that explanation was adequate under *State Farm. Here, unlike in Fox, the FCC has not offered any explanation—reasoned or otherwise*

> —*for changing its policy on fleeting images.* Rather, the FCC asserts it never had a policy of excluding fleeting images from the scope of actionable indecency, and therefore no policy change occurred when it determined that the Halftime Show's fleeting image of Janet Jackson's breast was actionably indecent.

Id. (emphasis added). Because our analysis of three decades of FCC enforcement contradicted the Commission's assertion in this regard, we concluded that "the FCC's new policy of including fleeting images within the scope of actionable indecency is arbitrary and capricious under *State Farm* and the Administrative Procedure Act, and therefore invalid as applied to CBS." *Id.* at 189.

We next engaged in a discussion regarding the degree of scienter necessary for the imposition of a forfeiture, and concluded the opinion by remanding to the agency, finding this course of action to be appropriate where the agency has issued an arbitrary decision. *See id.* at 209.

Eight months later the Supreme Court issued its decision in *Fox,* on certiorari from the Second Circuit. *See Fox,* 129 S. Ct. 1800. As noted above, the issue in that case was "the adequacy of the Federal Communications Commission's *explanation* of its decision that [the statutory prohibition on indecent language] sometimes forbids the broadcasting of indecent expletives even when the offensive words are not repeated," not, as

here, the question whether the FCC's order amounted to a policy change.[3] *Id.* at 1805 (emphasis added).

The Court reviewed the statutory and regulatory background in the introductory section of the opinion, concluding with a discussion of the FCC's ruling in *Golden Globes,* where "the Commission took one step further by declaring for the first time that a nonliteral (expletive) use of the F- and S-Words could be actionably indecent, even when the word is used only once," *Fox,* 129 S. Ct. at 1807. The Supreme Court observed:

> The [*Golden Globes*] order acknowledged that "prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' . . . are not indecent or would not be acted upon." It explicitly ruled that "any such interpretation is no longer good law." It "clarif[ied] . . . that the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." Because, however, "existing precedent would have permitted this broadcast," the Commission determined that "NBC and its affili-

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[3] In this regard, the Supreme Court noted that, in the orders at issue in *Fox:*

> The Commission forthrightly acknowledged that its recent actions have broken new ground, taking account of inconsistent "prior Commission and staff action" and explicitly disavowing them as "no longer good law." *Golden Globes,* 19 F.C.C.R. at 4980. . . . There is no doubt that the Commission knew it was making a change. That is why it declined to assess penalties; and it relied on the Golden Globes Order as removing any lingering doubt. *Remand Order,* 21 F.C.C.R. at 13308.

Fox, 129 S. Ct. at 1812.

> ates necessarily did not have the requisite notice to justify a penalty."

Id. at 1808 (internal citations omitted).

The Court next considered the case before it, which involved two instances of celebrities' use of the "F-Word" in live broadcasts. *Id.* (discussing Cher's and Nicole Richie's statements at two consecutive Billboard Music Awards broadcasts). The Commission had initially issued Notices of Apparent Liability, but imposed no fines. *See In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* 21 F.C.C.R. 2664 (2006). In further proceedings, the Commission gave Fox the opportunity to object, then upheld the indecency findings. *See In re Complaints Regarding Various Television Broadcasts Between February 2, 2002, and March 8, 2005,* 21 F.C.C.R. 13299 (2006) ("Remand Order"). The FCC's order explained its reason for departing from the position that fleeting expletives were exempt from otherwise applicable indecency standards:

> In the Commission's view, "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children)" to take "'the first blow'" and would allow broadcasters "to air expletives at all hours of a day so long as they did so one at a time."

Fox, 129 S. Ct. at 1809 (internal citations omitted). The FCC appeared to hedge to some degree as to the extent of, and timing of, its change in policy for fleeting material, but, as the Supreme Court noted, it "made clear [that] the *Golden Globes* Order eliminated any doubt that fleeting expletives could be actionably indecent, and the Commission disavowed the bureau-level decisions

and its own dicta that had said otherwise." *Id.* (internal citations omitted).

Regarding the adequacy of the FCC's explanation for its policy change, the Court rejected the Second Circuit's view that an agency must "make clear 'why the original reasons for adopting the [displaced] rule or policy are no longer dispositive' as well as 'why the new rule effectuates the statute as well as or better than the old rule.'" *Fox,* 129 S. Ct. at 1810 (quoting *Fox,* 489 F.3d at 456-57) (internal quotations omitted; alteration in original). It held:

> To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books. *See United States v. Nixon,* 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.

Id. at 1811.

The Court concluded that, in that case, the Commission's "reasons for expanding the scope of its enforcement activity were entirely rational":

> It was certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words, requiring repetitive use to render only the latter indecent. As the Commission said with regard to expletive use of the F-Word, "the word's power to insult and offend derives from its sexual meaning." And the Commission's decision to look at the patent offensiveness of even isolated uses of sexual and excretory words fits with the context-based approach we sanctioned in [*F.C.C. v. Pacifica Foundation*], 438 U.S. [726], 750, 98 S. Ct. 3026 [57 L. Ed. 2d 1073 (1978)]. Even isolated utterances can be made in "pander[ing,] . . . vulgar and shocking" manners, and can constitute harmful "'first blow[s]'" to children. It is surely rational (if not inescapable) to believe that a safe harbor for single words would "likely lead to more widespread use of the offensive language."

Fox, 129 S. Ct. at 1812-13 (internal citations omitted). Notably, the Court's discussion of the Commission's action concluded with the following statement: "[T]he agency's decision not to impose any forfeiture or other sanction precludes any argument that it is arbitrarily punishing parties without notice of the potential consequences of their action." *Id.* at 1813.

Accordingly, the Court reversed the Second Circuit's order and upheld the FCC's decision.

II.

We must decide the extent to which *Fox* affects our previous ruling in this case. We conclude that, if anything, the Supreme Court's decision fortifies our original opinion, in two ways.

For one thing, in *Fox,* unlike in this case, the FCC acknowledged that its orders had "broken new ground," as noted above. *See* 129 S. Ct. at 1812. The Supreme Court specifically noted that the FCC's "decision not to impose any forfeiture or other sanction" in that case signaled its recognition that assessing penalties based on violations of previously unannounced policies would amount to "arbitrarily punishing parties without notice of the potential consequences of their actions." *Id.* at 1813. The same logic implies that the FCC erred in imposing a fine on CBS in this case, as the chronology of events that are the subject of these cases demonstrates.

The FCC Enforcement Bureau's original, 2003 ruling in *Golden Globes* applied its then-controlling policy of exempting all fleeting indecent material from enforcement, determining that the singer Bono's use of the "F-Word" ("this is really, really f—brilliant") did "not fall within the scope of the Commission's indecency prohibition." *CBS Corp.,* 535 F.3d at 177 (quoting *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* 18 F.C.C.R. 19859, ¶ 6 (FCC Enforcement Bureau 2003)). But, in March 2004, the full Commission reversed the Enforcement Bureau's decision, overruling all of its prior cases that held fleeting expletives were not actionable. The Commission declined to impose a penalty on the *Golden Globes* broadcasters, however, because "'existing precedent would have permitted [the Golden Globe Awards] broadcast' and therefore it would be 'inappropriate' to sanction licensees for conduct prior to notice of policy change." *Id.* at 178 (quoting *Golden Globes,* 19 F.C.C.R. at 4981-82).

The expletive utterances by Cher and Nicole Richie that were considered in *Fox* took place, respectively, during the 2002 and 2003 Billboard Music Awards telecasts, before the full Commission's March 2004 *Golden Globes* decision. Accordingly, and applying the same rationale as in *Golden Globes,* the FCC declined to impose a fine. As the *Fox* Court observed and affirmed, the decision not to impose a fine in that case signaled the FCC's understanding that imposing sanctions for conduct that occurred before the FCC's policy change was announced would raise due process concerns. *See Fox,* 129 S. Ct. at 1813.

The same principle applies here. The relevant Halftime Show broadcast occurred in February 2004, *preceding* the FCC's ruling in *Golden Globes.* But despite its earlier consistent policy exempting all fleeting material—words *and* images—from its indecency rules, *see CBS Corp.,* 535 F.3d at 188, the FCC assessed a fine against CBS. *Fox* confirms our earlier observation that because the Commission did not announce any change in its fleeting-material policy until March 2004, and because the offensive conduct in this case (like the offending conduct in *Golden Globes* and *Fox*) *preceded* that date, the FCC's assessment of a forfeiture and imposition of a penalty against CBS constitutes arbitrary, and therefore unlawful, punishment. *Fox,* 129 S. Ct. at 1813; *see also CBS Corp.,* 535 F.3d at 180-81.

The FCC and our dissenting colleague contend that, in all events, the FCC's decision in *Young Broadcasting of San Francisco, Inc.,* 19 F.C.C.R. 1751 (2004), issued just days before CBS's Halftime Show, provided CBS with adequate notice that the FCC might impose a forfeiture for fleeting nude images. But as we pointed out

in our earlier opinion, the 2004 *Young Broadcasting* decision was a non-final notice of apparent liability; "the final disposition of *Young Broadcasting* was still unresolved" at the time of the Halftime Show broadcast. *Id.* at 187 & n. 18. The decision therefore reflects only "tentative conclusions" of the FCC, and, in our view, provides insufficient notice of the FCC's official policy on fleeting nude images, particularly when viewed in the context of the agency's consistent refusal over three decades to consider such fleeting material indecent, to justify the imposition of sanctions against CBS.

Therefore, we must reaffirm our conclusion that the penalty imposed in this case is arbitrary unless we find, contrary to the extensive analysis in our earlier opinion, that the FCC's pre-*Golden Globes* fleeting-material policy did not also apply to fleeting images. But, here again, *Fox* supports our previous conclusion. The Commission, and our dissenting colleague, point to one small portion of the background section in the Supreme Court's lengthy *Fox* opinion as support for the position that the FCC's fleeting-material policy never applied to images but was always restricted to words. But we discern no such meaning in the relevant passage, which briefly observed:

> Although the Commission had expanded its enforcement beyond the "repetitive use of specific words or phrases," it preserved a distinction between literal and nonliteral (or "expletive") uses of evocative language. The Commission explained that each literal "description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive," but that "deliberate and repetitive use . . . is a requisite to a finding of

> indecency" when a complaint focuses solely on the use of nonliteral expletives.

129 S. Ct. at 1807 (quoting *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699, ¶ 13 (1987)).

The FCC argues that images fall into the category of literal "descriptions or depictions" of sexual organs or functions, and that the Court's language indicates that the FCC's previous fleeting-material policy applied only to non-literal, or expletive, depictions or descriptions, and not, as we previously concluded, to fleeting images as well as expletives. We disagree.

First, we do not see how this summary recitation of the Commission's opinions affects the reasoning or result in our case. It appears in the Court's background discussion of the FCC's historical approach to indecent language, and is neither reasoning nor holding; it is mere characterization. Second, this language narrowly addresses *words and phrases,* with no discussion of images. Although the phrase "description or depiction," considered in isolation, could be construed to include images, Justice Scalia is paraphrasing the language of the FCC's 1987 *Pacifica Foundation* opinion, involving words alone, in which the complete phrase used by the FCC was "speech involving the description or depiction of sexual or excretory functions."[4] *In re Pacifica*

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[4] The full text of the relevant paragraph from *Pacifica Foundation* is as follows:

> While *speech that is indecent must involve more than an isolated use of an offensive word . . . , repetitive use of specific words or phrases* is not an absolute requirement for a finding of indecency. If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica,* deliberate and repetitive use in a patently offensive manner is a requisite to a

Found., Inc., 2 F.C.C.R. 2698, 2699, ¶ 13 (1987), *quoted in Fox,* 129 S. Ct. at 1807. As the dissent concedes, dissenting op. at 164-65 n. 7, *Fox* says nothing at all about images. Nor does it suggest that the FCC's previous fleeting-material policy applied only to "words," or distinguished between words and images, as the Commission originally argued to us (an argument we forcefully rejected after reviewing three decades of rulings). Indeed, the *Fox* Court had no occasion to consider the application of the FCC's pre-*Golden Globes* fleeting-material policy to images, since that case involved the use of spoken fleeting expletives.[5]

> finding of indecency. When a complaint goes beyond the use of expletives, however, *repetition of specific words or phrases* is not necessarily an element critical to a determination of indecency. Rather, *speech involving the description or depiction of sexual or excretory functions* must be examined in context to determine whether it is patently offensive under contemporary community standards applicable to the broadcast medium. The mere fact that *specific words or phrases* are not repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.

2 F.C.C.R. at 2699 ¶ 13 (emphases added).

[5] Our dissenting colleague contends that the Supreme Court's omission of any discussion of fleeting images in *Fox* "strongly suggests" that images never fell within the FCC's fleeting-material policy. Dissenting op. at 165. By contrast, we are unwilling to read the Court's *silence* as overruling our conclusion, based on a careful review of three decades of FCC precedent to discern the agency's policy on precisely this issue, that the FCC historically did not distinguish between fleeting images and words. *See* 535 F.3d at 188 ("[T]he Commission's entire regulatory scheme treated broadcasted images and words interchangeably for purposes of determining indecency. Therefore, it follows that the Commission's exception for fleeting material under that regulatory scheme likewise treated words and images alike."). Images simply were not involved in the case.

More to the point, read in context, this language does not refer to the FCC's *pre-Golden Globes* fleeting-material policy *at all.* Instead, it describes the evolution of the Commission's overall approach to a separate issue, i.e., whether "its enforcement power was limited to 'deliberate, repetitive use of the seven words actually contained in the George Carlin monologue.'"[6] *Id.* at 1807 (quoting *Pacifica Found.*, 2 F.C.C.R. at 2699 ¶ 12). Critically, the relevant portion of the *Pacifica Foundation* opinion that *Fox* quoted clearly distinguished between these two concepts, explaining that "speech that is indecent must involve more than an isolated," i.e., fleeting, "use of an offensive word," but that "repetitive use of *specific words or phrases*" (i.e., the expletive words or phrases from the Carlin monologue) was not required. *Pacifica Found.*, 2 F.C.C.R. at 2699 ¶ 13 (emphasis added). The Supreme Court in the quoted language from *Fox*, and the FCC in the *Pacifica Foundation* opinion that *Fox* quoted, were focused entirely on the FCC's earlier policy (arising out of the Carlin monologue) regarding the "'use of specific words or phrases'" as a prerequisite to a finding of indecency, not the question whether the reference to a particular word or image that might otherwise be deemed indecent was passing or fleeting in nature. Just as *Fox* involved spoken fleeting expletives, not fleeting images, *Pacifica Foundation* involved sustained, repeated use of expletives and sexually explicit language, not fleeting words or images.[7]

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[6] See *Fox*, 129 S. Ct. at 1806, and *CBS Corp.*, 535 F.3d at 175, for additional background on the Carlin monologue.

[7] *Pacifica Foundation* concerned a radio station's airing of a program entitled "Shocktime America," which allegedly contained a narration and song lyrics using words and phrases such as "eat shit,"

Moreover, the very next paragraph of *Fox* confirms that neither the Supreme Court nor the FCC interpreted *Pacifica Foundation*'s distinction between literal and non-literal uses of specific words or phrases to impact the otherwise applicable policy for fleeting material. *Fox,* 129 S. Ct. at 1807. In that paragraph, quoting an FCC policy statement from 2001, the Court made clear that, even after *Pacifica Foundation,* the exception for fleeting material still applied, separate and apart from any distinction arising between "literal" and "non-literal" words referring to sexual or excretory functions. Quoting a 2001 FCC policy statement, the Court said, "'No single factor,' the Commission said, 'generally provides the basis for an indecency finding,' but 'where sexual or excretory references have been made once or *have been passing or fleeting in nature,* this characteristic has tended to weigh against a finding of indecency.'" *Fox,* 129 S. Ct. at 1807 (quoting *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C § 1464 and Enforcement Policies Regarding Broadcast Indecency,* 16 F.C.C.R. 7999, 8003 ¶ 10, 8008 ¶ 17 (2001) ("*Industry Guidance*")) (emphasis added).[8]

If we were to read the Supreme Court's background discussion in *Fox* as indicating that the history of FCC

"mother-fucker," and "fuck the U.S.A.," and a program featuring excerpts from a play with dramatic readings of sexual fantasies and containing language highly descriptive of sexual and excretory activities. *Pacifica* defended that the Shocktime remarks were not scripted, and asserted that the language of the play was taken out of context and the broadcast was at night when children would not be listening.

[8] Interestingly, we cited this exact language as evidence of the FCC's "restrained enforcement policy" for fleeting indecent material in our earlier opinion. *See CBS Corp.,* 535 F.3d at 177.

enforcement in the area of fleeting material recognized an exception only for non-literal expletives, to the exclusion of images, we would be accusing the Supreme Court of rewriting history. This is because, in *Young Broadcasting,* which involved a fleeting image of a body part much like the one presented here, the Commission had the opportunity to explain that, after *Pacifica Foundation,* its fleeting-material policy did not apply to images. But the FCC did not say that, nor did it mention, much less rely on, *Pacifica Foundation* in analyzing the broadcast images at issue in that case.[9] *See Young Broadcasting,* 19 F.C.C.R. at 1755 ¶ 12 & n. 35.

Instead, the FCC noted the fact that "the actual exposure of the performer's penis" in that case "was fleeting in that it occurred for less than a second." *Id.* It then compared the overall circumstances in the case to other cases in which it had applied the fleeting-material exception, and held that *Young Broadcasting* was different—an exception to the exception—because "the material was apparently intended to pander to, titillate and shock viewers" and because the station knew in advance that "the interview involved performers who appear nude in order to manipulate and stretch their genitalia," but "failed to take adequate precautions to ensure that no actionably indecent material was broadcast." *Id.* at 1755-56 ¶¶ 12-13 & n. 35; *see also CBS Corp.,* 535 F.3d at 186 & n. 16-17.

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[9] Just as *Young Broadcasting* did not mention *Pacifica Foundation*'s literal/non-literal distinction, *Fox* does not reference or attempt to reconcile *Young Broadcasting,* confirming that the Court did not consider, much less decide, whether the FCC's pre-*Golden Globes* fleeting-material policy applied to images as well as words.

The Commission did not distinguish *Young Broadcasting* because it involved images rather than words, and its language demonstrates that it viewed the case as just another "instance" involving "fleeting remarks in live, unscripted broadcasts." *See Young Broadcasting,* 19 F.C.C.R. at 1755 ¶ 12 ("We reject Young's assertion that this material is equivalent to other instances in which the Commission has ruled that fleeting remarks in live, unscripted broadcasts do not meet the indecency definition."). As we pointed out in our previous *CBS* opinion, had the FCC believed that its fleeting-material policy categorically did not apply to sexually explicit images, it most certainly would have said so rather than relying on distinctions that could apply to all fleeting material—remarks and images alike. *Id.* at 187. The FCC has not persuaded us that the fleeting-material exception was ever limited to words or expletives, and it cannot do so when in *Young Broadcasting* it treated a fleeting image just as it would have treated fleeting words.

Considering all of these facts, we do not see any basis to conclude that *Fox* alters our previous analysis of the fleeting-material exception. At bottom, the Commission attempts to convert a passing reference in *Fox*'s background section into a holding that undermines what the opinion otherwise makes clear: an agency may not apply a policy to penalize conduct that occurred before the policy was announced. The Commission's argument also rewrites history, marginalizing the Supreme Court's recognition in *Fox* that *Golden Globes* reflected a clear change in FCC's fleeting-material policy, and ignoring the agency's consistent practice—over three decades before its order in this case—of exempting *all* fleeting

material, whether words or images, from enforcement under its indecency policy.[10]

Thus, we conclude that *Fox* does not alter our reasoning or initial resolution of this case.

Part B: Opinion Regarding the Merits

In reasoning through Part A of this opinion, we referred extensively to our prior opinion, which the Supreme Court vacated before remanding the case to us in light of *Fox*. While we ordinarily would simply reinstate our prior opinion after determining that *Fox* did not undermine it, we cannot do that here, for two reasons. First, the previous opinion was a unanimous opinion authored by Judge Scirica, whereas the opinion we now will issue is non-unanimous, with Judge Scirica dissenting. Second, the new majority does not believe that the earlier opinion's discussion of the scienter required for a violation was necessary, and we decline to readopt that portion of the analysis.

Accordingly, we do not reinstate our previous opinion. Instead, we incorporate below those portions of the

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[10] Our prior opinion chronicled that history at length. As we discussed:

> The Commission's conclusion on the nature and scope of its indecency regime-including its fleeting material policy—is at odds with the history of its actions in regulating indecent broadcasts. In the nearly three decades between the Supreme Court's ruling in *Pacifica Foundation* and CBS's broadcast of the Halftime Show, the FCC had never varied its approach to indecency regulation based on the format of broadcasted content. Instead, the FCC consistently applied identical standards and engaged in identical analyses when reviewing complaints of potential indecency whether the complaints were based on words or images.

CBS Corp., 535 F.3d at 184.

opinion that we wish to readopt as part of our resolution of this case.[11]

* * *

In this petition for review, CBS appeals orders of the Federal Communications Commission imposing a monetary forfeiture under 47 U.S.C. § 503(b) for the broadcast of "indecent" material in violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999. The sanctions stem from CBS's live broadcast of the Super Bowl XXXVIII Halftime Show, in which two performers deviated from the show's script resulting in the exposure of a bare female breast on camera, a deceitful and manipulative act that lasted nine-sixteenths of one second. CBS transmitted the image over public airwaves, resulting in punitive action by the FCC.

CBS challenges the Commission's orders on constitutional, statutory, and public policy grounds. Two of the challenges are paramount: (1) whether the Commission acted arbitrarily and capriciously under the Administrative Procedure Act, 5 U.S.C. § 706, in determining that CBS's broadcast of a fleeting image of nudity was actionably indecent; and (2) whether the Commission, in applying three theories of liability—traditional *respondeat superior* doctrine, an alternative theory of vicarious liability based on CBS's duties as a broadcast licensee, and the "willfulness" standard of the forfeiture statute—properly found CBS violated the indecency provisions of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999. We will vacate the FCC's orders.

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[11] We incorporate the pertinent portions of our previous opinion as they were filed on July 21, 2008 and amended on August 6, 2008. Thus, the citation information in Part B of our opinion is current as of that date and does not reflect any subsequent updates.

I.

On February 1, 2004, CBS presented a live broadcast of the National Football League's Super Bowl XXXVIII, which included a halftime show produced by MTV Networks.[12] Nearly 90 million viewers watched the Halftime Show, which began at 8:30 p.m. Eastern Standard Time and lasted about fifteen minutes. The Halftime Show featured a variety of musical performances by contemporary recording artists, with Janet Jackson as the announced headlining act and Justin Timberlake as a "surprise guest" for the final minutes of the show.

Timberlake was unveiled on stage near the conclusion of the Halftime Show. He and Jackson performed his popular song "Rock Your Body" as the show's finale. Their performance, which the FCC contends involved sexually suggestive choreography, portrayed Timberlake seeking to dance with Jackson, and Jackson alternating between accepting and rejecting his advances. The performance ended with Timberlake singing, "gonna have you naked by the end of this song," and simultaneously tearing away part of Jackson's bustier. CBS had implemented a five-second audio delay to guard against the possibility of indecent language being transmitted on air, but it did not employ similar precautionary technology for video images. As a result, Jackson's bare right breast was exposed on camera for nine-sixteenths of one second.

Jackson's exposed breast caused a sensation and resulted in a large number of viewer complaints to the

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[12] At that time, both CBS and MTV Networks were divisions of Viacom, Inc.

Federal Communications Commission.[13] In response, the Commission's Enforcement Bureau issued a letter of inquiry asking CBS to provide more information about the broadcast along with a video copy of the entire Super Bowl program. CBS supplied the requested materials, including a script of the Halftime Show, and issued a public statement of apology for the incident. CBS stated Jackson and Timberlake's wardrobe stunt was unscripted and unauthorized, claiming it had no advance notice of any plan by the performers to deviate from the script.

On September 22, 2004, the Commission issued a Notice of Apparent Liability finding CBS had apparently violated federal law and FCC rules restricting the broadcast of indecent material. After its review, the Commission determined CBS was apparently liable for a forfeiture penalty of $550,000.[14] CBS submitted its Opposition to the Notice of Apparent Liability on November 5, 2004.

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[13] The record is unclear on the actual number of complaints received from unorganized, individual viewers. In its brief, the FCC asserts it received "'an unprecedented number' of complaints about the nudity broadcast during the halftime show." FCC Br. at 12 (citation omitted). CBS disputes the calculation and significance of the viewer complaints. *See* CBS Reply Br. at 15 n.6 ("Of the 'over 542,000 complaints concerning the broadcast' the FCC claims to have received, over 85 percent are form complaints generated by single-interest groups. Approximately twenty percent of the complaints are duplicates, with some individual complaints appearing in the record up to 37 times." (citations omitted)).

[14] This figure represented the aggregate of proposed penalties against individual CBS stations. At the time the Commission issued its Notice of Apparent Liability, forfeiture penalties for indecency violations were statutorily capped at $27,500. The Commission proposed the maximum penalty for each CBS station.

The Commission issued a forfeiture order over CBS's opposition on March 15, 2006, imposing a forfeiture penalty of $550,000. *In re Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show,* 21 F.C.C.R. 2760 (2006) ("*Forfeiture Order*"). Affirming its preliminary findings, the Commission concluded the Halftime Show broadcast was indecent because it depicted a sexual organ and violated "contemporary community standards for the broadcast medium." *Id.* at ¶ 10. In making this determination, the FCC relied on a contextual analysis to find the broadcast of Jackson's exposed breast was: (1) graphic and explicit, (2) shocking and pandering, and (3) fleeting. *Id.* at ¶ 14. It further concluded that the brevity of the image was outweighed by the other two factors. *Id.* The standard applied by the Commission is derived from its 2001 policy statement setting forth a two-part test for indecency: (1) "the material must describe or depict sexual or excretory organs or activities," and (2) it must be "*patently offensive* as measured by contemporary community standards for the broadcast medium." *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency,* 16 F.C.C.R. 7999, 8002 ¶¶ 7-8 (2001) (emphasis in original). The Commission had informed broadcasters in its 2001 policy statement that in performing the second step of the test—measuring the offensiveness of any particular broadcast—it would look to three factors: "(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material

appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value." *Id.* at ¶ 10 (emphasis omitted).

Additionally, the FCC determined CBS's actions in broadcasting the indecent image were "willful" and therefore sanctionable by a monetary forfeiture under 47 U.S.C. § 503(b)(1). *See id.* at ¶ 15. Adopting the definition of "willful" found in section 312(f)(1) of the Communications Act,[15] the Commission offered three explanations for its determination of willfulness. *Id.* First, the FCC found CBS "acted willfully because it consciously and deliberately broadcast the halftime show, whether or not it intended to broadcast nudity. . . . " *Id.* Second, the FCC found CBS acted willfully because it "consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast." *Id.* Finally, the FCC applied a *respondeat superior* theory in finding CBS vicariously liable for the willful actions of its agents, Jackson and Timberlake. *Id.*

On April 14, 2006, CBS submitted a Petition for Reconsideration under 47 C.F.R. § 1.106, raising several arguments against the Commission's findings and conclusions. In its Order on Reconsideration, the FCC rejected CBS's statutory and constitutional challenges and reaffirmed its imposition of a $550,000 forfeiture. *In re Complaints Against Various Television Licensees Con-*

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[15] This section of the Communications Act provides: "The term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States." 47 U.S.C. § 312(f)(1).

cerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, 21 F.C.C.R. 6653 (2006) ("*Reconsideration Order*"). The *Reconsideration Order* revised the Commission's approach for determining CBS's liability under the willfulness standard. The Commission reiterated its application of vicarious liability in the form of *respondeat superior* and its determination that CBS was directly liable for failing to take adequate measures to prevent the broadcast of indecent material. *See id.* at ¶ 16. But it abandoned its position that CBS acted willfully under 47 U.S.C. § 503(b)(1) by intentionally broadcasting the Halftime Show irrespective of its intent to broadcast the particular content included in the show. Instead, it determined CBS could be liable "given the nondelegable nature of broadcast licensees' responsibility for their programming." *Id.* at ¶ 23. The Commission has since elaborated on this aspect of the *Reconsideration Order*, explaining it as a separate theory of liability whereby CBS can be held vicariously liable even for the acts of its independent contractors because it holds non-delegable duties as a broadcast licensee to operate in the public interest and to avoid broadcasting indecent material. *See, e.g.,* FCC Br. at 44-45.

CBS timely filed a petition for review of the *Reconsideration Order* on July 28, 2006. It challenges the FCC's orders on several grounds, and both parties are supported by briefing from several amici.

II.

Our standard of review of agency decisions is governed by the Administrative Procedure Act, 5 U.S.C. § 706. Under the Administrative Procedure Act, we "hold unlawful and set aside agency action, findings, and

conclusions" that are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* § 706(2)(A); *see, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). The scope of review under the "arbitrary and capricious" standard is "narrow, and a court is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43, 103 S. Ct. 2856. Nevertheless, the agency must reach its decision by "examin[ing] the relevant data," and it must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962)). We generally find agency action arbitrary and capricious where:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.

Id. at 43, 103 S. Ct. 2856 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947)).

Our review of the constitutional questions is more searching. In cases raising First Amendment issues, we have "an obligation 'to make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on

the field of free expression.'" *United States v. Various Articles of Merch., Schedule No. 287,* 230 F.3d 649, 652 (3d Cir. 2000) (quoting *Bose Corp. v. Consumers Union,* 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984) (citations omitted)).

III.

The FCC possesses authority to regulate indecent broadcast content, but it had long practiced restraint in exercising this authority. During a span of nearly three decades, the Commission frequently declined to find broadcast programming indecent, its restraint punctuated only by a few occasions where programming contained indecent material so pervasive as to amount to "shock treatment" for the audience. Throughout this period, the Commission consistently explained that isolated or fleeting material did not fall within the scope of actionable indecency.

At the time the Halftime Show was broadcasted by CBS, the FCC's policy on fleeting material was still in effect. The FCC contends its restrained policy applied only to fleeting utterances—specifically, fleeting expletives—and did not extend to fleeting images. But a review of the Commission's enforcement history reveals that its policy on fleeting material was never so limited. The FCC's present distinction between words and images for purposes of determining indecency represents a departure from its prior policy.

Like any agency, the FCC may change its policies without judicial second-guessing. But it cannot change a well-established course of action without supplying notice of and a reasoned explanation for its policy departure. Because the FCC failed to satisfy this requirement, we find its new policy arbitrary and capricious

under the Administrative Procedure Act as applied to CBS.

A.

Section 326 of the Communications Act prohibits the FCC from censoring its licensees' broadcasts.[16] Subject to this constraint, the FCC retains authority to regulate obscene, indecent, or profane broadcast content. *See* 18 U.S.C. § 1464 ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."). Indecency and obscenity are distinct categories of speech. *See FCC v. Pacifica Found.*, 438 U.S. 726, 739-41, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978) (plurality opinion) ("*Pacifica*"). Indecency, unlike obscenity, is protected by the First Amendment. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989). The FCC's authority to restrict indecent broadcast content is nevertheless constitutionally permissible because of the unique nature of the broadcast medium. *Pacifica*, 438 U.S. at 750-51, 98 S. Ct. 3026; *see also id.* at 755-56, 98 S. Ct. 3026 (Powell, J., concurring).

Congress authorized the FCC to impose forfeiture penalties for violations of 18 U.S.C. § 1464 in 1960.[17] But

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[16] *See* 47 U.S.C. § 326 ("Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.").

[17] *See* 47 U.S.C. § 503(b)(1)(D) ("Any person who is determined by the Commission . . . to have . . . violated any provision of section . . . 1464 of title 18 . . . shall be liable to the United States for a forfeiture penalty.").

the FCC did not exercise its authority to find a broadcast statutorily "indecent" until 1975, when it issued a forfeiture penalty against Pacifica Foundation for broadcasting comedian George Carlin's "Filthy Words" monologue. *See In re Citizen's Complaint Against Pacifica Found., Station WBAI(FM), N.Y., N.Y.,* 56 F.C.C. 2d 94, 1975 WL 29897 (1975). Carlin's monologue, which Pacifica aired on the radio in an early-afternoon time slot, contained extensive and repetitive use of several vulgar expletives over a period of twelve minutes. *See Pacifica,* 438 U.S. at 739, 98 S. Ct. 3026.

Pacifica appealed the FCC's forfeiture order to the United States Court of Appeals for the D.C. Circuit. The FCC issued a clarification order while Pacifica's appeal was pending, expressly limiting its prior forfeiture order to the specific facts of the Carlin monologue. *In re 'A Petition for Clarification or Reconsideration' of a Citizen's Complaint Against Pacifica Found., Station WBAI(FM), N.Y., N.Y.,* 59 F.C.C. 2d 892, 1976 WL 31850 (1976) ("*Pacifica Clarification Order*"). Expressly acknowledging the forfeiture order's potential negative impact on broadcast coverage of live events where "there is no opportunity for journalistic editing," the FCC stated its intention to exclude such circumstances from the scope of actionable indecency. *Id.* at ¶ 4 n. 1.

Following the *Pacifica Clarification Order*, the D.C. Circuit reversed the FCC's forfeiture order against Pacifica as vague and overbroad and found the agency's indecency regime constituted invalid censorship under 47 U.S.C. § 326. *Pacifica Found. v. FCC,* 556 F.2d 9, 14 (D.C. Cir. 1977). The FCC appealed and the Supreme Court reversed in a narrow plurality opinion. *See Pacifica,* 438 U.S. at 726, 98 S. Ct. 3026. The Court re-

jected Pacifica's statutory argument that the term "indecent" in 18 U.S.C. § 1464 only covered obscene speech. *Pacifica,* 438 U.S. at 739, 98 S. Ct. 3026. But the Court confirmed the general validity of the FCC's indecency regime, "emphasiz[ing] the narrowness of [its] holding," which it confined to the facts of the Carlin monologue. *Id.* at 750, 98 S. Ct. 3026. Justices Powell and Blackmun concurred in the judgment, writing separately in part to reiterate the narrowness of the decision and to note the Court's holding did not "speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here." *Id.* at 760-61, 98 S. Ct. 3026 (Powell, J., concurring).

Shortly after the Court's ruling in *Pacifica,* a broadcaster's license renewal was challenged on the basis that the broadcaster had aired indecent programming. *See In re Application of WGBH Educ. Found.,* 69 F.C.C. 2d 1250, 1978 WL 36042 (1978) ("*WGBH*"). Viewer complaints alleged the broadcaster aired several programs containing nudity and other allegedly offensive material. *Id.* at ¶ 2. Distinguishing the facts of *WGBH* from the Court's ruling in *Pacifica,* the FCC rejected the challenge and denied that *Pacifica* afforded it any "general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station." *Id.* at ¶ 10. The FCC, noting it "intend[ed] strictly to observe the narrowness of the *Pacifica* holding" and emphasizing the language in Justice Powell's concurring opinion, *id.* at ¶ 10, concluded the single use of an expletive in a program "should not call for us to act under the holding of *Pacifica.*" *Id.* at ¶ 10 n. 6.

The FCC's restrained enforcement policy continued in the years following *Pacifica.* Rejecting another challenge to a broadcaster's license renewal based on the airing of allegedly indecent material, the FCC reaffirmed that isolated use of expletives in broadcasts did not constitute actionable indecency under 18 U.S.C. § 1464. *See In re Application of Pacifica Found.*, 95 F.C.C. 2d 750, 1983 WL 182971 (1983). The complaint alleged the broadcaster had on multiple occasions aired programming containing language such as "motherfucker," "fuck," and "shit." *Id.* at ¶ 16. The FCC held these facts did not constitute a prima facie showing of actionable indecency under 18 U.S.C. § 1464, because the complainant had failed to show the broadcasts amounted to "verbal shock treatment" as opposed to "isolated use." *Id.* at ¶ 18.

In April 1987, the FCC issued three simultaneous indecency decisions. *See In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698 (1987); *In re Regents of the Univ. of Cal.*, 2 F.C.C.R. 2703 (1987); *In re Infinity Broad. Corp.*, 2 F.C.C.R. 2705 (1987). These decisions reaffirmed the Commission's restrained enforcement policy and reiterated the agency's policy that isolated or fleeting material would not be considered actionably indecent. *See, e.g., Regents of the Univ. of Cal.* at ¶ 3 ("Speech that is indecent must involve more than an isolated use of an offensive word.").

Later in 1987, reconsidering these decisions, the Commission abandoned the view that only the particular "dirty words" used in the Carlin monologue could be indecent.[18] Instead, the FCC explained it would thereaf

[18] *See In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, ¶ 5 (1987), *vacated in part on other grounds, Action for Children's Television v. FCC*, 852

ter rely on the broader terms of its generic indecency standard, which defined indecent material as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, when there is a reasonable risk that children may be in the audience." *Id.* at ¶¶ 2, 5.[19] Even so, the FCC affirmed all three decisions on reconsideration, never indicating disagreement with those decisions' express statements that isolated or fleeting material could not be actionably indecent. *Id.*

In 2001, the broadcast industry sought clarification of the policies and rules of the FCC's indecency enforcement regime. Guidance for the industry came in the form of a policy statement issued by the Commission. *See Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency,* 16 F.C.C.R. 7999, ¶ 19 (2001) ("*Industry Guidance*"). The policy statement

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F.2d 1332, 1337 (D.C. Cir. 1988) ("*ACT I*"), *superseded by Action for Children's Television v. FCC,* 58 F.3d 654 (D.C. Cir. 1995) (en banc) ("*ACT II*").

[19] As described in greater detail *infra,* subsequent litigation determined what time of day broadcasters could reasonably air indecent programming without expecting children to be in the audience. The D.C. Circuit Court of Appeals rejected a total ban on indecency, instructing the FCC to identify a precise time period during which broadcasters could air indecent material. *See ACT I, supra.* In response, the Commission adopted the safe-harbor rule of 47 C.F.R. § 73.3999. After further instruction from the D.C. Circuit in 1995, *ACT II, supra,* the Rule was amended to its current form, which confines enforcement of indecency restrictions to the hours "between 6:00 a.m. and 10:00 p.m." *See* 47 C.F.R. § 73.3999; *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464,* 10 F.C.C.R. 10558 (1995).

included multiple examples of FCC rulings as "case comparisons" highlighting the factors that had proved significant in prior indecency determinations. One of the factors noted as leading to prior determinations that a program was not actionably indecent was the "fleeting or isolated" nature of potentially indecent material in the context of the overall broadcast. *See id.* at ¶¶ 17-18.

Soon after the Commission's issuance of the *Industry Guidance* policy statement, its restrained enforcement policy changed. In an unscripted remark during a live NBC broadcast of the Golden Globe Awards on January 19, 2003, musician Bono said "this is really, really fucking brilliant" while accepting an award. *See In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* 19 F.C.C.R. 4975, ¶ 3 n. 4 (2004) ("*Golden Globes*"). Viewers complained to the FCC about Bono's speech, but the Commission's Enforcement Bureau rejected the complaints in part because the utterance was fleeting and isolated and therefore did "not fall within the scope of the Commission's indecency prohibition." *See In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* 18 F.C.C.R. 19859, ¶ 6 (FCC Enforcement Bureau 2003). The Enforcement Bureau specifically reaffirmed that "fleeting and isolated remarks of this nature do not warrant Commission action." *Id.*

On March 3, 2004, the full Commission reversed the Enforcement Bureau's decision. *See generally Golden Globes, supra.* Although the FCC acknowledged the existence of its restrained enforcement policy for isolated or fleeting utterances, it overruled all of its prior cases holding such instances not actionable. *Id.* at

¶ 12 ("While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law."). But the Commission made it clear that licensees could not be held liable for broadcasting fleeting or isolated indecent material prior to its *Golden Globes* decision. *See id.* at ¶ 15 & n. 40 (declining to impose a forfeiture penalty because "existing precedent would have permitted [the Golden Globe Awards] broadcast" and therefore it would be "inappropriate" to sanction licensees for conduct prior to notice of policy change).[20]

The FCC's new indecency policy created in *Golden Globes* was soon challenged by the broadcast industry. On February 21, 2006, the Commission issued an omnibus order resolving multiple indecency complaints against television broadcasters in an effort to "provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard." *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* 21 F.C.C.R. 2664, ¶ 2 (2006) ("*Omnibus Order*"). The *Omnibus Order* found four programs indecent and profane: (1) Fox's broadcast of the 2002 Billboard Music Awards, in which performer Cher used an unscripted expletive during her acceptance speech; (2) Fox's broadcast of the 2003 Bill-

[20] The Commission also cited *Trinity Broad. of Fla., Inc. v. FCC,* 211 F.3d 618 (D.C. Cir. 2000), explaining that the court in *Trinity* "reversed [a] Commission decision that denied a renewal application for abuse of process in connection with the Commission's minority ownership rules because the court found the Commission had not provided sufficiently clear notice of what those rules required." *Golden Globes* at ¶ 15 n. 40.

board Music Awards, in which presenter Nicole Richie used two unscripted expletives; (3) ABC's broadcast of various episodes of its NYPD Blue series, in which assorted characters used scripted expletives; and (4) a CBS broadcast of The Early Show, in which a guest used an unscripted expletive during a live interview. *Id.* at ¶¶ 101, 112 n. 64, 125, 137. Applying its policy announced in *Golden Globes,* the Commission found the broadcasts indecent despite the fleeting and isolated nature of the offending expletives. *Id.* at ¶¶ 104, 116, 129, 140.

As in *Golden Globes,* the Commission recognized the inequity in retroactively sanctioning the conduct of broadcast licensees. Because the offending broadcasts occurred prior to the issuance of its *Golden Globes* decision, the FCC concluded that existing precedent would have permitted the broadcasts. *Id.* Accordingly, the FCC did not issue forfeiture orders against any of the licensees. *Id.* at ¶¶ 111, 124, 136, 145.

The networks appealed the *Omnibus Order*, and the cases were consolidated before the United States Court of Appeals for the Second Circuit. Granting a request by the FCC, the court remanded the matter to allow the Commission an opportunity to address the petitioners' arguments. After soliciting public comment, the FCC issued a new order on November 6, 2006, reaffirming its indecency findings against Fox for the 2002 and 2003 Billboard Music Awards but reversing its finding against CBS for The Early Show broadcast and dismissing the complaint against ABC on procedural grounds. *See In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* 21 F.C.C.R. 13299 (2006) ("*Fox Remand Order*").

The networks' original appeal to the Second Circuit was reinstated on November 8, 2006, and consolidated with a petition for review of the *Fox Remand Order*. *Fox Television Stations, Inc. v. FCC,* 489 F.3d 444, 454 (2d Cir. 2007) ("*Fox*"), *cert. granted*, 552 U.S. 1255, 128 S. Ct. 1647, 170 L. Ed. 2d 352 (2008). The court granted motions to intervene by other networks, including CBS, and the networks collectively raised several challenges to the validity of the *Fox Remand Order* essentially mirroring those raised in this case. *See Fox,* 489 F.3d at 454.

Undertaking a thorough review of the history of the FCC's indecency regime similar to that which we engage in here, the Second Circuit found the FCC's "consistent enforcement policy" prior to the *Golden Globes* decision excluded fleeting or isolated expletives from regulation. *Id.* at 455. The court concluded "there is no question" that the FCC changed its policy with respect to fleeting expletives, and that the policy "changed with the issuance of *Golden Globes*." *Id.* (citations omitted). Judge Leval, dissenting in *Fox* for other reasons, agreed with the majority's conclusion that the FCC changed its position on fleeting utterances, although he considered the change of standard "relatively modest." *See id.* at 469 (Leval, J., dissenting); *see also id.* at 470 (Leval, J., dissenting) (stating that the FCC changed its position and finding that the FCC clearly acknowledges that its *Golden Globes* and *Fox Remand Order* rulings were not consistent with its prior standard). We agree that the *Golden Globes* decision represented a policy departure by the FCC. The extensive history detailed above demonstrates a consistent and entrenched policy of excluding fleeting broadcast material from the scope of actionable indecency.

In spite of this history, the FCC contends that by February 1, 2004 (the date of the Halftime Show), a broadcaster in CBS's position should have known that even isolated or fleeting indecent material in programming could be actionable. Despite its announced reversal of prior policy in its *Golden Globes* decision on March 3, 2004, the Commission points to one sentence in its 2001 policy statement to support its position: "Even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness." *Industry Guidance* at ¶ 19.[21] But when read in its original context rather than as an isolated statement, this sentence does not support the Commission's assertion here. The "relatively fleeting references" identified by that sentence are distinguishable

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[21] In its 2001 policy statement, the Commission described the "principal factors that have proved significant in [its] decisions to date" as: "(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value." Industry Guidance* at ¶ 10 (emphasis in original). It has since contended that its fleeting material policy was no policy at all, asserting instead that the fleeting nature of material was only a consideration under the second factor and could be outweighed by the other two factors depending on the specific facts of a case. But as we detail *infra*, this assertion contradicts the history of the Commission's indecency enforcement regime and is foreclosed by the agency's admissions in *Golden Globes* and *Fox*, which are controlling here, that its prior policy was to exclude fleeting material from the scope of actionable indecency. Although the FCC disputes the breadth of its policy, now contending the policy was limited only to fleeting expletives or alternatively to fleeting utterances, the fleeting nature of broadcast material was unquestionably treated by the FCC as more than one of several contextual factors subject to balancing.

from the truly "fleeting" broadcast material the FCC had included in its fleeting material policy. The paragraph cites, for instance, a notice of apparent liability against WEZB-FM, New Orleans, to exemplify the kind of "relatively fleeting references" the FCC considered actionably indecent. *See id.* (citing *EZ New Orleans, Inc. (WEZB(FM)),* 12 F.C.C.R. 4147 (MMB 1997) ("*WEZB-FM NAL*")). The citation to *WEZB-FM NAL* specifically describes as indecent an "announcer joke" involving incest, forceful sexual contact with children, and a reference to cleaning "blood off [a] diaper." *Id.* The "announcer joke" is distinguishable on its face from "fleeting" material such as a brief glimpse of nudity or isolated use of an expletive. Moreover, the "announcer joke" was merely one incident among dozens included in a transcript supporting the forfeiture liability determination in the *WEZB-FM NAL.*[22]

Nevertheless, as it clarified at oral argument, the FCC relies on its 2001 *Industry Guidance* to contend its policy on fleeting or isolated material "was a policy with respect to cases relying solely on the use of expletives." As the Commission explained at oral argument, "[t]here was not a policy that all short utterances were exempt." This reading of the Commission's policy on fleeting material is untenable. Even the FCC's *Industry Guidance*

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[22] The *WEZB–FM NAL* found a broadcast licensee apparently liable for a forfeiture penalty of $12,000 for its broadcast of indecent material during six radio broadcasts spanning fourteen hours of airtime over nearly a one year period. The *WEZB-FM NAL* provides transcript excerpts from these broadcasts, which involved very graphic segments discussing a variety of sexual topics in extended detail. The "announcer joke" included in the FCC's *Industry Guidance* was merely one of these factual predicates for the broadcast licensee's forfeiture liability for indecency.

fails to support such a narrow characterization. *See, e.g., Industry Guidance* at ¶ 18 (quoting *L.M. Commc'ns of S. C., Inc. (WYBB(FM)),* 7 F.C.C.R. 1595 (MMB 1992), for the proposition that "'a fleeting or isolated utterance . . . , within the context of live and spontaneous programming, does not warrant a Commission sanction.'").

Accordingly, we find the Commission's unsubstantiated contentions in this regard contradict the lengthy history of the Commission's restrained enforcement policy. While "an agency's interpretation of its own precedent is entitled to deference," *Cassell v. FCC,* 154 F.3d 478, 483 (D.C. Cir. 1998), deference is inappropriate where the agency's proffered interpretation is capricious. Until its *Golden Globes* decision in March of 2004, the FCC's policy was to exempt fleeting or isolated material from the scope of actionable indecency. Because CBS broadcasted the Halftime Show prior to *Golden Globes,* this was the policy in effect when the incident with Jackson and Timberlake occurred.

B.

If the FCC's restrained enforcement policy for fleeting broadcast material was intact until the *Golden Globes* decision in March of 2004, our inquiry would end with a simple examination of the chronology of the FCC's actions. CBS broadcasted the Halftime Show more than a month prior to *Golden Globes.* The Commission's orders here would amount to a retroactive application of the new policy it announced in *Golden Globes,* which would raise due process concerns. The Commission has recognized the inequity in such an outcome. *See Omnibus Order, supra,* at ¶¶ 111, 124, 136, 145 (declining to issue forfeiture orders because the offending

broadcasts occurred prior to the issuance of its *Golden Globes* decision, and therefore "existing precedent would have permitted [the] broadcasts"); *see also Trinity Broad. of Fla., Inc.*, 211 F.3d at 628 ("Because '[d]ue process requires that parties receive fair notice before being deprived of property,' we have repeatedly held that '[i]n the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability." (citation omitted)).

But the FCC urges another reading of *Golden Globes,* perhaps less obvious yet still plausible, which interprets *Golden Globes* as addressing only the broadcast of fleeting expletives, not other fleeting material such as brief images of nudity. Further, the Commission contends its fleeting material policy, as initially adopted, was limited to fleeting words and did not extend to fleeting images. Under this view, *Golden Globes* would be inapposite here—the Commission's sanction against CBS would be in line with its treatment of images as part of its historical indecency enforcement regime. If, as the FCC contends, *Golden Globes* was limited to fleeting expletives, then its orders issuing forfeiture penalties in this case did not constitute a retroactive application of the policy change in Golden Globes.

But even if we accept the FCC's interpretation of *Golden Globes* and read it as only addressing fleeting expletives, the Commission's view of the scope of its fleeting materials policy prior to *Golden Globes* is unsustainable. As we will explain, the Commission—before *Golden Globes*—had not distinguished between categories of broadcast material such as images and words.

Accordingly, even if, as the FCC contends, *Golden Globes* only addressed expletives, it nevertheless represented the first time the Commission distinguished between formats of broadcast material or singled out any one category of material for special treatment under its fleeting material policy. That is, it altered the scope of the FCC's fleeting material policy by excising only one category of fleeting material—fleeting expletives—from the policy. And it therefore did not constitute an abdication of its fleeting material policy. Rather, a residual policy on other categories of fleeting material—including all broadcast content other than expletives—remained in effect.

Accordingly, subsequent agency action was required to change the fleeting material policy as it applied to broadcast content other than expletives. By targeting another category of fleeting material—fleeting images—in its orders against CBS in this case, the FCC apparently sought to further narrow or eliminate the fleeting material policy as it existed following *Golden Globes*. The Commission's determination that CBS's broadcast of a nine-sixteenths of one second glimpse of a bare female breast was actionably indecent evidenced the agency's departure from its prior policy. Its orders constituted the announcement of a policy change—that fleeting images would no longer be excluded from the scope of actionable indecency.

The question is whether the FCC's departure from its prior policy is valid and enforceable as applied to CBS. As noted, agencies are free to change their rules and policies without judicial second-guessing. *See, e.g., Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863, 104 S. Ct. 2778, 81 L. Ed. 2d 694

(1984). But an agency cannot ignore a substantial diversion from its prior policies. *See Ramaprakash v. FAA,* 346 F.3d 1121, 1124 (D.C. Cir. 2003) (agency must "provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored"). As the Supreme Court explained in *State Farm,* an agency must be afforded great latitude to change its policies, but it must justify its actions by articulating a reasoned analysis behind the change:

> Petitioner . . . contend[s] that the rescission of an agency rule should be judged by the same standard a court would use to judge an agency's refusal to promulgate a rule in the first place—a standard Petitioner believes considerably narrower than the traditional arbitrary and capricious test and "close to the borderline of nonreviewability." We reject this view. . . . Petitioner's view would render meaningless Congress' authorization for judicial review of orders revoking . . . rules. Moreover, the revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to the proper course. A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." Accordingly, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."

463 U.S. at 42-43, 103 S. Ct. 2856 (citations omitted).

The agency's obligation to supply a reasoned analysis for a policy departure requires an affirmative showing on record. It "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* at 43, 103 S. Ct. 2856 (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156, 168, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962)). A reviewing court "must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Id.* (citations omitted). The agency's actions will then be set aside as "arbitrary and capricious" if the agency failed to provide a "reasoned explanation" for its decision to change course. *Massachusetts v. EPA,* 549 U.S. 497, 127 S. Ct. 1438, 1463, 167 L. Ed. 2d 248 (2007); *see State Farm,* 463 U.S. at 42-43, 103 S. Ct. 2856; *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 981, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005) ("unexplained inconsistency" in agency practice is a reason for holding a policy reversal "arbitrary and capricious" under the APA, unless "the agency adequately explains the reasons for a reversal of policy").

In *Fox,* the Second Circuit analyzed the FCC's changed policy on fleeting expletives under *State Farm,*[23] but the panel split on the outcome of its analy-

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[23] It was undisputed that the FCC changed its policy on fleeting expletives in *Golden Globes,* which was decided prior to *Fox.* But as the *Fox* court explained, the actual moment the agency changed its course was not pertinent in determining whether the change was valid under *State Farm:*

> [W]e . . . reject the FCC's contention that our review here is narrowly confined to the specific question of whether the two Fox

sis. Judge Pooler, writing for the majority, found the policy change arbitrary and capricious because the FCC failed to provide a reasoned explanation for the change. *Fox,* 489 F.3d at 455 ("The Networks contend that the Remand Order is arbitrary and capricious because the FCC has made a 180-degree turn regarding its treatment of 'fleeting expletives' without providing a reasoned explanation justifying the about-face. We agree."). Scrutinizing the sufficiency of the Commission's explanation for its policy change, the court rejected the agency's proffered rationale as "disconnected from the actual policy implemented by the Commission." *Id.* at 459 n. 8 (citation omitted).

Judge Leval, writing in dissent, also applied *State Farm,* but he disagreed with the amount of deference the majority afforded the FCC's policy decision. Although he agreed that the FCC was obligated to provide a reasoned explanation for its policy shift, he found the agency's explanation sufficient. As Judge Leval explained:

> In my view, in changing its position on the repetition of an expletive, the Commission complied with these requirements. It made clear acknowledgment that

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> broadcasts . . . were indecent. The [*Fox Remand Order*] applies the policy announced in *Golden Globes.* If that policy is invalid, then we cannot sustain the indecency findings against Fox. Thus, as the Commission conceded during oral argument, the validity of the new "fleeting expletive" policy announced in *Golden Globes* and applied in the [*Fox Remand Order*] is a question properly before us on this petition for review.

Fox, 489 F.3d at 454. To hold otherwise would create a situation ripe for manipulation by an agency. *Cf. ACT I, supra,* 852 F.2d at 1337 ("[A]n agency may not resort to [ad hoc] adjudication as a means of insulating a generic standard from judicial review.").

> its *Golden Globes* and *Remand Order* rulings were not consistent with its prior standard regarding lack of repetition. It announced the adoption of a new standard. And it furnished a reasoned explanation for the change. Although one can reasonably disagree with the Commission's new position, its explanation . . . is not irrational, arbitrary, or capricious. The Commission thus satisfied the standards of the Administrative Procedure[ ] Act.

Id. at 470 (Leval, J., dissenting).

In this case, *State Farm* also provides the correct standard of review, but we need not engage in the substantive inquiry that divided the Second Circuit panel in *Fox*. There, as Judge Leval noted in dissent, the FCC provided an explanation for changing its policy on fleeting expletives. The critical question splitting the court was whether that explanation was adequate under *State Farm*. Here, unlike in *Fox*, the FCC has not offered any explanation—reasoned or otherwise—for changing its policy on fleeting images. Rather, the FCC asserts it never had a policy of excluding fleeting images from the scope of actionable indecency, and therefore no policy change occurred when it determined that the Halftime Show's fleeting image of Janet Jackson's breast was actionably indecent. Accordingly, we must determine whether the FCC's characterization of its policy history is accurate. If it is not, then the FCC's policy change must be set aside as arbitrary and capricious, because it has failed to even acknowledge its departure from its former policy let alone supply a "reasoned explanation" for the change as required by *State Farm*.

CBS contends the FCC's indecency regime treated words and images alike, so the exception for fleeting

material applied with equal force to words and images. The Commission rejects this assertion, contending its prior policy on fleeting material was limited to words alone. Although the FCC acknowledges it had never explicitly distinguished between images and words for the purpose of defining the scope of actionable indecency, it contends the existence of such a distinction was obvious, even if unstated.[24]

The Commission's conclusion on the nature and scope of its indecency regime—including its fleeting material policy—is at odds with the history of its actions in regulating indecent broadcasts. In the nearly three decades between the Supreme Court's ruling in *Pacifica* and CBS's broadcast of the Halftime Show, the FCC had never varied its approach to indecency regulation based on the format of broadcasted content. Instead, the FCC consistently applied identical standards and engaged in identical analyses when reviewing complaints of poten-

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[24] The FCC's position is difficult to reconcile with the source of its authority to regulate broadcast content. The text of 18 U.S.C. § 1464 provides: "Whoever *utters* any obscene, indecent, or profane *language* by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." *Id.* (emphasis added). Although the text on its face only reaches spoken words, it is applied broadly, as here, to reach all varieties of indecent content. But this broad interpretation of the text requires that the FCC treat words and images interchangeably in order to fit its regulation of indecent images within the boundaries of its statutory authority. Where the FCC's entire enforcement regime is built on the agency's treatment of words and images as functionally identical, it is unclear how the difference between words and images is "obvious." At minimum, the FCC cannot reasonably expect the difference between words and images to be so self-evident that broadcast licensees seeking to comply with indecency standards would interpret FCC enforcement orders narrowly based on whether the reviewed content consisted of words or images.

tial indecency whether the complaints were based on words or images.

In 2000, for example, the FCC rejected a complaint of indecency based on scenes of nudity in a television broadcast of the film "Schindler's List." *In re WPBN/WTOM License Subsidiary, Inc.*, 15 F.C.C.R. 1838 (2000). Finding the broadcasted images not actionably indecent, the FCC noted "nudity itself is not *per se* indecent" and applied the identical indecency test the agency used to review potentially indecent language. *Id.* at ¶ 11. The Commission did not treat the nudity complaint differently—factually or legally—from a complaint for indecency based on a spoken utterance. *See id.* at ¶ 10 n. 5 ("The Supreme Court has observed that contextual assessments may involve (and are not limited to) an examination of whether the actual *words or depictions* in context are, for example, vulgar or shocking, a review of the manner in which the *words or depictions* are portrayed, and an analysis of whether the allegedly *indecent material is isolated or fleeting.*" (emphasis added)). The Commission even referred in a footnote to its policy towards fleeting material, never suggesting the policy would be inapplicable because the offending broadcast content was an image rather than a word. *See id.* at ¶ 5 n. 10 (explaining that contextual assessments of whether certain programming is patently offensive, and therefore actionably indecent, "may involve . . . analysis of whether the allegedly indecent material is isolated or fleeting").

The Commission took the same approach when reviewing viewer complaints against a television station for multiple broadcasts of programs containing expletives, nudity, and other allegedly indecent material. *See*

WGBH, supra[.][25] Categorically denying that the programming in *WGBH* was actionably indecent,[26] the FCC distinguished the facts of *WGBH* from the Carlin monologue in *Pacifica* by invoking its restrained enforcement policy for fleeting or isolated material. *See id.* at ¶ 10 ("We intend strictly to observe the narrowness of the *Pacifica* holding. . . . Justice Powell's concurring opinion . . . specifically distinguished 'the verbal shock treatment [in *Pacifica*]' from 'the isolated use of a potentially offensive word in the course of a radio broadcast.' . . . In the case before us, petitioner has made no comparable showing of abuse by WGBH-TV of its programming discretion."); *id.* at ¶ 10 n. 6 (finding that WGBH-TV's programs "differ[ed] dramatically from the concentrated and repeated assault involved in *Pacifica*"). In its indecency analysis in *WGBH*, the FCC

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[25] Among several broadcasts at issue in *WGBH* were: (1) "numerous episodes of *Monty Python's Flying Circus*, which allegedly consistently relie[d] primarily on scatology, immodesty, vulgarity, nudity, profanity and sacrilege for humor"; (2) "a program entitled *Rock Follies* . . . which [the petitioner] describe[d] as vulgar and as containing profanity" including "obscenities such as shit, bullshit, etc., and action indicating some sexually-oriented content in the program"; and (3) "other programs which allegedly contained nudity and/or sexually-oriented material." 69 F.C.C. 2d 1250 at ¶ 2 (internal quotation marks omitted).

[26] The FCC contends *WGBH* is inapposite because it was a license revocation proceeding rather than a direct complaint for indecency. But its analysis in reaching its decision is instructive. Because the complainant in *WGBH* challenged the broadcaster's license based on a pattern of allegedly indecent broadcasts, the Commission expressly answered the threshold question of whether the broadcasts were indecent. Separate from the question of whether the broadcaster's actions were sufficient to revoke its license, the Commission's analysis illustrates that "words" and "depictions" were treated identically for purposes of determining whether a broadcast was actionably indecent.

made no distinction between words and images (nudity or otherwise).

As evidence that the FCC's policy on fleeting material, as it existed at the time of the Halftime Show, did not distinguish between words and images, CBS presented several complaints viewers had submitted to the FCC about allegedly indecent broadcasts. CBS Letter Br., *submitted pursuant to* Fed. R. App. P. 28(j) (Aug. 13, 2007). Accompanying each complaint is a corresponding reply letter by the FCC rejecting the indecency allegation. Each complaint involves some variety of sexually explicit imagery. One letter, for example, describes the early-evening broadcast of a female adult dancer at a strip club and alleges the broadcast contained visible scenes of the woman nude from the waist down revealing exposed buttocks and "complete genital nudity" for approximately five to seven seconds. Another letter describes in part a Sunday-morning television broadcast of the movie "Devices and Desires," which included "scenes of a topless woman in bed with her lover, with her breast very clearly exposed, several scenes of a topless woman running on the beach, and several scenes of a nude female corpse, with the breasts clearly exposed."

Citing *Pacifica* and the indecency standard used to review the broadcast of potentially indecent language, the FCC summarily rejected each of these complaints as "not actionably indecent." The FCC contends these "form letters" are irrelevant, as the letters "do not even explain the grounds for the staff's conclusions that the broadcasts were not indecent, much less rely on the 'fleeting' nature of any alleged nudity as a reason for rejecting the complaints." FCC Letter Br., *submitted pursu-*

ant to Fed. R. App. P. 28(j) (Aug. 27, 2007). But the relevance of the FCC's rejection letters is not found in their specific reasons for finding the images not actionably indecent. Rather, the rejection letters illustrate that the FCC used the identical form letters and indecency analyses to address complaints of indecent nudity that it had long used to address complaints of indecent language.

Confronted with this history of FCC enforcement of restrictions on broadcast indecency, the entirety of which reveals no distinction in treatment of potentially indecent images versus words, the FCC nevertheless finds such a distinction evident in its prior decisions. *See, e.g.,* FCC Br. at 26-27. To support this view, the FCC offers its Notice of Apparent Liability for Forfeiture in *In re Young Broadcasting of San Francisco, Inc.,* 19 F.C.C.R. 1751 (2004), issued four days before CBS's broadcast of the Halftime Show. *See Reconsideration Order* at ¶¶ 10, 36; FCC Br. at 26-27. *Young Broadcasting* involved a morning news show segment in which two performers from a production titled "Puppetry of the Penis" appeared in capes but were otherwise naked underneath the capes. *Young Broadcasting* at ¶ 13. The two men, whose act involved manipulating and stretching their genitalia to simulate various objects, performed a demonstration of their act with the agreement of the show's hosts and at the urging of off-camera station personnel. *Id.* Although the performance was directed away from the camera, the penis of one performer was fully exposed on camera for less than one second as the men turned away to act out their performance. *See id.* at ¶¶ 12, 13. Based on these facts, the Commission found the station apparently liable for a

forfeiture penalty for broadcasting indecent material. *Id.* at ¶ 16.

The FCC contends *Young Broadcasting* was not a departure from its prior indecency regime. Rather, as it explains, *Young Broadcasting* merely represented the first instance in which the Commission expressly articulated its pre-existing (but unstated) policy of treating fleeting images differently from fleeting words.[27] On this view, according to the FCC, *Young Broadcasting* should have dispelled any doubts about the historical breadth of its fleeting material policy prior to the Halftime Show because it was issued a few days before CBS's broadcast. But *Young Broadcasting* is unavailing for this purpose. It makes no distinction, express or implied, between words and images in reaching its indecency determination. To the contrary, it discusses and compares several other FCC determinations on potentially indecent utterances and depictions, treating the cases interchangeably and ultimately distinguishing those cases' outcomes without any indication that the

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[27] Several statements in the FCC's own press release announcing the *Young Broadcasting* Notice of Apparent Liability belie the agency's contention here that *Young Broadcasting* accorded with its prior policies. *See* Press Release, FCC, *Com m' n Proposes to Fine Young Broadcasting of San Francisco, Inc., Statutory Maximum for Apparent Violation of Indecency Rules* (Jan. 27, 2004) (statement of Chairman Michael K. Powell: "Today, we open another front in our increased efforts to curb indecency on our nation's airwaves. . . . "); *id.* (statement of Commissioner Michael J. Copps: "I am pleased that this Commission is finally taking an initial step against indecency on television."); *id.* (statement of Commissioner Kevin J. Martin: "I hope that this step today represents the beginning of a commitment to consider each indecency complaint seriously. . . . ").

format of the offending material was a relevant consideration. *See, e.g., id.* at ¶ 12 & n. 35; *id.* at ¶ 14.[28]

Accordingly, *Young Broadcasting* does not support the FCC's assertion here that its policy on fleeting material had always excluded images and applied only to words. *Young Broadcasting* appears instead to be best understood as the Commission's initial effort to abandon its restrained enforcement policy on fleeting material. While the final disposition of *Young Broadcasting* was still unresolved,[29] the overarching policy departure that

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[28] One of the cases the FCC distinguished in *Young Broadcasting* was its Notice of Apparent Liability in *Flambo Broadcasting, Inc. (KFMH–FM),* 9 F.C.C.R. 1681 (MMB 1994), which involved "a radio station's broadcast of sexual material in a crude joke" that was not found actionably indecent. *Young Broadcasting* at ¶ 12 n. 35. As with the other cases it discussed in its *Young Broadcasting* Notice of Apparent Liability, the FCC did not draw any distinction between *Young Broadcasting* and *Flambo Broadcasting* based on the subject material there being words or images. But it did distinguish the two notices of apparent liability in part because: "assuming that the joke [at issue in *Flambo Broadcasting*] was cut off immediately, the staff of the then-Mass Media Bureau found that it would not have been actionably indecent because it was *brief, live, unscripted and from an outside source.*" *Young Broadcasting* at ¶ 12 n. 35 (emphasis added). Notably, the facts here"a brief image of a bare female breast during the live Halftime Show broadcast resulting from an unscripted stunt by Jackson and Timberlake—are remarkably similar to the *Flambo Broadcasting* fact pattern that the FCC found readily distinguishable from the actionably indecent material in *Young Broadcasting.*

[29] *Young Broadcasting* was a notice of apparent liability, which is non-final until the implicated licensee either declines to dispute the findings in the notice or the licensee's responsive opposition is fully adjudicated. *See* FCC Br. at 13 (describing content of CBS Notice of Apparent Liability as "tentative conclusions"); *see also* 47 U.S.C. § 504(c) ("In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this chapter, that

the Commission sought to accomplish there was effectuated by a combination of its *Golden Globes* order and its orders on appeal here. The Commission's reasoning in *Young Broadcasting* is therefore illuminating here.

In *Young Broadcasting,* the Commission distinguished that case's facts from several of its prior orders. But in so doing, the Commission overlooked the fact that application of its fleeting material policy had been a determinative factor in those prior orders. For example, the licensee in *Young Broadcasting* cited for support *L.M. Communications,* 7 F.C.C.R. 1595 (1992), in which the radio broadcast of a single expletive was found not actionably indecent. *Young Broadcasting* at ¶ 12 n. 35. The FCC found *L.M. Communications* "distinguishable because there was no finding that the material, in context, was pandering, titillating or intended to shock the audience." *Id.* But *L.M. Communications* made no reference to the pandering, titillating or shocking nature of the subject broadcast material. Rather, it determined the material was not actionably indecent because the "broadcast contained only a fleeting and isolated utterance which, within the context of live and spontaneous

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fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final."). At the time the Commission issued its *Reconsideration Order* against CBS and after its determination in *Golden Globes,* the question of whether the broadcast licensee in *Young Broadcasting* would contest the Notice of Apparent Liability in that case was still unresolved. *See Reconsideration Order* at ¶ 6 n. 25 (indicating the status of the *Young Broadcasting* Notice of Apparent Liability as "response pending" at the time of the *Reconsideration Order*'s issuance).

programming, does not warrant a Commission sanction." *L.M. Commc'ns,* 7 F.C.C.R. at 1595.

The Commission's failure to acknowledge the existence of its prior policy on fleeting material in *Young Broadcasting* is illustrative of its approach here. In *Young Broadcasting,* it read the policy out of existence by substituting new rationales for its prior indecency determinations that had applied the policy. Here, the Commission is foreclosed from adopting the same approach by its admission in *Golden Globes* that the fleeting material policy existed. So it instead apparently seeks to revise the scope of the policy by contending the policy never included fleeting images. But extensive precedent over thirty years of indecency enforcement demonstrates otherwise.

Our reluctant conclusion that the FCC has advanced strained arguments to avoid the implications of its own fleeting indecency policy was echoed by our sister circuit in *Fox:*

> In [its *Omnibus Order*], the FCC "reject[s] Fox's suggestion that Nicole Richie's [use of two expletives] would not have been actionably indecent prior to our *Golden Globes* decision," and would only concede that it was "not apparent" that Cher's [use of one expletive] at the 2002 Billboard Music Awards would have been actionably indecent at the time it was broadcast. [*Id.*] at ¶¶ 22, 60. Decisions expressly overruled in *Golden Globes* were now dismissed as "staff letters and dicta," and the Commission even implied that the issue of fleeting expletives was one of first impression for the FCC in *Golden Globes. Id.* at ¶ 21 ("[I]n 2004, the Commission itself considered for the first time in an enforcement action whether a

> single use of an expletive could be considered indecent.").

Fox, 489 F.3d at 456 n. 6. When confronted with these troublesome revisionist arguments, the FCC conceded the existence of its prior policy. *See id.* at 456 ("[I]n its brief to this court, the FCC now concedes that *Golden Globes* changed the landscape with regard to fleeting expletives." (citations omitted)); *see also id.* at 470 (Leval, J., dissenting) ("[The FCC] made clear acknowledgment that its *Golden Globes* and *Remand Order* rulings were not consistent with its prior standard regarding lack of repetition."). But it has made no such concession here. Faced with extensive evidence to the contrary, the Commission nevertheless continues to assert that its fleeting material policy was limited to words and did not exclude fleeting images from the scope of actionable indecency.

In sum, the balance of the evidence weighs heavily against the FCC's contention that its restrained enforcement policy for fleeting material extended only to fleeting words and not to fleeting images. As detailed, the Commission's entire regulatory scheme treated broadcasted images and words interchangeably for purposes of determining indecency. Therefore, it follows that the Commission's exception for fleeting material under that regulatory scheme likewise treated images and words alike. Three decades of FCC action support this conclusion. Accordingly, we find the FCC's conclusion on this issue, even as an interpretation of its own policies and precedent, "counter to the evidence before the agency" and "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm,* 463 U.S. at 43, 103 S. Ct. 2856.

Because the Commission fails to acknowledge that it has changed its policy on fleeting material, it is unable to comply with the requirement under *State Farm* that an agency supply a reasoned explanation for its departure from prior policy.[30] *See id.; cf. Ramaprakash,* 346 F.3d at 1125 ("[F]ailure to come to grips with conflicting precedent constitutes an [agency's] inexcusable departure from the essential requirement of reasoned decision making."); *LeMoyne-Owen College v. NLRB,* 357 F.3d 55, 61 (D.C. Cir. 2004) (Roberts, J.) ("[W]here, as here, a party makes a significant showing that analogous cases have been decided differently, the agency must do more than simply ignore that argument. . . . The need for an explanation is particularly acute when an agency is applying a multi-factor test through case-by-case adjudication."). Consequently, the FCC's new policy of including fleeting images within the scope of actionable indecency is arbitrary and capricious under *State Farm* and the Administrative Procedure Act, and therefore invalid as applied to CBS.

IV.

In finding CBS liable for a forfeiture penalty, the FCC arbitrarily and capriciously departed from its prior policy excepting fleeting broadcast material from the scope of actionable indecency. Therefore, we will grant

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[30] In its brief and at oral argument, the Commission continues to assert it has not changed its policy on fleeting material, yet it also suggests several reasons why a policy including fleeting images within the scope of actionable indecency is reasonable. *But see State Farm*, 463 U.S. at 50, 103 S. Ct. 2856 ("[T]he courts may not accept appellate counsel's post hoc rationalizations for agency action. It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." (internal citations omitted)).

CBS's petition for review and will vacate the Commission's order in its entirety.

SCIRICA, Circuit Judge, Dissenting.

This case comes to us on remand from the Supreme Court of the United States. CBS petitions for review of orders by the Federal Communications Commission imposing a monetary forfeiture under 47 U.S.C. § 503(b) for the broadcast of "indecent" material in violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999. I believe the Supreme Court's intervening opinion in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009), undermines the basis of our prior holding on the Administrative Procedure Act.[1] Accordingly, I respectfully dissent and would hold the FCC's imposition of a civil forfeiture here is neither arbitrary nor capricious. Furthermore, I would hold precedent requires we remand to the FCC for it to apply the proper standard for ordering a civil forfeiture for the broadcast of indecent material.

The alleged indecency occurred during the Halftime Show of Super Bowl XXXVIII, broadcast live by CBS on February 1, 2004. The Show's finale involved a routine by Janet Jackson and Justin Timberlake. In an unscripted moment at the end of the performance, Timberlake tore away part of Jackson's bustier, exposing her bare right breast to the camera. The image was broadcast over public airwaves for nine-sixteenths of one second.

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[1] My colleagues incorporate portions of our earlier decision in Part B of their opinion. Since I believe *Fox* requires a different result, I would omit our prior opinion.

At issue is the responsibility of television broadcasters for the transmission of unscripted "indecent" material during live, contemporaneous television shows. Broadcast television (as opposed to transmissions over cable, satellite, or internet) is subject to greater oversight because the finite number of broadcast frequencies are allocated among competing applicants. *See Red Lion Broad. Co. v. FCC,* 395 U.S. 367, 376, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969) ("Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard."); *cf. FCC v. Pacifica Found.,* 438 U.S. 726, 748, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978) ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection."). The "scarcity doctrine"—the idea that limited broadcast spectrum and practical factors make television broadcasting unique among media—"has required some adjustment in First Amendment analysis." *FCC v. League of Women Voters,* 468 U.S. 364, 376-77, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984).[2]

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[2] CBS and others have questioned whether broadcasting continues to be a unique medium. The Court, however, has so far declined to abandon the scarcity doctrine without the support of Congress or the FCC. *See League of Women Voters,* 468 U.S. at 376 n.11, 104 S. Ct. 3106 ("The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism. . . . We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."); *see also* Petition for Writ of Certiorari at 2-8, *FCC v. Fox Television Stations, Inc.,* 131 S. Ct. 3065 (2011) (No. 10-1293), 2011 WL 1540430 at *2-8 (providing the Solicitor

In our earlier decision, we invalidated the FCC's determination that CBS's broadcast of a fleeting image of nudity was actionably indecent. Examining the history of the FCC's enforcement of the indecency standard, we concluded the FCC's policy had been to treat unscripted fleeting material as *per se* exempt from regulation. Because we believed the FCC's forfeiture orders against CBS constituted an unacknowledged change in policy, we held they violated the Administrative Procedure Act's (APA) prohibition on arbitrary and capricious agency action. *See* 5 U.S.C. § 706(2)(A). Furthermore, even assuming the fleeting image of nudity was actionably indecent, we concluded CBS could not be held liable for the broadcast unless it acted with scienter, and it was unclear whether the FCC had applied the proper standard. Accordingly, we vacated the FCC's orders and remanded to allow the FCC an opportunity to reconsider its indecency standard and the *mens rea* for broadcaster liability.

The FCC filed a petition for certiorari. While that petition was pending, the Supreme Court decided *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009). The question presented in *Fox* was whether the FCC had violated the APA in issuing orders holding Fox liable for isolated expletives broadcast during the 2002 and 2003 Billboard Music Awards. The Court held the FCC had adequately explained its decision such that its orders were neither arbitrary nor capricious under the APA. Soon after deciding *Fox,* the Court granted the FCC's petition for certiorari in this case, vacated our judgment, and re-

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General's view on the development of indecency policy and the unique position of broadcast television).

manded for us to reconsider the case in light of *Fox. FCC v. CBS Corp.*, — U.S. — , 129 S. Ct. 2176, 173 L. Ed. 2d 1153 (2009).

In *Fox,* unlike here, the FCC acknowledged it was departing from precedent. Nevertheless, I believe the Court's intervening decision in *Fox* requires us to revise our prior APA holding. Based on the Supreme Court's account of the history of the FCC's enforcement policy, we cannot adhere to our earlier determination that prior FCC policy had granted a *per se* exemption to all fleeting indecent material; instead, *Fox* compels the conclusion that the fleeting exemption was limited to a particular type of words. Accordingly, under *Fox,* I cannot say the orders in this case represented a change in agency policy, and I would hold the FCC's indecency finding passes muster under the APA. The FCC, however, cannot impose a forfeiture penalty unless CBS acted with the requisite scienter. Because I believe the FCC's forfeiture orders rested on the wrong statutory provision, and misapprehended the proper *mens rea* standard, I would vacate the orders and remand for further proceedings.

I.

A.

Our previous opinion set forth the relevant facts:

> On February 1, 2004, CBS presented a live broadcast of the national Football League's Super Bowl XXXVIII, which included a halftime show produced by MTV Networks. Nearly 90 million viewers watched the Halftime Show, which began at 8:30 p.m. Eastern Standard Time and lasted about fifteen min-

> utes. The Halftime Show featured a variety of musical performances by contemporary recording artists, with Janet Jackson as the announced headlining act and Justin Timberlake as a "surprise guest" for the final minutes of the show.
>
> Timberlake was unveiled on stage near the conclusion of the Halftime Show. He and Jackson performed his popular song "Rock Your Body" as the show's finale. Their performance, which the FCC contends involved sexually suggestive choreography, portrayed Timberlake seeking to dance with Jackson, and Jackson alternating between accepting and rejecting his advances. The performance ended with Timberlake singing, "gonna have you naked by the end of this song," and simultaneously tearing away part of Jackson's bustier. CBS had implemented a five-second audio delay to guard against the possibility of indecent language being transmitted on air, but it did not employ similar precautionary technology for video images. As a result, Jackson's bare right breast was exposed on camera for nine-sixteenths of one second.

CBS Corp. v. FCC, 535 F.3d 167, 171-72 (3d Cir. 2008) (footnote omitted).

After fielding a large number of complaints from viewers of the Halftime Show, the FCC issued a letter of inquiry to CBS seeking additional information about the broadcast. CBS complied. It also made "a public statement of apology for the incident," stating that "Jackson and Timberlake's wardrobe stunt was unscripted and unauthorized" and "claiming it had no advance notice of any plan by the performers to deviate from the script." *Id.* at 172.

On September 22, 2004, the FCC issued a Notice of Apparent Liability finding that CBS had apparently violated federal law and FCC rules regulating the broadcast of indecency and was apparently liable for a forfeiture penalty of $550,000. CBS submitted its Opposition to the Notice.

On March 15, 2006, the FCC issued a forfeiture order and imposed a penalty of $550,000. *In re Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broad. of the Super Bowl XXXVIII Halftime Show,* 21 FCC Rcd. 2760 (2006) ("*Forfeiture Order*"). Applying the standard set forth in its 2001 policy statement, the FCC found the Halftime Show incident satisfied the two-part test for indecency: (1) "the material must describe or depict sexual or excretory organs or activities," and (2) it must be "*patently offensive* as measured by contemporary community standards for the broadcast medium." *In re Industry Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 FCC Rcd. 7999, 8002, ¶¶ 7-8 (2001) ("*Industry Guidance*"); *see Forfeiture Order,* 21 FCC Rcd. at 2764-65, ¶ 9. Finding the "broadcast of an exposed female breast" met the first part of the test, the FCC focused most of its analysis on whether the broadcast was "patently offensive." *Forfeiture Order,* 21 FCC Rcd. at 2764-67, ¶¶ 9-14.

The FCC's 2001 policy statement had explained that in determining whether broadcast material is patently offensive, "the *full context* in which the material appeared is critically important." *Industry Guidance,* 16 FCC Rcd. at 8002, ¶ 9. Three factors are of principal significance: "(1) the explicitness or graphic nature of

the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value." *Id.* at 8003, ¶ 10 (emphasis removed). According to the policy statement, "[n]o single factor generally provides the basis for an indecency finding"; the three factors "must be balanced" to determine whether a given broadcast is patently offensive. *Id.*

Applying these factors in its *Forfeiture Order*, the FCC determined that, "in context and on balance," the Halftime Show material was "patently offensive." 21 FCC Rcd. at 2765, ¶ 10. The FCC conceded the second factor weighed against a finding of indecency because "the image of Jackson's uncovered breast . . . is fleeting." *Id.* at 2766, ¶ 12. It noted, however, that "'even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness,'" and concluded "[i]n this case, . . . the brevity of the partial nudity is outweighed by the first and third factors of our contextual analysis." *Id.* (quoting *Industry Guidance,* 16 FCC Rcd. at 8009, ¶ 19). In the FCC's view, the image was "graphic and explicit" because "although the camera shot is not a close-up, the nudity is readily discernible[,] . . . Jackson and Timberlake, as the headline performers, are in the center of the screen, and Timberlake's hand motion ripping off Jackson's bustier draws the viewer's attention to her exposed breast." *Id.* at 2765, ¶ 11. The FCC also believed, taken in context, the material appeared to shock, pander to, or titillate the audience:

> The offensive segment in question did not merely show a fleeting glimpse of a woman's breast. . . . Rather, it showed a man tearing off a portion of a woman's clothing to reveal her naked breast during a highly sexualized performance and while he sang "gonna have you naked by the end of this song."

Id. at 2767, ¶ 13. On the strength of these two factors, the FCC found the image actionably indecent.

The *Forfeiture Order* also found that CBS was liable under 47 U.S.C. § 503(b)(1) for Timberlake and Jackson's performance. CBS claimed "it had no advance knowledge that Timberlake planned to tear off part of Jackson's clothing to reveal her breast." *Id.* at 2768, ¶ 17. The FCC did not dispute this contention, but it nonetheless determined CBS was subject to a monetary forfeiture. *Id.* at 2769-74, ¶ ¶ 18-25.

CBS submitted a Petition for Reconsideration challenging several aspects of the FCC's analysis. In an Order on Reconsideration filed on May 31, 2006, the FCC reaffirmed the $550,000 forfeiture. *In re Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broad. of the Super Bowl XXXVIII Halftime Show*, 21 FCC Rcd. 6653 (2006) ("*Reconsideration Order*"). The Order rejected CBS's constitutional arguments and reiterated the FCC's indecency finding. The *Reconsideration Order* revised the FCC's approach for determining CBS's liability under § 503(b)(1). According to the Order, there were three independent bases for CBS's liability. First, despite the fact the network "was acutely aware of the risk of unscripted indecent material in [the Halftime Show]," it "consciously and deliberately failed to take reasonable

precautions to ensure that no actionably indecent material was broadcast." *Reconsideration Order,* 21 FCC Rcd. at 6660, ¶ 17; *accord id.* at 6662, ¶ 23 (stating that the FCC's "finding of willfulness is based on CBS's knowledge of the risks and its conscious and deliberate omissions of the acts necessary to address them"). Second, the FCC found Jackson and Timberlake performed as employees of CBS, not independent contractors. Accordingly, CBS was vicariously liable for their actions under the doctrine of *respondeat superior. Id.* at 6662-64, ¶¶ 24-28. Third, even if Timberlake and Jackson were independent contractors, CBS would still be liable for their actions in the FCC's view because of "the nondelegable nature of broadcast licensees' responsibility for their programming." *Id.* at 6662, ¶ 23. For these reasons, the FCC refused to rescind or reduce its forfeiture penalty.

B.

CBS timely filed a petition for review of the *Reconsideration Order* on July 28, 2006. In our previous opinion, we agreed with CBS that the order's indecency finding violated the APA. *CBS,* 535 F.3d at 175. We acknowledged that "[t]he scope of review under the [APA's] 'arbitrary and capricious' standard is 'narrow, and a court is not to substitute its judgment for that of the agency,'" and that "[l]ike any agency, the FCC may change its policies without judicial second-guessing." *Id.* at 174-75 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)). But we noted the FCC "cannot change a well-established course of action without supplying notice of and a reasoned explanation for its policy departure." *Id.* at 175.

We concluded the FCC violated that principle here by failing to acknowledge or explain a departure from "a consistent and entrenched policy of excluding fleeting broadcast material from the scope of actionable indecency." *Id.* at 179. In our view, it was not until its *Golden Globes* decision, issued more than a month after the Halftime Show, that the agency expressly "overruled all of its prior cases holding [isolated or fleeting material] not actionable." *Id.* at 178; *see In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* 19 FCC Rcd. 4975, 4980, ¶ 12 (2004) ("*Golden Globes*") ("While prior Commission and staff action had indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law."). Before this date, we believed, "the FCC's policy was to exempt fleeting or isolated material" from indecency regulation. *CBS,* 535 F.3d at 180. "Because CBS broadcasted the Halftime Show prior to *Golden Globes,* this was the policy in effect when the incident with Jackson and Timberlake occurred." *Id.* Accordingly, by finding the fleeting image here to be actionably indecent, the FCC's orders in this case broke with agency policy. And since these orders failed to acknowledge the existence of that policy, we determined they were "unable to comply with the [APA's] requirement . . . that an agency supply a reasoned explanation for its departure" from its prior policy. *Id.* at 188.

As this account suggests, our construction of the FCC's enforcement history played a decisive role in our previous opinion. That opinion recounted this history in detail, *see id.* at 175-89, but a synopsis is necessary here

in order to make clear the significance of the Supreme Court's decision in *Fox*. The FCC's indecency policy had its genesis in 1975, when the FCC issued a forfeiture penalty against Pacifica Foundation for broadcasting comedian George Carlin's "Filthy Words" monologue.[3] *See In re Citizen's Complaint Against Pacifica Found., Station WBAI(FM), New York, N.Y.*, 56 F.C.C. 2d 94, 1975 WL 29897 (1975). "Carlin's monologue, which Pacifica aired in an early-afternoon time slot, contained extensive and repetitive use of several vulgar expletives over a period of twelve minutes." *CBS*, 535 F.3d at 175 (citing *Pacifica*, 438 U.S. at 739, 98 S. Ct. 3026). While Pacifica's appeal was pending before the United States Court of Appeals for the D.C. Circuit, the FCC "issued a clarification order . . . expressly limiting its prior forfeiture order to the specific facts of the Carlin monologue." *Id.* (citing *In re a Petition for Clarification or Reconsideration' of a Citizen's Complaint against Pacifica Found., Station WBAI(FM), New York, NY*, 59 F.C.C. 2d 892, 1976 WL 31850 (1976)). The D.C. Circuit reversed the FCC's forfeiture order as vague and overbroad, *Pacifica Found. v. FCC*, 556 F.2d 9, 14 (D.C. Cir. 1977), but the Supreme Court upheld the agency's action in a narrow plurality opinion, 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978). The plurality "confirmed the general validity of the FCC's indecency regime" while at the same time "'emphasiz[ing] the narrowness of [its] holding,' which it confined to the facts of the Carlin monologue." *CBS*, 535 F.3d at 176 (quoting *Pacifica*, 438 U.S. at 750, 98 S.

[3] "Congress authorized the FCC to impose forfeiture penalties for violations of 18 U.S.C. § 1464 in 1960." *CBS*, 535 F.3d at 175; *see* Communications Act Amendments, 1960, Pub. L. No. 86-752, § 7, 74 Stat. 889, 894 (codified as amended at 47 U.S.C. § 503(b)(1)).

Ct. 3026) (alterations in original). Justices Powell and Blackmun concurred in the judgment and wrote separately to underscore "the narrowness of the decision and to note the Court's holding did not 'speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here.'" *Id.* (quoting *Pacifica,* 438 U.S. at 760-61, 98 S. Ct. 3026 (Powell, J., concurring)).

Our previous opinion found that the FCC adopted a "restrained enforcement policy . . . in the years following *Pacifica.*" *Id.* In a 1978 opinion, the FCC rejected a challenge to "several programs containing nudity and other allegedly offensive material." *Id.; see In re Application of WGBH Educ. Found.,* 69 F.C.C. 2d 1250, 1978 WL 36042 (1978) ("*WGBH*"). The agency, noting it "'intend[ed] strictly to observe the narrowness of the *Pacifica* holding' and emphasizing the language in Justice Powell's concurring opinion, concluded the single use of an expletive in a program 'should not call for us to act under the holding *of Pacifica.*'" *Id.* (quoting *WGBH,* 69 F.C.C. 2d at 1254, ¶ 10 n.6) (alteration in *CBS*).

In our view, three decisions issued in 1987 had "reaffirmed the Commission's restrained enforcement policy and reiterated the agency's policy that isolated or fleeting material would not be considered actionably indecent." *Id.* We acknowledged that, in a subsequent order reconsidering these decisions, "the Commission abandoned the view that only the particular 'dirty words' used in the Carlin monologue could be indecent," but we observed that the order on reconsideration "never indicat[ed] disagreement with those decisions' express statements that isolated or fleeting material could not be

actionably indecent." *CBS,* 535 F.3d at 177; *see In re Infinity Broad. Corp.,* 3 FCC Rcd. 930 (1987), *vacated in part on other grounds, Action for Children's Television v. FCC,* 852 F.2d 1332, 1337 (D.C. Cir. 1988), *superseded in part by Action for Children's Television v. FCC,* 58 F.3d 654 (D.C. Cir. 1995) (en banc).

As noted, our earlier opinion concluded the *Golden Globes* opinion of March 3, 2004, was the first time the FCC indicated that fleeting material could be held indecent. That case involved an unscripted remark during a live NBC broadcast of the Golden Globe Awards on January 19, 2003, in which "musician Bono said 'this is really, really f[* * *] brilliant' while accepting an award." *CBS,* 535 F.3d at 177; *see Golden Globes,* 19 FCC Rcd. at 4976, ¶ 3 n.4. The FCC held the broadcast actionable, but it declined to impose a forfeiture penalty because "existing precedent would have permitted th[e] broadcast." *See Golden Globes,* 19 FCC Rcd. at 4981-82, ¶ 15 n.40 (citing *Trinity Broad. of Fla., Inc. v. FCC,* 211 F.3d 618 (D.C. Cir. 2000)). We believed *Golden Globes* itself "made it clear that licensees could not be held liable for broadcasting fleeting or isolated indecent material prior to its *Golden Globes* decision." *CBS,* 535 F.3d at 178.

On February 21, 2006, the FCC issued an omnibus order resolving multiple indecency complaints against television broadcasters. *See In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005,* 21 FCC Rcd. 2664 (2006). The Order found four programs, all of which involved the use of expletives,[4] to be indecent. But "[b]ecause the offending

[4] The four programs were: "(1) Fox's broadcast of the 2002 Billboard Music Awards, in which performer Cher used an unscripted expletive during her acceptance speech; (2) Fox's broadcast of the 2003 Billboard

broadcasts occurred prior to the issuance of its *Golden Globes* decision, the FCC concluded that existing precedent would have permitted the broadcasts. Accordingly, the FCC did not issue forfeiture orders against any of the licensees." *CBS,* 535 F.3d at 178 (internal citations removed).

The networks nonetheless appealed the Order, which, as revised,[5] was invalidated in a 2-1 decision by the United States Court of Appeals for the Second Circuit. *See Fox Television Stations, Inc. v. FCC,* 489 F.3d 444 (2d Cir. 2007), *rev'd,* 556 U.S. 502, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009). Our earlier opinion explicitly refrained from engaging the issue that split the Second Circuit panel, *see CBS,* 535 F.3d at 182-83; we focused instead on that court's unanimous finding that the FCC's enforcement policy "prior to the *Golden Globes* decision [had consistently] excluded fleeting or isolated expletives from regulation," *id.* at 179 (citing *Fox,* 489 F.3d at 455). That conclusion, we believed, confirmed our view that until *Golden Globes,* the FCC's policy "was

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Music Awards, in which presenter Nicole Richie used two unscripted expletives; (3) ABC's broadcast of various episodes of its NYPD Blue series, in which assorted characters used scripted expletives; and (4) a CBS broadcast of The Early Show, in which a guest used an unscripted expletive during a live interview." *CBS,* 535 F.3d at 178 (citing *Various Television Broads.,* 21 FCC Rcd. at ¶¶ 101, 112 n.64, 125, 137).

[5] *See In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005,* 21 FCC Rcd. 13299 (2006). The revised order reversed the finding that The Early Show broadcast was indecent and dismissed the complaint against ABC on procedural grounds. *Id.* at 13299, ¶ 1. The order reviewed by the Second Circuit (and subsequently by the Supreme Court) thus contained indecency determinations only as to the two Billboard Music Awards broadcasts.

to exclude fleeting material from the scope of actionable indecency." *Id.* at 179 n.10.

The FCC did not categorically deny that its policy had exempted fleeting content from regulation. But it contended—and continues to contend—that the exemption had been limited to fleeting expletives and had never applied to fleeting images such as the one at issue here. According to the FCC, the *Golden Globes* opinion simply eliminated the exceptional treatment of fleeting expletives and subjected all broadcast content to the same contextual, multi-factor test, in which the material's fleeting nature is but one consideration to be weighed in the balance. Our previous opinion rejected this interpretation. We concluded that, on the contrary, "[i]n the nearly three decades between the Supreme Court's ruling in *Pacifica* and CBS's broadcast of the Halftime Show, the FCC had never varied its approach to indecency regulation based on the format of broadcasted content." *Id.* at 184; *see id.* at 181 ("[T]he Commission—before *Golden Globes*—had not distinguished between categories of broadcast material such as images and words."); *see also id.* at 180 ("Until its *Golden Globes* decision . . . the FCC's policy was to exempt fleeting or isolated *material* from the scope of actionable indecency." (emphasis added)). In our view, fleeting images, like all other fleeting content, were immune from regulation under the pre-*Golden Globes* regime. Accordingly, we believed that if the FCC were right that "*Golden Globes* only addressed expletives, . . . a residual [*per se* exemption] policy on other categories of fleeting material—including all broadcast content other than expletives—remained in effect," and that "subsequent agency action was required to change the fleeting mate-

rial policy as it applied" to these remaining categories. *Id.* at 181.

The FCC had insisted that "any doubts about the historical breadth of its fleeting material policy prior to the Halftime Show" should have been "dispelled" by the FCC's decision in *In re Young Broadcasting of San Francisco, Inc.*, 19 FCC Rcd. 1751 (2004), issued a few days before CBS's Super Bowl broadcast. *CBS*, 535 F.3d at 186. There, the FCC issued a Notice of Apparent Liability for Forfeiture to:

> a morning news show segment in which two performers from a production titled "Puppetry of the Penis" appeared in capes but were otherwise naked underneath the capes. The two men, whose act involved manipulating and stretching their genitalia to simulate various objects, performed a demonstration of their act with the agreement of the show's hosts and at the urging of off-camera station personnel. Although the performance was directed away from the camera, the penis of one performer was fully exposed on camera for less than one second as the men turned away to act out their performance.

Id. (citing *Young Broad.*, 19 FCC Rcd. at 1755-56, ¶¶ 12, 13). The FCC conceded that the offending image was "fleeting" but concluded it was nonetheless indecent given its explicit and pandering qualities. *Young Broad.*, 19 FCC Rcd. at 1755-57, ¶¶ 11-14. In the FCC's view, *Young Broadcasting* should have made clear to CBS that the fleetingness of an offending image would not necessarily immunize the broadcaster from liability.

Our previous opinion found this argument unconvincing. We believed the FCC's action in *Young Broadcasting* was hobbled by the same flaw that afflicted the for-

feiture orders against CBS: it "fail[ed] to acknowledge the existence of [the FCC's] prior policy on fleeting material," instead "read[ing] the policy [of exempting fleeting material] out of existence by substituting new rationales for its prior indecency determinations that had applied the policy." *CBS*, 535 F.3d at 187. Because *Young Broadcasting* was, we believed, an invalid "initial effort to abandon [the FCC's] restrained enforcement policy on fleeting material," *id.*, that policy remained in effect at the time of the Halftime Show. And since the forfeiture orders against CBS similarly "fail[ed] to acknowledge" a change in FCC policy "on fleeting material," they were "unable to comply with the requirement . . . that an agency supply a reasoned explanation for its departure from prior policy." *Id.* at 188 (citing *State Farm*, 463 U.S. at 43, 103 S. Ct. 2856). In sum, *Young Broadcasting* did not alter our conclusion that the FCC's orders violated the APA.

This violation of the APA was not the only flaw we identified in the FCC's orders. Even assuming the FCC's indecency finding had been valid, we would have found "the Commission [had] incorrectly determined CBS's liability for Jackson and Timberlake's Halftime Show performance." *Id.* at 189. Two of the FCC's three arguments for liability were untenable. First, the agency "contend[ed] the performers' intent c[ould] be imputed to CBS under the common law doctrine of *respondeat superior*." *Id.* We concluded, however, that "Jackson and Timberlake were independent contractors, who are outside the scope of *respondeat superior*, rather than employees as the FCC found." *Id.* at 189-98. Second, the FCC argued "because broadcast licensees hold non-delegable duties to avoid the broadcast of indecent material and to operate in the public interest," they are

vicariously liable for the acts of even their independent contractors. *Id.* at 198. This proposition, we believed, could not be reconciled with the First Amendment. "[A]n unwitting broadcaster might be held liable for its independent contractor's negligence in monitoring and maintaining a tower antenna without raising a constitutional question," but "the same cannot be said of imposing liability for the speech or expression of independent contractors." *Id.* at 199. "A broadcast licensee," we explained, "should not be found liable for violating the indecency provisions of [federal law] without proof the licensee acted with scienter. Because the Commission's proffered 'non-delegable duty' theory of CBS's vicarious liability, which functionally equates to strict liability for speech or expression of independent contractors, appears to dispense with this constitutional requirement," we concluded it could "not be sustained." *Id.* at 203.

"As an alternative to vicarious liability, the FCC found CBS directly liable for a forfeiture penalty . . . for failing to take adequate precautionary measures to prevent potential indecency during the Halftime Show." *Id.* According to the FCC, the touchstone under this theory was whether CBS had "acted willfully." *Reconsideration Order,* 21 FCC Rcd. at 6655, ¶ 5. The FCC did "not dispute" that CBS "neither planned Jackson and Timberlake's offensive actions nor knew of the performers' intent to incorporate those actions into their performance." *CBS,* 535 F.3d at 189. But the FCC believed CBS had satisfied the "willfulness" requirement based on the agency's finding that "CBS was acutely aware of the risk of unscripted indecent material" in the Halftime Show, but had nonetheless "consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broad-

cast." *Reconsideration Order,* 21 FCC Rcd. at 6660, ¶ 17.

Without ruling on whether this third theory might ultimately sustain a finding of liability on the facts of this case, we found certain key aspects of the FCC's reasoning "unclear." *CBS,* 535 F.3d at 189. First, we had doubts about whether the agency had "properly applied the forfeiture statute." *Id.* at 203; *see* 47 U.S.C. § 503(b)(1). Under 47 U.S.C. § 503(b)(1)(B), the FCC has authority to order forfeiture penalties upon determining that a person "willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter." Another statutory subsection, § 503(b)(1)(D), authorizes forfeitures for violations of several specific statutory provisions, including the indecency statute, 18 U.S.C. § 1464. *See* 47 U.S.C. § 503(b)(1)(D). Although the FCC's orders sometimes specifically invoked § 503(b)(1)(B), *see, e.g., Forfeiture Order,* 21 FCC Rcd. at 2778, ¶ 36, and its "willfulness" standard appears to represent the agency's interpretation of that subsection's express *mens rea* element, the orders referred in other places to § 503(b) or § 503(b)(1) only generally, without specifying the applicable subsection, *see, e.g., Forfeiture Order,* 21 FCC Rcd. at 2760, ¶ 1 n.1; *Reconsideration Order,* 21 FCC Rcd. at 6655, ¶ 5. Given that § 503(b)(1)(D) expressly authorizes forfeitures for indecency violations, we questioned "whether the statutory scheme permits violations of 18 U.S.C. § 1464 to be penalized by forfeitures issued under section 503(b)(1)(B) instead of, or in addition to, section 503(b)(1)(D)." *CBS,* 535 F.3d at 205.

As noted, our previous opinion determined that "a showing of scienter is constitutionally required to penalize broadcast indecency." *Id.* Although § 503(b)(1)(B) contained an express *mens rea* standard, i.e. willfulness, and § 503(b)(1)(D) did not, we believed both provisions must be interpreted to "set a bar" to liability "at least as high as scienter." *Id.* A key question, then, was what level of scienter was necessary to sustain a penalty for indecent expression. "Where a scienter element is read into statutory text," we observed, "scienter would not necessarily equate to a requirement of actual knowledge or specific intent." *Id.* at 206. Instead, "[t]he presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." *Id.* (quoting *Carter v. United States*, 530 U.S. 255, 269, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000)). Applying this principle, we surmised that recklessness was a sufficiently culpable mental state for purposes of 18 U.S.C. § 1464. "It is likely," we explained, "that a recklessness standard would effectively separate wrongful conduct from otherwise innocent conduct of broadcasters without creating an end-around indecency restrictions that might be encouraged by an actual knowledge or intent standard." *Id.* (internal quotation marks and citation omitted). Moreover, we noted that recklessness had been found to be an adequate scienter standard in other contexts, including First Amendment contexts. *Id.* at 206-07.

The parties here had disputed whether CBS took adequate precautions with regard to the risk of indecency in the Halftime Show. The parties disagreed about whether certain events leading up to the broadcast—including public comments by Jackson's choreog-

rapher that the performance would include "some shocking moments"—indicated a high risk of indecent material. Another point of contention involved the role of video delay technology. Although CBS utilized a five-second audio delay, it did not delay its video broadcast. We found "[b]ecause the Commission carries the burden of showing scienter, it should have presented evidence to demonstrate, at a minimum, that CBS acted recklessly and not merely negligently when it failed to implement a video delay mechanism for the Halftime Show broadcast." *Id.* at 208. Because we found the "record at present" was wanting in this regard, we were "unable to decide whether the Commission's determination that CBS acted 'willfully' was proper in light of the scienter [i.e., recklessness] requirement." *Id.*

Having determined the FCC's enforcement actions here were arbitrary and capricious, our previous decision vacated the forfeiture orders and remanded. Although we recognized the FCC could "not retroactively penalize CBS" for material that was not indecent under FCC policy at the time of broadcast, we explained the agency could still enter a declaratory order on remand, "set[ting] forth a new policy and proceed[ing] with its indecency determination even though a retroactive monetary forfeiture [would be] unavailable." *Id.* at 209. The remand also afforded the agency an opportunity to address the constitutionally required scienter element of the indecency standard.

C.

While the FCC's petition for certiorari in this case was pending, the Supreme Court decided *Fox*. As noted, *Fox* reviewed the Second Circuit's decision invalidating monetary forfeitures issued against Fox and its affiliates

for several unscripted expletives broadcast live during two different Billboard Music Awards ceremonies.[6] The FCC's forfeiture orders for fleeting expletives in *Fox,* unlike its orders penalizing a fleeting image here, "forthrightly acknowledged that [they were breaking] new ground." *Fox,* 129 S. Ct. at 1812. Nonetheless, the Second Circuit had found the agency's explanation for its policy change inadequate. In reviewing this determination, the Supreme Court gave its own account of the FCC's enforcement history.

The Court's chronicle, like ours, began with *Pacifica*'s sanction of George Carlin's "Dirty Words" routine. *Id.* at 1806. The Court explained that "[i]n the ensuing years, the Commission took a cautious, but gradually expanding, approach to enforcing the statutory prohibition against indecent broadcasts." *Id.* Like our previous opinion, *Fox* noted the FCC decided in 1987 that its enforcement power was not limited to "the seven words actually contained in the George Carlin monologue." *Id.* at 1807 (quoting *In re Pacifica Found., Inc.,* 2 FCC Rcd. 2698, 2699, ¶ 12 (1987)). But the Court in *Fox* observed something in the 1987 decisions that we had not mentioned: it found the FCC opinions expanding the scope of the agency's enforcement also

> preserved a distinction between literal and nonliteral (or 'expletive') uses of evocative language. The Com-

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[6] The first incident occurred during the 2002 Awards, "when the singer Cher exclaimed, 'I've also had critics for the last 40 years saying that I was on my way out every year. Right. So f * * * ' em.'" *Fox,* 129 S. Ct. at 1808. The second took place during the 2003 Awards, when Nicole Richie "proceeded to ask the audience, 'Why do they even call it "The Simple Life"? Have you ever tried to get cow s * * * out of a Prada purse? It's not so f * * * ing simple.'" *Id.*

> mission explained that each literal "description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive," but that "deliberate and repetitive use . . . is a requisite to a finding of indecency" when a complaint focuses solely on the use of nonliteral expletives.

Id. (quoting *Pacifica Found.*, 2 FCC Rcd. at 2699, ¶ 13) (alteration in original) (citation omitted).

The Court in *Fox* found the *Golden Globes* decision was "the first time" the FCC declared "that a nonliteral (expletive) use of the F- and S-words could be actionably indecent, even when the word is used only once." *Id.* Because the broadcasts at issue in *Fox* had occurred prior to the *Golden Globes* order, the FCC had "declined to assess penalties." *Id.* at 1812. Accordingly, the indecency determinations in *Fox* did not pose a notice or due process problem, and the Court's majority opinion limited itself exclusively to the question of whether the FCC's explanation for holding fleeting or isolated expletives indecent—which largely echoed the justification proffered in *Golden Globes*—passed muster under the APA.

The Court answered that question in the affirmative. The Court rejected the principle (espoused by the Second Circuit) that "agency action that changes prior policy" requires "a more substantial explanation" than does action in an area previously untouched. *Id.* at 1810. Although "[a]n agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books . . . it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *Id.* at 1811.

Accordingly, the Court concluded an "agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Id.*

Judged under this clarified standard, the FCC orders at issue in *Fox* were not arbitrary and capricious. *Id.* at 1812-19. The FCC acknowledged its change in policy, and the Court found its reasons for including fleeting expletives within the scope of actionable indecency to be "entirely rational." *Id.* at 1812. In making this determination, the Court compared the FCC's policy toward fleeting expletives with its treatment of other offensive material. "It was certainly reasonable," the Court believed, for the agency "to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words, requiring repetitive use to render only the latter indecent." *Id.* The *per se* exemption for fleeting expletives, the Court explained, had been an anomaly:

> When confronting other requests for *per se* rules governing its enforcement of the indecency prohibition, the Commission ha[d] declined to create safe harbors for particular types of broadcasts. The Commission could rationally decide it needed to step away from its old regime where nonrepetitive use of an expletive was *per se* nonactionable because that was at odds with the Commission's overall enforcement policy.

Id. at 1813 (internal citations and quotation marks omitted). Because "[e]ven isolated utterances can be made in pand[ering,] . . . vulgar and shocking manners," the Court found it rational for the FCC to cease providing "a safe harbor for single words" and subject them in-

stead to the agency's general "context-based" test for "patent offensiveness." *Id.* at 1812-13 (internal quotation marks omitted) (second alteration and omission in original).

II.

According to the FCC, *Fox* stands for the proposition that the safe harbor had extended only to isolated expletives, i.e. non-literal language, and not, as we had originally concluded, to all fleeting material. The FCC points to *Fox*'s statement that FCC policy historically subjected "description[s] or depiction[s]" of sexual organs or functions to a contextual standard, reserving a safe harbor only for "nonliteral expletives." *Id.* at 1807 (quoting *Pacifica Found.*, 2 FCC Rcd. at 2699, ¶ 13). Because images are "depictions," the FCC argues, *Fox* tells us that images were not entitled to a safe harbor.

CBS, by contrast, denies that anything in *Fox* undermines our previous conclusion that the FCC's forfeiture orders represented a change in policy. "*Fox*," CBS argues, "does not involve allegedly indecent images, and focuses solely on words uttered." CBS Letter-Brief 6 (Jan. 29, 2010). In CBS's view, *Fox*'s discussion of the 1987 FCC opinion *Pacifica Foundation* is "utterly irrelevant" to the issue before us. *Id.* at 1. In its view, *Fox*'s identification of a distinction between the treatment of literal utterances and nonliteral expletives is merely background information incidental to the Supreme Court's holding and therefore dicta. The FCC, on the other hand, argues the Court's description of the FCC's historic enforcement policy is integral to its holding that the FCC orders in *Fox* complied with the APA.

I believe *Fox*'s distinction between the FCC's historic treatment of different kinds of fleeting material

undermines a key premise of our earlier opinion. Our opinion did not rest on an explicit statement by the FCC that fleeting images would be *per se* exempt from indecency regulation. Instead, we identified FCC decisions that had held certain isolated words immune from the enforcement regime. *See, e.g., CBS,* 535 F.3d at 176 (quoting *WGBH,* 69 F.C.C. 2d at 1254, ¶ 10 n.6). In addition, after reviewing the entirety of the agency's enforcement history up until the Halftime Show, we found "the FCC had never varied its approach to indecency regulation based on the format of broadcasted content." *Id.* at 184. Accordingly, we concluded the FCC's enforcement policy had contained a blanket rule exempting all fleeting material, without qualification, from the indecency standard.

In *Fox,* however, the Supreme Court states that FCC policy did, in fact, make distinctions "based on the format of broadcasted content." As the Court interpreted the FCC's pre-*Golden Globes* enforcement history, "literal 'description[s] or depiction[s] of sexual or excretory functions'" were subject to a multi-factor test and could potentially be found indecent notwithstanding their fleeting or nonrepetitive character, *Fox,* 129 S. Ct. at 1807 (quoting *Pacifica Found.,* 2 FCC Rcd. at 2699, ¶ 13); the safe harbor for fleetingness encompassed only the "use of nonliteral expletives," *id.* "Although the Commission had expanded its enforcement beyond the 'repetitive use of specific words or phrases,' it preserved a distinction between literal and nonliteral (or 'expletive') uses of evocative language." *See id.* at 1807. *Fox* therefore contradicts and undermines our previous holding that FCC enforcement policy embodied a general

exemption for all fleeting material.[7] Moreover, *Fox* describes the narrow safe harbor for fleeting "nonliteral expletives" or "evocative language" as a deviation from the default rule of contextual analysis. The *per se* exemption, *Fox* explains, was "at odds with the Commission's overall enforcement policy." *Id.* at 1813. "When confronting other requests for *per se* rules governing its enforcement of the indecency prohibition, the Commission ha[d] declined to create safe harbors for particular types of broadcasts." *Id.*

In other words, *Fox* identifies contextual analysis as the default policy for all broadcast content, with the narrow exception of nonliteral expletives. Although my colleagues emphasize the omission of any specific discussion of images in *Fox,* our earlier opinion's finding of a safe harbor for fleeting images was premised on a *per se* exemption for fleeting content generally. As *Fox* portrays the FCC's enforcement history, however, no such general policy existed. Instead, the Court concluded that the safe harbor for fleeting nonliteral expletives was an isolated exception rather than an instance of a more general rule. It reasoned that the removal of this

[7] I acknowledge that the allegedly indecent material at issue in *Fox* involved only words, and that *Fox*'s discussion of the FCC enforcement policy is not on its face addressed to the agency's treatment of images. But the Court's account of FCC enforcement policy and history limits the fleeting exemption solely to nonliteral use of "evocative language." See *id.* at 1807. The Court noted that the FCC had rejected other types of exemptions. *See id.* at 1813 ("When confronting other requests for *per se* rules governing its enforcement of the indecency prohibition, the Commission has declined to create safe harbors for particular types of broadcasts."). The structure of the Court's discussion conveys that the Court viewed the exception for nonliteral expletive language as an exception at odds with the FCC's treatment of all other material, including images.

exception allowed the FCC to bring treatment of fleeting indecent language into harmony with its overall enforcement policy. *Fox,* 129 S. Ct. at 1813. The existence of a similar safe harbor for fleeting images would have undermined this key holding of *Fox.* The Court's omission of any discussion of fleeting images strongly suggests that, rather than constituting a *per se* exception, such instances fell within the contextual approach that the Court identified as the "Commission's prior enforcement practice." *Fox,* 129 S. Ct. at 1814. It follows that the FCC's decision to apply a contextual analysis to the fleeting image in this case did not represent a change in policy.

The Court's holding expressly relied on the distinctions it identified in the FCC's historic treatment of different types of fleeting content. In concluding the agency's reasons for eliminating a safe harbor for fleeting "nonliteral expletives" were "entirely rational," the Court explained that "[i]t was certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words, requiring repetitive use to render only the latter indecent." *Id.* at 1812. The very fact that the safe harbor for fleeting expletives was an isolated exception to the FCC's general contextual standard was itself, the Court said, a defensible reason for the policy change announced in *Golden Globes* and *Fox:* "The Commission could rationally decide it needed to step away from its old regime where nonrepetitive use of an expletive was *per se* nonactionable because that was at odds with the Commission's overall enforcement policy." *Id.* at 1813 (internal quotation marks omitted).

As this examination of *Fox* makes clear, the Supreme Court's account of the FCC's pre-*Golden Globes* enforcement policy is not characterization, but central to *Fox*'s holding. Given that account, I would hold that the FCC's indecency determination in this case did not constitute a change of policy—unacknowledged or otherwise—and was not arbitrary and capricious under the APA.[8]

In our earlier opinion, we determined that if the policy change set forth in *Golden Globes* and *Fox* addressed

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[8] Our previous opinion identified several FCC decisions in which the FCC had found that certain fleeting images did not violate the indecency standard. *See CBS,* 535 F.3d at 184-86. We believed these decisions supported our conclusion that FCC policy had afforded a safe harbor to all fleeting material. In none of these cases, however, did the FCC state that fleeting images were *per se* nonactionable. In light of *Fox,* I believe that these decisions are also compatible with a contextual standard. Precisely because the reasoning in many of these opinions is sparse, they may be read as holding not that the fleeting quality of the images was *per se* dispositive but rather that, in the particular context presented, the image's transience outweighed any countervailing factors.

CBS argues that even if fleeting material did not enjoy a *per se* exemption under FCC policy, the agency applied its contextual standard differently here that it had in earlier cases where fleetingness proved dispositive. "[P]atently inconsistent applications of agency standards to similar situations are by definition arbitrary." *South Shore Hosp., Inc. v. Thompson,* 308 F.3d 91, 103 (1st Cir. 2002). But CBS has not shown that the facts in this case are materially indistinguishable from a case in which the agency found no indecency. As we have recognized, "an agency's interpretation of its own precedent is entitled to deference." *CBS,* 535 F.3d at 180 (quoting *Cassell v. FCC,* 154 F.3d 478, 483 (D.C. Cir. 1998)). Given the nature of the FCC's contextual standard, each case is likely to present a unique balance of factors, and I cannot say that the FCC acted unreasonably in determining that the fleetingness of the image here was outweighed by its graphic and pandering qualities.

only fleeting expletives, as the FCC has asserted, then it left in place a safe harbor for all other fleeting content. *CBS,* 535 F.3d at 181. *Fox* held precisely the opposite—that in eliminating a safe harbor for fleeting expletives in *Golden Globes* and *Fox,* the FCC made a reasonable decision to abolish an anomalous exception and establish a uniform contextual test for all allegedly indecent material. The rationale of the FCC decision suggested by our earlier opinion—to eliminate a safe harbor for presumptively less offensive fleeting expletives while maintaining a *per se* exemption for fleeting literal utterances and potentially graphic images—would appear more dubious. In short, our earlier opinion is irreconcilable with the reasoning by which the Supreme Court upheld the FCC orders in *Fox.*

CBS argues that even if the indecency determination here did not constitute a change of policy, the forfeiture penalty must be invalidated because CBS was not sufficiently "on notice" of its potential liability for fleeting images. "Because due process requires that parties receive fair notice before being deprived of property . . . in the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability." *Trinity Broad. of Fla., Inc. v. FCC,* 211 F.3d 618, 628 (D.C. Cir. 2000) (internal quotation marks and alterations omitted). Referring to the 1987 FCC decision quoted by *Fox,* CBS submits that "no fine [in this case] can be justified based on a cryptic reference in dictum that was never discussed or applied for over two decades." CBS Letter-Brief at 18.

CBS's argument implicitly assumes that the 1987 decision was the only indication by the FCC that fleeting images were potentially actionable. But that is not the case. At the very least, the FCC's opinion in *Young Broadcasting,* which involved somewhat similar facts and was issued only days before the Halftime Show, made clear that fleeting images of nudity could be found indecent if presented in a sufficiently explicit and pandering fashion. In issuing its Notice of Apparent Liability in that case, the FCC explained that "although the actual exposure of the performer's penis was fleeting in that it occurred for less than a second," this mitigating factor was outweighed by the explicitness and pandering quality of the image's presentation. *Young Broad.*, 19 FCC Rcd. at 1754-55, ¶¶ 10-12; *see also id.* ("In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent, or, alternatively, removing the broadcast material from the realm of indecency." (footnotes omitted)).[9]

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[9] It is true, as we noted in our previous opinion, that *Young Broadcasting* "makes no distinction, express or implied, between words and images." *CBS,* 535 F.3d at 186. The FCC's opinion suggests that *all* fleeting content is subject to a contextual standard and fails to acknowledge even the limited safe harbor for fleeting expletives identified in *Fox. See Young Broad.*, 19 FCC Rcd. at 1754-55, ¶¶ 10, 12 n.35; *see also Industry Guidance,* 16 FCC Rcd. at 8003, ¶ 10 (stating, without any mention of a *per se* exemption for fleeting expletives, that under the FCC's analytical framework, "[n]o single factor generally provides the basis for an indecency finding"). That *Young Broadcasting* overstated the historic scope of liability, however, does not preclude that case from furnishing adequate notice of broadcast licensees' potential liability for fleeting images; if anything, this error served to underscore the risk of liability. The FCC's forfeiture order here reflected the FCC's understanding that all fleeting material would be subject to a contextual

In our earlier opinion, we acknowledged that *Young Broadcasting* found a nude image indecent despite its fleetingness, but we declined to give effect to the FCC's decision because we believed it amounted to an unacknowledged change in policy in contravention of the APA. *See CBS,* 535 F.3d at 187 (describing *Young Broadcasting* as "the Commission's initial effort to abandon its restrained enforcement policy on fleeting material"). We held, in other words, that *Young Broadcasting* could not have validly changed the FCC's policy with regard to fleeting material and could not therefore have relieved the FCC of the obligation to acknowledge and explain its new policy. As noted, however, I would revisit and revise our APA conclusion on the basis of *Fox* and no longer find that FCC policy historically immunized fleeting material from regulation.[10] The finding of indecency for the fleeting imagery in *Young Broadcasting* put CBS on notice that FCC policy did not afford fleeting images an automatic exemption from indecency regulation.

My colleagues offer an alternate interpretation of *Young Broadcasting* as an application of "an exception within the [*per se*] exception."[11] Majority op. at 133.

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standard. *See Forfeiture Order,* 21 FCC Rcd. at 2766, ¶ 12 (concluding that "even though we find that the partial nudity [broadcast at the end of the Halftime Show] was fleeting, the brevity of the partial nudity is outweighed by the first and third factors of our contextual analysis").

[10] I will not address CBS's constitutional challenge to the indecency standard. *See infra* Section IV.

[11] It bears noting that the FCC in this case made the same finding as in *Young Broadcasting* that "the material was apparently intended to pander to, titillate and shock viewers." *Forfeiture Order,* 21 FCC Rcd. at 2763, ¶ 3, 2766-67, ¶ 13. If there is indeed an "exception within the

They also believe that *Young Broadcasting* could not provide CBS with notice because it was a non-final notice of apparent liability. *Id.* at 130. Both interpretations are inapposite. The most straightforward reading of *Young Broadcasting* reveals the FCC applying a contextual standard rather than a set of nested exceptions, weighing all three factors with no one being determinative.[12] Moreover, despite my colleagues' emphasis on notice, this standard was not a new departure for the FCC. *Young Broadcasting*'s use of a contextual standard is consistent with the FCC's 2001 *Industry Guidance* and the Court's account of FCC enforcement in *Fox*. The case's unexceptional application of an established legal standard was sufficient to alert CBS to the possibility that fleeting images might be deemed indecent.

Following *Fox,* I cannot say that the FCC changed its policy by applying its contextual, three-factor standard to a fleeting image. Therefore I cannot join the majority's holding that the forfeiture orders were arbitrary and capricious under the APA. Under *Young*

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exception" for titillating and shocking content, it would appear to apply in this instance as well.

[12] My colleagues argue that the FCC recognized an exemption in *Young Broadcasting* because it cited prior FCC decisions concluding that the fleetingness of an image tended to weigh in favor of a finding of no liability. Majority op. at 133. But the FCC discussed fleetingness in *Young Broadcasting* in the context of the three-factor contextual standard. *See Young Broad.,* 17 FCC Rcd. at 1755 ("In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent, or, alternatively, removing the broadcast material from the realm of indecency. In this case, we examine all three factors. . . . " (footnote omitted)). It did not state there was *a per se* exception for all fleeting images.

Broadcasting, it was apparent before the Halftime Show that fleeting images could, depending on the context, be deemed indecent. For this reason, CBS was adequately on notice of the policy the FCC applied in this case.

III.

Whether Jackson and Timberlake's performance was indecent is a distinct question from whether CBS can be held liable for the live broadcast of that performance. Because I would uphold the FCC's orders under the APA, the latter question, which we examined in our prior ruling, has heightened importance.

A.

CBS challenges the ability of Congress or the FCC to regulate any indecency on broadcast television within the bounds of the First Amendment. It contends technological change has undercut the traditional rationale for providing lesser protection to broadcasting in relation to other modes of speech. In *Pacifica,* the plurality noted the scarcity of available frequencies and the need for licensing has always subjected broadcasters' speech to greater regulation—including restrictions on speech that is indecent but not obscene. *See Pacifica,* 438 U.S. at 748, 98 S. Ct. 3026 ("[I]t is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of [its] license and [its] forum if the Commission decides that such an action would serve 'the public interest, convenience, and necessity.'"). *Pacifica* noted that broadcast television is uniquely pervasive in American life and uniquely accessible to children. *Id.* at 748-50, 98 S. Ct. 3026. Given the array of media currently available, CBS argues broad-

cast television no longer inhabits the unique and ubiquitous role in American society that the Court found made it deserving of lesser First Amendment protection. Notwithstanding this criticism, the Supreme Court has given no hint it views subsequent technological changes as undermining *Pacifica*'s rationale that the unique characteristics of this medium allows Congress to regulate indecent speech on broadcast television.

B.

After oral argument on remand, we requested supplemental briefing on the proper standard of scienter. The FCC no longer presses theories of vicarious liability and non-delegable duty we rejected in our prior decision. Nor does it appear to contest our prior judgment that CBS can be held liable only if it acted recklessly in broadcasting the offending image. Accordingly, the FCC requests a remand so that it may determine whether CBS acted with the required *mens rea.* CBS disputes the FCC's characterization of the scienter threshold and contends there is no factual basis for a forfeiture penalty.

Congress has authorized the FCC to impose monetary forfeitures in several circumstances. *See* 47 U.S.C. § 503(b)(1). Two provisions are relevant here. Section 503(b)(1)(B) permits a penalty for "willfully or repeatedly fail[ing] to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter," and § 503(b)(1)(D) authorizes a forfeiture for "violat[ing] any provision of section . . . 1464 . . . of Title 18." 47 U.S.C. § 503(b)(1)(B), (D). Although the FCC referenced § 503(b)(1)(D), its forfeiture orders in this case appear to rest solely on the authority of § 503(b)(1)(B). *See,*

e.g., Forfeiture Order, 21 FCC Rcd. at 2776, ¶ 29 n.103 (explaining that because the FCC had found CBS liable under § 503(b)(1)(B), there was no need to "address whether [CBS] could also be held responsible under Section 503(b)(1)(D)").

Our previous opinion expressed skepticism about the applicability of § 503(b)(1)(B) to indecency violations. *CBS,* 535 F.3d at 203-04. I would hold Congress intended the FCC to proceed under § 503(b)(1)(D) when sanctioning indecency violations. "Ordinarily, where a specific provision conflicts with a general one, the specific governs." *Edmond v. United States,* 520 U.S. 651, 657, 117 S. Ct. 1573, 137 L. Ed. 2d 917 (1997). Here, § 503(b)(1)(B) speaks generally of violations of "any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter." Section 503(b)(1)(D), on the other hand, refers specifically to having "violated any provision of section . . . 1464 . . . of Title 18."

The history of the forfeiture statute supports the view that Congress intended § 503(b)(1)(D) as the vehicle to impose forfeitures for airing indecent material. Both forfeiture provisions were originally enacted as part of the same set of amendments to the Communications Act. *See* Communications Act Amendments, 1960, Pub. L. No. 86-752, § 7, 74 Stat. 889, 894. At the time of enactment, § 503(b)(1)(B) could not have applied to indecency violations because 18 U.S.C. § 1464 was the only provision of federal law proscribing indecency; none of the "provisions of th[e] chapter" containing § 503(b)(1)(B), nor "any rule, regulation, or order issued by the Commission under th[at] chapter" addressed the subject of indecency. The FCC has argued that

47 C.F.R. § 73.3999, which was not promulgated until 1988, brought the indecency standard within the scope of § 503(b)(1)(B). But § 73.3999, which is entitled "Enforcement of 18 U.S.C. § 1464," merely establishes the hours of the day when 18 U.S.C. § 1464 will be enforced. Given the statutory history, I believe Congress intended violations of 18 U.S.C. § 1464 to be enforced under 47 U.S.C. § 503(b)(1)(D) and not § 503(b)(1)(B). And since 47 C.F.R. § 73.3999 merely enforces 18 U.S.C. § 1464's substantive standard, it did not serve to bring indecency violations under the authority of § 503(b)(1)(B).

Even if § 503(b)(1)(B) were applicable to indecency actions, I am skeptical that it would authorize a forfeiture in this case. The provision requires a showing that a licensee "willfully or repeatedly" violated a statutory or regulatory standard. According to the statutory definition, "the term 'willful,' when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act." 47 U.S.C. § 312(f). The FCC does not contend that CBS knew that Timberlake would expose Jackson's breast, or intended that display to occur. Instead, the FCC believes CBS's actions were "willful" insofar as the network "consciously and deliberately" failed to take precautions despite the alleged existence of a known or obvious risk that indecent material would be broadcast. But since the act that must be "willful" is, in this context, the violation of 18 U.S.C. § 1464, it would appear that CBS cannot be held liable unless it "consciously and deliberately" broadcast the specific material deemed indecent. The FCC argues the act can be either a commission or omission—here (in the view of the FCC) the failure to take necessary precautions. But even if an

omission can support a finding of a violation of § 503(b)(1)(B), the omission still must be "willful." The reckless omission of "precautions" would seem insufficient to satisfy the willfulness requirement of § 503(b)(1)(B).

Although I would find the FCC's orders relied on inapposite statutory authority, I do not believe this error precludes the FCC from applying § 503(b)(1)(D) on remand. *See WorldCom, Inc. v. FCC,* 288 F.3d 429, 430 (D.C. Cir. 2002) (remanding rulemaking where the FCC had relied on an inapposite statutory provision "[b]ecause there may well be other legal bases for adopting the rules chosen by the Commission"); *see also Castaneda-Castillo v. Gonzales,* 488 F.3d 17, 25 (1st Cir. 2007) ("If the agency decision is flawed by mistaken legal premises, . . . remanding to give the agency an opportunity to cure the error is the ordinary course." (emphasis omitted)); *cf. SEC v. Chenery Corp.,* 332 U.S. 194, 200-01, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947) ("The fact that the [agency] had committed a legal error in its first disposition of the case certainly gave [the prejudiced party] no vested right to receive the benefits of such an order.").

The Supreme Court has directed as a general matter:

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985). There have

been few instances where courts have found "rare circumstances." One such circumstance is "when there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decision-makers or where the absence of formal administrative findings makes such investigation necessary in order to determine the reasons for the agency's choice." *Sierra Club v. Peterson,* 185 F.3d 349, 369 (5th Cir. 1999) (quoting *Nat'l Audubon Soc'y v. Hoffman,* 132 F.3d 7, 14 (2d Cir. 1997)). Of course, remand is not required where a proper application of the correct standard could yield only one possible result. *See George Hyman Constr. Co. v. Brooks,* 963 F.2d 1532, 1539 (D.C. Cir. 1992) ("[W]e find that a remand would be futile on certain matters as only one disposition is possible as a matter of law."). But where "the answer the [agency] might give were it to bring to bear on the facts the proper administrative and statutory considerations" is "[s]till unsettled," remand is the proper course. *Chenery,* 332 U.S. at 200, 67 S. Ct. 1575. As I believe, following *Fox,* the FCC did not act in an arbitrary and capricious manner, whether CBS can be held liable for its broadcast of the Halftime Show is still unsettled.[13] That is the case here; the "function" of applying the proper liability standard to the facts of this case "belongs exclusively to the Commission in the first instance." *Id.*

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[13] Accordingly, I believe, as our prior opinion held, that even if the FCC's forfeiture order were arbitrary and capricious, the FCC could on remand issue a finding of indecency without a civil forfeiture as it did in *Golden Globes. CBS,* 535 F.3d at 209.

C.

1.

Section 503(b)(1)(D), unlike § 503(b)(1)(B), does not contain an express scienter requirement. On remand, both parties agree that scienter is a prerequisite of liability under § 503(b)(1)(D) and 18 U.S.C. § 1464, but they dispute what mental state is required. The FCC contends that recklessness suffices, while CBS insists it can be liable only if it had knowledge the Halftime Show would contain indecent material and it intended to violate the indecency standard.

In most criminal or civil actions for obscenity or indecency, the element of scienter as to the broadcast's content will not be in doubt as "the defendant will necessarily know the contents of his utterances." *United States v. Smith,* 467 F.2d 1126, 1129 (7th Cir. 1972). Scienter will be an issue in forfeitures under § 1464, where, as here, live, unscripted events are broadcast. The broadcaster may not have forewarning of a potentially-indecent unscripted or spontaneous event. Nor might the conduct of a third-party or independent contractor necessarily be imputed to the broadcaster. Live broadcasts, as opposed to scripted or "taped" programming, will always carry the possibility or risk of transmitting indecent material.

Against this backdrop, I believe recklessness is the constitutional minimum standard for scienter when imposing forfeiture penalties. "The presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." *Carter v. United States,* 530 U.S. 255, 269, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000) (internal quotation marks omitted).

Recklessness provides sufficient protection under the First Amendment to speech in similar contexts. *See New York Times Co. v. Sullivan,* 376 U.S. 254, 280, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (allowing the imposition of liability upon a showing that the defendant published a statement with "reckless disregard" of the risk it was false); *see also CBS,* 535 F.3d at 206-07 (citing *Osborne v. Ohio,* 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990)) ("Also instructive here are other cases determining recklessness to be an adequate level of scienter for imposing liability in related First Amendment contexts where speech or expression is restricted based on its content.").[14]

Imposing a higher scienter standard than recklessness, such as the actual knowledge or intent standard urged by CBS, dilutes the duty imposed by Congress in 18 U.S.C. § 1464 and risks creating an end-around indecency restrictions.[15] Such a standard could permit "will-

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[14] At common law, the concept of recklessness could be expressed in a variety of ways. Historically, terms such as malicious or wanton "were used interchangeably with recklessness." David M. Treiman, *Recklessness and the Model Penal Code,* 9 Am. J. Crim. L. 281, 293 (1981).

[15] CBS also argues that the FCC must show it specifically intended to violate the indecency prohibition in § 1464. CBS relies on pre-*Pacifica* case law addressing prosecutions for scripted broadcasts of obscene or indecent material. *See United States v. Smith,* 467 F.2d 1126 (7th Cir. 1972); *Tallman v. United States,* 465 F.2d 282 (7th Cir. 1972); *Gagliardo v. United States,* 366 F.2d 720 (9th Cir. 1966). These cases have limited value as they address criminal prosecutions for scripted content. *See Pacifica,* 438 U.S. at 747 n.25, 98 S. Ct. 3026 (Stevens, J., plurality op.) (differentiating precedents addressing criminal prosecutions and the First Amendment by noting "[e]ven the strongest civil penalty at the Commission's command does not include criminal prosecution"). Furthermore, *Pacifica* did not require the FCC

ful blindness" or allow broadcasters to fail to take reasonably available precautions (such as implementing delay technologies) despite any obvious risks, and then evade responsibility if indecent material is broadcast, claiming they neither intended nor were aware that the indecent material would be broadcast. End runs might also be effected through the use of independent contractors. Accordingly, I do not believe liability for indecent broadcasts requires a showing of actual knowledge, actual awareness, or intent on the part of the broadcaster.[16]

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show specific intent for the civil forfeiture at issue there nor did the Court cite to any of the cases on which CBS relies.

Even under the pre-*Pacifica* cases, this "specific intent" requirement of § 1464 is satisfied if one should have known the utterance or broadcasting of such speech would violate the law. In *Tallman v. United States,* upon which CBS relies, the Seventh Circuit in interpreting § 1464 concluded that "specific intent" is present under the standard traditionally used at common law "if the defendant knew or reasonably should have known that uttering the words he did over the air was a public wrong." 465 F.2d at 288; *see also Smith,* 467 F.2d at 1130 n.2 (citing *Tallman* for the proposition "an appropriate instruction as to specific intent under this statute might be that 'the defendant knew or reasonably should have known that uttering the words he did over the air was a public wrong'"). Even these pre-*Pacifica* precedents addressing criminal prosecutions recite an "objective" or "reasonable person" standard for scienter.

[16] The cases cited by CBS in defense of its proposed *mens rea* standard are inapposite, because in each case Congress had already provided a scienter standard as to some elements of the statutory offense. *See Flores-Figueroa v. United States,* 556 U.S. 646, 129 S. Ct. 1886, 173 L. Ed. 2d 853 (2009); *United States v. X-Citement Video, Inc.,* 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994). In each of these cases, the statute in question contained some mental state language, such as "knowingly," that when read naturally did not appear to modify all the elements in the statute, *see* 18 U.S.C. § 1028A(a)(1); 18 U.S.C. § 2252. The Court only addressed whether the express scienter term applied

2.

The question remains what is the proper standard of recklessness under § 1464. As an alternative argument, CBS contends there is more than one possible definition of recklessness, and the more demanding criminal standard ought to apply here. As the Supreme Court has explained:

> [t]he civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware.

Farmer v. Brennan, 511 U.S. 825, 836-37, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (internal citations omitted); *see also Safeco Ins. Co. of Am. v. Burr,* 551 U.S. 47, 68 n.18, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007) ("Unlike civil recklessness, criminal recklessness also requires subjective knowledge on the part of the offender.").

In my view, the FCC may on remand seek a civil forfeiture under 47 U.S.C. § 503(b)(1)(D), but CBS's alleged liability is predicated on its violation of 18 U.S.C. § 1464, a criminal statute. For this reason, CBS contends the level of scienter cannot vary based on whether the FCC pursues civil remedies or the Department of

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to every element of the statutory offense or whether the term modified a single element of the offense. These cases do not address what mental state requirement should be read into provisions like 47 U.S.C. § 503(b)(1)(D) and 18 U.S.C. § 1464 that contain no *mens rea* language whatsoever.

Justice charges criminal offenses. Notwithstanding the civil character of the forfeiture action, CBS contends it can be held liable for a forfeiture penalty only if it were criminally reckless—if it disregarded an unjustifiably high risk of broadcast indecency of which it was aware. *Farmer*, 511 U.S. at 836-37, 114 S. Ct. 1970. The FCC counters that in *Pacifica* the Supreme Court already interpreted the standard for civil forfeitures for indecency violations independent from § 1464's criminal applications, making clear the civil recklessness standard applies.

I believe a civil standard best comports with Congressional intent. In 1960, Congress expanded the civil forfeiture provisions of the Federal Communications Act to allow the FCC greater flexibility to regulate the broadcast medium. Before the 1960 Act, the FCC's regulatory tools were limited to revoking the broadcaster's license or asking the Department of Justice to commence criminal proceedings.[17] Communication Act Amendments, 1960, H.R. Rep. No. 86-1800, at 17, 1960 U.S.C.C.A.N. 3516, 3532. The FCC asked Congress to "provide it with an effective tool in dealing with violations where revocation or suspension does not appear to be appropriate." *Id.* The House Report explaining the amendments indicated that to achieve the desired flexibility the civil forfeiture provisions should be read as independent from other enforcement provisions. The Report states "the FCC will not be precluded from ordering a forfeiture merely because another type of sanc-

[17] Prior to 1960, § 503 only authorized forfeitures for accepting rebates or offsets that deviated from the tariff rates for the transmission of wire or radio messages. Federal Communications Act of 1934, Pub. L. No. 73-416, § 503, 48 Stat. 1064, 1101 (1934).

tion or penalty has been or may be applied to the licensee or permittee." *Id.*

The most telling argument in favor of a civil standard is the Supreme Court's opinion in *Pacifica.* As noted by the FCC, the plurality in *Pacifica* recognized that Congress intended the civil provisions of the Communications Act to be interpreted and applied apart from the criminal provisions. The plurality stated in footnote 13:

> The statutes authorizing civil penalties incorporate § 1464, a criminal statute. See 47 U.S.C. §§ 312(a)(6), 312(b)(2), and 503(b)(1)(E) (1970 ed. and Supp. V). But the validity of the civil sanctions is not linked to the validity of the criminal penalty. The legislative history of the provisions establishes their independence. As enacted in 1927 and 1934, the prohibition on indecent speech was separate from the provisions imposing civil and criminal penalties for violating the prohibition. Radio Act of 1927, §§ 14, 29, and 33, 44 Stat. 1168 and 1173; Communications Act of 1934, §§ 312, 326, and 501, 48 Stat. 1086, 1091, and 1100, 47 U.S.C. §§ 312, 326, and 501 (1970 ed. and Supp. V). The 1927 and 1934 Acts indicated in the strongest possible language that any invalid provision was separable from the rest of the Act. Radio Act of 1927, § 38, 44 Stat. 1174; Communications Act of 1934, § 608, 48 Stat. 1105, 47 U.S.C. § 608. Although the 1948 codification of the criminal laws and the addition of new civil penalties changed the statutory structure, no substantive change was apparently intended. *Cf. Tidewater Oil Co. v. United States*, 409 U.S. 151, 162, 93 S. Ct. 408, 34 L. Ed. 2d 375 [(1972)]. Accordingly, we need not consider any

> question relating to the possible application of § 1464 as a criminal statute.

Pacifica, 438 U.S. at 739 n.13, 98 S. Ct. 3026. Under *Pacifica,* the level of scienter to prove a violation of § 1464 need not be the same for both criminal and civil applications. Of course, the respective penalties are different. Violation of 18 U.S.C. § 1464 carries a statutory maximum penalty of up to two years imprisonment and a fine of up to $250,000 for individuals and $500,000 for organizations. 18 U.S.C. §§ 1464, 3571(b)-(c). At the time of the alleged violation,[18] a forfeiture under 47 U.S.C. § 503(b)(1) carried a maximum forfeiture of [$] 27,500 for each station. *Reconsideration Order,* 21 FCC Rcd. at 6654, ¶ 2. As the FCC found twenty stations aired the indecent material in the Halftime Show, it imposed a forfeiture on CBS of $550,000 (twenty violations at the maximum $27,500 per violation). *Id.*

CBS relies on *FCC v. American Broadcasting Co.*, 347 U.S. 284, 74 S. Ct. 593, 98 L. Ed. 699 (1954). In *ABC*, the FCC desired to ban "give away" contests where radio and television stations would distribute prizes to listeners and viewers who called in and correctly answered a question or solved a puzzle. 347 U.S. at 286-87, 74 S. Ct. 593. To this end, the FCC promulgated regulations interpreting 18 U.S.C. § 1304, which prohibits broadcasting "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part

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[18] In 2006, Congress added 47 U.S.C. § 503(b)(2)(C) which raised maximum penalties for those found "to have broadcast obscene, indecent, or profane language" to $325,000 per violation, not to exceed an aggregate of $3 million for any single act of failure to act. Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491, 491 (2006).

upon lot or chance." *Id.* at 285, 74 S. Ct. 593. The FCC defined games of chance to include "give away" contests. *Id.* at 286, 74 S. Ct. 593. Prior to adopting the regulation, the FCC had failed to persuade the Department of Justice to pursue criminal actions against such programs and had urged Congress unsuccessfully to amend the law. *Id.* at 296, 74 S. Ct. 593. Additionally, the Post Office, which administered a similar statute involving the mails, and the Department of Justice had interpreted the same statutory language to exclude the type of program the FCC wished to regulate. *Id.* at 294, 74 S. Ct. 593. The Court concluded "[t]here cannot be one construction for the Federal Communications Commission and another for the Department of Justice." *Id.* at 296, 74 S. Ct. 593; *see also Leocal v. Ashcroft,* 543 U.S. 1, 11-12 n.8, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004); *United States v. Thompson/Center Arms Co.,* 504 U.S. 505, 506-07, 112 S. Ct. 2102, 119 L. Ed. 2d 308 (1992) (plurality).[19] CBS contends we must construe § 1464 in

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[19] In *Leocal v. Ashcroft,* 543 U.S. 1, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004), when interpreting the definition of "crime of violence" contained in 18 U.S.C. § 16 as applied to a civil deportation proceeding, the Court noted that if the definition were ambiguous it would apply the rule of lenity used in criminal proceedings because the statute "has both criminal and noncriminal applications." *Id.* at 12 n.8, 125 S. Ct. 377. Similarly, in *United States v. Thompson/Center Arms Co.,* the Court had to define when a firearm was "made" to determine if a tax on the "making" was owed to the government. 504 U.S. 505, 506-07, 112 S. Ct. 2102, 119 L. Ed. 2d 308 (1992) (plurality). To resolve the issue, the Court applied the rule of lenity because "although it is a tax statute that we construe now in a civil setting, the [statute] has criminal applications." *Id.* at 517, 112 S. Ct. 2102; *see also id.* at 523, 112 S. Ct. 2102 (Scalia, J., concurring in judgment).

the exact same manner as if this were a criminal prosecution.[20]

There is some merit in CBS's position that, as a general matter, a statute should be read consistently in its criminal and civil applications. But in *ABC* (and also *Leocal* and *Thompson*), the Court construed the literal text of a statute, finding no good reason to apply different constructions for civil actions and criminal prosecutions. In this case, there is no text to interpret. The statutes (18 U.S.C. § 1464 and 47 U.S.C. § 503(b)(1)(D)) are silent on scienter; as a consequence, we must apply the constitutionally required level of scienter. Furthermore, "[i]f [Congress's] intent is made plain, it is unnecessary for us to refer to other canons of statutory construction, and indeed we should not do so." *In re Am. Home Mortg. Holdings, Inc.*, 637 F.3d 246, 254-55 (3d Cir. 2011). As I have noted, the Supreme Court in *Pacifica* concluded Congress intended the specific provision at issue to be interpreted for civil forfeitures without regard to its application in criminal prosecutions. *Pacifica*, 438 U.S. at 739 n.13, 98 S. Ct. 3026. Accordingly, I would read into the statute only the scienter necessary in this context for a civil forfeiture order—the objective standard of civil recklessness.

3.

If we were to reject, as I think we should, CBS's arguments under the APA, at issue would be whether the standard of recklessness for a civil forfeiture under § 503(b)(1)(D) is subjective (knowledge or awareness of

[20] Justice Stewart's dissent raised the argument CBS raises here that the statute must be read in keeping with *ABC*, *Pacifica*, 438 U.S. at 780 n.8, 98 S. Ct. 3026 (Stewart, J., dissenting), a proposition the plurality rejected in footnote 13.

an unjustifiably high risk of harm) or objective (should have been aware of such a risk). I believe an objective standard for recklessness is sufficient to separate wrongful from otherwise innocent conduct.[21] Adoption of a subjective standard, namely that for live television broadcasts the broadcaster must know or be aware indecency will occur, risks encouraging deliberate ignorance or failure to use available preventive measures such as delay technology.

In addition to comporting with Congress's intent in creating the civil forfeiture provision of § 503(b)(1)(D), a civil recklessness standard provides protection commensurate with indecency's constitutional status. The First Amendment requires we apply "only that *mens rea*

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[21] In practice the distinction between a subjective or an objective standard may not always result in differences on liability. The law has traditionally allowed the use of objective evidence to prove a party's subjective state of mind. *See Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1090 (3d Cir. 1988) ("[O]bjective circumstantial evidence can suffice to demonstrate actual malice."). The Supreme Court has noted:

> We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind. *See* [Roscoe] Pound, *The Role of the Will in Law*, 68 Harv. L. Rev. 1 [1954]. *Cf. American Communications Ass'n, C.I.O., v. Douds*, 339 U.S. 382, 411, 70 S. Ct. 674, 94 L. Ed. 925 [1950]. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.

Smith v. California, 361 U.S. 147, 154, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959); *see also Colorado v. Hall*, 999 P.2d 207, 220 (Colo. 2000) ("In addition to the actor's knowledge and experience, a court may infer the actor's subjective awareness of a risk from what a reasonable person would have understood under the circumstances.").

which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States,* 530 U.S. 255, 269, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000) (quoting *X-Citement Video,* 513 U.S. at 72, 115 S. Ct. 464). The issue presents a difficult question of constitutional law, as the plurality in *Pacifica* noted when it stated, "the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context" and noted the Court "tailored its protection" of speech "to both the abuses and the uses to which it might be put." *Pacifica,* 438 U.S. at 747 & n.24, 98 S. Ct. 3026. At a minimum, the FCC must show CBS had a sufficient level of culpability to justify a civil forfeiture. Because displays of indecent material "surely lie at the periphery of the First Amendment concern" an objective standard is appropriate. *Fox,* 129 S. Ct. at 1819 (quoting *Pacifica,* 438 U.S. at 743, 98 S. Ct. 3026). Furthermore, an objective standard is not without precedent.[22]

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[22] In other areas such as use of "fighting words"—words inherently likely to provoke a violent reaction—the Court has looked at what reaction a reasonable speaker would expect from the utterance of her speech. *See Chaplinsky v. New Hampshire,* 315 U.S. 568, 573, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). Recent Supreme Court cases have reaffirmed that some categories of speech are entitled to lesser or even no constitutional protection. There are traditional, though limited, categories where the First Amendment has not protected those who would "disregard these traditional limitations." *United States v. Stevens,* — U.S. —, 130 S. Ct. 1577, 1584, 176 L. Ed. 2d 435 (2010) (internal quotation omitted). These categories (including obscenity) "are 'well-defined and narrowly limited classes of speech, the prevention and punishment

It is not sufficient to show that CBS should have acted differently or was merely negligent. Inadvertence or common negligence will not suffice. CBS contends there is no evidence to support a finding that it acted recklessly. But this is a question of proof committed to the FCC in the first instance. CBS and the FCC continue to contest critical issues. One consideration is the availability of delay technology. CBS and the FCC dispute whether video delay technology could have been implemented at the time of the incident. They also dispute whether CBS should have anticipated that indecent material could be broadcast—e.g., whether Jackson's choreographer's "shocking moments" prediction should have put CBS on notice. Since the FCC appears to have based its forfeiture orders on an erroneous—or, at the least, unclear—standard of liability, after rejecting CBS's APA arguments, I would remand to allow the agency to measure CBS's conduct against the proper *mens rea* standard.

IV.

In addition to the arguments addressed, CBS contests the FCC's forfeiture orders on the ground that the agency's multi-factor, contextual indecency standard is unconstitutionally vague. In its most recent decision in

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of which have never been thought to raise any Constitutional problem.'" *Id.* (quoting *Chaplinsky,* 315 U.S. at 571-72, 62 S. Ct. 766).

Unlike obscenity, indecency enjoys some constitutional protection, but of a lesser kind. *See Pacifica,* 438 U.S. at 748, 98 S. Ct. 3026 ("Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."). An objective standard comports with this peripheral status.

Fox, the United States Court of Appeals for the Second Circuit endorsed this view, *see Fox Television Stations, Inc. v. FCC,* 613 F.3d 317 (2d Cir. 2010), and CBS encourages us to follow suit. In *Fox,* however, the constitutional question was the primary, if not exclusive, issue left in the case after the Supreme Court's remand. Here, it may be possible to dispose of the action without resolving the constitutional question.

"A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Nw. Indian Cemetery Protective Assn.,* 485 U.S. 439, 445, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988). Therefore, I would not address the constitutional issue.

V.

For the foregoing reasons, I would grant the petition for review, vacate the FCC's forfeiture orders, and remand for consideration of the forfeiture order under the proper standard.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

File No. EB-04-IH-0011
NAL/Acct. No. 200432080212

IN THE MATTER OF COMPLAINTS AGAINST VARIOUS TELEVISION LICENSEES CONCERNING THEIR FEBRUARY 1, 2004 BROADCAST OF THE SUPER BOWL XXXVIII HALFTIME SHOW

Adopted: May 4, 2006
Released: May 31, 2006

ORDER ON RECONSIDERATION

By the Commission: Commissioner Adelstein concurring in part, dissenting in part, and issuing a statement.

I. INTRODUCTION

1. In this *Order on Reconsideration*, issued pursuant to section 405(a) of the Communications Act of 1934, as amended (the "Act"), and section 1.106(j) of the Commission's rules,[1] we deny the Petition for Reconsideration of Forfeiture Order ("Petition") filed by CBS Broadcasting

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[1] 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(j).

Inc. ("CBS") in this forfeiture proceeding.[2] The CBS *Petition* seeks reconsideration of our decision to impose a forfeiture of $550,000 against CBS Corporation, as the ultimate parent company of the licensees of the television stations involved in this proceeding, for the violation of 18 U.S.C. § 1464 and the Commission's rule regulating the broadcast of indecent material.[3] We find that CBS has failed to present any argument warranting reconsideration of our *Forfeiture Order*.

II. BACKGROUND

2. This proceeding involves the broadcast of the halftime show of the National Football League's Super Bowl XXXVIII over the CBS owned-and-operated television stations in the CBS Network (the "CBS Stations") on February 1, 2004, at approximately 8:30 p.m. Eastern Standard Time.[4] Super Bowl XXXVII was the most-watched program of the 2003-2004 television season and had an average of audience of 89.8 million viewers.[5] At the end of the musical finale of the halftime show, Justin Timberlake pulled off part of Janet Jackson's bustier,

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[2] Petition for Reconsideration of Forfeiture Order by CBS, dated April 14, 2006 ("Petition").

[3] See *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Forfeiture Order, FCC 06-19 at 1 ¶ 1 & n.2, 2006 FCC LEXIS 1267 (rel. March 15, 2006) ("*Forfeiture Order*") (citing 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999).

[4] The CBS Stations were identified in the Appendix to the *Forfeiture Order*. The *Forfeiture Order* noted that viewers in markets served by each of the CBS Stations filed complaints with the Commission concerning the February 1, 2004 broadcast of the Super Bowl XXXVIII halftime show. *See Forfeiture Order* at 1 ¶ 1, n.4 and Appendix.

[5] VNU Media and Marketing Guide for Super Bowl, (http://www.nielsenmedia.com/newsreleases/2005/2005SuperBowl.pdf).

exposing one of her breasts to the television audience. After conducting an investigation, the Commission issued a Notice of Apparent Liability (the "*NAL*") finding the ultimate parent company of the licensees of the CBS Stations[6] apparently liable for violating 18 U.S.C. § 1464 and section 73.3999, the Commission's rule regulating the broadcast of indecent material.[7] The *NAL* proposed a forfeiture in the amount of $27,500, the statutory maximum forfeiture amount, against each of the CBS Stations, for a total forfeiture amount of $550,000.[8]

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[6] The *NAL* was directed to Viacom, Inc., which was the ultimate corporate parent company of the licensees in question at that time. As of December 31, 2005, Viacom, Inc. effected a corporate reorganization in which the name of the ultimate parent company of the licensees of the CBS Stations was changed to CBS Corporation. For the sake of clarity, we generally refer to the petitioner herein as CBS and to its corporate parent company as CBS Corporation, even for periods preceding the reorganization. As part of the reorganization, certain non-broadcast businesses, including MTV Networks, were transferred to a new company named Viacom Inc. At the time of the violations, however, the CBS Stations and MTV Networks were corporate affiliates under common control.

[7] *See Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability, 19 FCC Rcd 19230, n.4 (2004) ("*NAL*") (citing 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999). The *NAL* found that there was no evidence that any licensee of any non-CBS-owned television station was involved in the selection, planning or approval of the apparently indecent material and that such licensees could not have reasonably anticipated that the CBS Network's production of a prestigious national event such as the Super Bowl would contain material that included the on-camera exposure of Ms. Jackson's breast. *Id.*, 19 FCC Rcd at 19240 ¶ 25. Accordingly, the *NAL* did not propose a forfeiture by any such licensee.

[8] *Id.*, 19 FCC Rcd at 19240 ¶ 24.

3. CBS submitted its *Opposition* to the *NAL* on November 5, 2004.[9] CBS argued that the material broadcast was not actionably indecent under the Commission's existing case law.[10] CBS further argued that the broadcast of Jackson's breast was accidental, and therefore not "willful" under section 503(b)(1)(B) of the Act.[11] CBS further argued that the Commission's indecency framework is unconstitutionally vague and overbroad, both on its face and as applied to the halftime show.[12]

4. In the *Forfeiture Order*, released on March 15, 2006, the Commission rejected CBS's arguments and imposed the $550,000 forfeiture proposed in the *NAL*. The *Forfeiture Order* held that, under the Commission's contextual analysis, the broadcast of the halftime show was patently offensive as measured by contemporary community standards for the broadcast medium. With respect to the first principal factor in the Commission's contextual analysis, the Commission rejected CBS's arguments relating to whether the broadcast of partial nudity was premeditated or planned by the broadcaster. Rather, the Commission held that the focus of the first factor of the analysis is whether the broadcast was graphic and explicit from the viewer's or listener's point of view. The Commission found that the video broadcast of an image of a woman's breast is graphic and explicit if it is clear and recognizable to the average viewer, as was the case here.[13] With respect to the second principal

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[9] Opposition to Notice of Apparent Liability for Forfeiture by CBS, dated November 5, 2004 ("*Opposition*").

[10] *Opposition* at 13-34.

[11] *Id.* at 35-38.

[12] *Id.* at 44-77.

[13] *Forfeitue Order* at 6-7 ¶ 11.

factor in the Commission's contextual analysis, the Commission agreed with CBS that the image in the halftime show was fleeting, but the Commission held that the brevity of the partial nudity was not dispositive.[14] The third principal factor is whether the material is pandering, titillating or shocking. The Commission clarified that the broadcaster's or performer's state of mind is not relevant here. Rather, this factor focuses on the material that was broadcast and its manner of presentation.[15] The Commission rejected CBS's claim that the segment in question merely involved an accidental, fleeting glimpse of a woman's breast. Rather, the segment was part of a halftime show that featured "performances, song lyrics, and choreography [that] discussed or simulated sexual activities."[16] These sexually suggestive performances culminated in the spectacle of Timberlake tearing off a portion of Jackson's clothing to reveal her naked breast during a highly sexualized performance while he sang "gonna have you naked by the end of this song."[17] The Commission stated: "Clearly, the nudity in this context was pandering, titillating and shocking to the viewing audience."[18] The Commission therefore held that, on balance, the graphic, explicit, pandering, titillating and shocking nature of the material outweighed its brevity in the contextual analysis.[19]

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[14] *Id.* at 7 ¶ 12.

[15] *Id.* at 7 n.44.

[16] *NAL*, 19 FCC Rcd at 19236 ¶ 14.

[17] *Forfeiture Order* at 8 ¶ 13.

[18] *Id.*

[19] *Id.* at 8 ¶ 14.

5. The *Forfeiture Order* also rejected CBS's claim that the violation was accidental rather than willful under section 503(b)(1) of the Act. The Commission dismissed CBS's attempts to define "willful" in accordance with criminal law and copyright law cases, holding that the definition of the word appearing in section 312 of the Act applies to this case.[20] Specifically, the Commission held that CBS Corporation acted willfully because it consciously and deliberately broadcast the halftime show, whether or not it intended to broadcast nudity, and because it consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast.[21] The Commission further held that CBS Corporation was vicariously liable under the doctrine of *respondeat superior* for the willful actions of the performers and choreographer that it selected and over whose performance it exercised extensive control.[22]

6. The *Forfeiture Order* also rejected CBS's constitutional arguments, concluding that the Commission's indecency standard has been upheld in a series of decisions and has not been invalidated by subsequent developments in the legal or technological landscape.[23] The *Forfeiture Order* further held that the upward adjustment of the forfeiture amount to the statutory maximum was supported by the factors enumerated in section 503(b)(2)(D) of the Act, particularly the circumstances involving the preparation, execution and promotion of the halftime show by CBS Corporation, the gravity of

[20] *Id.* at 8-9 ¶ 15.

[21] *Id.* at 8-13 ¶¶ 15-22.

[22] *Id.* at 13-15 ¶¶ 23-25.

[23] *Id.* at 17-19 ¶¶ 30-35.

the violation in light of the nationwide audience for the indecent broadcast, CBS Corporation's ability to pay the forfeiture, and the need for strong financial disincentives to violate the Act and the indecency rule.[24] The *Forfeiture Order* also rejected CBS's claim that it lacked prior notice that a brief scene of partial nudity might result in a forfeiture. The Commission noted that in *Young Broadcasting*,[25] the Commission released a Notice of Apparent Liability proposing the statutory maximum forfeiture amount in a case involving a brief display of male frontal nudity shortly before the subject Super Bowl broadcast.[26]

III. DISCUSSION

7. *Indecency Analysis*. We reject CBS's contention that the Commission misapplied the test for broadcast indecency in the *Forfeiture Order*. In doing so, we note that CBS does not contest the Commission's determination that the material at issue here falls within the subject matter scope of our indecency definition because it "describe[d] or depict[ed] sexual or excretory organs or activities."[27] Rather, CBS takes issue with our conclusion that the Super Bowl halftime show was patently offensive as measured by contemporary community standards for the broadcast medium. While many of the arguments raised by CBS are repetitive of those set forth in its Opposition to the *NAL* and rejected by the

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[24] *Id.* at 15-16 ¶¶ 26-28.

[25] *Young Broadcasting of San Francisco, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1751 (2004) ("*Young Broadcasting*") (response pending).

[26] *Id.* at 16-17 ¶ 29.

[27] *Forfeiture Order* at 5 ¶ 9.

Commission in the *Forfeiture Order*, we do address two new objections raised in the *Petition*.

8. First, CBS disputes the Commission's conclusion that "a video broadcast image of [Justin] Timberlake pulling off part of [Janet] Jackson's bustier and exposing her bare breast, where the image of the nude breast is clear and recognizable to the average viewer, is graphic and explicit,"[28] arguing that this conclusion is inconsistent with determinations reached by the Commission in the *Omnibus Order*.[29] No such inconsistency exists; rather, a comparison of the Super Bowl halftime show to the material addressed in the *Omnibus Order* highlights the critical importance that the Commission places on the particular content and context in evaluating indecency complaints.

9. CBS's attempt to compare Ms. Jackson's "wardrobe malfunction" to the material addressed in the *Omnibus Order* from *The Today Show* and *The Amazing Race 6* is unavailing. In both of those cases, the complained—of material did not constitute the focus of the scene in question. During *The Today Show*, a man's penis was briefly exposed at a considerable distance while he was shown being pulled from raging floodwaters in news footage. As the Commission indicated, "the overall focus of the scene [was] on the rescue attempt, not on the man's sexual organ."[30] As a result, many viewers may not have even noticed the briefly ex-

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[28] *Id.* at 6 ¶ 11.

[29] Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, FCC 06-17, 2006 FCC LEXIS 1265, released March 15, 2006 ("*Omnibus Order*").

[30] *Omnibus Order* at ¶¶ 215.

posed penis. Similarly, during *The Amazing Race 6,* while two contestants were leaving a train in Budapest, the camera shot briefly showed the phrase "Fuck Cops!" spray-painted in small white letters on the side of a train. Again, the graffiti was in the background, did not constitute the focus of the scene, and would not likely have been noticed by the average viewer.[31] Under these circumstances, we found that the material at issue was not graphic or explicit.

10. In the Super Bowl halftime show, by contrast, the exposure of Ms. Jackson's breast was the central focus of the scene in question.[32] As we stated in the *Forfeiture Order*, "Jackson and Timberlake, as the headline performers, are in the center of the screen, and Timberlake's hand motion ripping off Jackson's bustier draws the viewer's attention to her exposed breast."[33] Furthermore, even though CBS claims that "this action occurred only after the shot moved away from a close-up to a long shot," Jackson's breast is nonetheless "readily discernable" and the natural focus of viewers' attention.[34] As Jackson and Timberlake were the headline performers on stage at that time, it would have been hard for someone looking at the television screen not to notice that he ripped off her clothing to expose her breast. We therefore reject CBS's theory that most viewers did not notice the exposure of Jackson's

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[31] *See Omnibus Order* at ¶¶ 189-92.

[32] As such, we note that the Commission's treatment of the Super Bowl halftime show is consistent with our evaluation of the brief exposure of a penis in *Young Broadcasting*.

[33] *Forfeiture Order* at 6 ¶ 11.

[34] *See id.*

breast.[35] We also reject CBS's repeated attempt to conflate the first and second factors of the Commission's contextual analysis. While we acknowledge that the exposure of Jackson's breast was relatively brief, this does not alter the fact that it was explicit.[36] For all of these reasons, we reaffirm our conclusion that the televised

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[35] In support of its claim that "the event became recognizable as nudity to most people only because they actively searched for images after the fact," CBS cites the facts that Janet Jackson was the most searched term on Google in February 2004 and that the end of the Super Bowl halftime show became the most TiVoed moment in the history of digital video recorders, *Petition* at 5, n.7. This evidence, however, does not provide support for CBS's theory. Given the widespread media coverage of the Super Bowl halftime show, it should come as no surprise that public interest in Jackson skyrocketed in the aftermath of the incident, thus causing many people to search for information about her using Google. While some of these searches may have been conducted by individuals wishing to see images from the halftime show, it is entirely speculative to suggest that many of these individuals: (1) had watched the halftime show; but (2) did not realize at the time that Jackson had exposed her breast. Similarly, the fact that the end of the Super Bowl halftime show was the most TiVoed moment in the history of digital video recorders lends no support to CBS's theory. There are many reasons why viewers might have replayed the exposure of Jackson's breast —not the least of which is that viewers clearly saw the image and were truly shocked. For CBS to suggest that the fact that the Super Bowl halftime show was the most TiVoed moment in history demonstrates that people watching the broadcast at the time were confused about what had happened has no basis in the evidence. For example, before Super Bowl XXXVIII, the most replayed moment in TiVo history had been the kiss shared by Britney Spears and Madonna during the 2003 MTV Video Music Awards, and it was not unclear at the time whether those two singers had actually kissed. *See* Ben Charny, "Janet Jackson Still Holds TiVo Title," September 29, 2004 (http://news.com.com/Janet+Jackson+still+holds+ TiVo+title/2100-1041_3-5388626.html).

[36] *See Young Broadcasting*.

image of Timberlake tearing off Jackson's clothing to reveal her bare breast was explicit.[37]

11. Second, CBS maintains that the Commission misconstrued the third prong of our contextual analysis. Tellingly, CBS does not directly dispute the Commission's conclusion that the material was presented in a pandering, titillating and shocking manner. At the conclusion of a halftime show filled with sexual references, Timberlake and Jackson performed a duet of the song "Rock Your Body" in which Timberlake repeatedly grabbed Jackson, slapped her buttocks, and rubbed up against her in a manner simulating sexual activity, all the while proclaiming, among other things: "I wanna rock your body." Then, as the Commission stated in the *Forfeiture Order*, the performance "culminated in the spectacle of Timberlake ripping off a portion of Jackson's bustier and exposing her breast while he sang 'gonna have you naked by the end of this song.'"[38]

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[37] To the extent that CBS attempts to compare, for purposes of explicitness, the exposure of Jackson's breast during the Super Bowl halftime show to the brief exposure of an infant's naked buttocks on *America's Funniest Home Videos*, *see Petition* at 5, we seriously question CBS's grasp of contemporary community standards. We also note that the Commission found the footage from *America's Funniest Home Videos* "somewhat explicit" but that factor was outweighed in that case by the scene's brevity and the absence of any shocking, pandering, or titillating effect on the audience. *Omnibus Order* at ¶ 226. Moreover, CBS's comparison of the Super Bowl halftime show to the display of a "portion of the side of [a] maid's breast" in material previously considered by the Commission is obviously inapposite as far more than a portion of the side of Jackson's breast was displayed during her duet with Timberlake. *See Petition* at 3, n.3.

[38] *Forfeiture Order* at 8 ¶ 13.

12. Understandably, given these facts, CBS does not make any effort to argue that the material was not presented in a pandering, titillating, and shocking manner. Instead, CBS argues that the Commission should have examined whether CBS *intended* to pander, titillate, or shock the audience, rather than the manner in which the material was actually presented. CBS fundamentally misunderstands the contextual analysis employed by the Commission. In evaluating whether material is indecent, we examine the material itself and the manner in which it is presented, not the subjective state of mind of the broadcaster.[39] Indeed, under the test proposed by CBS, the same material presented in the same manner and context could be indecent on one occasion but not indecent on another if the broadcasters in question had differing intents in airing the material. CBS suggests no legal or public policy reason why the Commission should be compelled to undertake such a fruitless analysis.

13. In this instance, it is clear that the material was presented in a pandering, titillating, and shocking manner. In this regard, we strongly dispute CBS's assertion that the exposure of Jackson's breast was "exactly" the same as a broadcast where a woman's dress strap breaks and accidentally reveals her breast.[40] In this

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[39] Contrary to CBS's assertion, *see Petition* at 7, n. 10, the Commission in *Young Broadcasting* used the same approach that we have employed in this case. In *Young Broadcasting*, the Commission concluded that "the *manner of presentation* of the complained—of material . . . was pandering, titillating, and shocking." *Young Broadcasting*, 19 FCC Rcd at 1757 (2004) (emphasis added). Among other things, the Commission pointed to the fact that the broadcast included comments made by off-camera station employees urging performers from "Puppetry of the Penis" to conduct a nude demonstration.

[40] *See Petition* at 7.

case, at the conclusion of a highly sexualized performance in which Timberlake, among other things, rubbed up against Jackson in a manner simulating sexual intercourse and implored her to "do that ass-shakin' thing you do," Timberlake ripped off a portion of Jackson's clothing, thus exposing her breast, while singing "gonna have you naked by the end of this song." To claim that this material is no more pandering or titillating than an incident where a woman's dress strap accidentally breaks, thus revealing her breast for a second, utterly ignores the far different contexts of each situation.

14. We also once again reject CBS's general argument that the imposition of a forfeiture here "would be contrary to contemporary community standards for the broadcast medium" because "available information shows that the community at large was not upset about the Super Bowl broadcast."[41] In light of the public uproar following the Super Bowl halftime show, we believe that it is CBS, and not the Commission, that is out of touch with the standards of the American people. Moreover, while we continue to reject the use of third-party polls as determinative in our assessment of contemporary community standards for the broadcast medium and our analysis in this order does not rely upon any third-party polls, we do not accept CBS's argument that "available information shows that the community at large was not upset about the Super Bowl broadcast."[42] The polls cited by CBS do not indicate whether the Super Bowl broadcast was patently offensive under contemporary community standards for the broadcast me-

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[41] *Petition* at 9.

[42] *Petition* at 9.

dium.[43] Moreover, we note that other survey information suggests that most Americans were indeed offended

[43] The surveys cited by CBS in its *Petition* highlight the difficulties associated with relying on third-party public opinion polls in assessing whether material is patently offensive as measured by contemporary community standards for the broadcast medium. Most significantly, the questions asked by pollsters are often not aligned with the issues we must resolve in determining whether broadcast material is indecent under the statute and our rule. For example, the Kaiser Family Foundation survey cited by CBS did not ask respondents whether or not they found the broadcast of the Super Bowl halftime show finale to be offensive. Rather, they were asked about a quite different matter: how concerned they were about the effect of the "Janet Jackson incident" on their own children. Indeed, the fact that 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" shows an astoundingly high level of concern about the impact of a single program on their own families, especially given that not all of the respondents even had children who watched the Super Bowl halftime show. Contrary to the suggestion of CBS, it certainly does not show that the community at large was "not upset about the Super Bowl broadcast." *Petition* at 9. Similarly, the Associated Press/Ipsos poll cited by CBS does not appear to have asked respondents whether or not they found the broadcast of the finale of the Super Bowl halftime show to have been offensive. Rather, the survey appears to have asked the conclusory question of whether the Timberlake/Jackson stunt was an illegal act, even though there is no evidence that poll respondents were informed before answering the question of the legal standard for broadcast indecency. *See* Poll: Janet's Revelation No Crime, February 21, 2004, www. cbsnews.conm/stories/2004/02/02/entertainment/printable597184.shtml. (We note that the poll is proprietary, and CBS does not provide any information concerning precisely what was asked to elicit the poll responses.) In sum, we view the results of polls and surveys in the indecency context with care and a measure of skepticism because survey results in this area can easily be skewed by the phraseology of the questions, and those questions are often not on point with the issues we must resolve in determining whether broadcast material is indecent under the statute and our rule.

by the Super Bowl halftime incident and did not believe that it was appropriate broadcast material.[44] Further, we note that while CBS now claims that the exposure of Jackson's breast was not patently offensive, it conceded otherwise shortly after the incident. For example, testifying before the House Energy and Commerce Committee, Viacom's President and Chief Operating Officer stated that "everyone at CBS and everyone at MTV was shocked and appalled . . . by what transpired" and maintained that the material "went far beyond what is acceptable standards for our broadcast network."[45] Similarly, at the same hearing, the Commissioner of the NFL said that he was "deeply disappointed and of-

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[44] For example, when specifically asked by survey researchers whether the $550,000 forfeiture proposed by the FCC against CBS was appropriate in this case, a majority of Americans responded either that the FCC had handled the case appropriately or that the Commission's proposed sanction was not harsh enough. *See* "Americans Geared Up for 'Ad Bowl' 2005", February 4, 2005, (http://www.comscore.com/press/release.asp?press=554) (44 percent of Americans agree that the FCC handled the Super Bowl halftime incident appropriately while another 12 percent felt that the Commission should have done more to punish CBS and the NFL). Moreover, a survey conducted by Opinion Dynamics Corporation also reveals that the majority of the American people think that CBS and MTV showed a lack of respect for the American people in airing the Super Bowl halftime show. *See* "Could Election 2004 Be as Close as 2000?" (February 5, 2004) (http://www.foxnews.com/story/0,2933,110675,00.html) (56 percent of Americans agree that CBS and MTV demonstrated a lack of respect for the American people with the Janet Jackson-Justin Timberlake halftime show during the Super Bowl).

[45] *Hearings Before the Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce of the House of Representatives on H.R. 3717*, Serial No. 108-68 (February 11, 2004) at 37 (statement of Mel Karmazin).

fended by the inappropriate content of the show."[46] Finally, we reject CBS's argument that the Commission generally does not evaluate material using contemporary community standards for the broadcast medium. As we have stated before, "We rely on our collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium."[47]

15. In sum, we reaffirm our conclusion in the *Forfeiture Order* that "the Super Bowl XXXVIII halftime show contained material that was graphic, explicit, pandering, titillating, and shocking and, in context and on balance, was patently offensive under contemporary community standards for the broadcast medium and thus indecent."[48] As we found in the *Forfeiture Order*, "[a]though the patently offensive material was brief, its brevity is outweighed in this case by the first and third factors in our contextual analysis."[49]

16. *Whether Violation Was "Willful."* Seeking to absolve itself of responsibility for the Super Bowl halftime show broadcast, CBS challenges the Commission's finding that the indecency violation was willful because of both CBS's own conduct and its vicarious liability for the willful actions of the performers under the doctrine of

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[46] *Id.* at 30 (statement of Paul Tagliabue).

[47] *Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Recd 5022, 5026 (2004).

[48] *Forfeiture Order* at ¶ 14.

[49] *Id.*

respondeat superior. We conclude that there is no basis to reconsider our decision on either ground.

17. CBS contends that the "only question" in determining whether it is legally responsible for "willfully" violating the Act and the Commission's rules is whether it "intended for Ms. Jackson to bare her breast as part of a broadcast that CBS aired."[50] The Commission disagrees. Not only is that not the "only question," it is not the question at all. CBS acted willfully because it consciously and deliberately broadcast the halftime show and consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast.[51] The record shows that CBS was acutely aware of the risk of unscripted indecent material in this production, but failed to take adequate precautions that were available to it to prevent that risk from materializing.[52] Under these circumstances, the Commission was justified in finding CBS responsible for the indecent broadcast based on its conscious and deliberate omissions even if it did not intend for Ms. Jackson to bare her breast.[53]

18. While defending its "meticulous efforts to ensure the performance adhered to broadcast standards and that no unforeseen incidents or departures from script occurred,"[54] and dismissing the record evidence on which the Commission relied, CBS fails to address several important facts cited by the Commission. For ex-

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[50] *Petition* at 12.

[51] *Forfeiture Order* at 8-13 ¶¶ 15-22.

[52] *Id.*

[53] *See* 47 U.S.C. § 312(f)(1).

[54] *Petition* at 14.

ample, CBS does not explain in its *Petition* why it was not alarmed by, and did not investigate, the news item posted on MTV's website before the show in which Jackson's choreographer predicted that Jackson's performance would include some "shocking moments."[55] By CBS's own account, the management of both MTV and Viacom were aware of the claims but apparently did nothing to investigate them, preferring instead to remain in the dark based on implausible assumptions regarding their meaning.[56] We found unconvincing CBS's previous assertions that MTV management believed that the "shocking moments" quote referred to Timberlake's "surprise" appearance, and that Viacom personnel who reviewed the story dismissed it as hyperbole common in the music industry. As we explained in the *Forfeiture Order*, it seems dubious that Timberlake's appearance would be described as "shocking" when MTV included his name in the on-screen credits before the show.[57] Similarly, CBS says nothing about the fact that a question posed by another halftime performer to MTV staff about the length of the broadcast delay was recognized as having "scary" implications—presumably because it signaled that a performer might be contemplating a script departure and was wondering what he might be able to get away with.[58] And CBS does not dispute that the show's sponsor, the NFL, raised specific concerns about Timberlake's scripted line "gonna have you naked

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[55] *Forfeiture Order* at 10 ¶ 19.

[56] *See Opposition* at 7-8.

[57] *See Forfeiture Order* at 12 n.74.

[58] *Forfeiture Order* at 10 ¶ 19; Con. App. 6.

by the end of this song," which anticipated the stunt resulting in the broadcast nudity.[59]

19. CBS dismisses as irrelevant the fact that it learned the morning of the show of plans to use tearaway cheerleading outfits for dancers in another halftime performance in connection with a scripted line ("I wanna take my clothes off") that is markedly similar to Timberlake's line that immediately preceded the tearaway of Jackson's bustier (and had, incidentally, worried the NFL). CBS claims that this "reveals that, in carefully examining the costumes before the show, CBS reinforced its prohibition on reveals or other stunts that could go wrong and implicate indecency concerns."[60] But CBS does not say whether in "carefully examining the costumes before the show" it noticed that Jackson's bustier was constructed so that the cups could easily be torn away.[61] Nor does it address whether the parallel lyrics noted by the Commission ("I wanna take my clothes off"/"gonna have you naked by the end of this song") caused it any concern. In fact, CBS does not explain at all how it "reinforced its prohibition on reveals or other stunts that could go wrong and implicate indecency concerns."[62]

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[59] *Forfeiture Order* at 10 ¶ 19; Con. App. at 5.

[60] *Petition* at 15-16.

[61] *Id.* *See also id.* at 14 ("CBS double-checked with Ms. Jackson's staff there would be no alterations in her performance as scripted, including any involving wardrobe"). *See also* "Jackson's halftime stunt fuels indecency debate," USAToday.com, February 2, 2004, http://www.usatoday.com/sports/football/super/2004-02-02-jackson-halftime-incident_x.htm ("Close-ups of the costume, posted on the Internet, appear to reveal snaps around that part of the bustier.").

[62] *Petition* at 15-16.

20. These should have served as warnings signs of the risk of visual as well as audio departures from script, yet CBS does not explain why its "meticulous efforts" did not include further investigation or an adequate delay mechanism.[63] It also fails to explain why it did not take the simple measure at the outset of requiring that MTV's agreements with the performers obligate them to conform to the script and to CBS's broadcast standards and practices.[64]

21. Regarding the evidence that it does address, CBS complains that the Commission has taken evidence out of context or inflated its significance, but the record suggests otherwise. For example, it takes issue with the Commission's characterization that MTV was seeking to "push the envelope" in its halftime production, but counters only with the argument that MTV did not use that term to mean pushing the bounds of propriety in terms of sexually provocative content.[65] But the Commission's characterization is its own, and is well-founded based on the entirety of the record. MTV clearly intended for the show to be sexually provocative and repeatedly made decisions in an effort to push the show in that direction. Moreover, the fact that the NFL had to rein in MTV when it felt the show was heading in too risqué a direction suggests that MTV was in fact trying to push the envelope of propriety, without regard to whether MTV chose to use that term.[66]

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[63] *See* para. 22 *infra* regading CBS's decision to implement a 5-second delay.

[64] *Forfeiture Order* at ¶ 20.

[65] *See Petition* at 14-15.

[66] *See Forfeiture Order* at 10 ¶ 18. *See also* Con. App. 1, 5.

22. CBS also disputes our conclusion that it made a calculated decision to rely on a five-second audio delay even though it was aware of the risk of visual deviations from the script that could not be blocked with a five-second delay. It asserts that this did not reflect a "calculated risk" but rather simply conformance with standard industry practice, and that a video delay was "entirely unprecedented, and the technique had to be specially engineered after the Super Bowl incident."[67] It also claims that the NFL was concerned only about audio, not visual, departures from the script.[68] Contrary to CBS's contention, however, the record indicates that the NFL's expressed concerns were not limited to audio deviation,[69] and, perhaps even more importantly, that CBS/MTV understood that the risks were not limited to audio deviations as well.[70] Furthermore, if the standard industry delay practice was inadequate to alleviate the concerns under the circumstances, then CBS was obligated to do more.[71] We note that this was not a typical broadcast; it was the most-watched television program of the year and millions of families and children were expected to be in the audience.

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[67] *Petition* at 15.

[68] *Id.* at n.24.

[69] The NFL's concern about the lyrics "I am going to get you naked by the end of this song" can most reasonably be understood as a concern that the performers might act out the lyrics. There did not appear to be any particular cause for concern that the performers might insert profanity into that line any more than any other line.

[70] *See* Con. App. 5, 8.

[71] Notwithstanding CBS's protestations to the contrary, delaying a live broadcast long enough to block visual indecency does not appear to pose major technical challenges to a company such as CBS.

23. Holding CBS responsible for the indecent broadcast under these circumstances is not tantamount to imposing strict liability, as CBS contends, because the finding of willfulness is based on CBS's knowledge of the risks and its conscious and deliberate omissions of the acts necessary to address them. As we stated in the *Forfeiture Order*, this approach is consistent with the statutory definition of willfulness,[72] and it is particularly appropriate here given the nondelegable nature of broadcast licensees' responsibility for their programming.

24. We find CBS's arguments concerning our application of the doctrine of respondeat superior equally unpersuasive. CBS's assertion that the Commission applied "unusually strict rules" of vicarious liability in the Forfeiture Order is inaccurate.[73] The Commission applied traditional agency principles, which "ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment."[74] Under these principles, the FCC concluded that Jackson, Timberlake and Jackson's choreographer were Viacom/CBS employees for purposes of determining whether CBS is vicariously liable for their conduct here, and that their actions were within the scope of their employment.[75] CBS's assertion that

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[72] 47 U.S.C. §§ 312(f)(1), 503(b)(1).

[73] *Petition* at 16 (internal quotes omitted).

[74] *Forfeiture Order* at 13 ¶ 23, quoting *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003) (citation omitted).

[75] *Id.* at 13-15 ¶¶ 24-25. This decision was consistent with *Holley*. In that case, the Supreme Court held that, absent a statutory basis, vicarious liability could not be imposed based solely on the right to control. Rather, evidence was also needed that the employee acted in the scope

the Commission "seeks to impose nontraditional vicarious liability" appears to be founded on the three's alleged status "as independent contractors, not employees."[76] The factors on which CBS relies, however, are not strongly indicative of independent contractor status in the circumstances before us, and CBS does not dispute the Commission's finding on the decisive control factor.

25. The Commission properly treated CBS's right to control the halftime show as the most significant test of its relationship with the performers. Courts look to numerous factors in determining a hired party's status under common law agency principles.[77] "Though no single factor is dispositive, the greatest emphasis should be placed on the first factor—that is, on the extent to which the hiring party controls the manner and means by which the worker completes his or her assigned tasks."[78] In addition, the relative weight of com-

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of employment. *See Meyer v. Holley*, 537 U.S. at 286. Here, the Commission determined that the performers were both subject to CBS's control and acting in the scope of their authority.

[76] *Petition* at 17.

[77] *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989), citing Restatement (Second) of Agency § 220(2) (1957) (Restatement).

[78] *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 114 (2nd Cir. 2000) ("The first factor is entitled to this added weight because, under the common law of agency, an employer-employee relationship exists if the purported employer controls or has the right to control both the result to be accomplished and the manner and means by which the purported employee brings about that result.") (internal quotes and citations omitted). *See id.* at 114-15 (listing authorities). *See also* Restatement § 220(1) cmt. D ("control or right to control the physical conduct of the person giving service is important and in many

mon law factors also varies according to the legal context in which the agency issue arises,[79] and the control factor is particularly important in the vicarious liability context because the root issue is where responsibility lies for preventing the risk of harm to third parties.[80]

26. CBS does not dispute the Commission's finding that the halftime show performance was subject to exacting control by Viacom/CBS. However, its suggestion that it exercised no more control than necessary "to ensure a proper result or end-product of the work"[81] belies the evidence that every aspect of the performance, including the exact time, length, location, material, set, script, staging, and wardrobe, was subject to the control of Viacom/CBS through its corporate affiliate MTV.[82] Viacom/CBS was not commissioning a sculpture for its lobby or hiring workers to install a floor covering, as were the hired parties in the cases it cites.[83] Rather, it

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situations is determinative" of whether that person is an employee or independent contractor).

[79] *See, e.g.*, *id.* at 116.

[80] *See* Restatement § 219(1) cmt. a ("Bearing in mind the purpose for fixing the categories, it may be said that a servant is an agent standing in such close relation to the principal that it is just to make the latter respond for some of his physical acts resulting from the performance of the principal's business.").

[81] *Petition* at 17.

[82] *Forfeiture Order* at 13-14 ¶ 24. *See Lorenz Schneider Co. v. NLRB*, 517 F.2d 445, 451 (2nd Cir. 1975) ("the more detailed the supervision and the stricter the enforcement standards, the greater the likelihood of an employer-employee relationship").

[83] *See Petition* at 18, n.31 and accompanying text (relying on *Community for Creative Nonviolence v. Reid*, 490 U.S. 730, 752-53 (1989) (sculptor was an independent contractor under the work-for-hire doctrine) and *Carpet Exch. Of Denver, Inc. v. Indus. Claim Appeals Office*,

was producing the Super Bowl halftime show in order to attract a large nationwide audience to a CBS network program and promote the brand of its corporate affiliate MTV.[84] Viacom/CBS developed the creative concepts for the show, scripted every word uttered on stage, and reviewed every article of clothing worn by the performers.[85] CBS's reliance on *Community for Creative Non-Violence v. Reid* and *Chaiken v. VV Publishing Corp*. is misplaced because the extent of control exercised by the hiring parties in those cases was not remotely comparable to this situation.[86] *Reid* is also a work-for-hire copyright case in which factors related to compensation and

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859 P.2d 278, 281 (Colo. App. 1993) (workers who installed floor covering purchased by company's customers were not employees for purposes of state worker's compensation law)). CBS cites the *Carpet Exch. Of Denver, Inc*. case for the proposition that "independent contractors, though 'subject to control sufficient to ensure that the end resulted contracted for is reached, are not subject to control over the[ir] means and methods." As discussed herein, however, in this case the performers were subject to extensive control over their means and methods.

[84] *See* CBS Response, App. C at Bates stamped pgs. 312, 355-57, 370.

[85] *Forfeiture Order* at 13-14 ¶ 24. *See* CBS Response, App. C. at Bates stamped pgs. 318, 452, 459-69, 518-19.

[86] *See Reid*, 490 U.S. at 753 ("Apart from the deadline for completing the sculpture, Reid had absolute freedom to decide when and how long to work."); *Chaiken v. VV Publishing Corp.*, 907 F. Supp. 689, 699 (S.D.N.Y. 1995) ("As an experienced reporter, Friedman controlled the manner in which the article was written—including the selection of a topic, research plan, and sources—without any guidance from the *Voice*. *Voice* editors reviewed the article only after Friedman completed a draft, and the editors subsequently made few substantive changes.").

benefits are generally accorded more weight than they are entitled to in other legal contexts.[87]

27. In this context, the contractual terms related to compensation and benefits cited by CBS are not strongly indicative of independent contractor status.[88] CBS was obligated to ensure that its broadcast programming served the public interest, and was not free to confer this obligation on another by contract.[89] Likewise, CBS's contention that the performers were "highly skilled" does not meaningfully cut in its favor. Courts applying common law agency principles have not hesitated to hold entertainers and artists to be employees of the parties that hire them.[90] We recognize that some of

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[87] As the Second Circuit has explained, special consideration of such factors "may make sense in the copyright work-for-hire context because, under the copyright statute, workers and employees are free to allocate intellectual property rights by contract." *Eisenberg*, 237 F.3d at 117. If *Reid*'s weighing of factors applied in the vicarious liability context, however, firms could devise compensation packages to opt out of tort liability. *Compare id.* (declining to accord presumptive significance to benefits and tax treatment in determining whether a female warehouse worker was an employee under anti-discrimination laws; "[w]hile the rights to intellectual property can depend on contractual terms, the right to be treated in a non-discriminatory manner does not depend on the terms of any particular contract.").

[88] *Petition* at 17.

[89] *See Forfeiture Order* at ¶ 16. *Cf. Eisenberg*, 237 F.3d at 117 (placing special weight on the extent to which the hiring party controlled the "manner and means" by which the worker completes her assigned tasks, rather than benefits and tax treatment factors, in anti-discrimination context because special consideration of benefits and tax treatment factors "would allow workers and firms to use individual employment contracts to opt out of the anti-discrimination statutes.").

[90] *See Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 87 (2nd Cir. 1995) (sculptors held to be employees despite their "artistic freedom and

the common law factors are not indicative of agency. Again, however, the relative weight of common law factors varies according to the legal context in which the agency issue arises. The central issue here is the parties' relationship for the specific purpose of imposing vicarious liability for the performers' actions in that performance that were harmful to the public (rather than for copyright, workers' compensation, anti-discrimination or other purposes). In this context, the Commission properly concluded that the evidence clearly demonstrating Viacom/CBS's right to control the halftime show performance was decisive.[91]

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skill"); *Jack Hammer Assoc., Inc. v. Delmy Productions, Inc.*, 499 N.Y.S. 2d 418, 419-20 (1st Dep't 1986) (actor in musical play); *Challis v. National Producing Co.*, 88 N.Y.S.2d 731 (3d Dep't 1949) (circus clown); *Berman v. Barone*, 88 N.Y.S.2d 327, 328 (3d Dep't 1949) (ballet dancer and variety artist). *See also Landman Fabrics, a div. of Blocks Fashion Fabrics, Inc.*, 160 F.3d 106, 113 (2nd Cir. 1998) (evidence would support a holding that artist who developed a fabric design was an employee in copyright context where, *inter alia*, artist was highly skilled but hiring party controlled the artist's work to the smallest detail). As the Commission noted, the contracts contain choice-of-law provisions specifying New York law. *Forfeiture Order* at 14 ¶ 25 n.87.

[91] CBS notes that Jackson's, Timberlake's, and Duldalao's contracts "were with a production company, not CBS or MTV," but fails to point out the significance of this fact. Examination of the record reflects that Jackson's and Timberlake's contracts were with "FRB Productions, Inc.," and Duldalao's contract was with "Remote Productions, Inc." Neither FRB nor Remote is identified in CBS's Response, but they appear to be creatures of MTV. MTV executives generated, reviewed, and signed the contracts on behalf of FRB and Remote. *See, e.g.*, CBS Response, App. C at Bates stamped pgs. 154-71, 257-61, 359-63, 2160-61, 2341. At least one document in the record specifies that Remote is "a wholly owned subsidiary of MTV Networks," *id.* at Bates stamped p. 2352, and another document suggests that MTV executives treated FRB as interchangeable with Remote. *See id.* at Bates stamped p. 2148.

28. CBS's assertion that the performers' actions were outside the scope of authority conferred by its agreements with them also lacks merit.[92] As the Commission explained, their conduct is fully attributable to CBS if it was "incident to the performance rather than 'an independent course of conduct intended to serve no purpose of the employer.'"[93] Here, the actions at issue were part of the performance for which Jackson and Timberlake were hired. Furthermore, examination of the record reflects that the costume reveal was intended to serve Viacom/CBS's overarching entertainment goal of providing a spectacular finale.[94] Accordingly, the Commission correctly concluded that Jackson and Timberlake were within the scope of their authority under common law agency principles.

29. *Amount of Forfeiture*. In its *Petition*, CBS asks the Commission to reduce the amount of the forfeiture imposed on it for three reasons. We find each of these arguments to be unpersuasive.

30. First, CBS maintains that "[t]o the extent that any O&O station was not the subject [of] a complaint about the halftime show, its fine should be rescinded and the total forfeiture reduced proportionately."[95] However, as we stated in the *Forfeiture Order*, "viewers in markets served by each of the CBS Stations filed complaints with the Commission concerning the February 1,

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[92] *Petition* at 19.

[93] *Forfeiture Order* at 14-15 ¶ 25, quoting Restatement (Third) of Agency § 7.07 (T.D. No.5 2004).

[94] *See Forfeiture Order* at 10 ¶¶ 18-19; CBS Response, App. B at Bates stamped pgs. 130, 135.

[95] *Petition* at 19-20.

2004 broadcast of the Super Bowl XXXVIII halftime show."[96] Accordingly, it was appropriate for the Commission to impose a forfeiture on all stations owned by CBS. To the extent that CBS is suggesting that the Commission will only impose a forfeiture in response to complaints that specifically mention a station's call letters, it misunderstands the enforcement policy announced by the Commission in the *Omnibus Order*. Under that policy, it is sufficient that viewers in markets served by each of the CBS Stations filed complaints with the Commission identifying the allegedly indecent program broadcast by the CBS Stations.

31. Second, CBS claims that the Commission has not provided a "logically consistent explanation" for why forfeitures were imposed on those stations owned by CBS but not on affiliates owned by others.[97] However, as we explained in the *Forfeiture Order*, CBS's culpability for the broadcast of indecent material in this case was far greater than that of other owners of CBS stations.[98] "CBS admits that it was closely involved in the production of the halftime show, and that its MTV affiliate produced it."[99] Under these circumstances, it was within the Commission's enforcement discretion to impose fines on the stations owned by CBS but not on affiliates owned by others. While CBS attempts to distance its wholly-owned television stations from its wholly-owned affiliate supervising the halftime production, it does not dispute that both entities were part of the same

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[96] *Forfeiture Order* at 1 ¶ 1, n.4.

[97] *Petition* at 20.

[98] *Forfeiture Order* at 15 ¶ 27.

[99] *Id.*

corporate structure, responsible to the same corporate parent.

32. Third, CBS argues that the forfeiture should be reduced because of its "long record of compliance with broadcast standards" and because it did not "intentionally flout[] FCC rules."[100] We disagree. Looking at all of the relevant factors enumerated in section 503(b)(2)(D) of the Act, we continue to believe that the maximum statutory forfeiture is warranted given the particular circumstances of this case. In particular, given CBS's size and resources, we stand by our belief that a lesser forfeiture "would not serve as a significant penalty or deterrent."[101] Indeed, we note that the amount of the forfeiture in this case is less than one-quarter of the $2.3 million that CBS charged for a single 30-second advertisement aired during its broadcast of Super Bowl XXXVIII.[102] While CBS observes that indecency findings may also have a deterrent effect because of the potential negative consequences on a company's licenses, it remains the case that monetary forfeitures are a central tool used by the Commission to ensure compliance with our rules.[103] Moreover, as we noted in the *Forfeiture Order*, the gravity of this violation is

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[100] *Petition* at 21.

[101] *Forfeiture Order* at 16 ¶ 28.

[102] "Television Keeps NFL On Top," *Fort Worth Star Telegram* at 1A (January 30, 2004) ("The cost for a 30-second advertisement is $2.3 million, or roughly the cost of a $77,000 luxury car each second.").

[103] Contrary to CBS's suggestion in its *Petition*, this does not mean, of course, that the Commission will always impose a maximum forfeiture anytime that a large company violates our rules. However, consistent with section 503(b)(2)(D) of the Act, a company's "ability to pay" is a factor that weighs in our analysis.

heightened because the indecent material was broadcast to "an enormous nationwide audience,"[104] a fact that CBS does not dispute. Indeed, the material in question was part of the most-watched program of the entire 2003-2004 television season by far,[105] and this fact heightens the gravity of the violation in this case. CBS's broadcast of Super Bowl XXXVIII was viewed by an average of 89.8 million people.[106] By contrast, the second most-watched program of the 2003-2004 television season, the series finale of *Friends*, only drew an average of 52.5 million viewers.[107] In addition, according to Nielsen Media Research, Super Bowl XXXVIII was the top-ranked program of the 2003-2004 television season among children of all age groups: 2 to 5; 6 to 11; and 12 to 17.[108] Finally, we continue to believe that the particular nature of this violation weighs in favor of the statutory maximum forfeiture. In this case, unsuspecting viewers were confronted during the Super Bowl halftime show, which was not rated as content inappropriate for children,[109] by a highly sexualized performance in which Timberlake tore off a piece of clothing to reveal Jackson's breast while singing "gonna have you naked by the end of this song." While CBS now argues that this conduct was not patently offensive, we disagree.

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[104] *Forfeiture Order* at 16 ¶ 28.

[105] *See* "Viewer Track: Top-rated programs of 2003-04" (www.tvb.org/rcentral/viewertrack/trends/top2003.asp).

[106] *See* VNU Media and Marketing Guide for Super Bowl, (http://www.nielsenmedia.com/newsreleases/2005/2005SuperBowl.pdf).

[107] *See* Joal Ryan, "52 Million Friends See Off 'Friends'" (May 7, 2004) (http://att.eonline.com/News/Items/0,1,14056,00.html).

[108] *See* Nielsen Media Research, TV National People Meter Data 9/22/2003 - 5/26/2004.

[109] Indeed, the program was not rated at all.

33. *Constitutional Issues*. We also adhere to our rejection of CBS's facial and as-applied constitutional challenges to the imposition of a forfeiture in this case.

34. The Commission's authority to enforce the statutory restrictions against the broadcast of indecent programming during times of day in which children are likely to be in the audience was upheld against constitutional challenge by the Supreme Court in *Pacifica* more than a quarter-century ago, and has been reaffirmed since then.[110] Under our standards implementing this settled precedent, as we have explained, CBS's broadcast was actionably indecent.

35. We reject CBS's contention that the *Forfeiture Order* abandons the policy of restraint upon which *Pacifica* was based.[111] The Order does no such thing. On the contrary, the Commission remains "sensitive to the impact of our decisions on speech."[112] In this case, however, CBS broadcast "the offensive spectacle of a man tearing off a woman's clothing on stage in the middle of a sexually charged performance" during the halftime show of one of the nation's most heavily-watched sporting events, to a vast nationwide audience that included numerous children.[113] As we have found, the broadcast was "planned by CBS and its affiliates under circumstances where they had the means to exercise control

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[110] *See, e.g.*, *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-51 (1978); *Action for Children's Television v. FCC*, 58 F.3d 654, 669-70 (D.C. Cir. 1995) (en banc) (*ACT III*), *cert. denied*, 516 U.S. 1043 (1996).

[111] *Petition* at 23.

[112] *Forfeiture Order* at 19 ¶ 35.

[113] *Id.* at 28.

and good reason to take precautionary measures."[114] Under the circumstances, we fail to see how the decision in *Pacifica*—or any other consideration—requires us to refrain from exercising our indecency enforcement powers to impose a forfeiture in this case.

36. We also reject CBS's argument that *Pacifica* limits the Commission's authority "to penalize isolated and fleeting transmissions of indecent material."[115] On the contrary, in upholding the Commission's power to proceed against material that involved the repeated use of expletives, the Court in *Pacifica* expressly left open the issue of whether an isolated expletive might also be held indecent, and did not even address a brief display of televised nudity.[116] In addition, the Commission has never itself held, as CBS suggests,[117] that a brief display of televised nudity could not be found actionably indecent. To the contrary, in *Young Broadcasting* (released shortly before the Super Bowl halftime show was broadcast), we made clear that a televised display of male frontal nudity, though comparably brief, constituted an apparent violation of our indecency rules.[118]

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[114] *Id.* at 19 ¶ 35.

[115] *Petition* at 23 n.42.

[116] *Pacifica*, 438 U.S. at 750; *see Golden Globes*, 19 FCC Rcd 4975, 4982 ¶ 16 (2004).

[117] *Petition* at 24.

[118] 19 FCC Rcd 1751, 1755 ¶ 12 (2004). In *WGBH Educ. Found.*, 68 FCC 2d 1250 (1978), we granted the renewal of a public television station license renewal in the face of complaints based on the station's broadcast of programs—including "Monty Python's Flying Circus"—that allegedly contained "nudity and/or sexually-oriented material." 69 FCC2d at 1250-51 ¶ 2. In holding that the complaints did not make out a case that the station's continued operation would be inconsistent with

37. Finally, we reiterate our rejection of CBS's contention that changes in law and technology have undermined *Pacifica* and its progeny.[119] CBS asserts that "*every* court decision that applies to *every* medium that allows targeted blocking of content has struck down broadcast-type indecency regulation."[120] But those same decisions recognize that there remain "special justifications" that allow for more extensive government regulation of broadcast speech.[121] Among them is that broadcasting continues to have "a uniquely pervasive presence in the lives of all Americans,"[122] a presence that is particularly evident where highly-anticipated annual national programming events—epitomized by the Super Bowl—are concerned. As for technological changes, while the V-chip provides a technological tool not available when *Pacifica* was decided, older televisions do not contain a V-chip,[123] and on newer sets the evidence shows that

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the public interest, *id.* at 1255, ¶ 13, we nowhere suggested that the televised broadcast of nudity could never be actionably indecent.

[119] *Petition* at 25.

[120] *Id.* (emphasis in original). (citing *United States v. Playboy Entmt. Group, Inc. v. FCC*, 529 U.S. 803 (2000); *Reno v. ACLU*, 521 U.S. 844 (1997); and *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727 (1996)).

[121] *Reno*, 521 U.S. at 868. *See Playboy*, 529 U.S. at 815. *See also ACT III*, 58 F.3d at 660 (recognizing that "radio and television broadcasts may properly be subject to different—and often more restrictive—regulation than is permissible for other media under the First Amendment").

[122] *See ACT III,* 58 F.3d at 659 (quoting *Pacifica*, 438 U.S. at 748).

[123] As of January 1, 2000, all television sets manufactured in the United States or shipped in interstate commerce with a picture screen of thirteen inches or larger must be equipped with a "V-chip" system that can be programmed to block violent, sexual, or other programming that parents do not wish their children to view. *Technical Requirements to*

most parents are unaware of the V-chip's existence or the manner of its operation.[124] The V-chip also depends on accurate program ratings,[125] but as the Commission explained in the *Forfeiture Order*, sporting events are not included in the V-chip ratings system,[126] and neither the Super Bowl nor its halftime show were given V-chip ratings in this case. Nor does CBS provide any basis for concluding that had it rated the Super Bowl halftime show, it would have rated the show as inappropriate for children. Thus, CBS's constitutional argument based on

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Enable Blocking of Video Programming Based on Program Ratings, 13 FCC Rcd 11248 (1998); 47 C.F.R. § 15.120(b). Out of a total universe of 280 million sets in U.S. households, *see* Nielsen Media Research U.S. TV Household Estimates, 2003-04, about 119 million sets in use are equipped with V-chips. Broadcasting & Cable TVFAX, *TV Watch "Exposes" V-chip Critics,* July 8, 2005, at 2.

[124] *See Forfeiture Order* at ¶ 34 n.117 (citing broadcaster's statements in 2004 that "less than 10 percent of all parents are using the V-chip and 80 percent of all parents who currently own a television set with a V-chip are not aware that they have it"). *See also Parents, Media and Public Policy: A Kaiser Family Foundation Survey* (Fall 2004), at 7 (telephone survey of 1,001 parents of children ages 2-17 showing that (1) only 15 percent of all parents have used the V-chip; (2) 26 percent of all parents have not bought a new television set since January 2000 (when the V-chip was first required in all sets); (3) 39 percent of parents have bought a new television set since January 2000, but do not think it includes a V-chip; and (4) 20 percent know they have a V-chip, but have not used it).

[125] In the Kaiser Family Foundation survey, nearly 4 in 10 parents of children aged 2-17 stated that most television programs are not rated accurately. *Id.* at 5. *See also* Parents Television Council, *The Ratings Sham: TV Executives Hiding Behind A System That Doesn't Work* (April 2005) (study of 528 hours of television programming concluding that numerous shows were inaccurately and inconsistently rated).

[126] *Implementation of Section 551 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 8232, 8242-43, ¶ 21 (1998).

the availability of blocking technology is completely irrelevant to this case.

38. *Conclusion*. For all of these reasons, we deny CBS's *Petition*. Based on our careful consideration of the law and the record in this case, we continue to believe that the $550,000 forfeiture imposed on CBS here is appropriate.

IV. ORDERING CLAUSES

39. Accordingly, IT IS ORDERED, pursuant to section 405(a) of the Act, and section 1.106(j) of the Commission's rules,[127] that the Petition for Reconsideration of Forfeiture Order filed by CBS on April 14, 2006 is DENIED.

40. IT IS FURTHER ORDERED that a copy of this Order on Reconsideration be sent by Certified Mail, Return Receipt Requested, to Anne Lucey, Esq., Senior Vice President for Regulatory Policy, CBS Corporation, 1750 K Street, N.W., 6th Floor, Washington, D.C. 20005 and Robert Corn-Revere, Esq., Davis Wright Tremaine LLP, 1500 K Street, N.W., Suite 450, Washington, D.C. 20005-1272.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[127] 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(j).

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN CONCURRING IN PART, DISSENTING IN PART

Re: Complaints Regarding Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, Order on Reconsideration

The Super Bowl XXXVIII halftime show was arguably one of the most shocking incidents in the history of live broadcast television. Indeed, the Super Bowl was the most-watched program of the entire 2003-04 television season and American viewers, collectively, expressed their disappointment and disapproval. The Commission, entrusted with the responsibility to execute faithfully broadcast indecency laws, responded swiftly and appropriately.

While I agree with the ultimate outcome of today's Order on Reconsideration, I concur in part because the Commission again has not provided much-needed clarity and guidance to our decision-making process in indecency enforcement. In addition, I dissent in part because I continue to believe the Commission has erred in fining only CBS owned and operated stations, not all stations that broadcasted the indecent material.

Considering the substantial public confusion that pervades the Commission's indecency enforcement, we should, whenever possible, opt for clear statements of Commission policy. Until today, Commission policy has been to refrain from considering third-party polls or opinion surveys in assessing whether a program is indecent as measured by contemporary community stan-

dards. Regardless whether the poll or survey attempts to reflect the views of the national or local audience, the Commission simply does not consider opinion polls in indecency cases and polls are not a factor in determining the contemporary community standards. To suggest otherwise, as the instant Order does, is contrary to long standing Commission policy.[1]

I also have grave concerns with the failure of this Order to provide clear guidance on the nature of the Commission's new fine imposition policy announced in the March 15th, 2006, Omnibus TV Order. Rather than stating what the new policy is *not*, as today's Order does,[2] the Commission should state affirmatively the key features of our new "more limited approach towards the imposition of forfeiture penalties."[3] After all, it is still unclear how the Commission determines the sufficiency

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[1] While the Commission, in today's Order, maintains that it rejects the use of third-party polls as "determinative" and that it does not "rely" upon any third-party polls, we should provide clear guidance as to whether the Commission, as a matter of policy, even "considers" polls in its indecency analysis. The answer to that inquiry should be an unequivocal "no." Rather than making this point clear, the Commission engages in a gratuitous discussion about the adequacy of the polls cited by CBS. The Commission argues that the opinion polls cited by CBS were unavailing because the polls did not answer the central legal question –namely, "whether the Super Bowl broadcast was patently offensive under contemporary community standards." Order at ¶ 14. This discussion is misleading because the Commission does not consider polling data, notwithstanding the artfulness of the questions asked by pollsters.

[2] Order at ¶ 30.

[3] Complaints Regarding Various Television Programs Broadcast Between February 2, 2002 and March 8, 2005, FCC 06-17 (released March 15, 2006) (Omnibus TV Order) at ¶ 71.

of a viewer's complaint in light of this new enforcement policy.[4]

Finally, I dissented in part in our initial Super Bowl decision (the September 22nd, 2004, *Notice of Apparent Liability*),[5] and I do so again today. I continue to believe the Commission has decided erroneously to fine only CBS owned and operated stations, not all stations that broadcasted the indecent material. Notwithstanding the fact that this Commission has always purported to apply a national indecency standard on the broadcast medium, the Commission has failed to penalize the vast

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[4] In a failed attempt to address this significant concern, the instant Order states that "it is sufficient that viewers in markets served by each of the CBS Stations filed complaints with the Commission identifying the allegedly indecent program broadcast by the CBS Stations." This is a mere restatement of fact, not a policy statement of the essential components of a sufficient and adequate complaint.

In the Omnibus TV Order, the sole guidance the Commission provided was that it would propose forfeiture against only the licensee whose broadcast of the material was actually the subject of a viewer complaint. Omnibus TV Order at ¶ 71. Yet in the same order, based on a California viewer's complaint of indecent material against a local Washington, D.C. affiliate *and* the entire network, the Commission proposed forfeiture only against the local D.C. affiliate. The California viewer did not even assert that she viewed the program in Washington, D.C. Further, in the same case, it was completely unclear whether the complainant even watched the program on over-the-air broadcasting or on cable. The Commission is obligated to resolve or clarify these legitimate concerns.

[5] See 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 (released September 22, 2004) (Commr. Jonathan S. Adelstein, approving in part and dissenting in part).

majority of stations that actually broadcasted the offending halftime performance.

I believe now, as I believed then, that this is not the restrained enforcement policy the Supreme Court advised in *Pacifica*. Consistent with the values of First Amendment, this Commission should exercise restraint and caution in its determination of the type of expression that is indecent. But once the indecency determination is made, the Commission should apply a uniform fine imposition policy across the broadcast medium.

The Commission has an obligation to provide clarity and guidance whenever possible. Equally, the Commission is obligated to enforce a consistent fine imposition policy across the broadcast medium. Sadly, today's Order fails to meet our obligation on both counts. Accordingly, I concur in part and dissent in part to this Order on Reconsideration.

APPENDIX C

BEFORE THE
FEDERAL COMMUNICATIONS COMMMISSION
WASHINGTON, D.C. 20554

File No. EB-04-IH-0011
NAL/Acct. No. 200432080212

IN THE MATTER OF COMPLAINTS AGAINST VARIOUS TELEVISION LICENSEES CONCERNING THEIR FEBRUARY 1, 2004 BROADCAST OF THE SUPER BOWL XXXVIII HALFTIME SHOW

Adopted: Feb. 21, 2006
Released: Mar. 15, 2006

FORFEITURE ORDER

By the Commission: Chairman Martin, Commissioners Copps and Tate issuing separate statements; Commissioner Adelstein concurring and issuing a statement.

I. INTRODUCTION

1. In this *Forfeiture Order* ("*Order*"), issued pursuant to section 503(b) of the Communications Act of 1934, as amended (the "Act"), and section 1.80 of the Commission's rules,[1] we impose a monetary forfeiture in the amount of $550,000 against CBS Corporation ("CBS"), as the licensee or the ultimate parent company of the

[1] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

licensees of the television stations listed in the Appendix ("CBS Stations").[2] We find that CBS violated 18 U.S.C. § 1464 and the Commission's rule regulating the broadcast of indecent material[3] in its broadcast of the halftime show of the National Football League's Super Bowl XXXVIII over the CBS Stations on February 1, 2004, at approximately 8:30 p.m. Eastern Standard Time.[4]

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[2] The Appendix is an updated version of Appendix A from the Notice of Apparent Liability in this proceeding. *See Complaints Against Various Television Licensee*s *Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftim*e *Show*, Notice of Apparent Liability, 19 FCC Rcd 19230 (2004) (the "*NAL*"). The *NA*L was directed to Viacom, Inc., which was the ultimate corporate parent company of the licensees in question at that time. As of December 31, 2005, Viacom, Inc. effected a corporate reorganization in which the name of the ultimate parent company of the licensees of the CBS Stations was changed to CBS Corporation. Accordingly, we generally refer to the company herein as CBS even for periods preceding the reorganization. As part of the reorganization, certain non-broadcast businesses, including MTV Networks, were transferred to a new company named Viacom Inc. At the time of the violations, however, the CBS Stations and MTV Networks were corporate affiliates under common control.

[3] 47 C.F.R. § 73.3999.

[4] We note that viewers in markets served by each of the CBS Stations filed complaints with the Commission concerning the February 1, 2004 broadcast of the Super Bowl XXXVIII halftime show.

II. BACKGROUND

2. The halftime show in question was a live broadcast of music and choreography produced by MTV Networks ("MTV"), which was then a Viacom, Inc. subsidiary. The halftime show lasted approximately fifteen minutes and aired over the CBS Stations and other television stations affiliated with the CBS Television Network. The show received considerable notoriety due to an incident at the end of its musical finale, in which Justin Timberlake pulled off part of Janet Jackson's bustier, exposing one of her breasts to the television audience.

3. Following the Super Bowl broadcast and the receipt of complaints, the Enforcement Bureau ("Bureau") issued a letter of inquiry ("LOI") to CBS, seeking information about the halftime show, followed by a letter requesting videotapes of the complete Super Bowl programming broadcast over the CBS Television Network stations on February 1, 2004, including the halftime show (collectively, the "Broadcast Videotape").[5] In response, CBS provided a videotape of the broadcast of the halftime show to the Bureau on February 3, 2004,[6]

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[5] *See* Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Howard Jaeckel, Vice President and Associate General Counsel, CBS, dated February 2, 2004; Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Robert Corn-Revere, Esquire, dated February 10, 2004.

[6] *See* Letter from Robert Corn-Revere, Esquire to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 3, 2004.

an "interim response" to the Bureau's inquiries on February 10, 2004,[7] the Broadcast Videotape on February 14, 2004,[8] and a complete response to the LOI on March 16, 2004.[9]

4. The script and Broadcast Videotape of the halftime show provided by CBS confirm that the show contained repeated sexual references, particularly in its opening and closing performances. The first song, "All For You," performed by Janet Jackson, began with the following lines, referring to a man at a party:

> All my girls at the party
> Look at that body

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[7] Letter from Robert Corn-Revere, Esquire to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 10, 2004 (the "*CBS Interim Response*").

[8] Letter from James S. Blitz, Esquire to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 14, 2004.

[9] Letter from Susanna M. Lowy, Esquire to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated March 16, 2004 (the "*CBS Response*"). Although many of CBS's responses to the LOI's inquiries are contained in both the *CBS Interim Response* and the *CBS Response*, for purposes of simplicity, unless otherwise noted, references herein will be to the latter. CBS requested confidential treatment of the bulk of the materials attached to its Response, including electronic mail and other documents relevant to the planning of the halftime show. We do not rule on CBS's request at this time because it is unnecessary to do so for purposes of this Order. Consistent with the request, however, we limit ourselves to describing or characterizing the substance of the materials and providing record citations herein, rather than actually quoting the materials or otherwise incorporating them into the Order. The Confidential Appendix, however, contains quotations to various documents in the record.

> Shakin' that thing
> Like I never did see
>
> Got a nice package alright
> Guess I'm gonna have to ride it tonight.[10]

These lyrics use slang terms to refer to a man's sexual organs and sexual intercourse and were repeated two more times during the song. Following that performance, P. Diddy and Nelly presented a medley of songs containing occasional references to sexual activities, emphasized by Nelly's crotch-grabbing gestures.[11] Then, after a medley by performer Kid Rock, Jackson reappeared for a performance of "Rhythm Nation" and then the closing song, "Rock Your Body," a duet in which she was joined by Justin Timberlake. During the finale, Timberlake urged her to allow him to "rock your body" and "just let me rock you 'til the break of day" while following her around the stage and, on several occasions, grabbing and rubbing up against her in a manner simulating sexual activity.[12] At the close of the song, while singing the lyrics, "gonna have you naked by the end of this song," Timberlake pulled off the right

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[10] Broadcast Videotape. *See also CBS Response*, Ex. 9 at 7-10; www.azlyrics.com/lyrics/janetjackson/allforyou.html.

[11] These sexual references include the lyrics "I was like good gracious ass bodacious . . . I'm waiting for the right time to shoot my steam (you know)" and "[i]t's gettin' hot in here (so hot), so take off all your clothes (I am gettin' so hot)" in the Nelly song "Hot in Herre." Broadcast Videotape. *See also CBS Response*, Ex. 9 at 16, 18; www.lyricsstyle.com/n/nelly/hotinherre.html.

[12] Broadcast Videotape. *See also CBS Response*, Ex. 9 at 36-37; www.lyricsondemand.com/j/justintimberlakelyrics/rockyourbodylyrics.html.

portion of Jackson's bustier, exposing her breast to the television audience.[13]

5. The Commission released its *NAL* on September 22, 2004, pursuant to section 503(b) of the Act and section 1.80 of the Commission's rules, finding that CBS apparently violated the federal restrictions regarding the broadcast of indecent material.[14] We noted that our indecency analysis involves two basic determinations. The first determination is whether the material in question depicts or describes sexual or excretory organs or activities.[15] We found that the broadcast material contained, *inter alia*, a performance by Jackson and Timberlake that culminated in the on-camera exposure of one of Jackson's breasts, thereby meeting the first standard.[16] The second determination is whether the material is patently offensive as measured by contemporary community standards for the broadcast medium.[17] We ob-

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[13] Broadcast Videotape.

[14] *See* 18 U.S.C. § 1464; 47 C.F.R. § 73.3999 ; and 47 U.S.C. § 503(b).

[15] *See Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency,* Policy Statement, 16 FCC Rcd 7999, 8002, ¶ 7 (2001) *("Indecency Policy Statement").*

[16] *NAL*, 19 FCC Rcd at 19235, ¶ 11.

[17] The "contemporary standards for the broadcast medium" criterion is that of an average broadcast listener and does not encompass any particular geographic area. *Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 8 and n.15. CBS suggests that we should rely on third-party public opinion polls to determine whether the material is patently offensive as measured by contemporary community standards for the broadcast medium. *Opposition* at 33-34. In determining whether material is patently offensive, we do not rely on polls, but instead apply the three-pronged contextual analysis described in the text. CBS provides no legal support for a departure from that approach.

served that, in our assessment of whether broadcast material is patently offensive, "the *full context* in which the material appeared is critically important."[18] Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock.[19] In examining these three factors, we stated that we must weigh and balance them on a case-by-case basis to determine whether the broadcast material is patently offensive because "[e]ach indecency case presents its own particular mix of these, and possibly, other factors."[20] We noted that, in particular cases, one or two factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent[21] or, alternatively, removing the broadcast from the realm of indecency.[22]

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[18] NAL, 19 FCC Rcd at 19235, ¶ 12, *quoting Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 9 (emphasis in original).

[19] *Indecency Policy Statement,* 16 FCC Rcd at 8002-15, ¶¶ 8-23.

[20] *NAL,* 19 FCC Rcd at 19235, ¶ 12, *quoting Indecency Policy Statement*, 16 FCC Rcd at 8003, ¶ 10 .

[21] *NAL,* 19 FCC Rcd at 19235, ¶ 12; *Indecency Policy Statement*, 16 FCC Rcd at 8009, ¶ 19 (citing *Tempe Radio, Inc. (KUPD-FM*), 12 FCC Rcd 21828 (Mass Media Bur. 1997) (forfeiture paid), and *EZ New Orleans, Inc. (WEZB(FM))*, 12 FCC Rcd 4147 (Mass Media Bur. 1997) (forfeiture paid), which found that the extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references.

[22] *NAL,* 19 FCC Rcd at 19235, ¶ 12; *Indecency Policy Statement*, 16 FCC Rcd at 8010, ¶ 20 (noting that "the manner and purpose of a

6. The Commission examined all three factors in the NAL and determined that, in context and on balance, the halftime show is patently offensive as measured by contemporary community standards for the broadcast medium. The Commission determined that the broadcast of partial nudity in this instance was explicit and graphic and appeared to pander to, titillate and shock the viewing audience. Therefore, the Commission determined that the material was patently offensive as measured by contemporary community standards for the broadcast medium, even though the nudity was brief.[23]

7. The Commission concluded, based upon its review of the facts and circumstances of this case, that CBS was apparently liable for a monetary forfeiture in the amount of $550,000, calculated by applying the maximum forfeiture of $27,500 to each CBS Station, for broadcasting indecent material in apparent violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.[24] In contrast, the Commission proposed no forfeiture against any licensee other than CBS. It did so based on its finding that no licensee of a non-CBS-owned CBS affiliate was involved in the selection, planning or

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presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding.")

[23] *NAL*, 19 FCC Rcd at 19235-36, ¶¶ 12-14.

[24] *Id.* at 19236-40, ¶¶ 16-24. The Commission recently amended its rules to increase the maximum penalties to account for inflation since the last adjustment of the penalty rates. However, the new rates apply to violations that occur or continue after September 7, 2004, and therefore do not apply here. *See Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 19 FCC Rcd 10945, 10946, ¶ 6 (2004).

approval of the material for the halftime show, nor could any such licensee reasonably have anticipated that Viacom's production of the show would contain indecent material.[25] On November 5, 2004, CBS submitted its *Opposition* to the *NAL*.[26]

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[25] *Id.*, 19 FCC Rcd at 19240-41, ¶ 25.

[26] "*Opposition to Notice of Apparent Liability for Forfeiture*" by CBS, dated November 5, 2004 ("*Opposition*"). In addition to CBS's Opposition, we also received filings from non-parties to this proceeding that we are treating as filings by amici curiae. One such filing is a "*Petition for Partial Reconsideration of Notice of Apparent Liability for Forfeiture*" submitted by Saga Quad States Communications, LLC, and Saga Broadcasting, LLC, which argues that the *NAL* improperly imposes a new requirement on network affiliate stations to employ delay technology to prescreen network feeds. The *NAL* urges such licensees to take reasonable precautions to prevent the broadcast of indecent programing over their stations, but this is not a new requirement. *See NAL*, 19 FCC Rcd at 19241, ¶ 25. See also *Complaints Against Various Licensees Regarding Their Broadcast of the Fox Network Program "Married by America"* on April 7, 2003, *Notice of Apparent Liability for Forfeiture*, 19 FCC Rcd 20191 (2004) ("*Married by America*") (response pending); 47 C.F.R. § 73.658(e)(1) (prohibiting television stations from entering into arrangements with networks that restrict their right to reject programming that the stations reasonably believe to be unsatisfactory or unsuitable or contrary to the public interest). Another such filing by Litigation Recovery Trust ("LRT") is styled a "Petition for Reconsideration" but fails to meet the requirements of Section 1.106(b)(1) of our rules for petitions for reconsideration by non-parties. First, a petition for reconsideration of a Notice of Apparent Liability is not appropriate under Section 1.106(b)(1) because such action is only a notice, not a Commission decision that is subject to reconsideration. Furthermore, even if a petition for reconsideration were appropriate here, LRT does not make the showings required under that rule that a non-party "state with particularity the manner in which the person's interest are adversely affected by the action taken, and show good reason why it was not possible for him to participate in the earlier stages of the proceeding." 47 C.F.R. § 1.106(b)(1). In substance, LRT's filing is a supplement to a prior request for rulemaking

8. CBS does not dispute that the halftime show included a segment in which Justin Timberlake pulls off a portion of Jackson's bustier to reveal her breast at the end of the performance of a song containing the lyrics quoted above.[27] CBS nonetheless argues that the material broadcast was not actionably indecent.[28] CBS also maintains that the broadcast of Jackson's breast was accidental, and therefore was not "willful" under section 503(b)(1)(B) of the Act.[29] CBS further argues that the Commission's indecency framework is unconstitutionally vague and overbroad, both on its face and as applied to the halftime show.[30] As discussed below, we reject CBS's arguments and find the broadcast indecent for the reasons set forth herein. We reject CBS's assertion that the material at issue is not indecent because it is not patently offensive. In addition, we reject CBS's interpretation of the term "willful" and also address specific circumstances indicating that: (1) CBS consciously

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on a matter that is outside the scope of, and is not affected by, this decision.

[27] *Opposition* at 11. CBS does take issue with the *NAL*'s statement that the nudity lasted for 19/32 of a second, stating that the actual time was 9/16 of a second. *Id.* at 11 n.7. We accept CBS's determination as to the duration, but we find no practical difference here. We also note that the brevity of the image is considered in connection with just one of three contextual factors, and no single factor is dispositive. *See Indecency Policy Statement*, 16 FCC Rcd at 8003, ¶ 10 ("Each indecency case presents its own particular mix of these [three], and pos-sibly other, factors, which must be balanced to ultimately determine whether the material is patently offensive and therefore indecent. No single factor generally provides the basis for an indecency finding.").

[28] *Opposition* at 13-34.

[29] *Id.* at 35-38.

[30] *Id.* at 44-77.

omitted the actions necessary to ensure that actionably indecent material would not be aired; and (2) the performers' willful actions here were attributable to CBS under established principles of agency and respondeat superior. Finally, we reject CBS's constitutional arguments, as the courts have repeatedly upheld the constitutionality of the Commission's indecency framework and our analysis of the halftime show is consistent with that framework. We therefore conclude that the broadcast of this material by the Viacom Stations violated 18 U.S.C. § 1464 and our rule against indecent broadcasts between 6 a.m. and 10 p.m., and that the maximum statutory forfeiture is warranted.

9. *Indecency Analysis.* The indecency analysis undertaken in the *NAL* followed the approach that the Commission has consistently applied. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition, *i.e.,* "the material must describe or depict sexual or excretory organs or activities."[31] The *NAL* properly concluded that the broadcast of an exposed female breast met this definition.[32] The halftime show broadcast therefore warrants further scrutiny to determine whether or not it was patently offensive as measured by contemporary community standards for the broadcast medium.

10. As discussed above, in our assessment of whether broadcast material is patently offensive, "the *full context* in which the material appeared is critically impor-

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[31] *Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 7.

[32] *NAL,* 19 FCC Rcd at 19235, ¶ 11 .

tant."[33] In cases involving televised nudity, the contextual analysis necessarily involves an assessment of the entire segment or program, and not just the particular scene in which the nudity occurs.[34] Accordingly, in this case, our contextual analysis considers the entire halftime show, not just the final segment during which Jackson's breast is uncovered. We find that, in context and on balance, the complained-of material is patently offensive as measured by contemporary community standards for the broadcast medium.

11. Turning to the first principal factor of our contextual analysis, we conclude that a video broadcast image of Timberlake pulling off part of Jackson's bustier and exposing her bare breast, where the image of the nude breast is clear and recognizable to the average viewer, is graphic and explicit.[35] CBS maintains that none of the cases cited in the *NAL* to support the conclusion that the partial nudity in the halftime show was explicit and

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[33] *Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 9 (emphasis in original).

[34] *See, e.g., Young Broadcasting of San Francisco, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1751, 1755-57 (2004) ("*Young Broadcasting*") (response pending) (Commission makes an assessment of the entire segment of a morning news program involving an interview of and demonstration by cast members from a "Puppetry of the Penis" stage production in which adult male nudity was aired for less than a second (¶¶ 11-13); and distinguishes an earlier case involving non-fleeting adult frontal nudity in a broadcast of *Schindler's List* based on "the full context of its presentation, including the subject matter of the film [World War II and wartime atrocities], the manner of presentation, and the warnings that accompanied the broadcast of the film" (¶ 14)).

[35] We note that, although Jackson wore a piece of jewelry on her nipple, it only partially covered her nipple and did not cover her breast.

graphic involved a televised broadcast of a woman's breast.[36] We reject CBS's argument that our conclusion regarding this factor is flawed. The *NAL* correctly relied on *Young Broadcasting*, which supports the proposition that a scene showing nude sexual organs is graphic and explicit if the nudity is readily discernible.[37] In this case, although the camera shot is not a close-up, the nudity is readily discernible. Furthermore, Jackson and Timberlake, as the headline performers, are in the center of the screen, and Timberlake's hand motion ripping off Jackson's bustier draws the viewer's attention to her exposed breast. CBS suggests that the fact that this nudity was not "planned and approved by [CBS]" is somehow relevant to whether it is explicit and graphic in nature.[38] However, CBS's suggestion that planning or premeditation should be a factor in deciding whether a televised image is explicit or graphic lacks any basis in

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[36] *Opposition* at 21.

[37] *NAL*, 19 FCC Rcd at 19235, ¶ 13 and n.42. CBS attempts to distinguish *Young Broadcasting* from this case. *See Opposition* at 19-20. However, CBS's analysis focuses on the foreseeability of the nudity in that case as compared to this case. As discussed below, foreseeability and premeditation relate to whether the broadcast of indecent matter was willful, and not to whether the material is graphic and explicit.

[38] *See Opposition* at 25 n.35. *See also id.* at 22. We agree that the exposure of Jackson's breast was not in the official script submitted by CBS, but CBS has not shown that it was unplanned. Clearly, the "costume reveal" that led to the exposure of the breast was at least planned by the performers (Jackson and Timberlake) and their choreographer, Gil Duldulao, who were hired by CBS for the halftime show. Timberlake's Declaration disavows any knowledge on his part that the costume reveal would lead to exposure of Jackson's breast, but Jackson's statement does not address her knowledge or intentions, and Duldulao did not provide a statement. *See CBS Response*, Ex. 7 and Ex. 8.

logic or law.[39] Rather, the first factor in our contextual analysis focuses on the explicitness of the broadcast from the viewer's or listener's standpoint. Notwithstanding CBS's claimed befuddlement at how the televised image of a man tearing off a woman's clothing to reveal her bare breast could be deemed explicit, we believe that conclusion is clearly warranted by the facts here and fully consistent with the case law.[40]

12. The second principal factor in our contextual analysis is whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs or activities. The *NAL* appropriately recognizes that the image of Jackson's uncovered breast during the

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[39] CBS compares this case to a decision that it claims involves programming that is "considerably more explicit and clearly premeditated," in which the Commission imposed a base forfeiture rather than the maximum forfeiture imposed in this case. *See Opposition* at 22-23, citing *Married by America*. The appropriate level of the forfeiture is best addressed in a subsequent section, but at this point we note that the case cited involved a program in which certain body parts were digitally obscured by pixilation to avoid a display of partial nudity such as that aired by CBS to a national audience in this case. Thus, that case is not a particularly useful precedent in determining whether the material at issue here is graphic and explicit.

[40] CBS argues that our recent dismissals of complaints about programming that we found not to be graphic or explicit requires a similar decision here. *Opposition* at 23-25, citing *KSAZ Licensee, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 15999 (2004) , and *Complaints Against Various Broadcast Licensees Regarding Their Airing of the UPN Network Program "Buffy the Vampire Slayer" on November 20, 2001*, Memorandum Opinion and Order, 19 FCC Rcd 15995 (2004). Neither case is apposite here because neither program included nudity. The other cases cited by CBS are inapposite for the same reason. *See Opposition* at 23-24.

halftime show is fleeting.[41] However, "even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness."[42] In this case, even though we find that the partial nudity was fleeting, the brevity of the partial nudity is outweighed by the first and third factors of our contextual analysis.

13. Under the third principal factor of our analysis—whether the material appears to pander or is titillating or shocking—we examine how the material is presented in context.[43] The *NAL* found that "the manner of presentation of the complained-of material over each [CBS Station], for which Viacom failed to take adequate precautions, was pandering, titillating and shocking."[44] The *NA*L noted that the exposure of Jackson's breast followed "performances, song lyrics and choreography

[41] *See NAL,* 19 FCC Rcd at 19236, ¶ 14.

[42] *Indecency Policy Statement,* 16 FCC Rcd at 8009, ¶ 19. *See also Young Broafcasting; Tempe Radio,* Notice of Apparent Liability, 12 FCC Rcd 21828 (Mass Media Bur. 1997) (paid); *LBJS Broadcasting,* Notice of Apparent Liability, 13 FCC Rcd. 20956 (Mass Media Bur. 1998) (paid).

[43] *Indecency Policy Statement,* 16 FCC Rcd at 8010, ¶20.

[44] *NAL,* 19 FCC Rcd at 19236 n.44. The *NAL* stated that "the nudity here was designed to pander to, titillate and shock the viewing audience." *Id.* at ¶ 14. To the extent that the language in the *NAL* could be interpreted to suggest that the broadcaster's state of mind is a decisional factor, we wish to clarify that this is not the case. Our *Indecency Policy Statement* frames this factor as "*whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value.*" *Indecency Policy Statement*, 19 FCC Rcd at 8003, ¶ 10 (emphasis in original). In making this determination, we focus on the material that was broadcast and its manner of presentation, not on the state of mind of the broadcaster or performer. *See Young Broadcasting*, 19 FCC Rcd at 1755-57, ¶¶ 13-14.

[that] discussed or simulated sexual activities."[45] Jackson's opening song contained repeated references to a man's "nice package" that she was "gonna have to ride . . . tonight"—slang references to male sexual organs and sexual intercourse. The P. Diddy/Nelly performance also contained sexual references, emphasized by Nelly's crotch-grabbing gestures. Likewise, the duet by Jackson and Timberlake of "Rock Your Body" contained repeated references to sexual activities[46] and choreography in which Timberlake grabbed Jackson, slapped her buttocks, and rubbed up against her in a manner simulating sexual activity. These sexually suggestive performances culminated in the spectacle of Timberlake ripping off a portion of Jackson's bustier and exposing her breast while he sang "gonna have you naked by the end of this song." Clearly, the nudity in this context was pandering, titillating and shocking to the viewing audience, particularly during a prime time broadcast of a sporting event that was marketed as family entertainment and contained no warning that it would include nudity.[47] Contrary to CBS's contention, we do evaluate the nudity in context. The offensive segment in question did not merely show a fleeting glimpse of a woman's breast, as CBS presents it. Rather, it showed a man tearing off a portion of a woman's clothing to reveal her

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[45] *NAL*, 19 FCC Rcd at 19236, ¶ 14.

[46] Timberlake sang the lyrics: "I've been watching you, I like the way you move, so go 'head and girl just do that ass-shakin' thing you do . . . I wanna rock your body, let me rock your body." Broadcast Videotape. *See also CBS Response*, Ex. 9 at 36-37; http://www.lyricsondemand.com/j/justintimberlakelyrics/rockyourbodylyrics.html.

[47] Indeed, CBS appears to concede that it was shocking, but maintains that "the 'costume reveal' was as much a shock to Viacom as to everyone else." *Opposition* at iii.

naked breast during a highly sexualized performance and while he sang "gonna have you naked by the end of this song." From the viewer's standpoint, this nudity hardly seems "accidental," nor was it.[48] This broadcast thus presents a much different case than would, for example, a broadcast in which a woman's dress strap breaks, accidentally revealing her breast for a fraction of a second.

14. Accordingly, we conclude that the Super Bowl XXXVIII halftime show contained material that was graphic, explicit, pandering, titillating and shocking and, in context and on balance, was patently offensive under contemporary community standards for the broadcast medium and thus indecent. Although the patently offensive material was brief, its brevity is outweighed in this case by the first and third factors in our contextual analysis. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under Section 73.3999 of the Commission's rules,[49] and is therefore legally actionable.

15. *Whether Violation was "Willful."* CBS argues that, if it did air indecent programming, its violation was "accidental" rather than "willful" and therefore cannot be sanctioned under section 503(b)(1) of the Act. In support of this argument, CBS cites definitions of "willful" from criminal and copyright law cases.[50] These defini-

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[48] *See CBS Response* at Ex. 7 and Ex. 8. Whether this nudity was planned or foreseeable by CBS and the stations that broadcast it is a distinct issue that is addressed below in the discussion of the "willfulness" factor.

[49] 47 C.F.R. § 73.3999.

[50] *See Opposition* at 37-38.

tions, however, are inapposite. Rather than borrowing definitions from unrelated areas of law, the Commission appropriately applies the definition of "willful" that appears in the Communications Act. Section 312(f)(1) of the Act defines "willful" as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.[51] As discussed in detail below, CBS acted willfully because it consciously and deliber-

[51] The Conference Report to the 1982 amendment to the Act that added this definition stated: "Willful means that the licensee knew he was doing the act in question, regardless of whether there was an intent to violate the law." H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982). The Conference Report also makes it clear that this definition applies to section 503(b) of the Act as well as section 312. *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991). CBS initially acknowledges that "the Commission has held that in order to satisfy the willfulness requirement, the purported offender need not intend to violate the Act or an FCC rule, or even be aware the action in question constitutes a violation." *Opposition* at 36. Yet on the next page of its Opposition it urges us to apply criminal cases in which the scienter requirement has been held to require "an act done with a bad purpose" or an "evil motive." *Id.* at 37. Clearly, those cases have no application in interpreting the willfulness requirement in a regulatory statute authorizing the imposition of administrative sanctions. We disagree with CBS's contention that criminal law definitions of "willful" are apt because 18 U.S.C. § 1464 is a criminal statute. *Id.* In *Pacifica*, the Supreme Court declined to consider questions relating to possible application of section 1464 as a criminal statute in upholding a broadcast indecency forfeiture imposed by the Commission. *FCC v. Pacifica Foundation*, 438 U.S. 726, 739 n.13 (1978) ("the validity of the civil sanctions [authorized under the Act] is not linked to the validity of the criminal penalty."). Likewise, we reject CBS's suggestion that the First Amendment requires statutes imposing civil penalties on speech to be interpreted to include the same scienter requirement as those imposing criminal penalties. *Opposition* at 38, citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77-78 (1994), *Smith v. California*, 361 U.S. 147 (1959), and *United States v. Reilly*, 2002 WL 31307170 (S.D.N.Y. 2002).

ately broadcast the halftime show, whether or not it intended to broadcast nudity, and because it consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast.[52] CBS also is vicariously liable for the willful actions of the performers under the doctrine of respondeat superior.

16. The Commission's forfeiture authority was enacted "to impel broadcast licensees to become familiar with the terms of their licenses and the applicable Rules, and to adopt procedures, including periodic review of operations, which will insure that stations are operated in substantial compliance with their licenses and the Commission's Rules."[53] The obligation of licensees to

[52] We note that application of this standard to CBS does not "impose a strict liability requirement on protected speech." *Opposition* at 38, *citing Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The Supreme Court held in *Gertz* that "the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual," so long as they do not impose liability without fault. *Id*. at 345-46. As discussed *infra*, CBS clearly is at fault for broadcasting actionably indecent material during the Super Bowl telecast. We also note that CBS's reliance on *Saxe v. State College*, 240 F.3d 200, 206 (3d Cir. 2001), as holding that willful indifference is a legally insufficient basis for punishing speech, is misplaced. *See Opposition* at 38. *Saxe* held that a school district policy prohibiting "harassing" speech was unconstitutionally overbroad because it was not limited to vulgar or lewd speech or school-sponsored speech, and was not necessary to prevent substantial disruption or interference with the rights of students or the conduct of the school. The court did not address the intent required to impose liability for expressive speech or conduct under the First Amendment.

[53] *Crowell-Collier Broadcasting Corp.*, Memorandum Opinion and Order, 44 FCC 2444, 2449 (1961) (violation due to erroneous advice from the station's competent engineering consultant warrants a forfeiture).

adopt measures to ensure compliance with the Act and the Commission's rules has particular force when it comes to broadcasters' responsibility for the programming that they broadcast to the public. Under well-established principles of broadcast regulation, "[b]roadcast licensees must assume responsibility for all material which is broadcast through their facilities," and that "duty is personal to the licensee and may not be delegated."[54]

17. CBS claims that it had no advance knowledge that Timberlake planned to tear off part of Jackson's clothing to reveal her breast. Even assuming that this claim is true, however, we do not believe that this relieves CBS from responsibility for the indecent material that it broadcast. Rather, the record reveals that CBS was acutely aware of the risk of unscripted indecent material in this production, but failed to take adequate precautions that were available to it to prevent that risk from materializing.

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[54] *Report and Statement of Policy re: Commission en banc Programming Inquiry*, 44 FCC Rcd 2303, 2313 (1960). *See also Yale Broadcasting Co. v. FCC*, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973) (affirmed action of Commission reminding broadcast licensees of their duty to have knowledge of the content of their programming and on the basis of this knowledge to evaluate the desirability of broadcasting music dealing with drug use); *Gaffney Broadcasting, Inc.,* 23 2d 912, 913 (1970) ("licensees are responsible for the selec-tion and presentation of program material over their stations, including . . . acts or omissions of their employees"); *Alabama Educational Television Commission,* 50 FCC 2d 461, 464 (1975) (AETC lost its license in part because it failed to maintain exclusive authority over all of its programming decisions); *WCHS-AM-TV Corp.,* 8 FCC 2d 608, 609 (1967) (maintenance of control over programming is a most fundamental obligation of the licensee).

18. It is disingenuous for CBS to argue that "the 'costume reveal' was as much a shock to Viacom as to everyone else."[55] CBS clearly recognized that the live broadcast of the Super Bowl halftime show posed a significant risk that indecent material would be aired. The extensive planning and preparation for the show highlighted this risk. CBS knew that MTV, the corporate affiliate that was producing the show, was seeking to push the envelope by, among other things, including sexually provocative performers and material.[56] In fact, the NFL expressed concerns about whether the planned halftime show might be heading in too risqué a direction and rebuffed MTV's desire to feature one performer because of a prior incident in which the performer unexpectedly removed her clothes during a national telecast of an NFL event.[57] MTV sought to overcome the NFL's objections to another performer by offering assurances that it would exercise control over her wardrobe and actions, despite its own doubts about its ability to do so.[58]

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[55] *Opposition at* iii.

[56] *See, e.g.*, *CBS Response*, App. B-C at Bates stamped pgs. 18, 176, 219, 314, 1175, 1229, 1456. *See also Super Bowl NAL*, 19 FCC Rcd at 19238-39 ¶ 19 (discussing MTV's promotion of the sexually-provocative nature of the halftime show by, *inter alia*, posting on its website a news item entitled "Janet Jackson's Super Bowl Show Promises 'Shocking Moments,'" which quoted her choreographer Gil Dulduleo's prediction that her performance would include "some shocking moments."). Confidential Appendix 1.

[57] *See CBS Response*, App. B at Bates stamped pgs. 72, 96, 195, 218-19. Confidential Appendix 2.

[58] *See CBS Response*, App. B at Bates stamped pgs. 123, 355, 447. Confidential Appendix 3.

19. CBS maintains that it selected Jackson and Timberlake "to minimize the possibility of the unexpected,"[59] but CBS was well aware that their selection did not obviate this risk. The NFL specifically expressed concerns to CBS about the costume that Jackson would wear during the halftime show.[60] Moreover, the NFL raised concerns about Timberlake's scripted line "gonna have you naked by the end of this song" that anticipated the stunt resulting in the broadcast nudity.[61] There were other warning signs as well. In a January 28, 2004 news item posted on MTV's website, Jackson's choreographer predicted that Jackson's performance would include "some shocking moments" and said "I don't think the Super Bowl has ever seen a performance like this . . ."[62] Shortly before the game, one halftime show performer asked about the length of the audio delay, a question that MTV employees evidently recognized implied an intention to depart from the script.[63] Further, MTV learned the morning of the Super Bowl telecast of plans

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[59] *Opposition* at 18. *See CBS Response* at 9 (stating that Jackson and Timberlake were "proven, experienced talent").

[60] *See CBS Response*, App. B at Bates stamped p. 72. Confidential Appendix 4.

[61] *See CBS Response*, App. B at Bates stamped pgs, 39, 452-54. Confidential Appendix 5. *Cf. CBS Radio License, Inc. (WLLD(FM))*, Notice of Apparent Liability for Monetary Forfeiture, 15 FCC Rcd 23881, 23883, ¶ 8 (Enf. Bur. 2000) (given licensee's awareness of the actual language used in performers' recordings, it should have taken precautions to avoid airing actionably indecent material during a live, unscripted broadcast).

[62] *See Super Bowl NAL*, 19 FCC Rcd at 19238-39, ¶ 19; *CBS Response*, App. D at Bates stamped pgs. 2659.

[63] *See CBS Response*, App. B at Bates stamped p. 462. Confidential Appendix 6.

to use tearaway cheerleading outfits for dancers in another halftime performance in connection with a scripted line ("I wanna take my clothes off") that is quite similar to Timberlake's line ("gonna have you naked by the end of this song").[64] The record reflects CBS's awareness that there is always a risk that performers will ad-lib remarks or take unscripted actions, and that the risk level varies according to the nature of the performance.[65] In sum, there was a significant and foreseeable risk in a halftime show seeking to push the envelope and replete with sexual content that performers might depart from script and staging, and this is particularly true of Jackson and Timberlake given the sexually-provocative nature of their performance, the fact that it was promoted as "shocking," and the fact that it culminated with the scripted line "gonna have you naked by the end of this song."[66] Based on examination of the record, we

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[64] *See CBS Response,* App. B at Bates stamped p. 458. Confidential Appendix 7.

[65] *See CBS Response*, App. B at Bates stamped pgs. 503-04, 511, 527. Confidential Appendix 5, 8. *See also supra*, ¶ 4. The risk of departures from the script was heightened here not only by the suggestive lyrics, but also by the fact that the line which occasioned Jackson's nudity was the culminating one in the script; the record reflects both the performers' and the producers' desire for a high-impact grand finale to the show. Confidential Appendix 9.

[66] *See Super Bowl NAL*, 19 FCC Rcd at 19237, ¶ 17 n.54, *citing Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975, 4979 (2004) (network could have anticipated that a recipient at a live award ceremony might use profanity because similar mishaps had occurred in the past). CBS points out that the *Golden Globe Awards Order* was released after the Super Bowl telecast, *Opposition* at 19, but the issue here is whether CBS could have anticipated an unscripted

conclude that CBS recognized the high risk that this broadcast raised of airing indecent material.[67]

20. Examination of the record also reveals that CBS failed to take adequate precautions to prevent the airing of unscripted indecent material. Aware of the risk of visual and spoken deviations from the script and staging—that something spontaneous might occur or be said—CBS made a calculated decision. It chose to rely on a five-second audio delay that would enable it to bleep offensive language but would not enable it to block unscripted visual moments. Thus, it could not cut off Jackson's "costume reveal" when it occurred—and it had no expectation that it would be able to block any indecent images.[68] Only *after* the Super Bowl halftime show —for the broadcast of the 2004 Grammy Awards—did CBS institute an audio *and* video delay "to ensure that no unexpected or unplanned video images would be

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costume reveal, not whether it had notice of the *Golden Globe Awards Order*.

[67] *See, e.g., supra*, ¶¶ 2, 4 and n.4.

[68] *See Opposition* at 5 ("Historically, a five-second delay has been adequate to preclude the broadcast of any spontaneous or unplanned audio material. With such an arrangement, an individual from the broadcast standards department monitors the transmission of a live event and manually 'hits the button' to delete any objectionable material before it is broadcast. Although both the audio and visual transmission is delayed, five seconds does not provide sufficient time to edit video images. Accordingly, the precaution of a five-second delay could not prevent the broadcast of the unexpected images at the end of the halftime show.") (emphasis added). As indicated above, CBS also had reason to believe that its five-second audio delay might be inadequate to edit unscripted audio material during the halftime show. *See* note *63 supra* and accompanying text.

broadcast."[69] CBS asserts that the delay used for the 2004 Grammy Awards was "unprecedented."[70] But CBS does not argue that use of a delay mechanism capable of editing video images during the Super Bowl halftime show would not have been feasible. The fact that use of such a delay mechanism would have been "far more technically complex and involved more broadcast standards staff to implement" than the delay that CBS actually used hardly excuses its omission under these circumstances.[71] Furthermore, CBS also failed to adopt other precautions available to it. For example, MTV's agreements with the performers did not require them to conform to the script or to CBS's broadcast standards and practices, notwithstanding the fact that MTV's agreement with the NFL contained provisions to this effect.[72] In addition, the record contains no evidence that MTV or CBS communicated CBS's broadcast standards and practices to Jackson, Timberlake, or Jackson's choreographer before the show, despite the highly sexualized nature of the performances and the fact that MTV's contract with the NFL required MTV to communicate those standards and practices to all performers.[73]

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[69] *CBS Response* at 5.

[70] *Id.* at 5, n.13.

[71] *CBS Response* at 5, n.13.

[72] *CBS Response*, App. B-C at Bates stamped pgs. 168-72, 431-34, 2152-2332, 2336-42, 2469. Confidential Appendix 10. CBS did not provide an executed agreement for either Jackson or Timberlake in response to the LOI, but none of the contract drafts provided by CBS refers to a script or to broadcast standards and practices. The executed agreement for Jackson's choreographer likewise contains no such references.

[73] See Confidential Appendix 10. Because CBS's failure to take reasonable precautions to prevent the broadcast of actionably indecent

21. CBS also overstates the level of care it exercised in overseeing the halftime production. Critically, it failed to investigate Jackson's choreographer's "shocking moments" prediction, which was posted on MTV's website, despite CBS's concern about unscripted remarks or actions.[74] In addition, contrary to its conten-

material was conscious and deliberate, its reliance on *Mega Communications of New Britain Licensee, L.L.C.*, 19 FCC Rcd 11373 (Enf. Bur. 2004), is misplaced. *See Opposition* at 36, n.57 ("The same result should apply here, where Viacom took all reasonable precautions based on past experience—*including inspecting Ms. Jackson's costume*—but an unforeseeable violation nevertheless occurred."). The Bureau held in *Mega* that a licensee did not commit a willful violation of the Commission's antenna structure fencing requirements because it conducted regular inspections in compliance with those requirements and "the problem occurred shortly after an inspection by Mega." As the above discussion indicates, however, CBS consciously failed to prevent the airing of indecent material. Moreover, the *Mega* case is distinguishable because it involved actions by a third party, not the licensee. *Vernon Broadcasting, Inc.*, Memorandum Opinion and Order, 60 RR 2d 1275 (1986), illustrates this distinction. In *Vernon*, the Commission rescinded a forfeiture liability for a tower fencing violation as not willful, while affirming a liability for an unintentional violation of the public file rule. The distinction between the two situations was that the damage to the fence was caused by vandals, despite the station's regular process of inspections and repairs, whereas the public file violation arose from the station's own actions.

[74] *See* note 62 *supra* and accompanying text. CBS maintains that it interpreted the "shocking moments" quote innocently, stating that it believed the quote referred to Timberlake's surprise guest appearance, and that it "did not stand out because such hyperbolic language is not uncommon in the music world." *Opposition* at 7-8. As the Commission has indicated, CBS's explanation lacks credibility. *See NAL*, 19 FCC Rcd at 19239, n.64 ("at the start of the halftime segment, MTV included an onscreen credit for Timberlake, hardly a disclosure that would be made ten minutes before his appearance, had his participation in the program been the 'shocking moments' that it had publicized for days on its Internet site."). CBS's explanation also is dubious in light of the fact

tion,[75] each aspect of the halftime show was not reviewed in advance by CBS's Program Practices Department. As stated above, MTV learned for the first time on the morning of the Super Bowl telecast of plans for dancers to use tearaway cheerleading outfits to act out the line "I wanna take my clothes off."[76] It does not appear that these plans were reviewed by CBS's Program Practices Department because the rehearsals that CBS, MTV and NFL representatives reviewed occurred several days before the Super Bowl telecast, and the dancers were not in costume during the scene in question.[77]

22. Under these circumstances, we believe that CBS can and should be held responsible for the patently offensive material that it broadcast to a nationwide audience. A contrary result would permit a broadcast licensee to stage a show that "pushes the envelope," send that show out over the air waves, knowingly taking the risk that performers will engage in offensive unscripted acts or use offensive unscripted language, and then disavow responsibility—leaving no one legally responsible for the result. We believe that these are fully appropri-

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that the quote referred to "moments" in the plural, whereas it would have been expected to refer to a "moment" if it only concerned Timberlake's appearance. CBS has never provided a statement from Jackson's choreographer to explain what he meant by the quote. But even accepting CBS's argument that the choreographer's comment may have been innocent hyperbole, it should at least have caused CBS to look into the matter, given the level of concern at CBS and the NFL about the edgy lyrics and the possibility of inappropriate script departures. CBS gives no indication that it did so.

[75] *Opposition* at 4. *See CBS Response* at 9-10.

[76] *See CBS Response*, App. B at Bates stamped p. 458.

[77] *See CBS Response* at 9, App. B at Videotapes 6, 8 (Jackson/Timberlake Dress Rehersal).

ate circumstances for application of the "conscious and deliberate . . . omission" basis for finding "willfulness" incorporated by Congress into Section 503(b) of the Act.[78] Indeed, given the nondelegable nature of broadcast licensees' responsibility for programming and the means available to but declined by CBS to reduce the risk of the broadcast of indecent programming, it is difficult to conceive of a more appropriate context in which to apply that standard.

23. Further, CBS is legally responsible here for another reason; it is fully responsible for the actions of Jackson, Timberlake, and Jackson's choreographer under the doctrine of respondeat superior. "It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment."[79] The Commission has long held licensees responsible for the unauthorized acts of their agents under this doctrine.[80] Respondeat superior subjects a principal to vicarious liability when its agent-employee commits a tort while acting within the

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[78] 47 U.S.C. § 503(b)(1); 47 U.S.C. § 312(f).

[79] *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (citations omitted).

[80] *See Dial-a-Page, Inc.*, 8 FCC Rcd 2767 (1993), *recon. den.*, 10 FCC Rcd 8825 (1995) (rule violation resulting from employee error was fully attributable to licensee under doctrine of respondeat superior and "willful" within the meaning of § 503(b)(1)); *Wagenvoord Broadcasting Co.*, 35 FCC 2d 361 (1972); *Eure Family Ltd. Partnership*, 17 FCC Rcd 7042, 7044 ¶ 7 (Enf. Bur. 2002) ("it is a basic tenet of agency law that the actions of an employee or contractor are imputed to the employer and 'the Commission has consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations.' ").

scope of employment.[81] Whether an agent is an employee for purposes of respondeat superior depends on whether the agent is subject to the principal's control or right to control the performance of the work.[82] An agent-employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control.[83]

24. It is appropriate to impose vicarious responsibility on CBS for the willful actions of Jackson, Timberlake, and Jackson's choreographer under the doctrine of respondeat superior. Even assuming arguendo that the corporate officers and other corporate employees of CBS and MTV did not act willfully within the meaning of section 503(b)(1), there is no question that the performers did. Timberlake's declaration acknowledges a premeditated plan for him to tear off part of Jackson's clothing during the performance.[84] Jackson, Timberlake, and Jackson's choreographer were CBS agents for the halftime show performance; Jackson and Timberlake entered into agreements with MTV (MTV and CBS at the time were both Viacom subsidiaries) to perform during the halftime show, and Gil Duldulao contractually

[81] *Restatement (Second) of Agency* § 219(l) (1957) (2nd Restatement). *See also Restatement (Third) of Agency* § 7.07 (T.D. No. 5 2004) (3rd Restatement).

[82] 2nd Restatement § 220. *See also* 3rd Restatement § 7.07.

[83] 2nd Restatement § 228.

[84] *CBS Response* at Att. 8 ("At the end of the song, I attempted to perform a 'costume reveal' by removing a portion of Ms. Jackson's costume and revealing the undergarment beneath. I had neither the intention nor the knowledge that the reveal could expose her right breast. The decision to add the 'costume reveal' to the finale was made by Ms. Jackson and her choreographer after final rehearsals for the Halftime Show. They informed me just before the performance began.").

agreed to choreograph the dance.[85] Based on examination of the record, we also believe that the three were CBS employees for purposes of applying the principle of respondeat superior. CBS had the right to control, and in fact exercised considerable control over, the halftime show:

> Each aspect of the halftime show was scripted in advance and a script of the halftime show was reviewed by the CBS Program Practices Department. In addition, employees of CBS, MTV, and the NFL attended two full run-throughs of the halftime show on Thursday, January 29 to review the production. The run throughs were videotaped, and reviewed by representatives of CBS and the NFL. MTV producers then used the tape to individually review the rehearsal performances with the talent to instruct them on changes to be made in the actual performance on Super Bowl Sunday. Based on these procedures, certain changes were made to the show. For example, the costume worn by one of the dancers during the run-throughs was considered to be too revealing, and she was instructed to change it before the final show. There was also concern about some of the language, and changes were suggested. . . . Because Ms. Jackson was not in costume during the run-throughs, an executive producer subsequently checked to make

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[85] *See CBS Response*, App. B-C at Bates stamped pgs. 168-72, 431-34, 2152-2332, 2336-42; 2nd Restatement § 1 ("Agency is a legal concept which depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking."), *cited in Meyer v. Holley*, 537 U.S. at 286.

sure that Ms. Jackson's wardrobe would conform to broadcast standards during the actual performance.[86]

25. Thus, CBS exercised control over all aspects of the performers' conduct in the performance of the halftime show, including the script, staging and wardrobe used during the Jackson-Timberlake performance. Other factual indicia of control are present as well. CBS (through MTV) provided the set and set elements for the performance and dictated its time and place, as well as the time and place of production and press-related activities.[87] Many courts have held entertainers to be employees for respondeat superior and other purposes under similar circumstances.[88] Finally, the perform

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[86] *CBS Response* at 9-10. Although CBS had the right to exercise control over the halftime show, and in fact exercised considerable control, there were, as discussed above, significant lapses in the level of care that it exercised in overseeing the halftime production. *See* para. 17-22. Those lapses in supervision do not, however, negate the fact that the performances were subject to CBS's control and that CBS was thus vicariously responsible for the performers' actions within the scope of their employment under the doctrine of respondeat superior. *See* note 87 *infra*.

[87] *Id.* at Bates-stamped pgs. 168-72, 431-34, 2336-42. *See* 2nd Restatement § 220; 3rd Restatement § 7.07 (relevant factual indicia of control include "whether the agent or the principal supplies the tools and other instrumentalities required for the work and the place in which to perform it").

[88] *See P.T. Barnum's Nightclub v. Duhamell*, 766 N.E.2d 729 (Ind. App. 2002) (referring to 2nd Restatement factors in affirming denial of summary judgment as to whether male exotic dancer was an employee for respondeat superior purposes where "the Club exercised some degree of control over Ajishegiri's work, particularly with regard to work hours, conditions, and regulations, and was in the business of displaying adult entertainers (primarily female), but did not dictate the stylistic aspects of Ajishegiri's performance"); *White v. Frenkel*, 615

ers' actions were clearly within the scope of their employment. In this regard, the determining factor is not whether their actions were authorized by CBS but whether the performance was subject to CBS's control.[89] Put differently, their conduct was incident to the performance rather than "an independent course of conduct intended to serve no purpose of the employer."[90] Accord-

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So.2d 535, 538-40 (La. App. 3 Cir. 1993) (professional wrestler was employee for respondeat superior purposes where, *inter alia*, promoter controlled who would win and who would lose wrestler's matches and had total control over who, where, and when wrestler wrestled); *Jeffcoat v. State Dept. of Labor*, 732 P.2d 1073, 1075-78 (Alaska 1987) (dancer was employee for purposes of state labor statute where, *inter alia*, club exercised some control over costumes and dances and total control over music and dancers' working hours); *Jack Hammer Assoc. v. Delmy Productions, Inc.*, 499 N.Y.S.2d 418, 419-20 (1st Dept. 1986) (actor was employee for purposes of determining availability of workers' compensation benefits where actor entered into a written contract for a stipulated sum for a term certain, time and place for his work was determined by production company, actor had to perform in a certain number of shows at specified times, and he had to follow a script and was subject to supervision of play's director). New York state courts have consistently held entertainers to be employees of the producers who engage them. *See Jack Hammer Assoc.*, 499 N.Y.S.2d at 419-20; *Challis v. Nat'l Producing Co.,* 88 N.Y.S.2d 731 (3d Dept. 1949) (circus clown); *Berman v. Barone*, 88 N.Y.S.2d 327, 328 (3d Dept. 1949) (ballet dancer and variety artist). *See also In re Sims*, 602 N.Y.S.2d 225 (3d Dept. 1993) (finding a sufficient degree of direction and control by a conductor who hired musicians for imposition of respondeat superior liability although supervision was not direct). Here, the performers' agreements contain choice-of-law provisions specifying New York law. *CBS Response* at Bates-stamped pgs. 168-72, 431-34, 2336-42.

[89] 2nd Restatement § 228.

[90] 3rd Restatement § 7.07 ("an employee's conduct is outside the scope of employment when it occurs within an independent course of conduct intended to serve no purpose of the employer."). *See also id.* ("Alternative formulations avoid the use of motive or intention to

ingly, the performers' willful actions are fully attributable to CBS under the doctrine of respondeat superior irrespective of whether the performers' actions were authorized by CBS.

26. *Amount of Forfeiture*. CBS offers a variety of arguments that the forfeiture proposed in the *NAL* is excessive or unfair. First, it contends that it is unfair to impose a forfeiture on it, when no forfeiture was imposed on those affiliates of the CBS Television Network that are not owned by CBS.[91] Second, CBS argues that the *NAL* improperly cites "the history of recent indecent broadcasts by CBS owned radio stations" with a footnote to cases that are not completely adjudicated.[92] Third, CBS maintains that the forfeiture is excessive in relation to the duration of the nude scene and in light of CBS's precautionary measures.[93] Fourth, CBS argues that it had no prior notice that a brief scene of partial

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determine whether an employee's tortious conduct falls within the scope of employment. These tests vary somewhat in how they articulate the requisite tie between the tortfeasor's employment and the tort. In general, such a tie is present only when the tort is a generally foreseeable consequence of the enterprise undertaken by the employer or is incident to it.").

[91] *Opposition* at 14.

[92] *Id.* at 39-40. CBS relies on section 504(c) of the Act, which provides that the Commission may not use the issuance of a notice of apparent liability in any other proceeding involving that person unless the forfeiture has been paid or there is a final court order for the payment of the forfeiture. CBS argues that the Commission not only must ignore cases in which there has been no final adjudication, but that it must consider CBS's long record of compliance with broadcast standards. *Id.* at 42.

[93] *Id.* at 41-43.

nudity constituted actionable indecency and thus should not be subject to any forfeiture.[94]

27. We conclude that CBS's arguments do not justify a reduction in the amount of the proposed forfeiture. The *NAL* proposed no forfeiture against CBS Television Network affiliate stations that are not owned by Viacom because there is no evidence that the licensees of any of those stations played any role in the selection, planning or approval of the halftime show or that they could have reasonably anticipated that CBS's production of the halftime show would include partial nudity. CBS has not provided any contrary evidence. In contrast, CBS admits that it was closely involved in the production of the halftime show, and that its MTV affiliate produced it.

28. With respect to the *NAL*'s reference to the history of indecent broadcasts by CBS's radio stations, we note that those cases have been resolved by a Consent Decree in which CBS admitted to certain violations, and the Commission agreed not to use that admission against CBS in any other proceeding, including this one.[95] Accordingly, we no longer rely on that history of indecent broadcasts in reaching our determination here.

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[94] *Id.* at 43.

[95] *See Viacom Inc.*, Order, 19 FCC Rcd 23100 (2004), *petition for recon. pending*. In light of that Consent Decree, entered into after the *NAL*, we conclude that CBS's history of past offenses is not relevant to our analysis. We note, however, that we disagree with, and have previously rejected, CBS's interpretation of section 504(c). We have made it clear that the Commission may rely on the underlying facts that provide the basis for a notice of apparent liability in a separate case. *See Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 15 FCC Rcd 303, 304-05, ¶¶ 3-5 (1999) ("*Forfeiture Policy Statement*"), *recon. denied*, 17 FCC Rcd 303 (1999).

Nevertheless, we remain convinced that the upward adjustment to the statutory maximum is appropriate in light of all of the factors enumerated in section 503(b)(2)(D) of the Act, particularly the circumstances involving the preparation, execution and promotion of the halftime show by CBS, the gravity of the violation in light of the nationwide audience for the indecent broadcast, and CBS's ability to pay.[96] The crux of CBS's defense is that the blame lies with the performers who planned and carried out the costume reveal that resulted in the exposure of Jackson's breast. However, CBS's attempt to place blame on the performers in question is unavailing; as discussed above, the performers were acting as CBS's agents and CBS is responsible for their actions within the scope of their employment. In addition, CBS planned almost every element of the halftime show. In the course of doing so, it brushed off warning signs of the potential for actionably indecent behavior and failed to take adequate precautions to prevent the airing of indecent material. As a result of its decisions, an enormous nationwide audience,[97] including numerous children, was subjected without warning to the offensive spectacle of a man tearing off a woman's clothing on stage in the midst of a sexually charged performance. Finally, regarding the element of ability to pay and fi-

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[96] *See* 47 U.S.C. § 503(b)(2)(D) (the Commission "shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require"); *NAL*, 19 FCC Rcd at 19237, ¶ 17.

[97] *See* http://www.usatoday.com/sports/football/super/2004-02-02-ratings_x.htm (stating that Super Bowl XXXVIII was "most-watched Super Bowl in history" with estimated 143.6 million viewers and 41.3 national rating).

nancial disincentives to violate the Act and rules,[98] we find that CBS's size and resources, without question, support an upward adjustment to the maximum statutory forfeiture of $550,000 because a lesser amount would not serve as a significant penalty or deterrent to a company of its size and resources.[99]

29. We also reject CBS's claim that it lacked prior notice that a brief scene of partial nudity might result in a forfeiture. Our rule against the broadcast of indecent material outside of the safe harbor hours has been in effect since 1993,[100] and our criteria for determining whether material is indecent were clearly spelled out in the *Policy Statement* issued in 2001. Furthermore, the *Young Broadcasting* decision, holding that a brief display of male frontal nudity was an apparent violation of that rule, was released shortly before the subject Super Bowl broadcast.[101] Thus, CBS was on notice that the

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[98] *See* 47 C.F.R. § 1.80, Note to Paragraph (b)(4), Section II, Upward Adjustment Criterion No. 2.

[99] *See* "Viacom Takes Big Write-Down, Creating a Loss," *New York Times*, Feb. 25, 2005, at C1 (reporting that Viacom, Inc. took a non-cash charge for 2004 to write down the value of its assets by 27%, to $49 billion, and that the company's revenue for the final quarter of 2004 was $6.3 billion); "While Shares Fell, Viacom Paid Three $160 Million," *New York Times*, April 16, 2005, at C1 (reporting that the company's top three executives received a total of $160 million in compensation for 2004).

[100] *See Enforcement of Prohibitions Against Broadcast Indecency*, Report and 8 FCC Rcd 704 (1993), *modified*, 10 FCC Rcd 10558 (1995). CBS, Inc. and Infinity Broadcasting Corporation, both of which became Viacom, Inc. subsidiaries, submitted comments in that rulemaking proceeding. *Id.*, 8 FCC Rcd at 712 .

[101] *Young Broadcasting*, 19 FCC Rcd at 1751 (release date of January 27, 2004) .

broadcast of partial nudity could violate the indecency rule and statute. CBS tries to liken its situation to that of NBC in the *Golden Globe Order*, where we declined to impose a forfeiture because we overruled precedent that had specifically held that isolated expletives were not actionably indecent.[102] We have never held, however, that fleeting nudity is not actionably indecent. On the contrary, as discussed above, we held that fleeting nudity was indecent in *Young Broadcasting* before the Super Bowl broadcast at issue here. The fact that this case is not identical to Young *Broadcasting* (or, indeed, any other case) certainly does not preclude us from imposing a forfeiture. The facts of most indecency cases are not identical to any that precede them. For example, the Commission has not been confronted before this case with a broadcast where a male performer ripped off the clothing of a female performer to reveal her breast in the midst of a song containing repeated sexual references and a dance containing simulated sexual activities. But any argument that CBS lacked adequate notice that such a performance would run afoul of the Commission's indecency regulations is groundless. The Commission is applying an established standard to the facts of a new case and is not overruling precedent. Thus, it is entirely lawful and appropriate to impose a forfeiture when we determine that the licensee has violated that standard.[103]

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[102] *Opposition* at 19, 27-28.

[103] As we find CBS legally responsible for the indecent broadcast based on both its own willful omission and its vicarious liability for the willful acts of its agents under the principle of respondeat superior, we need not address whether it could also be held responsible under Section 503(b)(1)(D) without a showing of willfulness.

30. *Constitutional Issues*. CBS offers a number of arguments attacking then constitutional underpinnings of the Commission's indecency framework. We find no merit in those arguments.

31. We reject CBS's arguments that the Commission's indecency standard is vague, overbroad, and vests the Commission with excessive discretion.[104] Courts have upheld the indecency standard applied in the *NAL* and in this *Order* against facial vagueness and overbreadth challenges.[105] The D.C. Circuit also has rejected the argument that the Commission's indecency standard is overbroad because it may encompass material with serious merit.[106] We do not believe that requiring broadcasters to exercise care to prevent a televised depiction of naked sexual organs prior to 10 p.m. unduly "chills" exercise of their First Amendment rights. As the D.C.

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[104] *Opposition* at 65-77.

[105] *See ACT III*, 58 F.3d at 659 (upholding the Commission's indecency definition against facial vagueness and overbreadth challenges). CBS's arguments about the Commission's discretion focus on the Commission's investigatory practices in cases where a complaint is based on a description of allegedly offensive programming, and not supported by a tape or a transcript. *Opposition* at 74-76. However, those arguments have nothing to do with this case, in which there was no dispute about what was broadcast and in which CBS issued a public apology to viewers for the violation of its broadcast standards. Similarly, CBS's contention about delay in the Commission's enforcement process (*Opposition* at 76-77) is irrelevant to this case. We also note that the D.C. Circuit has previously rejected this argument. *Action for Children's Television v. FCC*, 59 F.3d 1249, 1261-62 (D.C. Cir. 1995) ("*ACT IV*"), *cert. denied*, 516 U.S. 1072 (1996).

[106] *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) ("*ACT I*") ("'serious merit' need not, in every instance, immunize material from FCC channeling authority").

Circuit observed, "some degree of self-censorship is inevitable and not necessarily undesirable so long as proper standards are available."[107]

32. We also disagree with CBS that the *NAL* is inconsistent with the Supreme Court's *Pacifica* decision.[108] *Pacifica* stressed the importance of contextual analysis such as that reflected in this *Order*.[109] Accordingly, we do not read *Pacifica* as precluding an indecency finding based on a brief depiction of partial nudity. The Supreme Court specifically stated that it had not decided whether an occasional expletive in a different setting (*e.g.*, a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy) would justify any sanction.[110] The Court's emphasis on the narrowness of its holding was meant to highlight the "all-important" role of context, not to deprive the Commission of power to regulate broadcast indecency

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[107] *ACT IV*, 59 F.3d at 1261; *see ACT III*, 58 F.3d at 666 ("Whatever chilling effect may be said to inhere in the regulation of indecent speech, these have existed ever since the Supreme Court first upheld the FCC's enforcement of section 1464 of the Radio Act.").

[108] *Opposition* at 44-53. In making this argument, CBS generally ignores the specific context of this case, preferring instead to opine about live television coverage of political and other events and even to lament "the end of live broadcasting as we know it." *Id.* at 48. We reiterate that our decision is limited to the specific context of this case, which involves a Super Bowl halftime entertainment show that was produced by CBS, using performers selected and paid by CBS. For the reasons stated in the *NAL* and in this *Order*, there is ample support for our conclusion that CBS failed to take reasonable precautions to ensure that no actionably indecent material was broadcast in this context.

[109] *Pacifica*, 438 U.S. at 742 ("indecency is largely a function of context—it cannot be adequately judged in the abstract").

[110] *Id.*, 438 at 750; *see id.* at 760-61 (Powell, J., concurring).

except in situations involving extended or repetitious expletives or depictions of sexual or excretory organs or activities.[111]

33. CBS also claims that the constitutional validity of our indecency enforcement practice has been undermined by a changed legal and technological landscape, citing the Supreme Court's decisions in *United States v. Playboy Entertainment Group, Inc.*,[112] *Reno v. ACLU*,[113] and *Denver Area Educational Telecommunications Consortium v. FCC*,[114] and pointing to the pervasiveness of cable and satellite television, and the development of online media and media recording technology (*e.g.*, videocassette recorders, DVD recorders and personal video recorders featuring time-shifting technology) and the V-chip.[115] Again, we disagree. In striking down as unconstitutional an Internet indecency standard, the Supreme Court expressly recognized in *Reno* the "special justifications for regulation of the broadcast media," citing *Red Lion* and *Pacifica*.[116] Moreover, in *Denver Area*,

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[111] *Id.* at 750. The D.C. Circuit upheld the Commission's interpretation of *Pacifica* as not imposing such limits. *See ACT I*, 852 F.2d at 1338 (upholding the Commission's decision to depart from its prior policy of acting only in cases involving "the repeated use, for shock value, of words similar to those satirized in the Carlin 'Filthy Words' monologue. . . . The FCC rationally determined that its former policy could yield anomalous, even arbitrary, results.").

[112] 529 U.S. 803 (2000).

[113] 521 U.S. 844 (1997).

[114] 518 U.S. 717 (1996).

[115] *Opposition* at 53-61.

[116] Similarly, in *Playbody*, the Court distinguished broadcast services from cable due to differences in the nature of those media. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. at 815.

the Court addressed the constitutionality of a Commission order implementing provisions of the 1992 Cable Television Consumer Protection and Competition Act that concerned indecent and obscene cable programming, not over-the-air broadcasting. We find nothing in that opinion that undermines the constitutionality of our framework for enforcing our rule against the broadcast of indecent material outside the safe harbor hours.

34. Furthermore, CBS's arguments about new technologies have no apparent application to this case. The V-chip technology cannot be utilized to block sporting events such as the Super Bowl because sporting events are not rated.[117] Nevertheless, even if the V-chip could be used to block sporting events, based on CBS's representations it appears that CBS would not have rated the Super Bowl halftime show as inappropriate for children.

35. Finally, we address CBS's dire warnings that imposing sanctions in this case will have a chilling effect on

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[117] *See Implementation of Section 551 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 8232, 8242-43, ¶ 21 (1998) (news programming, sports programming and advertisements are not included in the V-chip ratings system). Outside of the context of exempt programming such as sports programming, we agree that the V-chip is an important protection, but it does not eliminate the need for enforcing our indecency rule or undermine the constitutionality of that rule. We note that last year, CBS and the other major networks announced their participation with the Advertising Council in an educational campaign designed to improve awareness of the V-chip. The announcement stated that less than 10 percent of all parents are using the V-chip and 80 percent of all parents who currently own a television set with a V-chip are not aware that they have it. *See* News Release, "The Advertising Council and Four Major Television Networks Announce Unprecedented Partnership to Educate Parents About the V-Chip," http:// www.adcouncil.org/about/news_033004 (March 30, 2004). In addition, numerous television sets in U.S. households lack V-chips.

live coverage of public events, such as national political conventions and presidential scandals, and "violates the Commission's own pledge" to "take no action which would inhibit broadcast journalism."[118] While we are sensitive to the impact of our decisions on speech and, in particular, on live news coverage, we do not believe that CBS's fears about the chilling effect of our decision here are well-founded. As discussed in detail above, this case involves a staged show planned by CBS and its affiliates, under circumstances where they had the means to exercise control and good reasons to take precautionary measures. These circumstances are obviously completely different from live coverage of breaking news events, which are not controlled by broadcasters, and this decision in no way suggests that we are imposing strict liability for such coverage or, indeed, any other programming.

36. *Conclusion*. Under section 503(b)(1)(B) of the Act, any person who is determined by the Commission to have willfully failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a monetary forfeiture penalty.[119] In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.[120] The Commission will then issue a forfeiture if it finds by a pre-

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[118] *Opposition* at 53, *quoting Pacifica Reconsideration Order*, 59 FCC 2d at 893. *See also Opposition* at ix, x, 46, 48-53.

[119] 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

[120] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

ponderance of the evidence that the person has violated the Act or a Commission rule. For the reasons set forth above, we conclude under this standard that CBS is liable for a forfeiture for its willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

37. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of $7,000 for transmission of indecent materials.[121] The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D) , such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[122] In this case, taking all of these factors into consideration, for the reasons set forth above, we find that the *NAL* properly proposed the statutory maximum forfeiture of $550,000 against CBS.

IV. ORDERING CLAUSES

38. Accordingly, IT IS ORDERED THAT, pursuant to section 503(b) of the Act[123], and sections 0.311 and 1.80(f)(4) of the Commission's Rules[124], CBS Corporation IS LIABLE FOR A MONETARY FORFEITURE in the amount of $550,000 for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

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[121] *Forfeiture Policy Statement*, 12 FCC Rcd at 17113.

[122] *Id.*, 12 FCC Rcd at 17100-01, ¶ 27.

[123] 47 U.S.C. § 503(b).

[124] 47 C.F.R. §§ 0.311 , 1.80(f)(4).

39. Payment of the forfeiture shall be made in the manner provided for in section 1.80 of the Commission's rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to section 504(a) of the Act.[125] Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. referenced above and the FRN(s) referenced in the Appendix. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

40. Requests for payment under an installment plan should be sent to: Associate Managing Director—Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.[126]

41. IT IS FURTHER ORDERED THAT a copy of this FORFEITURE ORDER shall be sent by Certified Mail, Return Receipt Requested to CBS Corporation, 2000 K Street, N.W., Suite 725, Washington, DC 20006, and to its counsel, Robert Corn-Revere, Esquire, Davis Wright Tremaine LLP, 1500 K Street, N.W., Washington, DC 20005.

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[125] 47 U.S.C. § 504(a).

[126] *See* 47 C.F.R. § 1.1914.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF

CHAIRMAN KEVIN J. MARTIN

Re: Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show; Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005; Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace"

Congress has long prohibited the broadcasting of indecent and profane material and the courts have upheld challenges to these standards. But the number of complaints received by the Commission has risen year after year. They have grown from hundreds, to hundreds of thousands. And the number of programs that trigger these complaints continues to increase as well. I share the concerns of the public—and of parents, in particular —that are voiced in these complaints.

I believe the Commission has a legal responsibility to respond to them and resolve them in a consistent and effective manner. So I am pleased that with the decisions released today the Commission is resolving hundreds of thousands of complaints against various broadcast licensees related to their televising of 49 different programs. These decisions, taken both individually and as a whole, demonstrate the Commission's continued commitment to enforcing the law prohibiting the airing of obscene, indecent and profane material.

Additionally, the Commission today affirms its initial finding that the broadcast of the Super Bowl XXXVIII

Halftime Show was actionably indecent. We appropriately reject the argument that CBS continues to make that this material is not indecent. That argument runs counter to Commission precedent and common sense.

STATEMENT OF

COMMISSIONER MICHAEL J. COPPS

Re: Complaints Regarding Various Television Broadcasts Between January 1, 2002 and March 12, 2005, Notices of Apparent Liability and Memorandum Opinion and Order

Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace", Notice of Apparent Liability

Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast Of The Super Bowl XXXVII Halftime Show, Forfeiture Order

In the past, the Commission too often addressed indecency complaints with little discussion or analysis, relying instead on generalized pronouncements. Such an approach served neither aggrieved citizens nor the broadcast industry. Today, the Commission not only moves forward to address a number of pending complaints, but does so in a manner that better analyzes each broadcast and explains how the Commission determines whether a particular broadcast is indecent. Although it may never be possible to provide 100 percent certain guidance because we must always take into account specific and often-differing contexts, the approach in today's orders can help to develop such guidance and to establish precedents. This measured process, common in jurisprudence, may not satisfy those who clamor for immediate certainty in an uncertain world, but it may just be the best way to develop workable rules of the road.

Today's Orders highlight two additional issues with which the Commission must come to terms. First, it is time for the Commission to look at indecency in the broader context of its decisions on media consolidation. In 2003 the FCC sought to weaken its remaining media concentration safeguards without even considering whether there is a link between increasing media consolidation and increasing indecency. Such links have been shown in studies and testified to by a variety of expert witnesses. The record clearly demonstrates that an overwhelming number of the Commission's indecency citations have gone to a few huge media conglomerates. One recent study showed that the four largest radio station groups which controlled just under half the radio audience were responsible for a whopping 96 percent of the indecency fines levied by the FCC from 2000 to 2003.

One of the reasons for the huge volume of complaints about excessive sex and graphic violence in the programming we are fed may be that people feel increasingly divorced from their "local" media. They believe the media no longer respond to their local communities. As media conglomerates grow ever larger and station control moves farther away from the local community, community standards seem to count for less when programming decisions are made. Years ago we had independent programming created from a diversity of sources. Networks would then decide which programming to distribute. Then local affiliates would independently decide whether to air that programming. This provided some real checks and balances. Nowadays so many of these decisions are made by vertically-integrated conglomerates headquartered far away from the communities they are supposed to be serving—entities

that all too often control both the distribution ***and*** the production content of the programming.

If heightened media consolidation is indeed a source for the violence and indecency that upset so many parents, shouldn't the Commission be cranking that into its decisions on further loosening of the ownership rules? I hope the Commission, before voting again on loosening its media concentration protections, will finally take a serious look at this link and amass a credible body of evidence and not act again without the facts, as it did in 2003.

Second, a number of these complaints concern graphic broadcast violence. The Commission states that it has taken comment on this issue in another docket. It is time for us to step up to the plate and tackle the issue of violence in the media. The U.S. Surgeon General, the American Academy of Pediatrics, the American Psychological Association, the American Medical Association, and countless other medical and scientific organizations that have studied this issue have reached the same conclusion: exposure to graphic and excessive media violence has harmful effects on the physical and mental health of our children. We need to complete this proceeding.

STATEMENT OF

COMMISSIONER JONATHAN S. ADELSTEIN

CONCURRING

Re: *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show,* Forfeiture Order

I have sworn an oath to uphold the Constitution[1] and to carry out the laws adopted by Congress.[2] Trying to find a balance between these obligations has been challenging in many of the indecency cases that I have decided. I believe it is our duty to regulate the broadcast of indecent material to the fullest extent permissible by the Constitution because safeguarding the well-being of our children is a compelling national interest.[3] I therefore have supported efforts to step up our enforcement of indecency laws since I joined the Commission.

The Commission's authority to regulate indecency over the public airwaves was narrowly upheld by the Supreme Court with the admonition that we should exercise that authority with the utmost restraint, lest we inhibit constitutional rights and transgress constitutional limitations on government regulation of protected

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[1] U.S. Const., amend. I.

[2] Congress has specifically forbidden the broadcast of obscene, indecent or profane language. 18 U.S.C. § 1464. It has also forbidden censorship. 47 U.S.C. § 326.

[3] *See,* e.g., *N.Y. v. Ferber,* 458 U.S. 747, 756-57 (1982).

speech.[4] Given the Court's guidance in *Pacifica,* the Commission has repeatedly stated that we would judiciously walk a "tightrope" in exercising our regulatory authority.[5] Hence, within this legal context, a rational and principled "restrained enforcement policy" is not a matter of mere regulatory convenience. It is a constitutional requirement.[6]

Accordingly, I concur with today's Super Bowl Order, but concur in part and dissent in part with the companion Omnibus Order[7] because, while in some ways today's Omnibus decision goes too far, in other ways it does not go far enough. Significantly, it abruptly departs from our precedents by adopting a new, weaker enforcement mechanism that arbitrarily fails to assess fines against broadcasters who have aired indecent material. Additionally, while today's Omnibus decision appropriately identifies violations of our indecency laws, not every instance determined to be indecent meets that standard.

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[4] *See FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978) (emphasizing the "narrowness" of the Court's holding); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) ("*ACT I*") ("Broadcast material that is indecent but not obscene is protected by the [F]irst [A]mendment.").

[5] *See* Brief for Petitioner, FCC, 1978 WL 206838 at *9.

[6] *ACT I, supra* note 4, at 1344 ("the FCC may regulate [indecent] material only with due respect for the high value our Constitution places on freedom and choice in what the people say and hear."); *Id.* at 1340 n.14 ("[T]he potentially chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.").

[7] *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order (decided March 15, 2006) (hereinafter "Omnibus Order").

We have previously sought to identify all broadcasters who have aired indecent material, and hold them accountable. In the Omnibus Order, however, the Commission inexplicably fines only the licensee whose broadcast of indecent material was the subject of a viewer's complaint, even though we know millions of other Americans were exposed to the offending broadcast. I cannot find anywhere in the law that Congress told us to apply indecency regulations only to those stations against which a complaint was specifically lodged. The law requires us to prohibit the broadcast of indecent material, period. This means that we must enforce the law anywhere we determine it has been violated. It is willful blindness to decide, with respect to network broadcasts we know aired nationwide, that we will only enforce the law against the local station that happens to be the target of viewer complaints. How can we impose a fine solely on certain local broadcasters, despite having repeatedly said that the Commission applies a national indecency standard—not a local one?[8]

The failure to enforce the rules against some stations but not others is not what the courts had in mind when they counseled restraint. In fact, the Supreme Court's decision in *Pacifica* was based on the uniquely pervasive characteristics of broadcast media.[9] It is patently arbitrary to hold some stations but not others accountable

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[8] *See, e.g., In re Sagittarius Broadcasting Corporation,* Memorandum Opinion and Order, 7 FCC Rcd 6873, 6876 (1992) (subsequent history omitted).

[9] *See Pacifica Found.*, 438 U.S. at 748-49 (recognizing the "uniquely pervasive presence" of broadcast media "in the lives of all Americans"). In today's Order, paragraph 10, the Commission relies upon the same rationale.

for the same broadcast. We recognized this just two years ago in *Married By America*.[10] The Commission simply inquired who aired the indecent broadcast and fined all of those stations that did so.

In the *Super Bowl XXXVIII Halftime Show* decision, we held only those stations owned and operated by the CBS network responsible, under the theory that the affiliates did not expect the incident and it was primarily the network's fault.[11] I dissented in part to that case because I believed we needed to apply the same sanction to every station that aired the offending material. I raise similar concerns today, in the context of the Omnibus Order.

The Commission is constitutionally obligated to decide broadcast indecency and profanity cases based on the "contemporary community standard," which is "that of the average broadcast viewer or listener." The Commission has explained the "contemporary community standard," as follows:

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[10] *See Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married by America" on April 7, 2003,* Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 20191, 20196 (2004) (proposing a $7,000 forfeiture against each Fox Station and Fox Affiliate station); *reconsideration pending*. *See also Clear Channel Broadcast Licenses, Inc.,* 19 FCC Rcd 6773, 6779 (2004) (proposing a $495,000 fine based on a "per utterance" calculation, and directing an investigation into stations owned by other licensees that broadcast the indecent program). In the instant Omnibus Order, however, the Commission inexplicably fines only the licensee whose broadcast of indecent material was actually the subject of a viewer's complaint to the Commission. *Id.* at ¶ 71.

[11] *See Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show,* Notice of Apparent Liability, 19 FCC Rcd 19230 (2004).

> We rely on our collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium.[12]

I am concerned that the Omnibus Order overreaches with its expansion of the scope of indecency and profanity law, without first doing what is necessary to determine the appropriate contemporary community standard.

The Omnibus Order builds on one of the most difficult cases we have ever decided, the *Golden Globe Awards* case,[13] and stretches it beyond the limits of our precedents and constitutional authority. The precedent set in that case has been contested by numerous broadcasters, constitutional scholars and public interest groups who have asked us to revisit and clarify our reasoning and decision. Rather than reexamining that case, the majority uses the decision as a springboard to add new words to the pantheon of those deemed to be inherently sexual or excretory, and consequently indecent and profane, irrespective of their common meaning or of a fleeting and isolated use. By failing to address the many serious concerns raised in the reconsideration petitions filed in the *Golden Globe Awards* proceeding, before prohibiting the use of additional words, the Commission falls short

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[12] *In re Infinity Radio License, Inc.,* Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 (2004).

[13] *In re Complaints Against Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 19 FCC Rcd 4975 (2004); *petitions for stay and reconsideration pending*.

of meeting the constitutional standard and walking the tightrope of a restrained enforcement policy.

This approach endangers the very authority we so delicately retain to enforce broadcast decency rules. If the Commission in its zeal oversteps and finds our authority circumscribed by the courts, we may forever lose the ability to protect children from the airing of indecent material, barring an unlikely constitutional amendment setting limitations on the First Amendment freedoms.

The perilous course taken today is evident in the approach to the acclaimed Martin Scorsese documentary, "The Blues: Godfathers and Sons." It is clear from a common sense viewing of the program that coarse language is a part of the culture of the individuals being portrayed. To accurately reflect their viewpoint and emotions about blues music requires airing of certain material that, if prohibited, would undercut the ability of the filmmaker to convey the reality of the subject of the documentary. This contextual reasoning is consistent with our decisions in *Saving Private Ryan*[14] and *Schindler's List*.[15]

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[14] *In the Matter of Complaints Against Various Television Licensees Regarding Their Broad. on November 11, 2004, of the ABC Television Network's Presentation of the Film, "Saving Private Ryan,"* Memorandum Opinion and Order, 20 FCC Rcd 4507, 4513 (2005) ("Deleting all [indecent] 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."). *See also Peter Branton*, Letter by Direction of the Commission, 6 FCC Rcd 610 (1991) (concluding that repeated use of the f-word in a recorded news interview program not indecent in context).

[15] *In the Matter of WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd 1838 (2000).

The Commission has repeatedly reaffirmed, and the courts have consistently underscored, the importance of content *and* context. The majority's decision today dangerously departs from those precedents. It is 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.

We should be mindful of Justice Harlan's observation in *Cohen v. California*.[16] Writing for the Court, he observed:

> [W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[17]

Given all of these considerations, I find that the Omnibus Order, while reaching some appropriate conclusions both in identifying indecent material and in dismissing complaints, is in some ways dangerously off the mark. I cannot agree that it offers a coherent, principled long-term framework that is rooted in common sense. In fact, it may put at risk the very authority to protect children that it exercises so vigorously.

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[16] 403 U.S. 15 (1971).

[17] *Id.* at 26 ("We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.").

STATEMENT OF

COMMISSIONER DEBORAH TAYLOR TATE

Re: Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, Forfeiture Order; *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order; *Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace"*, Notice of Apparent Liability for Forfeiture

Today marks my first opportunity as a member of the Federal Communications Commission to uphold our responsibility to enforce the federal statute prohibiting the airing of obscene, indecent or profane language.[1] To be clear—I take this responsibility very seriously. Not only is this the law, but it also is the right thing to do.

One of the bedrock principles of the Communications Act of 1934, as amended, is that the airwaves belong to the public. Much like public spaces and national landmarks, these are scarce and finite resources that must be preserved for the benefit of all Americans. If numbers are any indication, many Americans are not happy about the way that their airwaves are being utilized. The number of complaints filed with the FCC reached over one million in 2004. Indeed, since taking office in January 2006, I have received hundreds of personal e-mails from people all over this country who are unhappy

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[1] *See* 18 U.S.C. § 1464.

with the content to which they—and, in particular, their families—are subjected.

I have applauded those cable and DBS providers for the tools they have provided to help parents and other concerned citizens filter out objectionable content. Parental controls incorporated into cable and DBS set-top boxes, along with the V-Chip, make it possible to block programming based upon its content rating. However, these tools, even when used properly, are not a complete solution. One of the main reasons for that is because much of the content broadcast, including live sporting events and commercials, are not rated under the two systems currently in use.

I also believe that consumers have an important role to play as well. Caregivers—parents, in particular—need to take an active role in monitoring the content to which children are exposed. Even the most diligent parent, however, cannot be expected to protect their children from indecent material broadcast during live sporting events or in commercials that appear during what is marketed to be "appropriate" programming.

Today, we are making significant strides toward addressing the backlog of indecency complaints before this agency. The rules are simple—you break them and we will enforce the law, just as we are doing today. Both the public and the broadcasters deserve prompt and timely resolution of complaints as they are filed, and I am glad to see us act to resolve these complaints. At the same time, however, I would like to raise a few concerns regarding the complaints we address in these decisions.

First, I would like to discuss the complaint regarding the 6:30 p.m. Eastern Daylight Time airing of an episode

of *The Simpsons*. The *Order* concludes that this segment is not indecent, in part because of the fact that *The Simpsons* is a cartoon. Generally speaking, cartoons appeal to children, though some may cater to both children and adults simultaneously. Nevertheless, the fact remains that children were extremely likely to have been in the viewing audience when this scene was broadcast. Indeed, the marketing is aimed at children. If the scene had involved real actors in living color, at 5:30 p.m. Central Standard Time, I wonder if our decision would have been different? One might argue that the cartoon medium may be a more insidious means of exposing young people to such content. By their very nature, cartoons do not accurately portray reality, and in this instance the use of animation may well serve to present that material in a more flattering light than it would if it were depicted through live video. I stop short of disagreeing with our decision in this case, but note that the animated nature of the broadcast, in my opinion, may be cause for taking an even closer look in the context of our indecency analysis.

Second, our conclusion regarding the 9:00 p.m. Central Standard Time airing of an episode of *Medium* in which a woman is shot at point-blank range in the face by her husband gives me pause. While I agree with the result in this case, I question our conclusion that the sequence constitutes violence *per se* and therefore falls outside the scope of the Commission's definition of indecency. Without question, this scene is violent, graphically so. Moreover, it is presented in a way that appears clearly designed to maximize its shock value. And therein lies my concern. One of the primary ways that this scene shocks is that it leads the viewer to believe that

the action is headed in one direction—through dialogue and actions which suggest that interaction of a sexual nature is about to occur—and then abruptly erupts in another—the brutally violent shooting of a wife by her husband, in the head, at point-blank range. Even though the Commission's authority under Section 1464 is limited to indecent, obscene, and profane content, and thus does not extend to violent matter, the use of violence as the "punch line" of titillating sexual innuendo should not insulate broadcast licensees from our authority. To the contrary, the use of sexual innuendo may, depending on the specific case, subject a licensee to potential forfeiture, regardless of the overall violent nature of the sequence in which such sexual innuendo is used.

* * *

Finally, I would like to express my hope and belief that the problem of indecent material is one that can be solved. Programmers, artists, writers, broadcasters, networks, advertisers, parents, public interest groups, and, yes, even Commissioners can protect two of our country's most valuable resources: the public airwaves and our children's minds. We must take a stand against programming that robs our children of their innocence and constitutes an unwarranted intrusion into our homes. By working together, we should promote the creation of programming that is not just entertaining, but also positive, educational, healthful, and, perhaps, even inspiring.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3575

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; UNITED STATES OF AMERICA, RESPONDENTS

Jan. 18, 2012

Petition for Review of Orders of the
Federal Communications Commission
FCC Nos. 06-19 and 06-68

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

Present: MCKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, GREENAWAY, JR., and VANASKIE, *Circuit Judges*.

The petition for rehearing filed by Respondent FCC

having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED. Judges Scirica, Smith and Jordan would have granted rehearing.

By the Court,

/s/ MARJORIE O. RENDELL
MARJORIE O. RENDELL
Circuit Judge

Dated: Jan. 18, 2012
CMD/dmm/cc: All Counsel of Record

APPENDIX E

1. 18 U.S.C. 1464 provides:

Broadcasting obscene language

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.

2. 47 U.S.C. 312 provides in relevant part:

Administrative sanctions

(a) Revocation of station license or construction permit

The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

(6) for violation of section 1304, 1343, or 1464 Title 18; or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) Cease and desist orders

Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter, or section 1304, 1343, or 1464 Title 18, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

* * * * *

3. 47 U.S.C. 503 provides in relevant part:

Forfeitures

* * * * *

(b) Activities constituting violations authorizing imposition of forfeiture penalty; amount of penalty; procedures applicable; persons subject to penalty; liability exemption period

(1) Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have—

(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;

(B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;

(C) violated any provision of section 317(c) or 509(a) of this title; or

(D) violated any provision of section 1304, 1343, or 1464 of Title 18; shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this chapter; except that this subsection shall not apply to any conduct which is subject to forfeiture under subchapter II of this chapter, part II or III of subchapter III of this chapter, or section 507 of this title.

* * * * *

4. Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, provides:

> FCC REGULATIONS.—The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming—
>
> (1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and
>
> (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).
>
> The regulations required under this subsection shall be promulgated in accordance with section 553 of title 5, United States Code, and shall become final not later than 180 days after the date of enactment of this Act.

5. 47 C.F.R. 73.3999 provides:

> **Enforcement of 18 U.S.C. 1464 (restrictions on the transmission of obscene and indecent material).**
>
> (a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene.
>
> (b) No licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.