Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
	)	
WDBJ Television, Inc.	)	File Nos.: EB-IHD-14-00016819
	)	EB-12-IH-1363
Licensee of Station WDBJ(TV)	)	NAL/Acct. No. 201532080010
Roanoke, Virginia	)	FRN: 0002061737
	)	Facility ID No. 71329

OPPOSITION OF WDBJ TELEVISION, INC. TO NOTICE OF APPARENT LIABILITY

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WDBJ Television, Inc. ("WDBJ"), by counsel, hereby opposes the above-referenced Notice of Apparent Liability ("NAL") issued by the Commission on March 23, 2015. WDBJ will show that (1) the Commission should not impose any forfeiture on WDBJ because the television program in question did not violate the FCC's indecency policies; (2) the imposition of any forfeiture on WDBJ would violate the First Amendment; (3) WDBJ lacked the necessary scienter to justify a forfeiture; and (4) even if a forfeiture were warranted, the imposition of the maximum forfeiture in the Commission's arsenal, as proposed in the NAL, is entirely unjustified and excessive.

I. INTRODUCTION AND SUMMARY

In this case, the Commission proposes to fine WDBJ $325,000 – the highest amount permissible under the Broadcast Decency Enforcement Act ("BDEA") – for an inadvertent and momentary display of sexual imagery that was incidental to a bona fide news story about a local controversy. The FCC is seeking to impose the highest fine in history for a single "indecent" broadcast on one station despite the fact that in 2013 it initiated a proceeding to review its

indecency policies "to ensure they are fully consistent with First Amendment principles," and pledged in the interim to exercise the utmost restraint and to enforce its policy only in "egregious cases." WDBJ opposes the proposed forfeiture because: (1) it is based on an erroneous understanding of the facts; (2) it misapplies the FCC's current indecency test; (3) the Commission lacks a constitutional standard for enforcing its indecency rules; (4) the NAL's application of the rules is unconstitutional as applied to WDBJ; (5) the NAL is based on an erroneous and unconstitutional standard of willfulness; and (6) the proposed forfeiture is wildly excessive.

The NAL is Wrong on the Facts. The NAL is based on a July 12, 2012 newscast on WDBJ that covered a controversy in the Roanoke County community of Cave Spring about a former adult film star who had joined the volunteer rescue squad. The situation provoked various reactions in the community, including a request by the Fire Chief to terminate the young woman's employment. WDBJ's story about these events explored the dispute and illustrated parts of the story with material drawn from internet sources. Due to equipment limitations, however, station personnel were unable to see the full screen of the online material, and the eventual broadcast briefly displayed a small image of an erect penis at the extreme margin of the screen. The image appeared for 2.7 seconds during a three minute and ten second story, covered only 1.7 percent of screen at the far right edge, and prompted an immediate corrective response from WDBJ once it became aware of the mishap.

The NAL rests on a series of erroneous factual assumptions, including the notion that the offending image was visible to the journalist who assembled the story, that WDBJ personnel had ample opportunity to screen the material on the equipment available before it was broadcast, that the transmission could have been prevented if station personnel had only been more attentive, and that the sexual material was "plainly visible." None of these assumptions is correct. The

editing equipment at WDBJ, which in 2012 had yet to be upgraded following the digital transition, did not allow the journalist or his editors to view material taken from the internet at the far margin of the screen. The news story went through two levels of review before the story aired. Although station personnel took care to blur sensitive material from the web, including text links to pornographic websites, they were not able to see the image that prompted the NAL. Once WDBJ became aware of the problem, however, it removed the story from its website, obtained new editing equipment at a cost of nearly $800,000, and adopted stationwide policies regarding the use of online material in news stories.

The NAL Misapplies the FCC Test for Indecency. The NAL purports to apply the test for indecency first articulated as "industry guidance" in the Commission's 2001 *Indecency Policy Statement*. For material to be deemed indecent, two questions must be answered in the affirmative: (1) whether the material depicts or describes sexual or excretory organs or activities, and (2) whether the material is "patently offensive" as measured by contemporary community standards for the broadcast medium. In this case, WDBJ does not dispute that the answer to the first question is "yes," because the news broadcast briefly and accidentally included the image of a penis. But the Commission misapplied its own test for determining when the material is "patently offensive" based on contemporary community standards for the broadcast medium.

Under the *Indecency Policy Statement*, the Commission determines patent offensiveness by analyzing three factors: (a) the explicitness or graphic nature of the depiction; (b) whether the material dwells on or repeats at length the depiction; and (c) whether the material appears to pander or is used to titillate or shock. In this case, the Commission incorrectly allowed a single fact to override its analysis, and inappropriately conflated the various factors. Moreover, the FCC's treatment of each factor was inconsistent with its precedents. For example, the

Commission has previously held that the brief exposure of a penis in the course of presenting the news is not graphic or explicit where it was brief, unintentional, and not the focus of the newscast. The NAL glosses over the second factor, since there is no question that WDBJ did not "dwell on" or "repeat" the offending material. And the Commission rewrites the third factor, suggesting that the material was "pandering" as long as it is "explicit." However, this conflates the third and first factors of the FCC's indecency test and ignores agency precedent that pandering depends on a broadcaster's intent in presenting the material. Contrary to the NAL, it is impossible to "pander" by accident.

The FCC Lacks a Constitutionally-Sound Test for Indecency. The NAL falsely assumes that the Commission can impose the maximum indecency fine on a newscast because of the Supreme Court's decision in *FCC v. Pacifica Foundation, Inc.*, 438 U.S. 726 (1978). This ignores the facts that no court has ever upheld as constitutional the multi-factor test set forth in the *Indecency Policy Statement*, and that the only courts ever to assess the merits of that test have found it to be unconstitutionally vague. Indeed, in eight years of litigation between 2004 and 2012, the deficiencies of the FCC's approach to indecency enforcement have been laid bare. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 335 (2d Cir. 2010), *aff'd on other grounds*, 132 S. Ct. 2307 (2012) ("*Fox II*"); *ABC, Inc. v. FCC*, 404 F. App'x 530 (2d Cir. 2011), *aff'd on other grounds sub nom. Fox II*, 132 S. Ct. 2307 (2012). *See also CBS Corp. v. FCC*, 663 F.3d 122 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2677 (2012). These cases confirm that the FCC lacks a constitutionally-approved test for regulating indecency, as the Commission itself acknowledged in its 2013 Public Notice seeking comment on how to reform its indecency policies.

Pacifica upheld only a very restrained policy of indecency enforcement in which the FCC deferred to the good faith editorial judgments of licensees, and no action was taken against

fleeting, isolated, or inadvertent transmissions of potentially offending material. This restrained policy was required by the First Amendment, because the Commission's generic test for indecency otherwise lacked the necessary doctrinal rigor when the government seeks to regulate speech. But as the FCC departed from this policy of restraint, it never articulated a new standard that could survive constitutional scrutiny. As recent cases attest, the multi-factor test the FCC says it applied in the NAL fails to satisfy basic First Amendment requirements, and the Commission has not met its constitutional and statutory obligations to devise a new test. What it cannot do is simply continue to apply its discredited policies, even if the NAL had correctly applied them.

The NAL Violates the First Amendment as Applied to WDBJ. The FCC's application of its indecency test to WDBJ highlights all of the constitutional flaws identified in recent cases. While *Pacifica* approved only "restrained" enforcement so as to stay within constitutional bounds, the NAL takes a draconian approach by imposing the largest fine ever for a single "indecent" broadcast on one station. The harshness of the proposed sanction is magnified by the fact that the penalty is proposed for material broadcast as part of a bona fide newscast – programming the FCC previously has accorded the highest degree of editorial deference – and because the transmission was fleeting, inadvertent, and isolated, which are all characteristics that previously warranted no sanction at all. The Commission's response that it has repeatedly said there is no "news exemption" is the problem, not the answer, given the agency's inability to articulate a discernible standard by which broadcasters can accurately predict what speech is prohibited.

The NAL's Standard for Willfulness is Erroneous and Unconstitutional. The NAL violates the Communications Act insofar as it proposes to penalize WDBJ for an alleged indecency violation that was neither "willful" nor "repeated," as required by Section 503(b)(1). The Act defines "willful" as "conscious and deliberate commission or omission of any act." In

this case, the offending material was not "repeated," and the record confirms that WDBJ personnel were entirely unaware the image in question would be seen in the coverage as broadcast. Under established case law, the WDBJ newscast does not meet the standard for willfulness. This conclusion is also compelled by constitutional considerations. The First Amendment requires statutory provisions imposing penalties on speech to be interpreted to include a "guilty knowledge" requirement, and because speech restrictions must be applied narrowly, the constitutional validity of Section 1464 depends on a strict scienter standard. Neither "recklessness" nor even an extreme departure from professional standards would satisfy this standard. In this case, however, WDBJ followed reasonable precautions to screen offensive material from the newscast.

The Proposed Forfeiture is Excessive. Even if the Commission could justify its indecency finding in this case, proposing the maximum fine is grossly excessive. The FCC does not attempt to explain its decision to impose a fine more than forty-six times the base forfeiture in its guidelines for an infraction based on a fleeting, inadvertent, and isolated transmission. Both the factual bases and the policy assumptions underlying the proposed NAL are erroneous. The Commission also fails to give WDBJ credit for its immediate and extensive remedial measures undertaken prior to the FCC's inquiry. If any forfeiture at all is warranted, it must be reduced substantially.

Instead of the careful legal reasoning required by the First Amendment when the Commission regulates protected speech, the NAL rests on "the mystical aphorisms of the fortune cookie." *Obergefell v. Hodges*, No. 14-446, slip op. at 76 (U.S. June 26, 2015) (Scalia, J., dissenting). The NAL must be withdrawn.

II. THE FACTS

A. WDBJ Aired a Legitimate News Story on a Public Controversy

An actress who appeared in adult films retired from that career and settled in the Roanoke, Virginia area.[1] She volunteered to serve as an Emergency Medical Technician ("EMT"). She went through training and began to serve as an EMT in Cave Spring, Virginia, a suburb of Roanoke. Her background and previous profession became controversial and residents of the community raised questions about whether she should be permitted to serve as an EMT. One stated concern was whether the former actress was continuing to benefit from sales of her films and thus from her allegedly improper former career. The County Fire Chief was sufficiently motivated to write to the County Attorney to ask whether her services should be terminated.[2]

WDBJ, the CBS affiliate in the Roanoke television market, and the winner of numerous awards for news coverage,[3] determined that the story was of sufficient public interest to warrant coverage. It produced a story that included interviews with the actress's colleagues on the EMT squad, people who had been assisted by her, and people who had questions about the propriety of her service. The story quoted the Fire Chief's request to the County Attorney and his response. In order to demonstrate the scope of the actress's adult film career, the story showed an image of a Google™ search of her name. The actual links shown on the search page were blurred out to avoid showing any active links to adult websites.[4] In addition, the photojournalist producing the

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[1] The actress, whose real name is Tracy Rollan, appeared under the name Harmony Rose.

[2] The factual statements in this Response are attested to by the Declaration of Jeffrey A. Marks, President and General Manager of WDBJ, attached hereto as Appendix A.

[3] A list of the awards WDBJ has received for quality news programming is attached hereto as Appendix B.

[4] Thus, although the Commission cites a complaint stating that links to "pornographic videos" came up on the screen (NAL ¶ 16 n.48) in support of its central conclusion that the

story went onto a website of the distributor of her films to obtain pictures to use in the story. In those pictures, as the NAL concedes, "only her face and shoulders can be seen."[5]

The station's editorial choice to show that a Google™ search would bring up a large number of "hits" on adult-oriented websites and to show that the actress's films were currently available was a response to concerns expressed by some citizens that among the reasons the actress should not be allowed to serve as an EMT was that she continued to receive financial benefits from her previous career. Contrary to the implication in the NAL, the Station chose this material to illustrate the controversy, not to pander or titillate. The fact that the actress's films could be readily identified in an internet search and that her films were available on a website showed that there was a factual basis underlying the public controversy. Decisions about how best to present an issue in a news story are, of course, central to the editorial process protected by the First Amendment, and are among the reasons that the Commission has, with almost no exceptions, refused to sanction the inclusion of allegedly indecent material in news programs.[6]

WDBJ news story was pandering or titillating, that complaint was, as the Commission was aware, mistaken. No links to any site, pornographic or otherwise, could be seen in the WDBJ story.

[5] NAL ¶ 4. The NAL makes much of the fact that, in one of the images in the story, the actress placed a finger in her mouth "and appears to suck on her finger." *Id.* The NAL also recites that in one image in the story, "she appears to be sitting on a bed, wearing a bra." *Id.* ¶ 5. The relevance of these facts is obscure. None of these images involve either sexual or excretory organs or acts, and therefore are not remotely within the scope of the Commission's indecency policy. To the extent the Commission included these references in an effort to characterize WDBJ's news story as salacious, that characterization is both inaccurate insofar as the news story addressed an issue of public controversy in the Roanoke area, and irrelevant as the Commission neither purports to, nor constitutionally could, regulate "salacious" speech.

[6] Other media, including national websites for emergency professionals, also viewed the story as important and worthy of coverage. *See, e.g.*, www.huffington-post.com/2012/07/14/harmony-rose-porn-star-volunteer-rescue-quad_n_1671830.html; http://www.foxnews.com/us/2012/07/16/former-porn-star-now-reportedly-working-as-emt-in-virginia/; www.ironfiremen.com/2012/06/27/porn-star-or-felon-which-do-you-want-in-your-

B. The Material That Triggered the NAL Was Included Unintentionally

Like most stations in medium and small television markets, WDBJ converted its facilities to digital operation in several stages over a period of years. It first constructed digital transmission facilities, which included the construction of a new tower and acquisition of a new transmitter at its transmission site. In a second phase, it invested in an encoder to permit transmission of network programming in high definition. It then upgraded its master control facilities to permit full local control of high definition signals. Subsequently, the station invested in digital cameras and new sets to permit production of local programming and news in high definition. Upgrading its news production and editing equipment was among the last phases of its conversion to full digital operations. In 2012, when the story addressed in the NAL was produced, that final upgrade had not yet occurred. Production and review of news stories was undertaken on equipment that used monitors that displayed only a 4 by 6 image. That equipment did not allow users to adjust the monitor to view parts of a widescreen image that were outside of the area shown in the monitor. This equipment was used not only for final editing of news stories; it was also used to put news programming together, including obtaining any material the station used from internet websites. WDBJ's equipment, when used to access internet material, did not enable the operator to see material that was not in the center of a website.

The website used to illustrate the WDBJ news story about Ms. Rollan had clothed images of the actress that were the focus of the report, but also included along the edge of the screen "boxes" that displayed other films available from the distributor. Because they were at the far edge of the website, the "boxes" *could not be seen* by WDBJ's journalists when they downloaded images for use in the news story. However, these areas of the website became

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station/; www.ems1.com/ems-education/articles/1315580-Porn-star-turned-EMT-could-be-in-trouble.

visible when the story was viewed on a wide-screen television as it was broadcast. At one point during the story, video of the website briefly showed at the far right edge of the screen a portion of one of these "boxes" which included a male actor fondling his penis. That image, which as the Commission noted, was entirely unrelated to the news story,[7] was not viewable by the photojournalist when he downloaded the images from the website or when he put the story together. Nor was it visible to the story reporter, or to two newsroom managers who reviewed the story before it was broadcast, since editorial review at WDBJ took place on the same editing equipment. Thus, WDBJ personnel were entirely unaware that this image could be seen in the story as broadcast.

Part of that "box" did, however, appear for 2.7 seconds at the far right edge of the screen when the story was broadcast and viewed on a wide-screen television. The image on a wide-screen television occupied only 1.7 percent of the viewing area.[8] A few viewers nonetheless noticed the picture and complained to the station. WDBJ immediately investigated and found that this entirely unrelated picture inadvertently had been shown as part of its news program. It deleted the story from its online website, www.wdbj7.com, decided that the story would not be shown again in any other newscasts, and issued apologies to complaining viewers for the brief and inadvertent inclusion of unrelated material in its newscast.

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[7] *E.g.*, NAL ¶ 17.

[8] A full-frame digital picture from a television station broadcasting, like WDBJ, a 1080i digital signal, occupies 1920 by 1080 pixels, or a total of 2,076,600 pixels. The "box" on the side of the screen where the allegedly offensive material could be seen, took up, as measured by WDBJ engineers, 111 by 328 pixels, for a total of 36,408 pixels, or 1.7 percent of the total screen area.

C. WDBJ Took Immediate Remedial Measures

WDBJ took prompt steps to ensure that material taken from the internet could not and would not be inadvertently included in news programming. The Commission expressed some doubt as to whether the Station took remedial actions before it was notified of the Commission's investigation, NAL ¶ 31, but WDBJ in fact took these steps *immediately* after the incident and has continued to strengthen its internal controls to this day. These measures included:

- WDBJ replaced its entire news editing system, including the monitors that were incapable of displaying an entire 16 by 9 broadcast picture, at a cost of $798,310. This system includes not only the editing function but also the systems used to download and review any material from internet sources.

- WDBJ conducted training sessions for all news personnel concerning the uses of internet material and the Commission's indecency policies.

- WDBJ subsequently conducted training for all employees about copyright issues and their impact on selection of material to be included in news programming.

- WDBJ instituted a formal policy requiring approval of two news managers before any material obtained from an internet source was placed on air or on the Station's website. That policy specifically requires that managers review any material "in its entirety" on a high-definition monitor in full-screen mode "so all parts of the screen are able to be seen." Producers and managers are specifically directed to "carefully review the visual material to make sure it complies with indecency rules." WDBJ's written policy further cautions employees that "the need to get a story on the air quickly in a breaking news situation does NOT supersede" these procedures.

- WDBJ since 2012 has conducted training sessions for news employees in small groups about the uses of material found on the internet and, in particular, the need for complete examination of all such material before it is used.

III. THE NAL RESTS ON INCORRECT FACTUAL PREMISES

The NAL's description of the facts leading up to the July 12, 2012 broadcast is not supported by the record. These errors are fundamental, and go directly to the question of WDBJ's liability for the news broadcast. The factual misstatements alone require the Commission to withdraw the NAL and conclude that WDBJ did not violate the indecency policy.

First, the NAL states that WDBJ's "photojournalist does not claim that those boxes were not visible when he downloaded the material from the adult website, but rather simply that he did not notice them." NAL ¶ 6. But as explained above, the website was accessed from the same equipment that was used to edit the story for broadcast. Not only was the screen on that equipment incapable of showing the website from edge to edge (as well as not being capable of viewing the entire broadcast image), the equipment did not allow users to manipulate the website to see areas that were not displayed on the editing screen. Thus, contrary to the Commission's understanding, the "boxes" containing the offensive material were invisible to the WDBJ photojournalist who assembled the story, and his equipment lacked the capability of displaying material at the far margin of the screen. Likewise, the material was not visible to either of the senior newsroom personnel who carefully reviewed the story before it was broadcast.

Second, the NAL states that "WDBJ pre-recorded the broadcast and selected material from an adult website, *giving it ample opportunity to screen the material before it was broadcast.*" NAL ¶ 19 (emphasis added). On this basis, the Commission concluded that WDBJ's violation was worse than the indecency at issue in *Young Broadcasting*.[9] WDBJ, however, did not have such an opportunity because the "box" containing the offensive material was not visible, and could not have been made reviewable, on any equipment WDBJ then had available to produce and review news stories.

Third, in discussing the factors that it believed supported imposition of the maximum forfeiture, the Commission said: "Though he claims he [the photojournalist] did not notice the indecent material, he should have been more alert to what he was downloading for broadcast

[9] *Young Broad. of San Francisco, Inc.*, 19 FCC Rcd 1751 (2004). As discussed below, WDBJ objects to the Commission's reliance in any way on the NAL in *Young Broadcasting* since it amounts to only a charge which, on further reflection, the Commission determined was not appropriate to pursue. *See infra* 19-20.

from a sexually explicit website, and we cannot absolve the Licensee of responsibility because its employee failed to notice what he was downloading and preparing for broadcast." NAL ¶ 24. But WDBJ's employees could not have been expected to notice that which they could not see on the equipment used to prepare and edit the story. Thus, the inadvertent inclusion of brief nudity in the news story was not, as the Commission appeared to believe, the result of negligence or inattention on the part of WDBJ and its award-winning journalists.

Fourth, in discussing the basis for holding WDBJ responsible for broadcast of the material, even if it was unintentional, the Commission stated, "the indecent material *was plainly visible* to the Station employee who downloaded it; he simply didn't notice it and transmitted it to Station editors who reviewed the story before it was broadcast." NAL ¶ 29 (emphasis added). But as WDBJ made clear, the material in question was not "plainly visible;" to the contrary, it was impossible to see on the equipment used by either the photojournalist who inadvertently downloaded the material and edited the story, or by the other newsroom personnel who reviewed the story before it was broadcast.

Overall, the NAL is based on the incorrect assumption that station personnel were either negligent or insufficiently careful in reviewing the material that was aired. But the brief and inadvertent inclusion of one partial "box" containing offensive material at the extreme edge of the screen was entirely unintended and was not knowingly transmitted by WDBJ. The material was broadcast solely because of a regrettable technical limitation that has since been corrected, and not because of any decision by the licensee to try to shock viewers, or to pander or titillate. That alone requires the Commission to withdraw the NAL.

IV. THE COMMISSION MISAPPLIED ITS INDECENCY STANDARD TO THE WDBJ NEWSCAST

The unintended transmission of a brief glimpse of sexually-oriented material does not satisfy the Commission's own test for indecency. The NAL purportedly applied the formula first articulated in *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999 (2001) ("*Indecency Policy Statement*"). NAL ¶¶ 9-17. The *Indecency Policy Statement* posits two fundamental determinations that must be made in any Section 1464 case: (1) whether the material depicts or describes sexual or excretory organs or activities, and (2) whether the material is "patently offensive" as measured by contemporary community standards for the broadcast medium. 16 FCC Rcd at 8002 ¶¶ 7-8. To determine "patent offensiveness" the Commission analyzes three factors: (a) the explicitness or graphic nature of the depiction; (b) whether the material dwells on or repeats at length the depictions; and (c) whether the material appears to pander or is used to titillate or shock. *Id.* at 8002-03 ¶¶ 9-10. Although WDBJ does not dispute that the broadcast met the threshold test for the Commission's standard – that it briefly depicted a small image of a sexual organ or activity – the NAL's analysis of the three "patent offensiveness" factors is fatally defective.

As explained in greater detail below, this multi-factor test for indecency has never been upheld by any court, is currently under review by the FCC, and cannot serve as a valid basis for imposing an NAL in this case.[10] Even if the current test were constitutionally defensible, however, the Commission has misapplied it here. The NAL fails to adhere to the requirement that "[n]o single factor generally provides the basis for an indecency finding." *Indecency Policy*

[10] *See infra* §§ V.A & V.B.3. Both courts and the Commission have concluded that the current indecency test requires comprehensive review to ensure consistency with constitutional standards – a review that the Commission began but not concluded.

Statement, 16 FCC Rcd at 8003 ¶ 10. Instead, the NAL concludes that "one or two of the factors may outweigh the others." NAL ¶ 10. This degree of arbitrariness regarding the application of the FCC's own test invalidates it – there must be a basis to find that WDBJ's broadcast implicated *at least* two of the three factors for determining "patent offensiveness."

The Commission also failed to defer to good faith editorial judgments made in presenting news programming, as it historically had done in applying the indecency policy. *E.g.*, *Letter to Peter Branton*, 6 FCC Rcd 610 (1991) ("we traditionally have been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners"). In particular, the Commission must not second-guess decisions of reporters and editors in determining how to present news stories. Thus, in applying its "patent offensiveness" test, if there is any doubt about whether WDBJ's news story violated the standards, the Commission must hold that it does not. Despite the Commission's rote recitation of the "utmost restraint" policy, the NAL instead called every close question against the Station. That is entirely inconsistent with the Commission's established precedents.

A. The Newscast Was Not Graphic and Explicit Under Commission Precedent

Although WDBJ's newscast admittedly met the threshold requirement under the Commission's indecency test as a technical matter, the brief and inadvertent depiction of a sexual organ should not be considered "graphic and explicit" based on FCC precedents defining "patent offensiveness."[11] In analyzing this factor, the Commission has emphasized the "need for parti-

[11] By concluding that a fleeting and incidental exposure of a sexual organ was explicit and graphic, the Commission conflated the first part of the "patently offensive" test with the foundational determination that a broadcast show a sexual organ or activity to even be analyzed under the indecency policy. The Commission in the NAL notes that some viewers apparently "noticed the sexual activity shown in the broadcast." NAL ¶ 12. If the mere fact that a picture was "noticed" is sufficient to establish that it was "explicit and graphic," then the first element of the "patently offensive" standard will have been deprived of any meaning.

cular caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming." *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664, 2717 (2006) ("*2006 Omnibus Indecency Order*"), *recon. granted in part and denied in part*, 21 FCC Rcd 13299 (2006) ("*Omnibus Indecency Remand Order*"), *rev'd sub nom. Fox II*, 132 S. Ct. 2307.

The Commission has been particularly deferential to licensees' editorial judgments because of the risk of inadvertent or accidental transmissions. Thus, the Commission held that an incidental broadcast of a man's exposed penis on the *Today* show was not graphic and explicit, in large part because "the overall focus of the scene is on the rescue attempt, not on the man's sexual organ." *2006 Omnibus Indecency Order*, 21 FCC Rcd at 2716 ¶ 215. The Commission also stressed that the exposure in the *Today* show was "incidental to the coverage of a news event." *Id.* In other words, the Commission held that the image was not "graphic and explicit" where the image was brief and unintentional, and the broadcaster did not seek to draw attention to it. It has applied the same analysis to non-news programming as well. *See id.* at 2709 (rejecting indecency complaint where image of ""Fuck Cops!" graffiti in *The Amazing Race 6* was "small, out of focus, and difficult to read").[12]

The Commission failed to apply the same analysis to the WDBJ newscast. Here, the overall focus of the scene and over 98 percent of the screen was on the news story about the actress's previous profession as contrasted with her current participation as an EMT volunteer. The "box" showing the sexual organ was inadvertently included and was entirely incidental to WDBJ's coverage of a legitimate news story. The small, briefly visible image was at the very

[12] It is also noteworthy that all of the examples offered by the Commission of programming that had been found to be "graphic and explicit" lasted far longer than the brief shot in the WDBJ news program, even when those images were the subject of the programs at issue. *See Indecency Policy Statement*, 16 FCC Rcd at 8004-06 ¶¶ 13-14.

margin of the screen, it was not the focus of the presentation, and the licensee did nothing to draw attention to it. The Commission's conclusion that WDBJ's news story met the first element of the "patently offensive" test cannot be reconciled with the Commission's prior application of that test. *Cf. Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 21 FCC Rcd 2760, 2765-66 ¶ 11 (2006) ("*Super Bowl*"), *rev'd sub nom. CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008), *vacated*, 556 U.S. 1218 (2009), *reinstated*, 663 F.3d 122 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2677 (2012) (Commission's analysis of whether image is "graphic and explicit" based on placement "in the center of the screen").

B. The Broadcast Did Not Dwell on or Repeat Sexual Material

With respect to the second factor – "whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities"[13] – the NAL concedes that the "box" was visible for "approximately three seconds." NAL ¶ 15. It then goes on to note that some viewers apparently were able to see the material, although whether they did so during the actual broadcast or by looking at a recording later is not stated in any of the complaints, and therefore, was not known to the Commission. The NAL then states that "even relatively brief material can be indecent" if other factors are present, without reaching any clear determination on the second factor.

This analysis is flawed for two reasons. *First*, under well-established Commission precedent, appearances of three seconds or less, such as WDBJ's broadcast, are conclusively deemed to be fleeting. A "fleeting" appearance by a political candidate – generally deemed to be an appearance of less than four seconds – is not deemed to be a use of a station under Section

[13] *Indecency Policy Statement*, 16 FCC Rcd at 8003 ¶ 10.

315(a) of the Communications Act.[14] The Commission has never even attempted to explain why its consistent understanding that "fleeting" appearances will not be considered under the political broadcasting rules does not control its application of the same term in applying its indecency policy.[15]

Second, the Commission ignores its actual standard, which asks whether the broadcast "dwells on or repeats at length" depictions of sexual or excretory organs or activities. It does not attempt to explain in plain English how an incidental shot seen for only 2.7 seconds at the margin of the screen and never repeated could have "dwelled" on its subject. And there is no dispute that the subject was not repeated. *See also infra* n.34 (only basis for forfeiture under 47 U.S.C. § 503(b)(1) was alleged willfulness, not repetition). Therefore, the Commission must find that the WDBJ broadcast did not violate the second element of the "patently offensive" standard.

C. The Broadcast Did Not Seek to Pander or Titillate

The NAL fares no better with respect to the third element of the "patently offensive" test – whether the material "appears to pander or is used to titillate or whether the material

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[14] *See, e.g.*, *Allen H. Bondy*, 14 R.R. 1199 (1957); *National Urban Coalition*, 23 F.C.C.2d 123 (Broad. Bur. 1970); *Law of Political Broadcasting*, 100 F.C.C.2d 1476, 1492 ¶ 35 (1984); *Oliver Productions*, 4 FCC Rcd 5953, 5954 ¶ 7 (1989).

[15] To support the claim that fleeting images can be held to violate the indecency policy, the NAL cites Chief Justice Roberts' opinion concurring in the denial of certiorari in *FCC v. CBS Corp.*, 132 S. Ct. 2677, which states that licensees in the future would be on notice concerning brief images. First, that opinion was handed down on June 29, 2012, less than two weeks prior to the WDBJ broadcast, and the Chief Justice's comments were not widely noted beyond the Commission and lawyers who regularly handle indecency matters. Second, denials of *certiorari* are not holdings on the merits. *See United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.). "Concomitantly, opinions accompanying the denial of certiorari cannot have the same effect as decisions on the merits." *Teague v. Lane*, 489 U.S. 288, 296 (1988). Third, the Commission ignored Justice Ginsburg's concurring opinion in the same case, which pointed to the need for the Commission "to reconsider its indecency policy in light of technological advances and the Commission's uncertain course." 132 S. Ct. at 2678 (Ginsburg, J., concurring). If the Commission seeks to rely on the Chief Justice's opinion, it must also implement Justice Ginsburg's opinion directing it to reconsider its entire approach to indecency enforcement.

appears to have been presented for its shock value." *Indecency Policy Statement*, 16 FCC Rcd at 8003 ¶ 10. By its terms, this standard includes consideration of a broadcaster's intent in presenting the material. The natural meaning of the words "is *used* to titillate" and "have been *presented* for its shock value" refers to the purpose for which the material was included in the broadcast. In the *Indecency Policy Statement*, the Commission said exactly that: the "apparent *purpose* for which material is presented can substantially affect whether it is deemed to be patently offensive as aired."[16]

The examples the Commission cites also confirm that the third standard rests on a broadcaster's intent. For example, in issuing an NAL in *Citicasters Co. (KSJO(FM))*, 15 FCC Rcd 19095, 19096 ¶ 6 (Enf. Bur. 2000), the Commission cited statements by the station's disk jockeys as demonstrating that "the material was *intended to be pandering and titillating*" (emphasis added). More recently, in *Young Broadcasting*, the Commission "weigh[ed] heavily ... off-camera employees' comments urging the performers to conduct a nude presentation" as demonstrating the broadcaster's *intent* to pander, shock or titillate.[17] The Commission tries to rely on *Young Broadcasting* for the separate proposition that a brief glimpse of a penis may be considered indecent, even in the context of a newscast. But *Young Broadcasting* is not binding

[16] *Id.* at 8010 ¶ 20 (emphasis added). The Commission cited as authority Justice Powell's characterization of the material found indecent in *FCC v. Pacifica Foundation*, 438 U.S. 726, 757 (Powell, J., concurring in part): "[t]he language employed is, to most people, vulgar and offensive. It was *chosen* specifically for this quality, and it was repeated over and over as a sort of verbal shock treatment" (emphasis added). Therefore, the Commission clearly understood that the third factor rested on a broadcaster's affirmative choice of material and its intent to shock the audience.

[17] *Young*, 19 FCC Rcd at 1755-57; *see WQAM License Ltd. Partnership*, 19 FCC Rcd 22997, 22003 (2004) (pandering demonstrated by the "brutal" and "depraved" *intent* of the radio show host). The NAL in note 47 cites in support language in the *Omnibus Indecency Remand Order*, 21 FCC Rcd 13299, which in turn relied on statements in *Super Bowl*, 21 FCC Rcd at 6657-58. Since both of those decisions were subsequently reversed, the Commission cannot view either decision as controlling.

on this point because the FCC never issued a final order in that case.[18] And even if it had issued an order, it does not apply to the circumstances presented here, where there was no intent to pander or shock the audience. By definition, a broadcaster cannot "pander" inadvertently.

The NAL attempts to rewrite the third factor by denying the relevance of "the subjective state of mind of the broadcaster."[19] Instead of looking at whether there is any reason to believe that WDBJ intentionally broadcast the offending material, the Commission looks only at whether the material is "shocking." Once again, the Commission conflates separate factors in its analysis. According to the analysis in the NAL, any broadcast found to be "explicit and graphic" necessarily must be considered "pandering or titillating."

Instead, in applying the third factor, the Commission must examine evidence of intent. Here, the undisputed evidence is that WDBJ was unaware of the presence of the "boxes" at the edge of the broadcast picture. Because it did not know that the "boxes" were there, and certainly not that they would be seen by viewers, it could not have intended to "pander or titillate" nor could it present for shock material that it did not know existed.

The NAL suggests that WDBJ can be sanctioned because, in the Commission's view, it failed to take "adequate precautions" to avoid showing explicit material. NAL ¶ 17. But the

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[18] The FCC decision in *Young Broadcasting* is not binding precedent. As the Commission has explained, "NALs [are] the equivalent of complaints beginning adjudicatory proceedings[,] are not final decisions and are not judicially reviewable." *See* Reply of Federal Communications Commission *et al.* in Support of Joint Motion for Voluntary Remand, *Fox Television Stations, Inc. v. FCC*, No. 06-1760-AG (2d Cir., filed July 10, 2006), at 11-12. *See generally* 47 U.S.C. § 504(c). Although the licensee in *Young Broadcasting* filed a comprehensive opposition to the NAL in February 2004, the FCC never responded, and the FCC's complaint against the station lapsed. *Cf. CBS Corp.*, 663 F.3d at 130.

[19] NAL ¶ 16. Despite the NAL's focus on "subjective" intent, a proper application of the third factor does not mean that the Commission must somehow peer into a broadcaster's mind. The Commission can divine intentions from a broadcaster's actions. *See also infra* 50 (discussing import of subjective intent in constitutional scienter requirement).

evidence is otherwise – the news story was carefully and thoroughly reviewed by two senior personnel in the Station's news department, and the fact that the Station blurred out any website addresses in the program shows that, when it was aware of unrelated and inappropriate content, it took steps to ensure that viewers could not see it.[20] Thus, the Commission cannot – consistent with either the text of the third standard or its decisions applying it – conclude that the inadvertent and unrelated inclusion of a brief depiction of a sexual organ at the edge of the screen during a news program was "pandering or titillating" or "presented for shock value."[21] Any doubts about the application of these standards must, under the Commission's self-established "utmost restraint" policy, be resolved in favor of WDBJ. Therefore, the Commission should withdraw the NAL.

V. THE FCC LACKS A CONSTITUTIONALLY-SOUND TEST FOR INDECENCY

The Commission devotes a single paragraph of the NAL to its conclusion that imposing the maximum fine on WDBJ's newscast is consistent with the First Amendment. NAL ¶ 22. It states incorrectly that WDBJ's argument merely "incorporates arguments of ABC, Inc. and others in litigation unrelated to the broadcast at issue here" and assumes that WDBJ is asking the Commission to overturn *Pacifica*. *Id.* To avoid any further misunderstanding, WDBJ accordingly sets forth its constitutional analysis in greater detail below. As made abundantly clear in

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[20] Indeed, it would be particularly odd for the Station to blur website *addresses*, which by definition consist solely of text, because they referred to pornographic material, yet allow a pornographic image to make it to air.

[21] The Commission attempts to defend its analysis by claiming that, "[a]ny other application of the three principal factors of our contextual analysis in this case would permit a broadcaster to air graphic and explicit sexual material ... as long as such material was displayed for three seconds or less." NAL ¶ 17. But that suggestion misses the point; the record shows that the inclusion of the sexual material in WDBJ's broadcast was unintentional and inadvertent. A broadcaster which affirmatively chose such material would present a different case that would fall under the long line of precedents that viewed broadcaster intent as an influential factor.

recent cases involving the FCC's indecency rules, the Commission has both a constitutional and statutory responsibility to ensure that any actions taken under this policy comport with the First Amendment. But the Commission's actions thus far in this case fall far short of that obligation.

A. The Supreme Court Neither Upheld Nor Ratified the FCC's Indecency Policy

The NAL rejected WDBJ's constitutional arguments in this case by claiming its actions are "[c]onsistent with almost forty years of precedent and the Supreme Court's recent review of our indecency authority." *Id.* This facile conclusion misreads both *Pacifica* as well as the Supreme Court's more recent decision in *Fox II*, 132 S. Ct. 2307. The Supreme Court neither reaffirmed *Pacifica* nor ratified the FCC's current policies for enforcing its indecency standard. Rather, the Court held unanimously that the FCC's approach to enforcement had been so inconsistent with basic due process principles that it did not need to reach the First Amendment questions.[22]

1. The Constitutional Questions the Supreme Court Left Open in *Fox* Must be Addressed

To be sure, the Supreme Court in *Fox II* did not invalidate the Commission's current approach to enforcement – but the Court did not approve it, either. It left the Commission "free to modify its current indecency policy," but stressed that any enforcement is subject to "applicable legal requirements" and that courts will be "free to review the current policy or any modified policy in light of its content and application." *Id.* In this regard, a majority of the

[22] *Fox II*, 132 S. Ct. at 2320. In its reference to this case, the FCC overlooks the Court's holding, and cites only part of the background section describing how the FCC's policies evolved. NAL ¶ 22 n.68 (citing *Fox II*, 132 S. Ct. at 2312-14).

Court left no doubt that the "applicable legal requirements" governing the FCC's rules require strict adherence to First Amendment commands.[23]

This means that in any enforcement action – like this one – the FCC must explain how its proposed sanction is consistent with the First Amendment. It is insufficient for the Commission merely to state, as it does in the NAL, that "*Pacifica* remains valid and supporting authority for the Commission's indecency enforcement." NAL ¶ 22. Such a statement begs the question of what types of enforcement actions are permissible under *Pacifica*. The fact that the Supreme Court held in *Pacifica* that enforcing an indecency standard does not violate the First Amendment or Section 326 based on the facts of that case says nothing about the FCC's authority to apply a different test *in this case*.

To pretend otherwise is to ignore the litigation both at the agency and in the courts between 2004 and 2012 that explored the constitutional limits of indecency enforcement under *Pacifica*. In every case that reached the First Amendment question, the FCC's authority was curtailed. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 335 (2d Cir. 2010); *ABC, Inc. v. FCC*, 404 F. App'x 530 (2d Cir. 2011). *See also CBS Corp.*, 663 F.3d at 151 ("Our reluctant conclusion that the FCC has advanced strained arguments to avoid the implications of its own fleeting indecency policy was echoed by our sister circuit in *Fox*.").

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[23] *See, e.g.*, *Fox II*, 132 S. Ct. at 2321 (Ginsburg, J., concurring) ("Time, technological advances, and the Commission's untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration."); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 530-35 (2009) ("*Fox I*") (Thomas, J., concurring) (questioning the constitutional validity of FCC regulation of programming content); *id.* at 539 (Kennedy, J., concurring) (reserving judgment on whether the FCC's policies are constitutional); *id.* at 539 (Stevens, J., dissenting) ("the Commission's changed view of its statutory mandate certainly would have been rejected if presented to the Court at the time [of *Pacifica*]"); *id.* at 545-46 (Ginsburg, J., dissenting) ("there is no way to hide the long shadow the First Amendment casts over what the Commission has done"); *id.* at 556, 565-67 (Breyer, J., dissenting) ("the FCC works in the shadow of the First Amendment and its view of the application of that Amendment to 'fleeting expletives' directly informed its initial policy choice").

Specifically, the Second Circuit held that the FCC's "contextual" approach to indecency enforcement is impermissibly vague, that there has been little rhyme or reason to its decisions, and that its enforcement actions have substantially chilled protected speech. *Fox Television Stations, Inc.*, 613 F.3d at 330-35. The court was particularly skeptical about the FCC's inconsistent explanations for how it treats indecency allegations against news programming. *Id.* at 332 ("The policy may maximize the amount of speech that the FCC can prohibit, but it results in a standard that even the FCC cannot articulate or apply consistently.").

The Commission's dismissive reference to the Second Circuit cases as "litigation unrelated to the broadcast at issue here," NAL ¶ 22, misconstrues their import; the court made clear that its analysis was not tied to the facts of any particular case, but was based on a history of standardless and arbitrary decisionmaking. *ABC, Inc.*, 404 F. App'x at 535. Also, the court did not say that it would be impossible for the Commission to craft a constitutional policy – only that "the FCC's current policy fails constitutional scrutiny."[24] The "current policy" the court found so deficient was the same "industry guidance" *on which the Commission relies in this case*. *See* NAL ¶¶ 12-17 (applying *Indecency Policy Statement*).

To be clear: WDBJ is not arguing that the Second Circuit decision currently is binding on the Commission. But the FCC cannot act as if the test it purports to apply in this case is free from constitutional doubt where it has been found to be seriously deficient by the only courts ever to review it in operation. The Commission must address the constitutional issues that arise

[24] The Second Circuit did not purport to decide whether *Pacifica* remains good law. Although that court took note of seismic changes in media and technology since 1978, it observed that it is for the Supreme Court to decide whether *Pacifica* is still valid, while the circuit court "must evaluate the FCC's indecency policy under the framework established by the Supreme Court in *Pacifica*." *Fox Television Stations, Inc.*, 613 F.3d at 327.

from the application of its indecency test in *this* case, and it is no answer to state only that *Pacifica* is still good law.

The fact that the Supreme Court left open the question of the test's constitutional validity does not entitle the FCC to brush off the issue when raised by a licensee facing a Notice of Apparent Liability. *Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987) (The Commission "may not simply ignore a constitutional challenge in an enforcement proceeding."). The D.C. Circuit has stressed that "no precedent ... permits a federal agency to ignore a constitutional challenge to the application of its own policy merely because the resolution would be politically awkward." *Id.* at 874.

2. The Commission Has Not Met its Constitutional and Statutory Obligations

Five years have elapsed since the Second Circuit detailed the constitutional deficiencies of the FCC's indecency test, and three years have passed since the Supreme Court affirmed the result (if not the reasoning) of that decision. As explained in greater detail below, no court has ever upheld the FCC's test for indecency set forth in the 2001 *Indecency Policy Statement*. More to the point, *that test has been found to be constitutionally deficient by every court that has ruled on its merits*, which may help explain why the FCC has sought to avoid judicial review whenever it could.

In April 2013, following *Fox II*, the FCC issued a Public Notice and sought public comment to review its broadcast indecency policies and enforcement "to ensure they are fully consistent with vital First Amendment principles,"[25] but it has yet to come up with any answers. The Commission acknowledged the constitutional tensions at issue when it dismissed over one

[25] *See* Public Notice, *FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy*, 28 FCC Rcd 4082 (2013) ("*2013 Public Notice*").

million complaints as being beyond the statute of limitations, otherwise deficient, or "foreclosed by settled precedent." *2013 Public Notice*, 28 FCC Rcd at 4082. To date, the Commission has received nearly 103,000 comments in this docket, yet has taken no action to clarify its policies. Even if the FCC decides to leave its policies unchanged at the conclusion of its review, the *2013 Public Notice* is an acknowledgement that it owes licensees and the public a better explanation of its constitutional reasoning. *E.g.*, *Fox Television Stations, Inc.*, 613 F.3d at 327-28 ("The First Amendment places a special burden on government to ensure that restrictions on speech are not impermissibly vague," both to provide fair notice to those who must obey the law, and to prevent "subjectivity and discriminatory enforcement" by those who must enforce it.).

Two years is too long to wait for a constitutionally-sound standard to govern program content regulation for an agency constrained by the First Amendment. Before the Commission may impose an NAL in this case it must complete the review of its indecency standard it initiated with the *2013 Public Notice*. It is not sufficient for the Commission to enforce its current policies given their constitutional history and to say that it will focus only on "egregious cases." *Id.* at 4083. The *2013 Public Notice* failed to define what constitutes an "egregious case." The NAL simply ignores the question and says that the Commission will continue to apply its preexisting policies.[26]

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[26] NAL ¶ 21. Some insight may be gained from earlier actions of the Commission, but not in a way that clarifies the issues presented here. After *Fox II*, the FCC and Department of Justice voluntarily dismissed a pending collection action against Fox and certain of its affiliates for a program entitled *Married by America*. At the time, Chairman Genachowski explained that in the wake of the Supreme Court's decision, "the Commission is reviewing its indecency enforcement policy to ensure that the agency carries out Congress's directive in a manner consistent with vital First Amendment principles," and that "in the interim, I have directed the enforcement Bureau to focus its resources on the strongest cases that involve egregious indecency violations." John Eggerton, *DOJ, FCC Drop Pursuit of Fox 'Married by America' Indecency Fine*, Broadcasting & Cable, Sept. 21, 2012. Between then and now, the Commission

Administrative agencies are not free to announce one policy and then, without discussion or analysis, follow a different one. *See, e.g., Committee for Community Access v. FCC*, 737 F.2d 74, 77 (D.C. 1984) ("[T]he agency cannot silently depart from previous policies"); *accord CBS Corp. v. FCC*, 663 F.3d at 144-46. The Commission did not even attempt to explain how a miniature and inadvertent 2.7-second shot of a sexual organ could be deemed "egregious," and its failure to do so is fatal. Likewise, the Commission has yet to answer its own questions for how its policies might be changed to be consistent with "vital First Amendment principles." *2013 Public Notice*, 28 FCC Rcd at 4082. To enforce its policies without alteration or explanation in this NAL begs these important questions.

B. Devising a Constitutional Policy to Regulate Broadcast Indecency Requires Great Restraint

1. The FCC Must Adhere to the First Amendment

a. The Commission Has Very Limited Constitutional Authority to Prohibit Broadcast Programming

Broadcasters "are engaged in a vital and independent form of communicative activity," *League of Women Voters of Cal. v. FCC*, 468 U.S. 364, 378 (1984), and the Communications Act confers upon licensees "the widest journalistic freedom consistent with their public [duties]." *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (quoting *CBS, Inc. v. DNC*, 412 U.S. 94, 110 (1973)). Section 326 of the Act prohibits censorship and expressly withholds from government the power to "interfere with the right of free speech by means of radio communication." This denies to the FCC "the power of censorship" as well as the ability to promulgate any "regulation or condition" that interferes with freedom of speech. 47 U.S.C. § 326. These policies "were drawn from the First Amendment itself [and] the 'public interest' standard necessarily invites

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has not explained what it means by "egregious," or how that concept as applied in cases like *Married by America* can be distinguished from the present case.

reference to First-Amendment principles." *CBS, Inc. v. DNC*, 412 U.S. at 121. Consequently, "the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area." *League of Women Voters*, 468 U.S. at 378.

Any regulation of broadcast programming content requires the Commission to "walk a 'tightrope'" to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act." *CBS, Inc. v. DNC*, 412 U.S. at 117; *Banzhaf v. FCC*, 405 F.2d 1082, 1095 (D.C. Cir. 1968). Although the Supreme Court historically has allowed the FCC some latitude to impose some public interest requirements on broadcast licensees, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), this applies only to general programming guidelines and not to programming mandates or prohibitions. Licensees may be held "only broadly accountable to public interest standards." *CBS, Inc. v. DNC*, 412 U.S. at 120. While the Commission may "inquire of licensees what they have done to determine the needs of a community they propose to serve, it may not impose upon them its private notions of what the public ought to hear." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 650 (1994) (quoting *Report and Statement of Policy re: Commission En Banc Programming Inquiry*, 44 F.C.C. 2303, 2308 (1960)).

The Commission's indecency policy presents a more significant constitutional problem than does a general public interest requirement. Indecency enforcement actions prohibit and/or punish specific programs, and any such power to specify what material may or may not be broadcast "carries the seeds of the general authority to censor denied by the Communications Act and the First Amendment alike," and creates a "high-risk that such rulings will reflect the Commission's selection among tastes, opinions, and value judgments, rather than a recognizable public interest." *Banzhaf*, 405 F.2d at 1095. Although an indecency restriction had been part of the law since the Radio Act of 1927, the FCC did not attempt to define the concept as separate

from obscenity until 1975 in *A Citizen's Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y.*, 56 F.C.C.2d 94, 97-98 (1975) ("*FCC Pacifica Order*"). And the Supreme Court narrowly upheld the Commission's approach in *Pacifica*. These decisions define the constitutional limit of the FCC's authority in this area.

Any broadcast indecency regulations must be finely calibrated because indecent, but not obscene, speech is protected by the First Amendment. *Reno v. ACLU*, 521 U.S. 844, 874-75 (1997); *Fox Television Stations, Inc.*, 613 F.3d at 325 ("It is well-established that indecent speech is fully protected by the First Amendment."). Yet the standard for regulating broadcast indecency, at least on its face, is less rigorous than the one used to regulate obscenity,[27] a category of speech which is *not* protected by the First Amendment. *See Reno*, 521 U.S. at 872-75 (contrasting concepts of obscenity and indecency). Unlike the test for obscenity, the indecency definition does not require examination of the work "as a whole," and does not ask whether the material appeals primarily to the prurient interest. Indecency is not limited to patently offensive depictions of sex acts that are "specifically defined by law," and it is not a complete defense that the material has serious value. And the FCC's regulatory concern focuses on the impact of expression on children, not on the "average person" in a community.[28] Lacking

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[27] *Miller v. California*, 413 U.S. 15, 24 (1973) (to establish obscenity government must prove (1) that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals primarily to the prurient interest; (2) that it depicts or describes, in a patently offensive way, hard core sexual conduct specifically defined by the applicable state law; *and* (3) that it lacks serious literary, artistic, political, or scientific value).

[28] The indecency standard the FCC now uses is analytically indistinct from the Nineteenth Century obscenity test set forth in such cases as *United States v. Bennett*, 24 F. Cas. 1093, 1102 (CCNY 1879). The Supreme Court expressly overturned that test as a violation of the First Amendment in *Roth v. United States*, 354 U.S. 476, 489 (1957) ("judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press").

these more rigorous doctrinal limits, the Commission must find other effective ways to stay within constitutional bounds when it defines indecency.

b. The Commission Historically Followed a Restrained Indecency Enforcement Policy

The FCC historically has dealt with this constitutional paradox by following a tightly restrained enforcement policy. That is, because the indecency test was less demanding than the one for obscenity, the Commission sought to stay within First Amendment limits by adopting bright line restrictions on its own authority to provide greater certainty for broadcasters where it could. Such limits beyond which indecency complaints were not considered "actionable" include "time channeling," whereby the FCC will not apply the rules to broadcasts after 10 p.m., and refusal to consider complaints for fleeting, inadvertent, or isolated transmissions. Thus, under *Pacifica*, the FCC sought to satisfy its statutory and constitutional obligations through practical application of policies that limited significantly its enforcement flexibility and the chilling effects on broadcasters. *See, e.g., Action for Children's Television v. FCC*, 932 F.2d 1504, 1509-10 (D.C. Cir. 1991) ("*ACT II*") (First Amendment requires FCC indecency policy to have a "safe harbor").

One way or the other – by using a more doctrinally rigorous test or by adopting self-imposed limits on its enforcement authority – the Commission must meet its constitutional and statutory obligations. This is true regardless of the level of constitutional scrutiny that applies to the broadcast medium. As the Second Circuit explained, "[b]roadcasters are entitled to the same degree of clarity as other speakers, even if restrictions on their speech are subject to a lower level of scrutiny. It is the language of the rule, not the medium in which it is applied, that determines whether a law or regulation is impermissibly vague." *Fox Television Stations*, 613 F.3d at 329.

2. *Pacifica's* Restrained Enforcement Approach is Constitutionally Required

From the beginning, the FCC recognized the inherent imprecision of its "indecency" test (particularly when compared to that for obscenity), and sought to avoid First Amendment problems by construing the term "indecent" narrowly and exercising its authority cautiously. *See FCC Pacifica Order*, 56 F.C.C.2d at 103-04 (concurring statement of Commissioners Robinson and Hooks) ("the statute ... on its face expresses no limit on our power to forbid 'indecent' language over the air, [but] the First Amendment does not permit us to read the statute broadly"). The *FCC Pacifica Order* emphasized the need to "avoid the error of overbreadth" so that the indecency definition would not "force upon the general listening public debates and ideas which are 'only fit for children.'" *Id.* at 98-100.

The Commission decided that an indecency complaint would not be "actionable" for purposes of Section 1464 unless the licensee intentionally engaged in repeated or extended presentations of indecent material. *See Petition for Reconsideration of a Citizen's Complaint Against Pacifica Foundation Station WBAI (FM)*, 59 F.C.C.2d 892, 893 n.1 (1976) ("*Pacifica Recon. Order*") (emphasis added). It explained that inadvertent, isolated or fleeting transmissions of "indecent" material do not violate the law. *Id.*

This was consistent with the FCC's historic treatment of allegedly indecent broadcasts. *E.g.*, *Jack Straw Memorial Found.*, 21 F.C.C.2d 833, 842 (1971) ("[t]he standard of public interest is not so rigid that an honest mistake or error on the part of a licensee results in drastic action against him"). *See also CBS, Inc.*, 21 R.R.2d (P&F) 497, 498 (1971) (isolated use of "damn" did not violate Section 1464); *Pacifica Found.*, 36 F.C.C. 147, 150 (1964) (rejecting license challenge based on complaints that station aired five programs that contained profanity and discussions of homosexuality). The Commission has stressed that, "in sensitive areas like

this," the Commission can act "only in clear-cut, flagrant cases," and that "doubtful or close cases are clearly to be resolved in the licensee's favor." *Eastern Educ. Radio*, 24 F.C.C.2d 404, 414 (1970) (too close supervision of programming "would be flagrant censorship").

The approach also was the centerpiece of the Commission's defense of its *Pacifica* standard in the courts. The D.C. Circuit had invalidated the FCC's indecency standard as overly broad and vague, *Pacifica Found. v. FCC*, 556 F.2d 9, 17-18 (D.C. Cir. 1977), so in its briefing to the Supreme Court, the FCC stressed that its authority to penalize indecent broadcasts "must be read narrowly." Brief for the Federal Communications Commission, *FCC v. Pacifica Found.*, No. 77-528 (Mar. 3, 1978), 1978 WL 206838 at 26-27 (citation omitted). It emphasized "the *deliberate repetition* of these words" in the Carlin monologue, noting that the case involved "prerecorded language with the words repeated over and over [and] *deliberately broadcast*." *Id.* at 26 (emphasis added).

The Supreme Court took the Commission at its word and reversed the court of appeals on a very limited basis, characterizing its 5-4 decision as an emphatically narrow holding. *See Pacifica*, 438 U.S. at 750 ("It is appropriate ... to emphasize the narrowness of our holding."). Justices Powell and Blackmun, who supplied the crucial votes for *Pacifica's* slim 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." *Id.* at 760-61 (Powell, J., concurring). They stressed that the FCC does not have "unrestrained 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." *Id.* at 760-61. Critical to the Court's holding was the level of restraint the FCC historically had exercised in construing and enforcing Section

1464. *See id.* at 761 n.4 (Powell, J., concurring) ("the Commission may be expected to proceed cautiously, as it has in the past").

Following *Pacifica*, the FCC interpreted the decision as requiring that it enforce Section 1464 with great restraint. For example, in its first opportunity to construe the Court's decision, the agency rejected a broadcast station license challenge on indecency grounds. *See WGBH Educ. Found.*, 69 F.C.C.2d 1250 (1978). It explained:

> We intend strictly to observe the narrowness of the *Pacifica* holding. In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the "indecent" words in question. The opinion of the Court specifically stated that it was not ruling that "an occasional expletive ... would justify any sanction ...." Further, Justice Powell's concurring opinion emphasized the fact that the language there in issue had been "repeated over and over as a sort of verbal shock treatment." He specifically distinguished "the verbal shock treatment [in *Pacifica*]" from "the isolated use of a potentially offensive word in the course of a radio broadcast."

Id. at 1254 (citations omitted). For almost a decade after *Pacifica*, the FCC strictly limited its enforcement of Section 1464 to the "seven dirty words" in Carlin's monologue.

Gradually, however, the Commission began to relax some of these self-imposed restrictions. In 1987, the Commission concluded that the "generic definition" articulated in its original *Pacifica Order* could properly be applied to broadcast expression beyond the seven specific words made famous by George Carlin.[29] Yet in all other respects, the Commission reaffirmed that "Section 326 and the First Amendment dictate a careful and restrained approach with regard to review of matters involving broadcast programming," and that "[s]peech that is

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[29] *See Pacifica Radio*, 2 FCC Rcd 2698, 2699 (1987), *aff'd on recons., Infinity Broad. Corp. of Pa.*, 3 FCC Rcd 930 (1987), *aff'd in part, rev'd in part, Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*"). *See also Regents of the Univ. of Cal.*, 2 FCC Rcd 2703 (1987) (same subsequent history); *Infinity Broad. of Pa.*, 2 FCC Rcd 2705 (1987) (same subsequent history).

indecent must involve more than the isolated use of an offensive word." *Infinity Broad. Corp.*, 2 FCC Rcd at 2705.

On review, the D.C. Circuit affirmed the "generic definition" for construing Section 1464, but in doing so expressly reinforced the First Amendment principles that limit the statute's scope. Writing for the court, then-Judge Ginsburg emphasized that "the FCC may regulate [indecent] material only with due respect for the high value our Constitution places on ... what the people say and hear." *ACT I*, 852 F.2d at 1344. Quoting Justice Powell's "'expectation that [the] Commission will continue to proceed cautiously," Judge Ginsburg similarly anticipated that "the potential chilling effect of the FCC's generic definition ... will be tempered by the Commission's restrained enforcement policy." *Id.* at 1340 n.14.

3. The FCC's Current Multi-Factor Test for Indecency Has Never Been Upheld by Any Court

The Commission's movement to a "generic" indecency definition created pressure on the agency to more precisely define indecency. The FCC issued its 2001 *Indecency Policy Statement* to settle a 1994 enforcement action after the district court in that case denied the Commission's motion to dismiss all of the licensee's constitutional counterclaims. *See United States v. Evergreen Media Corp. of Chicago*, 832 F. Supp. 1183, 1187 (N.D. Ill. 1993). Rather than risk having a court rule on the constitutional validity of its more generalized approach to enforcement, the Commission dismissed the case and pledged to provide "industry guidance" on its broadcast indecency policies speech within nine months of the settlement. *Evergreen Media, Inc. v. FCC*, Civil No. 92 C 5600 (N.D. Ill. Feb. 22, 1994). Seven years later, the Commission issued its 2001 *Indecency Policy Statement*.

From the beginning, even the Commission had difficulty understanding or applying its own test under the *Indecency Policy Statement*. For example, in *KBOO Foundation*, 16 FCC

Rcd 10731, 10733 (Enf. Bur. 2001), issued just weeks after the *Indecency Policy Statement*, the Enforcement Bureau concluded that the rap poem *Your Revolution* was indecent because it contained "unmistakably patently offensive sexual references," but later reversed its evaluation of the same material, finding that, "on balance and in context, the sexual descriptions in the song are not sufficiently graphic to warrant sanction." *KBOO Found.*, 18 FCC Rcd 2472, 2474 (Enf. Bur. 2003). Likewise, the Bureau deemed the "radio edit" of the Eminem song *The Real Slim Shady* to contain "unmistakable offensive sexual references." *Citadel Broad. Co.*, 16 FCC Rcd 11839, 11839, 11840 (Enf. Bur. 2001). But it later characterized the exact same sexual references as "oblique," and not "expressed in terms sufficiently explicit or graphic enough to be found patently offensive." *Citadel Broad. Co.*, 17 FCC Rcd 483, 486 (Enf. Bur. 2002).

These reversals occurred not because new facts came to light or because the Commission refined its standard, but because the Bureau simply changed its "impressions" about the "patent offensiveness" of the material. "Your Revolution" initially was considered indecent despite the fact it had been performed for junior high and high school students in programs coordinated through the New York City Board of Education, *KBOO Foundation*, 16 FCC Rcd at 10733, but was later cleared, in part *because* the performer, Sarah Jones, had been asked to perform "Your Revolution" at high school assemblies. *KBOO Found.*, 18 FCC Rcd at 2474. The Second Circuit would later reject such reasoning in *Fox* because the standard allowed the FCC to reach "diametrically opposite conclusions at different stages of the same proceeding for precisely the same reason," *Fox Television Stations, Inc.*, 613 F.3d at 332-333, but for years the Commission was able to avoid judicial review of its indecency rulings.

The *Evergreen Media* case, now more than two decades old, was the last time a licensee contested a Section 1464 forfeiture order in court before the more recent litigation that

culminated in *Fox*.[30] As a consequence, *no court has ever upheld the multi-factor test for indecency that the FCC first articulated in 2001*. Since then, the Commission has done nothing to support or clarify the indecency test it announced in 2001, and instead has asserted authority to penalize a broader range of speech and to impose more draconian penalties. *See infra* § V.B.4.a. It was only after all this that the 2001 *Indecency Policy Statement* had its first court test – which it failed. *Fox Television Stations, Inc.*, 613 F.3d at 330.

4. The FCC Abandoned its Restrained Enforcement Policy

a. The Commission's Change in Policy Prompted Judicial Review of the Commission's Overall Test for Indecency

Beginning in 2004, the Commission changed its construction of Section 1464 in dramatic and far-reaching ways, including: (1) greatly expanding the scope of the potentially "indecent" images and utterances it prohibits; (2) overruling past precedent to sanction fleeting, isolated, or unintended utterances; (3) punishing licensees for indecent material broadcast during news programs; and (4) imposing separate penalties on "profane" speech.[31] Taken together, these changes created a fundamentally different regulatory regime than the one that was before the Supreme Court in *Pacifica*. This triggered an overall review of the Commission's standard for

[30] *See also supra* note 19 & accompanying text (discussing Commission's failure to issue final order in *Young Broadcasting* after opposition to NAL); *supra* note 27 (discussing government's voluntary dismissal of *Married by America* collection action after Fox refused to pay forfeiture). *Cf. Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace,"* 21 FCC Rcd 2732 (2006) (NAL allowed to lapse after opposition by broadcaster).

[31] *E.g., Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975 (2004); *2006 Omnibus Indecency Order*, 21 FCC Rcd at 2668-703 ¶¶ 16-145. It reversed earlier decisions finding that news programs had violated the indecency rules, *Omnibus Indecency Remand Order*, 21 FCC Rcd at 13327-28 ¶¶ 71-72, and it decided not to pursue separate penalties for profanity. In all other respects, however, the FCC endeavored to defend its new approach to enforcement as constitutional.

regulating broadcast indecency, including the so-called contextual approach set forth in the 2001 *Indecency Policy Statement*.

Although the parties to the litigation briefed the question of whether *Pacifica* is still valid as controlling precedent, the Second Circuit said it was unnecessary to address that issue to decide the case.[32] Instead, it focused on the factors articulated in the *Indecency Policy Statement* and found that the FCC's approach to enforcement is unconstitutionally vague. *Fox Television Stations, Inc.*, 613 F.3d at 330 (asking whether *Indecency Policy Statement* "provides a discernible standard by which broadcasters can accurately predict what speech is prohibited"). *See also id.* at 329 ("the questions left unresolved by *Pacifica* are now squarely before us").

The court held that the FCC's enforcement actions under the criteria set forth in the 2001 *Indecency Policy Statement* chilled speech "at the heart of the First Amendment," finding "little rhyme or reason" to the Commission's decisions, leaving broadcasters "to guess whether an expletive will be deemed 'integral' to a program or whether the FCC will consider a particular broadcast a '*bona fide* news interview.'" *Id.* at 332, 335. The court was particularly critical of the Commission's inability to define when news programming would be subject to indecency penalties. Although the agency purported to be deferential to licensees' editorial judgments – and in some cases actually exercised deference – it specifically declined to create a news "exemption," and could not define the circumstances under which news programming would be acceptable. The court found that news faced the same uncertainty that had always affected

[32] The Second Circuit reviewed the vast changes in the media landscape that have eclipsed the rationale set forth in *Pacifica*, and noted that the Supreme Court "may decide in due course to overrule *Pacifica* and subject speech restrictions in the broadcast context to strict scrutiny." *Fox Television Stations, Inc.*, 613 F.3d at 327. Until that day, however, the circuit court decided to review the constitutionality of the FCC's enforcement standard under the strictures set forth in *Pacifica*. *Id.* at 329. Of course, enforcement actions like this one may reopen the broader question of *Pacifica's* continuing validity.

programs under the *Indecency Policy Statement* and cited numerous examples of news programs that had been chilled by the absence of a news exemption, or by discernible criteria cabining the Commission's discretion. *Id.* at 334-35.

b. The Commission Has Yet to Devise an Adequate Replacement for its Restrained Enforcement Policy

In this case, two years after the Commission opened a proceeding to ensure that its indecency enforcement policies "are fully consistent with vital First Amendment policies," *2013 Public Notice*, 28 FCC Rcd at 4082, it has announced its intention to impose the maximum fine permitted under the statute for a newscast. It proposes doing so using the same test for indecency that the FCC devised in 2001, that the Second Circuit held was impermissibly vague. *Fox Television Stations, Inc.*, 613 F.3d at 327. This is neither a clear standard for regulating speech, nor does it show the restraint that *Pacifica* requires.

Pacifica did not give the FCC *carte blanche* to find an indecency violation based entirely on its subjective analysis of "contextual factors." The narrow holding focused on the "specific factual context" before the Court and concluded only that "the Carlin monologue was indecent *as broadcast*." *Pacifica*, 438 U.S. at 734-35 (emphasis added). *See id.* at 732, 742 ("[o]ur review is limited to the question whether the Commission has the authority to proscribe this particular broadcast," in which "offensive words" were "repeated over and over"). Since *Pacifica*, the Supreme Court repeatedly has reminded the government that it cannot regulate speech absent clear standards that limit administrative discretion. *E.g.*, *Reno*, 521 U.S. at 872 (risk of discriminatory enforcement poses grave First Amendment concerns); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132-33 (1992) ("First Amendment prohibits the vesting of such unbridled discretion in a government official").

In particular, the Supreme Court has cautioned that complex regulations that employ multi-factor tests, coupled with the threat of heavy penalties, "function as the equivalent of a prior restraint." *Citizens United v. FEC*, 558 U.S. 310, 335 (2010). The Court has warned that because an administrative agency's "business is to censor, there inheres the danger that [it] may well be less responsive than a court ... to the constitutionally protected interests in free expression." *Id.* at 366. As a consequence, protected speech is chilled because "the censor's determination may in practice be final." *Id.* Given these concerns, and the FCC's history in this area, the Commission lacks any discernible standard to support the NAL against WDBJ.

C. As Applied to WDBJ the Proposed Fine Violates the First Amendment

1. The Proposed NAL is Anything But "Restrained"

Despite the fact that a restrained enforcement policy is constitutionally required, the FCC is proposing the maximum forfeiture permitted under the law for a momentary technical slip-up on a news program in a small market television station. Mindful of the First Amendment requirement, the NAL repeats the language of restraint like a mantra. *E.g.*, NAL ¶ 11 ("we proceed cautiously and with appropriate restraint"); *id.* (the Commission "'recognize[d] the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming"); *id.* n.37 (because of First Amendment concerns the FCC's definition of indecency "will be tempered by the Commission's restrained enforcement policy"); ¶ 17 (we proceed "with the 'utmost restraint' that the First Amendment requires for news programming"). But the Commission's actions drown out its words. As the Seventh Circuit observed in another case, when stripped of its "self-congratulatory rhetoric about how careful and thoughtful and measured and balanced" it has been, "the opinion, like a Persian cat with its fur shaved, is alarmingly pale and thin." *Schurz Commc'ns, Inc. v. FCC*, 982 F.2d

1043, 1050 (7th Cir. 1992). Reviewing courts have no trouble seeing through such administrative paeans to First Amendment values that are "more ritual than real." *ACT I*, 852 F.2d at 1341.

Even the Commission appears to dismiss its own language about restraint. Its press release announcing the NAL observed that "[t]his enforcement action would be the highest fine the Commission has ever taken for a single indecent broadcast on one station." *News Release, FCC Plans Maximum Fine Against WDBJ for Broadcasting Indecent Programming Material During Evening Newscast* (Mar. 23, 2015). This boast is bolstered by the NAL. It notes this is the first time the FCC considered imposing the maximum fine under the BDEA, then proposes an "upward adjustment" more than forty-six times the base forfeiture amount of $7,000. NAL ¶¶ 25-26. This proposed action strains the meanings of both "adjustment" and "restraint."

The Commission claims that such action is necessary because the purported infraction of the rules is "extreme and grave enough to warrant a significant increase" in the base amount. But that characterization distorts what happened here. Whatever may be the merits of the FCC's indecency policy in other contexts, this is not a case of a "shock jock" intentionally pushing the boundaries of the FCC's limits on expletives. Nor is it a situation where a broadcaster intentionally aired extended scenes of graphic sexuality as if this involved a pay cable channel. Indeed, this is not a situation where the broadcaster intentionally aired anything offensive at all. It is a matter where a local newscast experienced a technical glitch that resulted in a momentary and inadvertent transmission of sexual imagery. It is regrettable and certainly worthy of the immediate remedial measures WDBJ implemented, but it is hardly the type of "egregious" case that the *2013 Public Notice* demanded but never defined.

The proposed NAL is anything but restrained in its subject matter as well. The Supreme Court has made clear that the "First Amendment requires a more careful assessment and charac-

terization of an evil" before the government may restrict "instances as fleeting as an image [of nudity] appearing on a screen for just a few seconds." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 819 (2000). Here, the FCC has announced its intention to impose the maximum fine in the two areas where reviewing courts have said the Commission's authority to restrict programming is at its lowest – newscasts, and inadvertent or accidental transmissions.

2. The NAL's Approach to News Programming Violates the First Amendment

In applying its indecency policies, the FCC has stressed that it is "imperative that we proceed with the utmost restraint when it comes to news programming" in light of "the important First Amendment interests at stake as well as the crucial role that context plays in our indecency determinations." *Omnibus Indecency Remand Order*, 21 FCC Rcd at 11327. Here, however, the Commission claims there is no constitutional problem with imposing a fine on WDBJ because it "has explicitly ruled that there is no news exemption from the indecency law or Rule." NAL ¶ 20. True enough, the FCC has avoided creating a news exemption, but that is the problem, as the Second Circuit found, where the agency lacks any coherent explanation for when news can be subjected to indecency penalties.

The court cited examples of where news programming and public affairs programming had been censored, and noted that this problem resulted from the fact that the FCC considered the existence (or not) of a news exemption to be "a matter within its discretion." *Fox Television Stations, Inc.*, 613 F.3d at 334. It concluded: "If the FCC's policy is allowed to remain in place, there will be countless other situations where broadcasters will use their editorial judgment and decline to pursue contentious people or subjects, or will eschew live programming altogether, in order to avoid the FCC's fines. This chill reaches speech at the heart of the First Amendment."

Id. at 335. The NAL not only ignores the court's decision in *Fox*, it rests on the same foundation that *Fox* rejected.

It also is inconsistent with the Commission's history of restrained enforcement. In light of the important First Amendment values associated with news programming, the Commission has historically given broadcasters an especially wide berth with respect to news coverage. *See, e.g.*, *Peter Branton*, 6 FCC Rcd 610 (interview with John Gotti that contained numerous uses of the word "fuck" and its variants not indecent when broadcast in a "legitimate news report"); *Infinity Broad. Corp. of Pa.*, 3 FCC Rcd 930 (1987) (presence of potentially indecent material in a bona fide news program "of less concern" than in other contexts); *Pacifica Recon. Order*, 59 F.C.C.2d 892 ("we must take no action which would inhibit broadcast journalism"). The Commission did not punish the fleeting and isolated use of an expletive in a context of a news broadcast, even when the expletive was not a core part of the news report itself. *See Lincoln Dellar*, 8 FCC Rcd 2582 (MMB 1993) (news announcer's use of the word "fucked" not indecent "in light of the isolated and accidental nature of the broadcast").

The Commission tries to distinguish this case from others in which it has shown restraint by explaining that it avoided imposing fines in past cases where, on reconsideration, it "considered the context of the material as news as it had not done before." NAL ¶ 20 n.62 (describing reconsideration of NAL for *The Early Show*). But this is not what happened. The Commission initially found the *Early Show* broadcast particularly shocking (and therefore indecent) because it occurred in the context of news, but then reversed its decision *citing the same exact factor*. The Second Circuit singled out this flip-flop as one of the particular reasons it found the FCC's indecency formula to be unconstitutional: "the FCC reached diametrically opposite conclusions at different stages of the proceedings for precisely the same reason – that

the word 'bullshitter' was uttered during a news program." *Fox Television Stations, Inc.*, 613 F.3d at 332.

The Commission also tries to distinguish its NAL in this case by noting that the sexual material that was briefly displayed "is unrelated to the subject of the news report." NAL ¶ 20. This is just another way of saying that the extraneous material was included by accident.[33] Although the NAL intimates that WDBJ should not have included material from an adult-themed website, that is not an appropriate call for the government to make. There is no claim by the Commission – nor could there be – that WDBJ's inclusion of material that illustrated the young woman's past profession was unrelated to a legitimate news story. Nor can the FCC legitimately substitute its news judgment for that of WDBJ. The Second Circuit made clear that the Commission cannot leave such choices to its own discretion. *Fox Television Stations, Inc.*, 613 F.3d at 334-35. Accordingly, the NAL should be withdrawn.

3. The NAL's Approach to Fleeting Images Violates the First Amendment

This case presents the same constitutional question that arose in the consolidated cases that culminated in *Fox II*: Can the Commission, consistently with the restrained enforcement policy approved in *Pacifica*, penalize a broadcaster under its indecency rules for a fleeting, isolated, or inadvertent transmission of sexually-oriented material? The NAL cites only Chief Justice John Roberts' concurring opinion denying certiorari in the *Super Bowl* case as supporting authority, *see supra* note 15, but otherwise ignores the reasoning in *Fox Television Stations, Inc.*,

[33] For this reason, the FCC's hypothetical of showing sexual images on a split screen with a news story is beside the point. NAL ¶ 20. This is not a case in which the broadcaster intentionally selected unrelated sexual imagery and purposefully transmitted it adjacent to a news report.

613 F.3d at 334, that the First Amendment does not permit the government to impose a rule that requires 100 percent effectiveness in preventing inadvertent transmissions by broadcasters.

The error in the WDBJ news broadcast that prompted the NAL met all of the criteria for the FCC's former policy of restraint. It was fleeting (2.7 seconds and visible on only 1.7 percent of the television screen); it was inadvertent (accidentally included because of a technical problem); and it was isolated (one time event that was corrected without FCC intervention). Yet the NAL considers this worthy of a sanction – indeed, the most extreme sanction – because it claimed the station did not take "adequate precautions to avoid such a result." NAL ¶ 19. Such a standard fails to provide the necessary "breathing space" the First Amendment requires when the government regulates speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). These basic First Amendment principles fully apply in this case, because broadcasting is accorded the "widest journalistic freedom consistent with its public obligations." *CBS, Inc. v. DNC*, 412 U.S. at 110. Accordingly, "[t]o perform its statutory duties the Commission must oversee without censoring." *Id.* at 118. The NAL ignores these constitutional requirements.

4. The NAL's Application of the Indecency Guidelines Violates the First Amendment

The NAL purports to impose liability on WDBJ through an uncritical application of the test for indecency articulated in the 2001 *Indecency Policy Statement*. NAL ¶¶ 10-17. As explained above, however, that test has never been upheld, and has been found to be constitutionally defective by the only courts to review its merits. The court in *Fox* held that the standard set forth in the *Indecency Policy Statement*, together with its subsequent decisions, did not provide a discernible standard by which broadcasters could predict what speech is prohibited. *Fox Television Stations, Inc.*, 613 F.3d at 330.

This concern is borne out by the FCC's arbitrary application of the test's various factors in this case. It conflates the various parts of the test, ignores whether the material was "fleeting," and generally reserves for itself the ability to impose liability based on its overall impressions. *See supra* § IV. This is the very problem the court identified in *Fox*, when it held that the FCC failed to satisfy the First Amendment by merely parroting the various factors in its test, without finding a way to clearly and consistently apply them. *Fox Television Stations, Inc.*, 613 F.3d at 330. Accordingly, the Commission should rescind the NAL.

VI. THE NAL ARTICULATES AN ERRONEOUS AND UNCONSTITUTIONAL STANDARD FOR WILLFULNESS

The NAL violates the Communications Act insofar as it proposes to penalize WDBJ for an alleged indecency violation that was neither "willful" nor "repeated," as required by Section 503(b)(1).[34] This is evident from the fact that the only action the NAL found to make the broadcast sanctionable was not done knowingly. Given that indisputable fact, no reasonable construction of the term "willful" supports the NAL's conclusion, nor can a forfeiture be constitutionally imposed under the First Amendment.

The record confirms that WDBJ personnel were entirely unaware that the image in question would be seen in the coverage as broadcast. That image was not viewable by the photojournalist who assembled the story when he downloaded online images for it,[35] nor by the story reporter or newsroom managers who reviewed it pre-broadcast. WDBJ's editing and pre-broadcast monitoring tools at the time were legacy equipment, while the rest of its technology

[34] *See* NAL ¶ 23 (citing 47 U.S.C. § 503(b)(1)). It is obvious the 2.7-second inclusion of the image of genital manipulation was not "repeated," and the NAL does not suggest otherwise.

[35] Indeed, as the NAL concedes, when the photojournalist producing the story went to the website of the distributor of the EMT's films to obtain pictures of her to use in the story, "only her face and shoulders can be seen." *See supra* 8.

supported wide-screen display, including the digital transmission facilities, HD encoder and master control facilities, and digital cameras. Meanwhile, production and review of news stories used monitors that displayed only 4 by 6 images and did not allow users to view parts of the widescreen image outside the area shown in the 4 by 6 monitor.

It is thus not the case, as the Commission suggests, that WDBJ personnel who assembled and reviewed the story "simply didn't notice" the fleeting image cited as sanctionable, NAL ¶ 29, but rather they *could not* have seen it in the story-creation and -review process – and there was certainly not awareness or intent that the broadcast include nudity or sexual conduct. Even if those involved had "been more alert," *id.* ¶ 24, they would not have recognized the inclusion of the problematic image. That perhaps explains why the NAL is reduced to assigning liability based on assertions that WDBJ "knew, or should have known, that its editing equipment … did not permit full screen review of material intended for broadcast," NAL ¶ 29; *id.* ¶ 24, and/or that it allegedly "omitted appropriate safeguards to assist it in making sure its audience was not subjected to" the material at issue.[36] It also explains why the Commission hedges its bets on willfulness, claiming that "[a]t the very least, the Station acted with reckless disregard." *Id.*

But it is not enough for the Commission to simply conclude, on this basis of oversight and inadvertence, that the broadcast was "willful." The Act requires that the "violation" itself be intentional. To be sure, the Commission has held that to satisfy willfulness, purported offenders need not intend to violate the Act or an FCC rule, or even be aware the action in question is a

[36] *Id.* ¶ 24. The most the Commission can muster is an assertion that "in conjunction with [] failure to monitor the full content of the broadcast," WDBJ "aired the sexually explicit images." *Id.* ¶ 16. These negligence-based theories cannot suffice in the application of a criminal statue (as is the case with the FCC's indecency rule implementing 18 U.S.C. § 1464), as what WDBJ knew at the time "does matter." *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015). *See also infra* 49-50.

violation.[37] But even the NAL notes that the Act defines "willful" as "conscious and deliberate commission or omission of any act." NAL ¶ 23 (quoting 47 U.S.C. § 312(f)(1), and noting its application to both §§ 312 and 503(b)).

Here, the question is not whether WDBJ intended to broadcast a newscast about a controversial EMT, or even whether it intended to show any of the websites that contained the offending image. The only question is whether WDBJ intended to depict the man's penis and his manipulation of it as part of the broadcast that aired. And all the evidence in the record indicates WDBJ not only formed no such intention, it did not even know the image was there until the broadcast aired. Significantly, the Commission must find "by a preponderance of the evidence," that the elements constituting violation of the Act or an FCC rule are present, NAL ¶ 23, yet the record points the opposite direction. Section 503(b)(1) thus precludes imposition of a forfeiture.

Any other reading of Section 503(b)(1) does not comport with well-settled precepts of what it means for actions to be "willful" – or constitutional limits imposed by the First Amendment. The textbook definition is that an action be "voluntary" or "intentional" to be "willful." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 n.3 (1998). In order "to establish a 'willful' violation of a statute, the Government must prove the defendant acted with the knowledge that his conduct was unlawful." *Bryan v. United States*, 524 U.S. 184, 205 (1998) (internal quotation marks omitted). *See also Ratzlaf v. United States*, 510 U.S. 135 (1994).

As the Supreme Court reinforced just this Term, "wrongdoing must be conscious to be criminal." *Elonis*, 135 S. Ct. at 2009 (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)). "The central thought is that [one] must be blameworthy in mind before he can be found

[37] *E.g.*, *Marshall D. Martin*, 19 FCC Rcd 20977 ¶ 8 (Enf. Bur. 2004). *See also* NAL ¶ 23 n.74 (citing H.R. Rep. No. 97-765, at 51 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2294-95). *But see* H.R. Conf. Rep. No. 97-765, at 51 (1982) (Section 503(b)(1)(B) requires the FCC to demonstrate that "the licensee knew that he was doing the act in question").

guilty, a concept that courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like." *Id.* Those upon whom the government wishes to impose liability under Section 1464 of the Criminal Code, and Section 73.3999 of the FCC rules, "must know of the facts that make his conduct fit the definition of the offense, even if he does not know that those facts give rise to a crime." *Id.* (quoting *Staples v. United States*, 511 U.S. 600, 608 n.3 (1994)) (internal quotation marks omitted).

Such requirements clearly apply to the Communications Act. For example, one court held the 47 U.S.C. § 312(f)(1) standard for willfulness, which also governs Section 503(b)(1), *see supra* 47 (citing NAL ¶ 23), was satisfied when a party "*chose* to circumvent" the "governing legal standard."[38] Moreover, in criminal statutes, such as 18 U.S.C. § 1464, which provides the FCC's indecency enforcement authority, the term "willful" has been held to "generally mean[ ] an act done with a bad purpose ... without justifiable excuse ... stubbornly, obstinately, perversely." *United States v. Murdock*, 290 U.S. 389, 394 (1933) (citations omitted). Accordingly, "evil motive to do that which the statute condemns becomes a constituent element of the crime." *Screws v. United States*, 325 U.S. 91, 101 (1945). Even to the extent "[t]he word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears," it at a minimum "denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental." *Bryan*, 524 U.S. at 191 & n.12 (quoting *Spies v. United States*, 317 U.S. 492, 497 (1943)). At a minimum, the level of volition that is required means the "accidental" inclusion of the fleeting image in question does not qualify.

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[38] *CBS Inc. v. PrimeTime 24 Joint Venture*, 9 F.Supp.2d 1333, 1343-44 (S.D. Fla. 1998) (emphasis added). *See also AT&T v. New York City Human Res. Admin.*, 833 F.Supp. 962, 974 (S.D.N.Y. 1993) (defining "[w]illful misconduct, in interpreting tariff, as the intentional performance of an action with knowledge" that the "act will probably result in injury or damage," or "in such a manner as to imply reckless disregard of the probable circumstances").

This interpretation is not only required by the Act, but is compelled as a constitutional matter in the context of sanctions that seek to punish expressive activity. The First Amendment requires statutory provisions imposing penalties on speech to be interpreted to include a scienter requirement. *E.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77-78 (1994); *United States v. Reilly*, 2002 WL 31307170 (S.D.N.Y. 2002). *See Smith v. California*, 361 U.S. 147 (1959). The government cannot, as a general proposition, impose a strict liability requirement on protected speech,[39] and Section 503(b)(1)(B) must be interpreted in a way that avoids constitutional conflicts. *See Rust v. Sullivan*, 500 U.S. 173, 191 (1991). The FCC thus may not impose a fine where WDBJ did not know it would transmit "indecent" material. To paraphrase *Elonis*:

> [C]ommunicating *something* is not what makes the conduct wrongful. Here, the crucial element separating legal innocence from wrongful conduct is the [indecent] nature of the communication. The mental state requirement must therefore apply to the fact that the communication contains [indecent material].

135 S. Ct. at 2011 (quoting *X-Citement Video*, 513 U.S. at 73) (internal quotation marks omitted). The record is abundantly clear that the necessary mental state was absent here.

The First Amendment compels a strict scienter standard for Section 1464 because "any statute that chills the exercise of First Amendment rights must contain a knowledge element."[40] In the defamation context, for example, the First Amendment requires proof that the actionable statement "was made with knowledge of its falsity or in reckless disregard of whether it was false or true" regardless of whether liability would arise under a criminal or civil law standard.

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[39] *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) ("punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally-guaranteed freedoms of speech and press"); *id.* ("a rule of strict liability that compels a … broadcaster" to make "guarantees" as to its programming "may lead to intolerable self-censorship").

[40] *CBS Corp. v. FCC*, 535 F.3d 167, 201 (3d Cir. 2008) (quoting *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 611 (6th Cir. 2005)); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992)).

Garrison v. Louisiana, 379 U.S. 64, 74 (1964); *New York Times v. Sullivan*, 376 U.S. at 279-80. The *New York Times* standard specifically intended to "prevent undue 'chilling effects' on ... expression," and to protect all but "[t]he knowing and deliberate lie." *Pierce v. Capital Cities Commc'ns, Inc.*, 576 F.2d 495, 507 (3d Cir. 1978). The Supreme Court has equated this with the "familiar and workable standard" of "subjective recklessness as used in the criminal law." *Farmer v. Brennan*, 511 U.S. 825, 839-40 (1994). Courts apply this standard in a variety of First Amendment contexts, particularly in cases involving laws analogous to Section 1464.[41]

The interplay of scienter and substantive First Amendment requirements determines whether a speech restriction provides sufficient "breathing space" for free expression, or is instead overly broad. *See, e.g., United States v. Alvarez*, 617 F.3d 1198, 1209 (9th Cir. 2010) (invalidating Stolen Valor Act and noting that, "[w]ithout a scienter requirement to limit the Act's application, the statute raises serious constitutional concerns"), *aff'd*, 132 S. Ct. 2537 (2012). In this regard, because speech restrictions must be applied narrowly, the constitutional validity of Section 1464 depends on a strict scienter standard.[42] The Commission's finding of liability and imposition of a maximum fine in the NAL here constitute the exact opposite of either a strict standard, or narrow application of limits on WDBJ's speech.

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[41] *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 115 (1990); *Hamling v. United States*, 418 U.S. 87, 123 (1974); *Ginsberg v. New York*, 390 U.S. 629, 644 (1968); *Mishkin v. New York*, 383 U.S. 502, 511 (1966); *Manual Enters., Inc. v. Day*, 370 U.S. 478, 492-93 (1962); *Smith v. California*, 361 U.S. at 153.

[42] This dovetails with the Commission's formerly restrained indecency enforcement policy, in which it treated only knowing and intentional broadcasts as actionable. *See Pacifica Recon. Order*, 59 F.C.C.2d at 893 n.1 (finding it would be inequitable to hold a licensee responsible for indecent language when "public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing"). *See also Pacifica*, 438 U.S. at 733 (approving admonishment only for airing certain offensive words that were "repeated over and over" and "deliberately broadcast").

Finally, even if "reckless disregard" could be the proper standard, NAL ¶ 24 – which WDBJ does not concede – nothing short of criminal recklessness can justify a forfeiture under Section 1464, because it is a criminal law that regulates speech protected by the First Amendment. A person is reckless in the civil law context if he acts (or fails to act) in the face of "an unjustifiably high risk of harm that is either known or so obvious that it should be known,"[43] which is an objective standard, *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 68-69 (2007), while in the criminal law context the government must prove "something extra." *Id.* at 60. That is, criminal law permits a finding of recklessness "only when a person disregards a risk of harm *of which he is aware*."[44] Not even an "extreme departure from professional standards," without more, will support a finding of recklessness. *Tucker v. Fischbein*, 237 F.3d 275, 286 (3d Cir. 2001); *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 665 (1989); *St. Amant v. Thompson*, 390 U.S. 727, 730-31 (1968). "Unlike civil recklessness, criminal recklessness ... requires subjective knowledge on the part of the offender." *Safeco Ins. Co.*, 551 U.S. at 68 n.18. There can be no doubt that such "subjective knowledge" was entirely absent here, as not only does the NAL concede as much, it makes it the core of its theory of liability.

VII. EVEN IF THE COMMISSION COULD FIND THAT WDBJ VIOLATED THE INDECENCY POLICY, THE PROPOSED FORFEITURE SHOULD BE VASTLY REDUCED

The NAL erred in imposing the maximum possible forfeiture on WDBJ. WDBJ has demonstrated above that its fleeting and inadvertent broadcast of a sexual organ during a news

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[43] *Farmer*, 511 U.S. at 836. *Compare* NAL ¶ 24 (claiming that "the risk of airing of the indecent material on the ... news was clearly foreseeable").

[44] *Farmer*, 511 U.S. at 836-37 (emphasis added). This scienter requirement applies to "each of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video, Inc.*, 513 U.S. at 72. *See Morissette*, 342 U.S. at 256. Without such a knowledge requirement, the law risks penalizing "a broad range of apparently innocent conduct." *Liparota v. United States*, 471 U.S. 419, 426 (1985); *Staples*, 511 U.S. at 610.

program should not be held to have violated the indecency policy, either as that policy has been applied up to now, and most certainly as that policy must be interpreted under the First Amendment. Even if the Commission could, despite those constraints, find that WDBJ's broadcast was actionably indecent, any forfeiture imposed on WDBJ should be significantly reduced from the amount proposed in the NAL.

As the NAL recognizes,[45] the Commission's Rules establish a base forfeiture for indecency violations of $7,000. The NAL sets out various reasons – many of which are incorrect – for a larger forfeiture, but utterly fails to explain why it is appropriate to impose a forfeiture more than *forty-six times the base amount* for the inadvertent inclusion in a news program of a depiction of a sexual organ for less than three seconds.

The NAL cites the Broadcast Decency Enforcement Act of 2005 which increased the maximum forfeiture for broadcast indecency to $325,000.[46] Congress did not attempt to establish that amount *as the minimum* or even expected forfeiture, or to indicate any intent to override the Commission's normal discretion with respect to the amount of a forfeiture in any particular case. In its decision implementing the BDEA, the Commission understood the limits of Congress' action, and did not amend its rules to change the amount of the base forfeiture or indicate any change in its established approach to indecency violations. *Amendment of Section 1.80(b)(1) of the Commission's Rules*, 22 FCC Rcd 10418 (2007). The Commission thus did not assume that Congress' decision to increase the maximum potential punishment for the most serious violation of the indecency policy meant that the Commission should "throw the book" at

[45] NAL ¶ 25.

[46] *Id.*

every violation. But now the Commission apparently has changed its position without any notice to broadcasters.

The Commission in the NAL alluded to what it viewed as the "graphic" nature of the material broadcast as justification for a "higher forfeiture." NAL ¶ 27. Even if that were justified – and as discussed above, the fact that the scene was on-screen for less than three seconds, and visible only at the extreme edge of the screen, undermines the Commission's characterization – a "higher forfeiture" should not mean the *highest* forfeiture without some extraordinary evidence of intent or fault. That is particularly true since the video was shown during news programming which the Commission accepts is deserving of the highest protection under the First Amendment.

The Commission's efforts to establish culpability in the NAL also rest on incorrect assumptions. The NAL concludes, without any evidence in the record, that "the indecent material was plainly visible to the Station employee who downloaded it; he simply didn't notice it and transmitted it to Station editors who reviewed the story before it was broadcast." NAL ¶ 29. But as WDBJ has demonstrated, the "boxes" at the edge of the website were *not visible* to the employee who downloaded the material, and were likewise not visible to Station personnel who edited and reviewed the story.

Further, contrary to the assumptions in the NAL, WDBJ recognized the sensitive nature of the material and took particular precautions to avoid broadcast of inappropriate material, including blocking out website addresses and review of the story by two senior news personnel. The fact that they did not see the entirely unrelated "box" at the edge of the screen does not – contrary to the NAL – suggest culpability, but instead at most a mistake. An error – particularly

as in this case an error of which responsible personnel were entirely unaware – is not a reason for the proposed dramatic increase from the established base forfeiture.

The Commission also refused to credit WDBJ for its extensive remedial efforts, stating that "WDBJ was unclear on whether it took such measures before or after our investigation … and whether it continues to rely on staff or upgraded its equipment."[47] To the extent that the Commission had any doubts, WDBJ has now explained that it took remedial measures – including instituting new procedures for review of materials obtained from the internet and training sessions for news personnel – *immediately* after the broadcast. It also replaced its editing equipment at a cost of nearly $800,000 *before* it received any notice of the Commission's investigation.

Each of these incorrect understandings requires the Commission to reconsider the amount of any forfeiture. Further, if this brief, inadvertent exposure of sexual organ during a news program deserves the maximum punishment the Commission can hand out, what would the Commission do if a station intentionally broadcast a lengthy and explicit indecent program? Although the NAL includes a rote recitation of the "Commission's overall restrained approach to indecency enforcement,"[48] nothing in the NAL shows any effort to exercise restraint in dealing with a brief and inadvertent inclusion of unrelated video in news programming. The Commission must reconsider the amount of any proposed forfeiture.

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[47] *Id.* ¶ 31.

[48] *Id.* ¶ 32.

VIII. CONCLUSION

For the reasons stated above, the findings of liability and monetary forfeiture proposed in the NAL should be cancelled in their entirety. Should the Commission nevertheless impose a forfeiture, the amount should be drastically lower than the $325,000 proposed.

Respectfully submitted,

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June 30, 2015

APPENDIX A

Declaration of Jeffrey A. Marks

Jeffrey A. Marks declares as follows:

1. I am the President of WDBJ Television, Inc. and the General Manager of Television Station WDBJ(DT), Roanoke, Virginia.

2. WDBJ has been the CBS Network affiliate in the Roanoke-Lynchburg Virginia television market since it began operations in 1955. WDBJ has consistently broadcast the most-watched news programming in the market; its news programming has won numerous awards for quality from state and national journalist organizations.

3. Television stations in medium and small television markets like Roanoke faced a significant financial burden in converting their operations to digital as part of the national transition to digital broadcasting. Like many stations, WDBJ first invested in a new tower, transmitter and antenna to begin broadcasting a digital signal. In the next phase of its transition, WDBJ acquired a high definition encoder so that network high definition programs could be broadcast. The station then began a series of upgrades to permit full digital operation and to enable it to produce and distribute local high definition programming. These steps included upgrading master control facilities, purchasing new cameras, and upgrading sets and lighting. While as of 2012 WDBJ could produce a high definition local news broadcast, it had not then replaced the equipment its News Department used to produce, edit and review news programming.

4. The editing equipment in use in 2012 had the capability of access internet sources to use material found there in newscasts. But that equipment still used monitors that displayed only a 4 by 6 picture, not the 16 by 9 proportions of a widescreen television. The editing equipment did not permit operators or editors to view anything at the edges of the picture beyond the boundaries of the editing screen or to view the edges of websites.

5. An actress who appeared in adult films retired from that career and settled in the Roanoke, Virginia area. The actress, whose real name is Tracy Rollan, appeared under the name Harmony Rose. She volunteered to serve as an Emergency Medical Technician ("EMT"). She went through training and began to serve as an EMT in Cave Spring, Virginia, a suburb of Roanoke. Her background and previous profession became controversial and residents of the community raised questions about whether she should be permitted to serve as an EMT. One stated concern was whether the former actress was continuing to benefit from sales of her films and thus from her allegedly improper former career. The County Fire Chief was sufficiently concerned to write to the County Attorney to ask whether her services should be terminated.

6. WDBJ's News Department determined that the controversy was of sufficient public interest to warrant coverage. A number of national news services also covered this story, as well as several websites for emergency professionals. WDBJ produced a story that included interviews with the actress' colleagues on the EMT squad, people who had been assisted by her, and people who had questions about the propriety of her service. The

story quoted the Fire Chief's request to the County Attorney and his response. In order to demonstrate the scope of the actress' adult film career and the fact that her films continued to be available, the story showed an image of a Google™ search of her name. The actual links shown on the search page were blurred out to avoid showing any active links to adult web sites. In addition, the photojournalist producing the story went onto a web site of the distributor of her films to obtain pictures to use in the story. These pictures showed only Ms. Rollan sitting on a bed and only her face and shoulders could be seen.

7. The web site from which WDBJ obtained pictures used to illustrate the news story about Ms. Rollan showed the clothed images of the actress that were the focus of the report, but also included along the edge of the screen "boxes" that displayed other films available from the film distributor. Because they were at the far edge of the website, the "boxes" could not be seen by WDBJ's journalists when they downloaded images for use in the news story. However, these areas of the website were visible when the story was viewed on a wide-screen television as it was broadcast. At one point during the story, video of the website briefly showed at the far right edge of the screen a portion of one of these "boxes" which included a male actor fondling his penis. That image was not viewable by the photojournalist when he downloaded the images from the website or when he put the story together.

8. Because the story involved sensitive material, it received careful review before it was aired. It was reviewed and edited by two senior staff in the WDBJ News Department. Since editorial review at WDBJ took place on the same editing equipment, the reviewers could not see the "boxes" at the edge of the screen and were not aware that they were there. Thus, WDBJ personnel were entirely unaware that this image could be seen in the story as broadcast. Had they seen the image, it would have been edited out before the story was broadcast.

9. Part of that "box," however, did appear for 2.7 seconds at the far right edge of the screen when the story was broadcast and viewed on a wide-screen television. The image on a wide-screen television occupied only 1.7 percent of the screen. A full-frame digital picture from a television station broadcasting, like WDBJ, a 1080i digital signal, occupies 1920 by 1080 pixels, or a total of 2,076,600 pixels. The "box" on the side of the screen where the allegedly offensive material could be seen, took up, as measured by WDBJ engineers, 111 by 328 pixels, for a total of 36,408 pixels, or 1.7 percent of the total screen area.

10. A few viewers nonetheless noticed the picture and complained to the station. WDBJ immediately investigated and found that this entirely unrelated picture had been inadvertently shown as part of its news program. It deleted the story from its online website, www.wdbj7.com, decided that the story would not be shown again in any other newscasts, and issued apologies to complaining viewers for the brief and inadvertent inclusion of unrelated material in its newscast.

11. WDBJ took prompt steps to ensure that material taken from the internet could not and would not be inadvertently included in news programming. These measures, which have continued to this day, included:

- WDBJ replaced its entire news editing system, including the monitors that were incapable of displaying an entire 16 by 9 broadcast picture, at a cost of $798,310. This system includes not only the editing function but also the systems used to download and review any material from internet sources.

- Following the incident in 2012, WDBJ conducted training sessions for all news personnel concerning the uses of internet material and the Commission's indecency policies.

- WDBJ subsequently conducted training for all employees about copyright issues and their impact on selection of material to be included in news programming.

12. WDBJ instituted a formal policy requiring approval of two news managers before any material obtained from an internet source is placed on air on the Station's website. That policy provides:

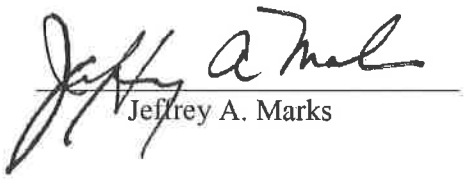
> **WDBJ7 Indecency Rules and Airing of Internet Material**
>
> Any screen shots or video from Internet sources such as websites or social media used in newscasts must go through the following procedures before airing on WDBJ7, My19, or any future channels licensed by WDBJ Television, Inc.:
>
> 1) A news manager must give preliminary approval to use Internet material. Reporters and MMJ's must make the request and provide reasons why the material is important to the story.
>
> 2) All efforts must be made to blur, mask, or crop Internet or social media material around the pertinent subject of the story.
>
> 3) Photographers and editors must view the complete story in its entirety on a full HD monitor once the story is edited.
>
> 4) The story must be reviewed by both the newscast producer and a news manager before it airs. Visual review of the story must occur on a full HD monitor so all parts of the screen are able to be seen.
>
> 5) News managers and producers must carefully review the visual material to make sure it complies with indecency rules and copyright laws.

> 6) The need to get a story on the air quickly in a breaking news situation does NOT supersede the above procedures.
>
> Failure to follow the outlined rules may lead to disciplinary action up to and including suspension or termination of employment.

13. WDBJ has since 2012 conducted training sessions for news employees in small groups about the uses of material found on the internet and, in particular, the need for complete examination of all such material before it is used.

14. I have reviewed the "Opposition of WDBJ Television, Inc. to Notice of Apparent Liability" and the factual statements in it are, to the best of my knowledge, true and correct.

15. I declare under penalty of perjury that the above statements are true and correct.



Jeffrey A. Marks

June 30, 2015

APPENDIX B

AWARDS RECEIVED BY WDBJ(DT) FOR QUALITY NEWS PROGRAMMING

Awarding Organizations:

NATAS – National Academy of Television Arts and Sciences
RTDNA – Radio Television Digital News Association
VAB – Virginia Association of Broadcasters
VAPB – Virginia Associated Press Broadcasters

2004

VAB – Best Documentary "What a Picture I Got—Images and Words of O. Winston Link"

2007

RTDNA – Regional Edward R. Murrow Award for Continuing Coverage
RTDNA – Regional Edward R. Murrow Award for Investigative Reporting

2008

NATAS – Regional Emmy Award for Best Weekend Newscast
VAPB – Outstanding Television News Operation

2009

VAB – Senior Reporter Joe Dashiell received the George A. Bowles Jr. Broadcast Journalism Award

2010

RTDNA – Regional Edward R. Murrow Award – Best Video News Series "Headlines in Hard Times"
VAPB – Best Coverage of a Continuing News Story

2011

VAB – Best Human Interest Series
VAB – Retired WDBJ7 Anchor Keith Humphry received the George A. Bowles Jr. Broadcast Journalism Award
VAPB – Superior Award for Continuing Coverage
VAPB – Meritorious Award for Best News Anchor of the Year -- Jean Jadhon
VAPB – Meritorious Award for Public Service Through Journalism
VAPB – Meritorious Award for In-Depth Reporting
VAPB – Meritorious Award for Feature Photography

2012

NATAS -- Emmy Award for Best Team Coverage
NATAS – Emmy Award for Best Daytime Newscast (5 p.m.)
NATAS – Emmy Award for Best Evening Newscast (11 p.m.)
RTDNA – Regional Edward R. Murrow Award for Overall News Excellence
VAPB -- Best Weathercast of the Year By a Television Station
VAPB -- Best Coverage of a Continuing News Story By a Television Station

2013

NATAS – Regional Emmy Award for Best Feature News Report Light Series "Virginia Roots & Tennessee Dreams: The Legacy of Patsy Cline
NATAS – Regional Emmy Award for Best Daytime Newscast (6 p.m.)
RTDNA – Regional Edward R. Murrow Award for Overall Excellence

2014

RTDNA – Regional Edward R. Murrow Award for Best Website
VAB – Outstanding Website
VAB – Best Documentary "Faces of Domestic Violence"

2015

NATAS – Nominated for Regional Emmy Award for "Facing the Future" (winners announced 06/27/15)
NATAS – Nominated for Regional Emmy Award for "Not So Sweet: The Truth about Diabetes" (winners announced 06/27/15)
VAB – Winner or runner-up for Outstanding News Series "Facing the Future" (to be awarded 06/26/15)
VAPB – Douglas Southall Freeman Award for Public Service through Television Journalism - Meritorious