No. 10-1293

In The
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law.

The ACLJ often appears before this Court on the side of First Amendment free speech claims. *E.g., Schenck v. Pro-Choice Network of Western New York,* 519 U.S. 357 (1999); *Hill v. Colorado*, 530 U.S. 703 (2000); *McConnell v. FEC*, 540 U.S. 93 (2003). It has also appeared before this Court resisting specious free speech claims. *E.g.*, *City of Pleasant Grove v. Summum*, 555 U.S. 460 (2009).

The ACLJ stands firmly in support of the protection of children against public indecency. The ACLJ files this brief in support of neither party in an effort to alert this Court to the potential unintended consequences of its ruling in this case upon the traditional governmental power to proscribe public indecency.

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[1]The parties in this case have given blanket consents to the filing of amicus briefs in support of either party or neither party. Consent letters are on file with the Court. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The police power of the state[2] includes the ability to outlaw public indecency, especially where such indecency threatens to reach minors. Prohibitions on public indecency are a constitutionally permissible means of furthering a compelling government interest in protecting children, among other interests.

Broadcast indecency, by virtue of its pervasiveness and accessibility to children, endangers the same interests and is therefore subject to the same prohibition. This conclusion is independent of the question whether broadcast media receives a lesser degree of free speech protection. Accordingly, the media cannot possess a constitutional right to broadcast indecency that would *a fortiori* jeopardize the universal state laws against public indecency.

ARGUMENT

An indecent television broadcast is essentially an indecent public display. Just as a state could prohibit someone from strutting around naked in public, the

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[2]The present case involves restrictions by the federal government, not a state. The federal government does not possess a general police power. Nevertheless, the existence of a state power to ban public indecency is relevant here. Assuming the right to free speech has identical meaning vis-a-vis both federal and state limitations, the existence of a state power to restrict broadcast indecency, consistent with the First Amendment, necessarily implies that such restrictions -- regardless of their governmental source -- do not violate the broadcaster's constitutional right to free speech. This amicus brief does not address the separate question of the federal government's authority to act in this area.

state could forbid someone from strutting around carrying a display -- still or video -- of someone naked. Likewise, a state may forbid companies from broadcasting into people's homes programs depicting someone strutting around naked. Thus, an indecent broadcast is properly subject to government prohibition. This rule is *not* dependent upon any lower standard of review for broadcast media but instead reflects this Court's consistent recognition of the government authority to outlaw public indecency.

I. BANS ON PUBLIC INDECENCY ARE CONSTITUTIONAL.

This Court has long recognized that "public nudity" is "traditionally subject to indecent exposure laws." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n.7 (1975). *See also Roth v. United States*, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting) ("No one would suggest that the First Amendment permits nudity in public places"). Currently all fifty states and the District of Columbia have laws against public indecency/indecent exposure. *See* Appendix.

This Court has declared that there is a compelling government interest in protesting minors from indecency. *Denver Area Educ. Telecomms. Consortium v. FCC ["DAETC"],* 518 U.S. 727, 755 (1996) (opinion of Court per Breyer, J., joined by Stevens, O'Connor, Kennedy, Souter, & Ginsburg, JJ.) ("We agree with the Government that protection of children [from indecency] is a 'compelling interest'"); *id.* at 773 (Stevens, J., concurring) ("the Government may have a compelling interest in protecting children from indecent speech on such a pervasive medium [as cable

TV]"); *id.* at 779 (O'Connor, J., concurring) (recognizing a "well-established compelling interest of protecting children from exposure to indecent material"); *id.* at 804 (Kennedy, J., joined by Ginsburg, J.) (acknowledging the "weighty" concern that "[t]he householder should not have to risk that offensive material come into the hands of his children before it can be stopped") (internal editing and quotation marks omitted); *id.* at 806 ("Congress does have . . . a compelling interest in protecting children from indecent speech"); *id.* at 832 (Thomas, J., joined by Rehnquist, C.J., & Scalia, J.) (recognizing "well-established compelling interest" in protecting minors from indecency).

Not surprisingly, then, this Court has upheld the constitutionality of bans on public indecency, even as applied to allegedly expressive nudity. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.,* 529 U.S. 277 (2000). Such laws rest not just upon "moral disapproval of people appearing in the nude among strangers in public places," *Barnes*, 501 U.S. at 568 (plurality opinion of Rehnquist, C.J., joined by O'Connor & Kennedy, JJ.), but also upon the grave risk of indecent exposure to children -- imperilling the compelling interest noted above. Moreover, even as to adults, the sensory shock of unexpected exposure to another person's private parts, whether in person or by visual display, is like "the first blow" that cannot be cured by then "run[ning] away," *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978).

II. BANS ON BROADCAST INDECENCY ARE ALSO CONSTITUTIONAL.

Broadcast indecency implicates these same concerns. By definition, "broadcast" media have "a uniquely pervasive presence in the lives of all Americans," *DAETC*, 518 U.S. at 745 (plurality) (quoting *Pacifica,* 438 U.S. at 748). Broadcast media can contain elements that "intrude on the privacy of the home without prior warning," *Sable Communications v. FCC*, 492 U.S. 115, 127 (1989), especially for the viewer who is just tuning in or switching channels. Moreover, broadcast media are "uniquely accessible to children," *id.* (internal quotation marks and citation omitted), who need navigate no passcodes or lockboxes to turn on a TV set.

Indecent broadcasts are thus subject to governmental restriction just like other forms of indecent exposure. Indeed, the instantaneous dispersal of a "wardrobe malfunction" on prime-time TV imposes upon an audience that is orders of magnitude greater than the limited audience of an intoxicated flasher or wandering naturist. Such high-tech broadcasts of indecent exposure are far more likely to reach children and ambush unwilling adults (not to mention contribute to the general degradation of public culture).

In short, the government can disallow public indecency on broadcast TV as well as on city streets. Importantly, this conclusion in no way rests upon any difference in the level of scrutiny between speech in public places and licensed broadcast media. Even if a TV broadcast were to be afforded the same protection as a soapbox orator in a park, laws against indecent

exposure would still be constitutional. The orator has no right to expose himself or herself, even as part of some message about nudity. *Supra* § I. Nor does Fox TV have the right to pipe such an exposure willy-nilly into homes across America.

CONCLUSION

This Court should decide this case in a way that reaffirms, rather than inadvertently undercuts, either directly or by logical implication, the constitutionality of the laws of all fifty states and the District of Columbia (set forth in the Appendix) forbidding indecent exposure.

Respectfully submitted,

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