June 19, 2013

Marlene H. Dortch
Secretary,
Office of the Secretary,
Federal Communications Commission
445 12th St. SW, Room TW-A325,
Washington, DC 20554

Re: GN Docket No. 13-86, DA 13-581

Dear Secretary Dortch:

We write to offer comments in response to the Federal Communications Commission's (the "Commission" or the "FCC") Notice of April 19, 2013, seeking input on changes to the Commission's enforcement of its broadcast indecency policies.[1] As explained in more detail below, we urge the Commission to indeed limit its enforcement of the broadcast indecency rules to the most egregious cases of misconduct,[2]

We applaud the Commission for opening this proceeding. The indecency enforcement record since the turn of the millennium showcases—in stark terms—the dangers presented by the grant to the government of authority to regulate speech based on terms as inherently unbounded as "indecency." Numerous instances of broadcaster self-censorship and arbitrary FCC enforcement

principle of the First Amendment—that democratic government, to survive, must be denied the power to impose content- or viewpoint-based restrictions on speech.[8]

The current state of our broadcast media also supports a relaxation or elimination of indecency regulation. In 1970, the year the FCC issued its first fine for indecency, analog television and radio broadcasts were, quite literally, the only mass distributed electronic media available.[9] Today, as a proportion of all media consumed, over-the-air broadcasting is dramatically less pervasive, and yet remains essential to millions of

audience.[18] In doing so, the Commission undertook several enforcement actions, including one condemning "innuendo and double entendre" on the drive-time Howard Stern show and another

- An ABC affiliate in Buffalo airing audiobooks for the visually impaired over its audio feed interrupted the service after a single complaint about sexual language in the Tom Wolfe book I Am Charlotte Simmons. When reinstated, the affiliate would only air the program during the safe harbor period.[25]

- In a case involving the chilling of indisputably political speech, PBS offered concerned affiliates an edited version of the civil rights documentary "Eyes on the Prize" to bleep out the famous statement by James Forman advocating a more aggressive approach to the movement: "[i]f we can't sit at the table, let's knock the fucking legs off."[26]

In addition to highlighting how far afield the indecency regime has strayed from what was permitted under *Pacifica*, the inconsistency, arbitrariness and chilling effect are all hallmarks of an unconstitutionally vague and overbroad law. Indeed, the Supreme Court found the indecency test the Commission applies in broadcast indecency cases unconstitutionally vague and overbroad for precisely those reasons in *Fox v. ACLU*.[27] In a more recent case, the Supreme Court cited *Fox* in explaining that the indicia of unconstitutional vagueness include a statute requiring "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings."[28] Notably, while the *Fox* Court distinguished *Pacifica*, it did so on the grounds that, at the time of the *Pacifica* decision, (1) the Carlin broadcast "represented a rather dramatic departure from traditional program content," (i.e., "verbal shock treatment"); (2) the *Pacifica* complaint was only about the time of broadcast, not a blanket prohibition; (3) the *Pacifica* order was not punitive; and (4) the uniquely pervasive nature of broadcast at the time justified greater regulation.[29]

With respect to (1), we note again the extent to which the indecency regime has been used to punish and suppress isolated instances of creative, social and political speech that in no way resemble the Carlin monologue. On (2), aggressive

has changed dramatically since 1978, so much so that the facts that drove the ,ac c,a Court no longer apply.

In short, the inconsistency and arbitrariness of indecency enforcement, which has expanded far beyond what was envisioned in ,ac c,a, suggest strongly that the current indecency enforcement regime would not withstand constitutional scrutiny even under the uniquely lax approach of the ,ac c,a court.

II. The Broadcast Medium is No Longer Uniquely Pervasive and Uniquely Accessible to Children, But Is Still an Essential Source of News and Entertainment for Millions of Adult Americans

When ,ac c,a was decided, broadcast television and radio were the only truly "mass" electronic media in the United States. The only real competitor, cable television, was still in its infancy. The first pay cable channel, Home Box Office, had been introduced only three years earlier, and C-SPAN only a year earlier. In total, only 9.4 million Americans subscribed to a cable service in 1978, and many of those customers were using cable to access over-the-air broadcast signals.[31]

By contrast, as of the end of 2011, cable, satellite and telephone television services had 101.2 million subscribers.[32] Broadband internet penetration and adoption is even higher, providing another avenue to both video and audio media.

and lower-income families.[37]

Additionally, “indecency” is not one of the narrow, “traditional” categories of content-based speech restrictions that the Supreme Court has identified as deserving of less constitutional protection. The indecency statute is indisputably a content-based restriction on speech.[42] In enforcing the statute, the FCC must make two inherently subjective judgments about the programming in question. First, does the speech de

on speech. And, finally, it does not fall within one of the traditional categories of content-based restrictions deserving of less constitutional protection. In short, the only constitutionally sound application of 18 U.S.C. § 1464 is against legal obscenity, and we urge the Commission to fashion an "egregious cases" policy with exactly that in mind.

Please do not hesitate to contact Legislative Counsel/Policy Advisor Gabe Rottman at 202-544-1681 or grottman@dcaclu.org if you have any questions or comments.

Sincerely,

Laura W. Murphy
Director, Washington Legislative Office

Gabriel Rottman
Legislative Counsel/Policy Advisor