ACLU
AMERICAN CIVIL LIBERTIES UNION

WASHINGTON LEGISLATIVE OFFICE
Laura W. Murphy
Director

1333 H Street, NW Washington, D.C. 20005

(202) 544-1681 Fax (202) 546-0738

February 15, 2005

Re: H.R. 310, the Broadcast Decency Enforcement Act of 2005

Dear Representative:

We are writing to urge you to vote against H.R. 310, the Broadcast Decency Enforcement Act of 2005, when it comes to the floor for a vote. The bill would dramatically increase fines for obscene, indecent, or profane broadcasts, sending a widening chill into the atmosphere of free expression protected by the First Amendment.

The heart of our objection to the bill is that it relies upon the FCC's definition of "indecency" which is already vague.[1] Because of the vagueness, speakers must engage in speech at their peril, guessing what the FCC will determine to be prohibited. This is particularly true under H.R. 310, since it specifically makes it easier for the FCC to fine artists and performers without any initial warning. Increasing fines merely exacerbates the problem, particularly for performers and small broadcasters. Rather than face a potentially ruinous fine, speakers and smaller broadcasters are more likely to remain silent.

The stepped-up enforcement by the FCC of its indecency regulations has already had a chilling effect on broadcasters, who are wary of running afoul of the rules. One example demonstrates not only the difficulty of predicting the FCC's rulings, but the arbitrariness of the FCC's enforcement: Last year, the FCC reversed years of precedent and held that lead singer for U2 Bono's fleeting use of the F-word during the Golden Globes constituted "indecency." Last Veteran's Day, some stations refused to air "Saving Private Ryan" because it contained multiple instances of the same word uttered by Bono. Yet, the stations that DID air "Saving Private Ryan" were not fined for indecency.[2]

Under H.R. 310, guessing incorrectly can have important ramifications for a broadcaster, including huge fines and possibly loss of its broadcasting license. Vague laws and interpretations create traps for broadcasters because they are unsure what conduct or speech will constitute indecency. Rather than have broadcasters act at their peril, the law prefers reasonable notice of what conduct will give rise to legal consequences, so that the speaker may act accordingly. Vagueness results in chilling of communications that may well NOT be indecent or profane, simply because the cost to the broadcaster of being wrong is too great. Vagueness encourages silence instead of robust debate. "Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . .than if the

[1] *Reno v. ACLU*, 521 U.S. 844 (1997) was the first Supreme Court case to undertake a rigorous examination of the definition of "indecency" in the Communications Decency Act. By a 9-0 decision, the Court invalidated that portion of the statute, finding the definition to be vague and overbroad. The Communications Decency Act definition was essentially the same as that used by the FCC.

[2] The ACLU is not contending that those stations SHOULD have been fined for indecency. We are merely pointing out the difficulty of divining the FCC's rules on indecency.

boundaries of the forbidden areas were clearly marked."'[3] The bottom line is that broadcasters enjoy First Amendment protection. The uncertainty inherent in the definition (or lack thereof) of "indecency" will inevitably lead broadcasters to avoid certain speech because that speech may later be deemed indecent, and the broadcaster faces tremendous liability because of the increase in the fines provided for in H.R. 310.

With the exception of loss of a broadcasting license, the same arguments apply to performers, who also enjoy First Amendment protection. Performers will be wary of incurring the wrath of the FCC and will therefore "steer wider of the unlawful zone" to avoid possibly ruinous fines.

All of this is fundamentally inconsistent with the "uninhibited, robust, and wide-open"[4] debate contemplated by the First Amendment. This is not just a matter of prohibiting certain words that some might find objectionable. The Supreme Court has noted, "we cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[5] Increasing the fines increases the risk of stepping over a blurry and ill-defined line.

***FCC v. Pacifica Foundation* does not provide unlimited authority to define and punish broadcast indecency. Furthermore, subsequent developments make it questionable whether *Pacifica* has any continued vitality.**

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court allowed some limited regulation of an allegedly indecent broadcast (George Carlin's "Seven Dirty Words" Monologue). Great caution, however, should be exercised in attempting to rely upon this 27-year-old case as precedent for deciding what broadcasts are indecent or the ability to impose draconian penalties.

Initially, it is important to note that, unlike obscenity, indecent speech is protected under the First Amendment. *Id.*, at 746 ("Some uses of even the most offensive words are unquestionably protected. . . .Indeed, we may assume, *arguendo*, that this monologue would be protected in other contexts.") The ability to regulate indecency in the broadcasting medium is an exception rather than the general rule. In many other contexts, the Supreme Court has invalidated efforts to restrict indecency.[6] In *Pacifica*, the Court applied a slightly different standard for broadcasting, but that decision cannot be read too broadly.

First, the decision was a fragmented one (5-4) that did not approve a particular standard for indecency, or uphold a substantive penalty against the licensee.[7] Since *Pacifica*, the Court has acknowledged that the FCC's definition of

---

[3] *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

[4] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

[5] *Cohen v. California*, 403 U.S. 15 at 26 (1971).

[6] Print medium: *Butler v. Michigan*, 352 U.S. 380, 383 (1957); *See also Hamling v. United States*, 418 U.S. 87, 113-114 (1974) (statutory prohibition on "indecent" or "obscene" speech may be constitutionally enforced only against obscenity); Film: *United States v. 12 200-ft. Reels of Film,*, 413 U.S. 123, 130 n.7 (1973); In the mails: *Bolger v. Youngs Drug Products Corp.* 463 U.S. 60 (1983); In the public forum: *Erzoznik v. City of Jacksonville*, 422 U.S. 205 (1975); Cable Television: *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000); the Internet: *Reno v. ACLU*, 521 U.S. 844 (1997).

[7] *See Pacifica,* 438 U.S. at 743 (plurality op.) and at 755-56 (Powell, J., concurring) ("[t]he Court today reviews only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion"). *See also Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 559 (2d Cir. 1988) ("[t]he *Pacifica* Court declined to endorse the Commission definition of what was indecent"); *ACLU v. Reno*, No. Civ. A. 96-963, 1996 WL 65464 at *3 (E.D.Pa. Feb. 15, 1996) (Buckwalter, J.) ("it simply is not clear, contrary to what the government suggests, that the word 'indecent' has ever been defined by the Supreme Court").

indecency was not endorsed by a majority of the Justices, and has repeatedly described the decision as an "emphatically narrow holding."[8]

Second, the rationale for the *Pacifica* decision, that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans,"[9] is highly questionable in this era of cable, satellite and the Internet, all of which compete with broadcast television. Yet, the government can only impose limited content controls on the broadcast media. Paradoxically, full First Amendment protection now depends, literally, upon whether you are watching a broadcast channel or a cable channel.

Third, and perhaps most importantly, the law itself has evolved since 1978. In *Pacifica*, three justices who joined the plurality opinion suggested "indecent" speech was subject to diminished scrutiny because it was "low value" speech.[10] Approximately twenty-two years later, the Supreme Court rejected that notion, holding that "indecent" speech is fully protected under the First Amendment, and not subject to diminished scrutiny as "low value" speech. The Court stressed that "[t]he history of the law of free expression is one of vindication in cases involving speech that many citizens find shabby, offensive, or even ugly," and that the government cannot assume that it has greater latitude to regulate because of its belief that "the speech is not very important."[11] Additionally, the Court since *Pacifica* has invalidated government-imposed indecency restrictions on cable television, despite its "pervasiveness." While *Pacifica* noted the pervasiveness of broadcast television as part of its rationale, the Court in striking such regulation in the cable television context found specifically that "[c]able television broadcasting, including access channel broadcasting, is as 'accessible to children' as over-the-air broadcasting, if not more so."[12] Thus, the rationale in *Pacifica* is undercut by the Court's later decision.

Finally, in *Reno v. ACLU*, the Court for the first time subjected the indecency definition (in the Internet context) to rigorous scrutiny, and found it to be seriously deficient.[13] *Reno* and other decisions subsequent to *Pacifica* undercut *Pacifica's* rationale and raise serious questions about its vitality.

Conclusion

The indecency standard already suffers from vagueness, making it difficult for broadcasters or performers to know what will result in sanctions. That uncertainty is heightened when the FCC itself has difficulty applying the standard. H.R. 310, far from avoiding constitutional inquiry, exacerbates an already serious problem. The effect of the bill is to turn down the thermostat in an already chilly atmosphere, deterring speech that is constitutionally

---

[8] *Reno*, 521 U.S. at 866-867, 870; *Sable*, 492 U.S. at 127; *Bolger*, 463 U.S. at 74.

[9] *Paifica*, 438 U.S. at 748.

[10] Only Justices Stevens, Rehnquist, and Chief Justice Burger joined in that part of the opinion asserting that indecent speech lies "at the periphery of First Amendment concern." *Pacifica*, 438 U.S. at 743.

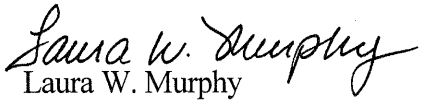
[11] *Playboy Entertainment Group*, 529 U.S. at 826.

[12] *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 717, 744 (1996).

[13] 521 U.S. at 871-881. In the context of obscenity which is not protected under the First Amendment, the work must be reviewed as a whole, the effect of the material is judged based on the average person, and material that has literary, artistic, political or scientific value cannot be restricted. None of these findings are required in determinations of indecency, although indecent speech is protected under the First Amendment. If the Supreme Court requires such findings before speech can be deemed obscene, it makes little sense to apply a lesser standard to speech that is, in fact, protected.

protected. For these reasons, we urge you to vote against this bill.

Sincerely,



Laura W. Murphy
Director

Marvin J. Johnson
Legislative Counsel