

# 08-0841-ag(L)

08-1424-ag(Con), 08-1781-ag(Con), 08-1966-ag(Con)

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ABC Inc., KTRK Television, Inc., WLS Television, Inc, Citadel Communications, LLC, WKRN, G.P., Young Broadcasting of Green Bay, Inc., WKOW Television Inc., WSIL-TV, Inc., ABC Television Affiliates Association, Cedar Rapids Television Company, Centex Television Limited Partnership, Channel 12 of Beaumont Incorporated, Duhamel Broadcasting Enterprises, Gray Television License, Incorporated, KATC Communications, Incorporated, KATV LLC, KDNL Licensee LLC, KETV Hearst-Argyle Television Incorporated, KLTV/KTRE License Subsidiary LLC, KSTP-TV LLC, KSWO Television Company Incorporated, KTBS Incorporated, KTUL LLC, KVUE Television Incorporated, McGraw-Hill Broadcasting Company Incorporated, Media General Communications Holdings LLC, Mission Broadcasting Incorporated, Mississippi Broadcasting Partners, New York Times Management Services, Nexstar Broadcasting Incorporated, NPG of Texas, L.P., Ohio/Oklahoma Hearst-Argyle Television Inc., Piedmont Television of Huntsville License LLC, Piedmont Television of Springfield License LLC, Pollack/Belz Communication Company, Inc., Post-Newsweek Stations San Antonio Inc., Scripps Howard Broadcasting Co., Southern Broadcasting Inc., Tennessee Broadcasting Partners, Tribune Television New Orleans Inc., WAPT Hearst-Argyle Television Inc., WDIO-TV LLC, WEAR Licensee LLC, WFAA-TV Inc., WISN Hearst-Argyle Television Inc.,  
Petitioners,

v.

Federal Communications Commission and United States Of America  
Respondents,

Fox Television Stations, Inc., NBC Universal, Inc., NBC Telemundo License Co., CBS Broadcasting, Inc.,  
Intervenors,

Center for Creative Voices in Media, Future of Music Coalition,  
Amicus Curiae.

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ON PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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SUPPLEMENTAL BRIEF FOR THE FCC AND THE UNITED STATES

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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08-0841-AG(L), 08-1424-AG(CON), 08-1966-AG(CON)

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ABC, INC, ET AL.,

Petitioners,

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FEDERAL COMMUNICATIONS COMMISSION AND  
UNITED STATES OF AMERICA,

Respondents.

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ON PETITIONS FOR REVIEW OF AN ORDER OF THE  
FEDERAL COMMUNICATIONS COMMISSION

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SUPPLEMENTAL BRIEF FOR THE FCC AND THE UNITED STATES

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The Federal Communications Commission and the United States respectfully submit this supplemental brief in response to this Court's order of July 22, 2010, directing the parties to address the impact of *Fox Television Stations, Inc. v. FCC*, No. 06-1760-ag(L), \_\_\_ F.3d \_\_\_, 2010 WL 2736937 (2d Cir. July 13, 2010), on the issues in this appeal.

**BACKGROUND**

This case arises out of a forfeiture order issued by the Commission imposing a monetary sanction on ABC and its affiliates (collectively, ABC) for violating

federal statutory and regulatory restrictions on the broadcast of indecent material. *See Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program “NYPD Blue,”* 23 FCC Rcd 3147 (2008) (*Forfeiture Order*). *See also* 18 U.S.C. § 1464; 47 C.F.R. § 73.3999(b). The broadcast in question was an episode of the ABC drama *NYPD Blue*, the opening moments of which featured a shower scene containing images of an adult actress’s naked buttocks. To determine whether the nude scene violated indecency restrictions, the Commission applied its longstanding policy of examining the overall context of the broadcast in which the nudity appeared. 23 FCC Rcd at 3152 ¶ 12. Applying that contextual analysis to the specific facts of this case, the Commission found that ABC’s broadcast of this *NYPD Blue* episode outside of the 10 p.m. to 6 a.m. safe harbor for indecent broadcasts, *see* 47 C.F.R. § 73.3999(b), was actionably indecent. 23 FCC Rcd at 3152-55 ¶¶ 12-18.

ABC sought review of the *Forfeiture Order* in this Court. ABC argued, among other things, that the Commission’s indecency policies were unconstitutionally vague. ABC Br. 43-50. On February 5, 2009, this Court (Wesley, Livingston, JJ., Restani, J., by designation) heard oral argument in the case.

On July 13, 2010, another panel of this Court (Leval, Pooler, Hall, JJ.) issued its decision on remand from the Supreme Court in *Fox*. At issue was the

Commission's determination that the 2002 and 2003 broadcasts of the Billboard Music Awards Show on the Fox television network contained indecent material because variants of the F-Word and the S-Word were gratuitously uttered during the broadcasts. The *Fox* panel reversed the Commission's indecency determination. Rather than focusing on the particular facts before it, the panel in *Fox* broadly concluded that the Commission's general approach to indecency enforcement "violates the First Amendment because it is unconstitutionally vague." Slip op. 4, 2010 WL 2736937, at \*1. Based on that conclusion, the panel "str[uck] down the FCC's indecency policy." *Id.* at 32, 2010 WL 2736937, at \*16.

### **DISCUSSION**

Unlike *Fox*, which involved the gratuitous utterances of verbal expletives during live broadcasts of nationally televised awards shows, this case involves the scripted airing of images of adult nudity. The panel's opinion in *Fox* does not turn on such distinctions, however. Rather, the panel in *Fox* held that the Commission's contextual approach to applying the federal indecency statute is inconsistent with constitutional requirements, and accordingly invalidated the Commission's indecency policy in its entirety. Because the contextual framework the Commission applied in *Fox* is the same one it applied in this case, the *Fox* decision appears to suggest that the Commission's indecency policy is unconstitutionally vague even as applied to the very different facts of this case.

A petition for rehearing and rehearing *en banc* in *Fox* would be due no later than August 27, 2010. Because of the substantial adverse consequences of the *Fox* panel's decision for federal broadcast indecency enforcement and the decision's inconsistency with precedent of the Supreme Court, this Court, and other courts of appeals, the interested agencies of the Federal Government are considering whether to file a petition. And because of the significance of the *Fox* panel decision for this case, it would be appropriate to defer issuing a merits decision in this case until the Court has had an opportunity to resolve any rehearing petition filed in *Fox*. If rehearing is granted, that action will have obvious implications for this case. If rehearing is denied, the Court would then be positioned to dispose of this case in light of the recent decision in *Fox*.

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August 23, 2010

08-0841-ag

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**ABC, Inc., et al., Petitioners**

**v.**

**Federal Communications Commission and United States of America,  
Respondents.**

**CERTIFICATE OF SERVICE**

I, Jacob M. Lewis, hereby certify that on August 23, 2010, I filed the foregoing Supplemental Brief via overnight delivery service and an electronic copy in PDF format with the Clerk of the Court for the United States Court of Appeals for the Second Circuit.

I also hereby certify that on this date true and correct copies of the foregoing document were served via first class United States Mail on the persons at the addresses below, and that an electronic copy of this document in PDF format was served on these persons via electronic mail.

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