

No. 10-1293

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IN THE  
**Supreme Court of the United States**

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FEDERAL COMMUNICATIONS  
COMMISSION, ET. AL.,

*Petitioners,*

*v.*

FOX TELEVISION STATIONS, INC., ET. AL.,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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**BRIEF OF *AMICI CURIAE*  
JUDITH A. REISMAN, PH.D.  
AND LIBERTY COUNSEL  
IN SUPPORT OF PETITIONERS**

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**INTEREST OF AMICI CURIAE<sup>1</sup>**

Liberty Counsel is an international nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the family. Founded in 1989 by Anita and Mathew Staver, who also serves as the Dean of Liberty University School of Law, Liberty Counsel has offices in Florida, Virginia, Texas, Washington, D.C., and Jerusalem, Israel and has hundreds of affiliate attorneys in all fifty states. A critical aspect of Liberty Counsel's mission is to preserve and protect the Judeo-Christian foundation of the country, and particularly the foundational social unit of the family. Liberty Counsel sees the infiltration of indecent language, sexualization of children and disrespect for human life as significant threats

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<sup>1</sup> Counsel for a party did not author this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this brief. The parties have filed consents to the filing of amicus briefs in support of either party or no party.

to the family and the country which should be stemmed before the foundations are so undermined that they crumble. While Liberty Counsel does not support increasing the power of the federal administrative structure, it does believe that administrative agencies such as the Federal Communications Commission, if properly restrained, can serve vital roles as guardians of the public interest. The broadcast decency standards under consideration in this case are examples of an agency fulfilling its role as guardian and, as such, they should be examined with great care and precision. Liberty Counsel has developed a body of research on how changing cultural standards have detrimentally affected the family and other foundational institutions. Liberty Counsel respectfully submits this Amicus Curiae Brief to provide this Court with information and arguments that may be of assistance in analyzing the constitutional issues raised by this case.

Judith A. Reisman, Ph.D., is an internationally recognized expert in media forensics, who has done groundbreaking research in the effects of media content on children, families and society. Dr. Reisman is also recognized internationally as an expert in the effects of the work of Dr. Alfred Kinsey on social institutions, and particularly, the family.

Dr. Reisman has done extensive research on the long-term effects of early exposure to indecent language and images – research that will provide this Court with further perspective on the FCC decency standards being challenged in this case. Dr. Reisman (drjudithreisman.com) is the author of numerous books and reports, including *Kinsey*, *Sex and Fraud*, *“Soft Porn” Plays Hardball*, *Kinsey Crimes and Consequences*, *Sexual Sabotage* and *Images of Children, Crime and Violence in Playboy, Penthouse and Hustler*, (United States Department of Justice Grant No. 84-JN-AX-K007). Dr. Reisman also respectfully submits this Amicus Curiae Brief for the Court’s consideration.

### SUMMARY OF ARGUMENT

The question at the heart of this case is whether broadcasters will be permitted to remove the restraints that prevent popular culture from sliding even further into an abyss of dehumanized decadence. Claiming that the decency standards which have been in place for decades are now too vague to be enforced, the broadcasters are in fact asking this Court to aid them in their subversion of America’s cherished cultural heritage of civil discourse and enriching entertainment. Broadcasters claim that their individual First Amendment rights are somehow violated by having to wait until

10 p.m. to spew expletives referring to sexual or excretory functions or organs. These privileged broadcasters seek to trample on the rights of the owners of the airwaves, the people of the United States, to ensure that the people's limited resources are utilized in a way that is beneficial, not harmful to, the public interest. These broadcasters appear indifferent, even contemptuous, of the government's obligation to prevent the sexual abuse and exploitation of vulnerable children that is often triggered by exposure to indecent images and words.

Social science and psychological studies demonstrate that even fleeting utterances of indecent words can adversely affect the developing brains of children and youth, making the need to restrain the use of such language even more critical. Balancing what is at stake – the well-being of children—with the restrictions placed on esurient broadcasters to merely limit indecent language to 10 p.m. to 6 a.m. (as opposed to banning it entirely) leads to the inescapable conclusion that the decency standards should remain in place.

This Court should not condone the further slide of popular culture championed by the networks. Instead, this Court should, as it has before, uphold the FCC's regulations by which it fulfills its role as guardian of the

public airwaves from which broadcasters derive profit and prestige.

### LEGAL ARGUMENT

#### I. THE FCC'S DECENCY STANDARDS ARE REASONABLE AND NECESSARY MEANS OF FULFILLING THE FCC'S OBLIGATION TO PROTECT THE PUBLIC'S INTEREST.

Since Congress first began regulating the airwaves in 1934, regulators and the courts have recognized the need to balance broadcasters' First Amendment rights with their obligations as trustees of the public airwaves. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386-88 (1969). Congress has designated the FCC as the "overseer" or "guardian" of the public's interest as owners of the airwaves. *Id.* at 379. In fulfilling that role, the FCC has developed a regulatory scheme, including the indecency standards at issue in these cases, as a means of protecting the paramount rights of the viewers and listeners. *Id.* This Court has upheld the regulations against claims of vagueness, censorship and overbreadth. This Court has recognized that the regulations are reasonable and appropriate means of furthering the state's, and public's, interest in regulating the transmission of indecent words

and images to protect the well-being of children. Nothing has occurred to change that conclusion. If anything, the proliferation of indecent language, and its consequences, accentuates the need to maintain or strengthen, not weaken, decency standards.

In analyzing governmental restrictions on broadcasters, “it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.” *Red Lion Broad*, 395 U.S. at 390. Since radio and broadcast frequencies are limited, the government is permitted to put restraints on licensees as part of ensuring that the people as a whole retain their interest in free speech in broadcasting and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. *Id.* “Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them.” *Id.* at 394.

Licensees, therefore, have, since the early days of broadcast regulation, served solely as “public trustees” required to operate in the public interest with the FCC acting as “overseer.” *CBS, Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 117 (1973). Fulfilling those roles has required balancing the sometimes competing interests of the broadcasters’ view of their free speech rights

and the public's right as owner of the airwaves. *Id.* As this Court observed, maintaining that balance for more than 70 years has required that both regulators and licensees "walk a 'tightrope' to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act." *Id.* In *CBS v. D.N.C.*, this Court acknowledged that the FCC could take into account that listeners and viewers in a very real sense constitute a "captive audience." *Id.* at 127.

Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can avoid these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may

reasonably be thought greater than  
the impact of the written word.

*Id.* at 127-28 (citing *Banzhaf v. FCC*, 405 F.2d 1082, 1100-01 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969)). The same can be said of even “fleeting” utterances of indecent language. Once spoken, the word is “in the air,” and, more importantly, imprinted in the viewer’s mind. As this Court explained in *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978), “broadcasting is uniquely accessible to children, even those too young to read.” Therefore, while an expletive printed on some clothing or in a publication might not be comprehended by a youngster, a broadcast containing the same word would be instantly recorded in the young child’s mind. *See id.* This ease of access and the ubiquity of broadcast programming “amply justify special treatment of indecent broadcasting.” *Id.* at 750.

The statutory prohibition against “utter[ing] any obscene, indecent, or profane language” in broadcast programming aired between 10 p.m. and 6 a.m., 18 U.S.C. § 1464, is one of the enforceable public obligations that broadcast licensees rightfully shoulder as part of being “granted the free and exclusive use of a limited and valuable part of the public domain.” *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1806 (2009). A broadcast license is a privilege, not a right. *CBS v. DNC*, 412 U.S. at

112-13. With that privilege comes the responsibility of protecting the public's interest as owners of the airwaves. See *F.C.C. v. Fox*, 129 S. Ct. at 1806. That includes refraining from airing indecent words during times when those least able to discern their impropriety are likely in the audience. *Pacifica Found.*, 438 U.S. at 750.

Broadcasters do not have the right to air whatever programming they calculate will garner them the highest profits without regard for their underlying obligation as privileged public trustees. The balancing of their interests with the interests of the viewing public requires that restrictions on transmission of indecent language remain in place.<sup>2</sup> While their

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<sup>2</sup> As the D.C. Circuit observed, millions of children are watching television even during what is euphemistically called the "safe harbor" hours between 10p.m. and 6a.m. "It is apparent, then, that of the approximately 20.2 million teenagers and 36.3 million children under 12 in the United States, a significant percentage watch broadcast television or listen to radio from as early as 6:00 a.m. to as late as 11:30 p.m.; and in the case of teenagers, even later. We conclude that there is a reasonable risk that large numbers of children would be exposed to any indecent material broadcast

profitability might benefit from removal of the time restriction, their obligation as public trustees, and the interests of the owners of the airwaves, will not.<sup>3</sup> Since “it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount,” *Red Lion*, 365 U.S. at 390, the public’s interest takes precedence over any perceived increase in profitability that might flow from increased use of indecent language.

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between 6:00 a.m. and midnight.” *Action for Children’s Television v. F.C.C.*, 58 F.3d 654, 665 (D.C. Cir. 1995). Protecting the welfare of children, therefore, would call for strengthening, not weakening the indecent language restrictions.

<sup>3</sup> Ted Turner, owner of Turner Network Television (TNT), testifying on the “Impact of Media Violence on Children” to the Senate Committee on Commerce, Science and Transportation, described the massive influence of media on child development and the pressure placed upon broadcasters to lower standards and gain a competitive edge: “We’ve eased up [media standards] because we are being forced to by the competition... They’re guilty of murder. We all are—me too.” WASH. POST, June 26, 1983, at B3.

**II. THE FCC'S DECENCY STANDARDS  
FURTHER THE COMPELLING  
STATE INTEREST IN  
SAFEGUARDING CHILDREN  
WHILE STILL PRESERVING  
BROADCASTERS' FREE SPEECH  
RIGHTS.**

The eminent reasonableness of the FCC's decency standards is brought into sharp focus when viewed in the context of this Court's and circuit court precedents which affirm the state's compelling interest in protecting the well-being of children. In some instances, particularly with regard to public education, the state's interest in the well-being of children has clashed with the parent's right to direct the upbringing of their children, and state interests have prevailed. *See, e.g., Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 529 (1st Cir. 1995) (rejecting parents' challenge to their children's mandatory attendance at an explicit AIDS awareness assembly that graphically demonstrated various sexual acts); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1200 (9th Cir. 2005), *amended by*, 447 F.3d 1187 (9th Cir. 2006), *cert denied*, 549 U.S. 1089 (2006) (rejecting parents' challenge to invasive sexual questions appearing in a student questionnaire, finding that parents do not have

a fundamental right to direct how a public school teaches their children about sexuality or any other topic). However, in the context of exposing children to indecent language or materials in the media, the state's interest in the well-being of children and the parents' right to direct the upbringing of their children have coalesced to provide a hedge of protection against infiltrating young minds with indecent words and images. *See Ginsberg v. New York*, 390 U.S. 629, 639, (1968) (relying upon both the parental right and compelling state interest in upholding a statute restricting the sale of pornography to minors). The FCC's decency standards are part of that hedge of protection which should not be breached as the broadcasters request.

**A. This Court Has Established That Indecent Speech Can Be Regulated In The Broadcast Context To Protect The State's Compelling Interest In Protecting The Well-Being Of Children.**

When analyzing questions regarding exposing children to sexual or other explicit content, courts have differentiated not only between public education and the media, but also among the various types of media. *FCC v.*

*League of Women Voters*, 468 U.S. 354, 376 (1984). “Because broadcast regulation involves unique considerations, our cases have not followed precisely the same approach that we have applied to other media.” *Id.* This Court has found that the interest in shielding viewers from unwanted exposure to indecent words or images can supplant the free speech rights of broadcasters, but not of people on the street. *Compare FCC v Pacifica Found.*, 438 U.S. 726, 750 (1978) (holding that broadcaster cannot air “seven dirty words” monologue during afternoon drive time), *with Cohen v California*, 403 U.S. 15, 18 (1971) (holding that court visitor cannot be prosecuted for wearing a jacket containing the words “F\*\*\* the Draft”). This Court has recognized that the ubiquity of broadcast media and its accessibility even to those who cannot read or write justifies restrictions upon indecent content. Rigorous research on brain development and the effects of words and images on underdeveloped brains further demonstrates the need to retain or even expand those restrictions.

Congress declared the 1990s “The Decade of the Brain.”<sup>4</sup> The scientific community has

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<sup>4</sup> See PROJECT ON THE DECADE OF THE BRAIN, <http://www.loc.gov/loc/brain/> (last visited August 22, 2011).

learned more about the body's executive organ in the last thirty years than in all of history.<sup>5</sup> The scientific consensus is that "inhibition rather than excitation is the hallmark of the healthy brain." Our brains obey "a law of strength."<sup>6</sup> The brain must commonly filter about 100 million messages per second,<sup>7</sup> and stronger scary or 'hot' stimuli are extracted over less strong factual, cool stimuli.<sup>8</sup> This means as the brain's neurochemical pathways are chemically reshaped by strong, obscene messages that language causally "effects" changes in a child's brain, mind and memory development.

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<sup>5</sup> *Id.*

<sup>6</sup> See 2004 *Testimony: The Science Behind Pornography*, *Addiction*,, [http://www.drjudithreisman.com/archives/2011/06/2004\\_testimony\\_1.html](http://www.drjudithreisman.com/archives/2011/06/2004_testimony_1.html) citing, e.g., Richard Restak, *The Mind*, 283 (1988) ("Inhibition rather than excitation is the hallmark of the healthy brain. If all of the neurons in the brain were excitatory we would be unable to do something as simple as reaching out for a glass of water.").

<sup>7</sup> See, e.g., Jack Fincher, *The Human Body: The Brain: Mystery of Matter and Mind*, 122-23 (Roy B. Pinchot ed.) (1984).

<sup>8</sup> See, e.g., Michael Sweeney, *Brain: The Complete Mind*, 147, 215 (2009).

**1. *Recognizing the harm that indecent language inflicts on children, this Court has upheld narrowly tailored restrictions on such language in the media.***

As this Court said in *Pacifica Found.*, “broadcasting is uniquely accessible to children, even those too young to read.” 438 U.S. at 749. Therefore, while Mr. Cohen's written message (F\*\*\* the Draft on his jacket) might have been incomprehensible to a first grader, Pacifica's broadcast of George Carlin's monologue describing the “seven dirty words” you cannot say on television “could have enlarged a child's vocabulary in an instant.” *Id.* (citing *Cohen*, 403 U.S. at 18). Media providers such as bookstores and newsstands can withhold indecent printed materials from young people without denying adults access to the materials. *Id.* However, that is not the case with radio and network (non-cable over the air) television broadcasts, which instantly transmit images and words to an entire audience with no effective means of shielding children from indecent content while providing access to adults. *Id.* That difference, coupled with the “government's interest in the ‘well-being of its

youth' and in supporting 'parents' claim to authority in their own household" justify special treatment of indecent broadcasting. *Id.* at 750 (citing *Ginsberg* 390 U.S. at 639-40).

As this Court explained in *Ginsberg*, "[t]he well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations . . . upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful." 390 U.S. at 639. "First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Id.* (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). "The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Id.* In addition, society has an independent, transcendent interest in protecting the welfare of children which also justifies special statutory regulation of the dissemination of pornography to children. *Id.* at 640.

The prevention of sexual exploitation and abuse of children constitutes “a government objective of surpassing importance.” *New York v. Ferber*, 458 U.S. 747, 757 (1982). “It is evident beyond the need for elaboration that a State's interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’” *Id.* at 756 (citing *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982)). Accordingly, this Court has sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. *Id.*

In *FCC v. Fox*, this Court upheld the FCC's decision to look at the patent offensiveness of even isolated uses of sexual and excretory words, rather than addressing only repeated uses. *FCC v. Fox*, 129 S. Ct. at 1812. “Even isolated utterances can be made in ‘pander[ing,] ... vulgar and shocking’ manners, and can constitute harmful ‘first blow[s]’ to children.” *Id.* (citations omitted).

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. One cannot demand a multiyear controlled study, in which some children are

intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency. It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained. . . . It is something else to insist upon obtaining the unobtainable. 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. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives. Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity.

*Id.* at 1812-13 (citation omitted). Even when the FCC had not adduced any quantifiable measure of the harm caused by the “seven dirty

words” in George Carlin’s monologue, and even before the extant confirming data on the actual re-shaping of the child’s malleable brain, the Supreme Court held that “government’s interest in the ‘well-being of its youth’ . . . justified the regulation of otherwise protected expression.” *Id.* at 1813-14 (citing *Pacifica*, 438 U.S. at 749). That interest also justifies rejecting the broadcasters’ claim that the prohibition against broadcasting indecent words or images between 10 p.m. and 6 a.m. should be rejected as “vague.”

**2. Courts have established that placing a time restriction on the broadcast of indecent language is a narrowly tailored response to the state’s compelling interest in protecting children.**

Finding that there is a compelling state interest in protecting the physical and psychological well-being of minors addresses only part of the question of whether the decency standards are constitutional. *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Unlike material defined as obscene,

sexual expression which is defined as “indecent” is protected by the First Amendment. *Id.* Therefore, the government can regulate its content only if it chooses the least restrictive means to further the articulated compelling interest. *Id.* This means that the regulations must be narrowly drawn to serve those interests without unnecessarily interfering with First Amendment freedoms. *Id.* The FCC’s complete ban on certain telephone communications was not narrowly tailored and therefore improper. *Id.*

By contrast, the FCC regulation in *Pacifica*, which did not ban broadcasting of the “seven dirty words” outright, but instead restricted when they could be aired, was found to be narrowly tailored. *Id.* at 127; *Pacifica*, 438 U.S. at 750–51. Due to the unique pervasiveness of the broadcast media and the accessibility of the messages to children, this Court has afforded broadcasting the most limited First Amendment protection and has repeatedly rejected broadcasters’ claims that the restrictions should be lifted. *Pacifica*, 438 U.S. at 750-51. Therefore, in the broadcast context, the FCC may, in appropriate circumstances, place restrictions on the broadcast of indecent speech. As was true in *Pacifica*, the Court here is addressing merely a time restriction, not an outright ban, and,

therefore, should uphold the restriction as a narrowly tailored means of achieving the state's ends of protecting young people from indecent language, images and collateral ideations.

**B. Research Regarding Brain Development And Observational Learning Underscore The Need To Protect Young People In Particular From Even Fleeting Utterances Of Indecent Language.**

Research on adolescent brain development and on the connection between the broadcast of indecent words and images and harmful behavior buttress this Court's findings upholding regulations aimed at lessening children's exposure to indecent images and words via broadcast media. The brain studies show that the portion of the brain which controls impulses and complex decision making is the last to develop and is not mature until the early 20s. Therefore, young people frequently immaturely process harmful or indecent presentations or appropriate versus inappropriate speech. Studies show that hearing indecent language in the media in a context that appears to be socially acceptable creates a proliferation of profanity, much like a

contagion, which can trigger anti-social, even harmful, behavior.

[S]ocial scientific research has largely confirmed the thesis that affect, attitudes, beliefs and behaviour can indeed spread through populations as if they were somehow infectious. Simple exposure sometimes appears to be a sufficient condition for social transmission to occur. This is the social contagion thesis; that sociocultural phenomena can spread through, and leap between, populations more like outbreaks of measles or chicken pox than through a process of rational choice.

The results of contagion research suggest that just as we do not choose to be infected with, and pass on, biological contagions, we often behave as if we have little control over the culture we become infected with and consequently spread. Such an observation undermines the traditional understanding of the human subject as an autonomous agent whose action is defined by individual intentionality

and rational evaluation. Whilst we may like to believe that we consciously and rationally decide on how to respond to situations, social contagion evidence suggests that some of the time this is simply not the case. Rather than generating and “having” beliefs, emotions and behaviours, social contagion research suggests that, in some very real sense, those beliefs, emotions and behaviours “have” us.<sup>9</sup>

The contagious nature of popular culture is of particular concern in light of the recent research on the adolescent brain. Dr. Jay N. Giedd of the National Institute of Mental Health has presented the findings of more than 20 years of neuro-imaging of adolescent

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<sup>9</sup> Paul Mardsen, *Memetics and Social Contagion, Two Sides of the Same Coin?* 2 THE JOURNAL OF MEMETICS: EVOLUTIONARY MODELS OF INFORMATION TRANSMISSION 2 (1998), available at [http://cfpm.org/jom-emit/1998/vol2/marsden\\_p.html](http://cfpm.org/jom-emit/1998/vol2/marsden_p.html) (last visited August 22, 2011).

brains.<sup>10</sup> The magnetic resonance imaging studies show that the frontal “new” brain matures later than other brain structures.<sup>11</sup> This late-maturing portion controls “executive functioning,” *i.e.*, attention, inhibition, regulation of emotion, organization and long-range planning.<sup>12</sup>

Building upon the imaging studies, researchers find that the brain is not fully developed at puberty as was once believed.<sup>13</sup> Instead, mature brain development is attained at roughly age 24.<sup>14</sup> As Dr. Giedd noted, one of the last areas of the brain to mature is the prefrontal cortex, which is responsible for the complex processing of information, including making judgments, controlling impulses, foreseeing consequences and setting goals and

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<sup>10</sup> Jay N. Giedd, M.D., *The Teen Brain: Insights from Neuroimaging*, 42 J. OF ADOLESCENT HEALTH 335, 340 (2008).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Ken C. Winters, Ph.D., *Adolescent Brain Development and Drug Abuse*, A Special Report Commissioned by the Treatment Research Institute 1 (November 2004), *available at* [www.tresearch.org/resources/specials.htm](http://www.tresearch.org/resources/specials.htm) (last visited August 17, 2011).

<sup>14</sup> *Id.*

plans.<sup>15</sup> The still-developing brain, *e.g.*, acting impulsively and ignoring negative consequences, is implicated in teen abuse of drugs, alcohol and pornography, refortifying the wisdom of delaying adolescents' exposure to harmful influences.<sup>16</sup> In the same vein, the under-development of the adolescent brain points to the wisdom of delaying exposure to indecent language which, as this Court observed, Congress has determined is harmful to children. *FCC v. Fox*, 129 S. Ct. at 1812-13. The harmful effects of indecent language are further borne out by research, as discussed below.

Psychologists point to three major aspects of brain development that help explain how early exposure to indecent words and images has long-lasting consequences.<sup>17</sup> First,

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<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.* at 3-4.

<sup>17</sup> David Walsh, Ph.D. & Douglas Gentile, Ph.D., *Slipping Under the Radar: Advertising and the Mind*, in L. Riley & I. Obot (Eds.) *Drinking it in: Alcohol Marketing and Young People*. Geneva, Switzerland: World Health Organization, available at <http://www.psychology.iastate.edu/faculty/dgentile/publications.htm> (last visited August 17, 2011).

experience plays a key role in how the brain is wired.<sup>18</sup> Inputs from all childhood experiences sculpt the finer elements of the developing neural network.<sup>19</sup> Second, the “lion’s share of the wiring happens in the early years of a child’s life.”<sup>20</sup> These first two points illustrate why children’s minds are so impressionable and why children are so susceptible to outside influences.<sup>21</sup> Finally, emotion plays a leading role in how the mind works by focusing attention, shaping attitudes and determining what is remembered.<sup>22</sup> Consequently, when indecent language is broadcast during times when children are listening or viewing, that language is sculpted into their brain’s wiring. If there is emotion associated with the word, such as someone being angry or excited, then the child’s attention is piqued and the word becomes more memorable. Limiting children’s exposure to indecent words and images, such as through the decency standards at issue in this case, can lessen the effects of the words and further the state’s interest in protecting the psychological well-being of children and youth.

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<sup>18</sup> *Id.* at 3-4.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

Social science research additionally confirms the truth of this Court's observation that children mimic the behavior they observe. *See FCC v. Fox*, 129 S. Ct. at 1812-13. Researchers have found that observational learning plays a significant role in cognitive development.<sup>23</sup> "By observing others' behaviors, including media figures, one may develop rules to guide his or her own subsequent actions or be prompted to engage in previously learned behavior, or both."<sup>24</sup> A person who regularly sees or hears a media star or other person whom they admire using indecent language with impunity will translate the presentation as acceptance or approval of the behavior, *i.e.*, using indecent language. Marketing studies further exemplify the concept, as they reveal that as few as 2½ percent of people can influence the majority of people to adopt certain beliefs or behaviors over time.<sup>25</sup> Since children's developing minds are particularly susceptible

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<sup>23</sup> Robin L. Nabi & Marina Krcmer, *Conceptualizing Media Enjoyment as Attitude: Implications for Mass Media Effects Research*, 14 COMMUNICATION THEORY 288 (November 2004).

<sup>24</sup> *Id.* at 302.

<sup>25</sup> Judith A. Reisman, Ph.D., *Sexual Sabotage*, 283 (2010) (citing Philip Kotler, *Marketing Management*, 345 (1988)).

to such outside influences,<sup>26</sup> children are particularly vulnerable to the effects of hearing celebrities utter indecent language. Consequently “[p]rogramming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives.” *FCC v. Fox*, 129 S. Ct. at 1812-13. The FCC’s decency standards help prevent at least some of the indecent language from reaching and becoming imprinted in the young brains, thereby furthering the state’s interest in protecting the welfare of its youngest citizens.

As even fleeting images or words attached to images can become imprinted into developing brains, even a modest reduction in the use of indecent words can reap significant benefits. The human brain links visual to motor neurons, so that when someone watches an event his body physically mirrors the excitement felt if he were actually involved in the event.<sup>27</sup> “Actual touch and the observed touch elicited similar activity in the subjects’ secondary somato-sensory cortex, an area involved in processing touch . . . . It’s as if the

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<sup>26</sup> Walsh & Gentile at 3-4.

<sup>27</sup> Reisman at 143.

brain translates vision into sensation.”<sup>28</sup> A person can watch someone drink a cup of tea and the same areas of the brain will activate as if he were drinking that tea.<sup>29</sup> Words usually connote certain images and those images become cemented into the wiring of the brain.<sup>30</sup> A word which is in a person’s head as an electrical signal for no more than a few seconds can leave a trace (of both it and the images associated with it) that will last for years.<sup>31</sup>

That can be especially problematic for children who are particularly susceptible to outside influences and whose under-developed cognition is particularly malleable. An indecent word fleeting into the child’s mind through a television broadcast, it will become part of his mind. If he does not understand the word, he might ask a parent or other adult for an explanation. However, in today’s digital age, a

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<sup>28</sup> Greg Miller, *Reflecting on Another’s Mind*, 308 SCIENCE 945-47 (May 13, 2005).

<sup>29</sup> Nicola Sater Alipanah, *Unraveling the mysteries and marvels of the brain*, WASH. TIMES, November 12, 2006, at B08.

<sup>30</sup> Reisman at 327.

<sup>31</sup> Richard Restak, *The Brain*, “Learning & Memory,” the Anneberg/CPB Collection, WNET/New York, (1984) (quoting University of California researcher Gary Lynch).

youngster is just as likely to type the word into an internet search engine and be instantly inundated with thousands of images. Those images will then become cemented to the word in the child's mind and memory. For example, each word at issue in this case was searched on Google images. All resembled the following sample for the word "f\*\*\*." This harassing word retrieved about 136 million results in .20 seconds, including people raising their middle finger, people engaged in sexual acts and even infants and animals appearing to make an obscene gesture.<sup>32</sup> The child's vocabulary, mind and memory are changed in an instant. See *Pacifica Found.*, 438 U.S. at 749. Limiting the broadcast of such words to the hours of 10 p.m. to 6 a.m. diminishes such instantaneous expansion of children's vocabulary, mind and memory and protects their physical and psychological well-being.

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<sup>32</sup> Google images search conducted August 18, 2011. GOOGLE, <http://google.com/imghp>.

**III. THE DECENCY STANDARDS ACT AS A BULWARK AGAINST THE NORMALIZATION OF PROFANITY AND INDECENCY WHICH DETRIMENTALLY AFFECTS ALL CITIZENS, BUT PARTICULARLY WOMEN AND CHILDREN.**

Maintaining the FCC's decency standards is critical for much more than helping to prevent exposure to and use of indecent language by children. Studies have shown that profanity is a form of verbal aggression that frequently escalates into physical aggression. Indecent language is also used to demoralize women and children during physical and sexual abuse and has contributed to the downward slide of popular culture and civil society. The decency standards cannot erase all use of profanity or its effects, but to the extent that they can block the downward progression they are serving the state's compelling interest in the health and well-being of its citizens.

**A. Profanity Is A Form Of Aggression Which Leads Which Is Mimicked By Children.**

Researchers' findings regarding social learning and television viewing offer further

evidence of the need to maintain or strengthen broadcast decency standards.<sup>33</sup> Children learn how to behave by watching the behavior of others and it is easier to imitate verbal aggression than physical violence.<sup>34</sup> Therefore, hearing television characters utter obscenities at each other teaches children that profanity is how people interact with each other. Viewers are influenced by behaviors they view most often, the reactions or consequences of such behaviors and what they can most easily imitate in their own lives.<sup>35</sup> Viewers who see television characters being reinforced for using expletives are more likely to perform the observed behavior.<sup>36</sup> This is particularly true of children who mimic what they observe without having sufficient frontal brain development to process the consequences of the behavior. Repeated exposure to coarse language leads to imitation and desensitization.<sup>37</sup> Desensitization then facilitates increased use and greater

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<sup>33</sup> Barbara K. Kaye & Barry S. Sapolsky, *Offensive Language in Prime-Time Television: Four Years After Television Age and Content Ratings*, 48 J. OF BROAD. & ELEC. MEDIA 554 (2004).

<sup>34</sup> *Id.* at 557.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

acceptance of profanity in everyday conversations and an increase in the amount of indecent language scripted for television.<sup>38</sup> So the vicious cycle continues and the levels and nature of profanity continue to increase and broadcasters zealously seek to push the envelope further and further, as is apparent in this case.

The escalation of profanity in broadcasting creates more than noise pollution. The use of insulting language is connected to a personality trait known as verbal aggressiveness, which reflects a person's tendency to attack another's self-concept in order to inflict psychological pain.<sup>39</sup> Verbal aggression is a highly destructive form of communication behavior that is designed to threaten and inflict harm.<sup>40</sup> Verbal aggressiveness damages the receiver's self-esteem and can be a catalyst for domestic abuse, alcoholism and substance abuse.<sup>41</sup> Profanity or cursing is a form of low-level

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<sup>38</sup> *Id.*

<sup>39</sup> Marina Krmar & Steve Sohn, *The Role of Bleeps and Warnings in Viewers' Perceptions of On-Air Cursing*, 48 J. OF BROAD. & ELEC. MEDIA, 570, 574 (2004).

<sup>40</sup> *Id.* at 574-75.

<sup>41</sup> *Id.*

aggression that can, and often does, escalate into higher levels of aggression and physical harm.<sup>42</sup> Cursing is used to stigmatize or derogate certain groups considered “unpopular.”<sup>43</sup> Cursing is also used to express prejudice through the use of racial, religious or sexual slurs or to express frustration, which can quickly escalate to dangerous levels of aggression.<sup>44</sup> Profanity is also used to gain attention, intimidate, rebel or impress peers.<sup>45</sup> This is particularly true of older children who will want to fit in with a certain crowd or be seen as “cool” and will mimic language heard on popular television shows.

Research shows that children as young as two can mimic these words, which, as discussed above, can become wired into their developing brains.<sup>46</sup> Studies show that children might know as many as four indecent words by the time they are two, 20 by the age of four and 30 to 40 by the age of ten.<sup>47</sup>

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<sup>42</sup> Arnold P. Goldstein, *The Psychology of Group Aggression* 54 (2002).

<sup>43</sup> *Id.* at 55.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

To the extent that the FCC's decency standards can reduce these statistics, or even prevent them from rising, they serve a compelling state interest in diminishing aggressive behavior and protecting the well-being of all citizens, but particularly children. The documented adverse effects of the proliferation of indecent language offer a convincing argument against jettisoning the standards to suit broadcasters' desires. Increasing the amount of profanity on the public airwaves and consequently in society cannot be considered to be in the public interest. As the studies discussed above (related to the escalation of language as a low-level aggression into higher levels of aggression) indicate, increasing or even maintaining the current level of indecent language in the culture will exacerbate higher level aggressive and antisocial behavior. In addition, the evidence that the amount of indecent language in programming increased after implementation of the existing rating system shows that removing standards will only increase the problem further. If broadcasters see the ratings as a license to include more profanity because the audience has been forewarned, then if they are unrestricted they will take even further license with language. As guardian of the public's interest in the airwaves, the FCC has a legal,

even moral [as in right conduct being healthful conduct] obligation to decrease the detrimental effects of programming. Decency standards help fulfill that obligation. Broadcasters should not be permitted to jettison those standards in their race to out-offend their cable competitors, increase profits and regain market share.

**B. The Increased Frequency of Indecent Words During Prime Time Broadcasts Points To The Need To Maintain Or Strengthen, Not Lessen, Decency Standards To Protect The Public's Interest.**

Even with the decency standards in place, broadcasters have continued to push the envelope of acceptable language in order to compete with their cable television competitors.<sup>48</sup> The use of indecent words has escalated over time.<sup>49</sup> One study showed a 51 percent increase in “curse words,” to about one per eight minutes in prime time, between 1997 and 2001.<sup>50</sup> The study showed that the “seven dirty words” made famous by George Carlin

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<sup>48</sup> Kaye & Saplosky at 557, 566.

<sup>49</sup> *Id.* at 566

<sup>50</sup> *Id.*

were spoken about once every three hours.<sup>51</sup> Programs rated “TV-PG” contained 58 percent of the foul language spoken in the 2001 program sample and there were more instances of the “seven dirty words,” excretory and strong curse words in TV-PG programs than in TV-14 programs.<sup>52</sup>

A later study by the same researchers showed that bullying language in prime time continued to coarsen.<sup>53</sup> Ninety percent of programs on both broadcast and cable networks contained at least one indecent word or phrase.<sup>54</sup> Use of the “seven dirty words” increased from two percent of the indecent language to sixteen percent.<sup>55</sup> Even with the restrictions in place, broadcasters arguably deliberately air more indecent words during hours when children watch, during each of the two hours between 8 p.m. and 10 p.m. than

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 564.

<sup>53</sup> Barbara K. Kaye & Barry S. Sapolsky, *Taboo or Not Taboo? That is the Question: Offensive Language on Prime-Time Broadcast and Cable Programming*, 53 *J. of BROAD. & ELEC. MEDIA* 1 (2009).

<sup>54</sup> *Id.* at 7.

<sup>55</sup> *Id.*

during the 10 p.m. to 11 p.m. hour.<sup>56</sup> The “seven dirty words” are uttered 5.5 times more often in the 8 p.m. to 9 p.m. hour.<sup>57</sup> Easing or jettisoning the decency standards would only exacerbate the willful proliferations of profanity and the associated adverse effects for society, which reach far beyond television programming.<sup>58</sup>

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<sup>56</sup> *Id.* at 11-13

<sup>57</sup> *Id.*

<sup>58</sup> As the indecent language becomes prolific, it enters into the larger political and social discourse and is used to disparage and threaten public servants who disagree with a particular position. For example, homosexual advocates utilize foul language to disparage sitting members of Congress, presidential candidates and prominent ministers who oppose same-sex marriage. *See, e.g., Mass Resistance Update*, (August 12, 2011), [http://www.massresistance.org/docs/gen/11c/it\\_gets\\_better/index.html](http://www.massresistance.org/docs/gen/11c/it_gets_better/index.html) (last visited August 19, 2011).

**C. Profanity Is Used As A Tool For Sexual Harassment And Assault So Stemming Its Proliferation Through Decency Standards Serves The State's Compelling Interest In Protecting Its Citizens.**

Those engaged in sexual harassment or sexual assault frequently use indecent language to bully, as part of their degradation and humiliation of the victims, pointing to another justification for restricting the broadcasting of such language over the public airwaves.

The Ninth Circuit found that “sexual or gender-based conduct which is abusive, humiliating, or threatening violates Title VII even if it does not cause diagnosed psychological injury to the victim. *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994). “It is enough, rather, if such hostile conduct pollutes the victim’s workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her position.” *Id.* In *Steiner*, the casino manager habitually referred to her and to other female employees in a derogatory fashion using sexually explicit and offensive terms, including

that he would “hate to terminate someone with big boobs.” *Id.* The court noted that the manager’s comment were “sexually explicit, offensive, highly derogatory, and publicly made.” *Id.* Notably, the manager testified that he had spoken that way all of his life. *Id.* That indicates that the manager had heard and absorbed “sexually explicit” and “offensive” language at a very young age and that it had become engrained into his developing brain.

A history of vulgar and indecent language directed toward women employees at a Hertz rental car agency was sufficient to prove liability for sex discrimination. *Sones Morgan v. Hertz Corp.*, 542 F. Supp. 123, 128 (W.D. Tenn. 1981), *aff'd sub nom.*, *Sones-Morgan v. Hertz Corp.*, 725 F.2d 1070 (6th Cir. 1984). “The proof is clear that the order of the day at Hertz is for supervisory men employees to address questions about sexual activity and preference to women rental representatives.” *Id.* “The Court is of the opinion that the addressing of sexually indecent comments to female employees is a form of sexual harassment and discrimination prohibited by Title VII of the Civil Rights Act of 1964, and that an injunction should issue against Hertz, its agents, servants and employees, restraining them from these kinds of comments. By this the Court means remarks such as ‘Did you get any

over the weekend?” *Id.* There was no specific evidence that the guilty parties had used such language all their life, as was true in *Steiner*. However, the prolific use of indecent language in the workplace points to ubiquity of the words in popular culture and the value of reducing the frequency of such bullying language.

A graphic example of the effect of indecent language on young people is presented in *D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1366 (3d Cir. 1992). Two female students in a graphic arts class alleged that several male students in the same class physically, verbally and sexually molested them repeatedly. *Id.* The defendants used obscene words and gestures toward the students and the female teacher, who was also physically abused by the boys. *Id.* The conduct took place on an average of two to four times per week from January to May and included sex acts and forced observation of sex acts performed on other students. *Id.* These middle school students had certainly heard the indecent language at some time in their childhood, had connected it to images and acted out those images on their fellow students.

The FCC decency standards would not necessarily prevent any similar tragedies in the future. However, to the extent that they lessen young people’s exposure to the indecent

language and images that can trigger such behavior, they serve the state's compelling interest in protecting the physical and psychological well-being of its citizens, especially children.

**D. Maintaining Decency Standards Helps Stop Popular Culture From Sliding Into "The Abyss of Human Decadence."**

The late Sen. Robert Byrd cogently described why the decency standards should remain in place.

The political and social environment in which parents must today raise their children is, unfortunately, an environment in which *anything goes* .... Profanity, vulgarity, sex and violence are pervasive in television programming, in the movies, and in much of today's books that pretend to pass for literature. The [n]ation is inexorably sinking toward the lowest common denominator in its

standards and values. Haven't we had enough?<sup>59</sup>

Those words spoken on the Senate Floor thirteen years ago ring even truer today as popular culture has continued to sink to an ever dropping lowest common denominator. Removing those restrictions that remain, such as the FCC's decency standards, would only speed up the decline.

Alexander Solzhenitsyn best summed up the reason for maintaining decency standards – to “defend against the abyss of human decadence.”<sup>60</sup>

The defense of individual rights has reached such extremes as to make society as a whole defenseless

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<sup>59</sup> Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 437 (2000) (citing 144 Cong. Rec. S10,110 (daily ed. Sept. 9, 1998) (statement of Sen. Byrd)).

<sup>60</sup> Alexander Solzhenitsyn, Address at Class Day Afternoon Exercises, Harvard University: A World Split Apart (June 8, 1978), *available at* <http://www.columbia.edu/cu/augustine/arch/solzhenitsyn/harvard1978.html> (last visited August 19, 2011).

against certain individuals. It is time, in the West, to defend not so much human rights as human obligations.

Destructive and irresponsible freedom has been granted boundless space. Society appears to have little defense against the abyss of human decadence, such as, for example, misuse of liberty for moral violence against young people, motion pictures full of pornography, crime and horror. It is considered to be part of freedom and theoretically counter-balanced by the young people's right not to look or not to accept. Life organized legalistically has thus shown its inability to defend itself against the corrosion of evil.<sup>61</sup>

Mr. Solzhenitzyn noted that the press, which includes television broadcasting, can both simulate public opinion and "miseducate it," claiming "everyone is entitled to know everything." "But this is a false slogan, characteristic of a false era: people also have the right not to know, and it is a much more valuable one. The right not to have their divine

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<sup>61</sup> *Id.*

souls stuffed with gossip, nonsense, vain talk. A person who works and leads a meaningful life does not need this excessive burdening flow of information,”<sup>62</sup> particularly when the information consists of indecent language and images that contribute to anti-social, even harmful behavior. Children whose brains are still developing do not need the burden of fleeing expletives and obscene images becoming ingrained in their memories before they fully understand the world around them.

“Hastiness and superficiality are the psychic disease of the 20th century and more than anywhere else this disease is reflected in the press.”<sup>63</sup> “The press has become the greatest power within the Western countries, more powerful than the legislature, the executive and the judiciary. One would then like to ask: by what law has it been elected and to whom is it responsible?”<sup>64</sup> The answer in this case is that the press, *i.e.* the broadcasters, as licensees granted permission to use the public airwaves, is accountable to the owners of the airwaves – the American people. Congress has appointed the FCC as the guardian of the public’s interest. As such, the FCC has enacted

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

decency standards that attempt to protect the public interest. Abandoning those standards would leave the broadcasters wholly unaccountable and would lead to use of the public airwaves in a manner that is detrimental to the public interest, not to mention the health, safety and welfare of the nation's children.

### CONCLUSION

The FCC's minimal decency regulations are reasonable and necessary responses to the downward slide of popular culture. As guardians of the public airwaves, the FCC has properly exercised its role by restricting the broadcast of indecent language to hours when children are least likely to be exposed to it.

The state's compelling interest in protecting the physical and psychological well-being of children amply justifies the regulations and they should be upheld.

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