No. 07-582

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals erred in striking down the Federal Communications Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language," 18 U.S.C. 1464; see 47 C.F.R. 73.3999, when the expletives are not repeated.

PARTIES TO THE PROCEEDING

Petitioners are the Federal Communications Commission and the United States of America.

Respondents who were petitioners in the court of appeals below are Fox Television Stations, Inc.; CBS Broadcasting Inc.; WLS Television, Inc.; KTRK Television, Inc.; KMBC Hearst-Argyle Television, Inc.; and ABC Inc.

Respondents who were intervenors in the court of appeals below are NBC Universal, Inc.; NBC Telemundo License Co.; NBC Television Affiliates; FBC Television Affiliates Association; CBS Television Network Affiliates; Center for the Creative Community, Inc., doing business as Center for Creative Voices in Media, Inc.; and ABC Television Affiliates Association.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 489 F.3d 444. The order of the Federal Communications Commission (Pet. App. 61a-142a) is reported at 21 F.C.C.R. 13,299.

JURISDICTION

The judgment of the court of appeals (Pet. App. 143a-144a) was entered on June 4, 2007. On August 23, 2007, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 4, 2007. On September 24, 2007, Justice Ginsburg further extended the time to November 1, 2007, and the petition was filed on that date. The petition for a writ of certiorari was granted on March 17, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent statutory and regulatory provisions are set out in an appendix to the petition for a writ of certiorari. Pet. App. 145a-149a.

STATEMENT

1. a. In the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, Congress sought "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 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). Among a licensee's public-interest obligations is the 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 F.C.C.R. 8358, 8358 ¶ 2 (1989).

The duty of licensees to refrain from the broadcast of indecent material was first set forth in the Radio Act of 1927, ch. 169, § 29, 44 Stat. 1172. It is now codified at 18 U.S.C. 1464, which makes it unlawful to "utter[] any obscene, indecent, or profane language by means of radio communication." As directed by Congress, the Federal Communications Commission (FCC or Commission) has adopted regulations specifying that indecent material may not be broadcast between the hours of 6 a.m. and 10

p.m. 47 C.F.R. 73.3999(b) (adopted pursuant to Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 954); see *Action for Children's Television* v. *FCC*, 58 F.3d 654, 669-670 (D.C. Cir. 1995) (en banc), cert. denied, 516 U.S. 1043 (1996) (*ACT III*). The Commission does not regulate indecent broadcasts outside that time period. The FCC has authority to enforce the indecency prohibition by, among other things, imposing civil forfeitures, see 47 U.S.C. 503(b)(1)(B) and (D), or taking violations into account during license-renewal proceedings, see 47 U.S.C. 307 (2000 & Supp. V 2005); 47 U.S.C. 309(k).

b. In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), this Court upheld the constitutionality of the FCC's authority to regulate indecent broadcasts. At issue in *Pacifica* was the midday radio broadcast of George Carlin's monologue "Filthy Words." Responding to a listener complaint, the Commission determined that the broadcast violated Section 1464. In reaching that conclusion, it applied a "concept of 'indecent' [that] is intimately connected with the exposure of children to language that 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." *Id.* at 731-732 (quoting *In re Citizen's Complaint Against Pacifica Found. Station WBAI (FM), New York*, 56 F.C.C.2d 94, 98 (1975) (*WBAI*)). As the Court observed, "[t]he Commission's decision rested entirely on a nuisance rationale under which context is all-important," and that "requires consideration of a host of variables." *Id.* at 750.

In rejecting a constitutional challenge to the Commission's enforcement of Section 1464, the Court explained

that, "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica*, 438 U.S. at 748. That is in part because "the broadcast media have established a uniquely pervasive presence in the lives of all Americans" in that "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." *Ibid.* In addition, the Court emphasized, "broadcasting is uniquely accessible to children, even those too young to read," and the broadcast of indecent language can "enlarge[] a child's vocabulary in an instant." *Id.* at 749. The Court concluded that "the government's interest in the well-being of its youth and in supporting parents' claim to authority in their own household justified the regulation of otherwise protected expression." *Ibid.* (internal quotation marks and citation omitted); see *id.* at 762 (Powell, J., concurring). The Court rejected the contention that "one may avoid further offense by turning off the radio when he hears indecent language," comparing it to "saying that the remedy for an assault is to run away after the first blow." *Id.* at 748-749.

c. For several years after *Pacifica*, the Commission enforced the indecency prohibition only against "material that closely resembled the George Carlin monologue," that is, material that "involved the repeated use, for shock value, of words similar or identical to those" used by Carlin. *In re Infinity Broad. Corp. of Penn.*, 3 F.C.C.R. 930, 930 ¶ 4 (1987) (*Infinity Reconsideration Order*). In 1987, however, the Commission determined that such a "highly restricted enforcement standard * * * was unduly narrow as a matter of law" because it

"focus[ed] exclusively on specific words rather than the generic definition of indecency." *Id.* at 930 ¶ 5. Accordingly, the Commission concluded that, in enforcing Section 1464, it would apply the generic indecency test articulated in *Pacifica*, that is, whether the language "describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, when there is a reasonable risk that children may be in the audience." *Id.* at 930 ¶¶ 2, 5.[1]

In making that change, the Commission recognized that "the question of whether material is patently offensive requires careful consideration of context." *Infinity Reconsideration Order*, 3 F.C.C.R. at 932 ¶ 16. Despite its renewed emphasis on context, however, the Commission stated that "[i]f a complaint focuses solely on the use of expletives * * * deliberate and repetitive use * * * is a requisite to a finding of indecency." *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 13 (1987).

The District of Columbia Circuit upheld the Commission's decision to move beyond its narrow post-*Pacifica* policies. See *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (1988) (R.B. Ginsburg, J.) (*ACT I*). As the court explained, "[s]hort of the thesis that *only* the seven dirty words are properly designated indecent * * * some more expansive definition must be attempted." *Id.* at 1338. Because "[t]he FCC rationally

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[1] Thus, the Commission found that certain broadcasts of the Howard Stern show would have been actionably indecent under its indecency standards as clarified because they involved "not merely an occasional off-color reference," but an "explicit" discussion of "matters sexual and excretory, in a pandering and titillating fashion," even though they did not employ "the specific words used in the *Pacifica* case." *In re Infinity Broad. Corp. of Penn.*, 2 F.C.C.R. 2705, 2706 ¶¶ 10, 11 (1987).

determined that its former policy could yield anomalous, even arbitrary results," and "[n]o reasonable formulation tighter than the one the Commission has announced has been suggested," the court concluded that the agency had provided an adequate explanation for its policy. *Ibid.*[2]

d. In 2001, the Commission issued a policy statement to provide further guidance concerning the indecency standard. See *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999, 7999 ¶ 1 (2001) (*Industry Guidance*). In that statement, the Commission explained that it applies a two-part test to determine whether a broadcast is indecent. First, the material at issue "must fall within the subject matter scope of [the] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities." *Id.* at 8002 ¶ 7. Second, "the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium." *Id.* at 8002 ¶ 8.

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[2] In a later portion of the same decision, the District of Columbia Circuit remanded the Commission's tentative determination that indecent material could be broadcast only after midnight, finding that the Commission had "failed to consider fairly and fully what time lines should be drawn." *ACT I*, 852 F.2d at 1341. Thereafter, the court invalidated a congressional directive to enforce Section 1464 "on a 24 hour per day basis." *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1507 (D.C. Cir. 1991) (*ACT II*) (emphasis omitted), cert. denied, 503 U.S. 913, 914 (1992). It later upheld a 10 p.m. to 6 a.m. statutory safe harbor for indecent broadcasts. See *ACT III*, 58 F.3d at 656; Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16a, 106 Stat. 954. The FCC's current regulations provide that "[n]o licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent." 47 C.F.R. 73.3999(b).

The policy statement reiterated that whether a broadcast is "patently offensive" turns on "the *full context*" in which the material is broadcast and is therefore "highly fact-specific." *Industry Guidance*, 16 F.C.C.R. at 8002-8003 ¶ 9. The Commission set out three "principal factors" that it considered "significant" in evaluating patent offensiveness: "(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; [and] (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 (emphases omitted). With respect to the second factor, the policy statement noted that "[r]epetition of and persistent focus on sexual or excretory material" may "exacerbate the potential offensiveness of broadcasts," but that "even relatively fleeting references may be found indecent where other factors"—such as the use of "graphic or explicit" language—"contribute to a finding of patent offensiveness." *Id.* at 8008-8009 ¶¶ 17, 19.

e. In January 2003, the NBC television network broadcast the Golden Globe Awards. In accepting the award for Best Original Song, the rock singer Bono stated: "This is really, really fucking brilliant. Really, really great." *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4976 n.4 (2004) (*Golden Globe Awards Order*). The Commission concluded that the broadcast of Bono's remark was indecent even though Bono's use of the F-Word was not "sus-

tained or repeated." *Id.* at 4980 ¶ 12.[3] The Commission explained that, even when used merely as an "intensifier," the F-Word falls within the subject-matter scope of indecency regulation because, given its "core meaning," the word "inherently has a sexual connotation." *Id.* at 4978 ¶ 8. The Commission also found that Bono's remark was "patently offensive" because "[t]he 'F-Word' is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language"; its use "invariably invokes a coarse sexual image"; and its broadcast "on a nationally telecast awards ceremony[] was shocking and gratuitous." *Id.* at 4979 ¶ 9. The Commission observed that NBC had not claimed that its broadcast of the word had "any political, scientific or other independent value." *Ibid.*

The Commission recognized that its decision "depart[ed]" from prior cases insofar as they stated that "isolated or fleeting use of the 'F-Word' or a variant thereof in situations such as this is not indecent," and it made clear "that such cases are not good law to that extent." *Golden Globe Awards Order*, 19 F.C.C.R. at 4980 ¶ 12. Instead, the Commission concluded, "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Ibid.*

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[3] The FCC's Enforcement Bureau had initially ruled that the broadcast was not indecent because Bono used the F-Word "as an adjective or expletive to emphasize an exclamation," and because the remarks were "fleeting and isolated." See *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 F.C.C.R. 19,859, 19,861 ¶¶ 5-6 (2003). The *Golden Globe Awards Order* reversed that staff decision.

Although the Commission concluded that Bono's remark was indecent, it did not impose a sanction. Because "prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent," the Commission determined that NBC "did not have the requisite notice to justify a penalty." *Golden Globe Awards Order*, 19 F.C.C.R. at 4980, 4982 ¶¶ 12, 15.

2. a. This case arises out of two broadcasts that aired before the Commission released the *Golden Globe Awards Order*. On December 9, 2002, the Fox television network broadcast the 2002 Billboard Music Awards beginning at 8 p.m. eastern standard time. During that broadcast, the entertainer Cher received an "Artist Achievement Award." In her acceptance speech, she said:

> I've had unbelievable support in my life and I've worked really hard. I've had great people to work with. Oh, yeah, you know what? I've also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck 'em. I still have a job and they don't.

Pet. App. 115a-116a.

The following year, on December 10, 2003, Fox broadcast the 2003 Billboard Music Awards beginning at 8 p.m. eastern standard time. Nicole Richie and Paris Hilton, the stars of Fox's show "The Simple Life," presented one of the awards. During their presentation, they engaged in the following exchange:

> Paris Hilton: Now Nicole, remember, this is a live show, watch the bad language.
>
> Nicole Richie: Okay, God.

> Paris Hilton: It feels so good to be standing here tonight.
>
> Nicole Richie: Yeah, instead of standing in mud and [audio blocked]. Why do they even call it "The Simple Life?" Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.

Pet. App. 69a-71a.

b. The Commission received complaints from viewers about both Billboard Music Awards broadcasts. See, *e.g.*, J.A. 19 ("My son and I were watching the 2003 Billboard Music Awards the other night. * * * [M]y son asked me what f**king meant."); J.A. 20 ("It is hard enough to teach your children manners and decent behavior without showing young adults on the TV using" expletives.). It issued an order addressing those complaints as well as complaints against numerous other programs, including (1) several "NYPD Blue" episodes aired by ABC in which, among other things, a character on the show used the term "bullshit," and (2) an episode of CBS's "The Early Show" in which a contestant on CBS's "Survivor: Vanuatu" referred to another contestant as a "bullshitter" in a live interview. J.A. 86-109. The Commission concluded that each of those four programs contained indecent language. J.A. 86. As in the *Golden Globe Awards Order*, however, the Commission did not impose any sanction because it concluded that broadcast licensees lacked adequate notice of its new policy regarding the airing of expletives. *Ibid.*

c. Respondents petitioned for review, and the cases were consolidated in the United States Court of Appeals for the Second Circuit. Pet. App. 66a. At the Commission's request, the court of appeals granted a remand in order to provide the agency an opportunity to address in

the first instance the broadcasters' specific challenges to the Commission's determinations with regard to their programs. *Id.* at 67a-68a.

d. On remand, the Commission vacated the relevant portions of its earlier order. Pet. App. 68a. It dismissed the complaints against "NYPD Blue" on procedural grounds, *id.* at 129a-131a, and it concluded that the use of an expletive on "The Early Show" was not indecent because it occurred in the context of a "news interview," *id*. at 125a-128a. The Commission explained that, "regardless of whether such language would be actionable in the context of an entertainment program," it was not "actionably indecent * * * in this context." *Id.* at 128a.

At the same time, the Commission reaffirmed its conclusion that the broadcast of the 2002 and 2003 Billboard Music Awards violated the prohibitions against the broadcast of indecent material. Pet. App. 69a-124a. Applying the framework set out in the 2001 *Industry Guidance*, the Commission concluded that the expletives aired during the Billboard Music Awards were sexual or excretory references that fell within the subject-matter scope of the indecency definition. Fox did not dispute that Richie's use of the S-Word referred to excrement. *Id.* at 73a. In addition, the Commission reaffirmed that the F-Word (used by both Richie and Cher) inherently "has a sexual connotation even if the word is not used literally" because "the word's power to 'intensify' and offend derives from its implicit sexual meaning." *Id.* at 73a-74a; see *id.* at 117a-118a. The Commission also concluded that both broadcasts were "patently offensive." *Id.* at 74a, 118a, 120a. With respect to both broadcasts, the Commission found that the language used was not only graphic and shocking—particularly in the context of nationally televised awards programs viewed by a

substantial number of children—but was also gratuitous. *Id.* at 76a-77a (for the 2003 broadcast, 2.3 million viewers (23.4% of the audience) were under age 18, and 1.1 million viewers (11% of the audience) were under age 12); 119a-120a (for the 2002 broadcast, 2.6 million viewers (27.9% of the audience) were under age 18, and 1.2 million viewers (12.7% of the audience) were under age 12). Indeed, the Commission noted, Fox did not argue that the expletives at issue "had any artistic merit or were necessary to convey any message." *Id.* at 76a n.44; see *id.* at 120a n.191.

As in the *Golden Globe Awards Order*, the Commission rejected the argument that the fleeting nature of the utterances should preclude a finding that the language was indecent. Pet. App. 82a-83a. The Commission explained that it was "artificial" to maintain a distinction between "expletives," which had to be repeated to be actionable, and literal "descriptions or depictions of sexual or excretory functions," which did not. *Id.* at 82a; see *Industry Guidance*, 16 F.C.C.R. at 8008, 8009 ¶¶ 17, 19. As the Commission observed, "[i]n evaluating whether material is patently offensive, the Commission's approach has generally been to examine all factors relevant to that determination." Pet. App. 83a. The Commission accordingly found that "categorically requiring repeated use of expletives in order to find material indecent" would be "inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context." *Ibid.* The Commission noted that *Pacifica* did not require it to "ignore 'the first blow' to the television audience in the circumstances presented here." *Ibid.* The Commission also observed that "granting an automatic exemption for 'isolated or fleeting' expletives" would allow broadcasters "to air any one of a

number of offensive sexual or excretory words, regardless of context, with impunity during the middle of the afternoon provided that they did not air more than one expletive in any program segment." *Id.* at 84a-85a. Permitting "[s]uch a result," the Commission explained, "would be inconsistent with our obligation to enforce the law responsibly." *Id.* at 85a.

The Commission again declined to sanction Fox because "it was not clear at the time that broadcasters could be punished for the kind of comment at issue here." Pet. App. 122a; see *id.* at 113a. It therefore found no need to address whether the broadcast-indecency violations were "willful" within the meaning of 47 U.S.C. 503(b), which authorizes the Commission to impose monetary forfeitures for "willful[]" or "repeated[]" violations of the Communications Act or Commission rules. Pet. App. 114a; 124a n.206. And because it imposed no sanction, the Commission stated that it would not consider its indecency findings "to have an adverse impact upon" the Fox stations that participated in the broadcasts, either "as part of the [license] renewal process or in any other context." *Id.* at 113a-114a, 124a.

3. A divided panel of the court of appeals vacated and remanded. Pet. App. 1a-60a.

a. The court of appeals concluded that the Commission's policy regarding isolated expletives was "arbitrary and capricious under the Administrative Procedure Act" because the Commission had "failed to articulate a reasoned basis for [its] change in policy." Pet. App. 2a. Taking the view that the "primary reason for the crackdown on fleeting expletives" was to protect "viewers (including children)" from the "first blow" of an expletive, the court of appeals stated that the Commission had failed to provide a "reasonable explanation for

why it has changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between *Pacifica* and *Golden Globes*." *Id.* at 25a.

Even "[m]ore problematic," according to the court of appeals, was the fact that "the Commission does not take the position that *any* occurrence of an expletive is indecent." Pet. App. 25a-26a. Because the Commission did not flatly prohibit the broadcast of vulgar expletives in every circumstance, the court concluded that "the record simply does not support the position that the Commission's new policy was based on its concern with the public's mere exposure to this language on the airwaves." *Id.* at 27a-28a. Even though the court recognized that any "per se ban would likely raise constitutional questions above and beyond the concerns raised by the [Commission's] current policy," *id.* at 26a n.7, the court nonetheless believed that it was arbitrary for the Commission to prohibit isolated expletives only in circumstances where their utterance was patently offensive.

The court of appeals also took issue with the Commission's determination that an expletive such as the F-Word has an inescapably sexual connotation, stating that "[t]his defies any commonsense understanding of these words, which, as the general public well knows, are often used in everyday conversation without any 'sexual or excretory' meaning." Pet. App. 29a. In addition, the court dismissed as "divorced from reality" the Commission's concern that a "per se exemption for fleeting expletives would 'permit broadcasters to air expletives at all hours of the day so long as they did so one at a time.'" *Id.* at 30a (citation omitted). And it faulted the Commission for failing to produce "any evidence that suggests a fleeting expletive is harmful," much less that

any such harm was "serious enough to warrant government regulation." *Id.* at 32a.

Although the court of appeals "refrain[ed] from deciding the various constitutional challenges * * * raised by the Networks," it made certain "observations" regarding the constitutionality of the Commission's broadcast-indecency policies. Pet. App. 35a. In those comments, which the court described as "dicta," *id.* at 35a n.12, the court "question[ed] whether the FCC's indecency test can survive First Amendment scrutiny," *id.* at 36a. Nevertheless, because the court decided the case on the "narrow ground" that the Commission's explanation for its policy was arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, it vacated and remanded "so that the Commission can set forth [its] analysis." *Id.* at 45a.

b. Judge Leval dissented. Pet. App. 46a-60a. In his view, the Commission had complied with the APA because it provided a "sensible" reason for its "relatively modest change of standard." *Id.* at 49a. In addition, he concluded that "[w]hat we have [here] is at most a difference of opinion between a court and an agency," and that in light of the Commission's explanation and "the deference courts must give to the reasoning of a duly authorized administrative agency in matters within the agency's competence," there was no basis for the court to substitute its judgment for the Commission's in this case. *Id.* at 58a-59a.

Judge Leval observed that "the Commission's central explanation for the change was essentially its perception that the 'F-Word' is not only of extreme and graphic vulgarity, but also conveys an inescapably sexual connotation." Pet. App. 49a. The FCC therefore "concluded that the use" of that expletive, "even in a single fleeting

instance without repetition," was "likely to constitute an offense to the decency standards of § 1464." *Id.* at 50a. "In other words," Judge Leval stated, "the Commission found, contrary to its earlier policy, that the word is of such graphic explicitness in inevitable reference to sexual activity that absence of repetition does not save it from violating the standard of decency." *Id.* at 52a.

Unlike the majority, Judge Leval was not troubled by the Commission's decision not to "follow an all-or-nothing policy." Pet. App. 53a. Instead, he explained that the Commission "attempt[ed] to draw context-based distinctions, with the result that no violation will be found in circumstances where usage is considered sufficiently justified that it does not constitute indecency." *Ibid.* Far from an example of "irrationality," Judge Leval stated, the policy "is an attempt on the part of the Commission over the years to reconcile conflicting values through standards which take account of context." *Id.* at 54a-55a. As Judge Leval explained, the Commission's context-driven approach "is in no way a consequence of the Commission's change of standard for fleeting expletives. It applies across the board to all circumstances." *Id.* at 53a. Thus, the "majority's criticism of inconsistency is not properly directed against the change of standard here in question," which "[i]f anything * * * has made the Commission more consistent rather than less" by ensuring that "the same context-based factors will apply to all circumstances." *Id.* at 54a.

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that the Commission's change in policy regarding isolated exple-

tives during times when children are likely to be in the audience violates the APA.

Congress has directed the Federal Communications Commission to enforce the statutory prohibition on the broadcast of "any obscene, indecent, or profane" language over the public airwaves. 18 U.S.C. 1464. In carrying out that duty, the Commission employs a contextual analysis that this Court upheld in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). Indeed, in *Pacifica*, the Court recognized that "context is all-important." *Id.* at 750. Until recently, the Commission made one factor dispositive in its analysis in certain cases by holding that the utterance of a single vulgar expletive could not be found indecent, no matter how strongly other contextual factors weighed in favor of such a finding. As the Commission reaffirmed in the order at issue here, that per se, one-free-expletive rule was inconsistent with a context-based approach to broadcast indecency enforcement. In abandoning that rule, the Commission acknowledged that it was adopting a new indecency enforcement policy, declined to impose fines, and provided a reasoned explanation for the change. That explanation fully satisfied the requirements of the APA and is well within the zone of discretion in which an administrative agency may operate in carrying out its statutory mandate.

The criticisms by the court of appeals of the Commission's change of policy are unfounded. Not only do those criticisms rest on an inappropriate second-guessing of policy judgments committed to the agency by Congress, they also have less to do with the Commission's revised policy on isolated expletives than they do with the enterprise of broadcast-indecency enforcement in general. In

that respect, the analysis of the court of appeals rests on premises rejected by this Court in *Pacifica*.

The court of appeals dismissed the Commission's concern for protecting audiences likely to include children from the broadcast of a single expletive because the Commission does not take the position that the broadcast of vulgar expletives is *always* indecent. But nothing in the APA requires the Commission to operate with the blunt instrument of an "all-or-nothing" policy in this area; under a contextual analysis, different contexts can appropriately lead to different results, even where the same word is concerned. In any number of ways, the use of an expletive by, for example, a wiretapped organized-crime figure on a news program is far removed from the use of the same word in a dialogue on an awards show. There is no statutory reason why the FCC is compelled to treat such fundamentally different cases the same way.

The court of appeals also erred in dismissing the Commission's determination that the F-Word has a sexual connotation even when used in a non-literal sense as an intensifier or as part of an insult. The Commission, after having studied the issue, is in a better position to evaluate the connotations of language. As the Commission explained, the F-Word is effective when used to intensify or insult precisely because it has an offensive sexual connotation. Moreover, fine points of the distinctions between denotations and connotations may be lost on children seeking an explanation of the word's meaning from their parents. The logic of the court's contrary rationale would suggest that the F-Word and other vulgar expletives should escape indecency regulation, even if repeated, unless it could be proved that the intent of

the speaker was to use the words in accordance with their literal meanings.

The court of appeals had no basis for demanding that the Commission demonstrate that broadcasters would flood the airwaves with expletives in the absence of a change in policy. It was sufficient for the Commission to point out that the logic of its prior policy, which would permit the airing of unlimited expletives one at a time, was inconsistent with responsible enforcement of the statute. In any event, making a predictive judgment on a matter within an agency's realm of expertise is the responsibility of the agency, not the courts. Nor was the Commission required to amass evidence that the broadcast of isolated expletives would be harmful to children. The Commission's duty is to enforce the statute that Congress enacted, not to second-guess the evidentiary basis for its enactment. In any event, courts have long recognized that exposure to indecent material risks harm to a child's psychological and moral development to an extent that makes it the proper subject of regulation. The court of appeals had no basis to override the Commission's judgment on the risks that isolated expletives pose to children during the broadcast times at issue.

Finally, because the adequacy of the Commission's explanation for its revised policy was the only issue addressed by the court of appeals, the Court should remand the case to allow that court to consider, in the first instance, respondents' other challenges to the Commission's order. Although the court of appeals made various "observations" about the constitutional challenges raised by respondents, it explicitly "refrain[ed] from deciding [those] constitutional challenges." Pet. App. 35a. And there is no reason for this Court to depart

from its customary practice and reach out to decide constitutional questions not passed on below.

ARGUMENT

THE COURT OF APPEALS ERRED IN INVALIDATING THE COMMISSION'S POLICY UNDER THE APA

A. The FCC Satisfied The Requirements Of The APA Because It Gave A Reasonable Explanation For Its Changed Enforcement Policy

As this case comes to this Court it turns on the application of well-settled principles of administrative law. Under the APA's arbitrary-and-capricious standard, "[t]he scope of review * * * is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); see 5 U.S.C. 706(2)(A). That is no less true when the policy under review reflects a change in position. The APA does not lock an agency into a single view for all time. Instead, under the APA, a court must uphold an agency's revised policy so long as the agency has given a reasoned explanation for the change.

This case concerns the Commission's policy on the broadcast of certain expletives during the time when children are most likely to be in the audience. The FCC expressly acknowledged that the enforcement policy first announced in the *Golden Globe Awards Order* represented a reversal of its prior policy, which had effectively imposed a per se rule under which isolated expletives could not be deemed indecent. The Commission accordingly refrained from imposing fines for the violations. The Commission gave several reasons for the change, including that the revised policy harmonized the treatment of expletives with the Commission's general

approach to indecency enforcement, under which context is "all-important," *Pacifica*, 438 U.S. at 750, and no one factor is dispositive. The agency's explanation fully satisfied the requirements of the APA, and the court of appeals erred in setting aside the Commission's order.

1. The APA permits an agency to change its policy as long as it provides a reasonable explanation for doing so

The APA does not require "[r]egulatory agencies [to] establish rules of conduct to last forever." *State Farm*, 463 U.S. at 42 (quoting *American Trucking Ass'ns* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967)). To the contrary, this Court has recognized that "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances." *Id.* at 57 (quoting *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971)). Indeed, far from being locked into one position by the APA, an agency has an obligation to reconsider "the wisdom of its policy on a continuing basis." *NCTA* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 863-864 (1984)).

When an agency changes its policy, the APA requires only that it "supply a reasoned analysis for the change." *State Farm*, 463 U.S. at 42. That analysis may show that the change is required by changed circumstances. But an agency also may alter its policy for the simple reason that, in its judgment, the "prior policy failed to implement properly the statute." *Rust* v. *Sullivan*, 500 U.S. 173, 187 (1991); see *Brand X*, 545 U.S. at 981 (explaining that an agency may make a policy change "in response to changed factual circumstances, or a change

in administrations") (citation omitted). The "discretion provided by the ambiguities of a statute" is left "with the implementing agency," not the reviewing court. *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996).

2. The Commission acknowledged its change in policy

As the court of appeals recognized, Pet. App. 20a-21a, the Commission expressly acknowledged that its abandonment of a per se rule requiring that expletives be repeated in order to be indecent represented a change in policy. In the *Golden Globe Awards Order*, the Commission noted that "prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' * * * are not indecent or would not be acted upon," and it explained "that any such interpretation is no longer good law." 19 F.C.C.R. at 4980 ¶ 12. The Commission further stated: "We now depart from * * * cases holding that isolated or fleeting use of the 'F-Word' or a variant thereof in situations such as this is not indecent." *Ibid.* Instead, the Commission explained, "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Ibid.*

In the order at issue here, the Commission elaborated on its statements in the *Golden Globe Awards Order*. It explained that the decisions that had established a per se rule "that expletives had to be repeated to be indecent" were "seriously flawed" and were "appropriately disavowed." Pet. App. 82a-83a.

Respondents suggest that the Commission said in its order "that its indecency policy had not changed and that no reasoned basis for that change was required." Fox Br. in Opp. 15; see NBC Br. in Opp. 17. That claim

ignores the relevant portions of the Commission's orders, and it overlooks that the Commission acknowledged its change in policy not only in its words but also in its actions. The Commission did not sanction Fox for either broadcast at issue here, and, in the case of the 2002 Billboard Music Awards, the only reason for its forbearance was its recognition that "it was not clear at the time that broadcasters could be punished for the kind of comment at issue here." Pet. App. 122a; see *id.* at 124a & n.206. In sum, the Commission's orders reflect a candid recognition that the *Golden Globe Awards Order* represented a change in policy—one that the Commission determined would better serve its statutory obligation to protect children from exposure to indecent broadcasts during the times of the day they are most likely to be in the audience.

3. The Commission provided a reasonable explanation for the change in policy

Before the *Golden Globe Awards Order*, the Commission's indecency policy was largely to ignore context when an expletive was not repeated. In the *Golden Globe Awards Order* and in the order at issue here, the Commission concluded that such a categorical exception or safe harbor was not warranted. The Commission offered three reasons for that conclusion, and its explanation fully satisfies the deferential standard of the APA.

a. The "most important[]" reason for its change in policy, the Commission explained, was that "categorically requiring repeated use of expletives in order to find material indecent is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context." Pet. App. 83a. The effect of the Commission's pre-*Golden Globe Awards Order* pol-

icy was to treat one contextual factor—"whether material had been repeated"—as "decisive" regardless of whether other factors (such as the explicitness or shocking nature of the material) contributed to the patent offensiveness of the broadcast. *Id.* at 83a. That result was "at odds" not only "with the Commission's overall enforcement policy," *ibid.*, but also with the contextual inquiry mandated by this Court's decision in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978).

In *Pacifica*, this Court upheld the Commission's authority to regulate broadcast indecency under "a nuisance rationale under which context is all-important." 438 U.S. at 750; see *id.* at 742 (plurality opinion) (noting that "indecency is largely a function of context—it cannot be adequately judged in the abstract"). As the Court explained, because a "nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard," the application of the indecency standard to a particular broadcast "requires consideration of a host of variables," including the "time of day," "the language * * * used," and "the composition of the audience." *Id.* at 750 (quoting *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388 (1926)). Consistent with *Pacifica*, the Commission has implemented a policy for enforcing federal indecency restrictions that looks to "the *full context* in which the material appear[s]." *Industry Guidance*, 16 F.C.C.R. at 8002 ¶ 9. For example, "[e]xplicit language in the context of a *bona fide* newscast might not be patently offensive, while [in another context] sexual innuendo that persists and is sufficiently clear to make the sexual meaning inescapable might be." *Id.* at 8002-8003 ¶ 9 (footnote omitted).

As Judge Leval observed, the Commission's revised policy "has made the Commission more consistent rath-

er than less, because under the new rule, the same context-based factors will apply to all circumstances." Pet. App. 54a. The revised policy is also more faithful to the text of the governing statute, which prohibits the broadcast of "*any* * * * indecent * * * language." 18 U.S.C. 1464 (emphasis added). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). The word "any" does not lend itself to a safe-harbor policy in which some indecency is permitted if it is not repeated. Under the Commission's revised policy, the statute can be applied to the broadcast of any indecent language, regardless of whether particular words are repeated.

b. The Commission also explained its change in policy by noting this Court's rejection in *Pacifica* of the argument that one could fully protect oneself—or, more to the point, one's children—from indecent programming "by turning off the broadcast upon hearing indecent language." Pet. App. 84a. "To say that one may avoid further offense by turning off the radio when he hears indecent language," the Court stated, "is like saying that the remedy for an assault is to run away after the first blow." *Pacifica*, 438 U.S. at 748-749. The Commission likewise concluded that "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow'" of vulgar expletives in circumstances in which their use is patently offensive. Pet. App. 84a. Particularly given that some of the complaints that the Commission received with respect to the broadcasts at issue in this case concerned the impact of isolated expletives on children, it was appropriate for the Commission to take

into account the full impact that a "first blow" may have in this context. See, *e.g.*, J.A. 15 ("My son asked me Mommy what is f[]ing?"); J.A. 19 ("My son and I were watching the 2003 Billboard Music Awards the other night. * * * [M]y son asked me what f**king meant."); J.A. 20 ("It is hard enough to teach your children manners and decent behavior without showing young adults on the TV using" expletives.).

c. Finally, the Commission observed that a blanket exemption for isolated expletives "would as a matter of logic permit broadcasters to air expletives at all hours of a day so long as they did so one at a time." Pet. App. 84a-85a. "For example," the Commission noted, "broadcasters would be able to air any one of a number of offensive sexual or excretory words, regardless of context, with impunity during the middle of the afternoon provided that they did not air more than one expletive in any program segment." *Id.* at 85a. "Such a result," the Commission rightly concluded, "would be inconsistent with our obligation to enforce the law responsibly." *Ibid.*[4]

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[4] The Commission's revised policy is further supported by the 2006 enactment of the Broadcast Decency Enforcement Act of 2005 (BDEA), Pub. L. No. 109-235, 120 Stat. 491. The BDEA substantially increased the maximum forfeitures that may be levied against licensees that broadcast "obscene, indecent, or profane language." § 2, 120 Stat. 491 (to be codified at 47 U.S.C. 503(b)(2)(C)(ii)). The BDEA was enacted after the Commission released the *Golden Globe Awards Order*, yet Congress expressed no disagreement with the FCC's revised policy. To the contrary, the House Report cited Bono's remark during the Golden Globe Awards and Nicole Richie's remarks during the 2003 Billboard Awards as evidence of the need for more rigorous enforcement of the broadcast-indecency prohibition. H.R. Rep. No. 5, 109th Cong., 1st Sess. 2 (2005). That Congress had these broadcasts in mind when it decided to increase the FCC's forfeiture authority provides

B. The Court Of Appeals Erred In Substituting Its Judgment For That Of The FCC

The court of appeals gave three reasons for rejecting the Commission's explanation of its change in policy. First, the court concluded that the Commission's objective of restricting the broadcast of nonrepeated vulgar expletives was inconsistent with its actual policy, which takes account of context in determining whether the use of those expletives is patently offensive. Pet. App. 25a-28a. Second, the court disputed the Commission's conclusion that a broadcast containing the F-Word could be indecent even when the word is not used literally to describe sexual activity. *Id.* at 29a-30a. And third, the court disputed the factual underpinnings for the agency's policy. *Id.* at 30a, 32a-33a.

None of those reasons withstands scrutiny. Instead, all three rest on a failure to appreciate the limited scope of review under the APA in reviewing agency policy determinations such as this. In addition, they have little to do with the Commission's change of policy on isolated expletives, but instead appear to reflect hostility to the agency's longstanding treatment of indecency in general. In that respect, the reasoning of the court of appeals is incompatible with this Court's decision in *Pacifica*. The court of appeals may consider respondents' constitutional challenges to the Commission's order once it has cleared respondents' statutory objections, but the Commission's efforts to give effect to the reasoning of

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additional evidence that the Commission's revised policy falls within its authority under Section 1464. Cf. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000).

Pacifica provide no basis for second-guessing its determination under the APA.

1. The Commission's consideration of context in determining offensiveness does not undermine its conclusion that an isolated expletive may be indecent

In its analysis of the FCC's change in policy, the court of appeals concentrated on the Commission's statement that granting an automatic exemption for a single utterance of an expletive "unfairly forces viewers (including children) to take 'the first blow.'" Pet. App. 84a. According to the court, "the 'first blow' theory" —which this Court itself credited in *Pacifica*, 438 U.S. at 748-749—"bears no rational connection to the Commission's actual policy regarding fleeting expletives" because "the Commission does not take the position that *any* occurrence of an expletive" is indecent. Pet. App. 26a.

Because it focused on the "first blow" concept, the court of appeals did not address the principal rationale behind the Commission's change in policy: the desire to make the implementation of the contextual approach to indecency determinations more consistent by no longer making one factor dispositive in a particular category of cases. The Commission's policy simply takes into account that some blows are likely to be more harmful to the audience (including children) than others, and even more to the point, that in some contexts a first blow can be sufficient. The "first blow" metaphor recognizes that in certain contexts even a single word can be so offensive that it should be subject to regulation; that is why a one-free-expletive rule is incompatible with the proper application of a contextual analysis. As the Commission explained—but the court of appeals ignored—the "most

important[]" reason for the Commission's decision here was the "inconsisten[cy]" between the contextual approach and a categorical rule requiring repetition of expletives. Pet. App. 83a.

The Commission's failure to "take the position that *any* occurrence of an expletive is indecent," Pet. App. 26a, is a necessary consequence of a meaningful contextual analysis. Judge Leval was therefore correct when he observed that the court's criticism "is not properly directed against the change of standard" but instead against the entire contextual approach to indecency enforcement. *Id.* at 54a. For example, the court looked to the Commission's finding that the use of expletives in a broadcast of the film "Saving Private Ryan" did not make the broadcast indecent, and it inferred that the Commission must not be "concern[ed] with the public's mere exposure to this language on the airwaves." *Id.* at 27a-28a. But the expletives in "Saving Private Ryan" arose in a much different context and in any event were repeated. Accordingly, if the non-indecency finding with respect to the repeated expletives in "Saving Private Ryan" makes the Commission's indecency finding with respect to the Billboard Music Awards broadcasts irrational, it would equally preclude an indecency finding with respect to any broadcast of repeated expletives, such as the Carlin monologue.

Contrary to the reasoning of the court of apeals, the FCC's contextual approach is appropriate because the context in which a word is used is relevant in determining whether the word is offensive. Judge Leval illustrated the point well when he observed that the judges of the court of appeals had used the F-Word at oral argument: "Had the case been on another subject, such usage would surely have seemed inappropriate. Because

of the issues in this case, the word was central to the issues being discussed. It is not irrational to take context into account to determine whether use of the word is indecent." Pet. App. 54a n.16. In other words, "contemporary community standards" recognize that a word that is appropriate in some contexts—such as an oral argument in an indecency case—may be "patently offensive" in others—such as a prime-time awards show when children are in the viewing audience. *Industry Guidance*, 16 F.C.C.R. at 8002 ¶ 8. Nothing in the APA prevents the Commission from reaching—or enforcing—that common-sense conclusion.

Additionally, when offensive language is used in certain contexts—such as a news program—countervailing First Amendment interests may be at stake, making it appropriate for the Commission to "proceed with the utmost restraint." Pet. App. 127a. The court of appeals was therefore wrong to criticize the FCC for its decision to "excuse an expletive" that occurred during a "news interview." *Id.* at 26a (quoting *id.* at 128a). Agencies are not required to pursue their policies at all costs and in disregard of competing interests, nor are they prohibited from recognizing that those interests may be greater in some contexts than in others. *Id.* at 54a-55a (Leval, J., dissenting) (FCC has properly "reconcile[d] conflicting values through standards which take account of context."); see *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 809-811 (1978); cf. *Chevron*, 467 U.S. at 865-866. In the news context, there is a countervailing interest in respecting "the editorial judgments of broadcast licensees" in presenting news programming, and the Commission properly took that interest into account. Pet. App. 126a-127a (quoting *In re Branton*, 6 F.C.C.R. 610, 610 (1991)).

This Court endorsed the Commission's contextual approach in *Pacifica*. In that case, the Court upheld the Commission's authority to regulate broadcast indecency precisely because "[t]he Commission's decision rested entirely on a nuisance rationale under which context is all-important." 438 U.S. at 750; see *ibid.* (indecency determination "requires consideration of a host of variables"). As Justice Stevens explained, "the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context." *Id.* at 747 (plurality opinion). Instead, "[i]t is a characteristic of speech such as this that both its capacity to offend, and its 'social value' * * * vary with the circumstances"; thus, "[w]ords that are commonplace in one setting are shocking in another." *Ibid.* "Because content of that character is not entitled to absolute constitutional protection under all circumstances," Justice Stevens wrote, "we must consider its context in order to determine whether the Commission's action was constitutionally permissible." *Id.* at 747-748; see *id.* at 742 ("indecency is largely a function of context" and "cannot be adequately judged in the abstract"); *id.* at 761 (Powell, J., concurring) (agreeing that "*on the facts of this case*, the Commission's order did not violate respondent's First Amendment rights") (emphasis added). In short, the FCC's contextual analysis was crucial to this Court's endorsement of the Commission's determination in *Pacifica*.[5]

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[5] NBC errs when it asserts (Br. in Opp. 25) that the *Pacifica* Court did not consider whether context was relevant to indecency determinations, because the case involved only "*concededly indecent* speech." In fact, one of the questions before the Court was whether the broadcast of Carlin's monologue was indecent. See *Pacifica*, 438 U.S. at 738-739

According to the court of appeals, a contextual approach to fleeting expletives bears "no rational connection" to the goal of protecting broadcast audiences from the "first blow." Pet. App. 26a. But the Commission's goal was not protecting audiences from a first blow simpliciter, but rather to protect them from indecency, which in some contexts could involve a single blow. Moreover, there is no inherent tension between a "first blow" theory and a consideration of context and, in effect, the potential impact of that blow. Indeed, it was this Court in *Pacifica* that first analogized the broadcast of indecent language to the "first blow" of an assault, 438 U.S. at 748-749, even as it recognized that the same language in a different context—*e.g.*, "a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy," *id.* at 750—might not be legally indecent. Moreover, in the discussion of Paul Cohen's famous jacket, *id.* at 747 n.25, 749, Justice Stevens made clear that context could matter in evaluating a single use of an expletive. See *id.* at 750 n.29.

The supposed inconsistency identified by the court of appeals in this case was a necessary consequence of the Commission's application of the analysis embraced by this Court in *Pacifica*. The court of appeals may entertain respondents' constitutional challenges to the Commission's order once the court has properly resolved the statutory challenges to that order. But the Commis-

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("The only other statutory question presented by this case is whether the afternoon broadcast of the 'Filthy Words' monologue was indecent within the meaning of § 1464."); *id.* at 739 (noting "Pacifica's claim that the broadcast was not indecent within the meaning of the statute"); *id.* at 741 (finding "no basis for disagreeing with the Commission's conclusion that indecent language was used in [the] broadcast" of Carlin's monologue).

sion's effort to give effect to the rationale of *Pacifica* provides no basis for invalidating its determination under the APA. Indeed, if anything, an agency's efforts to give effect to this Court's decisions should call for more, not less, deference to its judgments.

2. The Commission reasonably concluded that vulgar expletives need not be used in a literal sense to be indecent

The court of appeals also disagreed with the Commission's judgment that vulgar expletives can be indecent even when they are not used literally. According to the court, the "FCC's change in policy cannot be based on a categorical view that 'any use of [the F-Word] or a variation, in any context, inherently has a sexual connotation,' because * * * the Commission permits even numerous and deliberate uses of that word in certain contexts." Pet. App. 28a n.9 (quoting *Golden Globe Awards Order*, 19 F.C.C.R. at 4978 ¶ 8) (citation omitted). That statement reflects a misunderstanding of the Commission's reasoning. The Commission's determination that the F-Word "has a sexual connotation even if the word is not used literally," *id.* at 74a, 118a, means only that the word falls within the subject-matter scope of the Commission's indecency definition—in other words, that it satisfies the first part of the two-part indecency test. It does not represent a determination that the broadcast of that word is *always* patently offensive, satisfying the second part of the test. There is thus no inconsistency between the Commission's determination that the F-Word has an inescapably sexual connotation and its decisions that have found some broadcasts of the word not indecent.

The court of appeals also believed that the Commission's conclusion that the F-Word always has a sexual connotation was "unsupported by any record evidence and contradicted by the evidence submitted by the Networks." Pet. App. 30a n.10. The court pointed to examples that, in its view, showed that the F-Word can be employed "in everyday conversation without any 'sexual or excretory' meaning," *id.* at 29a, including Bono's statement at the Golden Globe Awards and Vice President Cheney's use of the F-Word in a conversation with Senator Patrick Leahy, *id.* at 29a-30a. That observation is of limited relevance to this case, since it is undisputed that at least one of the expletives at issue was used in a literal sense. *Id.* at 71a.

More fundamentally, the court's criticism was misdirected, because the Commission was well aware that the F-Word may be used "for emphasis or as an intensifier," Pet. App. 73a, or "as a metaphor to express hostility," *id.* at 120a, and that when it is employed in such contexts it "is not used literally," *id.* at 74a. The Commission did not conclude that every use of the F-Word is a literal sexual reference. Rather, it determined that "the word's power to insult and offend derives from its sexual meaning," *id.* at 118a, and that any use of the F-Word therefore "has a sexual *connotation*," *ibid.* (emphasis added); see *id.* at 74a n.39 (citing *American Heritage College Dictionary* 559 (4th ed. 2002)); *id.* at 74a n.40 (citing Robert F. Bloomquist, *The F-Word: A Jurisprudential Taxonomy of American Morals (In a Nutshell)*, 40 Santa Clara L. Rev. 65, 98 (1999) ("all F-word usage has at least an implicit sexual meaning")). The court of appeals erred in overriding that determination.

As Judge Leval observed, "the Commission did not mean that every speaker who utters [the F-Word] in-

variably intends to communicate an offensive sexual meaning," but that "even when the speaker does not intend a sexual meaning, a substantial part of the community, and of the television audience, will understand the word as freighted with an offensive sexual connotation." Pet. App. 58a. Of course, the force of that "offensive sexual connotation" is precisely why the word is effective when used as an intensifier or an insult. See Steven Pinker, *The Stuff of Thought: Language As a Window Into Human Nature* 369 (2007) ("If you're an English speaker, you can't hear [words such as the F-Word] without calling to mind what they mean to an implicit community of speakers, including the emotions that cling to them."); Timothy Jay, *Why We Curse: A Neuro-Psycho-Social Theory of Speech* 136 (2000) ("Curse words are different" from ordinary words "in that the connotative meaning dominates over the denotative meaning."). And whatever subtle non-literal meanings the F-Word might have to an adult, a child impressed by the use of a new word and asking for an explanation of the word's meaning may be less impressed with subtle distinctions between denotations and connotations or between literal and figurative uses.

Both the FCC and this Court have long recognized the inherent sexual meaning of the F-Word. For example, the expletives in the Carlin monologue were mostly used in a non-literal sense—indeed, one of Carlin's principal themes was that the F-Word "leads a double life," literal and non-literal, a theme he illustrated with numerous examples of phrases employing the F-Word (and other expletives) non-literally. *Pacifica*, 438 U.S. at 754. Nevertheless, in determining that the broadcast of the monologue was indecent, the Commission made no effort to parse the transcript to identify specific lit-

eral uses of expletives or to give the non-literal uses a free pass. Instead, it concluded that, as a general matter, the F-Word and the S-Word "depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards." *WBAI*, 56 F.C.C.2d at 99 ¶ 14. This Court treated the broadcast the same way. See *Pacifica*, 438 U.S. at 739 (noting that "[t]he Commission identified several words that referred to excretory or sexual activities or organs," but without distinguishing between the literal and non-literal uses of those words); *id.* at 745 (plurality opinion) (describing Carlin's monologue as "a broadcast of patently offensive words dealing with sex and excretion").

That is not to say that an expletive's literal or non-literal use is not part of the relevant context in determining whether the use of an expletive is patently offensive. Once again, the court of appeals appears to have taken one strand of the Commission's reasoning and treated it as if it were somehow an end in itself, when in reality the Commission's goal is a context-specific inquiry that does not exclude potentially patently offensive remarks based on a per se rule. Moreover, like its criticisms of the FCC's consideration of context, the court of appeals' statements about non-literal uses of expletives have little to do with the Commission's change of policy with regard to isolated expletives. Instead, under the court's reasoning, the Commission would lack authority to regulate any non-literal uses of offensive sexual or excretory terms, no matter how many times they are deliberately repeated and no matter what time of day the broadcast takes place. That counter-intuitive result is inconsistent with *Pacifica* and the Commission's statutory responsibilities to regulate

indecency, and nothing in the APA requires the Commission to adopt it.

3. The court of appeals erred in second-guessing the Commission's judgment that a change in its indecency enforcement policy was appropriate

Finally, the court of appeals concluded that the Commission's revised policy was unnecessary. Seizing upon the Commission's observation that a blanket exemption for isolated expletives "would as a matter of logic permit broadcasters to air expletives at all hours of a day so long as they did so one at a time," Pet. App. 84a-85a, the court opined that because "broadcasters have never barraged the airwaves with expletives even prior to *Golden Globes*," *id.* at 30a, the suggestion that they might do so was "both unsupported by any evidence and directly contradicted by prior experience," *id.* at 30a n.11. The court also objected that the record "is devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation." *Id.* at 32a. Neither rationale represents a proper basis for setting aside the agency's predictive judgment on such matters.

a. Retaining an automatic exception to the indecency prohibition for nonrepeated expletives would, at least as a logical matter, undeniably allow broadcasters to air "one expletive in any program segment." Pet. App. 85a. Regardless of whether, or to what extent, the regulated community might exercise self-restraint and not avail itself of a one-free-expletive rule, it was appropriate for the Commission to consider where the logic of the broadcasters' argument would extend, and to conclude that the result "would be inconsistent with [its] obligation to enforce the law responsibly." *Ibid.* Section 1464

broadly prohibits the broadcast of "any" indecent language, and the Commission could reasonably conclude that its prior policy of requiring repetition where expletives were involved "failed to implement properly the statute." *Rust*, 500 U.S. at 187.

Moreover, it was well within the Commission's discretion to make a predictive judgment about the consequences of such a rule on a going-forward basis. There was ample evidence to support the proposition that the broadcast of vulgar expletives would increase in the absence of a change in policy. In the *Golden Globe Awards Order*, the Commission cited a study that found that "offensive" language had increased significantly on broadcast television between 1990 and 2001. 19 F.C.C.R. at 4979 ¶ 9 n.26; see Barbara K. Kaye and Barry S. Sapolsky, *Watch Your Mouth! An Analysis of Profanity Uttered by Children on Prime-Time Television*, 7 J. Mass Commc'n & Soc'y 429, 441 (2004) (finding that "offensive" language was used 98 times on major broadcast networks between 8 and 9 p.m. in 1990, but 216 times on the same networks during the same hour in 2001). And the House Committee considering the Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491, noted another study that showed that offensive "language increased overall during every timeslot between 1998 and 2002" and that "[f]oul language during the 'family hour' increased by 94.8 percent between 1998 and 2002 and by 109.1 percent during the 9 p.m. time slot." H.R. Rep. No. 5, 109th Cong., 1st Sess. 2 (2005). The Commission could reasonably anticipate that the

trend would continue in the absence of any regulatory change. See Pet. App. 56a-57a (Leval, J., dissenting).[6]

As this Court has explained, when an agency makes judgments of a "predictive nature," "complete factual support in the record for the Commission's judgment or prediction is not possible or required"; instead, "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *National Citizens Comm.*, 436 U.S. at 813-814 (quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)); see *Public Citizen, Inc.* v. *NHTSA*, 374 F.3d 1251, 1260-1261 (D.C. Cir. 2004) ("Predictions regarding the actions of regulated entities are precisely the type of policy judgments that courts routinely and quite correctly leave to administrative agencies.") (quoting *Public Utils. Comm'n of the State of Cal.* v. *FERC*, 24 F.3d 275, 281 (D.C. Cir. 1994)). The court of appeals erred in overriding the agency's predictive judgment here.

b. The court of appeals also refused to uphold the Commission's change in policy because the Commission had failed to produce "any evidence that suggests a

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[6] The Commission had experienced a similar phenomenon before 1987, when its enforcement policy was that "no action was taken unless [the broadcast] involved the repeated use, for shock value, of words similar or identical to those satirized in the Carlin 'Filthy Words' monologue." *Infinity Reconsideration Order*, 3 F.C.C.R. at 930 ¶ 4. As a result of that policy, broadcasters believed that "only concentrated and repeated use of the specific offensive words at issue in the *Pacifica* case" would be indecent, and they aired patently offensive programming that simply avoided the use of those words. See, *e.g.*, *In re Infinity Broad. Corp. of Penn.*, 2 F.C.C.R. 2705, 2705 ¶ 7 (1987). The Commission ultimately disavowed the policy as "unduly narrow as a matter of law and inconsistent with [its] enforcement responsibilities under Section 1464." *Infinity Reconsideration Order*, 3 F.C.C.R. at 930 ¶ 5.

fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation." Pet. App. 32a. But 18 U.S.C. 1464, which prohibits the broadcast of "any obscene, indecent, or profane language," does not require the Commission to compile evidence showing that the language to which it applies is otherwise harmful; harm has already been presumed by Congress. The Commission's duty is to enforce the statute enacted by Congress, not to conduct its own investigation of whether the statute is necessary or advisable as a policy matter. When Congress's intent is clear, that is the end of the matter.

That the Commission previously followed a different policy does not suggest that the agency had determined that the broadcast of a single expletive was harmless; instead, the pre-*Golden Globe Awards Order* decisions embodied a policy that a single expletive did not warrant the exercise of the Commission's enforcement authority. See *Industry Guidance*, 16 F.C.C.R. at 8008-8009 ¶ 18. The decision below resulted from the Commission's decision to recalibrate that policy to more "responsibly" enforce federal prohibitions against indecent broadcasting. Pet. App. 85a. The Commission's earlier exercise of its discretion to forbear from enforcing Section 1464 in single-expletive cases does not disable it from enforcing the statute now. Reevaluating the threat posed by certain regulated conduct is precisely the sort of thing that responsible agencies do in carrying out their statutory mandate, and nothing in the APA stands in the way of such diligence.

More importantly, this Court has never insisted that an agency must amass evidence of harm to minors before it may enforce regulations designed to protect their well-being. In *Pacifica*, for example, the Court upheld

the Commission's indecency determination even though there was no evidence of any harm caused by the Carlin monologue. Instead, the Court found a sufficient basis for regulation in the commonsense observations that "broadcasting is uniquely accessible to children, even those too young to read," and that written messages "incomprehensible to a first grader," when broadcast, can "enlarge[] a child's vocabulary in an instant." *Pacifica*, 438 U.S. at 749; see J.A. 15 (viewer complaint regarding the 2003 Billboard Music Awards) ("Mommy what is f[]ing?"). The Commission was not required to conduct further proceedings to arrive at the inescapable conclusion that such language presents a threat to children in the audience.

Likewise, in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Court upheld a statute prohibiting the sale of material obscene as to minors, even while it recognized that the link between exposure to obscenity and the "ethical and moral development of our youth" was not "an accepted scientific fact." *Id.* at 641. As the District of Columbia Circuit has observed, "Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material." *ACT III*, 58 F.3d at 662. To the contrary, "the Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech." *Id.* at 661-662. Under this Court's precedents, the court of appeals had no basis for demanding that the Commission identify further "evidence" of harm caused by the expletives at issue.

C. This Court Should Remand To Allow The Court Of Appeals To Consider Respondents' Other Challenges To The FCC's Order

Before the court of appeals, respondents presented several additional challenges to the FCC's order, arguing among other things that Section 1464's indecency prohibition violates the First Amendment. Pet. App. 18a. Because the court of appeals did not rule on those challenges, this Court should remand to allow the court of appeals to consider them in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to reach issues that "were not addressed by the Court of Appeals," because "we are a court of review, not of first view"); see also Fox Br. in Opp. 19 ("[I]f this Court were to * * * reverse the Second Circuit's administrative law holding, the Court would still have to remand the case to the Second Circuit to permit it to consider Fox's scienter and constitutional arguments.").

To be sure, the panel majority made a variety of "observations" about the constitutional issues raised by respondents. Pet. App. 35a. It specifically "refrain[ed] from deciding" those issues, however, and its comments were concededly "dicta." *Ibid.*; *id.* at 35a n.12. It is well settled that this Court reviews "judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)). "That admonition has special force when the statements raise constitutional questions," because it is the Court's "settled practice to avoid the unnecessary decision of such issues." *Pacifica*, 438 U.S. at 734; see *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Consideration of respondents' constitutional arguments at this stage would be especially inappropriate in light of the rule that a "cross-petition is required * * * when the respondent seeks to alter the judgment below." *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994). In this case, the judgment below vacated the Commission's order and remanded to the Commission "for further proceedings in accordance with" the court's opinion, Pet. App. 144a—that is, for further proceedings aimed at "provid[ing] a reasoned analysis" for the Commission's policy, *id.* at 34a. But if respondents were to prevail on their constitutional challenges, they would be entitled to a different judgment that would provide them with broader relief. Having elected not to file a cross-petition, respondents are precluded from raising their constitutional challenges in this Court. See *Board of Trs. of the State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 485 (1989).

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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JUNE 2008