

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

In the Matter of

COMPLAINTS AGAINST VARIOUS
BROADCAST LICENSEES REGARDING
THEIR AIRING OF THE "GOLDEN
GLOBE AWARDS" PROGRAM

)
)
) File No. EB-03-IH-0110
)
)
)

PETITION FOR RECONSIDERATION

**American Civil Liberties Union
American Federation of Television
and Radio Artists
Beasley Broadcast Group, Inc.
Citadel Broadcasting Corporation
The Creative Coalition
Directors Guild of America, Inc.
Entercom Communications Corp.
The First Amendment Project
Fox Entertainment Group, Inc.
Freedom to Read Foundation
Margaret Cho
Media Access Project**

**Minnesota Public Radio®
National Coalition Against Censorship
National Federation of Community Broadcasters
Penn & Teller
People For the American Way Foundation
Radio One, Inc.
Recording Artists' Coalition
Recording Industry Association of America, Inc.
Screen Actors Guild
Viacom Inc.
When in Doubt Productions, Inc.
Writers Guild of America, west**

Robert Corn-Revere
Ronald G. London
Davis Wright Tremaine L.L.P.
1500 K Street, N.W., Suite 450
Washington, D.C. 20005
(202) 508-6625

Counsel for Petitioners

April 19, 2004

SUMMARY

On March 18, 2004, the Federal Communication Commission reversed an Enforcement Bureau order involving a live telecast of the Golden Globe Awards and in the process overruled well-established precedent to announce a broad new policy, applicable to all broadcasters, that significantly expands its regulation of programming content. *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Mem. Op. and Order, FCC 04-43 (Mar. 18, 2004). The Commission's decision that the isolated use of an unplanned and unscripted expletive is both "indecent" and "profane" represents an unconstitutional expansion of the government's intrusion into broadcast content. It is not a narrow as-applied ruling in which the full Commission decided only that the Enforcement Bureau erred in failing to sanction a broadcaster for airing a given word in a particular context. Rather, the FCC's decision is a rule of general applicability that already is exerting a substantial chilling effect on constitutionally-protected speech.

Petitioners urge the Commission to reconsider its aggressive new approach to regulating broadcast indecency, its newly-crafted profanity standard, and its revised enforcement procedures. The Petitioners are a diverse group of broadcast licensees, public interest organizations, professional associations, production entities, programmers, writers and performers that have a direct stake in the FCC's enforcement of 18 U.S.C. § 1464.

The *Golden Globe Awards* decision asserts FCC power to regulate broadcasting far beyond anything the Supreme Court contemplated or approved in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). It puts broadcast licensees on notice that the Commission in the future will punish broadcasters for "isolated" or "fleeting" expletives even if they are accidental or unintentional, and adds the broad, vague and unbounded term "profanity" to the types of

speech the government will restrict. With this decision the Commission has abandoned the regulatory restraint mandated by well-established judicial precedent. The indecency policy has long been recognized as a very limited exception to the basic constitutional command that the government cannot reduce viewers or listeners to viewing or hearing only what is fit for a child. Reviewing courts accordingly have confined the enforcement of indecency restrictions exclusively to the broadcast medium during certain times of the day, and only so long as the government exercises considerable restraint.

The Commission also has changed its procedural approach to indecency regulation, thus announcing its intention to apply its increasingly muddled standard more harshly. The *Golden Globe Awards* decision confirms that the FCC no longer requires that complaints be substantiated, and that, in some cases, no complaint need be filed at all. And when the FCC concludes that the indecency rules have been violated – as it may do in any case where it deems words or images to be “offensive” – its stated intention is to impose greatly magnified fines and possible license revocation as sanctions.

The Commission’s aggressive crackdown on “coarse” speech has sent shock waves through the broadcast industry and the lack of clear guidelines, coupled with threats of draconian administrative action, has forced licensees to censor speech that unquestionably is protected by the First Amendment. By prescribing delayed broadcasts as an “element” of its indecency calculus and putting station licenses at risk even for unintentional slips of the tongue, the FCC is undermining the ability to engage in live broadcasting in America. Radio stations also are scouring their play lists and dropping or heavily editing songs, many of which have been played for years – some for decades – without ever having drawn a complaint. The *Golden Globe Awards* decision also has resulted in significant self-imposed restrictions on television

programming. It has led to changes in acclaimed network drama series and prompted some public television stations to edit, and in some cases drop, serious documentary programs.

The Golden Globe Awards decision amounts to a rulemaking through adjudication that imposes sweeping new content controls on the broadcast industry. Because the Commission adopted this new approach without notice or opportunity for public comment, Petitioners urge the Commission to reconsider this decision. Upon doing so, the Commission should: (1) reverse its finding that the isolated or fleeting broadcast of an expletive may constitute actionable indecency; (2) rescind its decision to add "profanity" as a separate category of proscribed speech under the law; (3) require complaints to be supported by credible evidence, such as a tape or transcript; (4) cease imposing disproportionate fines on a "per utterance" basis; and (5) seriously examine whether the system of government regulation of content announced in this Order, including its threats of potential license revocations, is fundamentally incompatible with the First Amendment of the Constitution.

TABLE OF CONTENTS

	Page
SUMMARY	i
I. INTRODUCTION	2
II. BACKGROUND	4
III. THE FCC'S NEW APPROACH TO SECTION 1464 ENFORCEMENT IS UNCONSTITUTIONAL AND SIGNIFICANTLY CHILLS PROTECTED SPEECH....	6
A. <i>Golden Globe Awards</i> Expands the Scope of Actionable Indecency Beyond Permissible Constitutional Limits By Applying Arbitrary and Vague Standards to the Regulation of Protected Speech.....	7
B. <i>Golden Globe Awards</i> Substantially Expands Content Regulation by Adopting a New Standard for Profanity	13
C. The Commission's Enforcement Procedures Violate the First Amendment and Basic Principles of Due Process.....	15
D. The FCC's New Policies Already Are Significantly Chilling Protected Speech.....	17
IV. CONCLUSION.....	20

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

In the Matter of

COMPLAINTS AGAINST VARIOUS
BROADCAST LICENSEES REGARDING
THEIR AIRING OF THE "GOLDEN
GLOBE AWARDS" PROGRAM

)
)
) File No. EB-03-IH-0110
)
)

PETITION FOR RECONSIDERATION

Pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.106, American Civil Liberties Union; American Federation of Television and Radio Artists; Beasley Broadcast Group, Inc.; Citadel Broadcasting Corporation; The Creative Coalition; Directors Guild of America, Inc.; Entercom Communications Corp.; The First Amendment Project; Fox Entertainment Group, Inc.; Freedom to Read Foundation; Margaret Cho; Media Access Project; Minnesota Public Radio*; National Coalition Against Censorship; National Federation of Community Broadcasters; Penn & Teller; People For the American Way Foundation; Radio One, Inc.; Recording Artists' Coalition; Recording Industry Association of America, Inc.; Screen Actors Guild; Viacom Inc.; When in Doubt Productions, Inc.; and Writers Guild of America, west (together, "Petitioners"), by counsel, hereby submit this Petition requesting that the Commission reconsider its aggressive new approach to regulating broadcast indecency, its newly-crafted profanity standard, and its revised enforcement procedures as articulated in *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Mem. Op. and Order, FCC 04-43 (Mar. 18, 2004) ("*Golden Globe Awards*"). The new indecency enforcement

policy exceeds the Commission's authority under the Communications Act and violates the First Amendment rights of broadcast licensees, performers, program producers, writers, and broadcast viewers and listeners.

I. INTRODUCTION

On March 18, 2004, the Commission adopted four orders fundamentally altering the standards of what the government deems acceptable broadcast fare.¹ Each of the decisions, most prominently the Commission's decision to reverse a staff ruling in *Golden Globe Awards*, applied new interpretations of the FCC's indecency policies that depart significantly from established precedent.² In *Golden Globe Awards* the Commission put all broadcast licensees, performers and audience members on notice that the Commission will apply new substantive and procedural standards that vastly expand the government's control over "indecent" or "profane" speech. In doing so, the FCC upset the delicate balance in what it inexplicably continues to characterize as its "very limited" role in regulating broadcast content, and it cast a significant pall over constitutionally-protected speech that already is having a substantial chilling effect.

Despite the obvious constitutional ramifications of the Commission's actions, it did not conduct a notice and comment rulemaking before adopting sweeping new rules of general application, despite recently being asked to do so by a broadly based consortium.³ Rather, it simply announced the new policies in the context of a Commission reversal of a staff ruling that was consistent with longstanding precedent. Thus, the FCC upended decades of

¹ *Golden Globe Awards*, FCC 04-43; *Infinity Radio License, Inc.*, Mem. Op. and Order, FCC 04-48 (rel. Mar. 18, 2004) ("*Infinity Radio License*"); *Infinity Broad. Operations, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 04-49 (rel. Mar. 18, 2004) ("*Infinity Broadcasting*"); *Capstar TX Ltd. P'ship*, Notice of Apparent Liability for Forfeiture, FCC 04-36 (rel. Mar. 18, 2004) ("*Capstar*") (together, the "*March 18 Indecency Orders*").

² This Petition seeks reconsideration of the Commission's *Golden Globe Awards* decision. However, to the extent any of the issues raised in this Petition implicate one or more of the other *March 18 Indecency Orders*, the Petitioners also seek reconsideration of such orders.

³ See *Infinity Broad. Operations, Inc.*, 18 FCC Rcd. 26360, 26363 n.7 (2003).

established case law and extended its authority to regulate broadcast content well beyond judicially-approved narrow limits with virtually no participation by broadcasters and other parties most directly affected.⁴

On very similar facts the FCC has in the past recognized the propriety of review of constitutionally sensitive issues arising from its indecency rules. In *Infinity Broadcasting Corporation of Pennsylvania*, 3 FCC Rcd. 930 (1987), the Commission considered several petitions and comments addressing a public notice that summarized three indecency decisions and “put[] all broadcast . . . licensees on notice as to new standards” that the Commission said “will apply in enforcing the prohibition against obscene and indecent” content. *New Indecency Standards to be Applied to All Broadcast and Amateur Radio Licensees*, 2 FCC Rcd. 2726 (1987). Where adjudication of specific broadcasts resulted in the adoption of “new standards” that “could have an impact on all licensees,” the Commission deemed it appropriate “to address the uncertainty created by those rules” by “treat[ing] the filings . . . as requests for reconsideration of the three specific cases” and issuing a substantive reconsideration decision. *Infinity Broad.*, 3 FCC Rcd. at 936 n.18. Similarly, the court of appeals treated the FCC’s actions as more like “the result of a notice-and-comment rulemaking than . . . an ad hoc adjudicatory proceeding.” *ACT I*, 852 F.2d at 1337.

The Petitioners here seek similar substantive reconsideration of the new course in Section 1464 regulation that the Commission charted in *Golden Globe Awards*. The Petitioners

⁴ In view of the Commission’s election to proceed in this manner, Petitioners who were not parties to *Golden Globe Awards* satisfy the requirements in 47 C.F.R. § 1.106(b)(1) for seeking reconsideration. Each Petitioner will be adversely affected by the new standards and policies adopted or relied upon in *Golden Globe Awards*, as they apply prospectively to all broadcasters and thus directly control their programming, and individuals appearing in the programs, as well as their viewers. See *Action for Children’s Television v. FCC*, 852 F.2d 1332, 1334, 1336-37 (D.C. Cir. 1988) (“*ACT I*”) (citing, *inter alia*, *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)). Petitioners did not participate in earlier stages of the proceeding as it was not foreseeable the Commission would adopt standards of general application in an indecency adjudication involving a single program aired by specific licensees, nor that it would reverse what the Commission acknowledges is long-standing precedent.

represent a coalition of broadcast licensees, programmers, producers, directors, public interest organizations, professional associations, writers, and performers that share concerns about the effect of FCC policies on freedom of expression for the broadcast medium. Petitioners are described, in a manner disclosing how their interests are adversely affected by the *Golden Globe Awards*, in the Appendix to this Petition.

II. BACKGROUND

This controversy arose from an initial October 2003 Enforcement Bureau decision declining to impose a penalty on NBC and its affiliates for a live telecast of the 2003 Golden Globe Awards during which U-2's lead singer Bono uttered a phrase to the effect "this is really, really, fucking brilliant" when accepting an award.⁵ Applying well-established Commission precedent, the Bureau ruled the licensees did not violate the law because, in the context of a live unscripted event, "fleeting and isolated remarks of this nature do not warrant Commission action."⁶ Additionally, while acknowledging that many people might find Bono's statement "crude and offensive," the Bureau staff reasoned that "the material aired . . . does not describe or depict sexual and excretory activities and organs" as required by the Commission's long-standing definition of indecency.⁷

⁵ *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 FCC Rcd. 19859 (2003) (Enf. Bur., 2003) ("Bureau Order"). At the time of the staff ruling, 93 percent of the complaints on file with the Commission had been submitted by persons associated with one organization – the Parents Television Council. The exact phrasing at issue was variously stated on the face of the complaints, which did not include a tape or transcript of the broadcast. *Golden Globe Awards* ¶ 3 & n.4.

⁶ *Bureau Order*, 18 FCC Rcd. at 19861 (citing *Entercom Buffalo License LLC (WGR(AM))*, 17 FCC Rcd. 11997 (Enf. Bur. 2002); *L.M. Communications of S.C., Inc. (WYBB(FM))*, 7 FCC Rcd. 1595 (MMB 1992); *Peter Branton*, 6 FCC Rcd. 610 (1991); *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Their Broadcast*, 16 FCC Rcd. 7999, 8008-09 (2001) ("Industry Guidance"). The Bureau also found the material was not obscene. *Id.* at 19862 (citing *Miller v. California*, 413 U.S. 15 (1973); *WGBH Educ. Found. (WGBH-TV)*, 69 F.C.C.2d 1250 (1978)).

⁷ *Id.* at 19861-62 (citing *Industry Guidance* and *FCC v. Pacifica Found.*, 438 U.S. 726 (1978)). The Bureau found the cited use of the word was as an "adjective or expletive to emphasize an exclamation," and thus not indecent under FCC precedent.

The full Commission, acting on an application for review filed by the Parents Television Council, reversed the Bureau's decision. Though the Commission purported to acknowledge that its "role in overseeing program content is very limited" under the Communications Act and First Amendment, the agency concluded it was compelled to act in part because, if it "were routinely not to take action against isolated and gratuitous uses of such language on broadcasts," it "would likely lead to more widespread use." *Golden Globe Awards* ¶¶ 4, 9. The Commission rejected the Bureau's analysis of the usage of the word "fucking," finding that "within the scope of our indecency definition . . . it does depict or describe sexual activities." *Id.* ¶ 8. It then held that prior agency decisions holding "that isolated or fleeting broadcasts of the 'F-Word' . . . are not indecent or would not be acted upon" are "no longer good law." *Id.* ¶ 12. The Commission also found as "an independent ground" that the material violated 18 U.S.C. § 1464 because it "constitutes 'profane' language" under that provision. *Id.* ¶ 13.

The Commission announced that "broadcasters are on clear notice that, in the future, they will be subject to potential enforcement action for any broadcast of the 'F-Word' or variations thereof," and it took the "opportunity to reiterate . . . that serious multiple violations of our indecency rule . . . may well lead to . . . license revocation proceedings, and that we may issue forfeitures for each indecent utterance in a particular broadcast."⁸ Notwithstanding these findings, the Commission by a 3-2 vote refrained from imposing a forfeiture on the licensees that aired the offending material. *Golden Globe Awards* ¶ 15. The majority declined to impose a forfeiture because precedent at the time of the broadcast would have permitted airing the material so that the licensees "lacked the requisite notice to justify a penalty." *Id.* But the full Commission acknowledged that it was taking "a new approach to profanity." *Id.* Moreover, as

⁸ *Id.* ¶ 17. The Commission first issued this warning about "serious violations" in *Infinity Broadcasting Operations, Inc.*, 18 FCC Rcd. 6915 (2003).

discussed more fully below, the Commission also changed its procedural approach to indecency regulation, thus announcing its intention to apply these nebulous rules more harshly in the future. The *Golden Globe Awards* thus represents a sea change in the Commission's approach to regulating broadcast indecency.

III. THE FCC'S NEW APPROACH TO SECTION 1464 ENFORCEMENT IS UNCONSTITUTIONAL AND SIGNIFICANTLY CHILLS PROTECTED SPEECH

Despite acknowledging that the First Amendment is a "critical constitutional limitation" that requires "restraint" in enforcing the indecency rules, the Commission devotes only a single paragraph of *Golden Globe Awards* to constitutional analysis, concluding that its aggressive new policy is "not inconsistent" with *FCC v. Pacifica Foundation*. But this cursory treatment of a "critical" limitation is predicated on the Commission's mistaken assumption that the Court in *Pacifica* "explicitly left open the issue of whether an occasional expletive could be considered indecent." See *Golden Globe Awards* ¶ 16. This is wrong. Although Justice Powell, who supplied a crucial swing vote for *Pacifica*'s 5-4 majority, noted "[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word," he also stressed that the FCC does not have "unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes."⁹ Justice Powell expressly distinguished "the isolated use of a potentially offensive word" from "the verbal shock treatment administered by respondent," and explained that the order under review

⁹ *Pacifica*, 438 U.S. at 760-761 (Powell, J., joined by Blackmun, J., concurring). See also *id.* at 772 (Brennan J., dissenting) ("I believe that the FCC is estopped from using either this decision or its own orders in this case . . . as a basis for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening and containing the relentless repetition, for longer than a brief interval, of [offensive language].").

“was limited to the facts of this case.”¹⁰ He noted the danger of chilling protected speech in what he described as a “relatively new and difficult area of law,” but allowed the FCC some latitude because “the Commission may be expected to proceed cautiously, as it has in the past.”¹¹ Here however, the Commission consciously decided to extend its power to restrict content far beyond what was approved by the Court in *Pacifica*. Consequently, the Commission has an obligation to reconsider carefully the constitutionality of its actions.

A. *Golden Globe Awards Expands the Scope of Actionable Indecency Beyond Permissible Constitutional Limits By Applying Arbitrary and Vague Standards to the Regulation of Protected Speech*

Even at its most expansive, the Commission’s authority to regulate indecent speech is narrow and has been considered constitutionally permissible only so long as the FCC exercised considerable restraint. Even within such limits, judicial tolerance for this anomalous legal doctrine has eroded since *Pacifica* was decided in 1978, as more recent cases have subjected the indecency rationale to far less forgiving constitutional review. The Court has confirmed that “indecent” speech is fully protected by the First Amendment and is not subject to diminished scrutiny as “low value” speech, as three Justices who joined the *Pacifica* plurality opinion had suggested.¹² Since *Pacifica*, the Supreme Court has invalidated government-imposed indecency restrictions on cable television access channels despite finding them “as ‘accessible to children’ as over-the-air broadcasting, if not more so.”¹³ Additionally, in *Reno v.*

¹⁰ *Id.* at 761 (Powell, J., concurring) (emphasis added).

¹¹ *Id.* at 756, 760, 761 (Powell, J., concurring). Justice Powell wrote that the Commission should take into account the chilling effect on speech “as it develops standards in this area.” *Id.* at 760.

¹² Rather, it stressed that the government cannot assume it has greater latitude to regulate because of its assumption that “the speech is not very important” or that the speech is “shabby, offensive, or even ugly.” *United States v. Playboy Entmt. Group, Inc.*, 529 U.S. 803, 826 (2000).

¹³ *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 717, 744 (1996). The Court upheld a provision that permitted cable operators to adopt editorial policies for leased access channels, but rejected government-imposed restrictions on indecent programs on leased and public access channels.

ACLU, the Court for the first time subjected the indecency definition (in the Internet context) to rigorous scrutiny and found it significantly overbroad. 521 U.S. 844, 871-881 (1997). These decisions addressed the underlying logic of the indecency standard, thus extending their significance beyond the broadcast-specific context. The factual underpinnings of *Pacifica* have been superseded by significant changes as well, including the rise of cable television and the Internet as equally pervasive electronic media.¹⁴

In these circumstances, the Commission should be more circumspect about regulating broadcast content, not less. But *Golden Globe Awards* eliminates many interpretive restraints the Commission previously used to ensure that its enforcement of 18 U.S.C. § 1464 does not cross the constitutional line. For example, by overruling its previous precedents which held that isolated or fleeting references to “indecent” words are not actionable, the Commission opened a broad new area of enforcement. But the Supreme Court stressed in *Pacifica* that it was not empowering the Commission to act in such isolated instances, and it emphasized that the context in which words are used is “all-important.” *Pacifica*, 438 U.S. at 750. *Golden Globe Awards* drains the FCC’s contextual approach of meaning because the agency’s focus is on whether a particular word will “enlarge a child’s vocabulary” regardless of the setting in which the word is used. *Golden Globe Awards* ¶ 9 (the fact that the broadcast of vulgar language is

¹⁴ As the Commission has found, “the modern media marketplace is far different than just a decade ago.” *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd. 13620, 13648 (2003). It noted that traditional media “have greatly evolved,” and “new modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history.” *Id.* Of particular relevance here, the Commission noted that “[t]oday’s high school seniors are the first generation of Americans to have grown up with this extraordinary level of abundance in today’s media marketplace.” It found that most teens have access to cable television and high speed Internet access, many live in households that receive 100 to 200 channels of video programming and thus “have come to expect immediate and continuous access to news, information, and entertainment.” *Id.* at 13648-49. In this environment, imposing special speech restrictions on the broadcast medium because a teenager might hear something that could “enlarge[] a child’s vocabulary in an instant,” *Pacifica*, 438 U.S. at 749, is futile, and needlessly reduces broadcast content to only what is fit for children.

isolated and unintentional “is irrelevant; it still has the effect of exposing children to indecent language”).

The Commission’s insistence that the context of speech continues to be “critically important” in indecency determinations is belied by its reasoning in *Golden Globe Awards*. Although it suggests that the “merit” of a work may be considered as part of its indecency analysis, the FCC confines this review to whether “there was any political, scientific or other independent value of use of the word here.” *Golden Globe Awards* ¶ 17. Such a narrow, atomistic view of merit word-by-word is about as far as one can get from the “work as a whole” requirement for evaluating obscenity, which, paradoxically, is unprotected by the First Amendment.¹⁵ This approach vests the Commission with standardless discretion to pick and choose between favored and disfavored speakers. Such arbitrariness is precisely what the vagueness doctrine in First Amendment law is designed to prevent. *NAACP v. Button*, 371 U.S. 415, 432-433 (1963). The government’s ability to assist favored speakers and penalize disfavored ones is the principal vice of vagueness in speech regulation. *Kolender v. Lawson*, 461 U.S. 352, 360 (1983).

Arbitrariness also is a chronic problem with the FCC’s indecency policy that is greatly exacerbated by *Golden Globe Awards*, which gives no guidance for when the “context” of a given program will outweigh its presumed offensiveness. For example, the Commission in the past has held that use of the word “‘fuck’ or ‘fucking’ 10 times in 7 sentences” in a “legitimate news report” on NPR is not actionably indecent, *Industry Guidance*, 16 FCC Rcd. at 8012 (citing *Peter Branton*, 6 FCC Rcd. 610), but it more recently held that the inadvertent, split-

¹⁵ The Commission’s overly narrow view of “context” and “merit” is a significant constitutional defect. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 248 (2002) (“work as a whole” requirement is “an essential First Amendment rule [that t]he artistic merit of a work does not depend on the presence of a single explicit scene”); *ACLU v. Ashcroft*, 322 F.3d 240, 252 (3d Cir. 2003) (reviewing material considered to be harmful to minors “in context” is constitutionally deficient because “[t]he taken ‘as a whole’ language is crucial”).

second flash of a penis during a news interview with cast members of a critically-acclaimed off-Broadway production was indecent.¹⁶ With respect to literary or artistic works, the merit of the material may save it from an indecency finding,¹⁷ or, more likely, it may not.¹⁸ There simply is no way to predict when the “context” will save speech from an indecency finding, and there are ominous indications that the Commission plays favorites when it applies its vague standards.¹⁹

Despite its purported attempt to clarify its indecency standards by decreeing that “any use of [the ‘F-Word’] or a variation, in any context, inherently has a sexual connotation,” the Commission has only made matters more confusing.²⁰ To begin with, it is not even clear whether the FCC is purporting to ban just the word “fuck” or would also restrict its euphemisms, including the term “F-Word.”²¹ While in other circumstances it might be reasonable to assume the government intends only to ban the actual word and not its semantic replacements, it is not

¹⁶ *Young Broadcasting of San Francisco, Inc.*, 19 FCC Rcd. 1751 (2004). Some radio stations have declined even to carry advertising for the stage production after the FCC decision. See News Release, *Puppetry of the Penis – Indecent or Art?*, Mar. 30, 2004, attached as Exhibit 1.

¹⁷ See *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd. 1838 (2000) (considering context, the depiction of full frontal nudity in the film *Schindler’s List* is not actionably indecent).

¹⁸ *Golden Globe Awards* ¶ 9 & n.25 (warning broadcasters that “social or political value” of a work does not save it from an indecency finding and noting that “the works of Joyce, [and] words and phrases found in the writings of D.H. Lawrence [and] James Baldwin” may be considered indecent) (quoting *ACT I*, 852 F.2d at 1340).

¹⁹ When the FCC declined to sanction NPR for its newscast about mob boss John Gotti, for example, Commissioner Ervin S. Duggan suggested that his fellow Commissioners had been influenced by the fact that “the broadcast in question was by National Public Radio.” *Peter Branton*, 6 FCC Rcd. at 611 (dissenting statement of Commissioner Ervin S. Duggan). Now, the FCC has ruled that, even without the evidence of a tape or transcript, and without evidence of what words were actually broadcast, it can determine that material is actionably indecent because of the subject matter discussed “and the *identities of the participants* (a ‘shock jock’ and a porn star.” *Emmis Radio License Corp.*, Mem. Op. and Order, FCC 04-62 (rel. Apr. 8, 2004) (“*Emmis Radio*”) (emphasis added).

²⁰ *Golden Globe Awards* ¶ 8. The Commission’s initial premise that the word at issue has *only* a sexual connotation is simply wrong. See, e.g., WEBSTER’S NEW COLLEGIATE DICTIONARY 463 (1977) (including among the definitions “sometimes used in the present participle as a meaningless intensive”). See also *THE F WORD* (2d ed., Random House 1999) (a 272-page book with an introduction by Roy Blount, Jr. which traces the etymology of the word “fuck” and sets forth its myriad meanings and usages).

²¹ The Commission order and separate statements use the expression “F-Word” thirty-five times, including in the legal analysis and in the Order’s conclusion, while the words “fuck” or “fucking” appear only in footnotes, largely involving parenthetical references to other cases. See *Golden Globe Awards* ¶ 8 n.32.

safe for licensees to rest on such an assumption where a wrong guess can cost a station a huge fine or lead to license revocation. In the three other *March 18 Indecency Orders*, for example, the FCC reinforced the notion that even innuendo and colloquial references can be actionable where the FCC concludes the sexual connotation is “unmistakable.”²² In this regard, the expression “F-Word” appears easily to qualify since the Commission found it unnecessary to define the term even though roughly eight thousand six hundred other words in the English language also begin with the letter “F.”²³ Moreover, the Commission warned broadcasters that it intends to interpret its mandate broadly, to prohibit “vulgar and coarse language” including “words (or variants thereof) that are as highly offensive as the “F-Word.”²⁴ As a consequence, many other commonly understood euphemisms in addition to the “F-Word” may be unsafe to broadcast.²⁵ But it is impossible to tell from the FCC’s newly-announced standard which words are acceptable and which ones are not.

Which words may be deemed “highly offensive” is a function of contemporary community standards for the broadcast medium – a concept the Commission has never previously defined other than to say it is a national standard based on the “average broadcast viewer or listener.” *Industry Guidance*, 16 FCC Rcd. at 8002. Now, however, in its *March 18 Indecency Orders*, the FCC claims to rely on its “collective experience and knowledge, developed through *constant interaction* with lawmakers, courts, broadcasters, public interest

²² *Capstar* ¶ 9; *Infinity Broadcasting* ¶ 10; *Infinity Radio License* ¶ 5.

²³ WEBSTER’S 3RD NEW INT’L DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 811-926 (1986).

²⁴ *Golden Globe Awards* ¶¶ 13-14.

²⁵ Some commonly understood euphemisms of the “F” variety include “eff” (or “effing”), “fug,” “frig,” “freaking,” “having fun,” “funch,” “fungoo,” and “futz.” Hugh Rawson, *DICTIONARY OF EUPHEMISMS AND OTHER DOUBLETALK* 173, 177, 179, 182-183 (Revised ed. 1995). Many other well-worn expressions similarly stand in for the word. *Id.* at 232 (listing more than 40 examples). Compare *Palmetto Broad. Co.*, 33 FCC 250, 251 (1962), *aff’d on other grounds*, *Robinson v. FCC*, 334 F.2d 534 (D.C. Cir. 1964) (DJ’s use of expressions such as “let it all hang out” considered “obscene, coarse, vulgar, and suggestive material susceptible of indecent double meaning”).

groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium.” *Infinity Radio License* ¶ 12 (emphasis added). This dubious explanation of the methodology employed in assessing contemporary community standards is legally deficient and further compounds the confusion that attends the Commission’s Section 1464 enforcement scheme.

In fact, there has been no “constant interaction” by the Commission with the courts on the subject of indecency. To the contrary, the last time a court opined on the Commission’s indecency enforcement scheme was nearly ten years ago, and that was at the behest of broadcasters. *See Action for Children’s Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995). To the extremely limited extent courts have interacted with the Commission, they have expressly relied on FCC commitments to exercise restraint and caution when regulating indecent material. *E.g.*, *ACT I*, 852 F.2d at 1340 n.14. More significantly, such interactions have been in the context of facial challenges in which the definition and application of community standards are not at issue. Indeed, the Commission has *never* been involved in a case that resulted in a judicial application of “community standards” as currently defined by the FCC. The only case that came close to doing so was a decade ago, but it resulted instead in a settlement that produced (seven years later, in 2001) the Commission’s *Industry Guidance* – a document that now appears to be of limited utility.²⁶

The Commission’s interaction with public interest groups and ordinary citizens is generally one-sided, and clearly tends to reflect the interests of those who choose to complain about broadcast material, at the expense of the interests of the vast majority of listeners and viewers, who cannot reasonably be expected to contact the Commission in support of their

²⁶ *See Evergreen Media Corp. v. FCC*, Civil No. 92 C 5600 (N.D. Ill. Feb. 22, 1994) (agreeing to publish guidelines as to the meaning of the term “indecency” within 9 months).

favorite stations and programming.²⁷ Individual complaints, especially those filed as part of an orchestrated campaign by one or two organizations (as was the case in *Golden Globe Awards*) are a poor substitute for the objective measurement of contemporary community standards through such means as polling or analysis of ratings results, the latter of which the Commission irrationally discounts.²⁸ It should correct that error through reconsideration here.

B. *Golden Globe Awards* Substantially Expands Content Regulation by Adopting a New Standard for Profanity

The Commission's independent rationale for *Golden Globe Awards* – that the isolated use of the word “fuck” was “profane” – further undermines the constitutionality of its indecency policy. This alternative basis for reversing the Bureau decision has the effect of replacing one vague standard with several – broadcasters now must excise any words or images that may be indecent, blasphemous, or vulgar. This new regime defines “profanity” in at least four ways: (1) “personally reviling epithets naturally tending to provoke violent resentment”; (2) “language so grossly offensive to members of the public who actually hear it as to amount to a nuisance”; (3) blasphemy, or divine imprecation; and (4) “vulgar, irreverent, or coarse language.” The decision unhelpfully adds that “[w]e will analyze other potentially profane words or phrases on a case-by-case basis,” while providing no meaningful guidance as to what those words might be. *Golden Globe Awards* ¶¶ 13-14.

²⁷ The Commission periodically issues reminders that “[t]he Commission receives many informal complaints that do not involve violations of the Communications Act, a rule or order of the Commission. The existence of a complaint does not necessarily indicate wrongdoing by the company at issue.” Consumer and Governmental Affairs Bureau, *Report on Informal Consumer Inquiries and Complaints*, Nov. 20, 2003, at 1.

²⁸ See *Infinity Broad. Operations*, 17 FCC Rcd. 27711, 27715 (Enf. Bur. 2002). Contemporary surveys demonstrate far different attitudes among members of the broadcast audience than the FCC presumes. See Kavla McCabe, *Study Reveals Rock Listeners' Views on Indecency*, RADIO & RECORDS, Apr. 9, 2004 at 1; *Rated R for Rock*, RADIO & RECORDS, Apr. 9, 2004 at 15 (reporting results of surveys by Jacobs Media and Edison Media Research on contemporary listeners' attitudes), attached hereto in Exhibit 2.

None of these definitions can survive constitutional scrutiny, as each suffers from obvious vagueness and overbreadth. The range of statements encompassed by blasphemy and divine imprecation, both religiously based, is far removed from the sphere of indecency which the Commission had heretofore sought to regulate. The most commonplace of divine imprecations, such as “Go to Hell” or “God Damn It,” are now actionable under *Golden Globe Awards*.²⁹ By encompassing such protected speech, the profanity standard’s blasphemous and divine imprecation components are impermissibly and unconstitutionally vague and overbroad. By bringing its suddenly heavy hand down into this area of religiously oriented speech, the Commission also has impermissibly breached the First Amendment wall that separates church and state.

The “nuisance” and “personally reviling epithet” prongs fare no better. The “nuisance” definition on its face ranges far beyond indecency to include “grossly offensive” words that do not have a sexual or excretory meaning. The Commission relies on a definition of “nuisance” as including speech that “is prejudicial to the . . . sense of decency or morals of the citizens at large.”³⁰ This open-ended definition wholly encompasses the concept of “indecency” and suggests no logical stopping point. “Personally reviling epithets,” which require a tendency to provoke, are the constitutional equivalent of “fighting words.”³¹ This definition, too, suffers from fatal vagueness and overbreadth, opening up broadcasters to an entirely new range of

²⁹ *Duncan v. United States*, 48 F.2d 128, 134 (9th Cir.), *cert. denied*, 283 U.S. 863 (1931). To the extent the FCC has shown restraint in the recent past and refrained from regulating blasphemous words, such decisions are of little help now since *Golden Globe Awards* reaffirmed the FCC’s authority to do so. *Golden Globe Awards* ¶ 14 (“Broadcasters are on notice that the Commission in the future *will not limit* its definition of profane speech to *only* those words and phrases that contain an element of blasphemy or divine imprecation . . .”) (emphasis added).

³⁰ *Golden Globe Awards* ¶ 13 & n.36 (citing definition from *BALLENTINE’S LAW DICTIONARY* (3d ed. 1969)). The same dictionary defines “profane” as “Common rather than sacred. Irreverent toward or contemptuous of sacred things.”

³¹ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (finding that there are “fighting words” that by their ordinary meaning are “likely to cause a fight” or “are threatening, profane or obscene revilings”).

prohibitions on speech that have nothing to do with sexual or excretory organs and activities. The Supreme Court has repeatedly held that “fighting words” regulations must be carefully drawn so as to avoid application to protected expression.³² Moreover, an essential element of “fighting words” is that they be uttered face-to-face, which obviously is impossible in the typical broadcast setting. The vagueness and overbreadth of the new test for profanity is fatal.³³

C. The Commission’s Enforcement Procedures Violate the First Amendment and Basic Principles of Due Process

The procedures and penalties affirmed in *Golden Globe Awards* demonstrate a further lack of regard for constitutional limitations. The Commission’s new approach eviscerates due process requirements in determining whether an indecent broadcast has occurred and, upon finding a transgression, imposes wholly disproportionate and punitive sanctions. The Commission used the decision to reiterate the policy that “serious multiple violations” of the indecency rule could lead to license revocations and that forfeitures may be issued for each indecent utterance in a particular broadcast.³⁴ Furthermore, the Commission reserved to itself the right to declare particular words profane on a case-by-case basis, with all the attendant dire consequences, without giving any indication of what those words might be. Not only are these changes already having a profound chilling effect on speech, *see infra* Section III.D, they are eliminating live broadcasting as it is currently practiced, since *Golden Globe Awards* articulates a technological delay requirement as an “element” of its indecency calculus. *Golden Globe Awards* ¶¶ 11, 17.

³² See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 523 (1972); *Cohen v. California*, 403 U.S. 15, 20 (1971). See also *Lewis v. New Orleans*, 415 U.S. 130 (1974).

³³ See, e.g., *State v. Poe*, ___ P.3d ___, 2004 WL 396052 (Idaho 2004) (striking down state law against using profanity “within the presence or hearing of children”).

³⁴ The Commission has since issued Notices of Apparent Liability based on this new approach. See *Clear Channel Broad. Licenses, Inc.*, FCC 04-88 (rel. Apr. 8, 2004) (“*Clear Channel*”) (proposing a \$495,000 fine based on a “per utterance” calculation).

Even worse, the FCC would now place the burden on licensees to prove that their broadcasts are not indecent. The Commission no longer finds it necessary for complaints to accurately report and substantiate the contents of the broadcast.³⁵ It appears to presume that a broadcast is indecent because of the subject matter at issue and the identity of the speakers. See *Emmis Radio* ¶¶ 10-12. It also has indicated its intention to take action against stations even if they have received no complaints at all. E.g., *Clear Channel* ¶ 16. Moreover, in evaluating licensees' responses to complaints, the Commission has said that broadcasters' good faith attempts to understand and comply with the rules are "irrelevant," *Golden Globe Awards* ¶ 9, thus effectively reading out of the law any requirement that a violation be "willful."³⁶ The Commission also moved recently to implement an increase in indecency fines as threatened in *Golden Globe Awards*, by basing the forfeiture on each individual "indecent" utterance, but the Commission's methodology for doing so is vague and confusing. *Clear Channel*, *supra* note 34 (NAL for a \$495,000 forfeiture). Although the Commission has not yet instituted license revocation proceedings against a licensee, the threat to do so is quite real and has a significant *in terrorem* effect.³⁷

³⁵ In *Golden Globe Awards*, for example, the Commission was untroubled by the fact that certain complainants inaccurately recollected or reported what was actually said. *Golden Globe Awards* ¶ 3 n.4. The decision establishes a new enforcement process in which no tape or transcript need be supplied, or even a precise recollection of the actual broadcast. See also *Emmis*, *supra*, and *Capstar*, *supra*.

³⁶ The FCC's new approach conflicts with the Communications Act. Section 503(b) of the Act requires that a violation of the Commission's rules be "willful" or "repeated" before the government may assess a forfeiture, but the approach applied in *Golden Globe Awards* eliminates any such requirements. The fact that an "isolated" reference now may constitute actionable indecency cannot be reconciled with a requirement that the violation be repeated. Moreover, the FCC's disregard of broadcaster intent as "irrelevant" eviscerates not just a "willfulness" requirement, but would punish broadcasters even without a showing of negligence. This approach also conflicts with the First Amendment. See *ACT I*, 852 F.2d at 1340 n. 14 (Commission promised court that it would accord weight to "reasonable licensee judgments" in assessing potential sanctions).

³⁷ *Golden Globe Awards* ¶ 17. As the Nixon Administration's Director of Telecommunications Policy explained to *The Washington Post*, "The main value of the sword of Damocles is that it hangs, not that it drops. Once you take a guy's license away, you no longer have leverage against him." *Yale Broad. Co. v. FCC*, 478 F.2d 594, 605 n.22 (D.C. Cir. 1971) (Bazelon, C.J., dissenting from denial of rehearing *en banc*) (quoting Clay T. Whitehead).

These procedural changes, combined with the new substantive standard for indecency and profanity, converts the FCC into a “roving Commission” capable of broadly suppressing speech it dislikes. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 59 (1963) (condemning commission charged with reviewing material “manifestly tending to the corruption of the youth”). In these circumstances, “the Commission must discharge its constitutional obligations by explicitly considering [a] claim that the FCC’s enforcement of [its policies] against [the licensee] deprives it of its constitutional rights.” *Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987).

D. The FCC’s New Policies Already Are Significantly Chilling Protected Speech

The vagueness and overbreadth of the indecency and profanity standards, and the FCC’s ability to engage in discriminatory enforcement guarantees that broadcasters will “steer far wider of the unlawful zone” and restrict their expression “to that which is unquestionably safe.”³⁸ Indeed, the Commission’s new approach to indecency enforcement already is having this effect across the board in the broadcast industry. Already broadcasters have eliminated or curtailed live programming for fear a single uttered indecency by an individual over which the broadcaster lacks control could lead to fines or other punishment. Radio stations have fired on-air personnel for even inadvertent broadcasts of a single expletive, and numerous songs, long staples of radio playlists, have been removed or edited as too risky to continue airing as they have in the past, in some cases for over twenty years. Television and radio shows once deemed perfectly acceptable – in some cases by the FCC itself – have been canceled or altered. These

³⁸ *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). See also *Kolender*, 461 U.S. at 358; *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 (1968) (“the permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children”).

actions, most occurring in but the first month since *Golden Globe Awards* issued, vividly illustrate the constitutional defects of the Commission's actions and the need for reconsideration.

Among the first casualties of *Golden Globe Awards* have been other live broadcasts, the unpredictability of which, coupled with uncertainty over the new FCC standards, has caused broadcasters to shy away from live fare. A number of radio stations have stopped airing live performances by visiting artists, opting instead to record them for broadcast at a later time, thus losing the spontaneity of the live format. Others have abandoned any use of a live call-in format.³⁹ Broadcasters also have felt compelled to terminate a variety of on-air talent in the new environment the FCC has fostered. This is not limited to the much-publicized purging of Howard Stern from several stations and termination of Todd Clem (either of which is troublesome enough from a constitutional perspective),⁴⁰ but also has included others such as writer, actress, and six-year "fixture" on non-commercial educational station KCRW(FM) Sandra Tsing Loh. She was terminated in "a precautionary measure to show the station had distanced itself . . . in case the FCC investigates" after broadcast of a Loh monologue including a single expletive that was intended to be "bleeped" but inadvertently aired in unedited form.⁴¹

Radio stations also have found themselves constrained to eliminate or edit songs considered classics of middle-of-the road formats and which previously aired in unexpurgated

³⁹ See, e.g., Mark Brown, *Broadcast Words, Actions Stir Efforts to Clean Up "Dirty" Airwaves*, ROCKY MTN. NEWS, Mar. 27, 2004 at 1D ("in Denver, live radio is history"); John Eggerton, *Stations Consider Tape-Delayed News*, BROADCASTING & CABLE, Apr. 6, 2004. These articles and others referenced in this Section III.D are attached in Exhibit 2.

⁴⁰ See, e.g., Sarah McBride, *Clear Channel Dumps Stern After Big Fine*, WALL ST. J., Apr. 9, 2004, at B1; Jube Shiver, Jr., *Radio Chain Boots Stern Off Stations; Clear Channel Makes the Temporary Move Permanent After FCC Proposes Fining it for Airing the Shock Jock*, L.A. TIMES, Apr. 9, 2004, at C1; *Clear Channel Fires Fla Radio DJ Bubba The Love Sponge*, DOW JONES INT'L NEWS, Feb. 24, 2004. Cf. W. Scott Bailey, *Union Calling Clear-Channel's Zero-Tolerance Plan Indecent*, SAN ANTONIO BUS. J., Mar. 12, 2004.

⁴¹ Greg Braxton, *KCRW Fires Loh Over Obscenity*, L.A. TIMES, Mar. 4, 2004, at B1. The station later offered to reinstate Ms. Loh, but she declined, citing a "toxic environment" at the station. Scott Collins, *et al.*, *The Decency Debate*, L.A. TIMES, Mar. 28, 2004, at E26. See Exhibit 2.

form.⁴² Classic Rock format stations have dropped several such songs from their rotation, including The Who's "Who Are You," Pink Floyd's "Money," Lou Reed's "Walk on the Wild Side," Steve Miller's "Rock 'n Me" and "Jet Airliner," Warren Zevon's "Lawyers, Guns & Money," and Steppenwolf's "The Pusher."⁴³ Stations also have been forced to drop or edit more recent songs by such critically acclaimed artists as Pearl Jam ("Jeremy" and "Why Go"), Alice in Chains ("Man in the Box" and "Heaven Beside You"), Guns 'n' Roses ("Its So Easy" and "Mr. Brownstone") and OutKast ("Roses"). Even pop songs generally thought innocuous, such as John Mellencamp's "Jack and Diane" or "Play Guitar" and Sheryl Crow's "A Change Would Do You Good" have been edited for radio, or in some cases, dropped altogether.

Other programming also has been directly affected by sensitivity to the new FCC standards. Principals involved in this year's annual Victoria's Secret fashion show – a telecast the Commission staff has in the past deemed not indecent⁴⁴ and which already had been filmed – elected to scrap the program.⁴⁵ An episode of *ER* was edited to eliminate a brief shot of the

⁴² See *Rated R For Rock*, *supra* note 28, at 54, 60; Mark Brown, *Broadcast Words, Actions Stir Efforts to Clean Up "Dirty" Airwaves*, ROCKY MTN. NEWS, Mar. 27, 2004 at 1D ("Rock songs that have been played for a quarter-century are suddenly being pulled and re-edited."); *Stations Are Pruning Their Pink Floyd and Cleaning Up Steve Miller's "Jet Airliner,"* INSIDE RADIO, Mar. 23, 2004 at 1; Bram Teitelman, *Radio Reacts to Indecency Flak*, BILLBOARD, Mar. 13, 2004; Hotline, THE BOSTON HERALD, Mar. 26, 2004 at E4 ("classic rock stations around the country are 'retiring' hit songs because a word or two in the lyrics might irk the FCC"); Tom Feran, *Indecency Uproar Stirs a Loud Silence*, CLEVELAND PLAIN DEALER, Mar. 26, 2004 at E1 (Pink Floyd's "Dark Side of the Moon" dropped from airplay, along with Warren Zevon's "Lawyers, Guns and Money," Steve Miller's "Jet Airliner," and the Who's "Who Are You?"); Jason Bracelin, *The \$500K #!*@%*, CLEVELAND SCENE, Apr. 7, 2004.

⁴³ Songs such as the Rolling Stones' "Bitch," Nazareth's "Hair of the Dog," and Elton John's "The Bitch is Back" also have been dropped or edited due to use of the word "bitch" (which involves neither sexual nor excretory references).

⁴⁴ See Letter from Charles W. Kelley, File No. EB-01-1H-0661/RBP (Mar. 21, 2002) (dismissing complaint against the Victoria's Secret special because complainant failed to demonstrate "the sexual aspects of the material was, in context, so graphic or explicit as to be patently offensive").

⁴⁵ Shelly Branch and Joe Flint, *Limited Brands Decides to Cancel Lingerie TV Show*, WALL ST. J., Apr. 12, 2004, at B2; Michele Gershberg, *Indecency Uproar Taming U.S. Network TV*, REUTERS, Apr. 12, 2004.

exposed breast of an 80-year-old woman receiving emergency care.⁴⁶ On ABC, the network darkened for some Central and Mountain time zone affiliates a love scene between two characters on a show known for over a decade to feature such material.⁴⁷ Public broadcaster WGBH edited a hint of cleavage out of its *American Experience* documentary “Emma Goldman.”⁴⁸ Further, on “Every Child is Born a Poet: The Life and Work of Piri Thomas” for the *Independent Lens* series, PBS felt it must edit certain expletives (including nonsexual but offensive epithets) even though they appear in the poetry of subject Piri Thomas, a renowned poet, writer and educator, on a program that featured him reading excerpts from some of his work and other parts being dramatized.⁴⁹ The Commission’s recent actions undermine previous attempts by the Bureau to moderate the censorial effects of a vague indecency policy.⁵⁰

The FCC’s new Section 1464 enforcement scheme forces broadcasters to follow the maxim “when in doubt, leave it out.” The chilling effect of this more restrictive regime is obvious. As one experienced observer of the medium put it, “[i]t’s as if someone turned the thermostat down 20 degrees.”⁵¹ The new scheme is antithetical to the First Amendment guarantee that speech in the United States will be “uninhibited, robust, and wide-open.” *New*

⁴⁶ See *The Decency Debate*, supra note 41. This article provides a catalog of other television and radio programs that were edited, cancelled or thematically altered in response to the FCC’s actions.

⁴⁷ Dusty Sanders, *Some States Not Exposed to “Blue” Nudity*, ROCKY MTN. NEWS, Mar. 27, 2004, at 1D.

⁴⁸ Lisa de Moraes, *Even Buttoned-Down PBS Gets Caught in the Wringer*, WASH. POST, Mar. 11, 2004. See Exhibit 2.

⁴⁹ See Press Release, PBS Edits “Offensive” Content From Independently-Produced Documentary *Every Child is Born a Poet: The Life and Work of Piri Thomas* in Order to Comply With New FCC Indecency Rules, April 6, 2004, attached as Exhibit 3. Some public broadcasting systems, such as Nebraska Public Television, dropped the documentary altogether.

⁵⁰ Compare *The KBOO Foundation*, 16 FCC Rcd. 10731 (Enf. Bur. 2001) (\$7,000 NAL for broadcast of “Your Revolution”), with *The KBOO Foundation*, DA 03-469 (Enf. Bur., Feb. 20, 2003) (rescinding NAL). In the current environment, it is no longer safe to assume that the Bureau’s latest analysis remains operative.

⁵¹ David Hinckley, *Across the Dial, Tone-Down*, N.Y. DAILY NEWS, Apr. 1, 2004 (quoting Tom Taylor, editor of INSIDE RADIO and citing numerous examples).

York Times v. Sullivan, 376 U.S. 254, 270 (1964). The effect is not limited to having broadcasters edit out a few naughty words here or there, for as the Supreme Court has noted, “we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.” *Cohen v. California*, 403 U.S. at 26. The general manager of two radio stations owned by Bonneville International Corp. explained:

You have to watch the theme to make sure you’re not offending someone, whether you are discussing gay marriages or the disabled or African-Americans We really don’t want to go there anymore.”⁵²

Such editorial skittishness is widespread on radio and television stations across the nation even though the *Golden Globe Awards* decision is less than a month old. Already this newly restrictive environment has exacted a significant financial toll in the form of canceled programs (that already had been produced) and higher editing and production costs. The Commission must reconsider the decision before the chilling effect becomes even more pronounced.

IV. CONCLUSION

Sweeping changes approved in *Golden Globe Awards* belie the Commission’s claim that its role in overseeing program content is “very limited” and that “the First Amendment is a critical constitutional limitation that demands that . . . we proceed cautiously and with appropriate restraint.” *Golden Globe Awards* ¶¶ 4, 5. The FCC’s new indecency regime cannot fairly be characterized as “limited” or “restrained” to the extent it expands the scope of the indecency standard, adds a “profanity” element, reduces due process protections, and imposes harsher penalties. The FCC is seeking not to enforce contemporary community standards for the broad-

⁵² Diane Toroian Keaggy, *Radio’s “Shock” Therapy*, ST. LOUIS POST-DISPATCH, Apr. 11, 2004 (quoting John Kijowski, general manager of WVRV-FM and WSSM-FM). See also David Hinckley, *DJ Fired For Race Remark*, N.Y. DAILY NEWS, Mar. 23, 2004.

cast medium, but to remake them. *Golden Globe Awards* takes the Commission well beyond established precedent and raises questions about the continuing validity of *Pacifica* itself.

For these reasons, Petitioners respectfully request that the Commission reconsider its new standards for enforcing indecency under 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999. Upon doing so, the Commission should: (1) reverse its finding that the isolated or fleeting broadcast of an expletive may constitute actionable indecency; (2) rescind its decision to add “profanity” as a separate offense under the law; (3) require complaints to be supported by credible evidence, such as a tape or transcript; (4) cease imposing disproportionate fines on a “per utterance” basis; and (5) the Commission should grant reconsideration to seriously examine whether the system of government regulation of content announced in this Order, including its threats of potential license revocations, is fundamentally incompatible with the First Amendment of the Constitution.

Respectfully submitted,



Robert Corn-Revere
Ronald G. London
Davis Wright Tremaine L.L.P.
1500 K Street, N.W., Suite 450
Washington, D.C. 20005
(202) 508-6625

Counsel for Petitioners

April 19, 2004