IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

06-3575

CBS CORPORATION, CBS BROADCASTING INC., CBS TELEVISION STATIONS INC., CBS STATIONS GROUP OF TEXAS L.P., AND KUTV HOLDINGS, INC.

Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

Respondents

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES

STATEMENT OF JURISDICTION

The Federal Communications Commission had jurisdiction under 47 U.S.C. § 503(b). CBS filed a timely petition for review, and this Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATEMENT OF THE ISSUES

Whether the Commission properly imposed a forfeiture on CBS after concluding that its broadcast of Janet Jackson's exposed breast during the 2004

Super Bowl halftime show violated the federal statutory and regulatory prohibitions against broadcast indecency.

STATEMENT OF THE CASE

During CBS's broadcast of the 2004 Super Bowl halftime show, Justin Timberlake ripped off part of the bustier of fellow performer Janet Jackson, exposing her breast to tens of millions of television viewers. The Commission concluded that the broadcast violated federal statutory and regulatory prohibitions against the broadcast of indecent material, and it imposed a $550,000 forfeiture. CBS paid the forfeiture under protest and petitioned for review.

STATEMENT OF RELATED CASES

Respondents are unaware of any case in this Court or any other court or agency that involves the decisions under review here. The U.S. Court of Appeals for the Second Circuit has before it network challenges to FCC indecency determinations concerning two different broadcasts. *See Fox Television Stations, Inc. v. FCC*, No. 06-1760. Oral argument in that case was held on December 20, 2006.

STATEMENT OF FACTS

I. The Communications Act and Regulation of Broadcast Indecency

The Communications Act of 1934 is designed "to maintain the control of the United States over all the channels of radio transmission" by "provid[ing] for the use of such channels" under licenses that are granted "for limited periods of time," 47 U.S.C. § 301, and that are issued and renewed only upon a finding by the FCC that "the public interest, convenience, and necessity" will thereby be served. 47 U.S.C. §§ 309(a), (k)(1)(A). A broadcast licensee is "granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (quotation marks omitted). For this reason, a broadcaster "must be deemed to be a 'trustee' for the public." *McIntire v. William Penn Broad. Co.*, 151 F.2d 597, 599 (3d Cir. 1945).

Among a licensee's public-interest obligations is its duty not to transmit indecent material during times of the day when children are likely to be in the audience. *See Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 4 FCC Rcd 8358 ¶ 2 (1989). To enforce this obligation, the Communications Act of 1934 included a specific prohibition on the broadcast of "any obscene, indecent, or profane language." Pub. L. No. 73-416, § 326, 48 Stat. 1091, codified at 18 U.S.C. § 1464.

A. *Pacifica*

In *FCC v. Pacifica Foundation*, the Supreme Court upheld the constitutionality of the Commission's interpretation and enforcement of the prohibition against broadcast indecency. 438 U.S. 726 (1978). That case involved a radio station's afternoon broadcast of a monologue by the comedian George Carlin containing a series of highly vulgar words. *See id.* at 729-30. The Commission had concluded that the program violated Section 1464: the agency explained that while not obscene, the broadcast was indecent in that it "'describe[d], in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.'" *Citizen's Complaint Against Pacifica Found. Station WBAI (FM)*, 56 FCC 2d 94, 98 (1975).

The Supreme Court held that regulating indecent broadcasting was consistent with the First Amendment, noting that "each medium of expression presents special First Amendment problems" and that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica,* 438 U.S. at 748. The Court concluded that the government's interest in safeguarding "the well-being of its youth and in supporting parents' claim to authority in their own household," combined with the

"ease with which children may obtain access to broadcast material," justified the regulation of indecent broadcasts. *See id.* at 749-50 (quotation marks omitted).

B. Subsequent Developments

For a number of years after *Pacifica*, the Commission limited the exercise of its authority to regulate indecent broadcasts to the seven words used in the Carlin monologue. *See New Indecency Enforcement Standards to Be Applied to All Broadcast & Amateur Radio Licensees*, 2 FCC Rcd 2726, 2726 (1987) ("*New Indecency Enforcement Standards*"). In a series of orders released in 1987, however, the Commission found that this limited enforcement policy was "unduly narrow." *Infinity Broad. Corp.*, 3 FCC Rcd 930 ¶ 5 (1987) ("*Infinity Reconsideration Order*"). The Commission explained that the exclusive focus "on specific words . . . made neither legal nor policy sense," since it meant that "material that portrayed sexual or excretory activities or organs in as patently offensive a manner as the earlier Carlin monologue – and, consequently, of concern with respect to its exposure to children – would have been permissible to broadcast simply because it avoided certain words." *Id*. The Commission consequently chose to abandon its exclusive focus on the seven words and to apply instead the generic definition of indecency upheld in *Pacifica*, *i.e.*, "language or material that depicts or describes, in terms patently offensive as measured by

contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *New Indecency Enforcement Standards*, 2 FCC Rcd at 2726.

The D.C. Circuit upheld the Commission's decision to move beyond its narrow, post-*Pacifica* enforcement policies. *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1338 (D.C. Cir. 1988) (R.B. Ginsburg, J.) ("*ACT I*"). "Short of the thesis that *only* the seven dirty words are properly designated indecent . . . some more expansive definition must be attempted," the court concluded, and "[n]o reasonable formulation tighter than the one the Commission has announced has been suggested." *Id.*

In its 1987 orders, the Commission also reiterated its prior suggestion that it would permit indecent broadcasts at those hours of the night "when it is reasonable to expect that it is late enough to ensure that the risk of children in the audience is minimized." *See Infinity Reconsideration Order*, 3 FCC Rcd at 937 ¶ 27 n.47. Congress subsequently directed the Commission to promulgate regulations "to prohibit the broadcast[] of indecent programming . . . between 6 a.m. and 10 p.m." by any public radio or television station "that goes off the air at or before 12 midnight," and "between 6 a.m. and 12 midnight" for all other radio and television stations. *See* Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16, 106 Stat. 949, 953 (1992), 47 U.S.C. § 303 note.

Sitting en banc to review the resulting regulations, the D.C. Circuit upheld the Commission's power to regulate broadcast indecency. *See Action for Children's Television v. FCC*, 58 F.3d 654, 659-67 (D.C. Cir. 1995) ("*ACT III*"). Had it not been for Congress's differential treatment between public stations that go off the air at or before midnight and other broadcasters, the court would also have affirmed the midnight safe harbor. *See id.* at 664-67. But because Congress did not explain the basis for that distinction, the court held the narrower safe harbor could not be sustained. *See id.* at 669. The court therefore directed the Commission to "limit its ban on the broadcasting of indecent programs to the period from 6:00 a.m. to 10:00 p.m." *Id*. at 669-70. The Commission accordingly promulgated its current regulation on broadcast indecency, which forbids any "licensee of a radio or television broadcast station" to broadcast "any material which is indecent" during the hours "between 6 a.m. and 10 p.m." 47 C.F.R. § 73.3999(b).

C. 2001 *Industry Guidance*

Several years after the *ACT* litigation concluded, the Commission issued a policy statement "to provide guidance to the broadcast industry regarding [its] case law interpreting 18 U.S.C. § 1464 and [its] enforcement policies with respect to broadcast indecency." *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast*

Indecency, 16 FCC Rcd 7999, 7999 ¶ 1 (2001) ("*Industry Guidance*"). The statement laid out in detail the Commission's analytical approach and emphasized that the agency's indecency decisions rested on "two fundamental determinations." *Id.* at 8002 ¶ 7. First, "the material alleged to be indecent must fall within the subject matter scope of our indecency definition – that is, the material must describe or depict sexual or excretory organs or activities." *Id.* Second, "the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium." *Id.* at 8002 ¶ 8.

The Commission explained that the inquiry into whether material is "patently offensive" requires consideration of its "full context" and is "highly fact-specific." *Id.* at 8002-03 ¶ 9. Nonetheless, it identified three "principal factors" that were "significant" to the agency's determination whether material is patently offensive:

> (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; (3) *whether the material appears to pander or is used to titillate,* or *whether the material appears to have been presented for its shock value.*

Id. at 8003 ¶ 10.

After listing these factors, the Commission stressed that "[e]ach indecency case presents its own particular mix of these, and possibly other, factors, which must be balanced to ultimately determine whether the material is patently offensive

and therefore indecent." *Id.* For example, it noted that "where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency," but cautioned that "even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness." *Id.* at 8008-09 ¶¶ 17, 19.

II. Proceedings Below

A. The Super Bowl XXXVIII Halftime Show

The 2004 Super Bowl had an average viewership of 89.8 million – making it not only the highest rated Super Bowl up to that time but also the highest rated show during the 2003-04 television season, both generally and among children of all age groups. *See Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 21 FCC Rcd 2760, 2775 ¶ 28 n.97 (2006) ("*Forfeiture Order*") (J.A. 0006); *Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 21 FCC Rcd 6653, 6666 ¶ 32 (2006) ("*Reconsideration Order*") (J.A. 0040). The halftime show that year was produced by MTV Networks ("MTV"), a subsidiary of Viacom, Inc., and was carried live both by independently owned affiliates of the CBS Television Network and stations owned by CBS Broadcasting, another Viacom subsidiary. It aired at

approximately 8:30 p.m. in the Eastern Time Zone (5:30 p.m. on the West Coast) and carried no warnings that it might contain content unsuitable for children.

The 15-minute halftime show included performances with numerous sexual references. The show began with Janet Jackson's performance of the song, "All for You," which opened as follows:

> All my girls at the party
> Look at that body
> Shakin' that thing
> Like I never did see
> Got a nice package alright
> Guess I'm gonna have to ride it tonight.

Id. ¶ 4.

Jackson repeated these lyrics – which use slang terms for a man's sexual organs ("package") and sexual intercourse ("ride it") – two additional times during the song. *See id.* Two other performers, P. Diddy and Nelly, followed with a song medley that also included sexual references. Among the lyrics in the Nelly song "Hot in Herre" were: "I was like good gracious ass bodacious . . . I'm waiting for the right time to shoot my steam (you know)" and "[i]t's gettin' hot in here (so hot), so take off all your clothes (I am gettin' so hot)." *Id.* ¶ 4 n.11. During this medley, Nelly grabbed his crotch several times. *See id.* ¶ 4.

As the halftime show's finale, Jackson reappeared to perform "Rhythm Nation" and "Rock Your Body." During the latter song, singer Justin Timberlake

joined Jackson on stage and followed her around while periodically grabbing her, rubbing against her in a manner suggestive of sexual activity, and slapping her buttocks. *See id.*; *id.* ¶ 13. As he did this, he asked Jackson to allow him to "rock your body" and "just let me rock you 'til the break of day." *Id.* ¶ 4.

At the culminating moment of both the song and the halftime show, Timberlake sang the lyric, "gonna have you naked by the end of this song" and simultaneously pulled off the right portion of Jackson's bustier, clearly exposing her breast to the television audience. *See id.*

An hour after the halftime show, MTV's website featured an item promoting the planned replay of the halftime show. The item was titled "Janet Gets Nasty." *Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 19230, 19239 ¶ 20 (2004) ("*NAL*") (J.A. 510). An hour later, the item was updated to include the following language:

> Jaws across the country hit the carpet at exactly the same time. You know what we're talking about. . . Janet Jackson, Justin Timberlake and a kinky finale that rocked the Super Bowl to its core. P. Diddy, Kid Rock, & Nelly rounded out the halftime show in the midst of the greatest game on earth. MTV was Super Bowl central, so armchair quarterbacks, fair weather fanatics and fans of Janet Jackson and her pasties were definitely in the right place.

Id.

B. Commission Proceedings

The Commission received "an unprecedented number" of complaints about the nudity broadcast during the halftime show. *NAL* ¶ 2. Many of those complaints were from parents who had assumed that the Super Bowl and its halftime show would be appropriate to watch with their children:

- "You can't even watch football without being exposed to behavior that teaches nudity/sex are all about taking advantage of someone and can be broadcast [to] millions. My five and seven year old were old enough to understand the humiliation of ripping her clothes off and the forum was ridiculously inappropriate." (J.A. 694).
- "My family including my children (ages 12, 10, 7) were watching the Super Bowl half-time show when Janet Jackson and Justin Timberlake revealed one of Janet's breasts. This is unacceptable behavior for this time of day and this type of forum. This display caused me to have to do some unwelcome explaining to my kids." (J.A. 691).
- "My [seven-year-old] daughter was so embarrassed that she could not even speak out loud. She whispered, Oh my goodness, Mommy, did you see that?" (J.A. 770).
- "Have you tried to explain to a child or adolescent why it is okay to rip off anyone's clothes, male or female?" (J.A. 771).

The Commission issued a letter of inquiry, asking CBS to provide a tape of the broadcast and information about its production. In the meantime CBS issued a statement that expressed "deep[] regret[]" for the incident, emphasized that "[t]he moment did not conform to CBS broadcast standards," and "apologize[d] to anyone who was offended." J.A. 101. And Viacom's president and chief operating officer told a congressional committee that "everyone at CBS and everyone at MTV was shocked and appalled . . . by what transpired" and that the material "went far beyond what is acceptable standards for our broadcast network." *Hearings Before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce on H.R. 3717*, Serial No. 108-68 (Feb. 11, 2004) at 37 (statement of Mel Karmazin) ("*Hearings*").

After considering CBS's written submissions in response to the letter of inquiry, the Commission issued a Notice of Apparent Liability ("NAL") regarding the halftime show, concluding that CBS had apparently violated the statutory and regulatory restrictions on broadcast indecency, and proposing a forfeiture of $550,000. *See NAL* ¶ 24; 47 U.S.C. § 503(b).

(1) Forfeiture Order

After considering CBS's response to the NAL, the Commission reaffirmed its tentative conclusions. As an initial matter, the Commission found that the material fell within the scope of its indecency definition because the broadcast of

"an exposed female breast" depicted a sexual organ. *Forfeiture Order* ¶ 9. Next, applying its three-factor contextual analysis, the Commission found that the material was patently offensive as measured by contemporary community standards for the broadcast medium. *See id.* ¶¶ 10-14.

The Commission first concluded that the material broadcast was graphic and explicit. *See id.* ¶ 11. The image of Jackson's "nude breast [was] clear and recognizable to the average viewer." *Id.* The Commission explained that the explicitness of the image was reinforced by the presence of Jackson and Timberlake (the show's headline performers) in the center of the screen and by the fact that Timberlake's dramatic ripping off of Jackson's bustier drew the viewer's attention to what was exposed. *See id.*

The Commission also concluded that the broadcast of Jackson's exposed breast was shocking and pandering. It noted that the exposure of Jackson's breast occurred just as Timberlake sang "gonna have you naked by the end of this song" and after "repeated references to sexual activities" and sexually suggestive choreography. *Id.* ¶ 13 (footnote omitted). The Commission observed that the display was particularly "shocking to the viewing audience" because it occurred "during a prime time broadcast of a sporting event that was marketed as family entertainment and contained no warning that it would include nudity." *Id.*

The Commission acknowledged that the image of Jackson's breast was displayed only briefly. *See id.* ¶ 12. Nonetheless, the Commission noted that it had long held that "'even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness.'" *Id.* (quoting *Indecency Policy Statement*, 16 FCC Rcd at 8010 ¶ 19). In this case, the Commission determined, the nudity's "brevity" was outweighed by its explicitness and its titillating nature. *Id.* ¶ 12.

The Commission also determined that the violation was "willful" and could therefore provide a basis for the imposition of a monetary forfeiture. *Id.* ¶¶ 15-25; *see* 47 U.S.C. § 503(b)(1).

First, CBS "consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast." *Forfeiture Order* ¶ 15. CBS was "acutely aware of the risk of unscripted indecent material in this production, but failed to take adequate precautions that were available to it to prevent that risk from materializing." *Id.* ¶ 17. The Commission relied in particular on a news item posted on the MTV website four days before the Super Bowl, in which Jackson's choreographer was quoted as promising that the halftime show would deliver "some shocking moments." *Id.* ¶ 19. CBS chose not to investigate these statements or determine what "shock[]" Jackson's choreographer intended.

Second, the Commission found that Jackson's and Timberlake's intent was properly attributed to CBS because they were its agents. *See id.* ¶¶ 23-25. The latter finding was based on the great level of control CBS and MTV exercised over the halftime show and the performers' actions in it. *See id.* Moreover, "'the Commission has consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations.'" *Id.* ¶ 23 n.80 (quoting *Eure Family Ltd. P'ship*, 17 FCC Rcd 7042, 7044 ¶ 7 (Enf. Bur. 2002)).

Finally, the Commission rejected CBS's constitutional challenges to the forfeiture. *See id.* ¶¶ 30-35.

(2) Reconsideration Order

The Commission subsequently denied CBS's request for reconsideration. *See Reconsideration Order*, 21 FCC Rcd 6653. The Commission rejected CBS's contention that its indecency determination conflicted with findings in another Commission order released the same day as the *Forfeiture Order*. *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664 (2006) ("*Omnibus Order*"). As the Commission explained, in the *Omnibus Order*, the Commission found material not to be indecent where it was not the focus of the scene. *See Reconsideration Order* ¶ 9.

By contrast, at the culmination of the halftime show, "the exposure of Ms. Jackson's breast was the central focus of the scene in question." *Id.* ¶ 10.

The Commission again rejected CBS's contention that its violation of the broadcast indecency rules was not "willful." *See id.* ¶¶ 16-27. In particular, the Commission rejected CBS's claim that the intent of Jackson and Timberlake could not be attributed to it under the doctrine of respondeat superior because of their supposed status as "independent contractors." *Id.* ¶¶ 24-27. The Commission concluded that CBS remained liable because it "was obligated to ensure that its broadcast programming served the public interest, and was not free to confer this obligation on another by contract." *Id.* ¶ 27.[1]

SUMMARY OF ARGUMENT

As much of the country watched in disbelief, Justin Timberlake ripped off part of Janet Jackson's clothing during CBS's broadcast of the Super Bowl XXXVIII halftime show, exposing her breast to a nationwide television audience. The FCC reasonably concluded that, although brief, this display of nudity violated longstanding federal prohibitions on the broadcast of indecent material.

[1] The Commission also affirmed, as an equitable matter, its decision to impose a forfeiture against only CBS, noting that "CBS's culpability . . . was far greater than that of "independently owned CBS affiliates. *Reconsideration Order* ¶ 31.

The Commission also reasonably held that CBS's violation of its broadcast indecency rules was "willful" and therefore justified a forfeiture. The Commission properly imputed Jackson's and Timberlake's intent to the broadcaster because, as performers in the halftime show, they were subject to extensive CBS control and were therefore acting as CBS employees. And even if the two were deemed independent contractors, CBS had a nondelegable duty to comply with the statutes and regulations governing broadcast indecency, and it was therefore liable for the intentional acts of those it hired to perform on the air. The Commission also reasonably found that CBS was itself at fault because the network consciously and deliberately chose not to take reasonable precautions to prevent the broadcast of indecent material during the halftime show. CBS ignored numerous warning signs that the performers might behave inappropriately – including a public statement from Jackson's choreographer promising that the show would include "some shocking moments."

Finally, the forfeiture is consistent with the First Amendment. The government has a compelling interest in protecting children and the privacy of the home. Channeling broadcast indecency to the hours when children are less likely to be in the audience is a permissible means of balancing the rights of adults to receive indecent material with the interests of government (and parents) in protecting children from such material. While CBS argues that the Commission

must exercise restraint in indecency enforcement, nothing in the First Amendment requires the agency to take a hands-off approach to the broadcast of "brief" nudity on prime-time television. Finally, contrary to CBS's contention, the V-chip is not a constitutionally required alternative means of shielding children from broadcast indecency because it is generally ineffective, and, in any event, the halftime show had no V-chip rating.

STANDARD OF REVIEW

The Commission's interpretation of the federal broadcast indecency statutes is due deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under that standard, "[i]f a statute is ambiguous," the court is required "to accept the agency's construction" so long as it is "reasonable." *National Cable & Telecomm. Ass'n v. Brand X Internet Services, Inc*., 125 S. Ct. 2688, 2699 (2005).

To the extent CBS challenges the reasonableness of the FCC's actions, the Court must affirm unless the agency's decisions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this standard, the Commission's factual findings must be upheld so long as they are supported by substantial evidence. *See Sevoian v. Ashcroft*, 290 F.3d 166, 174 (3d Cir. 2002).

ARGUMENT

I. THE COMMISSION REASONABLY CONCLUDED THAT THE HALFTIME SHOW WAS INDECENT.

In finding the halftime show indecent, the Commission correctly applied its longstanding analytical framework for evaluating allegedly indecent broadcasts. As a threshold matter under that analysis, the material in question must fall within the indecency definition's subject-matter scope, meaning that it "'must describe or depict sexual or excretory organs or activities.'" *Forfeiture Order* ¶ 9 (quoting *Indecency Policy Statement*, 16 FCC Rcd at 8002 ¶ 7). Here, the Commission found (and CBS does not dispute) that the display of Jackson's naked breast satisfied this test. *See id.*

The Commission therefore proceeded to the next step of the indecency inquiry, which asks whether the material "was patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* This analysis requires consideration of the material's "full context," *i.e.*, "an assessment of the entire segment or program, and not just the particular scene in which the nudity occurs." *Id.* ¶ 10. The Commission examined the broadcast by assessing three factors – the explicitness of the material, whether the material was dwelled upon or repeated, and whether the material was shocking or titillating – and it reasonably concluded that on balance these factors supported a finding of patent offensiveness.

CBS challenges the Commission's evaluation of all three of these factors, and also mounts a general challenge to the Commission's assessment of community standards for the broadcast medium. None of these arguments has merit.

A. The Commission Correctly Evaluated the Factors Supporting Its Finding of Patent Offensiveness.

(1) The Commission reasonably concluded that exposure of Janet Jackson's breast was "explicit."

Applying the first factor of the contextual analysis, the Commission properly found that the image of Timberlake ripping off a portion of Jackson's bustier to expose her bare breast was graphic and explicit because it was "clear and recognizable to the average viewer." *Forfeiture Order* ¶ 11. As the Commission explained, the nudity was "readily discernible"; Jackson and Timberlake were at the center of the screen; and Timberlake's ripping motion drew attention to Jackson's breast as he exposed it. *Id.* CBS's claim (Br. 48) that the Commission's "only articulated basis" for finding the image "explicit" was "its reference to 'performances, song lyrics and choreography' during the halftime show generally" is therefore incorrect. The passage quoted by CBS supported the Commission's finding that the material was pandering, titillating, and shocking, *Forfeiture Order*

¶ 13; it had nothing to do with the finding of explicitness, which was based on the broadcast of Jackson's bare breast, *see id.* ¶ 11.

CBS contends (Br. 46) that the Commission erred in finding the image explicit because it lasted "only nine-sixteenths of a second." This argument conflates the first factor (explicitness or graphic nature) and the second factor (repetition) of the Commission's contextual analysis. According to CBS, other Commission decisions demonstrate that the agency "has typically and understandably considered the brevity and obscurity of images in analyzing whether something is 'explicit' or 'graphic.'" Br. 47. Several of these decisions do conclude that an *obscure* image is not explicit, but they are inapposite here, where the Commission found, notwithstanding CBS's claim to the contrary, that the image of Jackson's bare breast was not at all obscure, but rather "clear and recognizable to the average viewer." *Forfeiture Order* ¶ 11.

Contrary to CBS's claim, none of the decisions it cites relied on brevity – as opposed to obscurity – as a basis for finding material non-explicit. For example, the Commission concluded that an image of a flood victim's penis shown on a news program was not explicit because "[t]he shot of the man's penis [was] not at close range, and the overall focus of the scene [was] on the rescue attempt, not on the man's sexual organ." *Omnibus Order* ¶ 215. In discussing an episode of "The Amazing Race 6" in which graffiti saying "Fuck Cops!" was visible on the side of

a bus in the background, the Commission concluded that it was not graphic or explicit, but only because it was "small, out of focus, and difficult to read." *Id.* ¶ 191. The Commission found a scene from "Will and Grace" in which two characters touch another's breasts non-explicit because it "contain[ed] no nudity." *Id.* ¶ 156. And the Commission concluded that a scene in which a "portion of the side of [a woman's] breast is shown, but her nipple is not exposed" was non-explicit because of what was shown (or not shown), rather than the image's brevity. *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 FCC Rcd 1920, 1924, 1927 ¶¶ 6, 9 (2005).

The most analogous case is one that CBS does not mention in this portion of its brief: *Young Broadcasting of San Francisco, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1751 (2004). That case involved the brief exposure of a man's penis. Like CBS, the licensee argued that because "the duration of the exposure was very limited, the material is not graphic or explicit." *Id.* at 1755 ¶ 11. The Commission rejected the contention, concluding that the assertion that "the exposure was fleeting" belonged to "the analysis under the second and third factors" of the Commission's indecency analysis, and was irrelevant to the question whether the image was explicit. *Id.*

(2) The Commission reasonably concluded that the relatively "fleeting" nature of the nudity did not exempt it from the indecency prohibition.

The second factor in the contextual analysis "is whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs or activities." *Forfeiture Order* ¶ 12. The Commission acknowledged that the image of Jackson's breast was "fleeting" but noted that it had previously held that "'even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness.'" *Id.* (quoting *Indecency Policy Statement*, 16 FCC Rcd at 8009 ¶ 19). This approach is hardly surprising – under a contextual analysis in which factors are weighed against each other, the presence or absence of a single factor should not be dispositive in all cases. Here, the nudity's explicitness and shocking nature – the first and third factors in the contextual analysis – made the material indecent. *See id.*

CBS contends (Br. 35-36) that in the "three decades" prior to this case the Commission had consistently permitted "isolated and fleeting material" on broadcast television during the times of day when children are likely to be in the audience, and that this policy applied to "transmissions" of any kind (Br. 37), not just words. CBS goes on to argue that it had no notice that "fleeting" nudity might be considered indecent, so to sanction it would violate due process. CBS's account of the regulatory history is demonstrably incorrect.

Tellingly, CBS cites no case in which the Commission has denied an indecency complaint based on an exemption for "fleeting" nudity. No such case exists. *See Forfeiture Order* ¶ 29 ("We have never held . . . that fleeting nudity is not actionably indecent."); *see also Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998) ("An agency's interpretation of its own precedent is entitled to deference.").[2] Instead, CBS relies exclusively on the Commission's decisions involving vulgar language. To be sure, in 2004 there were Commission decisions stating "that isolated *expletives* were not actionably indecent." *Forfeiture Order* ¶ 29 (emphasis added). But this precedent did not apply to "speech involving a description or depiction of sexual or excretory functions," *Pacifica Found.*, 2 FCC Rcd at 2699 ¶ 13, and in any event recognized an exception: "fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness." *Industry Guidance*, 16 FCC Rcd at 8009 ¶ 19. More importantly, there was no such precedent involving images of nudity, and for obvious reasons. Nudity is qualitatively different from spoken language and has a different impact on the

[2] The Commission's rejection of the petition to deny the license renewal in *WGBH Educational Found.*, 69 FCC 2d 1250 (1978) (*see* CBS Br. 27), concluded that petitioner's generalized assertions that Monty Python's Flying Circus relied on "scatology, immodesty, nudity, profanity and sacrilege" were not sufficient to preclude renewal of the station's license. 69 FCC 2d at 1251 ¶ 4. *WGBH* nowhere suggests that television nudity could never be actionably indecent; still less does it propose an exemption for the broadcast of nudity because it is fleeting.

television viewer. A spoken vulgarity simply cannot be analogized to the display of a person's sexual organs.

This Court has recognized the unique power of visual images in discussing "the very great difference between videotape evidence and other forms of evidence." *United States v. Martin*, 746 F.2d 964, 971 (3d Cir. 1984). As the Court explained, "[t]he hackneyed expression, 'one picture is worth a thousand words' fails to convey adequately the comparison between the impact of the televised portrayal of actual events upon the viewer of the videotape and that of the spoken or written word upon the listener or reader." *Id.* at 972.

If CBS doubted the applicability of indecency regulation to brief nudity, its doubts should have been dispelled in the days before the Super Bowl when the Commission found apparently indecent the broadcast of nudity lasting less than a second. *See Young Broadcasting*, 19 FCC Rcd at 1757 ¶ 15. That decision involved the 2002 broadcast of an interview with the performers in a production called "Puppetry of the Penis." *Id.* at 1752 ¶ 3. During the interview, the performers "turned away from the camera to demonstrate their act to the show's hosts," and as they did so, "the penis of one was fully exposed on-camera." *Id.* The Commission concluded that this broadcast was patently offensive because the image's relative brevity was outweighed by its explicitness and its shocking and pandering nature. *See id.* at 1755 ¶¶ 11-12.

Although only a notice of apparent liability, *Young Broadcasting* forecloses CBS's claim that it had no reason to believe that the Commission might view "fleeting" nudity as indecent. The fact that *Young Broadcasting* "did not purport to overrule established precedent involving fleeting references" (Br. 39 n.13) does not help CBS's cause; on the contrary, it is further evidence that the Commission's prior precedent had not established any exemption for brief nudity. There was nothing to overrule.

(3) The Commission reasonably concluded that the exposure of Jackson's breast was shocking and titillating.

The third factor in the indecency analysis requires the Commission to consider whether the material appears to pander or is titillating or shocking. *See Forfeiture Order* ¶ 13. Contrary to CBS's claim (Br. 50), the Commission correctly considered the "manner in which" the indecent material "was . . . presented" in determining whether the exposure of Jackson's breast was shocking, titillating, or pandering. *Reconsideration Order* ¶ 12; *see Industry Guidance*, 16 FCC Rcd at 8010 ¶ 20; *Pacifica*, 438 U.S. at 750 ("context is all-important" in indecency determinations). Accordingly, the Commission analyzed the halftime show in its entirety, noting in particular that the exposure of Jackson's breast was the culminating moment of a duet with sexualized lyrics and choreography and occurred just as Timberlake sang "gonna have you naked by the end of this song."

Forfeiture Order ¶ 13. In this context, the nudity was presented in a "titillating" manner, and the shock of its appearance was heightened by its presence in one of the year's most significant television events, which was marketed as family entertainment. *Id.*

CBS claims (Br. 49) that the halftime show was not shocking or titillating because "no one at the network, planned, knew about, or would have approved the Jackson/Timberlake stunt had they known about it in advance." The subjective state of mind of CBS management is irrelevant to the question whether, in context, material was shocking or titillating. The Commission "focus[es] on the material that was broadcast and its manner of presentation, not on the state of mind of the broadcaster or performer." *Forfeiture Order* ¶ 13 n.44. If the rule were otherwise, the Commission explained, "the same material presented in the same manner and context could be indecent on one occasion but not indecent on another if the broadcasters in question had differing intents in airing the material," a result that has "no legal or public policy reason." *Reconsideration Order* ¶ 12. In this case, Viacom's president and chief operating officer testified that "everyone at CBS and everyone at MTV was shocked" by the exposure of Jackson's breast. *Hearings* at 37. CBS offers no reason to believe the average television viewer would have reacted any differently.

B. The Commission Properly Assessed the Patent Offensiveness of the Halftime Show In Light of Community Standards for the Broadcast Medium.

The Commission reasonably concluded that CBS's broadcast of the Super Bowl halftime show contained material that was "patently offensive under contemporary community standards for the broadcast medium and [was] thus indecent." *Forfeiture Order* ¶ 14. CBS's actions led to the broadcast of "the offensive spectacle of a man tearing off a woman's clothing on stage in the midst of a sexually charged performance" during the halftime show of one of the nation's most heavily watched sporting events, to a vast nationwide audience that included numerous children. *Id.* ¶ 28. Viacom's president and chief operating officer acknowledged to Congress that the material "went far beyond what is acceptable standards for our broadcast network." *Hearings* at 37.

CBS nonetheless challenges the Commission's determination on the ground that the Commission's community-standards formulation is "entirely subjective and boundless." Br. 40. To the extent that CBS suggests that the Commission's broadcast indecency regime is unconstitutionally vague (*id.*; *see* Fox Br. 28), its contention is foreclosed by precedent, and in any event has no application to this case.

As the D.C. Circuit has explained, the FCC's definition of indecency "is virtually the same definition the Commission articulated in the order reviewed by

the Supreme Court in the *Pacifica* case," so when the Supreme Court "h[e]ld the Carlin monologue indecent," it necessarily signaled that it "did not regard the term 'indecent' as so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988) ("*ACT I*") (citation omitted); *accord ACT III*, 58 F.3d at 659; *see also Dial Information Servs. Corp. of N.Y. v. Thornburgh*, 938 F.2d 1535, 1541 (2d Cir. 1991) (rejecting vagueness challenge to law prohibiting "indecent" telephone messages); *Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 874-75 (9th Cir. 1991) (same).

Any vagueness challenge to the Commission's broadcast indecency regime would also have no application to the exposure of Janet Jackson's breast on national television at issue here. A "plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *181 South, Inc. v. Fischer*, 454 F.3d 228, 235 (3d Cir. 2006) (quotation marks omitted); *see also Gibson v. Mayor & Council of City of Wilmington*, 355 F.3d 215, 225 (3d Cir. 2004). Here, CBS could have been under no illusions that its nationwide broadcast of Janet Jackson's exposed breast was consistent with community standards for the broadcast medium.

While CBS complains that "the Commission has never identified a nexus between [the three factors in its contextual analysis] and the standards of any community," (Br. 46), the Commission explained in its 2001 *Industry Guidance* that it evaluates patent offensiveness by examining these contextual factors in light of contemporary community standards for the broadcast medium. *See* 16 FCC Rcd at 8003 ¶ 10. CBS also errs in suggesting that the Commission relies on its own subjective views in gauging community standards. The Commission is an expert agency and draws upon its extensive knowledge of the industry and its interactions with lawmakers, broadcasters, public-interest groups, and the public at large. *See Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, FCC 06-166 ¶ 28 (Nov. 6, 2006) ("*Remand Order*"). Contrary to the suggestion of *amicus* Center for Democracy & Technology (at 8), the Commission does not rely on the number of complaints received in assessing whether a broadcast is patently offensive under contemporary community standards. Nor is it necessary, as CBS contends (Br. 40), for the Commission to apply a mechanical "measure" to determine what the community thinks. In its *Pacifica* decision, the Commission cited no external evidence of community standards. *See* 56 FCC 2d at 98 ¶ 11. Instead, the Commission's approach to discerning community standards parallels that used in obscenity cases, where the jury is instructed to rely on its own knowledge of community standards in determining whether material is

patently offensive. *See Smith v. United States*, 431 U.S. 291, 305 (1977). There is no requirement that the trier of fact be provided with external evidence, such as expert testimony. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 & n.6 (1973); *United States v. Ragsdale*, 426 F.3d 765, 772-73 (5th Cir. 2005); *United States v. Pryba*, 900 F.2d 748, 757 (4th Cir. 1990).

CBS errs when it contends (Br. 43-44) that the Commission ignored evidence indicating that the community did not find the broadcast of Jackson's breast to be patently offensive. The Commission did not ignore the evidence presented by CBS but rather found it to be inadequate. The particular polls CBS proffered were uninformative both because CBS did not disclose their methodology and because the polls apparently did not ask the relevant question, *i.e.*, whether the exposure of Jackson's breast was patently offensive under contemporary community standards for the broadcast medium. *Reconsideration Order* ¶ 14. For example, the Associated Press/Ipsos Poll cited by CBS (Br. 44 n.17) is proprietary, and CBS does not disclose what questions it asked. *See Reconsideration Order* ¶ 14 n.43. Likewise, the Kaiser survey "did not ask respondents whether or not they found the broadcast . . . to be offensive." *Id.* Finally, CBS now cites a *Time Magazine* poll (Br. 45 n.18), on which it did not rely during the proceedings before the Commission. *See* 47 U.S.C. § 405(a) (issue not raised before Commission is barred). The only part of that poll that is arguably

relevant to the community-standards inquiry actually rebuts CBS's contentions: only 11% of respondents said that broadcast of the female breast should be permissible before 10 p.m. *See* www.srbi.com/time_poll_tv.html.

To the extent that CBS suggests that the Commission is required to produce its own polls to verify its assessment of community standards, this proposal lacks any support in precedent or in logic. *Cf. Pryba*, 900 F.2d at 757 (trial court in obscenity case properly excluded polling data on community standards). Nor, as the evidence in this case demonstrates, are opinion polls necessarily a reliable measure of contemporary community standards for the broadcast medium. As the Commission explained, "survey results in this area can easily be skewed by the phraseology of the questions, and those questions are often not on point with the issues [the Commission] must resolve in determining whether broadcast material is indecent under the statute." *Reconsideration Order* ¶ 14 n.43.

In the end, CBS's challenge to the Commission's processes in this case is beside the point. Had CBS wished to obtain a jury's evaluation of community standards, it had only to refuse to pay the forfeiture, and it would have been entitled to a "trial de novo" in any action by the government for collection. 47 U.S.C. § 504(a); *see Action for Children's Television v. FCC*, 59 F.3d 1249, 1261 (D.C. Cir. 1995) ("*ACT IV*"). Having waived that opportunity by paying the

forfeiture, CBS cannot complain that it has been relegated to the Commission's determination of community standards.

II. CBS'S INDECENCY VIOLATION MADE IT LIABLE FOR A MONETARY FORFEITURE.

The Commission also reasonably determined that CBS's violation of the statutes and regulations governing the broadcast of indecent material merited a monetary forfeiture because CBS's violation was "willful" within the meaning of 47 U.S.C. § 503.

A. The Communications Act Authorizes the Imposition of a Forfeiture for "Willful" Violation of the Commission's Broadcast Indecency Rules.

Section 503 of the Communications Act authorizes the Commission to impose forfeitures on anyone who "violated any provision of section . . . 1464," 47 U.S.C. § 503(b)(1)(D), *or* on anyone who "*willfully* or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter," *id.* § 503(b)(1)(B) (emphasis added). The Communications Act defines "willful" as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f); *see also Liability of Midwest Radio-Television, Inc.*, 45 FCC 1137, 1141 ¶ 11 (1963) ("[T]he word 'willfully' . . . does not require a showing that the licensee knew [it] was acting wrongfully; it requires only that the

Commission establish that the licensee knew that [it] was doing the acts in question – in short that the acts were not accidental (such as brushing against a power knob or switch).”). Although by its terms this definition applies only to the term “willfully” in Section 312 (dealing with license revocations), Congress intended it to cover “willfully” in Section 503 as well. *See* H.R. Conf. Rep. 97-765, at 51 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2261, 2295; *accord* Fox Br. 22 n.12.

Among the regulations enforceable through Section 503(b)(1)(B) is 47 C.F.R. § 73.3999(b), which proscribes the broadcast of “material which is indecent” between 6 a.m. and 10 p.m. Where the violation of this regulation is “willful,” the Commission may impose a forfeiture. *See* 47 U.S.C. § 503(b)(1)(B). *Amicus* Fox Television Stations contends (Br. 17-21) that the Commission cannot use Section 503(b)(1)(B) to impose a forfeiture for violation of Section 73.3999 because to do so would violate congressional intent and constitute an “end-run” around Section 1464. But Section 73.3999 can hardly be a circumvention of congressional intent, since that regulation was promulgated at Congress’s express instruction. *See* Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 47 U.S.C. § 303 note. Fox claims (Br. 18) that the 1992 Act “simply ordered the FCC to establish the safe harbor hours during which it would not enforce § 1464.” This is both wrong and beside the point. First, the Act used language different from Section 1464, so it did not contemplate a mere restatement

of the statute. *Compare* Pub. L. No. 102-356, § 16(a) (directing the Commission to issue a regulation on "indecent *programming*" (emphasis added)) *with* 18 U.S.C. § 1464 (prohibiting "utter[ing]" of "indecent . . . language"). Second, no matter what Congress's intent in directing the promulgation of Section 73.3999, it remains a "regulation" of the Commission and is therefore enforceable under the plain language of Section 503(b)(1)(B).

The same standard also governs civil liability under 18 U.S.C. § 1464. Rather than attempting to divine what level of scienter a court would read into Section 1464 in a criminal prosecution, the Commission applies the Communications Act's willfulness standard to its civil enforcement of the statute. *See Forfeiture Order* ¶ 15 & n.51. This approach follows from *Pacifica*, which held that "the validity of the civil sanctions" under 18 U.S.C. § 1464 "is not linked to the validity of the criminal penalty." 438 U.S. at 739 n.13. As originally enacted, the broadcast indecency statute was a freestanding prohibition within the Communications Act; it was enforced through civil and criminal mechanisms found in other provisions. *See* Communications Act of 1934, § 326, Pub. L. No. 73-416, § 326, 48 Stat. 1091. When Congress codified criminal statutes in Title 18 in 1948, it placed the ban on broadcast indecency there and combined it with the criminal enforcement provision, leaving civil enforcement mechanisms with the rest of the Communications Act in Title 47. *See Pacifica*, 438 U.S. at 739 n.13;

see also H.R. Rep. 80-304 (1947), *reprinted in* 1948 U.S.C.C.S. 2434, 2563 (only purpose of § 1464 was to "consolidate[] [the] last sentence of section 326 with penalty provision of section 501"). *Pacifica* held that the 1948 recodification of the statute in Title 18 did not produce any "substantive" change. *Id.* Thus, under *Pacifica*, a court reviewing a civil application of Section 1464 "need not consider any question relating to the possible application of § 1464 as a criminal statute." 438 U.S. at 739 n.13.

The Commission's imposition of a forfeiture on the basis of its finding that CBS's violation was "willful" is a complete answer to the claims by CBS (Br. 29-30) and Fox (Br. 10-13) that the First Amendment prohibits strict liability and that punishment without a finding of scienter is disfavored. The Commission did not hold CBS strictly liable; it found that CBS was liable because its actions were willful. As the Supreme Court has explained, "[t]he presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269 (2000) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)). As long as the *mens rea* is sufficient to perform this function, "the presumption in favor of scienter does not justify reading a specific intent requirement" into the statute. *Id.* at 270. Nor is the First Amendment an impediment to holding a principal liable when its agent possesses

the requisite intent. *See Cantrell v. Forest City Pub'g Co.*, 419 U.S. 245, 253-54 (1974) (newspaper properly held "vicariously liable" for writer's knowing and reckless errors even though there was "no evidence that [it] had knowledge of any of the inaccuracies").

B. The Commission Reasonably Concluded That CBS's Violation Was "Willful."

The Commission properly concluded that CBS's violation of 47 C.F.R. § 73.3999 and 18 U.S.C. § 1464 was "willful" for two separate and independent reasons. First, as the evidence shows, Jackson and Timberlake intentionally took actions that foreseeably resulted in the exposure of Jackson's breast to the television audience; their actions were therefore willful under any definition of that term. Because they were hired by CBS to perform for its broadcast audience and were subject to its exacting control, their intent is properly attributed to CBS under both black-letter agency law and principles unique to broadcast regulation. *See Forfeiture Order* ¶ 24; *Reconsideration Order* ¶ 27. Second, even if their intent were not attributable to CBS, the network intentionally chose not to take adequate

precautions despite a known risk that the halftime show would include indecent material. *See Forfeiture Order* ¶ 20; *Reconsideration Order* ¶ 17.[3]

(1) CBS was responsible for the intentional acts of Jackson and Timberlake.

CBS does not dispute the Commission's finding that Jackson's and Timberlake's own actions were willful. *Forfeiture Order* ¶¶ 24, 11 n.38; *see also id.* ¶ 13 ("[T]his nudity hardly seems 'accidental,' nor was it."). In his declaration, Timberlake admitted that Jackson and her choreographer planned what he called a "costume reveal" and told him of their plan before the show. He further admitted that, acting according to this plan, he intentionally ripped off Jackson's bustier. *Id.* ¶ 24 n.84. While Timberlake stated that he had "neither the intention nor the knowledge that the reveal could expose [Jackson's] right breast," *id.*, Jackson's declaration included no such denial. *Id.* ¶ 11 n.38. Just as significant, CBS offered no declaration at all from Jackson's choreographer, who had promised beforehand that the halftime show would include "shocking moments"; had he been willing to deny that exposure of Jackson's breast was intentional, CBS presumably would have submitted a declaration to that effect. *See id.* Finally, had the exposure of

[3] Because CBS's violation was willful on either of these grounds, the Court need not consider whether CBS's intentional broadcast of the halftime show (whether or not it intended to broadcast nudity) could by itself satisfy the requirements for imposition of a forfeiture. *See Forfeiture Order* ¶ 15; *Reconsideration Order* ¶ 17.

Jackson's breast simply been the result of a "wardrobe malfunction," CBS presumably would have provided a specific explanation of how it happened. It did not do so. In sum, the Commission's finding that Jackson intended to expose her breast is supported by substantial evidence.

CBS contends (Br. 55) that it is impermissible to attribute Jackson's and Timberlake's actions to it because the two performers were "independent contractors." This argument fails for two separate reasons. First, substantial evidence supports the Commission's conclusion that, for purposes of the halftime show, Jackson and Timberlake were CBS employees. Second, CBS's nondelegable duty as a broadcast licensee to comply with its statutory indecency obligations makes it responsible for the actions of those it hired to perform on the air.

(a) Jackson and Timberlake were CBS employees for purposes of the halftime show.

The Commission found that the relationship between CBS and the performers was that of employer-employee, and its finding is supported by substantial evidence. *See Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 842 F.2d 1466, 1478 (3d Cir. 1988) (presence or absence of agency relationship is question of fact); *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1276 (3d Cir. 1979). As the Commission noted, the critical factor in determining whether an

employment relationship exists is "'the extent to which the hiring party controls the manner and means by which the worker completes his or her assigned tasks.'" *Reconsideration Order* ¶ 25; *see McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 853 (3d Cir. 1996) ("most important" factor in determining whether individual is employee or independent contractor is "the degree of control exercised by the principal"); *accord Restatement (Third) of Agency* § 7.07(3) (2006).

As the Commission found (and CBS concedes, Br. 55), "the halftime show performance was subject to exacting control by Viacom/CBS." *Reconsideration Order* ¶ 26. Indeed, "every aspect of the performance, including the exact time, length, location, material, set, script, staging, and wardrobe, was subject to the control of Viacom/CBS through its corporate affiliate MTV." *Id*. The evidence shows that, for example:

- CBS provided the set for the show and dictated how long it would be. *Id.*
- "Viacom/CBS developed the creative concepts for the show, scripted every word uttered on stage, and reviewed every article of clothing worn by the performers." *Id.*
- Personnel from CBS, MTV, and the NFL attended two full dress rehearsals of the show on Thursday, January 29. MTV then used videotapes of these rehearsals to review segments with performers and

direct changes. For example, one performer was instructed to change her costume because it was too revealing. *Forfeiture Order* ¶ 24.

- An executive producer personally checked Jackson's planned wardrobe in advance of the show to make sure it conformed to CBS broadcast standards. *Id.*

The critical factor of control weighs so heavily in favor of a conclusion that Jackson and Timberlake were CBS's employees that, as the Commission reasonably determined, consideration of that factor alone is "decisive." *Reconsideration Order* ¶ 27. That Jackson and Timberlake were provided a lump-sum "budget" rather than "benefits" (CBS Br. 55 n.22) is not by itself "strongly indicative of independent contractor status," *Reconsideration Order* ¶ 27, nor is CBS's assertion that the two were "highly skilled artists" (CBS Br. 55 n.23), since courts have held skilled artists to be employees where the control test has been satisfied, *see e.g.*, *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 87 (2d Cir. 1995) (sculptors); *Russell v. Torch Club*, 97 A.2d 196, 200 (N.J. Hudson County Ct. 1953) (singer). CBS cites cases finding artists to be independent contractors (Br. 55), but the degree of control in those cases was not at all comparable to that present here. *See Community for Creative Nonviolence v. Reid*, 490 U.S. 730, 753 (1989) ("*CCNV*") ("Apart from the deadline for completing the sculpture, Reid had absolute freedom to decide when and how long to work."); *Chaiken v. VV*

Publishing Corp., 907 F. Supp. 689, 699 (S.D.N.Y. 1995) ("Friedman controlled the manner in which the article was written – including the selection of a topic, research plan, and sources – without any guidance from the *Voice*.").

CBS also contends that, even if the actions of Jackson and Timberlake could be imputed to it, the Commission could not impose a monetary forfeiture because, under New York law, a principal cannot be liable for punitive damages unless it is "complicit" in the actions of its agent. CBS Br. 56-57. Because CBS never made this argument before the Commission, it may not do so now. *See* 47 U.S.C. § 405(a); *Service Elec. Cable TV Inc. v. FCC*, 468 F.2d 674, 676-77 (3d Cir. 1972). In any event, since the issue here is the interpretation of the liability provisions of a nationally applicable statute that must be interpreted to effectuate federal policy, federal law – not New York law – controls the agency question. *See CCNV*, 490 U.S. at 740-41.[4] A court applying federal agency law should not follow the New York rule on punitive damages identified by CBS, as New York is in the distinct minority on this question. The majority of courts reject New York's "complicity rule" and allow for recovery of punitive damages against a principal for the actions

[4] Contrary to CBS's suggestion, the Commission did not "conclude[]" that New York law "governs the interpretation" of the performers' contract (Br. 56), but instead merely noted that the performers' contracts included a New York choice-of-law provision and that New York law was consistent with the general rule that control by the principal is usually the dispositive factor in finding an agent to be an employee. *Forfeiture Order* ¶ 25 n.88; *Reconsideration Order* ¶ 27 n.90.

of an agent acting with apparent authority. *See American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982); *American Biomaterials Corp. v. Creative Care Sys., Inc.*, 954 F.2d 919, 924 (3d Cir. 1992).

In any event, the New York punitive damages rule applies only to common-law tort actions and has no bearing in cases involving special statutory damages. *See Restatement (Second) of Agency* § 217C, cmt. c (1958). This is especially the case when the action is brought by the government, not a private party. In a case involving enforcement of a regulated entity's public interest obligations, the "risk allocation theories" that led the New York courts to make an exception to normal respondeat superior rules for punitive damages awards to private parties, *see, e.g.*, *Loughry v. Lincoln First Bank, N.A.*, 494 N.E.2d 70, 74 (N.Y. 1986), are inapplicable.

(b) CBS could not delegate its regulatory obligations to "independent contractors."

The Commission also properly concluded that, as a broadcast licensee subject to statutory and regulatory duties, "CBS was obligated to ensure that its broadcast programming served the public interest, and was not free to confer this obligation on another by contract." *Reconsideration Order* ¶ 27; *see also Forfeiture Order* ¶ 16 ("Under well-established principles of broadcast regulation, '[b]roadcast licensees must assume responsibility for all material which is

broadcast through their facilities,' and that 'duty is personal to the licensee and may not be delegated.'"). Because of the regulatory obligations that attach to broadcast licensees, the intent of the artists hired by CBS to perform on the air is properly attributed to CBS whether they were employees or independent contractors. *See id.* ¶ 23 n.80 (citing FCC precedent observing that "the Commission has consistently refused to excuse licensees from forfeiture penalties where actions of employees *or independent contractors* have resulted in violations." (emphasis added)).

The Commission's longstanding policy of refusing to absolve broadcast licensees for the actions of those to whom they choose to entrust compliance with their statutory duties is derived from black-letter agency law. As the *Restatement (Second) of Agency* puts it,

> [w]hen a license is required for the performance of acts, one having a license who delegates performance of the acts to another is subject to liability for the negligence of the other. Thus, a trucking company doing an interstate business requiring a license is liable for the negligence of an independent contractor whom it employs to do some of the work.

Restatement (Second) of Agency § 214 cmt. b (1958); *accord Restatement (Third) of Agency* § 7.06 (2006). Relatedly, a regulated entity's statutory duties cannot be delegated by contract; its overriding obligation to the public means that it remains liable for the actions of those acting on its behalf. *See* 5 Fowler V. Harper *et al.*, *The Law of Torts* § 26.11, at 83 (2d ed. 1986) ("[d]uties imposed by statute"

typically cannot be avoided "'by employing a contractor'"); *MBH Commodity Advisors, Inc. v. CFTC*, 250 F.3d 1052, 1068 (7th Cir. 2001).

Consistent with this authority, the courts and the Commission have long held that a broadcaster's attempt to avoid responsibility for its programming is *itself* a violation of the Communications Act. "The Commission has always regarded the maintenance of control over programming as a most fundamental obligation of the licensee." *Application of WCHS-AM-TV Corp.*, 8 FCC 2d 608 ¶ 7 (1967); *see also Regents of New Mexico Coll. of Agric. & Mech. Arts v. Albuquerque Broad. Co.*, 158 F.2d 900, 906 (10th Cir. 1947) (under Communications Act, broadcast licensee cannot cede determination of whether programming is in the public interest to another); *En Banc Programming Inquiry*, 44 FCC Rcd 2303, 2314 (1960) (the "individual station licensee continues to bear legal responsibility for all matter broadcast over his facilities," and this "is a duty personal to the licensee [that] may not be avoided by delegation of the responsibility to others").

Here, a license is required in order to broadcast, and a licensee has a statutory obligation to serve the public interest and not to air indecent programming. *See* 47 U.S.C. § 301; 18 U.S.C. § 1464. Accordingly, under well-settled principles of agency law, CBS's attempt to disavow control over what it broadcast during the halftime show cannot absolve it of responsibility for the

willful actions taken by its hired performers, even if they could be characterized as "independent contractors" for other purposes and under other circumstances.

This rule does not chill television coverage of events over which broadcasters have no control. Because "this case involves a staged show planned by CBS and its affiliates, under circumstances where they had the means to exercise control and good reasons to take precautionary measures," it presents "circumstances . . . completely different from live coverage of breaking news events, which are not controlled by broadcasters." *Forfeiture Order* ¶ 35.

In CBS's view, there should be no liability – even for willful violations of the Communications Act – so long as those violations are committed by "independent contractors" whom broadcast licensees have hired to perform on the air. This would have severe consequences for the enforcement of broadcasters' statutory obligations, and it would allow licensees to insulate themselves from liability through contractual artifice. The Supreme Court cited the same concern in rejecting a trade association's effort to avoid antitrust liability for the actions of its agent on the ground that it had not approved of his actions. *See Hydrolevel*, 456 U.S. 556 at 573. As the Court explained, under the association's proposed rule, it "could avoid liability by ensuring that it remained ignorant of its agents' conduct, and the antitrust laws would therefore encourage [it] to do as little as possible to oversee its agents." *Id.*

Just so here. Under CBS's rule, a radio station could change its relationship with a habitually foul-mouthed host to make him an "independent contractor," thus avoiding all liability for his statements and actions, no matter how egregious. Such irresponsibility is fundamentally incompatible with the broadcast licensee's public interest obligations, yet it would flow directly from the rule CBS advocates in this case.

(2) CBS willfully failed to take reasonable precautions to ensure that no actionably indecent material was broadcast.

The willfulness requirement is satisfied here for another reason: CBS chose not to take reasonable precautions to ensure that the halftime show would not include indecent material. The broadcast of indecent material therefore resulted from a "conscious and deliberate . . . omission" on the part of CBS. 47 U.S.C. § 312(f)(1). It was not at all analogous to the accidental "brushing against a power knob or switch," *cf. Midwest Radio-Television*, 45 FCC at 1141 ¶ 11, that would remove an act from the scope of the statutory definition. *See supra* at 34. Instead, it was entirely foreseeable in light of the facts known to CBS – or the facts that would have been known, had CBS not chosen to remain willfully blind to them. *Cf. United States v. Leahy*, 445 F.3d 634, 652-54 (3d Cir. 2006).

As the Commission found, CBS "was acutely aware of the risk of unscripted indecent material" in the halftime show. *Forfeiture Order* ¶ 17. The loudest alarm bells were the public comments of Jackson's choreographer, who was quoted – in a story posted on the MTV website three days before the Super Bowl – as predicting that Jackson's performance would include "some shocking moments," adding "I don't think the Super Bowl has ever seen a performance like this." *Id.* ¶ 19; J.A. 507. These statements, by a person intimately familiar with Jackson's planned performance, should have put CBS on notice that Jackson and Timberlake might be planning to diverge from their script. But rather than inquiring about what "shocking" surprises were in store, CBS chose to do nothing. *Forfeiture Order* ¶ 21. As the Commission found, this was a critical failure on CBS's part. *See id*.

CBS claims to have believed (Br. 8 n.3) that the "shocking moments" statement referred to Timberlake's "unannounced, surprise appearance." But the Commission reasonably found this assertion "implausible." *Reconsideration Order* ¶ 18; *Forfeiture Order* ¶ 21 n.74. Timberlake's appearance could hardly have been shocking, since his name was included in the on-screen credits before the show. *Reconsideration Order* ¶ 18.

The choreographer's prediction was not the first warning that CBS ignored. Throughout the halftime show planning process, CBS's corporate affiliate, MTV, had made no secret of its interest in finding performers and performance elements

that would add a sexual element to the show. *See Forfeiture Order Confidential App.* ¶ 1 (J.A. 0036). MTV's efforts raised significant concerns at the NFL. Commissioner Paul Tagliabue even warned CBS President Les Moonves that the show should not "go so far that I have a dozen of my owners complaining to me about the appropriateness of the halftime show . . . what Janet Jackson was wearing (or not wearing) on stage at halftime, etc." *Id.* ¶ 2 (J.A. 0036). The NFL also expressed apprehension (which proved prescient) about Timberlake's scripted line, "I am going to get you naked by the end of this song." *Id.* ¶ 5 (J.A. 0037).

Despite these warning signs pointing to a risk that there might be unscripted visual indecency during the halftime show, *see, e.g.*, *id.* ¶ 8 (J.A. 0037) (warnings in internal CBS e-mails of "something spontaneous being said *or occurring* during the halftime show" and of risk "of language *or other concerns*" (emphasis added)), CBS made a "calculated decision" not to take adequate precautions. *Forfeiture Order* ¶ 20. CBS opted to use a five-second audio delay "that would enable it to bleep offensive language but would not enable it to block unscripted visual moments." *Id.* (Video delay technology was plainly available – CBS used it for the 2004 Grammy Awards just after the Super Bowl. *Id.*) Moreover, there is no evidence that CBS or MTV communicated CBS's broadcast standards and practices to Jackson or Timberlake, "despite the highly sexualized nature of the

performance" that was contemplated and the prediction that it would contain "shocking moments." *Id.* ¶ 20.

On the basis of these considerations, the Commission reasonably determined that it should impose a monetary forfeiture on CBS for the indecent material it broadcast during the Super Bowl halftime show. "[A] contrary result," the Commission explained, "would permit a broadcast licensee to stage a show that 'pushes the envelope,' send that show out over the airwaves, knowingly taking the risk that performers will engage in offensive unscripted acts or use offensive unscripted language, and then disavow responsibility – leaving no one responsible for the result." *Forfeiture Order* ¶ 22. The Commission properly refused to countenance such a stark failure to comply with the federal statutes and rules regulating the broadcast of indecent material over the air.

III. THE *ORDERS* ARE CONSTITUTIONAL.

A. The *Orders* Are an Appropriate Exercise of the FCC's Power to Regulate Indecency on the Airwaves.

In *Pacifica*, the Supreme Court settled that the First Amendment does not prevent the FCC from satisfying its statutory obligations to regulate indecent broadcasting. 438 U.S. 726 (1978); *see also Action for Children's Television v. FCC*, 58 F.3d 654, 656-70 (D.C. Cir. 1995) (en banc) ("*ACT III*"). *Pacifica*'s constitutional holding remains good law, and it binds this Court.

CBS does not challenge the Commission's general authority under the Constitution to regulate broadcast indecency. Instead, it contends that the First Amendment requires the Commission to adhere to a "restrained approach" (Br. 20-24) that precludes the imposition of sanctions on the broadcast of indecency that is "fleeting." (Br. 25-28). But, as the Commission found, an image can be indecent, even though only briefly displayed, so long as it is sufficiently graphic, explicit and shocking. In this case, no reasonable interpretation of the First Amendment required the Commission to refrain from regulating the broadcast of Janet Jackson's exposed breast to a nationwide audience at the culmination of the Super Bowl halftime show simply because the transmission of that image was not prolonged.

(1) Broadcast speech has only limited First Amendment protection.

"[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica*, 438 U.S. at 748. Not only have the broadcast media "established a uniquely pervasive presence in the lives of all Americans," but "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Id.* at 748. Moreover, "broadcasting is

uniquely accessible to children, even those too young to read." *Id.* at 749. Unlike indecent material sold in bookstores and movie theaters, for example, indecent speech broadcast over the air may not "be withheld from the young without restricting the expression at its source." *Id.*

Outside the broadcast arena, a restriction on the content of protected speech will generally be upheld only if it satisfies strict First Amendment scrutiny – that is, if the restriction furthers a "compelling" government interest and is the "least restrictive means" to further that interest. *See Sable Communications of Calif., Inc*., v. *FCC*, 492 U.S. 115, 126 (1989). But contrary to CBS's contention (Br. 15), government restrictions on broadcast speech are not subject to this exacting standard.

Instead, regulation of the broadcast spectrum – a "scarce and valuable national resource" – "involves unique considerations." *FCC v. League of Women Voters of Calif.*, 468 U.S. 364, 376 (1984); *see also Fabulous Assocs., Inc. v. Pennsylvania Pub. Utility Comm'n*, 896 F.2d 780, 784 (3d Cir. 1990) (acknowledging the "special treatment of indecent broadcasting"). "A licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'" *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981). As a result, even where regulation of broadcast speech that "lies at the heart of First

Amendment protection" is concerned, the government's interest need only be "substantial" and the restriction need only be "narrowly tailored" to further that interest – not the least restrictive available. *League of Women Voters*, 468 U.S. at 380, 381. Although (contrary to this authority) the D.C. Circuit in *ACT III* stated that it was applying strict scrutiny in affirming indecency regulations, it stressed that in doing so it had "take[n] into account the unique context of the broadcast medium." *ACT III*, 58 F.3d at 660.

The Supreme Court has reaffirmed that, "[d]espite the growing importance of cable television and alternative technologies, 'broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.'" *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 190 (1997). Though broadcast television is "but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression." *Id.* at 194. Broadcast television thus remains "properly subject to more regulation than is generally permissible under the First Amendment." *ACT III*, 58 F.3d at 660; *see also Remand Order* ¶ 49 (noting that in 2003, 98.2% of households had at least one television, and there are an estimated 73 million broadcast-only television sets in American households). The broadcast media also remain uniquely accessible to children. *See also id*. (two-thirds of children aged 8 to 18 have a

television set in their bedrooms, and nearly half of those sets do not have cable or satellite connections).

(2) The government's interests are substantial.

It cannot reasonably be disputed that the government has a "compelling" interest "in protecting the physical and psychological well-being of minors," nor that this interest "extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable*, 492 U.S. at 126. *See Fabulous Assocs*., 896 F.2d at 787 ("There is little question that the interest of the state in shielding its youth from exposure to indecent materials is . . . compelling"). The government's interests in the "well-being of its youth" and in supporting "parent's claim to authority in their own household" can justify "the regulation of otherwise protected expression." *Pacifica*, 438 U.S. at 749. Just as clearly, "the Government has a compelling interest in protecting children under the age of 18 from exposure to indecent broadcasts." *ACT III*, 58 F.3d at 656.

The government's "interest in protecting the well-being, tranquility, and privacy of the home" is an additional interest "of the highest order in a free and civilized society." *Frisby v. Schultz*, 487 U.S. 474, 484 (1988). Indeed, the Supreme Court has "repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this

freedom." *Id.* at 485; *see also Pennsylvania Alliance for Jobs and Energy v. Council of Borough of Munhall*, 743 F.2d 182, 186 (3d Cir. 1984).

(3) The indecency rules are narrowly tailored.

The regulatory regime governing the broadcast of indecent matter is narrowly tailored to advancing the government's compelling interests in shielding children and protecting the privacy of the home from indecent speech, while at the same time allowing reasonable access to adults who desire to view or listen to such material. By prohibiting radio or television stations from broadcasting indecent material "on any day between 6 a.m. and 10 p.m.," 47 C.F.R. § 73.3999(b), the Commission's rules provide some assurance to parents that programs broadcast during that time will be safe for their children to view. By channeling indecent broadcasting to times of day in which fewer children are in the audience, but which nonetheless remain accessible to adult viewers and listeners, the Commission permissibly advances the government's interests "without unduly infringing on the adult population's right to see and hear indecent material." *ACT III*, 58 F.3d at 665.

Even apart from late-night viewing, adults who wish to view indecent material "will have no difficulty in doing so through the use of subscription and pay-per-view cable channels, delayed-access viewing using VCR equipment, and

the rental or purchase of readily available audio and video cassettes." *Id*. at 663. Whatever small burdens on adult access to indecent broadcasting remain, it is "entirely appropriate that the marginal convenience of some adults be made to yield to the imperative needs of the young." *Id.* at 667.

CBS argues that the application of the Commission's indecency enforcement policies to fleeting material violates the "restrained approach" required by the First Amendment (Br. 20) and does not permit sufficient "breathing space" for expression (Br. 25). But "restraint" does not compel abdication of responsibility, and "breathing space" is not license. It is simply unreasonable to interpret the Constitution to create a categorical exemption for all "fleeting" transmissions, regardless of context. Such an exemption would permit broadcasters to gratuitously broadcast any number of highly offensive sexual or excretory images in the middle of the afternoon, so long as they did so one at a time. That result plainly is not required by the First Amendment.

CBS also argues (Br. 16) that the *Orders* "[a]re [u]nconstitutional under *Pacifica*." In fact, however, *Pacifica* involved only language, not images. Even in that context, it did not hold that "an occasional expletive" would not be sanctionable; instead, it specifically reserved that question in the context of a "two-way radio conversation between a cab driver and a dispatcher," or a "telecast of an Elizabethan comedy." 438 U.S. at 750.

Nor does the Constitution or *Pacifica* compel the Commission categorically to exempt "live coverage" from indecency regulation, as CBS suggests. *See* CBS Br. 21. In its *Pacifica Reconsideration Order*, the Commission stated that it would be "inequitable" to "hold a licensee responsible for indecent *language* . . . where *public* events are covered live, and there is no opportunity for *journalistic* editing." 59 FCC 2d at 893 n.1 (emphases added). That sentence, however, appeared in an order addressing the application of the Commission's indecency regulation to "a bona fide news or public affairs program," *id.* at 893 ¶ 3, and plainly contemplated a situation where broadcast journalists are covering a news event outside a licensee's control. It has no application where the "public event" in question is an entertainment performance planned, produced, and staged by the licensee itself. Moreover, that sentence looks only to language and does not suggest that the regulation of indecent images would pose the same concerns. And it would be particularly odd to absolve a licensee of liability where the evidence shows that the technology to edit out offensive displays was available, but was not employed. Finally, the Commission conditioned its suggestion that equitable considerations might support a hands-off policy on the licensee's exercise of "judgment, responsibility, and sensitivity to the community's needs, interests and tastes" – considerations which are notably lacking in this case. *Id.*

B. Legal and Technological Developments Have Not Undermined the Commission's Authority to Regulate Indecent Broadcasting.

CBS also contends that "recent technological and legal developments" have undermined *Pacifica* and its progeny. *See* CBS Br. 31-35 (capitalization altered). If the passage of years had lessened the force of one of its decisions, it would be up to the Supreme Court to say so. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). But in fact, nothing in later cases or recent technology undercuts *Pacifica* or the Commission's constitutional authority to regulate broadcast indecency.

CBS first contends that the Commission "should have been more circumspect" in regulating indecency on broadcast television because later decisions have enjoined attempts to regulate indecency in other media, such as cable television and the Internet. CBS Br. 35. But the Supreme Court has "long recognized" that "each medium of expression presents special First Amendment problems." *Pacifica*, 438 U.S. at 748 (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952)). Thus, when it invalidated a statute regulating indecency on the Internet, the Supreme Court specifically distinguished *Pacifica*, in part on the ground that broadcasting has traditionally "received the most limited First Amendment protection." *Reno v. ACLU*, 521 U.S. 844, 867 (1997). Decisions

involving other means of communication thus do not undercut the "special justifications for regulation of the broadcast media." *See id*. at 868.

CBS also maintains that this Court is not obligated to follow *Pacifica* because "less restrictive means of control" – in the form of the "V-chip" installed in all larger televisions since 2000 – "now exist for broadcasting." CBS Br. 32. *See* 47 C.F.R. § 15.120. Under intermediate scrutiny, however, there is no least-restrictive-means requirement. *See Turner II*, 520 U.S. at 218. In any event, the V-chip has no application to this case because "V-chip technology cannot be utilized to block sporting events such as the Super Bowl because sporting events are not rated," and there is no indication that CBS would have rated the halftime show as inappropriate for children. *Forfeiture Order* ¶ 34; *see also Implementation of Section 551 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 8232, 8242-43 ¶ 21 (1998).

Moreover, as the Commission explained, "while the V-chip provides a technological tool not available when *Pacifica* was decided," *Reconsideration Order* ¶ 37, there are numerous real-world obstacles to its implementation that undermine its utility in shielding children from indecent broadcast content. Not only do "older televisions . . . not contain a V-chip," but "on newer sets the evidence shows that most parents are unaware of the V-chip's existence or the manner of its operation." *Reconsideration Order* ¶ 37; *see also Forfeiture Order*

¶ 34 n.117; *Remand Order* ¶ 51. In addition, a V-chip is of little use when the rating – or lack of rating, as here – does not reflect the material that is broadcast. *Reconsideration Order* ¶ 37. *See also Remand Order* ¶ 51 n. 162. Studies demonstrate that inaccurate ratings are far from an isolated problem, and that V-chip "content descriptors actually identify only a small minority of the full range of violence, sex, and adult language found on television." *Id*. Even if content descriptors were accurately applied, the Commission has noted, they would not assist the majority of parents because they are not sufficiently understood. *See id.*

The court reviews an agency's finding that a proffered alternative is ineffective only to determine whether that finding is supported by "substantial evidence." *Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 872, 873-74 (9th Cir. 1991). In this case, the evidence goes well beyond a demonstration that the V-chip is not "a perfect solution." CBS Br. 34. It shows that the V-chip "simply does not do the job of shielding minors" from the broadcast of material that is indecent, *Dial Information Servs. Corp. of N.Y. v. Thornburgh*, 938 F.2d 1535, 1542 (2d Cir. 1991), and CBS makes no attempt otherwise to confront the evidence on which the Commission relied. Because V-chip technology does not effectively further the government's compelling interests, it cannot be a less-restrictive alternative.

* * * * *

The Commission "remains 'sensitive to the impact of [its] decisions on speech.'" *Reconsideration Order* ¶ 35 (quoting *Forfeiture Order* ¶ 35). But in this case, "CBS broadcast 'the offensive spectacle of a man tearing off a woman's clothing on stage in the middle of a sexually charged performance' during the halftime show of one of the nation's most heavily-watched sporting events, to a vast nationwide audience that included numerous children." *Id*. (quoting *Forfeiture Order* ¶ 28). Moreover, "[t]he broadcast was 'planned by CBS and its affiliates under circumstances where they had the means to exercise control and good reason to take precautionary measures'" against any indecency. *Id*. (quoting *Forfeiture Order* ¶ 35). "Under the circumstances," the Commission rightly concluded, no constitutional – or other – consideration required it "to refrain from exercising [its] indecency enforcement powers to impose a forfeiture" on CBS for its broadcast of the Super Bowl XXXVIII halftime show. *Id*.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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IN THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

CBS CORPORATION, CBS Broadcasting Inc., CBS Television Stations Inc., CBS Stations Group of Texas L.P., and KUTV Holdings, Inc. PETITIONERS V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA RESPONDENTS	)	06-3575

COMBINED CERTIFICATION

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,919 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman.

The text of the E-Brief (in PDF format) and the text of the hard copies of the brief are identical. A virus scan was performed on the electronic version of this brief using Symantec Anti-Virus Corporate Edition, version 12/21/06 rev. 24, and no viruses were detected in the file.

Although the undersigned is a member of this Court's bar, we note that pursuant to the Court's longstanding practice, attorneys representing the United States and federal agencies are not required to be members of the bar of this Court. *See* 3d Cir. Rule 28.3, Committee Comment.

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