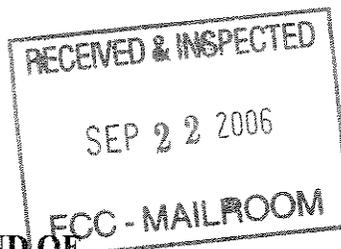


The Thomas Jefferson Center for  
the Protection of Free Expression



*Congress shall make no law...  
abridging the freedom of speech,  
or of the press... THE FIRST AMENDMENT*

COMMENTS ON THE COURT REMAND OF  
SECTION III.B OF THE FCC'S MARCH 15, 2006 *OMNIBUS*  
*ORDER* RESOLVING NUMEROUS BROADCAST TELEVISION  
INDECENCY COMPLAINTS

by  
THE THOMAS JEFFERSON CENTER  
FOR THE PROTECTION OF FREE EXPRESSION

SEP 25 2006

INTRODUCTION

Pursuant to the request contained in the Public Notice issued by the Federal Communications Commission on September 7, 2006, the Thomas Jefferson Center for the Protection of Free Expression submits the following comments on "Court Remand of Section III.B of the Commission's March 15, 2006 *Omnibus Order* Resolving Numerous Broadcast Television Indecency Complaints." The Center's comments will address only the issues raised in ¶¶ 125-136 of the *Omnibus Order* concerning the broadcast of eight episodes of the television program "NYPD Blue."

The Thomas Jefferson Center is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. The Center has as its sole mission the protection of freedom of speech and press from threats of all forms. The Center pursues that mission through research, educational programs, and intervention on behalf of the right of free expression. Since its founding in 1990, the Center has filed briefs as *amicus curiae* in numerous state and federal courts in cases that raised important free expression issues. The Center has also previously filed comments on other matters before this Commission.

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## SUMMARY OF COMMENTS

The Commission's March 15, 2006 order regarding eight episodes of "NYPD Blue," broadcast between January and May 2003, that included use of the word "bullshit" is problematic when viewed in light of the Commission's policies as well as Supreme Court precedent. In its order, the Commission found that the word "bullshit," as a derivative of the word "shit," was presumptively indecent while use of the word "dick" and its derivatives were not indecent in context. Under current FCC standards, a finding of indecency requires a two-pronged analysis: to be indecent, the material in question needs to both 1) describe or depict sexual or excretory activity, *and* 2) be patently offensive as measured by contemporary community standards. By regarding all derivatives of the word "shit" as presumptively indecent, the Commission appears to be departing from its own guidelines by not considering non-sexual and non-excretory meanings of the word "bullshit" and foregoing an analysis of the context in which the word was used.

In evaluating the second prong of the indecency analysis, whether language is patently offensive, the Commission, in compliance with Supreme Court precedent, has consistently looked to three factors: 1) the explicitness of the description of sexual or excretory activity, 2) whether the material dwells on or repeats these descriptions, and 3) whether the material appears to pander or is presented for shock value. The material in "NYPD Blue" does not meet these factors. The material when taken in context did not describe sexual or excretory activity and was not dwelled upon or repeated. Most importantly, the material in question was contextually and artistically necessary to create a realistic portrayal of the New York City Police Department. The Commission has allowed similar language in the past based on contextual and artistic

considerations, such as when it allowed the airing of “Saving Private Ryan” during primetime. Although use of the term “bullshit” may be seen to meet the first prong of the analysis, it should not be regarded as indecent if its use is appropriate for the context or creates a certain artistic effect of realism. In the case of “NYPD Blue,” the language is meant to add to the realism of the New York City Police Department by reflecting a reasonable officer's reaction to the extraordinary circumstances faced in his or her job.

In its March 15 order, the Commission also reinterpreted the word profane when it called the “S-Word” “presumptively profane,” expanding the meaning of profane to the point where it is both impermissibly vague and overly broad. By declaring profanity to include any “vulgar” and “course” language, the Commission stripped “profanity” of its religious connotation and effectively usurped the legal meaning and purpose of “indecent” as a separate category of unprotected broadcast speech. Under this new definition, profanity analysis is so vague that the determination of whether a broadcast is profane will almost certainly depend more on the sensibilities of individual commissioners than on the plain meaning of the statutes the Commission is charged with enforcing. Ultimately, this ruling will have a chilling effect on protected speech as broadcasters will have no reliable guide as to what sort of language is permissible in a broadcast medium.

#### COMMENTS

#### I. THE INDECENCY RULING EFFECTIVELY CREATES AN IMPROPER PER SE BAN ON ALL USES OF THE WORD “SHIT” AND IGNORES THE NECESSARY CONTEXTUAL ANALYSIS.

On March 15, 2006, the Commission issued an order that included findings against KMBC Hearst Argyle Television, Inc., and other ABC affiliates for the broadcast of eight episodes of “NYPD Blue” between January and May 2003, that included use of the word

“bullshit.” *In Re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, FCC 06-17, ¶125-136 (Fed. Comm’n Comm’n March 15, 2006)(notice)(hereinafter *Omnibus Order*). The order concluded that the material at issue that contained “derivatives of the ‘S-Word’” was “explicit and shocking and gratuitous,” and therefore “patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent.” *Id.* at ¶ 131.

A finding of indecency requires two determinations: first, the allegedly indecent material must “describe or depict sexual or excretory organs or activities,” and second, the broadcast must be “patently offensive as measured by contemporary community standards for the broadcast medium.” *Industry Guidelines of the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999, 8002 (2001) (hereinafter *Indecency Policy Statement*).

The first prong of the indecency analysis requires a determination of whether the disputed content describes or depicts sexual or excretory organs or activities. *Id.* On this point, the Commission determined that the use of the word “fuck” during a live broadcast violated 18 U.S.C. §1464--the federal law prohibiting the broadcast of “obscene, indecent, or profane language.” *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globes Awards” Program*, 19 F.C.C.R. 4975, 4976 and 4982 (2004) (hereinafter *Golden Globes II*). “Fuck” was held to have a “core meaning” with an inherently sexual connotation regardless of whether or not the speaker intended the word to depict or describe a sexual act. *Id.* at 4978. Specifically, the Commission held that it does not matter if the word is being used “only as an intensifier” because the term “in any context, inherently has a sexual connotation.” *Id.* Therefore, the Commission concluded that any use of the word “fuck” satisfies

the first prong of the Commission indecency standards. The Commission applied the same analysis to the current use of the word “bullshit” in episodes of “NYPD Blue.”

The emphasis on the core meaning of these words ignores the necessary contextual examination that is the foundation of the indecency analysis and effectively creates a per se ban on a growing list of words that the Commission considers indecent in any context. The American Heritage Dictionary of the English Language defines the word “shit” to include: “to tease or try to deceive;” “things; items;” “foolishness; nonsense;” and “trouble or difficulty”. *See Shit*, The American Heritage Dictionary of the English Language 1666 (3d ed. 1996).

The Commission has consistently held that the “full context in which the material appeared is critically important,” *Indecency Policy Statement* at 8002, a position which comports with Supreme Court precedent related to linguistic indecency. In affirming the Commission’s ruling in *FCC v. Pacifica* that George Carlin’s monologue was indecent, the Supreme Court of the United States held that “context is all-important” and commented that “indecency is largely a function of context—it cannot be adequately judged in the abstract.” 438 U.S. 726, 742 (1978). A contextual analysis of the use of the word “bullshit” on “NYPD Blue” will show that the word did not describe or depict the excretory activity of a bull, but rather was used convey a fictional character’s disdain for what was happening to another character. *Omnibus Order* ¶ 125, n. 187. It therefore fails the first prong of the Commission’s indecency analysis.

The second prong of the indecency analysis requires a determination as to whether the content is patently offensive according to contemporary community standards. The Commission’s determination of whether disputed content is patently offensive should rely upon three primary factors: “(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length

descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for shock value. *Indecency Policy Statement* at 8003. FCC guidelines on indecency underscore the importance of the contextual analysis and recognize that “each indecency case presents its own particular mix of these, and possibly other, factors.” *Id.* Context is essential because “the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding.” *Id.* at 8010.

The first factor to be weighed in the contextual analysis is the “explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities.” *Indecency Policy Statement* at 8003. On its face, this portion of the guidelines only applies to descriptions or depictions. The order against “NYPD Blue” found the word “bullshit” to be “one of the most vulgar and explicit descriptions of excretory activity in the English language.” *Omnibus Order* at ¶ 128. However, the use of the word “shit” in “NYPD Blue” was neither descriptive nor meant to depict sexual or excretory organs or activities. Rather, it was used in reference to one of the other definitions of the word, namely “nonsense” or “foolishness”.

Surprisingly, the Commission fails to see the broadcast of “dick” and “dickhead” on “NYPD Blue” as indecent by the same standards because “although these words are undeniably coarse and vulgar, they do not have the same level of offensiveness as the ‘F-word’ or ‘S-word.’” *Omnibus Order* at ¶127. Both “dick” and “dickhead” surely have reference to the male sexual organ as their “core meaning,” and both are at least as graphic or explicit as the word “shit” and “fuck.” The Commission’s only rationale for distinction is that the word “shit” possesses a higher level of offensiveness. Nothing in the very context-sensitive holding of *Pacifica*

foreshadows this move to making presumptive findings about the offensiveness of words apart from their use in the context of a particular broadcast. 438 U.S. at 729.

The second factor to be weighed in the contextual analysis is “whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities.” *Indecency Policy Statement* at 8003. The Commission rejected the idea that *Pacifica* provided protection from indecency involving the fleeting use of an expletive, reasoning that the Supreme Court “explicitly left open the issue of whether an occasional expletive could be considered indecent.” The Commission went on to decide that a word that is broadcast fleetingly, or even once, may be found indecent. *Golden Globes II* at 4980. The *Pacifica* decision did not state that the broadcast of any of the seven words involved would always be held indecent. On the contrary, the opinion stressed that context is the important consideration in the indecency analysis, saying that the seven words were indecent as used by George Carlin when broadcast in the middle of the day, but may well be permitted if used in a different way at a different time. 438 U.S. at 750. The word “bullshit” as used in “NYPD Blue” did not dwell on or repeat at length descriptions of sexual or excretory organs or activities and therefore should not have been found to be indecent under the second factor.

The third factor to be weighed in the contextual analysis is “whether the material appears to pander or titillate, or whether the material appears to have been presented for its shock value.” *Indecency Policy Statement* at 8003. FCC guidelines recognize context as a mitigating factor within this part of the analysis for indecency. *Indecency Policy Statement* at 8002. A recent example is the FCC order in response to complaints related to the ABC broadcast of the film “Saving Private Ryan.” *In Re: Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004 of the ABC Television Network’s Presentation of the Film*

“Saving Private Ryan,” 20 F.C.C.R. 4507 (2005)(hereinafter *Saving Private Ryan*). The content in controversy included dialogue containing the words “fuck” (and variations thereof), “shit” (and variations thereof), “bastard,” “hell,” “ass,” “asshole,” “son of a bitch,” “crap,” “prick,” and “pee.” *Id.* at 4512. The disputed content satisfied the first prong of the Commission indecency definition because the language was of either a sexual or excretory nature. However, the Commission held that the disputed content was not patently offensive because it was contextually appropriate. The Commission reasoned:

The expletives uttered by these men as these events unfold realistically reflect the soldiers’ strong human reactions to, and often, revulsion at, those unspeakable conditions and the peril in which they find themselves. Thus, in context, the dialogue, including the complained-of material, is neither gratuitous nor in any way intended or used to pander, titillate, or shock. Indeed, it is integral to the film’s objective of conveying the horrors of war through the eyes of these soldiers, ordinary Americans placed in extraordinary situations.

*Id.* at 4512-13.

Similarly, context effectively mitigates the use of the word “shit” in “NYPD Blue,” which depicts the experiences of a group of New York City police officers as they carry out their extraordinary duties. New York City police officers face serious risks and grave dangers on a daily basis in the course of their often perilous service.

Context is especially significant in “NYPD Blue” because the show’s creators have taken deliberate steps to ensure the series depicts life for a New York City police officer as accurately as possible. The success of the series’ realistic portrayal of New York City police officers is perhaps best attested to in a survey of police officers conducted by Court TV and American Police Beat magazine, the publication most widely read by law enforcement officers in the nation. *Court TV Announces the Results of Its “Police Beat 2001” Poll*, BUSINESS WIRE, Dec. 17, 2001. Of the 1,000 police officers surveyed, 41% ranked “NYPD Blue” as the “most

accurate portrayal of police officers” (13% higher than all other choices) and 50% ranked “NYPD Blue’s” Andy Sipowicz as the most realistic character portrayal of a police detective (8% higher than all other choices). *Id.*

The strong language used by the police officers depicted on “NYPD Blue” was as contextually appropriate as the language of the soldiers depicted in “Saving Private Ryan.” The use of the word “bullshit” realistically reflects these police officers’ natural reactions to the extraordinary perils of their career. Even if the word met the first prong of the indecency analysis, it was contextually appropriate because it underscores the officers’ unique circumstances and is not used to pander, titillate, or shock. The disputed language is representative of the language police officers would use to react to and manage the dangers and struggles they encounter.

The use of the word “bullshit” on “NYPD Blue” is not only contextually justified, but also artistically defensible. The Commission’s opinion in the “Saving Private Ryan” order suggests that when putatively indecent expression is contextually appropriate, regulation that interferes with that expression jeopardizes the artistic integrity of the broadcast and cannot be justified. 20 F.C.C.R. at 4513. Since the use of the word “shit” and derivations in “NYPD Blue” are contextually appropriate, the show’s producers should be left to determine if these words enhance the artistic integrity of the program and whether deletions or modifications to the expression would significantly endanger the nature of the work. The purpose of incorporating strong language in the television program is to bolster the accuracy of the portrayal and thereby enhance the viewing experience. Just as the explicit language in “Saving Private Ryan” was essential to achieving the film’s descriptive and commemorative objectives, the expletives contained in “NYPD Blue” are vital to the program’s authentic depiction of New York City

police officers. Therefore, any modification of the show's language would surely diminish the program's power, realism and immediacy, and thus be deemed an unjustifiable interference with artistic objective.

In making indecency determinations, the nature of the audience is as relevant as the nature of the material. *See Pacifica*, 438 U.S. at 750 n.29 (stating the Commission should consider the fact that even primetime broadcast of some material would "not be likely to command the attention of many children who are both old enough to understand and young enough to be adversely affected" by a program). As the "Saving Private Ryan" opinion demonstrates, the Commission not only requires that the indecent material be contextually appropriate within a certain program, but also insists that the presentation of the broadcast itself be audience-appropriate.

Much of the material typically presented in episodes of "NYPD Blue" may not be appropriate for children, a fact well known to parents familiar with the program's mature subject matter, often violent content, and strong language. "NYPD Blue" aired on ABC for twelve years, making it one of the longest-running and most critically acclaimed police dramas in television history. Additionally, the ABC-affiliates under investigation broadcast the program between 9:00 p.m. and 10:00 p.m., an hour during which most young children are less likely to be viewing the program.

The *Omnibus Order* asserts that the "S-Word" is "one of the most vulgar, graphic and explicit descriptions of excretory activity in the English language" and that its use "invariably invokes a coarse excretory image." The Commission concludes that the broadcast of the "S-Word," "*under the circumstances presented here*, is vulgar, graphic, and explicit." *Omnibus Order* at ¶ 128 (emphasis added). The order refers to the circumstances of the broadcast, yet it

does not undertake any contextual analysis. The position espoused by the Commission suggests that all uses of the word “shit,” regardless of context, invariably invoke an excretory image and there is therefore no need to analyze context. This presumption that the word “shit” is patently offensive in all contexts amounts to an effective elimination of the contextual analysis.

## II. THE COMMISSION’S NEW DEFINITION OF PROFANITY CONFLICTS WITH PRECEDENT AND THREATENS BROADCASTERS’ FIRST AMENDMENT FREEDOMS.

The Commission’s declaration in *Golden Globes II* that it would apply a “nuisance rationale” to classify some words as “presumptively profane,” was a marked departure from precedent. 19 F.C.C.R. at 4981. The adoption of such a vague standard for determining whether the use of a particular word is profane threatens the First Amendment rights of broadcasters and those involved in the creation of material intended for broadcast. The Commission’s ruling in the *NYPD Blue* order is an example of the potential for arbitrary application of the new standard. The Commission found that the use of the word “bullshit” on “NYPD Blue” was profane based only on a declaration that “the ‘S-Word’ is a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane.” *Omnibus Order* at ¶133.

### A. The Commission’s current interpretation of “profane” is an unwarranted departure from precedent.

Despite the fact that 18 U.S.C. § 1464 has been the subject of several court cases and FCC decisions since its enactment in 1927, the Commission in *Golden Globes II* cited only dicta from one single case and two modern dictionary definitions to support its decision to re-interpret “profane” as referring to any “vulgar” and “coarse” language. 19 F.C.C.R. at 4981 n.34 (citing Black’s Law Dictionary 1210 (6th ed. 1990) and American Heritage College Dictionary 1112 (4th ed. 2002)) and n.35 (citing *Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972)). In

doing so, the Commission deviated substantially from the interpretation of “profane” followed by the courts for over a century and by the Commission itself as recently as 2003.

Legal actions against the use of profane language have consistently involved words “which imprecate divine vengeance or imply divine condemnation.” Thomas R. Trenkner, Annotation, *Validity and Construction of Statutes or Ordinances Prohibiting Profanity or Profane Swearing or Cursing*, 5 A.L.R.4th 956 (1981). See, e.g., *Diehl v. State*, 451 A.2d 115 (Md. 1982), (holding that saying “Fuck you” to a police officer did not violate a statute proscribing profane language because the phrase “neither invoked divine power nor was it specifically irreverent toward ‘God or holy things.’”), *cert. denied* 460 U.S. 1098 (1983); *Foster v. State*, 25 S.E. 613 (Ga. 1896) (“[I]f the word ‘damned’ is used in a sense ‘importing an imprecation of future divine vengeance,’ it is profane, whether the name of the Deity be called or not.” (internal citations omitted)); *State v. Moser*, 33 Ark. 140 (1878) (stating that Defendant’s exclamation, “[G]o to hell, God damn you!” was “certainly profane”); *Holcomb v. Cornish*, 8 Conn. 375 (1831) (discussing statements such as “Damn you to hell” and “You are a goddamned old rascal,” and stating that any words importing an imprecation of future divine vengeance may constitute profane cursing).

Section 1464 originated as part of § 29 of the Radio Act of 1927, which was re-enacted as § 326 of the Communications Act of 1934. See *FCC v. Pacifica Foundation*, 438 U.S. 726, 780, n. 6 (U.S. 1978). The earliest case to discuss the profanity provision as part of the Radio Act of 1927 came in 1931. In *Duncan v. United States*, 48 F.2d 128 (9th Cir. 1931), the defendant was accused of knowingly, unlawfully, willfully, and feloniously uttering the following allegedly profane language by means of radio communication:

“You’re the infernal gang that put in and turned the dairy industry over to that damn scoundrel. \* \* \* “ (name omitted.) “You’re a fine example, by God, for the

children of this school district.” “He will do anything, there's nothing in God Almighty's world that \* \* \* wouldn't do.” And, “Wait until I get through some of the trouble you're getting an ex-convict to make for me and I'll put on the mantle of the Lord and call down the curse of God on you, that's what I'll do. You infamous harlot, you arch criminal, the people should tar and feather you and yours,” etc.

*Id.* at 133. In determining that these statements constituted profane language, the court stated that the area is usually examined as a branch of common-law blasphemy. The court also noted that the Century Dictionary in 1931 defined “profane” as “[i]rreverent toward God or holy things; speaking or spoken, acting or acted, in manifest or implied contempt of sacred things; blasphemous: as, profane language; profane swearing.” *Id.* After reviewing several cases in which state courts had defined profane language as language that imports “imprecation of divine vengeance” or implies “divine condemnation,” the court held that “the defendant having referred to an individual as ‘damned,’ having used the expression ‘By God’ irreverently, and having announced his intention to call down the curse of God” was properly convicted for using profane language under § 1464. *Id.* at 133-34.

Thirty years later the Ninth Circuit, citing Establishment Clause concerns, backed away from a view of § 1464 that punishes use of merely irreligious language regardless of context, but the Court reiterated that profanity must involve an element of blasphemy or divine imprecation to distinguish it from merely offensive language. *Gagliardo v. United States*, 366 F.2d 720, 725 (9th Cir. 1966). In *Gagliardo*, the plaintiff was charged with violating § 1464 by using profane and obscene language during the course of a heated argument over citizens’ band radio. The court held that although the record showed Mr. Gagliardo had used words that did not constitute “parlor language,” the “only words attributed to appellant which could even remotely be considered as being ‘profane’ were ‘God damn it.’” 366 F.2d at 725. The court held that this phrase, because it was “uttered in anger,” was not sufficient for conviction. *Id.* The court also

discussed an obscenity charge and held that Gagliardo's "language as a whole can not be viewed as appealing to the prurient or calculated to arouse the animal passions, but rather was made during a moment of anger." *Id.* The court seemed to say that there must also be a particular meaning intended by the speaker, either an "appeal to the prurient interest" for a finding of obscenity or some form of blasphemy for a finding of profanity, and that expressions uttered in anger did not have the requisite intent.

As recently as 2003, the Commission was still interpreting "profane" consistently with the weight of precedent. The Commission's decision in *In re Raycom America, Inc.*, 18 F.C.C.R. 4186 (2003) invokes a rationale opposite of the one introduced in *Golden Globes II*. In *Raycom*, the Commission ruled that mere offensiveness, though arguably a necessary condition, was not a sufficient one for a finding of profanity. *Id.* The Commission reasoned that "[t]he courts have held that material, such as the phrase 'god damn it', uttered in anger, while offensive to some, is not legally profane," and ruled that the broadcast of an episode of "The West Wing" in which one character addresses God as "you son of a bitch" was not profane for purposes of § 1464. *Id.* In addition to *Gagliardo*, the Commission cited its own 1971 decision *In re Complaint by Warren B. Appleton*, 28 F.C.C.2d 36 (B'cast Bur. 1971), in which it argued that "[t]he courts have held in many cases that material which may be offensive to some persons is not legally profane." These decisions demonstrate the departure from precedent embodied in the Commission's new approach to classifying language as profane announced in *Golden Globes II*.

Although the Commission's own decisions on the subject are relatively few, the precedent from the courts is overwhelming. Over a century of precedent has made it clear that profanity is limited to the context of blasphemy.

As the Court held in *Pacifica*, “The words ‘obscene, indecent, or profane’ are written in the disjunctive, implying that each has a separate meaning.” 438 U.S. at 739-40. The Commission’s interpretation of the word “bullshit” as an “excretory term” in the *Omnibus Order*, the manner in which the Commission applied the regulation in *Golden Globes II*, and the series of rulings accompanying the findings regarding “NYPD Blue” effectively stripped “profane” of its religious connotation and created a category of speech practically indistinguishable from indecency. This interpretation ignores the plain meaning of the statute the Commission is charged with enforcing.

B. The use of the word “bullshit” employed in the various episodes of “NYPD Blue” is not profane under an interpretation based on precedent.

Using the Commission’s prior standard for profanity that was based on substantial precedent, it is clear that the use of the word “bullshit” in the various “NYPD Blue” episodes examined by the Commission is not profane. The Commission’s pre-*Golden Globes II* rulings and court decisions such as *Gagliardo* establish that language considered “profane” under § 1464 must be both (1) blasphemous and (2) not “uttered in anger.” *Gagliardo*, 366 F.2d at 725. Examining the uses of the word “bullshit” noted by the Commission, *Omnibus Order* at ¶125, n.187, it is apparent from their context that neither prong is met.

As an illustration of this point, in the episode that aired on January 14, 2003, Detective Sipowicz responded to his partner’s arrest by Internal Affairs by saying, “All right, this is bullshit!” *Id.* Unlike the episode of “The West Wing” at issue in *Raycom*, Sipowicz is not referring to a divine entity, so the language at issue fails the first part of the profanity test. Additionally, Sipowicz is speaking in anger as he expresses his feelings upon learning his partner has been arrested. Thus the language fails the second part of the profanity test as well. The

other examples cited by the Commission similarly fail to meet the established standard for profanity. *See Omnibus Order* at ¶125, n.187.

C. The vague standard established by the Commission’s interpretation of “profane” threatens broadcasters’ First Amendment freedoms.

Whether or not the use of the word “bullshit” on “NYPD Blue” merited a finding of profanity, the Commission’s new interpretation of § 1464 is so broad as to be constitutionally defective. In *NAACP v. Button*, the Supreme Court wrote that “[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” 371 U.S. 415, 433 (1963). According to the Supreme Court in *Gooding v. Wilson*, a “statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression.” 405 U.S. 518, 522 (1972). (That decision also established the right of plaintiffs to seek facial review of regulations affecting First Amendment values even where the regulation may not offend those values “as applied.” *See id.* at 521.)

After the Supreme Court dismissed the defendant’s conviction in *Gooding* under an overbroad Georgia “breach of peace” statute, the Court remanded to state courts a trio of cases involving convictions under statutes banning the use of profanity in public. On remand, the Supreme Court of New Jersey held that the attorney general’s proposed interpretation of “profane” as “so grossly offensive to members of the public so as to amount to a nuisance’...would present factual uncertainties and obscurities of meaning and would not be at all likely to satisfy *Cohen* and *Gooding*.” *State v. Rosenfeld* 303 A.2d 889, 894 (N.J. 1974) (citing *Cohen v. California*, 403 U.S. 15 (1971), and *Gooding*, *supra*). That interpretation of “profane” was similar to the one now used by the Commission. While the move from the public

square to the broadcast airwaves may justify tighter government controls on speech, a standard producing “factual uncertainties and obscurities of meaning” is nevertheless problematic.

The Supreme Court has also held impermissibly broad restrictions on speech based on its tendency to provoke discomfort or annoyance:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute,...is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

*Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (internal citations omitted). In *Terminiello* the Court struck down a law outlawing speech that ““stirred people to anger, invited public dispute, or brought about a condition of unrest.”” Yet the Commission seeks to regulate “profanity” because it is “so grossly offensive to members of the public who actually hear it as to amount to a nuisance.” Where courts have permitted regulation of speech in terms of “nuisance,” they have interpreted the term to refer to language that creates a condition threatening imminent breach of peace, i.e. “fighting words.” Where the regulated speech did not refer to language creating a threatening condition, courts have routinely followed *Terminiello*, *Cohen*, and *Gooding* in holding that the statutes threatened to chill protected speech.

The Supreme Court has established that overly broad, content-based speech regulation “raises special First Amendment concerns because of its obvious chilling effect on free speech.” *Reno v. ACLU*, 521 U.S. 844, 872 (1997). The subject matter prong of the indecency test is meant to ensure that the language at issue is not speech protected by the First Amendment.

However, when the regulation is addressed toward all putatively offensive language and does not take into account any subject matter limitation, the reasoning from *Cohen* re-asserts itself:

[W]hile the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual. Additionally, we cannot overlook the fact...that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech [sic] has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.

403 U.S. at 26. While broadcast speech may not be as well protected as ordinary public speech, the chilling effect of overbroad regulation remains a valid concern.

Overbroad statutory interpretation is constitutionally defective not only because it produces a chilling effect but also because it gives too much discretion to administrators. The conviction of stations affiliated with The ABC Television Network for airing “NYPD Blue” under the Commission’s interpretation of § 1464 demonstrates the Commission’s ability to sweep in a great variety of conduct under a general and indefinite characterization. *See Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (discussing how an overbroad statute is analogous to “sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.”) Comparing the Commission’s ruling here with its analytic contortions in *Saving Private Ryan* suggests that whether a broadcast is deemed profane will depend more on the individual commissioners than on the plain meaning of the statute.

The Commission’s new interpretation of “profane” is impermissibly vague as well as overbroad. Section 1464 prohibits the broadcast of three categories of speech that courts have

held to be distinct and that, until *Golden Globes II*, were easily distinguishable by reference to the meaning of the language to which they refer: obscene, indecent and profane. The Commission's new profanity analysis corrodes this established framework by transforming "profanity" into an indefinite category under which a wide spectrum of language may be placed. The Commission has effectively dispensed with any subject matter or meaning requirement and embraces instead a vague and arbitrary standard based on a word's supposed inherent offensiveness.

The Court in *Grayned v. Rockford* listed three principle reasons that the due process and free speech guarantees of the Constitution require specificity in laws and their authoritative interpretations:

First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.

408 U.S. 104, 109 (internal citations omitted). The Court's fears are clearly relevant to the situation at hand. In the wake of the *Golden Globes II* decision, many broadcasters chose not to air "Saving Private Ryan" for fear of running afoul of the new standards. Lisa de Moraes, *Where Aired, 'Private Ryan' Draws a Crowd*, THE WASH. POST, Nov. 13, 2004. The Commission has not issued reliable guidance as to what sort of expression it will allow. It seems likely that broadcasters and content creators will continue to censor their protected speech as a result.

Respectfully submitted,

The Thomas Jefferson Center for the Protection of  
Free Expression

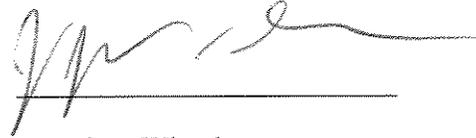
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