

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**UNITED STATES OF AMERICA,  
Plaintiff,**

**v.**

**FOX Television Stations, Inc.,  
WJBK(TV), and WTTG(TV)  
Washington, DC 20016,**

**TVT License, Inc.,  
Licensee of Station WTVT(TV)  
Washington, DC 20016,**

**Defendants.**

**Civil Action No. 08-584 (PLF)**

**PLAINTIFF'S RESPONSE TO  
ORDER OF NOVEMBER 18, 2010**

**INTRODUCTION**

The Federal Communications Commission (“FCC”) has used the same basic legal framework for evaluating indecent broadcasts for over twenty-five years. Under that framework, broadcast material is considered in context to determine whether it “describes, 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.” *Federal Commc’ns Comm’n v. Pacifica Found.*, 438 U.S. 726, 732 (1978). That definition of “indecenty” has been upheld against constitutional challenge by the Supreme Court in *Pacifica* and several times by the D.C. Circuit in three separate decisions in *Action for Children’s Television v. Federal Communications Commission*. See *ACT I*, 852 F.2d 1332 (D.C. Cir. 1988); *ACT II*, 932 F.2d 1504 (D.C. Cir. 1991); *ACT III*, 58 F.3d 654 (D.C. Cir. 1995).

In a departure from that precedent, the Second Circuit recently held that the FCC's long-standing indecency framework was unconstitutionally vague in an action challenging its application to two live broadcasts during which "a single, nonliteral use of an expletive" (a "fleeting expletive") was uttered. *See Fox Television Stations, Inc. v. Federal Commc'ns Comm'n*, 613 F.3d 317 (2d Cir. 2010) (hereinafter "*Fox v. FCC*"). By Order of November 18, 2010, this Court requested supplemental briefing on the applicability, if any, of the Second Circuit's reasoning on the issues in Defendants' pending motion to dismiss.

As explained below, the Second Circuit's decision does not bind this Court because there is contrary D.C. Circuit precedent, and this case is distinguishable on the facts. The government, moreover, is considering petitioning the Supreme Court for certiorari in *Fox v. FCC*. Given that possibility of further judicial review and the early procedural posture of this case, the United States respectfully suggests that judicial economy would be served by staying the proceedings here to await possible further clarification by the Supreme Court.

## **ARGUMENT**

### **I. THE SECOND CIRCUIT'S DECISION DOES NOT CONTROL THIS COURT'S ANALYSIS OF THE PENDING MOTION TO DISMISS.**

As an initial matter, the constitutionality of the FCC's indecency framework is not properly before the Court because Defendants elected not to challenge the Forfeiture Order here in the court of appeals. *See* Plaintiff's Opposition to Defendants' Motion to Dismiss ("Pl. Opp.") 9 (filed July 15, 2009) [Dkt. No. 34] (explaining that, by statute, the courts of appeals have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission made reviewable by

section 402(a) of title 47”). This Court accordingly must take the FCC’s existing indecency framework as given and determine only whether the United States has sufficiently pled facts supporting a finding that Defendants’ April 7, 2003 broadcast of *Married by America* violated 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999.

Even if incidental to that limited review, the Court were to consider the constitutionality of that framework, there is binding D.C. Circuit precedent on that issue. The *en banc* D.C. Circuit in *Action for Children’s Television v. Federal Communications Commission*, 58 F.3d 654 (D.C. Cir. 1995), expressly reaffirmed its “reject[ion of] the argument that the Commission’s definition of indecency was unconstitutionally vague and overbroad.” *Id.* at 658; *see also generally* Pl. Opp. Pt. III (addressing Defendants’ improperly raised First Amendment challenges to the FCC’s indecency framework).<sup>1</sup> Defendants contend that the *ACT* decisions are not controlling because the D.C. Circuit did not have before it the FCC’s “*new* indecency enforcement policy.” *See* Supplemental Memorandum in Support of Defendants’ Motion to Dismiss Complaint (“Defs. Supp. Mem.”) 6 (filed Dec. 6, 2010) (emphasis added) [Dkt. No. 37]. On the contrary, the FCC’s policy, both at the time of the *ACT* decisions and now, has been to employ a generic definition that identifies as indecent, material depicting or describing sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the broadcast medium. *Compare ACT I*, 852 F.2d at 1335, 1338 with *Industry Guidance*, 16 FCC Rcd 7999, 8002 (2001).

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<sup>1</sup> *Fox v. FCC* has no bearing on the arguments addressed in Parts I & II of the government’s opposition to Defendants’ motion to dismiss. *See* Pl. Opp. Pts. I & II.

Nevertheless Defendants urge this Court to adopt the Second Circuit's conclusion that the *ACT* decisions were "predicated on the FCC's 'restrained' enforcement policy,' which the Commission has now abandoned." Defs. Supp. Mem. at 6 (quoting *Fox v. FCC*, 613 F.3d at 329 & n.8).<sup>2</sup> Even if the Court were to accept the Second Circuit's characterization about the lack of agency restraint in *Fox v. FCC*, which involved an expansion of the FCC's enforcement with respect to fleeting expletives, that should have no bearing in this case involving repeated indecent images, specifically, visual depictions of strippers attempting to lure guests into sexually compromising positions at bachelorette and bachelor parties. *See* Complaint for Recovery of a Monetary Forfeiture ("Compl.") ¶¶ 20, 21. The Second Circuit was not confronted with, and therefore had no occasion to address, whether the FCC's decision here to proceed against the deliberate airing of such images during a pre-recorded broadcast constituted an abandonment of a prior policy of restraint. Thus, *Fox v. FCC* is not controlling here.

## **II. THE PROCEEDINGS IN THIS COURT SHOULD AWAIT THE FINALITY OF THE SECOND CIRCUIT'S DECISION.**

Although not binding on this Court and, in any event, distinguishable on its facts, *Fox v. FCC* now squarely presents for consideration by the Supreme Court the constitutionality of the FCC's indecency policy. Fox Television's premature effort to obtain review of that issue when certiorari originally was granted in that case occasioned the Supreme Court to state:

Whether [the FCC's orders cause some broadcasters to avoid certain language], and, if so, whether it is unconstitutional, will be determined soon enough, perhaps in this very case. . . . We see no reason to abandon our usual procedures in a rush to judgment without a lower court opinion.

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<sup>2</sup> The government previously addressed why the Supreme Court's decision in *Reno v. ACLU*, 521 U.S. 844 (1997), referenced in Defendants' supplemental memorandum (*see* Defs. Supp. Mem. at 7), does not undermine the *ACT* decisions' rejection of the vagueness challenge to the FCC's broadcast indecency policies. *See* Pl. Opp. at 23-25.

*Federal Commc'ns Comm'n v. Fox Television Stations*, 129 S. Ct. 1800, 1819 (2009). The government is presently considering whether to petition the Supreme Court for certiorari in *Fox v. FCC*.<sup>3</sup> If certiorari is sought again and granted on the constitutional question presented by that case, the Supreme Court's decision necessarily will inform the issues here. Considerations of judicial economy therefore dictate that these proceedings await the final resolution of that question.

This Court previously recognized the efficiency of that course when certiorari was granted in *Fox v. FCC* the first time. While acknowledging the “differences between that case and this one,” this Court noted that the Second Circuit case “involves issues of considerable (if not dispositive) significance to this case, including the constitutionality of the FCC’s so-called ‘indecent regime,’” and concluded that resolution of Defendants’ “pending motion to dismiss before the Supreme Court decides [that case] would not be an efficient use of the resources of either the Court or the parties.” Order of November 17, 2008 [Dkt. No. 25]. A similar forbearance is appropriate pending the disposition of any certiorari petition filed in *Fox v. FCC*.<sup>4</sup>

### CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court stay this action pending completion of judicial review of *Fox v. FCC*.

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<sup>3</sup> The government petitioned the Second Circuit for rehearing and rehearing *en banc* but that petition was denied by Order of November 22, 2010. *See* Pet. of the FCC and U.S. for Reh'g and Reh'g En Banc in *Fox v. FCC*, Case Nos. 06-1760-ag et al. (2d Cir., Aug. 25, 2010).

<sup>4</sup> Such a petition is currently due February 18, 2011.

Date: December 20, 2010

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on this 20th day of December 2010, I caused a copy of the foregoing Plaintiff's Response to the Court's Order of November 18, 2010 to be filed electronically and that the document is available for viewing and downloading from the ECF system.

/s/Jacqueline Coleman Snead  
JACQUELINE COLEMAN SNEAD