BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
Indecency Rules and an "Egregious Cases Policy "	)	GN Docket No. 13-86

To: The Commission

Comments of
National Religious Broadcasters

National Religious Broadcasters ("NRB"), through undersigned counsel, hereby files Comments in response to the Commission's April 1, 2013 *Public Notice* in the above-captioned matter.[1] We oppose the Commission adopting a so-called "egregious cases" policy, and instead suggest our own reformulation of the FCC's indecency rules in a way that will comport with Supreme Court decisions, including the most recent one, *FCC v. Fox Television Stations, Inc.* 132 S. Ct. 2307 (2012) ("*Fox* II").

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[1] Public Notice, *FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (more than one million complaints); seeks comment on adopting egregious cases policy, April 1, 2013* (hereinafter "Notice").

TABLE OF CONTENTS

Background

National Religious Broadcasters (NRB) is a non-profit association that exists to keep the doors of electronic media open and accessible for Christian broadcasters and communicators, and to promote media excellence. NRB's many members include a significant number of radio and television broadcasters that produce and/or telecast religious programming over the airways. Our members have a distinct, vested interest in preserving the quality and decency of content that is broadcast during children's viewing hours.[2] Our broadcast stations and program producers, in effect, *swim in the same waters* as all other broadcasters. "Pollution" at one end of the stream will affect all broadcasters, including ours. If parents and families, disgusted by lowered standards among broadcast licensees, end up turning off the dial as they feel compelled to look to other means for family-friendly information and entertainment other than over-the-air broadcasts, our member stations will suffer. But beyond that, a diminishing of the civility and decency of discourse and imagery during children's' viewing hours will diminish families, children, and our culture, and will impair the public interest.

For those reasons, and others, NRB filed its Amicus Curiae brief with the United States Supreme Court in the first appeal in *FCC v. Fox*, where we urged the Court to uphold the Commission's indecency rules as reasonable and rational. [3] We argued that the FCC indecency policy "was a rational means to carry out the mandate of Congress," a mandate expressed in 18 U.S.C. § 1464, which outlaws, among other things, the

[2] Broadcast indecency restrictions only apply between 6:00 a.m. and 10:00 p.m. daily, hours when children are more likely to be in the audience. 47 C.F.R. §73.3999(b).
[3] Amicus Brief of National Religious Broadcasters in Support of Petitioners ("Amicus Brief, *Fox* I"), *FCC v. Fox*, Supreme Court Case No. 07-582.

broadcasting of "indecent … language …" over the airways. Amicus Brief, *Fox* I, page xi.

In 2009 the Supreme Court upheld the Commission's policy that had expanded its indecency enforcement regime to include "fleeting expletives," ruling that the FCC's approach was "neither arbitrary nor capricious" as viewed through the prism of administrative law. *FCC v. Fox,* 566 U.S. 502, 530 (2009) ("*Fox* I"). After remand, and a second ruling by the Second Circuit Court of Appeals, this time striking down the rules as having violated the First Amendment, a second appeal ensued. NRB also filed an Amicus Curiae brief with the Supreme Court in that appeal as well, and there also we urged the Court not to strike down the indecency regulations on the basis of the First Amendment. [4]

In these Comments we discuss, in sections I, II, and III below, the Supreme Court's 2012 decision in *Fox* II. In section IV we refer to the current FCC rule on indecency. In sections V – VIII we set-forth our suggested language for necessary clarifications of the Commissions' indecency rules, including the reason we believe that the Commission should reject the so-called "egregious cases" policy.

Summary of NRB's Comments

In sections I – IV below, NRB reviews the history of the Supreme Court's treatment of the issue of indecency and the current rule. In sections V – VIII, NRB proposes certain clarifications and modifications to the Commission rules. These are

[4] Amicus Brief of National Religious Broadcasters in Support of Petitioners ("Amicus Brief, *Fox* II"), *FCC v. Fox*, Supreme Court Case No. 10-1293.

suggested in the context of the current Commission rule which is restated here, with our proposed changes, as follows: [5]

> The Commission defines indecent speech as material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium. In determining "contemporary community standards for the broadcast industry," the Commission shall take cognizance of current, voluntary industry standards, codes and *best practices* expressly adopted or commonly practiced by the relevant sector of the broadcast industry. Thus, indecency findings require two primary determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition – that is, the material must describe or depict sexual or excretory organs or activities. Second, the material must be patently offensive as measured by contemporary community standards for the broadcast medium. In our assessment of whether broadcast material is patently offensive, "the full context in which the material appeared is critically important," and shall be based on the totality of all relevant circumstances regarding the disputed content and the particular broadcast. ~~Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length the descriptions; and (3) whether the material panders to, titillates or shocks the audience. In examining these three factors, we must weigh and balance them 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." 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.~~ The Commission shall enforce all prohibitions regarding indecent content aired during children's viewing hours (to-wit: 6:00 a.m. to 10:00 p.m.). This shall include *fleeting expletives and/or momentary nudity* that meet the definition of "indeceny," unless the broadcaster can show that it had exercised every reasonable precaution usually exercised by the broadcasting industry, in a good faith attempt to prevent the

[5] Underlined portions are NRB's suggested language. Text that is crossed-out represents language that we propose should be eliminated, consisting of the three-factor analysis which we recommend be replaced by a "totality of the circumstances" approach. The original text of the FCC rule is derived from: *In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*: Order, 21 FCC Rcd 13299 (2006), ¶ 15 ("2006 Order").

fleeting expletives or momentary nudity from being broadcast; provided, however, that substantial evidence of a prior failure on the part of a broadcaster to have prevented an instance of a fleeting expletive or an instance of momentary nudity shall create a rebuttable presumption that the broadcaster failed to exercise every reasonable precaution in the later incident. The egregiousness of an incident of indecency shall *not* be a factor in the Commission's decision to enforce these rules regarding that incident; however, egregiousness shall be considered in determining the imposition of a fine or other sanction for a violation.

Indecent material is not actionable, and shall not be subject to an enforcement action if it was part of live news coverage, and the broadcaster shows that the indecent content was a spontaneous utterance or unexpected physical occurrence where, based on all of the circumstances, it could not have been anticipated or prevented by a broadcaster exercising reasonable care to prevent such indecent material from being broadcast. In deciding close questions regarding what is genuine "news" coverage qualifying for the exemption, and what is mere "entertainment," which would not qualify, the Commission shall rely upon its body of decided cases where it defined "bona fide" news programs in the context of administering its political advertising rules.

In addition, indecency is not actionable if it constitutes only a small part of a broadcasted work with serious artistic, literary, social, political or scientific value for children, and where the broadcaster shows that it had taken reasonable precautions before and during the broadcast to warn viewers of the objectionable content, and the broadcaster produces substantial evidence that the subject matter of the broadcast work and other circumstances indicate a low probability that younger children for whom the material would not be age-appropriate under any conditions would be in the listening or viewing audience.

I. The Narrow Basis of the Court's Ruling: Fair Notice

In this second appeal, *Fox* II, the Court viewed the Commission's finding of prohibited indecency regarding profanity that was aired on Fox during the 2002 and 2003 Billboard Music Awards, and its finding of indecency against ABC regarding a seven second depiction of adult, female nudity taking place in front of a male child during a

2003 episode of the crime drama NYPD Blue. The networks challenged the finding by the Commission that these "fleeting" examples of expletives and nudity could be found to constitute actionable indecency. Specifically, the broadcasters argued (1) that technological and media landscape changes since the Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) should require that *Pacifica* (upholding the First Amendment constitutionality of the FCC's then existing indecency standard in the interest of protecting children) be overruled; and (2) that the FCC's enforcement approach did not provide adequate, fair notice of the indecency standards to which they should adhere; and (3) additionally, that the policy itself was "void for vagueness" in failing to describe with sufficient clarity what is, or is not, "indecent" content, particularly in the context of "fleeting," non-repetitive utterances or visual depictions.

The Supreme Court took pains to stress the limited, narrow "scope" of its decision. *Fox* II, 132 S. Ct. at 2320. Indeed, the Court chose the narrowest possible basis upon which to rule against the FCC. The Supreme Court "vacated" the judgment of the Second Circuit Court of Appeal which had struck down the FCC's indecency policy on broad, First Amendment grounds. Further, the Supreme Court *did not* uphold the Second Circuit's decision that the policy was unconstitutionally vague and was therefore *invalid in its entirety*. Instead, the Supreme Court held that only one particular prong of the "void for vagueness" doctrine had been violated – i.e. the particular mandate that government regulations must give "fair notice" to those who are subject to those rules, regarding (a) which rules apply, and (b) what conduct is expected or prohibited. In essence, the Court decided that the FCC failed with respect to (a) but declined to decide (b).

The key to the Court's decision was the fact that the offending broadcasts took place in 2001 - 2003; however, the FCC's orders at issue actually enforced a standard that was not clarified until 2004. As the Court stated: "Even though the incidents at issue in these cases took place before the [2004] Golden Globes Order, the Commission applied its new policy regarding fleeting expletives and fleeting nudity." *Fox* II, *supra*, at 2315. Thus, the FCC's action in enforcing a 2004 expansion of older FCC pronouncements against broadcasts that occurred *before* that standard was clearly articulated was held to be defective. The failing of the FCC was not because of the language, or scope of the FCC's indecency policy, or its authority to promulgate that policy, but rather, because it applied a *new* policy to *old* actions of broadcasters, i.e. a procedural flaw.

Further, it is clear that the Court did not invalidate the actions of the FCC on any First Amendment grounds, but instead, chose to reverse the FCC sanctions against Fox and ABC on narrow "due process" grounds, a point that it stressed. The Court stated flatly, "because the Court resolves these cases on fair notice grounds under the Due Process Clause, it need not address the First Amendment implications of the Commission's indecency policy." *Fox* II, at 2330. For now at least, the Court's decision has given no solace to the complaints of the broadcasters that the FCC indecency rules create a "chilling effect" on free speech rights.

II. Indecency Rules as a Means of Protecting Children

While the Court did not expressly address the legitimacy of the underlying justification behind *Pacifica*, namely, the protection of children from indecency when they are likely to be in the viewing and listening audience during "children's hours," it is

clear that the Court's decision considered that factor to be important. In *Fox* II, the Supreme Court mentioned children seven times in its decision: four times regarding the basic rationale expressed in the *Pacifica* decision that protecting children from indecency is a legitimate governmental interest; once, relative to the FCC's criticism of Fox's supposed failure "to protect children from being exposed to" the expletives (*Fox* II, at 2319); once, regarding a prior FCC decision that even fleeting and non-repetitive content can be actionably "indecent" where it refers to sexual activity with a child (Id. at 2314); and once more, regarding the fact that the NYPD Blue episode at issue showed a nude woman standing in front of a child (Id.).

In our Amicus brief in the *Fox* II appeal, we outlined the First Amendment paradigm illustrated in recent Supreme Court cases, whereby free speech is permitted to generously flourish in all cases except for those that fall into the "well-defined and narrowly limited classes of speech," where the Court has held that regulation or even prohibition poses no constitutional problem. Amicus Brief, Fox II, pages 25-27, citing *Brown v. Entertainment Merchants Assn*. 564 U.S. ___, 131 S. Ct. 2729 (2011).

In our brief we further cited several other Supreme Court cases that demonstrate clearly that regulations impacting expression that are reasonably designed to protect minor children fit well within that "narrowly limited" class of speech that can be regulated or even prohibited without violating the First Amendment. Amicus Brief, *Fox* II, page 27, citing: *Ginsberg v. New York*, 390 U.S. 629 (1968) (state statute could ban the sale of sexually explicit materials to minors even if it could not also prohibit it as to adults); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (school could punish a middle-school student speaker at a school assembly where his speech was so

laced with sexual innuendo that it rose to the level of "sexually explicit" content); *Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (school board may lawfully remove books in public school library deemed to be "vulgar"). The Court's decision in *Fox* II gives us no reason to believe that it is departing from these cases or from *Pacifica*.

Beyond that, in the *Brown* case, *supra*, the Court affirmed the general constitutionality of regulations that restrain certain speech in order to protect children. It noted that, regarding government regulations that restrain certain "forms of speech" on the basis that they "corrupt the young or harm their moral development," "[w]e have no business passing judgment on [that] view …" *Brown*, 131 S. Ct. at 2741. Instead, the Court noted, its task was, rather, "only to say whether or not such works constitute a 'well-defined and narrowly limited clas[s] of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.'" Id. If, as NRB believes, profane broadcast content or television depictions of nudity or sexuality during children's' viewing hours *does* fall "into that limited class of speech," then the First Amendment is not offended by its prohibition.

Further, we argued in *Fox* I that, despite the contention of the broadcasting networks and the Second Circuit, *there is no requirement of empirical proof* to support an otherwise lawful regulation that makes a judgment that certain kinds of profanity or nudity is harmful to children who listen to it or who view it. Amicus Brief, *Fox* I, pages 17-22. In its ruling in *Fox* I, the Supreme Court made the same point clearly, indicating that the scant availability of any empirical evidence to prove with scientific accuracy the connection between indecency and a direct harm to minors does not render the

prohibition against indecency unconstitutional: "There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them … Here it suffices to know that children mimic the behavior they observe – or at least the behavior that is presented to them as normal and appropriate." *Fox* I, 556 U.S. at 519 (2009).

III. Matters not Decided

The FCC's indecency policy inquiry and any changes to it should be governed by those legal principles and pronouncements that remain untouched by the Supreme Court. In *Fox* II, the Court listed several issues it refrained from deciding:

- The Court declined to address the "First Amendment implications" of the FCC's indecency policy.
- The Court declined to decide whether *Pacifica* should be reconsidered and possibly reversed. [6]
- The Court declined to rule on the constitutionality of the FCC's 2004 *Golden Globes Order* where the Commission set-forth its current indecency policy.

However, in it's conclusion, the Court also indicated that the narrow nature of its decision gave the FCC the opportunity "to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements." That suggestion is significant. The time is ripe for the FCC to explain with greater clarity those standards that it will apply to indecent broadcast content. The Commission still possesses

[6] Justice Ginsburg, alone, issued a concurring opinion in the case suggesting that *Pacifica* should be reconsidered given "[t]ime, technological advances, and the Commission's untenable rulings now before the Court …"

considerable authority to distinguish between those narrow areas of indecent content that can be prohibited and the much broader areas of broadcast expression that cannot.

IV. The Current Rule

The Commission's current rule was reiterated in its 2006 Order involving incidents in two consecutive years of the Billboard Music Awards, and single episodes of The Early Show and NYPD Blue. [7] We have set-forth, in the Summary section above, the text of the current rule as modified by NRB's proposed language, together with suggested textual deletions. In the sections that follow below, we discuss our recommended changes.

V. Community Standards

As a general proposition, we believe that the "contemporary community standards" element of the FCC rules is both essential and constitutional. We note that in *Ashcroft v. ACLU*, 535 U.S. 564, 576, n. 7, the Supreme Court took account of the fact that in the text of the Child Online Protection Act (COPA), which it upheld, the determination of whether a communication is "patently offensive … is also a question of fact to be decided by … applying contemporary community standards."

However, NRB would add an additional clarification: that the Commission, in determining "contemporary community standards for the broadcast industry," should take cognizance of current voluntary industry standards expressly adopted or commonly practiced by the relevant sector of the broadcast industry. In fact, during oral argument in *Fox II*, counsel for Fox Television Stations responded this way to a question from Justice Alito:

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[7] *In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*: Order, 21 FCC Rcd 13299 (2006), ¶ 15 ("2006 Order").

> Justice Alito: But if we rule in your favor on First Amendment grounds, what will – people who watch Fox be seeing between 6:00 a.m. and 10:00 p.m.? Are they going to be seeing a lot of people parading around in the nude and a stream of expletives?
>
> Mr. Phillips: Not under the guidelines that Fox has used consistently from 10:00 p.m. until 6:00 a.m. and candidly that all of the other networks follow. The truth is the advertisers and the audiences that have to be responded to by the networks insist on some measure of restraint …

FCC v. Fox, II, Oral Arg. T. page 28, L 24-25 and page 29, L 1-5. This concession by the broadcasters warrants that their own network standards should be treated as strongly relevant to the determination of "contemporary community standards of the broadcast industry." In order to remove any uncertainty, and to limit future legal attacks regarding this element, the Commission's rules should adopt our suggested language.

VI. Fleeting Expletives and Images

In *Fox* II, the Supreme Court characterized the profanity in the music awards shows and the nudity on NYPD Blue as "fleeting expletives and momentary nudity." *Fox* II, 132 S. Ct. 2330. Three things must be remembered in this regard: (1) that if the networks had decided to air the objectionable content at 10:01 p.m. or later, no indecency restrictions would have applied in any event;[8] (2) in *Fox* II, the Supreme Court *did not* rule that the prohibition of fleeting expletives or momentary nudity violated the First Amendment; and finally, (3) in *Fox* I the Court affirmed the reasonableness of the Commission's decision to ban fleeting expletives, noting the underlying logic behind it and the inevitable degradation of television standards that will occur without it: "to predict that complete immunity for fleeting expletives … will lead to a substantial

[8] 47 C.F.R. §73.3999(b).

increase in fleeting expletives seems to us an exercise in logic rather than clairvoyance." *Fox* I, 556 U.S. at 521 (2009).

NRB opposes a limitation of indecency enforcements to only "egregious" violations for those reasons we describe below. Instead of that limitation on enforcement, NRB recommends the following rule clarification to sharpen the policy regarding "fleeting" episodes of indecency: the Commission shall enforce all prohibitions regarding indecent content aired during children's viewing hours (to-wit: 6:00 a.m. to 10:00 p.m.), and this includes *fleeting expletives and/or momentary nudity* that meet the definition of "indecency," unless the broadcaster can show that it had exercised every reasonable precaution usually exercised by the broadcasting industry, in a good faith attempt to prevent the fleeting expletives or momentary nudity from being broadcast. In addition, evidence of a prior failure on the part of a broadcaster to have prevented an instance of a fleeting expletive or an instance of momentary nudity shall create a rebuttable presumption that the broadcaster failed to exercise every reasonable precaution in the later incident. [9]

We believe that this *shifting burden of proof* approach will give broadcasters due notice regarding their obligations to eliminate or drastically reduce the potential for fleeting expletives or momentary nudity during children's viewing hours, and will create a more objective standard than the current one. Admittedly, in determining whether content is "patently offensive," the Commission's 2006 Order stated that one of the

[9] "The fact that technological advances have made it easier for broadcasters to bleep out offending words further supports the Commission's stepped-up enforcement policy." *Fox* I, 556 U.S. at 519 (2009). Further, as we pointed out in our Amicus Brief in *Fox* II, some standard on-air talent contracts provide that guests or talent are warned that they could be required to reimburse the station for FCC fines and attorneys fees if they make an actionable utterance of depiction of obscene, indecent, or profane material during a broadcast. NRB Amicus Brief, *Fox* II, page 19.

contextual factors was "whether the material dwells on or repeats at length the [offensive] descriptions," which implies that fleeting indecency may or may not be actionable, depending on the facts. NRB believes that this uncertainty renders the indecency regulations legally vulnerable to the same arguments made by the broadcasters in *Fox* II.

An offensive word uttered *once*, or *fleeting images* of nudity, are currently judged by the *length*, and *numbers* of times they are perceived by the audience, a troublesome metric for the Commission to determine a broadcaster's culpability. Indeed, whether the indecency is fleeting, intensive, or repetitive should be a factor in determining and levying the fine and other sanctions; however it should *not be a factor* in deciding whether it is a violation. Judged objectively, a single expletive is just as indecent as George Carlin's lengthy, verbal shock treatment in *Pacifica*. [10] The *frequency* and *obviousness* of the profanity or nudity should be relevant only to the process of adjusting the punishment to the offense. [11]

In the same vein, we oppose the idea that the Commission should limit its enforcement of indecency regulations to only the most "egregious" cases for two reasons. First, under that kind of rule change, *fleeting* expletives and *momentary* nudity, even if they are broadcast brazenly and with foreknowledge, would probably be deemed insufficiently "egregious" to punish. Once that happens, as the Supreme Court has noted, simple "logic rather than clairvoyance" is all that is necessary to predict an increase in indecent content as some broadcasters or their more adventurous on-air personalities try to test the limits, or else the sheer gravitational pull of standards that have been lowered will cause stations to be less diligent.

[10] *Fox I* made it clear that *Pacifica* did not define the outer reaches of the FCC's indecency authority.
[11] Obviously, there may be instances where the profanity or the sexual imagery is so inconsequential or so imperceptible to the audience that the Commission will be justified in ruling that it is *de minimus*.

Second, because the Commission's indecency determinations have been "context" driven, it would be difficult if not impossible to craft in the abstract an appropriate test that would give broadcasters sufficient Due Process notice of what is "egregious" and what is not. Setting defensible standards in the first instance regarding indecency has been difficult enough for the Commission; but predicting the circumstantial factors that would constitute *severe* as opposed to *minimal* indecent offensiveness would be a Herculean task. Vague or confusing standards of "egregiousness" would then result in yet another round of legal challenges, perhaps yielding a similar decision from the Court, sending the rules back to the Commission for more retooling.

Instead, NRB advocates a more objective standard; one that rests on the basic elements in the Commission's current rule, plus the qualifications suggested by NRB: first, the basic definition of indecent expression as material that, in its factual context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium, but with the NRB clarifications that (1) "contemporary community standards for the broadcast medium" shall take into account the anti-indecency policies and practices of broadcasters in the industry, and (2) that fleeting indecency shall still be punished, but under the shifting burden of proof approach we mention above.[12] Then, if the objectionable material meets the foregoing standard, NRB suggests one final burden shifting approach: at that point the burden should then shift to the broadcaster to demonstrate that the indecent communication nevertheless satisfies one or both of two exceptions, explained

[12] See the Summary of NRB's Comments above, where the FCC's rule is quoted from the 2006 Order, but with NRB's suggested changes.

below: namely, the "genuine live news coverage" exception, and the "serious value" exception.

VII. News and Serious Value Exceptions

Offensive content that meets the core definition of "indecency" described above should be actionable unless it meets a *live news* or *serious value* exception.

Regarding a news exception, the Commission has noted: "To be sure, there is no outright news exemption from our indecency rules … [but in that area, in light of important First Amendment considerations] it is imperative that we proceed with the utmost restraint when it comes to news programming."[13]

We believe the better rule, and the more objective one, is to clearly define an outright news exception. We propose the following: that indecent material is <u>not</u> actionable if it is part of live news coverage, and the indecent content was a spontaneous utterance or unexpected physical occurrence where, based on all of the circumstances, it could not have been anticipated or prevented by a broadcaster exercising reasonable care to prevent such indecent material from being broadcast.

Further, in deciding close questions regarding what is genuine "news" coverage which would qualify for the exemption, and what is mere "entertainment," which would not, we suggest that the Commission rely upon its body of decided cases defining "bona fide" news programs in the context of administering its political advertising rules.[14]

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[13] 2006 Order, ¶ 71.

[14] In those cases, the FCC decides whether a news program is "bona fide" by considering several factors, including (a) the format, nature and content of the program, (b) whether the format, nature and content of the program is based on the broadcaster's good faith journalistic judgment, (c) who initiates the program, (d) who produces and controls the program, (e) when the program was initiated, and (f) whether the program is regularly scheduled. 47 U.S.C. §315(a) 1-4 (setting forth types of bona fide news exemptions); *see also Complaint of Angelides for Governor Campaign*, 21 FCC Rcd. 11919, ¶¶8-10 (2006) (providing history of factors and news determination in connection with talk show).

In addition, NRB recommends a second exception: that indecency should not be actionable if it is a small part of a work with serious artistic, literary, social, political or scientific value for children, and where the broadcaster had taken precautions before and during the airing to warn viewers of the objectionable content, and where the subject matter of the broadcast work and other circumstances strongly indicate a low probability that younger children for whom the material would not be age-appropriate under any conditions would be in the listening or viewing audience. This is a test that is supported by Supreme Court precedent. [15]

VIII. No Factors to Balance

NRB's proposals in these Comments have done away with the three contextual factors which the Commission had utilized in their present rule, and have replaced them with a "totality of the circumstances" test, and with objective criteria and a burden-shifting approach. Therefore we see no need for the Commission to continue using, let alone balancing, those three factors.

[15] We have codified the reasoning in *Fox* I, 556 U.S. at 520 (2009) in the second clause of our above language ("… a low probability …"). The Court stated that a broadcast of the sexually ribald content in a classic like Chaucer's *Miller's Tale*, or the profanity in the more current *Saving Private Ryan* which was permitted by the Commission as an exception to indecency, would be likely to only "command the attention of [few] children who are both old enough to understand and young enough to be adversely affected," thus justifying the Commission's decision in *Saving Private Ryan* and providing a basis for similar treatment for certain "classics." The inference by the Court was that by giving a narrow exemption to potentially offensive "classics" or serious artistic or historical works, the Commission could therefore provide sufficient protection for First Amendment freedoms. Further, as Justice Breyer pointed out in his dissent in *Brown v. Entertainment Merchants Assn., supra*, the law upheld by the Court in *Ginzburg v. United States, supra*, prohibited the sale of pornographic materials to minors where the materials are "utterly without redeeming social importance *for children*." *Brown, supra*, at 2763 (2011), Breyer, J. dissenting (emphasis added). We have adapted a similar test in the first clause of our suggestion above. Our "serious value" language is also similar to that approved in *Miller v. California*, 413 U.S. 15 (1973).

Conclusion

For the above reasons, NRB respectfully submits that the Commission should reject an "egregiousness" approach to actionable indecency, and instead adopt the modifications that we suggest above.

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