No.

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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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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The Solicitor General, on behalf of the Federal Communications Commission and the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals (App., *infra*, 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, and on September 24, 2007, Justice Ginsburg further extended the time to and including November 1, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions are set out in an appendix to this petition. App., *infra*, 145a-148a.

STATEMENT

1. a. Under 18 U.S.C. 1464, it is 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 the indecency prohibition applies to radio and television broadcasts aired 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 § 16(a), Pub. L. No. 102-356, 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). 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, 309(k).

b. In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) (*Pacifica*), 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, N.Y.*, 56 F.C.C.2d 94, 98 (Feb. 12, 1975)). Under that definition, the Court explained, "context is all-important." *Id.* at 750.

In rejecting a constitutional challenge to the Commission's enforcement of Section 1464, the Court observed that "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." *Pacifica*, 438 U.S. at 748. The Court further observed that, because "broadcasting is uniquely accessible to children," 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. In subsequent orders, the Commission sought to describe the circumstances under which non-repetitive utterances of offensive sexual or excretory terms would violate Section 1464. By 1987, the Commission had determined that when "a complaint focuses solely on the use of expletives, * * * repetitive use in a patently offensive manner is a requisite to a finding of indecency." *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 13 (Apr. 16, 1987). In contrast, when offensive language "goes beyond the use of expletives" and involves "the description or depiction of sexual or excretory functions," "repetition of specific words or phrases is not necessarily an element critical to a determination of indecency." *Ibid.*

The Commission further explained the indecency standard in a 2001 policy statement. See *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999, 7999 ¶ 1 (Mar. 14, 2001) (*Industry Guidance*). That statement set out a two-part test for indecency. 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.

The policy statement explained that whether a broadcast is "patently offensive" turns on the "*full context*" in which the material was broadcast and is therefore "highly fact-specific." *Industry Guidance*, 16 F.C.C.R. at 8002-8003 ¶ 9. Three "principal factors" are

"significant": "(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 "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.

d. In January 2003, the NBC network aired a live broadcast of 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 Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4976 n.4 (Mar. 18, 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 "sustained or repeated." *Id.* at 4980 ¶ 12.[1] The Commission explained that, even when used

[1] The FCC's Enforcement Bureau had initially ruled that the broadcast was not indecent because Bono "used the word 'fucking' as an adjective or expletive to emphasize an exclamation," and because the remarks were "fleeting and isolated." See *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden*

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.*

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. 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

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Globe Awards" Program, 18 F.C.C.R. 19,859, 19,861 ¶¶ 5-6 (Oct. 3, 2003). The *Golden Globe Awards Order* reversed that staff decision.

> 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.

App., *infra*, 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.

App., *infra*, 69a-71a.

a. The Commission received complaints from viewers about both Billboard Music Awards broadcasts. It addressed those and other complaints in an order intended to provide "guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard." *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664, 2665 ¶ 2 (Feb. 21, 2006) (*Omnibus Order*). As relevant here, the *Omnibus Order* addressed the 2002 and

2003 Billboard Music Awards, as well as two other programs: (1) several "NYPD Blue" episodes aired by the ABC network 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. *Id.* at 2690-2700 ¶¶ 100-145.

In the *Omnibus Order*, the Commission concluded that each of those four programs contained indecent language in violation of Section 1464 and the Commission's indecency regulations. 21 F.C.C.R. at 2690 ¶ 24. 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.*; see *id.* at 2700 ¶ 145.

b. Respondents sought review of the *Omnibus Order*, and the cases were consolidated in the United States Court of Appeals for the Second Circuit. App., *infra*, 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.

c. On remand, the Commission vacated the relevant portions of the *Omnibus Order*. App., *infra*, 68a. It dismissed the complaints against "NYPD Blue" on procedural grounds, *id.* at 129a-131a, and it concluded that the use of the term "bullshitter" on "The Early Show" was not indecent because it occurred in the context of a "news interview," *id*. at 125a-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. App., *infra*, 69a-142a. 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. 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 75a-76a, 118a-120a. 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.

The Commission also rejected the argument that the isolated nature of the utterances should preclude a finding that the language was indecent. App., *infra*, 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. As the Commission observed, "[i]n evaluating whether material is patently offensive, the Commission's approach has generally been to exam-

ine all factors relevant to that determination." *Id.* at 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 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 [the] obligation to enforce the law responsibly." *Id.* at 85a.

3. A divided panel of the court of appeals vacated and remanded. App., *infra*, 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." App., *infra*, 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. The court 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.

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 or profane under its rules." App., *infra*, 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, under *Pacifica*, 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 would be patently offensive.[2]

The court of appeals also took issue with the Commission's determination that an expletive such as the F-

[2] The court also invalidated the Commission's conclusion that nonrepeated expletives could be "profane." App., *infra*, 33a-34a. In the *Golden Globe Awards Order*, the FCC had held that Bono's use of the F-Word was "profane" within the meaning of Section 1464; in doing so, it rejected an interpretation of "profane" that was limited to blasphemous utterances, instead construing the term to mean "language * * * so grossly offensive to members of the public who actually hear it as to amount to a nuisance." 19 F.C.C.R. at 4981 ¶ 13. The court stated that the Commission had failed to provide any "explanation of what harm this separate enforcement against profane speech addresses that is not already addressed by the FCC's indecency and obscenity enforcement." App., *infra*, 34a.

Word has an inescapably sexual connotation. The court stated 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." App., *infra*, 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).

Although the court of appeals "refrain[ed] from deciding the various constitutional challenges to the Remand Order raised by the Networks," it made certain "observations" regarding the constitutionality of the Commission's broadcast indecency policies. App., *infra*, 35a. The court "question[ed] whether the FCC's indecency test can survive First Amendment scrutiny," *ibid.*, and it expressed doubt "that by merely proffering a reasoned analysis for its new approach to indecency and profanity, the Commission can adequately respond to the constitutional and statutory challenges raised by the Networks," *id.* at 45a.

b. Judge Leval dissented. App., *infra*, 46a-60a. In his view, the Commission had provided a "sensible" reason for its "relatively modest change of standard." *Id.* at 49a. "[T]he 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." *Ibid.* 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." App., *infra*, 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.

REASONS FOR GRANTING THE PETITION

In vacating the FCC's order, the court of appeals adopted an analysis that directly conflicts with the approach toward broadcast-indecency regulation that this Court mandated in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). The court of appeals criticized the Commission for taking context into account and refusing to

treat a single use of an expletive, no matter how graphic or gratuitous, as per se not indecent, even though, in *Pacifica*, this Court emphasized that "context is all-important" in evaluating indecency. *Id.* at 750. Indeed, while the court of appeals faulted the Commission for not having the courage of its convictions and treating expletives as per se indecent, it also recognized that in light of *Pacifica*'s focus on context, a blanket prohibition on all uses of particular words would almost certainly violate the First Amendment. App., *infra*, 26a n.7. By faulting the Commission for exercising the contextual judgment that *Pacifica* mandated, the court of appeals appears to have put the FCC to a choice between allowing one free use of any expletive no matter how graphic or gratuitous, or else adopting a (likely unconstitutional) across-the-board prohibition against expletives. There is no reason that the Commission must choose between those per se rules.

The decision of the court of appeals is also inconsistent with settled principles governing judicial review of agency action. The court asserted that the Commission had not adequately explained why it reversed its policy of categorically exempting isolated expletives from the federal restrictions on indecent broadcasts. In reality, the Commission provided a thorough, reasoned explanation for its change in policy. Under the deferential standard of review required by the Administrative Procedure Act (APA), 5 U.S.C. 501 *et seq.*, the Commission's judgment as to how best to enforce the federal prohibition on the broadcast of indecent material should have been upheld, and the court's contrary conclusion was erroneous. And the court's determination that the FCC was required to provide "record evidence" showing that expletives are harmful is in direct conflict with a holding

of the D.C. Circuit. See *Action for Children's Television* v. *FCC*, 58 F.3d 654, 662 (1995) (en banc), cert. denied, 516 U.S. 1043 (1996).

In most cases, a remand to an agency for a fuller explanation of a policy would not merit this Court's review. Here, however, the court of appeals candidly acknowledged that, under its decision, the Commission probably will be unable to "adequately respond to the constitutional and statutory challenges" in this case even by "proffering a reasoned analysis for its new approach to indecency." App., *infra*, 45a. The court has thus sent the Commission back to run a Sisyphean errand while effectively invalidating much of the Commission's authority to enforce 18 U.S.C. 1464. In the meantime, the Commission is left in the untenable position of having a grant of authority that the public expects it to exercise, and that *Pacifica* allows it to exercise, but that the Second Circuit has indicated cannot be meaningfully exercised consistently with that court's view of the APA and the First Amendment. Accordingly, this Court's review is warranted.

A. The Decision Below Conflicts With This Court's Decision In *Pacifica*

The reasoning of the court of appeals conflicts directly with the context-driven approach governing broadcast indecency that this Court upheld in *Pacifica*. In its analysis of the FCC's policy, the court of appeals focused on the Commission's statement, picking up on *Pacifica*, that it sought to protect broadcast audiences from the "first blow" resulting from the single utterance of an expletive. App., *infra*, 84a. The court rejected that rationale based on its view that "the 'first blow' theory 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. *Id.* at 26a. Thus, the court emphasized that the broadcast of a vulgar expletive on "The Early Show" was found not to be indecent because it took place in the context of a "news interview," and that the expletives in "Saving Private Ryan" did not make the broadcast of that movie indecent because, among other reasons, deleting the expletives "would have * * * diminished the power, realism and immediacy of the film experience for viewers." *Id.* at 26a-27a (quoting *id.* at 128a, and *In re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4513 ¶ 14 (Feb. 3, 2005) (*Saving Private Ryan Order*)). According to the court, those outcomes demonstrated that "the Commission's new policy was [not] based on its concern with the public's mere exposure to this language on the airwaves." *Id.* at 27a-28a. But just because the "first blow" theory is relevant does not mean that the Commission must ignore context and treat any first blow as a knockout punch.

Contrary to the reasoning of the court of appeals, the Commission's consideration of context is appropriate for three reasons. First, the context in which a word is used is highly 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." App., *infra*, 54a n.16.

Second, 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." App., *infra,* 127a. Agencies are not required to pursue their policies in complete disregard of competing interests, nor are they prohibited from recognizing that those interests may be greater in some contexts than in others. *Id.* at 55a (Leval, J., dissenting) (FCC has properly "reconcile[d] competing 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 USA Inc.* v. *NRDC*, 467 U.S. 837, 865-866 (1984).

Third, and most importantly, the court of appeals' hostility to a contextual analysis is, at bottom, an attack on this Court's decision in *Pacifica*. In *Pacifica*, the Court upheld the Commission's authority to regulate broadcast indecency precisely because "[t]he Commission's decision rested entirely on a nuisance rationale in which context is all-important." 438 U.S. at 750; see *ibid.* (indecency determination "requires consideration of a host of variables"). "[A] nuisance," the Court observed, "may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." *Ibid*. (quoting *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).

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." *Pacifica*, 438 U.S. 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*.

According to the court of appeals, a contextual approach to isolated expletives bears "no rational connection" to the goal of protecting broadcast audiences from the "first blow." App., *infra*, 26a. But there is no inherent tension between a "first blow" theory and a consideration of context. 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 a page later 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, see *id.* at 747 n.25, 749, Justice Stevens made clear that context could matter in analyzing a single use of an expletive. See also *id.* at 750 n.29.

Consistent with *Pacifica*, the Commission in this case reasonably concluded that Cher's and Richie's remarks constituted a "first blow" that could be redressed, not only because of the words that were used but also because of the context in which they were uttered: The language was vulgar and graphic; the words were uttered without any warning to parents during a live, nationally broadcast awards program watched by millions of children, App., *infra*, 76a, 119a; and it was undisputed that Cher's and Richie's remarks were gratuitous and unjustified by any artistic purpose, *id.* at 76a n.44, 120a n.191. Nothing in the Administrative Procedure Act required the Commission to prohibit the use of the same words in all other contexts in order to reach the reasonable conclusion that Cher's and Richie's comments were indecent as broadcast. While the court of appeals believed that consideration of countervailing First Amendment interests on a case-by-case basis undermined the reasonableness of the Commission's decision to abandon the per se exemption for isolated expletives, the court's position cannot be reconciled with *Pacifica*. Once it is recognized that (1) a particularly graphic utterance can serve as a first blow that can cause immediate damage, and (2) context matters, it follows logically that there is no mandate for a per se rule of either prohibition or license.

B. The Decision Below Is Inconsistent With Settled Principles Of Administrative Law And Conflicts With A Decision Of The D.C. Circuit

The court of appeals gave several additional reasons for its conclusion that "the FCC has failed to articulate a reasoned basis for [its] change in policy" regarding isolated expletives. App., *infra*, 2a. None withstands

scrutiny, and one is in direct conflict with a decision of the D.C. Circuit.

1. "The scope of review under the 'arbitrary and capricious' standard 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). Under that standard, "if the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'" *NCTA* v. *Brand X Internet Servs.*, 545 U.S. 967, 981-982 (2005) (quoting *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996)).

The Commission here gave a reasonable explanation for reaffirming its determination, first made in the *Golden Globe Awards Order*, that 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." App., *infra*, 82a (quoting *Golden Globe Awards Order*, 19 F.C.C.R. at 4980 ¶ 12). The Commission explained that, "[i]n evaluating whether material is patently offensive, [its] approach has generally been to examine all factors relevant to that determination." *Id.* at 83a. Accordingly, the Commission reasoned, to "suggest[] that one of these factors—whether material had been repeated—would always be decisive in a certain category of cases" would be "at odds with the Commission's overall enforcement policy." *Ibid.* As Judge Leval explained, the *Golden Globe Awards Order* eliminated the "nearly automatic pass" that the Commission had previously given to isolated expletives, and recognized that a brief sexual or excretory reference could be

patently offensive if uttered in certain contexts. *Id.* at 49a; see 19 F.C.C.R. at 4980 ¶ 12. That change in policy "made the Commission more consistent rather than less, because under the new rule, the same context-based factors will apply to all circumstances." App., *infra*, 54a. The panel majority's refusal to accept the Commission's reasoned and reasonable explanation for its change of policy is inconsistent with the deferential standard mandated by *State Farm*.

2. The court of appeals refused to defer to the Commission's justifications for its policy because, in the court's view, the Commission was required to explain "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*." App., *infra*, 25a; see *id.* at 32a ("The agency asserts the same interest in protecting children as it asserted thirty years ago, but until the *Golden Globes* decision, it had never banned fleeting expletives."). In this regard, the court repeatedly insisted that the agency should have provided "record evidence" to support its changed view of the broadcast of single expletives. *Id.* at 29a n.10; see *id* at 29a n.11, 32a. The hurdles that the court of appeals erected to the Commission's ability to make a change in policy find no support in the Administrative Procedure Act.[3]

[3] The court of appeals found it significant that broadcasters had relied on the exemption that the Commission had provided for isolated expletives. App., *infra*, 2a, 32a. The Commission, however, has consistently declined to sanction broadcasters for isolated expletives that were aired before the Commission announced its revised policy in the *Golden Globe Awards Order*. Accordingly, the Commission's change in policy does not undermine any reliance interests.

The court of appeals failed to appreciate that "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances," *State Farm*, 463 U.S. 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)). Thus, an agency has an obligation to reconsider "the wisdom of its policy on a continuing basis" and may make adjustments, whether "in response to changed factual circumstances, or a change in administrations." *Brand X*, 545 U.S. at 981 (citation omitted). And an agency may rationally alter its policy for the straightforward reason that its "prior policy failed to implement properly the statute." *Rust* v. *Sullivan*, 500 U.S. 173, 187 (1991).

Here, the Commission explained that its prior policy on isolated expletives had "failed to implement" Section 1464 properly, *Rust*, 500 U.S. at 173, because it rested on an "artificial" distinction between "expletives" and "descriptions or depictions of sexual or excretory activity" that ignored the fact that "an expletive's power to offend derives from its sexual or excretory meaning." App., *infra*, 82a-83a (internal quotation marks and citation omitted). The Commission also explained that treating isolated expletives as automatically permissible in every circumstance was inconsistent with the "critical nature of context" in evaluating whether a sexual or excretory reference is "patently offensive." *Id.* at 83a.

The court of appeals, however, believed that the Commission was required to adduce "evidence that suggests a fleeting expletive is harmful," and that "this harm is serious enough to warrant government regulation." App., *infra*, 32a. That argument is inconsistent with *Pacifica*, in which this Court upheld the Commission's indecency determination even though there was

no record evidence of any harm caused by the Carlin monologue. Instead, the Court found a sufficient basis for regulation in the commonsense observation 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.

In addition, the reasoning of the court of appeals is in direct conflict with that of the D.C. Circuit in *Action for Children's Television* v. *FCC*, 58 F.3d 654 (1995) (en banc), cert. denied, 516 U.S. 1043 (1996). That decision affirmed the Commission's authority to regulate broadcast indecency, holding that the government has an interest in protecting children from material that would have an adverse impact on their "ethical and moral development." *Id.* at 662. The court explained that "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 just this side of legal obscenity." *Ibid.* 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; cf. *Ginsberg* v. *New York*, 390 U.S. 629, 641 (1968) (upholding statute prohibiting sale of material obscene as to minors, even though the harmfulness of such material was not "an accepted scientific fact"). Here, the applicable statute prohibits the broadcast of "any obscene, indecent, or profane language." 18 U.S.C. 1464. Section 1464 does not require the Commission to show that the

language to which it applies is otherwise harmful; harm has already been presumed by Congress.

3. The court of appeals also took issue with the Commission's conclusion that "*in certain cases*, it is difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions," App., *infra*, 83a (emphasis added), because, in the court's view, "the general public well knows" that offensive sexual or excretory words "are often used in everyday conversation without any 'sexual or excretory' meaning," *id.* at 29a. But the Commission made that statement in the context of its broader observation that "an expletive's power to offend derives from its sexual or excretory meaning." *Id.* at 83a (internal quotation marks omitted). Moreover, Cher's reference to her critics is an example of a use of an expletive in a way that at a minimum draws force from its sexual or excretory origins, even if she was not literally "suggesting that people engage in sexual activities" with her critics. *Id.* at 120a; see *id.* at 58a (Leval, J., dissenting) ("It is surely not irrational for the Commission to conclude that * * * the F-Word is never completely free of an offensive, sexual connotation"). The court deemed the Commission's conclusion unsupported by "record evidence," *id.* at 30a n.10, but that assessment overlooks the evidence cited in the order, *id.* at 74a & nn.39-40. Moreover, the court's analysis is inconsistent with *Pacifica*, in which the Court upheld the Commission's conclusion that the Carlin monologue "depicted sexual and excretory activities," 438 U.S. at 732, even though one of Carlin's principal themes was that many of the expletives he used had non-literal meanings, see, *e.g.*, *id.* at 754.

4. Finally, the court of appeals exceeded the proper scope of its review when it concluded that the Commission had not shown that its revised policy was necessary. The Commission had 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," App., *infra*, 84a-85a—a result that would seriously undermine the objectives of Section 1464. But the court asserted that "broadcasters have never barraged the airwaves with expletives even prior to *Golden Globes*," and it suggested that the prediction that they might do so was "both unsupported by any evidence and directly contradicted by prior experience." *Id.* at 30a & n.11.

As an initial matter, the Commission's point was less a prediction than a consideration of the logic of providing a per se exemption for isolated expletives. A policymaker is well-served to consider where the logic of an argument would extend, even if the regulated community might exercise self-restraint in the short run.

In any event, there is substantial support for the notion that the failure to regulate "isolated and gratuitous uses of [vulgar] language on broadcasts when children were expected to be in the audience * * * would likely lead to more widespread use of the offensive language." *Golden Globe Awards Order*, 19 F.C.C.R. at 4979 ¶ 9.[4]

[4] In the *Golden Globe Awards Order*, the Commission cited an academic 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).

As Judge Leval explained, there was "good reason to expect that a marked increase" in the broadcast of expletives "would occur if the old policy were continued." App., *infra*, 57a. The court erred in "substitut[ing] its judgment for that of the agency," *State Farm*, 463 U.S. at 43, and its decision is in tension with decisions of the D.C. Circuit recognizing that "[p]redictions regarding the actions of regulated entities are precisely the type of policy judgments that courts routinely and quite correctly leave to administrative agencies." *Public Citizen, Inc.* v. *NHTSA*, 374 F.3d 1251, 1260-1261 (1994); see *American Gas Ass'n* v. *FERC*, 428 F.3d 255, 264 (2005) ("[I]t is within the scope of the agency's expertise to make . . . a prediction about the market it regulates, and a reasonable prediction deserves our deference.") (brackets in original).

C. The Question Presented Is Important And Warrants This Court's Review

On its face, the decision of the court of appeals does nothing more than remand the case to the FCC to provide a new explanation for its change in policy. App., *infra*, 45a. In an ordinary case, such a decision would not merit this Court's review. Here, however, the Commission has already fully explained its policy, and the opinion of the court of appeals makes clear that the Commission is unlikely to be able to say anything on remand that the court would deem satisfactory to justify that policy. On the one hand, the court of appeals found the Commission's regulation of isolated expletives unjustified because it takes account of context, rather than adopting a per se rule of prohibition. On the other hand, the alternative—a flat ban on any use of expletives, regardless of context—would almost certainly violate the

First Amendment. See *Pacifica*, 438 U.S. at 746 (plurality opinion) ("Some uses of even the most offensive words are unquestionably protected."). Indeed, the court of appeals recognized that "a per se ban would likely raise constitutional questions above and beyond the concerns raised by the current policy." App., *infra*, 26a n.7. Having established those parameters for the remand, it is no wonder that the court predicted that the FCC would be unable to "adequately respond to the constitutional and statutory challenges" in this case even by "proffering a reasoned analysis for its new approach to indecency." App., *infra*, 45a. As a result, the court's decision has an immediate and significant effect that warrants review.

Nor can the consequences of the decision below be confined to the FCC's disposition of the complaints regarding the 2002 and 2003 Billboard Music Awards programs. Rather, the decision effectively reinstitutes an automatic per se exemption for the broadcast of isolated expletives—an exemption that the Commission has expressly disavowed as inconsistent with its obligation to enforce responsibly the prohibition on broadcast indecency. Indeed, the decision calls into serious question the Commission's authority to regulate even *repeated* uses of offensive sexual or excretory language. In disagreeing with the Commission's treatment of "non-literal" uses of expletives such as the "F-Word," the court of appeals opined that such expletives "are often used in everyday conversation without any 'sexual or excretory meaning.'" App., *infra*, 29a. But the Commission has sensibly held that "both literal and non-literal uses of the 'F-Word' come within the subject matter scope of [its] indecency definition" because the "core meaning" of the "F-Word" has an inescapably "sexual connotation,"

and "the word's power to insult and offend derives from its sexual meaning." *Id.* at 118a; see *Golden Globe Awards Order*, 19 F.C.C.R. at 4979 ¶ 9 (any use of the word "invariably invokes a coarse sexual image"). Because the Commission's authority to regulate broadcast indecency has long been interpreted to depend upon a connection to sexual or excretory matters, see, *e.g.*, *Pacifica*, 438 U.S. at 732, if, under the court of appeals' reasoning, "non-literal" uses of even the most highly offensive sexual expletives have no such connection, then they would fall outside the Commission's regulatory power—no matter how many times those "non-literal" uses are deliberately repeated.

More broadly, the court of appeals' rejection of the Commission's contextual analysis strikes at the heart of broadcast indecency regulatory framework. As Judge Leval recognized, the FCC's focus on context "is in no way a consequence of the Commission's change of standard" with respect to isolated expletives. App., *infra*, 53a. Instead, the contextual approach "applies across the board to all circumstances," whether or not the material in question was repeated. *Ibid*. The adoption of a contextual approach to expletives is really just an effort to conform the treatment of expletives to the rest of the regulatory regime. *Id.* at 54a. As a result, the majority's criticism of the Commission's approach was in reality directed against the entire structure of Section 1464. *Id.* at 54a.

For example, the Commission took account of context in finding that the repeated use of expletives in Carlin's monologue was indecent, but that the repeated use of some of the same expletives in *Saving Private Ryan* was not. Compare *Pacifica*, 438 U.S. at 732, with *Saving Private Ryan Order*, 20 F.C.C.R. at 4512-4513 ¶¶ 14-15

(noting that, in context, the expletives were "integral to the film's objective of conveying the horrors of war" and were "neither gratuitous nor in any way intended or used to pander, titillate or shock"). According to the logic of the court of appeals, considering context in this manner would make it irrational to find the Carlin monologue (or a present-day expletive-filled rant by a radio shock jock) indecent.

Thus, the court's approach is difficult to square with *Pacifica*, and effectively nullifies the prohibition on indecent language found in Section 1464, which was upheld as constitutional in that decision. That result would not be surprising, since the court of appeals made little effort to hide its hostility to *Pacifica*'s reasoning. Compare, *e.g.*, *Pacifica*, 438 U.S. at 748-749 (describing "the broadcast media" as "uniquely pervasive" and "uniquely accessible to children"), with App., *infra*, 40a (questioning the accuracy of *Pacifica*'s holding to that effect). If the Commission's contextual analysis cannot survive the court's view of the FCC's obligation to provide a reasoned explanation—and if, as the court of appeals suggested, a per se prohibition on particular words is also not permissible—the FCC may find itself unable to fulfill a large portion of its broadcast indecency enforcement obligations.

The court of appeals' decision places the Commission in an untenable position. Although it orders a remand, the decision signals that there is no way for the Commission to regulate isolated expletives consistent with the parameters the court of appeals established. But Congress gave the Commission authority to regulate; *Pacifica* suggests that contextual regulation is not forbidden by the First Amendment; and the public rightfully expects the Commission to exercise what authority it has

to keep broadcast television suitable for children during certain hours. The court of appeals' decision suggests that the Commission retains some authority, but denies the Commission any permissible scope to exercise it, and leaves the Commission accountable for the coarsening of the airwaves while simultaneously denying it effective tools to address the problem.

At a minimum, the decision of the court of appeals is likely to generate considerable confusion for the Commission—which has pending before it hundreds of thousands of complaints regarding the broadcast of expletives, both isolated and repeated—and for broadcasters, leaving them uncertain as to the standards that are to govern the Commission's enforcement of the statutory prohibition on broadcast indecency. That confusion is unlikely to be resolved by allowing further percolation in the courts of appeals, because the possibility of further development of a circuit conflict is limited, at least as far as the major television networks are concerned. All of the network respondents appear to have their corporate headquarters in New York City, allowing them to confine any future challenges to the Second Circuit. See 28 U.S.C. 2343 (providing for venue in the D.C. Circuit and in the "circuit in which the petitioner resides or has its principal office"). Review by this Court is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 06-1760-ag (L), 06-2750-ag (CON),
06-5358-ag (CON)

FOX TELEVISION STATIONS, INC., CBS BROADCASTING, INC., WLS TELEVISION, INC., KTRK TELEVISION, INC., KMBC HEARST-ARGYLE TELEVISION, INC., ABC, INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, RESPONDENTS

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., ABC TELEVISION AFFILIATES ASSOCIATION, INTERVENORS

Decided: June 4, 2007

Before: LEVAL, POOLER, and HALL, Circuit Judges.

POOLER, Cicuirt Judge.

Fox Television Stations, Inc., along with its affiliates FBC Television Affiliates Association (collectively "Fox"), petition for review of the November 6, 2006, or-

der of the Federal Communications Commission ("FCC") issuing notices of apparent liability against two Fox broadcasts for violating the FCC's indecency and profanity prohibitions.[2] Fox, along with other broadcast networks and numerous amici, raise administrative, statutory, and constitutional challenges to the FCC's indecency regime. The FCC, also supported by several amici, dispute each of these challenges. We find that the FCC's new policy regarding "fleeting expletives" represents a significant departure from positions previously taken by the agency and relied on by the broadcast industry. We further find that the FCC has failed to articulate a reasoned basis for this change in policy. Accordingly, we hold that the FCC's new policy regarding "fleeting expletives" is arbitrary and capricious under the Administrative Procedure Act. The petition for review is therefore granted, the order of the FCC is vacated, and the matter is remanded to the Commission for further proceedings consistent with this opinion. Because we vacate the FCC's order on this ground, we do not reach the other challenges to the FCC's indecency regime raised by petitioners, intervenors, and amici.

BACKGROUND

The FCC's policing of "indecent" speech stems from 18 U.S.C. 1464, which provides that "[w]hoever utters any obscene, indecent, or profane language by means of

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[2] The petitions for review filed by Fox and CBS in Docket No. 06-1760 and ABC in Docket No. 06-2750 pertain to portions of a prior order by the FCC that has since been vacated. Accordingly, those petitions for review are denied as moot. The remainder of this opinion addresses the petition for review filed by Fox in Docket No. 06-5358.

radio communication shall be fined under this title or imprisoned not more than two years, or both." The FCC's authority to regulate the broadcast medium is expressly limited by Section 326 of the Communications Act, which prohibits the FCC from engaging in censorship. *See* 47 U.S.C. § 326. In 1960, Congress authorized the FCC to impose forfeiture penalties for violations of Section 1464. *See* 47 U.S.C. § 503(b)(1)(D). The FCC first exercised its statutory authority to sanction indecent (but non-obscene) speech in 1975, when it found Pacifica Foundation's radio broadcast of comedian George Carlin's "Filthy Words" monologue indecent and subject to forfeiture. *See Citizen's Complaint Against Pacifica Found. Station WBAI(FM), N.Y, N.Y.*, 56 F.C.C.2d 94 (1975). True to its title, the "Filthy Words" monologue contained numerous expletives in the course of a 12-minute monologue broadcast on the radio at 2:00 in the afternoon. In ruling on this complaint, the FCC articulated the following description of "indecent" content:

> [T]he concept of 'indecent' 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. Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe that such words are indecent within the meaning of the statute and have no place on radio when children are in the audience.

Id. at 11 (internal footnote omitted).

Pacifica appealed the FCC's order to the Court of Appeals for the D.C. Circuit. While that appeal was pending, the FCC issued a "clarification" order in which it specifically noted that its prior order was intended to address only the particular facts of the Carlin monologue as broadcast, and acknowledged the concern that "in some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing." '*Petition for Clarification or Reconsideration of a Citizen's Complaint against Pacifica Foundation, Station WBAI(FM), N.Y., N.Y.*, 59 F.C.C.2d 892, at ¶ 4 n.1 (1976) ("Pacifica Clarification Order"). The FCC stated that in such a situation, "we believe that it would be inequitable for us to hold a licensee responsible for indecent language." *Id.*

Although acknowledging the FCC's additional clarification, the D.C. Circuit nevertheless concluded that the FCC's indecency regime was invalid. *See Pacifica Found. v. FCC,* 556 F.2d 9 (D.C. Cir. 1977). Labeling the Commission's actions censorship, the court found the FCC's order both vague and overbroad, noting that it would prohibit "the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the *Bible.*" *Id.* at 14.

The Commission appealed this decision to the Supreme Court, which reversed in a plurality opinion. In its brief to the Supreme Court, the FCC stressed that its ruling was a narrow one applying only to the specific facts of the Carlin monologue. *See* Br. of FCC at 41-49, *FCC v. Pacifica Found.,* No. 77-528 (U.S. Mar. 3, 1978),

available at 1978 WL 206838. The Court took the Commission at its word and confined its review to the specific question of whether the Commission could find indecent the Carlin monologue as broadcast. *See FCC v. Pacifica Found.*, 438 U.S. 726, 732-35, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978). The Court first rejected Pacifica's statutory argument that "indecent" in Section 1464 could not be read to cover speech that admittedly did not qualify as obscenity. *Id.* at 739, 98 S. Ct. 3026. Finding that obscene, indecent, and profane have distinct meanings in the statute, the Court held that the FCC is permitted to sanction speech without showing that it satisfied the elements of obscenity. *Id.* at 739-41, 98 S. Ct. 3026. The Court then rejected Pacifica's constitutional challenges. The Court stated that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection" because the broadcast medium is a "uniquely pervasive presence in the lives of all Americans" that extends into the privacy of the home and is "uniquely accessible to children, even those too young to read." *Id.* at 748-749, 98 S. Ct. 3026. The Court therefore found that the FCC could, consistent with the First Amendment, regulate indecent material like the Carlin monologue. The Court then once again "emphasize[d] the narrowness of our holding . . . We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene." *Id.* at 750-51, 98 S. Ct. 3026.

Justices Powell and Blackmun, who concurred in the judgment and supplied two of the votes necessary for

the 5-4 majority,[3] also emphasized in their concurring opinion that the Court's holding was a narrow one limited to the facts of the Carlin monologue as broadcast. *Id.* at 755-56, 98 S. Ct. 3026 (Powell J., concurring). Foreshadowing the question now before us, they explicitly noted that "[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here." *Id.* at 760-61, 98 S. Ct. 3026 (Powell J., concurring). Furthermore, citing the FCC's brief to the Court, Justice Powell stated that he did not foresee an undue chilling effect on broadcasters by the FCC's decision because "the Commission may be expected to proceed cautiously, as it has in the past." *Id.* at 761 n.4, 98 S. Ct. 3026 (Powell J., concurring).

The FCC took the *Pacifica* Court's admonitions seriously in its subsequent decisions.[4] Shortly after the *Pacifica* ruling, the FCC stated the following in an opinion rejecting a challenge to a broadcaster's license renewal on the basis that the broadcaster had aired indecent programming:

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[3] The four dissenting justices would have held invalid any attempt by the FCC to prohibit indecent (non-obscene) speech. *See Pacifica*, 438 U.S. at 762-80, 98 S. Ct. 3026.

[4] At the time, the Commission interpreted *Pacifica* as involving a situation "about as likely to occur again as Halley's Comet." Br. of Amici Curiae Former FCC Officials at 6 (quoting FCC Chairman Charles D. Ferris, Speech to New England Broad. Assoc., Boston, Mass. (July 21, 1978)).

> With regard to 'indecent' or 'profane' utterances, the First Amendment and the 'no censorship' provision of Section 326 of the Communications Act severely limit any role by the Commission and the courts in enforcing the proscription contained in Section 1464. The Supreme Court's decision in *FCC v. Pacifica Foundation,* 46 U.S.L.W. 5018 (1978), No. 77-528, decided July 3, 1978, affords this Commission no general prerogative to intervene in any case where words similar or identical to those in Pacifica are broadcast over a licensed radio or television station. *We intend strictly to observe the narrowness of the Pacifica holding.* In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the 'indecent' words in question. The opinion of the Court specifically stated that it was not ruling that 'an occasional expletive . . . would justify any sanction . . .' Further, Justice Powell's concurring opinion emphasized the fact that the language there in issue had been 'repeated over and over as a sort of verbal shock treatment.' He specifically distinguished 'the verbal shock treatment [in Pacifica]' from 'the isolated use of a potentially offensive word in the course of a radio broadcast.'

Application of WGBH Educ. Found., 69 F.C.C.2d 1250, at ¶ 10 (1978) (emphasis added) (ellipses in original; internal footnotes and citations omitted). The FCC also specifically held that the single use of an expletive in a program that aired at 5:30pm "should not call for us to act under the holding of *Pacifica.*" *Id.* at ¶ 10 n.6. A few years later, the Commission again rejected a challenge to a license renewal that complained the broadcaster

had aired indecent programming in violation of Section 1464. The FCC acknowledged the complaint that the broadcaster on three separate occasions had aired programming during the morning hours containing language such as "motherfucker," "fuck," and "shit," but nevertheless concluded that "it is clear that the petitioner has failed to make a *prima facie* case that [the broadcaster] has violated 18 U.S.C. 1464" since the language did not amount to "verbal shock treatment" and the complainant had failed to show this was more than "isolated use." *Application of Pacifica Found.*, 95 F.C.C.2d 750, at ¶¶ 16, 18 (1983).

It was not until 1987 that the FCC would find another broadcast "indecent" under Section 1464. *See Infinity Broad. Corp., et al.*, 3 F.C.C.R. 930 (1987) ("Infinity Order"). The Commission explained:

> In cases decided subsequent to the Supreme Court's ruling [in *Pacifica*], the Commission took a very limited approach to enforcing the prohibition against indecent broadcasts. Unstated, but widely assumed, and implemented for the most part through staff rulings, was the belief that only material that closely resembled the George Carlin monologue would satisfy the indecency test articulated by the FCC in 1975. Thus, no action was taken unless material involved the repeated use, for shock value, of words similar or identical to those satirized in the Carlin "Filthy Words" monologue . . . As a result, the Commission, since the time of its ruling in 1975, has taken no action against any broadcast licensee for violating the prohibition against indecent broadcasts.

Id. at ¶ 4 (internal footnotes omitted). The Infinity Order affirmed on reconsideration three decisions issued

simultaneously by the FCC in April 1987 that found certain programs indecent. *See Pacifica Found., Inc.,* 2 F.C.C.R. 2698 (1987); *The Regents of the Univ. of Cal.,* 2 F.C.C.R. 2703 (1987); *Infinity Broad. Corp.,* 2 F.C.C.R. 2705 (1987). The FCC explained in the Infinity Order that it would no longer take the narrow view that a finding of indecency required the use of one of the seven "dirty words" used in Carlin's monologue. *See Infinity Order,* at ¶ 5. The FCC instead would use the generic definition of indecency it had articulated in connection with its prior decision in *Pacifica. Id.* Under the Commission's definition, "indecent speech is language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. Such indecent speech is actionable when broadcast at times of the day when there is a reasonable risk that children may be in the audience." *Regents of the Univ. of Cal.,* 2 F.C.C.R. 2703, at ¶ 3 (internal footnote omitted). The FCC also reaffirmed, however, the prevailing view that a fleeting expletive would not be actionable. *See id.* ("Speech that is indecent must involve more than an isolated use of an offensive word."); *Pacifica Found., Inc.,* 2 F.C.C.R. 2698, at ¶ 13 ("If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in Pacifica, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency."). Notably, in *Pacifica Foundation*, the Commission declined to make a finding of indecency against a radio broadcast of the program "Shocktime America," which had contained words and phrases such as "eat shit," "mother-fucker" and "fuck the U.S.A," in part because, without a transcript or tape of the program, the FCC was unable to

determine "whether the use of patently offensive speech was isolated." *Id.* at ¶¶ 3, 17.

Broadcasters appealed the Infinity Order to the D.C. Circuit, challenging the FCC's definition of indecency as unconstitutionally vague. *See Action for Children's Television v. FCC,* 852 F.2d 1332 (D.C. Cir. 1988) ("ACT I"), *superseded in part by Action for Children's Television v. FCC,* 58 F.3d 654 (D.C. Cir. 1995) (in banc). The D.C. Circuit rejected this argument on the basis that the definition at issue was "virtually the same definition the Commission articulated in the order reviewed by the Supreme Court in the *Pacifica* case." *Id.* at 1338. The court concluded that *Pacifica* implicitly rejected any vagueness challenge to the FCC's definition of "indecent," which therefore foreclosed its ability to revisit any such argument. *Id.* at 1339. The court then invited correction from "Higher Authority" if its reading of *Pacifica* was incorrect. *Id.* Before leaving the First Amendment issue, however, the court explicitly noted that the "FCC has assured this court, at oral argument, that it will continue to give weight to reasonable licensee judgments when deciding whether to impose sanctions in a particular case. Thus, the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy." *Id.* at 1340 n.14 (citing *Pacifica,* 438 U.S. at 761, 98 S. Ct. 3026 (Powell J., concurring)).

This restrained enforcement policy would continue. In 2001, pursuant to a settlement agreement by which the FCC agreed to clarify its indecency standards, the Commission issued a policy statement to "provide guidance to the broadcast industry regarding our case law interpreting 18 U.S.C. § 1464 and our enforcement policies with respect to broadcast indecency." *Industry*

Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464, 16 F.C.C.R. 7999, at ¶ 1 & ¶ 30 n.23 (2001) ("Industry Guidance"). The FCC first noted that "indecent speech is protected by the First Amendment, and thus, the government must both identify a compelling interest for any regulation it may impose on indecent speech and choose the least restrictive means to further that interest." *Id.* at ¶ 3.

The FCC then explained that an indecency finding involves the following two determinations: (1) whether the material falls within the "subject matter scope of [the] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities"; and (2) whether the broadcast is "*patently offensive* as measured by contemporary community standards for the broadcast medium." *Id.* at ¶¶ 7-8. The FCC considers the following three factors in determining whether the material is patently offensive: "(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the materials *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (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 ¶ 10. The policy statement contained numerous examples of prior FCC decisions evaluating whether certain material was indecent in an attempt to provide guidance to broadcasters. In discussing the second factor in the "patently offensive" analysis, the FCC cited examples distinguishing between material that "dwells" on the offensive content (indecent) and material that was "fleeting and isolated" (not indecent). *Id.* at ¶¶ 17-18.

This restrained enforcement policy would soon change. During NBC's January 19, 2003, live broadcast of the Golden Globe Awards, musician Bono stated in his acceptance speech "this is really, really, fucking brilliant. Really, really, great." *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, at ¶ 3 n.4 (2004) ("*Golden Globes*"). Individuals associated with the Parents Television Council filed complaints that the material was obscene and indecent under FCC regulations. *Id.* at ¶ 3. The FCC's Enforcement Bureau, however, denied the complaints on the basis that the expletive as used in context did not describe sexual or excretory organs or activities and that the utterance was fleeting and isolated. *See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 F.C.C.R. 19859, at ¶¶ 5-6 (Enforcement Bureau 2003) ("Golden Globes (Bureau Decision)"). The Bureau accordingly found that the speech "does not fall within the scope of the Commission's indecency prohibition," and reaffirmed FCC policy that "fleeting and isolated remarks of this nature do not warrant Commission action." *Id.* at ¶ 6.

Five months later, the full Commission reversed the Bureau's decision. First, the FCC held that any use of any variant of "the F-Word" inherently has sexual connotation and therefore falls within the scope of the indecency definition. *Golden Globes*, at ¶ 8. The FCC then held that "the 'F-Word' is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language" and therefore the use of that word was patently offensive under contemporary community standards. *Id.* at ¶ 9. The Commission found the fleeting and isolated use of the word irrelevant and overruled

all prior decisions in which fleeting use of an expletive was held not indecent. *Id.* at ¶ 12 ("While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law.").

The FCC then held that the material in question was also "profane" under Section 1464. *Id.* at ¶ 13. The Commission acknowledged that prior decisions interpreting "profane" had defined that term as blasphemy, but found that nothing in its prior decisions limited the definition of profane in such a manner. *Id.* at ¶ 14. The Commission, however, declined to impose a forfeiture because "existing precedent would have permitted this broadcast" and therefore NBC and its affiliates "necessarily did not have the requisite notice to justify a penalty." *Id.* at ¶ 15. The Commission emphasized, though, that licensees were now on notice that any broadcast of the "F-Word" could subject them to monetary penalties and suggested that implementing delay technology would ensure future compliance with its policy. *Id.* at ¶ 17.

NBC, along with several other parties including Fox, filed petitions for reconsideration of the *Golden Globes* order, raising statutory and constitutional challenges to the new policy. NBC, Fox, and Viacom Inc. also filed a joint petition to stay the effect of the *Golden Globes* order. These petitions have been pending for more than two years without any action by the FCC. Nevertheless, the FCC has applied the policy announced in *Golden Globes* in subsequent cases.

On February 21, 2006, the FCC issued an order resolving various complaints against several television broadcasts. *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* 21 F.C.C.R. 2664 (2006) ("Omnibus Order"). Through this order, the FCC intended to "provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard." *Id.* at ¶ 2. In Section III.B of the Omnibus Order, the Commission found four programs—Fox's broadcast of the 2002 Billboard Music Awards, Fox's broadcast of the 2003 Billboard Music Awards, various episodes of ABC's NYPD Blue, and CBS's The Early Show—indecent and profane under the policy announced in *Golden Globes.* The factual situations at issue are as follows:

- **2002 Billboard Music Awards:** In her acceptance speech, Cher stated: "People have been telling me I'm on the way out every year, right? So fuck 'em."

- **2003 Billboard Music Awards:** Nicole Richie, a presenter on the show, stated: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."

- **NYPD Blue:** In various episodes, Detective Andy Sipowitz and other characters used certain expletives including "bullshit," "dick," and "dickhead."

- **The Early Show:** During a live interview of a contestant on CBS's reality show Survivor: Vanuatu, the interviewee referred to a fellow contestant as a "bullshitter."

Id. at ¶¶ 101, 112 n.64, 125, 137. In finding these programs indecent and profane, the FCC reaffirmed its decision in *Golden Globes* that any use of the word "fuck" is presumptively indecent and profane. *Id.* at ¶¶ 102, 107. The Commission then concluded that any use of the word "shit" was also presumptively indecent and profane. *Id.* at ¶¶ 138, 143. Turning to the second part of its indecency test, the FCC found that each of the programs were "patently offensive" because the material was explicit, shocking, and gratuitous. *Id.* at ¶¶ 106, 120, 131, 141. Citing *Golden Globes,* the Commission dismissed the fact that the expletives were fleeting and isolated and held that repeated use is not necessary for a finding of indecency. *Id.* at ¶¶ 104, 116, 129, 140. The FCC, however, declined to issue a forfeiture in each case for the express reason that the broadcasts in question occurred before the decision in *Golden Globes,* and thus "existing precedent would have permitted this broadcast." *Id.* at ¶¶ 111, 124, 136, 145.

Fox and CBS filed a petition for review of the Omnibus Order in this court. ABC filed a petition for review in the D.C. Circuit, which was then transferred to this court and consolidated with the petition for review filed by Fox and CBS. Before any briefing took place, however, the FCC moved for a voluntary remand in order to give the Commission the first opportunity to address petitioners' arguments and "ensure that all licensees are afforded a full opportunity to be heard before the Commission issues a final decision." *See* FCC Mot. for Voluntary Remand at 2, No. 06-1760 (July 6, 2006). On September 7, 2006, this court granted the FCC's request for remand and stayed enforcement of the Omnibus Order. The Commission was given sixty days to issue a

final or appealable order, at which time the pending appeal would be automatically reinstated.

The FCC promptly issued a public notice soliciting comments on its decision in the Omnibus Order. Numerous parties, including those who have participated in the briefing in this appeal, submitted comments raising various statutory and constitutional arguments against the FCC's indecency regime. The FCC then issued a new order on November 6, 2006. *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, FCC 06-166 (Nov. 6, 2006) ("Remand Order"). The Remand Order vacated Section III.B of the Omnibus Order in its entirety and replaced it with the Remand Order. *Id.* at ¶ 11. In the Remand Order, the FCC reaffirmed its finding that the 2002 and 2003 Billboard Music Award programs were indecent and profane, but reversed its finding against The Early Show. It also dismissed on procedural grounds the complaint against NYPD Blue.[5]

With regard to the 2003 Billboard Music Awards, the Commission found that it would have been actionably indecent even prior to the decision in *Golden Globes* because the potentially offensive material was "repeated,"

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[5] The Commission dismissed the complaint against NYPD Blue because the only person who complained of the material resided in the Eastern time zone, where NYPD Blue aired during the "safe harbor" period after 10pm. *Remand Order,* at ¶ 75; *see also* 47 C.F.R. § 73.3999(b) (providing that broadcasting of indecent material is prohibited only between the hours of 6am and 10pm); *Action for Children's Television v. FCC,* 932 F.2d 1504 (D.C. Cir. 1991) ("ACT II") ("safe harbor" period is constitutionally required), *superseded in part by Action for Children's Television v. FCC,* 58 F.3d 654 (D.C. Cir. 1995) (in banc). In light of the FCC's revised decision regarding NYPD Blue, ABC is no longer participating in this appeal.

since Nicole Richie used "two extremely graphic and offensive words," and was "deliberately uttered" because of "Ms. Richie's confident and fluid delivery of the lines." *Id.* at ¶ 22. With regard to the 2002 Billboard Music Awards, the Commission "acknowledge[d] that it was not apparent that Fox could be penalized for Cher's comment at the time it was broadcast." *Id.* at ¶ 60. In both cases, the FCC rejected Fox's argument that fleeting expletives were not actionable, now characterizing its prior decisions on that issue as "staff letters and dicta." *Id.* at ¶ 20. The Commission, however, declined to impose a forfeiture for either broadcast. *Id.* at ¶¶ 53, 66.

Turning to The Early Show, the FCC reversed its finding that the expletive used was indecent or profane because it occurred in the context of a "*bona fide* news interview." *Id.* at ¶ 68. The Commission stated that in light of First Amendment concerns, "it is imperative that we proceed with the utmost restraint when it comes to news programming," and found it "appropriate . . . to defer to CBS's plausible characterization of its own programming" as a news interview. *Id.* at ¶ 71-72. Given this context, the FCC declined to find the comment indecent or profane. *Id.* at ¶ 73.

In accordance with our September 6th order, this appeal was automatically reinstated on November 8, 2006. Fox then filed a petition for review of the Remand Order and moved to consolidate that appeal with the one already pending before this court. We granted the motion for consolidation as well as motions to intervene by CBS Broadcasting Inc. ("CBS") and NBC Universal Inc. and NBC Telemundo License Co. (collectively, "NBC"). We have also received several briefs from various amici.

DISCUSSION

Fox, CBS, and NBC (collectively, "the Networks"), supported by several amici, raise a variety of arguments against the validity of the Remand Order, including: (1) the Remand Order is arbitrary and capricious because the Commission's regulation of "fleeting expletives" represents a dramatic change in agency policy without adequate explanation; (2) the FCC's "community standards" analysis is arbitrary and meaningless; (3) the FCC's indecency findings are invalid because the Commission made no finding of scienter; (4) the FCC's definition of "profane" is contrary to law; (5) the FCC's indecency regime is unconstitutionally vague; (6) the FCC's indecency test permits the Commission to make subjective determinations about the quality of speech in violation of the First Amendment; and (7) the FCC's indecency regime is an impermissible content-based regulation of speech that violates the First Amendment. The FCC, also supported by several amici, dispute each of these contentions. We agree with the first argument advanced by the Networks, and therefore do not reach any other potential problems with the FCC's decision.

I. Scope of Review

Before turning to the merits of the Networks' arguments, we first note that we reject the FCC's contention that our review here is narrowly confined to the specific question of whether the two Fox broadcasts of the Billboard Music Awards were indecent and/or profane. The Remand Order applies the policy announced in *Golden Globes*. If that policy is invalid, then we cannot sustain the indecency findings against Fox. Thus, as the Commission conceded during oral argument, the validity of the new "fleeting expletive" policy announced in *Golden*

Globes and applied in the Remand Order is a question properly before us on this petition for review. As the D.C. Circuit explained in rejecting this precise argument in another proceeding, "the agency may not resort to adjudication as a means of insulating a generic standard from judicial review." *ACT I,* 852 F.2d at 1337.

II. Administrative Procedure Act

Courts will set aside agency decisions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). As the Supreme Court has explained: "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). Agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* Reviewing courts "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* (quoting *SEC v. Chenery Corp.,* 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947)). The Networks contend that the Remand Order is arbitrary and capricious because the FCC has made a 180-degree turn regarding its treatment of "fleeting exple-

tives" without providing a reasoned explanation justifying the about-face. We agree.

First, there is no question that the FCC has changed its policy. As outlined in detail above, prior to the *Golden Globes* decision the FCC had consistently taken the view that isolated, non-literal, fleeting expletives did not run afoul of its indecency regime. *See, e.g., Pacifica Clarification Order,* 59 F.C.C.2d 892, at ¶ 4 n.1 (advising broadcasters that "it would be inequitable for us to hold a licensee responsible for indecent language" that occurred during a live broadcast without an opportunity for journalistic editing); *Application of WGBH Educ. Found.,* 69 F.C.C.2d 1250, at ¶ 10 & n.6 (distinguishing between the "verbal shock treatment" of the George Carlin monologue and "the isolated use of a potentially offensive word" and finding that the single use of an expletive in a program "should not call for us to act under the holding of *Pacifica*"); *Pacifica Foundation, Inc.,* 2 F.C.C.R. 2698, at ¶ 13 ("If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in Pacifica, deliberate and repetitive use in a patently offensive manner is a *requisite* to a finding of indecency." (emphasis added)); *Industry Guidance,* 16 F.C.C.R. 7999, at ¶¶ 17-18 (distinguishing between material that is repeated or dwelled on and material that is "fleeting and isolated") (citing *L.M. Communications of S.C., Inc.,* 7 F.C.C.R. 1595 (Mass Media Bureau 1992) (finding the single utterance of "mother-fucker" not indecent because it was a "fleeting and isolated utterance which, within the context of live and spontaneous programming, does not warrant a Commission sanction"); *Lincoln Dellar, For Renewal of the Licenses of Stations KPRL(AM) and KDDB(FM),* 8 F.C.C.R. 2582 (Audio Serv. Div. 1993) (news an-

nouncer's remark that he "fucked that one up" not indecent because the "use of a single expletive" did not warrant further review "in light of the isolated and accidental nature of the broadcast")). This consistent enforcement policy changed with the issuance of *Golden Globes*:

> While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the "F-Word" such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law. . . . The staff has since found that the isolated or fleeting use of the "F-Word" is not indecent in situations arguably similar to that here. We now depart from this portion of the Commission's 1987 *Pacifica* decision as well as all of the cases cited in notes 31 and 32 and any similar cases holding that isolated or fleeting use of the "F-Word" or a variant thereof in situations such as this is not indecent and conclude that such cases are not good law to that extent.

Golden Globes, 19 F.C.C.R. 4975, at ¶ 12 (internal footnote omitted); *see also id.* at ¶ 14 (providing new definition of "profane" speech). The Commission declined to issue a forfeiture in *Golden Globes* precisely because its decision represented a departure from its prior rulings. *See id.* at ¶ 15 ("Given, however, that Commission and staff precedent prior to our decision today *permitted the broadcast at issue,* and that we take a *new approach to profanity,* NBC and its affiliates necessarily did not have the requisite notice to justify a penalty." (emphasis added)). The Omnibus Order similarly declined to issue a forfeiture because "existing precedent would have per-

mitted this broadcast." *Omnibus Order*, 21 F.C.C.R. 2664, at ¶¶ 111, 124, 136, 145.

Although the Remand Order backpedals somewhat on this clear recognition that the Commission was departing from prior precedent,[6] in its brief to this court, the FCC now concedes that *Golden Globes* changed the landscape with regard to the treatment of fleeting expletives. *See* Br. of Respondent FCC at 33 ("In the *Golden Globe Order*, the Commission made clear that it was changing course with respect to the treatment of isolated expletives."); *see also* Br. of Amici Curiae Former FCC Officials at 9 (noting that the "extraordinary and unprecedented" decision in *Golden Globes* represented a radical change in policy that "greatly expanded the scope of what constituted indecency").

Agencies are of course free to revise their rules and policies. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) ("An initial agency interpretation is not instantly carved in stone."). Such a change, however, must provide a reasoned analysis for departing from prior precedent. As this court has explained:

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[6] In the Remand Order, the FCC "reject[s] Fox's suggestion that Nicole Richie's comments would not have been actionably indecent prior to our *Golden Globe* decision," and would only concede that it was "not apparent" that Cher's comment at the 2002 Billboard Music Awards would have been actionably indecent at the time it was broadcast. *Remand Order*, at ¶¶ 22, 60. Decisions expressly overruled in *Golden Globes* were now dismissed as "staff letters and dicta," and the Commission even implied that the issue of fleeting expletives was one of first impression for the FCC in *Golden Globes*. *Id.* at ¶ 21 ("[I]n 2004, the Commission itself considered for the first time in an enforcement action whether a single use of an expletive could be indecent.").

> [W]hen an agency reverses its course, a court must satisfy itself that the agency knows it is changing course, has given sound reasons for the change, and has shown that the rule is consistent with the law that gives the agency its authority to act. In addition, the agency must consider reasonably obvious alternatives and, if it rejects those alternatives, it must give reasons for the rejection, sufficient to allow for meaningful judicial review. Although there is not a "heightened standard of scrutiny . . . *the agency must explain why the original reasons for adopting the rule or policy are no longer dispositive.*" Even in the absence of cumulative experience, changed circumstances or judicial criticism, an agency is free to change course after reweighing the competing statutory policies. But such a flip-flop must be accompanied by a reasoned explanation of why the new rule effectuates the statute *as well as or better than the old rule.*

N.Y. Council, Ass'n of Civilian Technicians v. Fed. Labor Relations Auth., 757 F.2d 502, 508 (2d Cir. 1985) (second emphasis added; internal citations omitted); *see also State Farm,* 463 U.S. at 41-42, 103 S. Ct. 2856 ("A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." (internal quotation marks omitted)); *Huntington Hosp. v. Thompson,* 319 F.3d 74, 79 (2d Cir. 2003) ("While an agency is not locked into the first interpretation of a statute it embraces, it cannot simply adopt inconsistent positions without presenting 'some reasoned analysis.'"); *Mr. Sprout, Inc. v. United States,* 8 F.3d 118, 129 (2d

Cir. 1993) ("When the Commission departs from its own settled precedent, as here, it must present a 'reasoned analysis' that justifies its change of interpretation so as to permit judicial review of its new policies."). An agency's "failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making." *Ramaprakash v. FAA.,* 346 F.3d 1121, 1125 (D.C. Cir. 2003) (internal quotation marks omitted). Accordingly, agency action will be set aside as arbitrary and capricious if the agency fails to provide a reasoned explanation for its decision. *See, e.g., Massachusetts v. EPA,* —U.S.—, 127 S. Ct. 1438, 1463, 167 L. Ed. 2d 248 (2007) ("EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore arbitrary, capricious, . . . or otherwise not in accordance with law.") (ellipses in original; internal quotation marks omitted); *State Farm,* 463 U.S. at 34, 103 S. Ct. 2856 (agency's rescinding of rule requiring passive restraints in automobiles was arbitrary and capricious for failure to provide a reasoned explanation justifying revocation); *see also Yale-New Haven Hosp. v. Leavitt,* 470 F.3d 71, 72 (2d Cir. 2006) (agency action based on new rule governing Medicare reimbursement was arbitrary and capricious "because the Secretary did not satisfactorily explain his reasons" for changing historical practice); *ANR Pipeline Co. v. Fed. Energy Regulatory Comm'n,* 71 F.3d 897, 901 (D.C. Cir. 1995) ("[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.").

Our evaluation of the agency's reasons for its change in policy is confined to the reasons articulated by the agency itself. *See State Farm*, 463 U.S. at 50, 103 S. Ct. 2856 ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action. It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." (internal citation omitted)); *Yale-New Haven Hosp.*, 470 F.3d at 81 ("Generally speaking, after-the-fact rationalization for agency action is disfavored."). The primary reason for the crackdown on fleeting expletives advanced by the FCC is the so-called "first blow" theory described in the Supreme Court's *Pacifica* decision. In *Pacifica*, the Supreme Court justified the FCC's regulation of the broadcast media in part on the basis that indecent material on the airwaves enters into the privacy of the home uninvited and without warning. 438 U.S. at 748, 98 S. Ct. 3026. The Court rejected the argument that the audience could simply tune-out: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow." *Id.* at 748-49, 98 S. Ct. 3026. Relying on this statement in *Pacifica*, the Commission attempts to justify its stance on fleeting expletives on the basis that "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow.'" *Remand Order*, at ¶ 25.

We cannot accept this argument as a reasoned basis justifying the Commission's new rule. First, the Commission provides no 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*. More problematic,

however, is that the "first blow" theory bears no rational connection to the Commission's actual policy regarding fleeting expletives. As the FCC itself stressed during oral argument in this case, the Commission does not take the position that *any* occurrence of an expletive is indecent or profane under its rules.[7] For example, although "there is no outright news exemption from our indecency rules," *Remand Order,* at ¶ 71, the Commission will apparently excuse an expletive when it occurs during a "*bona fide* news interview," *id.* at ¶ 72-73 (deferring to CBS's "plausible characterization" of a segment of The Early Show interviewing a contestant on its reality show Survivor: Vanuatu as news programming and finding expletive uttered during that part of the show not indecent or profane). Certainly viewers (including children) watching the live broadcast of The Early Show were "force[d] . . . to take the 'first blow" of the expletive uttered by the Survivor: Vanuatu contestant. Yet the Commission emphasized during oral argument that its news exception is a broad one and "the Commission has never found a broadcast to be indecent on the basis of an isolated expletive in the face of some claim that the use of that language was necessary for any journalistic or artistic purpose." The Commission further explained to this court that a broadcast of oral argument in this case, in which the same language used in the Fox broadcasts was repeated multiple times in the

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[7] Such a per se ban would likely raise constitutional questions above and beyond the concerns raised by the current policy. *See Pacifica,* 438 U.S. at 746, 98 S. Ct. 3026 (plurality opinion) ("Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected.").

courtroom, would "plainly not" be indecent or profane under its standards because of the context in which it occurred. The Commission even conceded that a re-broadcast of precisely the same offending clips from the two Billboard Music Award programs for the purpose of providing background information on this case would not result in any action by the FCC, even though in those circumstances viewers would be subjected to the same "first blow" that resulted from the original airing of this material. Furthermore, the Commission has also held that even repeated and deliberate use of numerous expletives is not indecent or profane under the FCC's policy if the expletives are "integral" to the work. *See Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Televison Network's Presentation of the Film "Saving Private Ryan"*, 20 F.C.C.R. 4507, at ¶ 14 (2005) ("Saving Private Ryan") (finding numerous expletives uttered during film Saving Private Ryan not indecent or profane because deleting the expletives "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers"). In all of these scenarios, viewers, including children who may have no understanding of whether expletives are "integral" to a program or whether the interview of a contestant on a reality show is a "*bona fide* news interview," will have to accept the alleged "first blow" caused by use of these expletives. Thus, 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 air-

waves.[8] The "first blow" theory, therefore, fails to provide the reasoned explanation necessary to justify the FCC's departure from established precedent.[9]

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[8] Thus, our rejection of the agency's proffered rationale as the required "reasoned explanation" is not that the "Commission's change of standard is irrational because it is inconsistent" as the dissent suggests, dissent op. at 471, but that the Commission's proffered rationale is disconnected from the actual policy implemented by the Commission. *See State Farm,* 463 U.S. at 43, 103 S. Ct. 2856 (Agency action is arbitrary and capricious if the agency fails to "articulate a *satisfactory explanation* for its action including a '*rational connection* between the facts found and the choice made.' ") (emphasis added).

[9] The dissent takes the position that the "reasoned analysis" underlying the FCC's change in policy is its statement in *Golden Globes* that "given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation. . . . The '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." Dissent Op. at 468-69 (quoting *Golden Globes,* at ¶¶ 8-9). Much like the "first-blow" theory, however, this cannot provide the requisite "reasoned analysis" because it is not consistent with the Commission's actual policy. The FCC's change in policy cannot be based on a categorical view that "any use of that word or a variation, *in any context,* inherently has a sexual connotation," *Golden Globes,* at ¶ 8 (emphasis added), because, as discussed above, the Commission permits even numerous and deliberate uses of that word in certain contexts. Notably, the FCC did not rely on this statement from *Golden Globes* in

The Remand Order makes passing reference to other reasons that purportedly support its change in policy, none of which we find sufficient. For instance, the Commission states that even non-literal uses of expletives fall within its indecency definition because it is "difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions." *Remand Order,* at ¶ 23. This 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. Bono's exclamation that his victory at the Golden Globe Awards was "really, really fucking brilliant" is a prime example of a non-literal use of the "F-Word" that has no sexual connotation. *See Golden Globes (Bureau Decision),* 18 F.C.C.R. 19859, at ¶ 5 ("As a threshold matter, the material aired during the 'Golden Globe Awards' program does not describe or depict sexual and excretory activities and organs. . . . Rather, the performer used the word 'fucking' as an adjective or expletive to emphasize an exclamation."), *rev'd by Golden Globes,* 19 F.C.C.R. 4975 (2004). Similarly, as NBC illustrates in its brief, in recent times even the top leaders of our government have used variants of these expletives in a manner that no reasonable person would believe referenced "sexual or excretory organs or activities." *See* Br. of Intervenor NBC at 31-32 & n.3 (citing President Bush's remark to British Prime Minister Tony Blair that the United Nations needed to "get Syria to get Hezbollah to stop doing this shit" and Vice President Cheney's widely-reported "Fuck yourself" comment to

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arguing that it provided a reasoned explanation for its decision. *See* Br. of Respondent FCC, at 36-37.

Senator Patrick Leahy on the floor of the U.S. Senate).[10] Similarly, the Commission's warning 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," *Remand Order*, at ¶ 25, is equally divorced from reality because the Commission itself recognizes that broadcasters have never barraged the airwaves with expletives even prior to *Golden Globes, see Remand Order*, at ¶ 29.[11] Finally, the Com

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[10] Contrary to the dissent's view, our rejection of this proffered rationale is not merely a "difference of opinion" with the agency. Dissent op. at 473-74. We reject this reason not because we disagree with it, but because it is both unsupported by any record evidence as well as contradicted by evidence submitted by the Networks. Thus, we need not consider whether the FCC's statement that "any use of [the F-Word] or a variation, in any context, inherently has a sexual connotation," in actuality means, "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," as the dissent suggests. *Id.* Even if we accept the dissent's reading, the FCC still has failed to set forth the required reasoned explanation because its proffered rationale remains unsupported by any record evidence and contradicted by the evidence submitted by the Networks. *See Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 626, 106 S. Ct. 2101, 90 L. Ed. 2d 584 (1986) ("Agency deference has not come so far that we will uphold regulations whenever it is possible to 'conceive a basis' for administrative action.") (plurality op).

[11] We agree with the dissent that this proffered rationale "is at most a small part of the agency's justification for its action," dissent op. at 473, but because it is one of the reasons advanced by the agency, we address it here. We disagree with the dissent, however, that our rejection of this proffered rationale is a mere difference of opinion with the agency in predicting the future. The FCC's obligation to provide a "reasoned analysis" for its change in policy is not satisfied when the proffered rationale—that without its new policy the airwaves will be overtaken by fleeting expletives—is both unsupported by any evidence and directly contradicted by prior experience. We further note while

mission's claim that "categorically requiring repeated use . . . is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context," *Remand Order,* at ¶ 23, also does not provide sufficient justification for its departure from prior precedent. First, the Commission's own policy of treating all variants of certain expletives as presumptively indecent and profane, whether used in a literal or non-literal sense, also fails to comport with this "general approach" that "stresses the critical nature of context." *See, e.g., Golden Globes,* 19 F.C.C.R. 4975, at ¶ 8 (declaring that "any use of [the F-Word] or a variation, *in any context,* inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition") (emphasis added). In addition, the Commission's indecency test itself remains unchanged, but the Commission fails to provide a reasoned explanation for why a single, isolated expletive now should fit within the articulation of that test set forth in *Golden Globes, see Pacifica Found., Inc.,* 2 F.C.C.R. 2698, at ¶ 13 ("If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in Pacifica, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency.").

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the dissent attempts to provide support for the agency's prediction, including broadcasters' need to compete with cable "which increasingly make liberal use of their freedom to fill programming with such expletives," dissent op. at 472, no evidence supporting this proposition is contained in the record that was considered by the FCC when rendering its decision. *See, e.g., State Farm,* 463 U.S. at 43, 103 S. Ct. 2856 ("The reviewing court should not attempt itself to make up for [the agency's] deficiencies: 'We may not supply a reasoned basis for the agency's action that the agency itself has not given.'") (quoting *SEC v. Chenery Corp.,* 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947)).

For decades broadcasters relied on the FCC's restrained approach to indecency regulation and its consistent rejection of arguments that isolated expletives were indecent. The agency asserts the same interest in protecting children as it asserted thirty years ago, but until the *Golden Globes* decision, it had never banned fleeting expletives. While the FCC is free to change its previously settled view on this issue, it must provide a reasoned basis for that change. Cf. *State Farm,* 463 U.S. at 42, 103 S. Ct. 2856 ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change *beyond that which may be required* when an agency does not act in the first instance.") (emphasis added). The FCC's decision, however, 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. Such evidence would seem to be particularly relevant today when children likely hear this language far more often from other sources than they did in the 1970s when the Commission first began sanctioning indecent speech. Yet the Remand Order provides no reasoned analysis of the purported "problem" it is seeking to address with its new indecency policy from which this court can conclude that such regulation of speech is reasonable. *See, e.g., United States v. Playboy Enter. Group, Inc.,* 529 U.S. 803, 822-23, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000) (rejecting indecency regulation of cable television in part because "[t]he question is whether an actual problem has been proved in this case. We agree that the Government has failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban."); *Turner Broad. Sys. v. FCC,* 512 U.S. 622, 664, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) (remanding for

additional fact finding to determine whether speech regulation justified because government had failed to demonstrate "that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way"); *Quincy Cable TV, Inc. v. FCC,* 768 F.2d 1434, 1463 (D.C. Cir. 1985) (invalidating FCC regulation because "the Commission has failed entirely to determine whether the evil the rules seek to correct 'is a real or merely a fanciful threat'"); *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 36 (D.C. Cir. 1977) ("[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." (internal quotation marks omitted)). The Commission has similarly failed to explain how its current policy would remedy the purported "problem" or to point to supporting evidence.

The Commission's new approach to profanity is supported by even less analysis, reasoned or not. The Commission sets forth no independent reasons that would justify its newly-expanded definition of "profane" speech, aside from merely stating that its prior precedent does not prevent it from setting forth a new definition, *see Golden Globes,* 19 F.C.C.R. 4975, at ¶ 14. To the extent the Commission believes its arguments for expanding its indecency enforcement support its new policy regarding profanity, those arguments are rejected for the reasons stated above. Furthermore, the Commission fails to provide any explanation for why this separate ban on profanity is even necessary. Prior to 2004, the Commission never attempted to regulate "profane" speech. In fact, the Commission took the view that a separate ban on profane speech was unconstitutional. *See* 122 Cong. Rec. 33359, 33359, 33364-65 (1976) (rec-

ommending Congress delete "profane" from Section 1464 "[b]ecause of the serious constitutional problems involved"); FCC, *The Public and Broadcasting,* 1999 WL 391297 (June 1999) ("Profanity that does not fall under one of the above two categories [indecent or obscene] is fully protected by the First Amendment and cannot be regulated."). The Commission again has not provided this court with a reasoned analysis of why it has undertaken this separate regulation of speech. Finally, the Commission provides no explanation of what harm this separate enforcement against profane speech addresses that is not already addressed by the FCC's indecency and obscenity enforcement. Particularly considering that the scope of the FCC's new profanity definition appears to be largely (if not completely) redundant with its indecency prohibition, *see infra* Part IV, this would seem to be an important question for the Commission to consider. The Remand Order, however, provides no indication that the Commission has engaged in any such analysis.

Accordingly, we find that the FCC's new policy regarding "fleeting expletives" fails to provide a reasoned analysis justifying its departure from the agency's established practice. For this reason, Fox's petition for review is granted, the Remand Order is vacated, and the matter is remanded to the FCC for further proceedings consistent with this opinion. Because we have found that the FCC's new indecency regime, announced in *Golden Globes* and applied in the Remand Order, is invalid under the Administrative Procedure Act, the stay

of enforcement previously granted by this court in our September 6th order is vacated as moot.[12]

III. Constitutional Challenges

"A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. N.W. Indian Cemetery Protective Ass'n,* 485 U.S. 439, 445, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988). Thus, we refrain from deciding the various constitutional challenges to the Remand Order raised by the Networks. We note, however, that in reviewing these numerous constitutional challenges, which were fully briefed to this court and discussed at length during oral argument, we are skeptical that the Commission can provide a reasoned explanation for its "fleeting expletive" regime that would pass constitutional muster. Because we doubt that the Networks will refrain from further litigation on these precise issues if, on remand, the Commission merely provides further explanation with no other changes to its policy, in the interest of judicial economy we make the following observations.

As an initial matter, we note that *all* speech covered by the FCC's indecency policy is fully protected by the

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[12] We recognize that what follows is dicta, but we note that "dicta often serve extremely valuable purposes. They can help clarify a complicated subject. They can assist future courts to reach sensible, well-reasoned results. They can help lawyers and society to predict the future course of the court's rulings. They can guide future courts to adopt fair and efficient procedures. What is problematic is not the utterance of dicta, but the failure to distinguish between holding and dictum." The Honorable Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta,* 81 N.Y.U.L. Rev. 1249, 1253 (2006).

First Amendment. *See Sable Commc'ns v. FCC,* 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989) (noting that speech "which is indecent but not obscene is protected by the First Amendment"); *Industry Guidance,* 16 F.C.C.R. 7999, at ¶ 3 ("[I]ndecent speech is protected by the First Amendment, and thus, the government must both identify a compelling interest for any regulation it may impose on indecent speech and choose the least restrictive means to further that interest."). With that backdrop in mind, we question whether the FCC's indecency test can survive First Amendment scrutiny. For instance, we are sympathetic to the Networks' contention that the FCC's indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague. Although the Commission has declared that all variants of "fuck" and "shit" are presumptively indecent and profane, repeated use of those words in "Saving Private Ryan," for example, was neither indecent nor profane. And while multiple occurrences of expletives in "Saving Private Ryan" was not gratuitous, *Saving Private Ryan,* 20 F.C.C.R. 4507, at ¶ 14, a single occurrence of "fucking" in the Golden Globe Awards was "shocking and gratuitous," *Golden Globes,* 19 F.C.C.R. 4975, at ¶ 9. Parental ratings and advisories were important in finding "Saving Private Ryan" not patently offensive under contemporary community standards, *Saving Private Ryan,* 20 F.C.C.R. 4507, at ¶ 15, but irrelevant in evaluating a rape scene in another fictional movie, *see Omnibus Order,* 21 F.C.C.R. 2664, at ¶ 38 (issuing maximum forfeiture penalty against NBC Telemundo for movie "Con el Corazón en la Mano"). The use of numerous expletives was "integral" to a fictional movie about war, *Saving Private Ryan,* 20 F.C.C.R. 4507, at ¶ 14, but occasional exple-

tives spoken by real musicians were indecent and profane because the educational purpose of the documentary "could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives," *Omnibus Order*, 21 F.C.C.R. 2664, at ¶ 82 (finding Martin Scorsese's PBS documentary "The Blues: Godfathers and Sons" indecent). The "S-Word" on The Early Show was not indecent because it was in the context of a "*bona fide* news interview," but "there is no outright news exemption from our indecency rules," *Remand Order*, at ¶¶ 68, 71-73. We can understand why the Networks argue that the FCC's "patently offensive as measured by contemporary community standards" indecency test coupled with its "artistic necessity" exception fails to provide the clarity required by the Constitution, creates an undue chilling effect on free speech, and requires broadcasters to "steer far wider of the unlawful zone," *Speiser v. Randall*, 357 U.S. 513, 526, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958).

The Networks' position is further buttressed by the Supreme Court's decision in *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997), which struck down as unconstitutionally vague a similarly-worded indecency regulation of the Internet.[13] The Court found that the statute's use of the "general, undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material with serious educational or other value. Moreover, the 'community

[13] Section 223(d) of the of the Communications Decency Act prohibited material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." *Reno*, 521 U.S. at 860, 117 S. Ct. 2329.

standards' criterion as applied to the Internet means that any communication available to a nation wide audience will be judged by the standards of the community most likely to be offended by the message." *Id.* at 877-78, 117 S. Ct. 2329. Because of the "vague contours" of the regulation, the Court held that "it unquestionably silences some speakers whose messages would be entitled to constitutional protection," and thus violated the First Amendment. *Id.* at 874, 117 S. Ct. 2329. Because *Reno* holds that a regulation that covers speech that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" is unconstitutionally vague, we are skeptical that the FCC's identically-worded indecency test could nevertheless provide the requisite clarity to withstand constitutional scrutiny. Indeed, we are hard pressed to imagine a regime that is more vague than one that relies entirely on consideration of the otherwise unspecified "context" of a broadcast indecency.

We also note that the FCC's indecency test raises the separate constitutional question of whether it permits the FCC to sanction speech based on its subjective view of the merit of that speech. It appears that under the FCC's current indecency regime, any and all uses of an expletive is presumptively indecent and profane with the broadcaster then having to demonstrate to the satisfaction of the Commission, under an unidentified burden of proof, that the expletives were "integral" to the work. In the licensing context, the Supreme Court has cautioned against speech regulations that give too much discretion to government officials. *See, e.g., Forsyth County, Ga. v. Nationalist Movement,* 505 U.S. 123, 130, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992) ("A government

regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view."); *City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 758, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988) (finding a permit scheme facially unconstitutional because "*post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression"). In succeeding on this challenge, the Networks need not prove that the FCC "has exercised [its] discretion in a content-based manner, but whether there is anything in [its policy] preventing [it] from doing so." *Forsythe,* 505 U.S. at 133 n.10, 112 S. Ct. 2395 ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.").

Finally, we recognize there is some tension in the law regarding the appropriate level of First Amendment scrutiny. In general, restrictions on First Amendment liberties prompt courts to apply strict scrutiny. *FCC v. League of Women Voters,* 468 U.S. 364, 376, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984). Outside the broadcasting context, the Supreme Court has consistently applied strict scrutiny to indecency regulations. *See, e.g., Playboy,* 529 U.S. at 811-813, 120 S. Ct. 1878 (holding that regulation proscribing indecent content on cable television was content-based restriction of speech subject to strict scrutiny); *Sable,* 492 U.S. at 126, 109 S. Ct. 2829 (holding that indecency regulation of telephone messages was content-based restriction subject to strict

scrutiny); *Reno,* 521 U.S. at 868, 117 S. Ct. 2329 (holding that indecency regulation of Internet was a content-based restriction subject to strict scrutiny). At the same time, however, the Supreme Court has also considered broadcast media exceptional. "[B]ecause broadcast regulation involves unique considerations, our cases . . . have never gone so far as to demand that such regulations serve 'compelling' governmental interests." *League of Women Voters,* 468 U.S. at 376, 104 S. Ct. 3106. Restrictions on broadcast "speech" have been upheld "when we [are] satisfied that the restriction is narrowly tailored to further a substantial governmental interest." *Id.* at 380, 104 S. Ct. 3106.

The Networks contend that the bases for treating broadcast media "different[ly]" have "eroded over time," particularly because 86 percent of American households now subscribe to cable or satellite services, *Remand Order,* at ¶ 49. As the Networks argue, this and other realities have "eviscerated" the notion that broadcast content is, as it was termed in *Pacifica,* 438 U.S. at 748-49, 98 S. Ct. 3026, "uniquely pervasive" and "uniquely accessible to children." Whatever merit these arguments may have, they cannot sway us in light of Supreme Court precedent. *See, e.g., Reno,* 521 U.S. at 867, 117 S. Ct. 2329 (noting that "as a matter of history" broadcast television has enjoyed less First Amendment protection than other media, including the internet); *Pacifica,* 438 U.S. at 748-50, 98 S. Ct. 3026.

Nevertheless, we would be remiss not to observe that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast

television. In light of this possibility, the Networks rightly rest their constitutional argument in part on the holding of *Playboy,* which involved a challenge to a statute requiring cable operators who provide channels primarily dedicated to sexually explicit or otherwise indecent programming to either fully scramble these channels or limit their transmission to the 10 pm to 6 am safe harbor period. 529 U.S. at 806, 120 S. Ct. 1878. The Supreme Court, applying strict scrutiny, invalidated the statute because a less restrictive alternative to the prohibition existed: "One plausible, less restrictive alternative could be found in another section of the [Telecommunications] Act [of 1996]: § 504, which requires a cable operator, 'upon request by a cable service subscriber . . . without charge, [to] fully scramble or otherwise fully block' any channel the subscriber does not wish to receive." *Id.* at 809-10, 120 S. Ct. 1878. The Court held: This "targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests." *Id.* at 815, 120 S. Ct. 1878. In so holding, the Court suggested its decision might go beyond the mechanistic application of strict scrutiny, and rely in part on a notional pillar of free speech—namely, choice:

> When a student first encounters our free speech jurisprudence, he or she might think it is influenced by the philosophy that one idea is as good as any other, and that in art and literature objective standards of style, taste, decorum, beauty, and esthetics are deemed by the Constitution to be inappropriate, indeed unattainable. Quite the opposite is true. The Constitution no more enforces a relativistic philosophy or moral nihilism than it does any other point of

> view. The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.

Id. at 818, 120 S. Ct. 1878. The Court specifically rejected the arguments that parents' ignorance of this option, its underutilization, or its inability to be 100% effective rendered targeted blocking an ineffective alternative: "It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." *Id.* at 824, 120 S. Ct. 1878.

The Networks argue that the advent of the V-chip and parental ratings system[14] similarly provide a less

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[14] In 1996, Congress mandated that every television, 13 inches or larger, sold in the United States, come equipped with blocking technology commonly known as the V-chip. *See* 47 U.S.C. § 303(x) (stating that in the case of an "apparatus" designed to receive television signals, "such apparatus [shall] be equipped with a feature designed to enable viewers to block display of all programs with a common rating"). To implement V-chip technology, Congress also required a television ratings system. The industry developed the "TV Parental Guidelines" rating system, which was approved by the FCC. *See In the Matter of Implementation of Section 551 of the Telecommunications Act of 1996,* 13 F.C.C.R. 8232, at ¶ 2.

restrictive alternative to the FCC's indecency ban. The FCC counters that the V-chip is an ineffective alternative because, in its view, few televisions feature a V-chip, most parents do not know how to use it, programs are often inaccurately rated, and fleeting expletives, such as those witnessed at the programs at issue here, could elude V-chip blocking even if the show during which they occurred was otherwise accurately labeled. *See Remand Order,* at ¶ 51 & n.162. The FCC's arguments are not without merit, but they must be evaluated in the context of today's realities. The proliferation of satellite and cable television channels—not to mention internet-based video outlets—has begun to erode the "uniqueness" of broadcast media, while at the same time, blocking technologies such as the V-chip have empowered viewers to make their own choices about what they do, and do not, want to see on television. *Playboy* distinguished *Pacifica* on the grounds that "[c]able systems have the capacity to block unwanted channels on a household-by-household basis" and thus "[t]he option to block reduces the likelihood, so concerning to the Court in *Pacifica,* that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem." 529 U.S. at 815, 120 S. Ct. 1878 (internal citation omitted). The FCC is free to regulate indecency, but its regulatory powers are bounded by the Constitution. If the *Playboy* decision is any guide, technological advances may obviate the constitutional legitimacy of the FCC's robust oversight.

IV. The FCC's Construction of Profane

The Networks also argue that the FCC employed an improper definition of "profane" under Section 1464. Although we need not reach this argument to dispose of

this appeal, on remand, the FCC may desire to explain its gloss on the definition of "profane." In the *Remand Order*, the FCC applied its new definition of "profane" as set forth in *Golden Globes.* The FCC now defines "profane" as "those personally reviling epithets naturally tending to provoke violent resentment or denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance." *Golden Globes,* 19 F.C.C.R. 4975, at ¶ 13 (quoting *Tallman v. United States,* 465 F.2d 282, 286 (7th Cir. 1972)). The FCC, noting that "shit" and "fuck" fall within this definition, ruled that Cher's and Nicole Richie's fleeting expletives were "profane," as well as indecent. Most dictionaries interpret the term "profane" to denote something that pertains to the irreligious, and since 1927, courts—as well as the FCC itself—have assumed that "profane" in the broadcast context refers to sacrilege, and nothing more. *See, e.g. Duncan v. United States,* 48 F.2d 128, 134 (9th Cir. 1931) (collecting cases and holding defendant "was properly convicted of using profane language" where he "referred to an individual as 'damned,' . . . used the expression 'By God' irreverently, and . . . announced his intention to call down the curse of God"); *Gagliardo v. United States,* 366 F.2d 720, 725 (9th Cir. 1966) ("the only words attributed to appellants which could even remotely be considered as being 'profane' . . . were 'God damn it'"); *In re Complaint by Warren B. Appleton, Brockton, Mass.,* 28 F.C.C.2d 36 (1971) (analyzing the word "damn" as a matter of profanity). As the FCC notes, the Seventh Circuit's 1972 *Tallman* decision, 465 F.2d at 286, suggested an alternate definition for this term, but we do not believe the FCC can find refuge in this case. *Tall-*

man concerned a prosecution for obscenity, not profanity, and thus the *Tallman* court had no occasion to determine conclusively how profane should be interpreted. *See id.* ("The trial judge did not undertake to define the terms 'indecent' and 'profane,' but he had no occasion to do so because he determined that petitioner's utterances were properly classifiable as 'obscene.'"). The *Tallman* court's brief reference to "profane" served only to demonstrate that there may be a construction of "profane" that could pass constitutional scrutiny.

But the FCC's definition of "profane" here, would substantially overlap with the statutory term "indecent." This overlap would be so extensive as to render the statutory term "indecent" superfluous. Because our canons of statutory construction do not permit such an interpretation, *see TRW Inc. v. Andrews,* 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001), we do not believe the FCC has proffered a reasonable construction of the term "profane." While we may owe *Chevron* deference to the FCC's construction, the FCC must still demonstrate that its construction is reasonable, particularly in light of Congressional intent, the canons of statutory construction, and the historical view of the plain meaning of this term.

CONCLUSION

As the foregoing indicates, we are doubtful that by merely proffering a reasoned analysis for its new approach to indecency and profanity, the Commission can adequately respond to the constitutional and statutory challenges raised by the Networks. Nevertheless, because we can decide this case on this narrow ground, we vacate and remand so that the Commission can set forth that analysis. While we fully expect the Networks to

raise the same arguments they have raised to this court if the Commission does nothing more on remand than provide additional explanation for its departure from prior precedent, we can go no further in this opinion. Accordingly, we grant the petition for review, vacate the order of the FCC, and remand the case for further proceedings consistent with this opinion. The stay previously granted by this court is vacated as moot.

LEVAL, Circuit Judge, dissenting.

I respectfully dissent from my colleagues' ruling because I believe the Federal Communications Commission ("FCC" or "Commission") gave a reasoned explanation for its change of standard and thus complied with the requirement of the Administrative Procedures Act, 5 U.S.C. § 706(2)(A).

A television broadcaster, Fox Television Stations, Inc., challenges the lawfulness of a small change made by the FCC in its standards for adjudicating complaints of indecency over the airwaves. The Commission exercises the responsibility of determining, upon receipt of public complaints, whether a licensed broadcaster has violated 18 U.S.C. § 1464 by disseminating indecent material over the airwaves. Beginning with its adjudication of complaints arising from the broadcast of the Golden Globe Awards in 2002, the Commission instituted a change in its manner of dealing with "fleeting," i.e. unrepeated, expletives. During this broadcast, rock-musician Bono expressed delight over his receipt of an award by saying, "[T]his is really, really, fucking brilliant." In a lengthy tradition of previous FCC rulings, absence of repetition of an expletive had been virtually conclusive against finding an indecency violation. The staff therefore recommended in Bono's case, largely because the

expletive was unrepeated, that no violation be found. *See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* 18 F.C.C.R. 19859, at ¶ 6 (Enforcement Bureau 2003). The Commission reversed the recommendation of its staff. Adopting a new altered standard, which diminished the significance of the fact that the potentially offensive expletive was not repeated, the Commission concluded that the broadcast of Bono's expletive constituted indecency in violation of § 1464. *See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* 19 F.C.C.R. 4975, at ¶¶ 12, 17 (2004) ("*Golden Globes*").

The occurrences under review in this case followed soon after the Bono incident, during live broadcasts by Fox of Billboard Music Awards shows in 2002 and 2003. In the 2002 Billboard Music Awards, the actress and singer Cher, expressing triumphant delight upon her receipt of an award, said, "People have been telling me I'm on the way out every year, right? So fuck 'em." The incident during the 2003 Billboard Music Awards involved Nicole Richie and Paris Hilton, the co-stars of a serialized televised comedy show entitled, "The Simple Life," as presenters of awards. In "The Simple Life," Richie and Hilton play themselves as two spoiled, rich young women from Beverly Hills who cope with life on a farm. In joking reference to their own show, Richie said, "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." The Commission received complaints about each incident. Referring to its newly changed policy developed in response to the Bono incident in *Golden Globes,* the Commission found that the

two Billboard Music incidents were violations. *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* 21 F.C.C.R. 13299 (2006) ("*Remand Order*"). Fox brought this action seeking to invalidate the Commission's rulings.

In adjudicating indecency complaints the Commission generally employs a context-based evaluation to determine whether the particular utterance is "*patently offensive* as measured by contemporary community standards." *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464,* 16 F.C.C.R. 7999, at ¶ 8 (2001) ("*Industry Guidance*") (emphasis in original). Factors weighing in favor of a finding of indecency are: "(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; (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*." *Industry Guidance,* at ¶ 10 (emphasis in original). Especially in relation to the "pandering" factor, a finding of violation is less likely if the broadcast of the utterance involved a genuine news report, or if censorship of the expletive would harm or distort artistic integrity. Prior to the Bono incident, the Commission attached great importance to the second factor, which focuses on whether an expletive was repeated. Under the pre-*Golden Globes* rulings, the fact that an utterance was fleeting was virtually conclusive in assuring it would not be deemed a violation (unless it breached special barriers, such as by referring to sexual activities with children). With its *Golden Globes* adjudication, however, the Commission adopted a less permissive stance. It announced that henceforth fleeting exple-

tives would be judged according to a standard more closely aligned with repeated utterances of expletives. Thus, the Commission has declared that it remains unlikely to find a violation in an expletive that is broadcast in the context of a genuine news report, or where censorship by bleeping out the expletive would compromise artistic integrity, but it will no longer give a nearly automatic pass merely because the expletive was not repeated. *See Remand Order,* at ¶ 23.

The Commission explained succinctly why lack of repetition of the F-Word would no longer result in a virtual free pass. "[W]e believe that, given the core-meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation. . . . The '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." *Golden Globes,* at ¶¶ 8-9. "[A]ny use of that word has a sexual connotation even if the word is not used literally." *Remand Order,* at ¶ 16.

My colleagues find that in so altering its standards the Commission has acted illegally. They rule that the Commission failed to give a reasoned analysis explaining the change of rule. They accordingly find that the change of standard was arbitrary and capricious and therefore violated the Administrative Procedure Act. I disagree. In explanation of this relatively modest change of standard, the Commission gave a sensible, although not necessarily compelling, reason. In relation to the word "fuck," 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.

The Commission thus concluded that the use of the F-Word—even in a single fleeting instance without repetition—is likely to constitute an offense to the decency standards of § 1464.

The standards for judicial review of administrative actions are discussed in a few leading Supreme Court opinions from which the majority quotes. Agencies operate with broad discretionary power to establish rules and standards, and courts are required to give deference to agency decisions. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). A court must not "substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983); *see also Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.,* 435 U.S. 519, 558, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978) ("Administrative decisions should [not] be set aside . . . because the court is unhappy with the result reached."). In general, an agency's determination will be upheld by a court unless found to be "arbitrary and capricious." *See* 5 U.S.C. 706(2)(A).

An agency is free furthermore to change its standards. *See Chevron,* 467 U.S. at 863, 104 S. Ct. 2778 ("An initial agency interpretation is not instantly carved in stone."); *Huntington Hosp. v. Thompson,* 319 F.3d 74, 79 (2d Cir.2003) ("[A]n agency is not locked into the first interpretation of a statute it embraces."); *Ramaprakash,* 346 F.3d at 1125 ("Agencies are free to change course as their expertise and experience may suggest or require."). The Supreme Court has made clear that when an agency changes its standard or rule, it is "obligated

to supply a reasoned analysis for the change." *State Farm,* 463 U.S. at 42, 103 S. Ct. 2856. If an agency without explanation were to make an adjudication which is not consistent with the agency's previously established standards, the troubling question would arise whether the agency has lawfully changed its standard, or whether it has arbitrarily failed to adhere to its standard, which it may not lawfully do.[15] Accordingly our court has ruled that "an agency . . . cannot simply adopt inconsistent positions without presenting 'some reasoned analysis.'" *Huntington Hosp.,* 319 F.3d at 79. Such explanation, we have said, is necessary so that the reviewing court may "be able to understand the basis of the agency's action so that it may judge the consistency of that action with the agency's mandate." *Mr. Sprout, Inc. v. United States,* 8 F.3d 118, 129 (2d Cir. 1993). The District of Columbia Circuit has similarly reasoned that an agency's "failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making." *Ramaprakash,* 346 F.3d at 1125 (quotation marks omitted). In changing course, an agency must "provide a reasoned analysis indicating that prior policies and stan-

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[15] Judge Friendly noted:

> What gives concern is the manner, alas not atypical of the agencies, in which [a] change was made—slipped into an opinion in such a way that only careful readers would know what had happened, without articulation of reasons, and with prior authorities not overruled, so that the opinion writers remain free to pull them out of the drawer whenever the agency wishes to reach a result supportable by the old rule but not the new.

Henry J. Friendly, The Federal Administrative Agencies 63 (1962).

dards are being deliberately changed, not casually ignored." *Id.* at 1124 (quotation marks omitted).

In my view, in changing its position on the repetition of an expletive, the Commission complied with these requirements. It made clear acknowledgment that its *Golden Globes* and *Remand Order* rulings were not consistent with its prior standard regarding lack of repetition. It announced the adoption of a new standard. And it furnished a reasoned explanation for the change. Although one can reasonably disagree with the Commission's new position, its explanation—at least with respect to the F-Word—is not irrational, arbitrary, or capricious. The Commission thus satisfied the standards of the Administrative Procedures Act.

The Commission explained that the F-Word is "one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language [whose] use invariably invokes a coarse sexual image." *Golden Globes,* at ¶ 9. In other words, 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.

My colleagues offer several arguments in support of their conclusion that the Commission's explanation was not reasonable and therefore arbitrary and capricious. They argue (i) the Commission's position is irrational because of inconsistency resulting from the Commission's willingness to allow viewers to be subjected to a "first blow" if it comes in the context of a genuine news broadcast; (ii) the Commission's prediction that allowance of fleeting expletives will result in a great increase in their incidence is irrational because prior experience

was to the contrary; and (iii) the Commission is "divorced from reality" believing that the F-Word invariably invokes a sexual connotation. I respectfully disagree.

The majority argues that the Commission's change of standard is irrational because it is inconsistent. The opinion goes on to explain:

> [T]he Commission does not take the position that *any* occurrence of an expletive is indecent. . . . [T]he Commission will apparently excuse an expletive when it occurs during a "*bona fide* news interview". . . . The Commission even conceded that a rebroadcast of precisely the same offending clips of the two Billboard Music Award programs for the purpose of providing background information on this case would not result in any action by the FCC. . . . [E]ven repeated and deliberate use of numerous expletives is not indecent . . . if the expletives are "integral" to the work [as in the case of the film "Saving Private Ryan"].

Majority op. at pages 458-59. The majority is of course correct that the Commission does not follow an all-or-nothing policy. Its standards do attempt 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.

This, however, is in no way a consequence of the Commission's change of standard for fleeting expletives. It applies across the board to all circumstances. Regardless of whether the expletive was repeated or fleeting, the Commission will apply context-based standards to

determine whether the incident constituted indecency. A bona fide news context and recognition of artistic integrity favor a finding of no violation. The majority's criticism of inconsistency is not properly directed against the change of standard here in question, which has done nothing to increase the inconsistency. If anything, the change of standard has made the Commission more consistent rather than less, because under the new rule, the same context-based factors will apply to all circumstances. If there is merit in the majority's argument that the Commission's actions are arbitrary and capricious because of irrationality in its standards for determining when expletives are permitted and when forbidden, that argument must be directed against the entire censorship structure. It does not demonstrate that the Commission's change of standard for the fleeting expletive was irrational.

Furthermore, while the Commission will indeed allow the broadcast of the same material in some circumstances but not in others, I do not see why this differentiation should be considered irrational. It rather seeks to reconcile conflicting values. On the one hand, it recognizes, as stressed by the Supreme Court in *Pacifica,* the potential for harm to children resulting from exposure to indecency. On the other hand, the Commission has historically recognized that categorical prohibition of the broadcast of all instances of usage of a word generally considered indecent would suppress material of value, which should not be deemed indecent upon consideration of the context. This is not irrationality.[16] It is an

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[16] Spectators in the courtroom observing the argument of this case would have heard the judges and the lawyers saying "fuck" in open court. Had the case been on another subject, such usage would surely

attempt on the part of the Commission over the years to reconcile conflicting values through standards which take account of context.

The majority then argues that the Commission reasoned irrationally when in its *Remand Order*, as a part of its explanation for its change of position, the Commission observed:

> [G]ranting an automatic exemption for "isolated or fleeting" 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. For example, broadcasters would be able to air . . . offensive . . . words, regardless of context, with impunity . . . provided that they did not air more than one expletive in any program segment.

Remand Order, at ¶ 25. The majority asserts that this concern was "divorced from reality." Majority op. at page 460. On the majority's view, because broadcasters did not "barrage[ ] the airwaves with expletives" during the period prior to *Golden Globes* when fleeting expletives received a free pass, they would not do so in the future.

The agency has one prediction of what would likely occur in the future under the pre-*Golden Globes* policy. The majority has another. The majority may be right in speculating that the Commission's concern is exaggerated. Who knows? As a matter of law, it makes no difference. The court is obligated to give deference to agency judgment and may not substitute its judgment

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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.

for that of the agency, or set aside an agency action merely because the court believes the agency is wrong. *See State Farm,* 463 U.S. at 43, 103 S. Ct. 2856 (court must not "substitute its judgment for that of the agency"); *Vermont Yankee,* 435 U.S. at 558, 98 S. Ct. 1197 ("Administrative decisions should [not] be set aside . . . because the court is unhappy with the result."). Only if the agency's action is "arbitrary and capricious" may the court nullify it. 5 U.S.C. § 706(2)(A).

Furthermore, if obligated to choose, I would bet my money on the agency's prediction. The majority's view presupposes that the future would repeat the past. It argues that because the networks were not flooded with discrete, fleeting expletives when fleeting expletives had a free pass, they would not be flooded in the future. This fails to take account of two facts. First, the words proscribed by the Commission's decency standards are much more common in daily discourse today than they were thirty years ago. Second, the regulated networks compete for audience with the unregulated cable channels, which increasingly make liberal use of their freedom to fill programming with such expletives. The media press regularly reports how difficult it is for networks to compete with cable for that reason.[17] It seems

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[17] *See, e.g.*, Gail Pennington, *Kingpin There Are More Things in Heaven and Earth Than "Sopranos," NBC Insists,* St. Louis Post-Dispatch, Feb. 2, 2003, at F1 ("Although they tried at first to feign indifference, broadcasters have seethed for years over the critical acclaim and abundant awards handed to cable series like 'The Sopranos.'" The complaint: "that the playing field isn't level. Broadcasters are strained by FCC rules about content—nudity and sex, violence and language—that don't apply to cable."); Jim Rutenberg, *Few Viewers Object as Unbleeped Bleep Words Spread on Network TV,* N.Y. Times, Jan. 25, 2003, at B7 ("Broadcast television, under intensifying attack by saltier cable

to me the agency has good reason to expect that a marked increase would occur if the old policy were continued.

In any event, even if the majority could reasonably label *this aspect* of the Commission's reasoning "arbitrary and capricious," it still would not matter. The agency's action in changing the standard for fleeting expletives did not depend on the defensibility of this prediction. It is at most a small part of the agency's justification for its action.

Finally the majority disagrees with the Commission's view that the word "fuck" communicates an "inherently . . . sexual connotation [and] invariably invokes a coarse sexual image." *Golden Globes,* at ¶¶ 8-9. The majority notes that the F-Word is often used in everyday conversation without any sexual meaning. Majority op. at page 459. I agree with the majority that the word is often used without a necessary *intention on the part of the speaker* to refer to sex. A student who gets a disappointing grade on a test, a cook who burns the roast, or a driver who returns to his parked car to find a parking ticket on the windshield, might holler out the F-Word to express anger or disappointment. The word is also sometimes used to express delight, as with Bono's exhilarated utterance on his receipt of his award. Some use it more as a declaration of uncompromising tough-

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competitors, is pushing the limits of decorum further by the year, and hardly anyone is pushing back."); Jim Rutenberg, *Hurt by Cable, Networks Spout Expletives,* N.Y. Times, Sept. 2, 2001, at 11 ("Broadcast television is under siege by smaller cable competitors that are winning audiences while pushing adult content. In that climate, broadcast is fighting the perception that its tastes are lagging behind those of a media-saturated culture whose mores have grown more permissive.").

ness, or of alignment on the side of vulgarity against prissy manners, without necessarily intending to evoke any sexual meaning. Some use it to intensify whatever it is they may be saying, and some sprinkle the word indiscriminately throughout their conversation with no apparent meaning whatsoever.

The majority, however, misunderstands the Commission's reasoning, or in any event interprets it in the manner least favorable to the Commission. In observing that *fuck* "invariably invokes a coarse sexual image," *Golden Globes,* at ¶ 9, that this is so "even if the word is not used literally," *Remand Order,* at ¶ 16, and that its power to offend "derives from its sexual . . . meaning," *id.* at ¶ 23, the Commission did not mean that every speaker who utters the word invariably intends to communicate an offensive sexual meaning. The Commission explicitly recognized that the word can be used in a manner that does not intend a sexual meaning. A fairer reading of the Commission's meaning is 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. It is surely not irrational for the Commission to conclude that, according to the understanding of a substantial segment of the community, the F-Word is never completely free of an offensive, sexual connotation. It is no accident that in many languages, the equivalent of the F-Word finds usage, as in English, to express anger, disgust, insult, and confrontation.

What we have is at most a difference of opinion between a court and an agency. Because of the deference courts must give to the reasoning of a duly authorized

administrative agency in matters within the agency's competence, a court's disagreement with the Commission on this question is of no consequence. The Commission's position is not irrational; it is not arbitrary and capricious.

I believe that in changing its standard, the Commission furnished a reasoned explanation, and thus satisfied the requirements of the Administrative Procedures Act.[18]

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[18] As each of the instances under review in this case involved the use of the F-Word, and because I find that the Commission has given a rational justification for its rule as applied to use of the F-Word, I do not consider the Commission's standard which makes it a decency violation to use the word "shit." In *Pacifica*, in upholding the constitutionality of censorship under § 1464, the Supreme Court stressed the accessibility of broadcasting to children. *See Pacifica*, 438 U.S. at 749, 98 S. Ct. 3026; *Remand Order,* at ¶ 51. The potential for harm to children resulting from indecent broadcasting was clearly a major concern justifying the censorship scheme. In this regard, it seems to me there is an enormous difference between censorship of references to sex and censorship of references to excrement. For children, excrement is a main preoccupation of their early years. There is surely no thought that children are harmed by hearing references to excrement.

Nicole Richie's script called for her to say it was not easy to get "pig crap" out of a Prada purse. In delivering the line, Richie changed "pig crap" to "cow shit." Had she stuck with "pig crap," that reference would not have been a violation, but her change to "cow shit" could have resulted in forfeitures and perhaps even the loss of Fox's license to broadcast. In another instance, the Commission found a violation (which was later vacated on other grounds) because someone was described as a "bullshitter." *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* 21 F.C.C.R. 2664 (2006); *Remand Order,* at ¶ 73. The justification is surely not that children will be harmed by hearing "shit" but not by hearing "crap." It appears that at least some of the Commission's prohibitions are not justified at all by the risk of harm to children but only by concern for good manners. When the censorship is exercised only to

I therefore respectfully dissent.[19]

protect polite manners and not by reason of risk of harm, I question whether it can survive scrutiny. Because each instance of censorship at stake in this case involved the F-Word, which in the Commission's view inherently retains a sexual reference, the question does not arise in this case.

[19] I express neither agreement nor disagreement with my colleagues' added discussion of Fox's other challenges to the Commission's actions because, as the majority opinion recognizes, it is dictum and therefore not an authoritative precedent in our Circuit's law. In subsequent adjudications, the respect accorded to dictum depends on its persuasive force and not on the fact that it appears in a court opinion.

APPENDIX B

Before the
Federal Communications Commission
Washington, D.C. 20554

IN THE MATTER OF COMPLAINTS REGARDING VARIOUS TELEVISION BROADCASTS BETWEEN FEBRUARY 2, 2002 AND MARCH 8, 2005

Released: Nov. 6, 2006
Adopted: Nov. 6, 2006

ORDER

By the Commission: Commissioner Adelstein concurring in part, dissenting in part, and issuing a statement.

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I. INTRODUCTION

1. In this Order, we address complaints alleging that four television programs ("The 2002 Billboard Music Awards," "The 2003 Billboard Music Awards," "NYPD Blue," and "The Early Show") contained indecent and/or profane material.[1] After considering the comments submitted by broadcasters as well as other interested parties, we find that comments made by Nicole Richie during "The 2003 Billboard Music Awards" and by Cher during the "The 2002 Billboard Music Awards" are indecent and profane as broadcast but that the complained-of material aired on "The Early Show" is neither indecent nor profane. In addition, we dismiss on procedural grounds the complaints involving "NYPD Blue" as inadequate to trigger enforcement action.

II. BACKGROUND

2. On March 15, 2006, the Commission released Notices of Apparent Liability and a Memorandum Opinion and Order ("*Omnibus Order*") resolving numerous complaints that television broadcasts aired between February 2, 2002, and March 8, 2005, contained indecent, profane, and/or obscene material.[2] Section III.A of the *Omnibus Order* proposed monetary forfeitures against six

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[1] For purposes of this Order, we refer to all of the complained-about episodes of "NYPD Blue" as a single "program."

[2] *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664 (2006) ("*Omnibus Order*"), *pets. for review pending, Fox Television Stations, Inc. v. FCC*, No. 06-1760-AG (2d Cir. filed Apr. 13, 2006), *remanded and partially stayed*, Sept. 7, 2006 ("*Remand Order*").

different television broadcasts for apparent violations of our prohibitions against indecency and/or profanity.[3] Section III.C addressed twenty-eight broadcasts that we concluded did not violate indecency, profanity, and/or obscenity restrictions for various reasons.[4] In the portion of the *Omnibus Order* at issue here, Section III.B, the Commission considered complaints filed against four programs.

3. "*The 2002 Billboard Music Awards*." The Commission received a complaint concerning "The 2002 Billboard Music Awards" program that aired on Station WTTG(TV), Washington, DC, beginning at 8:00 p.m. Eastern Standard Time on December 9, 2002.[5] The complaint specifically alleged that during the broadcast Cher, an award winner, stated, "'People have been telling me I'm on the way out every year, right? So fuck 'em.'"[6]

4. "*The 2003 Billboard Music Awards*." The Commission received a number of complaints about the "The 2003 Billboard Music Awards" program that aired on Fox Television Network stations beginning at 8:00 p.m. Eastern Standard Time on December 10, 2003.[7] The complaints concerned a segment in which Nicole Richie,

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[3] *Id.* at 2670-90 ¶¶ 22-99.

[4] *Id.* at 2700-20 ¶¶ 146-232.

[5] *Id.* at 2690 ¶ 101. *See* Letter from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (August 22, 2003).

[6] *Id.* The Enforcement Bureau obtained a videotape of the broadcast that confirmed the allegation in the complaint. *Omnibus Order*, 21 FCC Rcd at 2690 ¶ 101.

[7] *Id.* at 2692 ¶ 112.

an award presenter, stated, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."[8]

5. "*NYPD Blue*." The Commission received complaints concerning the use of the term "bullshit" in several "NYPD Blue" episodes that aired on KMBC-TV, Kansas City, Missouri, beginning at 9:00 p.m. Central Standard Time on various dates between January 14 and May 6, 2003.[9]

6. "*The Early Show*." The Commission received a viewer complaint that Station KDKA-TV, Pittsburgh, Pennsylvania, licensed to CBS Broadcasting, Inc.

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[8] *Id.* at ¶ 112 and n. 164.

[9] *Id.* at 2696 ¶ 125. The Commission provided the following descriptions of the complained-of portions of the broadcasts:

> 1/14/03 episode (Det. Sipowitz in response to his partner's arrest by Internal Affairs): "Alright, this is Bullshit!"
>
> 2/4/03 episode (Det. Sipowitz to street officer regarding that officer's partner framing Sipowitz's partner): "Over time—over what—bullshit, a beef!"
>
> 2/18/03 episode (stated by a suspect who bragged about, but now denies, killing his daughter): "I told people I killed Samia to try and get respect back. She had ashamed me and my community look at me as a fool." Det. 1: "You took credit for killing your daughter?! Bullshit!"
>
> 4/15/03 episode (Det. harassing suspect who had harassed prosecutor): "I'm hoping this bullshit about you trying to get under ADA Haywood's skin is a misunderstanding."
>
> 5/6/03 episode (Captain to Det. who harassed suspect in 4/15 episode): "He said you nearly assaulted his client last night.' Det.: 'Well, that's a bunch of bullshit."

Id. at n. 187.

("CBS"), aired the word "bullshit" during "The Early Show" at approximately 8:10 a.m. Eastern Standard Time on December 13, 2004.[10] A videotape obtained from CBS showed that during a live interview with Twila Tanner, a contestant on the CBS program "Survivor: Vanuatu," Ms. Tanner referred to another contestant as a "bullshitter."[11]

7. In Section III.B of the *Omnibus Order*, the Commission found that the broadcasts at issue apparently violated the statutory and regulatory prohibitions against airing indecent and profane material.[12] In light of the circumstances, however, the Commission did not initiate forfeiture proceedings against the relevant licensees.[13] All of the broadcasts discussed in Section III.B, except for the "The Early Show," preceded the *Golden Globe Awards Order*,[14] in which the Commission

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[10] *Id.* at 2698-99 ¶ 137.

[11] *Id. See id.* at 2699 n.199 ("In commenting on the strategy employed by the fellow contestant, Ms. Tanner stated: 'I knew he was a bullshitter from Day One.' The interviewer, Julie Chen, recognized the inappropriateness of the language, stating: 'I hope we had the cue ready on that one . . . We can't say that word . . . There is a delay.'").

[12] *Id.* at 2690-2700 ¶¶ 100-45. *See* 18 U.S.C. § 1464; 47 C.F.R. § 73.3999. However, with respect to complaints regarding the use of the words "dick" and "dickhead" in episodes of "NYPD Blue," the Commission found that in context the broadcasts of these terms were not patently offensive under its contextual analysis and based on FCC precedent. *Omnibus Order*, 21 FCC Rcd at 2696-97 ¶ 127.

[13] *Omnibus Order,* 21 FCC Rcd at 2690 ¶ 100.

[14] *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* Memorandum Opinion and Order, 18 FCC Rcd 19859 (Enf. Bur. 2003), review granted, 19 FCC Rcd 4975, 4981 ¶¶ 13-14 (2004) ("*Golden Globe Awards Order*"), *petitions for stay and recon. pending.*

made clear that the isolated use of an offensive expletive could be actionably indecent.[15] The FCC also stated that its precedent at the time of "The Early Show" broadcast "did not clearly indicate that the Commission would take enforcement action against an isolated use" of "shit" (the "S-Word") or its variants.[16] Accordingly, consistent with its commitment to proceed with caution and restraint in this area, the Commission decided that it would not take any adverse action against any licensee as a result of these apparent violations.[17]

8. Following release of the *Omnibus Order*, several parties petitioned for judicial review of Section III.B, asserting a variety of constitutional and statutory challenges. Fox Television Stations, Inc. ("Fox") and CBS filed a joint petition for review in the United States Court of Appeals for the Second Circuit.[18] ABC Television Network ("ABC") and Hearst-Argyle Television, Inc. ("Hearst") filed a joint petition for review in the United States Court of Appeals for the D.C. Circuit, which later transferred the petition to the Second Circuit. The Second Circuit consolidated the petitions on June 14, 2006.[19]

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[15] *See Omnibus Order*, 21 FCC Rcd at 2692 ¶ 111, 2695 ¶ 124, 2698 ¶ 136.

[16] *Id.* at 2700 ¶ 145.

[17] *Id.* at 2690 ¶ 100.

[18] *See supra* n. 2 (noting pending petitions for review).

[19] The Second Circuit also granted motions to intervene in the Fox-CBS case by NBC Universal, Inc., NBC Telemundo License Co., NBC Television Affiliates, FBC Television Affiliates Association, CBS Television Network Affiliates Association, and the Center for Creative Community, Inc. Before transferring the ABC-Hearst case, the D.C. Circuit granted ABC Television Affiliates Association's motion to intervene.

9. At the same time, several parties complained to the Commission about the process the Commission followed in formulating Section III.B of the *Omnibus Order*. The Commission ordinarily provides broadcasters with an opportunity to file responses and raise arguments before imposing forfeiture liability.[20] With one exception, however, the FCC did not seek the views of the licensees affected by Section III.B of the *Omnibus Order* because the Commission did not impose any sanctions on them.[21] Following the release of the *Omnibus Order*, broadcasters complained that they should have had an opportunity to present their views before the Commission reached its decisions in Section III.B. Upon reflection, the Commission agreed and stated that it wanted to ensure that all of the affected licensees were afforded a full opportunity to be heard before the Commission issued a final decision with respect to the broadcasts at issue. Accordingly, on July 5, 2006, the Commission asked the Second Circuit for a voluntary remand of the case and stay of the briefing schedule. The Commission asked the court to remand the case for 60 days in order to afford interested parties an opportu-

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[20] *See* 47 U.S.C. § 503(b)(4)(A); *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8015-16 ¶¶ 26-27 (2001) ("*Indecency Policy Statement*").

[21] The Commission did send a narrow Letter of Inquiry ("LOI") regarding "The 2003 Billboard Music Awards" broadcast, receiving a limited response from Fox on January 30, 2004. Fox also responded to a supplemental LOI without presenting new legal arguments. The Commission did not send LOIs regarding the complained-of broadcasts of "The 2002 Billboard Music Awards," "NYPD Blue," and "The Early Show" prior to the court's remand.

nity to file responses and the Commission an opportunity to give the issues further consideration.

10. The Second Circuit granted the Commission's motion on September 7, 2006, remanding for a period of 60 days "for the entry of a further final or appealable order of the FCC following such further consideration as the FCC may deem appropriate in the circumstances."[22] On the same day, the Commission announced a two-week filing period for interested parties wishing to submit comments concerning the four cases.[23] The Enforcement Bureau separately issued Letters of Inquiry ("LOIs") to Fox, CBS, and KMBC Hearst-Argyle Television, Inc. on September 7, 2006, and to those broadcasters as well as other parties to the Second Circuit proceeding on September 18, 2006.

III. DISCUSSION

11. Consistent with our commitment to consider the comments and LOI responses filed following the Second Circuit's *Remand Order* and to take a fresh look at the issues raised by the four programs at issue on remand, we vacate Section III.B of the *Omnibus Order* in its entirety and replace it with the decisions below.

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[22] *Remand Order* at 2.

[23] *See* Public Notice, *FCC Announces Filing Procedures In Connection With Court Remand of Section III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints*, DA 06-1739 (rel. Sept. 7, 2006).

A. "The 2003 Billboard Music Awards"

12. *The Programming*. The Commission, Fox, stations licensed to Fox or its affiliated companies, and affiliates of the Fox Television Network all received a number of complaints from individual viewers and organizations alleging that Fox stations aired indecent material during "The 2003 Billboard Music Awards" program on December 10, 2003 between 8 p.m. and 10 p.m. Eastern Standard Time.[24] The complainants alleged that Nicole Richie, who with Paris Hilton presented an award on the program, uttered language that was indecent and profane in violation of 18 U.S.C. § 1464 and the Commission's rule restricting the broadcast of indecent material. The complainants requested that the Commission impose sanctions against each station that aired the remarks.

13. The Bureau sent Fox a letter of inquiry on January 7, 2004.[25] Fox responded on January 30, 2004, attaching a transcript of the material at issue.[26] According to Fox, the program announcer introduced Paris Hilton and Nicole Richie, stars of the Fox Television Network show "The Simple Life,"[27] as follows: "To pre-

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[24] FCC File Nos. EB-03-IH-0617, EB-04-IH-0295, EB-04-IH-0091.

[25] *See* Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Fox Television Stations, Inc. (January 7, 2004).

[26] *See* Letter from John C. Quale, Counsel, Fox Television Stations, Inc., to Investigations and Hearings Division, Enforcement Bureau, FCC, File No. EB-03-IH-0617 (January 30, 2004) ("*Response*").

[27] "The Simple Life," which debuted on December 2, 2003, followed Ms. Hilton's and Ms. Richie's fish-out-of-water adventures upon being transplanted from Beverly Hills, California to an Arkansas farm for 30 days. A *New York Times* review described the show as "[a]n updated

sent the award for Top 40 Mainstream Track, here are two babes whose lives are anything but mainstream. From their hit TV series, 'The Simple Life,' please welcome Nicole Richie and Paris Hilton." Following that introduction, Paris Hilton and Nicole Richie walked onstage to present the award. Fox-owned stations and Fox affiliates in the Eastern and Central Time Zones then broadcast the following exchange between them:

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

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'Green Acres'" featuring "Ms. Hilton, 22, of the hotel fortune, and Ms. Richie, also 22, daughter of the pop singer Lionel Richie." Alessandra Stanley, *With a Rich Girl Here and a Rich Girl There*, N.Y. Times, Dec. 2, 2003, at E1. The cover of the Simple Life DVD describes Ms. Hilton and Ms. Richie in the following manner: "They're Rich. They're Sexy. They're TOTALLY-OUT-OF-CONTROL!" Discussing Fox executives' original idea for the show in an interview, one executive touched on the same excretory theme as "The 2003 Billboard Awards" script, stating that "'[t]hey wanted to see stilettos in cow shit.'" *http://web.archive.org/web/20040215040316/http://www.tvweek.com/topstorys/112403simplelife.html*. Daily Variety's review of the premiere episode also described Ms. Richie's penchant for "bad language," labeling her as "potty-mouthed." Brian Lowry, *The Simple Life*, Daily Variety, Nov. 25, 2003 at 4.

> out of a Prada purse? It's not so fucking simple.[28]

14. Fox contends that this broadcast was not actionably indecent. Although Fox concedes that it broadcast the F-Word, it argues that the word, in context, did not depict or describe sexual activities but rather, "at most," was a "vulgar expletive used to express emphasis," and thus is outside the scope of the Commission's indecency definition.[29] As for the use of the S-Word, Fox does not deny that it was used in the excretory sense. It argues, however, that the dialogue "contained at most a passing reference to an excretory by-product (i.e., 'cow shit') and an expletive used for emphasis," that the dialogue lasted only 22 seconds, and that it was not pandering, titillating or shocking.[30] Therefore, Fox contends that the dialogue is not actionably indecent.

15. *Indecency Analysis*. The Commission defines indecent speech as material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.[31] Thus, indecency findings require two primary determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency defi-

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[28] *See Response* at 3-4.

[29] *Id.* at 12-13.

[30] *Id.*

[31] *Infinity Broadcasting Corporation of Pennsylvania*, Memorandum Opinion and Order, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (*citing Pacifica Foundation*, Memorandum Opinion and Order, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)).

nition—that is, the material must describe or depict sexual or excretory organs or activities. Second, the material must be patently offensive as measured by contemporary community standards for the broadcast medium.[32] In our assessment of whether broadcast material is patently offensive, "the full context in which the material appeared is critically important."[33] Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length the descriptions; and (3) whether the material panders to, titillates or shocks the audience.[34] In examining these three factors, we must weigh and balance them to determine whether the broadcast material is patently offensive because "[e]ach indecency case presents its own particular mix of these, and possibly other, factors."[35] In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,[36]

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[32] *Indecency Policy Statement*, 16 FCC Rcd at 8002 ¶ 8 (emphasis in original); *see Omnibus Order*, 21 FCC Rcd at 2667 ¶ 12.

[33] *Indecency Policy Statement*, 16 FCC Rcd at 8002 ¶ 9 (emphasis in original).

[34] *Id.* at 8002-15 ¶¶ 8-23.

[35] *Id.* at 8003 ¶ 10.

[36] *Id.* at 8009 ¶ 19 (*citing Tempe Radio, Inc. (KUPD-FM)*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 21828 (Mass Media Bur. 1997) (forfeiture paid) (extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references); *EZ New Orleans, Inc. (WEZB(FM))*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 4147 (Mass Media Bur. 1997) (forfeiture paid) (same)).

or, alternatively, removing the broadcast material from the realm of indecency.[37]

16. With respect to the first determination, Fox does not dispute that Ms. Richie's comment—"Have you ever tried to get cow shit out of a Prada purse?"—refers to excrement, and we conclude that it is clearly within the scope of our indecency definition. Fox does contend that Ms. Richie's use of the "F-Word"—in the statement "[i]t's not so fucking simple"—does not describe sexual activities and thus falls outside the scope of our indecency definition, but we disagree. A long line of precedent indicates that the use of the "F-Word" for emphasis or as an intensifier comes within the subject matter scope of our indecency definition.[38] Given the core

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[37] *Indecency Policy Statement*, 16 FCC Rcd at 8010 ¶ 20 ("the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding").

[38] *See, e.g., Grant Broadcasting System II, Inc. Licensee WJPR-TV*, 12 FCC Rcd 8277, 8279 (Mass Media Bur. 1997) (NAL issued for non-literal uses of the "F-Word" and the "S-Word," such as "this fucking place is going to blow up"); *Pacifica Foundation, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 2698, 2699 ¶¶ 12-13 (1987) (subsequent history omitted) (distinguishing between the use of "expletives" and "speech involving the description or depiction of sexual . . . functions" but indicating that both fall within the subject matter scope of our indecency definition). The Enforcement Bureau's departure from this precedent in its *Golden Globe Awards* decision, *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards*," Memorandum Opinion and Order, 18 FCC Rcd 19859 (Enf. Bur. 2003), was contrary to this precedent and thus appropriately overturned by the Commission. While the Bureau cited two cases for the proposition that the use of the "F-Word" did not necessarily fall within the subject matter scope of our indecency definition, both cases were inapposite. First, the "F-Word" was not even an issue in *Entercom*, which addressed the words "prick" and "piss," and, in any event,

meaning of the "F-Word," any use of that word has a sexual connotation even if the word is not used literally. Indeed, the first dictionary definition of the "F-Word" is sexual in nature.[39] Moreover, it hardly seems debatable that the word's power to "intensify" and offend derives from its implicit sexual meaning.[40] Accordingly, we conclude that, as we stated in *Golden Globe*,[41] its use inherently has a sexual connotation and thus falls within the scope of our indecency definition. The material thus warrants further scrutiny to determine whether it is patently offensive as measured by contemporary community standards for the broadcast medium. Looking at the three principal factors in our contextual analysis, we conclude that it is.

17. We will first address the first and third principal factors in our contextual analysis—the explicitness or graphic nature of the material and whether the material panders to, titillates, or shocks the audience. The com-

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was a Bureau rather than a Commission decision. *See Entercom Buffalo License, LLC (WGR(AM))*, Order, 17 FCC Rcd 11997 (Enf. Bur. 2002). Second, in *Peter Branton*, the Commission did not rule that the some uses of the "F-Word" fell outside the subject matter scope of our indecency definition. Rather, we decided that the uses of the "F-Word" there were not "patently offensive" in the context of the news programming at issue in that case. *See Peter Branton*, 6 FCC Rcd 610 (1991), *appeal dismissed*, 993 F.2d 906 (D.C. Cir. 1993), *cert. den.* 511 U.S. 1052 (1994).

[39] *See, e.g.*, American Heritage College Dictionary 559 (4th ed. 2002) (defining the F-Word as "1: to have sexual intercourse with").

[40] *See* 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").

[41] *See Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 8.

plained-of material is quite graphic and explicit. Ms. Richie's comment referring to excrement conveys a graphic image of Ms. Richie trying to scrape cow excrement out of her designer hand bag. Because of her use of the "S-Word," Ms. Richie's description also contained quite vulgar language. Furthermore, the vulgar description of excrement was coupled with the use of the "F-Word." As we have previously concluded, the "F-Word" is one of the most vulgar, graphic, and explicit words for sexual activity in the English language.[42] Here, Ms. Richie's use of the "F-Word" coupled with her graphic and explicit description of the handling of excrement during a live broadcast of a popular music awards ceremony when children were expected to be in the audience was vulgar and shocking.[43] Her comments were also presented in a pandering manner. As part of their dialogue, Ms. Hilton reminded Ms. Richie to "watch the bad language," a comment that served to preview and highlight for the viewing audience Ms. Richie's remarks.

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[42] *See id.*

[43] To the extent that Fox argues that it did not present Ms. Richie's comment for "shock value," *see, e.g., Response* at 13, it fundamentally misunderstands the contextual analysis employed by the Commission. "In evaluating whether material is indecent, we examine the material itself and the manner in which it is presented, not the subjective state of mind of the broadcaster." *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Order on Reconsideration, 21 FCC Rcd 6653, 6657-58 ¶ 12 (2006) ("*Super Bowl Order on Reconsideration*"), *pet. for review pending, CBS Corp. v. FCC*, No. 06-3575 (3d Cir. filed July 28, 2006).

Moreover, Fox does not argue that there was any justification for Ms. Richie's comments.[44]

18. We note that when the Supreme Court stressed the importance of context in *Pacifica*, it mentioned as relevant contextual factors the time of day of the broadcast, program content as it affects "the composition of the audience," and the nature of the medium.[45] All of these factors support the conclusion that the dialogue here was patently offensive in context. The complained-of material was broadcast early in prime time. The program's content was, as discussed above, graphic, explicit and vulgar, both in its excretory description and its use of the "F-Word." The program was designed to draw a large nationwide audience that could be expected to include many children interested in seeing their favorite music stars. Although there is no requirement that we document the presence of children in the audience for a program that is subject to an indecency complaint and is aired between 6 a.m. and 10 p.m.,[46] we note that in this case a significant portion of the viewing audience for this program was under 18. According to Nielsen ratings data, during an average minute of "The 2003 Billboard Music Awards" broadcast, 2,312,000 (23.4%) of the 9,871,000 people watching the program were under 18,

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[44] For example, Fox does not argue that Ms. Richie's remarks had any artistic merit or were necessary to convey any message.

[45] *See Pacifica*, 438 U.S. at 749-51.

[46] *See Action for Children's Television* v. *FCC*, 58 F.3d 654, 665 (D.C. Cir. 1995) (en banc) ("*ACT III*") (holding that the Commission could rely on bright-line time channeling rule and rejecting contention that it was required to use "station-specific and program-specific data in assessing whether children are at risk of being exposed to broadcast indecency"), *cert. denied*, 516 U.S. 1072 (1996).

and 1,089,000 (11%) were between the ages of 2 and 11. In addition, we note that this program was rated TV-PG(DL). Such a rating would *not* have put parents or others on notice of such vulgar language, and the broadcast contained no other warnings to viewers that it might contain material highly unsuitable for children.[47] This no doubt helps explain the strong feelings that many of the complainants, particularly those who were watching the program with their children, expressed

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[47] Fox notes that its policy is to rate any programming containing the "F-Word" TV-MA. *See* Letter from John C. Quale to Marlene H. Dortch, Secretary, FCC, in FCC File Nos. EB-03-IH-0460, EB-03-IH-0617, EB-04-IH-0295, EB-04-IH-0091 at 4 (filed Sept. 29, 2006) ("Fox Response to 9/18/2006 LOI"). The TV-MA rating (mature audience only) signifies that the program is specifically designed to be viewed by adults and therefore may be unsuitable for children under 17. In the context of a TV-MA rated program, an "L" would signify "crude indecent language." The TV-PG rating (parental guidance suggested), by contrast, merely signifies that the program contains material that parents may find unsuitable for younger children, and that parents may want to watch the program with their younger children. TV-PG is the most common rating, covering a majority of the programs that are rated. *See* Nancy Signorielli, *Age-Based Ratings, Content Designations, and Television Content: Is There a Problem?*, 8 Mass Comm. & Soc'y 277, 293 (2005) (six in ten rated programs are rated TV-PG). The "D" signifies that the program may contain some suggestive dialogue, and the "L" signifies that the program may contain some infrequent coarse language. Moreover, we note that the TV-PG(DL) rating appeared only at the beginning and once in the middle of the program; thus, a viewer tuning into this 2-hour broadcast at another time may not even have been aware that it was rated TV-PG(DL). *See Pacifica*, 438 U.S. at 748 ("Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.").

regarding the unexpectedly vulgar content.[48] In light of all of these factors, we conclude that the first and third factors in our contextual analysis both weigh heavily in favor of a finding that the material is patently offensive.

19. With respect to the second factor in our contextual analysis—whether the complained-of material was sustained or repeated—Fox argues that the dialogue

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[48] *See*, *e.g.*, e-mail complaint from individual to Fox station KMSP(TV), Minneapolis, dated December 10, 2003 ("I would appreciate it if you would pass on my intense opinion of the Billboard Awards and Nicole Ritchie (sic). We teach our kids that people like her have a potty mouth. My children were watching part of this program and happened to catch her vulgarity. We will not finish watching the awards nor will we continue to watch fox network in this household."); e-mail complaint from individual to Fox station WTVT(TV), Tampa, dated January 21, 2004 ("Fox insults my ears and those of my wife and children with the "f' word, etc. and we leave you for good . . ."); e-mail complaint from individual to Fox station KMSP(TV), Minneapolis, dated December 10, 2003 ("Why are you allowing that kind of language at 8:00 p.m. for all ages of people to hear? . . . It was disgusting and very disturbing . . ."); e-mail complaint from individual to Fox station KMSP(TV), Minneapolis, dated December 13, 2003 ("I was watching the event with my 12 and 13 y/o daughters . . . the amount of swearing that was done and the severity of some of the words was horrible . . . Watching TV has become very unpredictable these days . . . I do not feel it is a safe source of entertainment for our children. . . ."); complaint from individual to David Solomon, Chief of Enforcement Bureau, dated December 12, 2003 ("I was horrified to learn that some of the young children in the school that I teach in viewed the program. Several of these children are among those children who have social problems and are often in trouble. Is this what our children have to look toward for example on how to live? Would you want your children or grandchildren to mimic these entertainers ?????") All of these complaints except for the last one to the FCC's Enforcement Bureau are attached to Fox's January 30, 2004 *Response*.

here was a "fleeting and isolated utterance" and that such material is not actionably indecent.[49] We disagree.

20. Fox's argument that a "fleeting and isolated utterance" is not actionably indecent is based largely on staff letters and dicta in decisions predating the Commission's *Golden Globe Awards Order*. For example, in a 1987 decision clarifying that our indecency definition was not restricted only to the seven words contained in the George Carlin monologue determined to be indecent in *Pacifica*, the Commission distinguished in dicta between "expletives"—words such as the "F-Word" or the "S-Word" used outside of their core sexual or excretory meanings—and descriptions of sexual or excretory functions. And, in so doing, the Commission suggested: "If a complaint focuses solely on the use of expletives, we believe that . . . deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency."[50] The Commission made clear, however, that repetition was *not* required when speech "involv[es] a description or depiction of sexual or excretory functions" and that "[t]he mere fact that specific words or phrases are not *repeated* does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[51] In this case, Ms. Richie's use of the "S-Word" clearly involved "a description of excretory functions."[52]

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[49] *Response* at 12, 13.

[50] *Pacifica Foundation, Inc.*, 2 FCC Rcd at 2699. *See also New Indecency Enforcement Standards To Be Applied to All Broadcast and Amateur Radio Licensees*, Public Notice, 2 FCC Rcd 2726 (1987).

[51] *See Pacifica Foundation, Inc.,* 2 FCC Rcd at 2699 (emphasis added).

[52] *Id.*

21. Subsequent to this 1987 guidance, there were several Bureau-level decisions finding the isolated use of an expletive not to be actionably indecent.[53] In no case, however, did the Commission itself, when evaluating an actual program, find that the isolated use of an expletive, such as the "F-Word," as broadcast was not indecent or could not be indecent. In our 2001 *Indecency Policy Statement*,[54] we explained that "where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency,"[55] but also noted "even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness."[56] Then, in 2004, the Commission itself considered for the first time in an enforcement action whether a single use of an expletive could be indecent. And in evaluating the broadcast of the F-Word during "The Golden Globe Awards," we overturned the Bureau-level decisions holding that an isolated expletive could not be indecent and disavowed our 1987 dicta on which those decisions were based.

22. While it is important to understand the history of the Commission's decisions in this area, we reject Fox's suggestion that Nicole Richie's comments would not have been actionably indecent prior to our *Golden*

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[53] *See, e.g., Golden Globe Awards Order*, 19 FCC Rcd at 4981 ¶ 12 n. 32 (listing Bureau-level decisions).

[54] *Indecency Policy Statement*, 16 FCC Rcd at 8008-09 ¶¶ 17-19.

[55] *Id.* at 8008 ¶ 17.

[56] *Id.* at 8009 ¶ 19.

Globe decision.[57] Rather, Ms. Richie's remarks would have been actionably indecent prior to our *Golden Globe* decision for three separate reasons. First, even under our pre-*Golden Globe* dicta, the offensive material here does not consist solely of the use of expletives; as discussed above, the "S-Word" was used here in its excretory sense and was integral to a graphic and vulgar description that clearly falls within the scope of our indecency rule. As we stated in our 1987 guidance, "repetitive use" was not required under such circumstances.[58] Second, the offensive language was "repeated" in that it included not one but two extremely graphic and offensive words. Third, there seems to be little doubt that Ms. Richie's comments were deliberately uttered and that she planned her comments in advance.[59] Ms. Hilton's opening remark to Ms. Richie that this was a live show and she should "watch the bad language" strongly suggests that the offensive language that followed was not spontaneous. Further, there is nothing in Ms. Richie's confident and fluid delivery of the lines, and her use of multiple offensive words, that suggests that any of the language was a spontaneous slip of the tongue. Thus, given the presence of a graphic description of excretory functions, the presence of multiple of-

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[57] In this respect, our decision differs from our suggestion in Section III.B of the *Omnibus Order*, now vacated, that prior to the Commission's decision in *Golden Globe* this broadcast would not have warranted enforcement action because it involved an "isolated use of expletives." *See Omnibus Order*, 21 FCC Rcd at 2695 ¶ 124. For the reasons discussed above, we do not believe that our prior suggestion accurately reflected the context of this broadcast or Commission precedent.

[58] *Pacifica Foundation, Inc.*, 2 FCC Rcd at 2699.

[59] *See id.* (discussing "deliberate" use of expletives).

fensive words, and the deliberate nature of Ms. Richie's comments, we conclude that this broadcast would have been actionably indecent consistent with prior Commission guidance even in the absence of our *Golden Globe* decision.[60]

23. In addition, this broadcast is actionably indecent under the *Golden Globe Awards Order*.[61] In that Order, we stated that 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."[62] While, as explained above, Commission dicta and Bureau-level decisions issued before *Golden Globe* had suggested that expletives had to be repeated to be indecent but "descriptions or depictions of sexual or excretory functions" did not need to be repeated to be indecent, we believe that this guidance was seriously flawed. We thus reaffirm that it was appropriate to disavow it. To begin with, any strict dichotomy between "expletives" and "descriptions or depictions of sexual or excretory functions" is artificial and does not make sense in light of the

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[60] For these reasons, Ms. Richie's comments differ significantly from the language involved in the two Bureau-level decisions finding fleeting expletives not to be indecent that were cited in the *Indecency Policy Statement*. *See Indecency Policy Statement*, 16 FCC Rcd at 8008-09 ¶ 18. Rather, they are more similar to the material in the *LBJS Broadcasting Company* Notice of Apparent Liability cited in the *Indecency Policy Statement* because they combine a graphic and vulgar description of sexual or excretory material with an expletive. *Id.* at 8009 ¶ 19, *citing LBJS Broadcasting Company*, 13 FCC Rcd 20956 (Mass Media Bur. 1998) (forfeiture paid) (finding broadcast apparently indecent for use of phrase "[s]uck my dick you fucking cunt").

[61] *See Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12.

[62] *Id.*

fact that an "expletive's" power to offend derives from its sexual or excretory meaning.[63] Indeed, this is why it has long been clear that such words fall within the subject matter scope of our indecency definition, which since *Pacifica* has involved the description of sexual or excretory organs or activities.[64] Moreover, in certain cases, it is difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions. Finally, and perhaps most importantly, 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.[65] In evaluating whether material is patently offensive, the Commission's approach has generally been to examine all factors relevant to that determination.[66] To the extent that Commission dicta had previously suggested that one of these factors—whether material had been repeated—would always be decisive in a certain category of cases, we believe that such dicta was at odds with the Commission's overall enforcement policy and was appropriately disavowed.

24. Turning back to "The 2003 Billboard Music Awards" broadcast, we believe that we need not ignore "the first blow" to the television audience in the circumstances presented here.[67] Nor do we think that *Pacifica* requires that approach. The major broadcast networks

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[63] *See supra* para. 16.

[64] *Pacifica*, 438 U.S. at 742.

[65] *Indecency Policy Statement,* 16 FCC Rcd at 8002-03 ¶ 9.

[66] *Id.* at ¶¶ 9-10.

[67] *Pacifica*, 438 U.S. at 748-49.

("Networks") argue that the *Pacifica* Court "would have never approved" an indecency enforcement regime that applied to isolated and fleeting expletives.[68] But this claim finds no support in *Pacifica*, in which the Court specifically reserved the question of "an occasional expletive" and noted that it addressed only the "particular broadcast" at issue in that case.[69] Indeed, we think it significant that the "occasional expletive" contemplated by the Court was one that occurred in "a two-way radio conversation between a cab driver and a dispatcher,"—a conversation not broadcast to a wide audience—"or a telecast of an Elizabethan comedy," settings far removed from the broadcast at issue here.[70]

25. In explaining the special nature of the broadcast medium, the Supreme Court emphasized the "pervasive presence [of the broadcast medium] in the lives of all Americans" and that indecent broadcasts invade the privacy of the home. It rejected the argument that one could protect oneself by turning off the broadcast upon hearing indecent language: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."[71] We believe that granting an automatic exemption for "isolated or fleeting" expletives unfairly forces viewers (including children) to take "the first blow." Indeed, it would as a

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[68] Joint Comments of Fox, CBS, NBC Universal, Inc. and NBC Telemundo License Co. in DA 06-1739 at 3 (filed Sept. 21, 2006) ("*Joint Comments*").

[69] *Pacifica*, 438 U.S. at 742, 750.

[70] *Id.* at 750.

[71] *Id.* at 748-49.

matter of logic permit broadcasters to air expletives at all hours of a day so long as they did so one at a time. For example, 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.[72] Such a result would be inconsistent with our obligation to enforce the law responsibly. We do not believe that viewers of free television broadcasts utilizing the public airwaves should feel, as so many of the complaining viewers of "The 2003 Billboard Music Awards" clearly do, that they cannot safely allow their families to watch prime-time broadcasts.[73]

26. Nor, as discussed above, are the Networks correct in their suggestion that fleeting utterances have never before been regulated. On the contrary, our *Golden Globe Awards* decision was not the first time that a fleeting utterance had been found to be indecent.[74] We have long recognized that "even relatively fleeting references may be found indecent" if the context makes them patently offensive.[75]

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[72] Such words could include grossly offensive sexual terms such as "cunt."

[73] *See* complaints listed in note 48 *supra*. Like the broadcast in *Pacifica*, Ms. Richie's statements "could have enlarged a child's vocabulary in an instant." *Pacifica*, 438 U.S. at 749.

[74] *Indecency Policy Statement*, 16 FCC Rcd at 8009 ¶ 19.

[75] *See id.* (listing examples of isolated utterances found to be actionably indecent).

27. We thus conclude that the fact that the offensive dialogue here was relatively brief is not dispositive under these particular circumstances. This is not a case involving a single, spontaneously uttered expletive. Rather, it was two sentences, one of which contained a graphic excretory description and the other a vulgar expletive used to heighten the effect of the excretory description. And, as noted above, these statements were not spontaneous slips of the tongue, but rather were planned by the speaker and presaged by the introductory remark to "watch the bad language."

28. With respect to our analysis of the complained-of material, we emphatically reject the argument made by Fox and other broadcasters that the "contemporary community standards" employed by the Commission merely reflect the "subjective opinions" or "the tastes of the individuals with seats on the Commission."[76] Rather, as we have previously stated, in evaluating material, we rely on the Commission's "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens."[77]

29. In this case, moreover, our assessment of contemporary community standards for the broadcast medium is strongly bolstered by broadcasters' own practices. As mentioned above, during the 10:00 p.m.-6:00 a.m. "safe harbor," broadcasters are permitted to air indecent and profane material. Nevertheless, with rare exceptions, they do not allow the "F-Word" or the "S-

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[76] *Joint Comments* at 10-11.

[77] *Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 ¶ 12 (2004).

Word" to be broadcast during that time period. Fox, for example, "generally prohibit[s] use of any form of the F-word or S-word during any day part, *including late-night programming*."[78] NBC also "does not broadcast the 'F-Word' and the 'S-Word'" during the "safe harbor" "except in unusual circumstances" and generally does not allow such language to be broadcast on its flagship late-night program "The Tonight Show with Jay Leno."[79] Similarly, ABC, even during safe harbor hours, "generally has not approved the broadcast of the 'f-word' and the 's-word.'"[80] For instance, during a recent broadcast of "Nightline," ABC deleted uses of the "F-Word" in a piece on actor Mark Wahlberg.[81] CBS, likewise, indicates that "[g]enerally speaking, broadcast[s] of the 'F-word' and 'S-word' are not permitted under CBS's Television Network Standards *at any time of [the] day*."[82] Hearst also reports that its general policy, "which applies *at all times*, is that vulgar language such as the F-Word and the S-Word [is] not to be knowingly broad-

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[78] Fox Response to 9/18/2006 LOI at 4 (emphasis added).

[79] Letter from F. William LeBeau to Marlene H. Dortch, Secretary, FCC, File Nos. EB-03-IH-0355, EB-03-IH-0460, EB-03-IH-0617, EB-04-IH-0295, EB-04-IH-0091, EB-05-IH-0007 at 4-5 (Sept. 29, 2006) ("NBC Response to 9/18/2006 LOI").

[80] Letter from John W. Zucker, Senior Vice President, ABC, Inc. to Marlene H. Dortch, Secretary, FCC, File No. EB-03-IH-0355 at 2 (Sept. 29, 2006) ("ABC Response to 9/18/2006 LOI").

[81] "Nightline," Sept. 29, 2006.

[82] Letter from Anne Lucey, Senior Vice President, CBS Corp. to Marlene H. Dortch, Secretary, FCC, File No. EB-05-IH-0007 at 2 (Sept. 29, 2006) ("CBS Response to 9/18/2006 LOI") (emphasis added).

cast."[83] To be sure, each of the broadcasters avers that in certain contexts, such as the motion picture *Saving Private Ryan*, they do permit the broadcast of the "F-Word" and the "S-Word." However, none of these examples bears even the slightest resemblance to Nicole Richie's comments during "The 2003 Billboard Music Awards."[84] Indeed, in Congressional testimony, Fox's President of Entertainment recognized that the very comments at issue here—Ms. Richie's remarks—contained "inappropriate language."[85] Moreover, Fox edited out her comments in its broadcasts to the Mountain and Pacific Time Zones.

30. Taken as a whole, broadcasters' practices with respect to programming aired during the safe harbor reflect their recognition that airing the "F-Word" and the "S-Word" on broadcast television is generally offensive to the viewing audience and, in the usual case, not consistent with contemporary community standards for the broadcast medium. They also reinforce our conclusion that Nicole Richie's comments during "The 2003 Billboard Music Awards" were patently offensive under contemporary community standards. For all of these reasons, we conclude that, given the explicit, graphic,

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[83] Response of Hearst-Argyle Television, Inc., File No. EB-03-IH-0355 at 3 (Sept. 29, 2006) ("Hearst Response to 9/18/2006 LOI") (emphasis added).

[84] *See* ABC Response to 9/18/2006 LOI at 2; CBS Response to 9/18/2006 LOI at 2-3; Hearst Response to 9/18/2006 LOI at 4-5; NBC Response to 9/18/2006 LOI at 3-4; Fox Response to 9/18/2006 LOI at 4.

[85] *H.R. 3717, the 'Broadcast Decency Enforcement Act of 2004': Hearing Before the Subcommittee on Telecommunications and the Internet of the House Comm. on Energy & Commerce*, 107th Congress, (Feb. 26, 2004) (statement of Gail Berman).

vulgar, and shocking nature of Ms. Richie's comments, they were patently offensive under contemporary community standards for the broadcast medium and thus indecent as broadcast.[86]

31. We also disagree that it would be inequitable to hold Fox responsible for airing offensive language during "The 2003 Billboard Music Awards" due to the live, unscripted nature of the material.[87] In disclaiming responsibility, Fox states that Nicole Richie's and Paris Hilton's scripted dialogue did not contain the "F-Word" or "S-Word." Rather, Ms. Richie's first scripted line read: "Yeah—instead of standing in mud and pig crap." When she spoke, she substituted "cow shit" (which was blocked out in the audio feed) for "pig crap" in that line. In the sentences at issue here, Ms. Richie was scripted to say "Have you ever tried to get cow manure out of a Prada purse? It's not so freaking simple."[88]

32. Fox also describes the measures it employed to delete objectionable material from the broadcast. It says that as in previous years—including during "The 2002 Billboard Music Awards" broadcast when it aired Cher's use of the phrase "fuck 'em"—it utilized a five-second delay that it normally used during the production of live entertainment programming. A Broadcast Standards

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[86] The Networks also complain about the Commission's analysis of contemporary community standards in other pending proceedings, such as *The Blues: Godfathers and Sons*. *See Joint Comments* at 10. In the case of *The Blues*, the Commission has issued only a Notice of Apparent Liability for Forfeiture, *see Omnibus Order* at 2683-87 ¶¶ 7285, and we will address such issues in further proceedings in that case.

[87] *See Response* at 13.

[88] *Id.* at 6.

employee monitored the broadcast and operated a "delay button" that enables an employee to edit out objectionable content before it airs. Fox also assigned a Broadcast Standards representative to the event to review the script, attend dress rehearsals and be present at the event, as it normally did for the production of live entertainment events. During "The 2003 Billboard Music Awards" program, the employee operating the delay button edited out the vulgar phrase "cow shit" the first time Ms. Richie said it, but failed to edit out the remaining offensive language discussed above. The program aired several hours later on stations in the Mountain and Pacific time zones, and Fox did remove the offensive language before it aired on those stations.[89]

33. As Fox points out, the FCC has long recognized that it may be inequitable to hold a licensee responsible for airing offensive speech during live coverage of a public event under some circumstances.[90] But the Commission has not hesitated to enforce its indecency standard where, as here, a licensee fails to exercise "reasonable

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[89] *Id.* at 8-9. Following this broadcast, Fox implemented a longer delay mechanism and a second delay button for all live broadcasts to serve as a back-up. *Id.* at 9. In its recent response to a LOI relating to the broadcast of "The 2002 Billboard Music Awards," Fox states that it now uses a total of four delay buttons for all live broadcasts of entertainment programming. In addition, it "recognizes that certain performers may present more risk of spontaneous objectionable content during live performances than others" and thus "has begun to tape in advance certain performances to air during otherwise 'live' broadcasts." See Letter from John C. Quale to Marlene H. Dortch, Secretary, FCC, File No. EB-03-IH-0460 at 6 (Sept. 21, 2006) ("Fox Response to 9/7/06 LOI").

[90] *Pacifica*, 438 U.S. at 733 n.7, *quoting Pacifica Foundation*, 59 FCC 2d at 893 n.1. *See Response* at 12.

judgment, responsibility and sensitivity to the public's needs and tastes to avoid patently offensive broadcasts."[91] Here, the original script for "The 2003 Billboard Music Awards" increased the likelihood that Ms. Richie would ad-lib offensive remarks; as noted above, it called for her to make excretory references to "pig crap" and "cow manure," and to substitute the euphemism "freaking" for the "F-Word."[92] Such a script

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[91] *Pacifica Foundation, Inc.*, 2 FCC Rcd at 2700 ¶ 18. *See Liability of San Francisco Century Broadcasting, L.P.*, Memorandum Opinion and Order, 8 FCC Rcd 498, 499 ¶ 7 (1993) ("the mere fact that a show is live does not excuse a station from exercising its editorial responsibilities, especially where commonly available screening techniques can eliminate the element of surprise."), *citing Sound Broadcasting Corp.*, Notice of Apparent Liability, 6 FCC Rcd 2174 (Mass Media Bur. 1991); *Radio Station KFMH-FM, Muscatine, Iowa*, Notice of Apparent Liability, 9 FCC Rcd 1681, 1681-82 (Mass Media Bur. 1994) (rejecting contention that licensee should not be held responsible for broadcasting live and unscripted offensive material from an outside source where the broadcaster suspected "that the caller involved was the same person who had told the objectionable joke only eight minutes earlier" but "chose to place the call on the air rather than to discontinue the broadcast or to use precautions such as a delay device."); *L.M. Communications*, Notice of Apparent Liability, 7 FCC Rcd 1595 (Mass Media Bur. 1992) (rejecting argument that broadcaster should not be sanctioned for airing indecent material within live and unscripted programming where "the scatological material as broadcast involved a deliberate and repetitive use of the word 'crap' to heighten the audience's awareness of and attention to the subsequent use of the term 'shit' by the announcer.").

[92] *See* Response at 6; *see also Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Forfeiture Order, 21 FCC Rcd 2760, 2769 ¶ 19 (2006) (citing evidence that "there is always a risk that performers will ad-lib remarks or take unscripted actions, and that the risk level varies according to the nature of the performance.") (subsequent history omitted).

might have posed minimal risk in the hands of some performers. Relying on Ms. Hilton and Ms. Richie to avoid vulgar language, however, involved a substantially greater risk.[93] As Fox well knew, Ms. Richie frequently used indecent language in inappropriate contexts. For example, during the three episodes of "The Simple Life" that it broadcast in the days leading up to the "The 2003 Billboard Music Awards," Fox felt it necessary to bleep expletives (the "F-Word" or "S-Word") uttered by Ms. Richie no fewer than nine times.[94] Yet Ms. Richie was still selected as a presenter for the live, prime-time awards show, and Fox has not claimed it made any effort to caution Ms. Richie about its broadcast standards for the program or that it took any special precautions (beyond its standard five-second delay) to guard against her use of expletives on the air. Indeed, Fox does not

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[93] *See supr*a note 27. As discussed above, Fox advertised Ms. Hilton and Ms. Richie as being "totally-out-ofcontrol" on the cover of the Simple Life DVD. Additionally, *The Los Angeles Times* review of the first episode of "The Simple Life" describes Ms. Hilton and Ms. Richie as "out-of-control." Carina Chocano, *Work for a Living? What a Concept*, L.A. Times, Dec. 2, 2003, at 1 (Calendar Section).

[94] *"The Simple Life*," Season 1, Episodes 1-3. In addition, Ms. Richie's penchant for cursing is highlighted in a scene during the first episode in which their host, reviewing the house rules with them, states "no cussing or bad language," at which point the camera focuses on Ms. Richie giggling helplessly at Ms. Hilton. Their penchant for vulgarity is also illustrated during the third episode in two scenes at a local fast food franchise where Ms. Richie and Ms. Hilton are working for the day. Directed to change the letters of a sign out front to read "Half Price Burgers All Day," they instead arrange the letters to read "1/2 Price Anal Salty Weiner Bugers." Later, standing on the curb in costumes of the restaurant's mascot, an animated milkshake, they stick up their respective middle fingers (which are pixilated) to passersby.

even contend that it took any action against Ms. Richie after this episode.

34. Even more significant, the particular five-second delay and editing system that Fox used in this case had already proved inadequate to delete Cher's offensive language during Fox's broadcast of "The 2002 Billboard Music Awards" the previous year. During that broadcast, Cher, when accepting an award, had stated, "'People have been telling me I'm on the way out every year, right? So fuck 'em.'"[95] According to Fox, the employee in charge of deleting objectionable material did not act quickly enough and ended up editing out dialogue that aired after Cher's comment.[96] Despite this failure, Fox took no additional precautions to avoid airing such material the next year.[97] The record also demonstrates that steps may be taken, such as adding "delay buttons" or lengthening the delay, that allow for far more effective editing of potentially objectionable content.[98] Here, Fox itself contends that the time delay and editing system that it used for "The 2003 Billboard Music Awards" was inadequate, maintaining that it imposed on the operator a "Herculean task" because he was "essentially trying to watch two programs at once—the live version occurring in real-time and the delayed version that was broadcast seconds later."[99] Then, if he heard or saw objectionable content, he was required to "press the appropriate audio

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[95] *See infra* para. 56.

[96] *See* Fox Response to 9/7/06 LOI at 5.

[97] *See* Response at 5.

[98] *See, e.g., id.* at 8-9.

[99] Fox Response to 9/18/2006 LOI at 10 n. 21.

and/or video delay buttons at the precise instant necessary to eliminate the objectionable content from the delayed feed" while at the same time "staying abreast of the continuing live feed."[100] In short, under these circumstances, Fox should have recognized the high risk that "The 2003 Billboard Music Awards" broadcast raised of airing indecent material. Nevertheless, Fox chose to rely on the same delay and editing system that had proved inadequate the previous year to delete an expletive during the same show. We are not persuaded, therefore, that Fox's efforts to edit out the offensive language were diligent or reasonable.

35. We recognize that no delay and editing system is foolproof and that there is always a possibility of human error in using delay equipment to edit live programming. The Commission can and will consider these facts in deciding what, if any, remedy is appropriate. In this case, however, as discussed above, we conclude that Fox's efforts to prevent and edit out Ms. Richie's comments were not diligent or reasonable.

36. Holding Fox responsible for airing indecent material in this case does not place live broadcasts at risk or impose undue burdens on broadcasters.[101] This case does not involve breaking news coverage that Fox and other broadcasters have traditionally presented in so-

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[100] *Id.* By contrast, Fox states that its current time delay and editing system "relies upon technology to ensure that once an edit button is pressed, the potentially objectionable content is edited at the right time during the delayed feed." *Id.* As stated above, Fox's current system also utilizes more than one employee "to provide redundancy." *Id.* at 10.

[101] *See Joint Comments* at 12-16.

called "real time."[102] Nevertheless, Fox argues that "[t]he live presentation of awards shows . . . is what makes this content so compelling."[103] Fox, however, did not even decide to air the program live in much of the country. Rather, viewers in the Mountain Time Zone saw the program with a one-hour delay, and those in the Pacific Time Zone experienced a three-hour delay. We find it difficult to understand why viewers on the East Coast would no longer find "live programming" to be "compelling" with a ten-second delay while it is evidently acceptable to provide this programming to viewers in the western half of the country with a one-hour or three-hour delay. Moreover, with respect to awards shows as a whole, the record reflects that the vast majority of awards shows are not aired by major networks live in the Pacific Time Zone.[104] Rather, they are generally broadcast with a three-hour delay, thus undermining any assertion that it is important that viewers see the presentation of the awards without the compara-

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[102] Since this case does not involve breaking news or sports programming, we do not address issues involving such programming here. But as we recognize elsewhere in this Order, "in light of the important First Amendment interests at stake as well as the crucial role that context plays in our indecency determinations, it is imperative that we proceed with the utmost restraint when it comes to news programming." *See infra*, § III.C.

[103] See *Joint Comments*, Appendix X (Declaration of Peter Ligouri) at ¶ 2.

[104] Of the 32 awards shows that were broadcast by the major networks and are discussed in the record, only the Academy Awards aired live in all time zones. *See* ABC Response to 9/18/2006 LOI at 2; NBC Response to 9/18/2006 LOI at 4 and Exh. C.; Fox Response to 9/18/2006 LOI at 3-4; CBS Response to 9/18/2006 LOI at 7.

tively minimal delay required to remove indecent language.

37. Under the circumstances, we fail to see how a delay of five, ten, or even fifteen seconds meaningfully affects the value of this programming or significantly implicates First Amendment values. In this vein, we note that so-called "live" programming is not literally live—viewers at home do not see an event at the very time that it is actually occurring. Rather, there is a natural delay caused by the time that it takes a signal to reach viewers. The record shows that digital signals, for example, may take up to 1.3 to 3.3 seconds to reach viewers over-the-air.[105] And, if viewers are receiving such signals through a cable operator or satellite provider, there may be an additional delay of up to 3 seconds.[106] Finally, if a viewer has a digital video recorder, there is another additional delay of approximately another half-second.[107] Thus, using a conservative estimate, a viewer may be watching an event more than three seconds after it occurs, even in the absence of any delay technology. In light of this, we fail to see how there is a meaningful adverse impact on a viewer's experience because he or she learns the winner of the Billboard Award for Top 40 Mainstream Track some eight to eighteen seconds after

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[105] Fox Response to 9/18/2006 LOI at 11.

[106] *Id.*

[107] *Id. See* ABC Response to 9/18/2006 LOI at 7-8 (reporting that transmitting signals from ABC's New York Broadcast Center to affiliates results in less than a two second delay, that feeding live material from remote locations to ABC's New York Broadcast Center may cause an additional delay of up to a second, and that distribution of the signals to the consumers through cable and satellite systems may cause an additional delay).

the winner is announced on stage in Las Vegas (with a delay) as opposed to after the normal three to six seconds (without one).

38. Finally, we note that our decision here will not deprive Fox of the ability to present such programming in substantially the same way that it has in the past. Fox has utilized a time delay and other procedures to avoid airing patently offensive material during live entertainment broadcasts such as "The 2003 Billboard Music Awards" for years before the Commission's decision in the *Golden Globe Awards Order*.[108] We also disagree that "delaying live broadcasts to edit potentially offensive language inevitably results in overbroad censorship of appropriate material."[109] As the D.C. Circuit observed, "some degree of self-censorship is inevitable and not necessarily undesirable so long as proper standards are available."[110] The possibility that an over-zealous broadcast standards employee may "dump" material that is not actionably indecent during the live presentation of an awards show does not outweigh the compelling

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[108] *See Response* at 8; *see also* Fox Response to 9/7/06 LOI at 5. In addition, Fox uses delays for live entertainment broadcasts even after 10 p.m. *See id.* at 5-7. The Commission's indecency regulation does not apply at that time, *see* 47 C.F.R. § 73.3999(b), so Fox obviously has reasons apart from regulatory compulsion for using a delay.

[109] *Joint Comments* at 15.

[110] *Action for Children's Television v. FCC*, 59 F.3d 1249, 1261 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996) (*ACT IV*), *citing Pacifica*, 438 U.S. at 743. *See ACT III*, 58 F.3d at 666 ("Whatever chilling effects may be said to inhere in the regulation of indecent speech, these have existed ever since the Supreme Court first upheld the FCC's enforcement of section 1464 of the Radio Act.").

interest in preventing patently offensive broadcasts such as the one that occurred in this case.

39. For all of these reasons, we conclude that Fox's broadcast of "The 2003 Billboard Music Awards" violated the prohibitions in 18 U.S.C. § 1464 and the Commission's rules against broadcast indecency and that it is not inequitable to hold Fox responsible for these violations.

40. *Profanity Analysis*. Consistent with our decisions in the *Golden Globe Awards Order* and the *Omnibus Order*, we also find that the complained-of language in the program at issue violated Section 1464's prohibition on the broadcast of "profane" utterances.[111] In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" was profane within the meaning of Section 1464 because, in context, it constituted vulgar and coarse language "'so grossly offensive to members of the public who actually hear it as to amount to a nuisance.'"[112] Similarly, we concluded in the *Omnibus Order* that the "S-Word" is a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane.[113] In certain cases, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work

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[111] 18 U.S.C. § 1464.

[112] *Golden Globe Awards Order*, 19 FCC Rcd at 4981 ¶ 13, *quoting Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972).

[113] *Omnibus Order*, 21 FCC Rcd at 2686 ¶ 81 ("Like the 'F-Word,' [the 'S-Word'] is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.").

or essential to informing viewers on a matter of public importance.[114] However, such circumstances are not present here: Fox does not contend that Ms. Richie's profane language was essential to informing viewers on a matter of public importance or that modifying the language would have had a material impact on its function as a source of news and information. On the contrary, Fox sought (albeit unsuccessfully) to delete the profane language, and did remove it before the program aired on time delay in the Mountain and Pacific Time Zones.[115] It is undisputed that the complained-of material, including the "F-Word" and the "S-Word," was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination.[116] Because there was a reasonable risk that children may have been in the audience at the time of the broadcast on December 10, 2003,[117] the broadcast is legally actionable.

41. Contrary to the Networks' *Joint Comments*, we believe that our interpretation of "profane" as used in Section 1464 is appropriate.[118] The word has long carried a variety of meanings, including non-religious

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[114] *Id.* at 2669 ¶ 19, *citing Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* Memorandum Opinion and Order, 20 FCC Rcd 4507, 4512-14 ¶¶ 13-18 (2005).

[115] *Response* at 8.

[116] *See Omnibus Order*, 21 FCC Rcd at 2666 ¶ 8.

[117] *See supra* para. 18 (noting that, according to Nielsen ratings data, 23.4% of the people watching an average minute of "The 2003 Billboard Music Awards" broadcast were under 18, and 11% were between the ages of 2 and 11).

[118] *See Joint Comments* at 28-32; Thomas Jefferson Center For the Protection of Free Expression Comments at 11-15 (Sept. 21, 2006).

meanings.[119] Several courts have interpreted the word in a non-religious sense, consistent with the established rule that a court should construe a statute, if reasonably possible, to avoid constitutional problems.[120] Further,

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[119] The 1891 edition of the Century Dictionary includes this definition of profane: "2. To put to a wrong use; employ basely or unworthily." Century Dictionary 4754 (1891 ed.). In an appendix to his concurring opinion in *Burstyn v. Wilson*, 343 U.S. 495, 533-40 (1952), Justice Frankfurter collected definitions of "sacrilege," "blasphemy," and "profane" dating to 1651. The earliest of these definitions of profane is "to apply any thing sacred to common use. To be irreverent to sacred persons or things. To put to a wrong use." *Id.* at 536, *quoting* Rider, A New Universal English Dictionary (London, 1759). The next is "To violate; to pollute.—To put to wrong use." *Id.* at 537, *quoting* Kenrick, A New Dictionary of the English Language (London, 1773). Frankfurter's concurring opinion also notes that Funk & Wagnalls' New Standard Dictionary of the English Language, first copyrighted in 1913, includes a definition of "to profane" as "3. To vulgarize; give over to the crowd." *Id.* at 527 n. 48. Thus, we disagree that Congress clearly would have understood the term in 1927 to mean only blasphemous or sacrilegious. *Joint Comments* at 28.

[120] *See Tallman v. United States*, 465 F.2d at 286; *State v. Richards*, 896 P.2d 357, 364 (Id. App. 1995) (in rejecting a vagueness challenge to state statute proscribing telephone harassment through, *inter alia*, "obscene, lewd or profane language," construing "profane" to mean "characterized by abusive language . . . cursing or vituperation . . ."); *see also United States v. Hicks*, 980 F.2d 963, 970 n.9 (5th Cir. 1992) (angry reference to flight attendant as a "bitch" and angry admonition that she should get her "ass" to the plane's kitchen qualified as "profane"). We disagree with the Networks that Tallman addressed the word's meaning in dicta, and that the case actually refutes the Commission's interpretation because the Court cited with approval *Duncan v. United States*, 48 F.2d 128 (9th Cir.), *cert. denied*, 383 U.S. 863 (1931), and *Gagliardo v. United States*, 366 F.2d 720 (9th Cir. 1966). *See Joint Comments* at 31. *Tallman* held that the word "profane" in Section 1464 must be interpreted narrowly as, *inter alia*, "denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to

when viewed in its statutory context with the words "obscene" and "indecent," both of which have vulgar overtones, we believe that the word "profane" is reasonably interpreted in the related sense of "grossly offensive."[121]

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a nuisance" to preserve its validity in response to a facial constitutional challenge. *Tallman*, 465 F.2d at 286. The Court cited *Duncan* and *Gagliardo* solely as examples of prior judicial interpretations available to the trial judge had jury instructions on the word's meaning been necessary, without approving or even identifying such interpretations. *Id.* We also reject the Networks' argument that the rule of lenity counsels against the Commission's interpretation of "profane." *See Joint Comments* at 30, n.34. Among other things, the Networks make no showing that their preferred construction of the term is any narrower than the Commission's. Indeed, we think it likely that more broadcast speech would be considered "profane" under the Networks' interpretation of the term than under ours. *See also infra* para. 54 (explaining that the *Pacifica* Court squarely rejected the argument that the FCC's civil authority to enforce Section 1464 must be interpreted in accordance with rules that apply to criminal statutes, such as the rule of lenity).

[121] *See State v. Richards*, 896 P.2d at 364 ("when words appear in a list or are otherwise associated, they should be given related meanings."), *citing Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985), *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303 (1961), 2A Norman J. Singer, Southerland's Statutes and Statutory Construction § 47.16 at 183 (5th ed. 1992); *United States v. Hicks*, 980 F.2d at 970 n.9 ("By 'profanity' or 'vulgarity,' we refer to words that, while not obscene, nevertheless are considered generally offensive by contemporary community standards."). The fact that the words "indecent" and "profane" in Section 1464 have "separate" meanings does not render our interpretation of profane "implausible." *See Joint Comments* at 31, *quoting Pacifica*, 438 U.S. at 739-40. We recognize that the two words have separate meanings, and the Commission interprets the two words differently. Our enforcement policy limiting the regulation of profane language to words that are sexual or excretory in nature or are derived from such terms stems from First Amendment considerations rather than the meaning of the word. *See Omnibus Order*, 21 FCC Rcd at 2669 ¶ 18.

We do not read the cases cited by the Networks as precluding a non-religious interpretation. *Duncan* upheld a conviction for broadcasting profanity where the defendant "referred to an individual as 'damned,'" "used the expression 'By God' irreverently," and "announced his intention to call down the curse of God upon certain individuals."[122] But the court held only that this language was "within the meaning of that term" as used in the Radio Act of 1927, not that the provision *only* covered such language.[123] *Gagliardo* addressed the meaning of "profane" in Section 1464 only in *dict*a, because the government in that case did not contend that the words at issue were profane.[124] Finally, the fact that the Commission has a specific rule addressing "obscene" and "indecent" programming[125] plainly does not foreclose the agency from exercising in an adjudication its express

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[122] *Duncan*, 48 F.2d at 133-34 (the phrase "God damn it" uttered in anger was not profane under Section 1464).

[123] *Id.* at 134. *Duncan* was decided before constitutional law evolved to the point that such language could not be proscribed. *See Burstyn v. Wilson*, 343 U.S. 495 (1952) (holding unconstitutional a New York statute authorizing state officials to license films for public exhibition unless the films are "sacrilegious").

[124] *Gagliardo*, 366 F.2d at 725 ("God damn it" uttered in anger not legally profane). The FCC did not address whether "profane" could be interpreted in a non-religious sense in *Raycom America, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 4186 (2003) (portions of "The West Wing" in which a character "'scream[ed] at God,' and made irreverent references toward the deity—'[y]ou're a sonofabitch, you know that?,' and 'have I displeased you, you feckless thug?'" not actionably profane), and *Warren B. Appleton*, 28 FCC 2d 36 (Broadcast Bur. 1971) ("damn" not actionably profane), because those cases involved language with religious connotations.

[125] 47 C.F.R. § 73.3999.

statutory authority to take enforcement action against broadcasts that are "profane."[126]

42. *Constitutional Issues*. The Networks offer a variety of arguments attacking the constitutionality of the Commission's indecency framework as it relates to "The 2003 Billboard Music Awards" broadcast. We do not find any of these arguments to be persuasive.

43. First, the Networks argue that our definition of indecency is unconstitutionally vague.[127] However, that definition is essentially the same as the one that we articulated in the order under review in *FCC v. Pacifica Foundation*.[128] The Supreme Court had no difficulty in applying that definition and using it to conclude that the broadcast at issue in that case was indecent.[129] We agree with the D.C. Circuit that "implicit in *Pacifica*" is an "acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge."[130]

44. The Networks suggest that the Supreme Court's more recent decision in *Reno v. ACLU*[131] has "undermine[d] any constitutional defense of the Commission's current approach" to indecency.[132] In *Reno*, the Court considered the constitutionality of the Communications Decency Act of 1996 (CDA), a statute that regulated

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[126] 47 U.S.C. § 1464; 47 U.S.C. § 503(b)(1)(D). *See Joint Comments* at 32.

[127] *See, e.g., Joint Comments* at 7-8.

[128] *Pacifica*, 438 U.S. at 732.

[129] *See id.* at 739, 741.

[130] *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) ("*ACT I*"); *accord ACT III*, 58 F.3d at 659.

[131] 521 U.S. 844 (1997).

[132] *Joint Comments* at 7.

indecency on the Internet and that contained a definition similar to ours.[133] Though the Court did not hold that the statute was "so vague that it violates the Fifth Amendment," it concluded that "the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment."[134]

45. *Reno* in no way undermines *Pacifica*. On the contrary, the Court in *Reno* expressly distinguished *Pacifica*, and it gave three different reasons for doing so. First, the Court noted that the Commission is "an agency that [has] been regulating radio stations for decades," and that the Commission's regulations simply "designate when—rather than whether—it would be permissible" to air indecent material.[135] The CDA, in contrast, was not administered by an expert agency, and it contained "broad categorical prohibitions" that were "not limited to particular times."[136] Second, the CDA was a criminal statute, whereas the Commission has no power to impose criminal sanctions for indecent broadcasts.[137] Third, unlike the Internet, the broadcast medium has traditionally "received the most limited First Amendment protection."[138] Thus, far from casting doubt on *Pacifica*'s vagueness holding, *Reno* recognizes its continuing vitality.

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[133] *See* 47 U.S.C. § 223(d) (1994 Supp. II).

[134] *Reno*, 521 U.S. at 870.

[135] *Id.* at 867.

[136] *Id.*

[137] *See id.* at 867, 872; *see also Pacifica*, 438 U.S. at 750 (declining to decide whether an indecent broadcast "would justify a criminal prosecution").

[138] *Reno*, 521 U.S. at 867 (quoting *Pacifica*, 438 U.S. at 748).

46. The Networks also argue that the more relaxed level of First Amendment scrutiny discussed in *Pacifica* should no longer apply to broadcasting in light of changes in the media marketplace. Specifically, they contend that because of the prevalence of other media, such as the Internet and cable and satellite television, "it is fanciful to believe that aggressive enforcement of § 1464 against broadcasters will be effective in preventing children from being exposed to potentially offensive words."[139]

47. We disagree that technological changes have undermined the validity of the reasoning in *Pacifica*.[140] In *Pacifica*, the Court identified two reasons why broadcasting has received "the most limited First Amendment protection."[141] First, "the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home."[142] Second, "broadcasting is uniquely accessible to children, even those too young to read."[143]

48. Notwithstanding the growth of other communications media, courts have recognized the continuing validity of these rationales. In 1994, the Supreme Court reaffirmed that "our cases have permitted more intrusive

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[139] *Joint Comments* at 22.

[140] In any event, the Commission has no authority to overrule *Pacifica*. Cf. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

[141] *Pacifica*, 438 U.S. at 748.

[142] *Id.*

[143] *Id.* at 749.

regulation of broadcast speakers than of speakers in other media."[144] And the D.C. Circuit has rejected precisely the argument advanced by the Networks here: "Despite the increasing availability of other means of receiving television, such as cable, . . . there can be no doubt that the traditional broadcast media are properly subject to more regulation than is generally permissible under the First Amendment."[145]

49. The broadcast media continue to have "a uniquely pervasive presence" in American life. The Supreme Court has recognized that "[d]espite the growing importance of cable television and alternative technologies, 'broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.'"[146] Though broadcast television is "but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression."[147] In 2003, 98.2% of households had at least one television, and 99% had at least one radio.[148] The Networks correctly point out that almost 86% of households with tele-

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[144] *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994); *see also Reno*, 521 U.S. at 868 (recognizing "special justifications for regulation of the broadcast media").

[145] *ACT III*, 58 F.3d at 660. *See also Prometheus Radio Project v. FCC*, 373 F.3d 372, 401-02 (3d Cir. 2004) (rejecting argument that broadcast ownership regulations should be subjected to higher level of scrutiny in light of the rise of "non-broadcast media").

[146] *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 190 (1997) (*quoting U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)).

[147] *Id.* at 194.

[148] U.S. Census Bureau, *Statistical Abstract of the United States* 737 (2006).

vision subscribe to a cable or satellite service.[149] That still leaves 15.4 million households that rely exclusively on broadcast television, hardly an inconsequential number.[150] In addition, it has been estimated that almost half of direct broadcast satellite subscribers receive their broadcast channels over the air,[151] and many subscribers to cable and satellite still rely on broadcast for some of the televisions in their households.[152] All told, the National Association of Broadcasters ("NAB") estimates that there are an estimated 73 million broadcast-only television sets in American households.[153] Moreover, many of those broadcast-only televisions are in children's bedrooms. According to a 2005 Kaiser Family Foundation report, 68 percent of children aged eight to 18 have a television set in their bedrooms, and nearly

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[149] *Joint Comments* at 21 (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, ¶ 8 (2006) ("*Annual Assessment*")).

[150] *Annual Assessment*, 21 FCC Rcd at 2508 ¶ 15; *see also* Comments of the Walt Disney Co. in MB Docket No. 04-210 at 2 (filed Aug. 11, 2004) ("Disney/ABC stresses that these customers [relying on broadcast only] represent a significant portion of our potential viewing audience.").

[151] *Media Bureau Staff Report Concerning Over-the-Air Broadcast Television Viewers*, No. 04-210, ¶ 9 (MB Feb. 28, 2005), *available at* 2005 WL 473322, at *2.

[152] *Annual Assessment*, 21 FCC Rcd at 2508 ¶ 15.

[153] *Id.* at 2552 ¶ 97. The NAB has properly characterized this number as "enormous." Reply Comments of the National Association of Broadcasters and the Association for Maximum Service Television, Inc. in MB Docket No. 04-210 at i (filed Sept. 7, 2004).

half of those sets do not have cable or satellite connections.[154]

50. In addition, the bare number of cable and satellite service subscribers does not reflect the large disparity in viewership that still exists between broadcast and cable television programs. For example, during the week of September 18, 2006, each of the top ten programs on broadcast television had more than 15 million viewers, while only one program on cable television that week managed to attract more than 5 million viewers.[155] Similarly, of the 495 most-watched television programs during the 2004-2005 season, 485 appeared on broadcast television, and the highest-rated program on cable television was only the 257th most-viewed program of the season.[156]

51. The broadcast media are also "uniquely accessible to children." In this respect, broadcast television differs from cable and satellite television. Parents who subscribe to cable exercise some choice in their selection of a package of channels, and they may avoid subscribing to some channels that present programming that, in their judgment, is inappropriate for children. Indeed, upon the request of a subscriber, cable providers are required by statute to "fully block the audio and video

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[154] *See* Kaiser Family Foundation, *Generation M: Media in the Lives of 8-18 Year-olds* 77 (2005).

[155] *See* Nielsen Media Research, "Top 10 Broadcast TV Programs for the Week of September 18, 2006;" Nielsen Media Research, "Top 10 Cable TV Programs for the Week of September 18, 2006."

[156] *See* Television Bureau of Advertising, "Season-to-Date Broadcast vs. Subscription TV Primetime Ratings: 2004-2005," *available at* http://www.tvb.org/rcentral/ViewerTrack/FullSeason/fs-b-c.asp?ms=2004-2005.asp.

programming of each channel carrying such programming so that one not a subscriber does not receive it."[157] In contrast, as the D.C. Circuit has observed, "broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters."[158] The V-chip provides parents with some ability to control their children's access to broadcast programming. But most televisions do not contain a V-chip, and most parents who have a television set with a V-chip are unaware of its existence or do not know how to use it.[159] In addition, the effectiveness of a V-chip depends on the accuracy of program ratings; a V-chip is of little use when, as here, the rating does not reflect the material that is broadcast.[160] In light of the TV-PG rating given to "The 2003 Billboard Music Awards," even an informed use of a V-

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[157] 47 U.S.C. § 560 (2000); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

[158] *ACT III*, 58 F.3d at 660.

[159] *See Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6667 ¶ 37. In Congressional testimony shortly after the 2003 Billboard Music Awards, Fox's President of Entertainment acknowledged that the V-chip and television ratings were "underutilized." *H.R. 3717, the 'Broadcast Decency Enforcement Act of 2004': Hearing Before the Subcommittee on Telecommunications and the Internet of the House Comm. On Energy & Commerce*, 107th Congress, (Feb. 26, 2004) (statement of Gail Berman). According to a 2003 study, parents' low level of V-chip use is explained in part by parents' unawareness of the device and the "multi-step and often confusing process" necessary to use it. Annenberg Public Policy Center, *Parents' Use of the V-Chip to Supervise Children's Television Use* 3 (2003). Only 27 percent of mothers in the study group could figure out how to program the V-Chip, and "many mothers who might otherwise have used the V-Chip were frustrated by an inability to get it to work properly." *Id.* at 4.

[160] *See supra* para. 18, n. 46; *Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6667-68 ¶ 37.

chip would not necessarily have protected children from Ms. Richie's vulgar comments,[161] and studies demonstrate that inaccurate ratings are far from an isolated problem. In a Kaiser Family Foundation survey, for example, nearly 4 in 10 parents of children aged 2-17 stated that most television programs are not rated accurately.[162]

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[161] *See supra* para. 18, n.46.

[162] Henry J. Kaiser Family Foundation, *Parents, Media and Public Policy: A Kaiser Family Foundation Survey* 5 (2004) ("Kaiser Survey"). Likewise in a study published in the journal *Pediatrics*, parents concluded that half of television shows the industry had rated as appropriate for teenagers were in fact inappropriate, a finding the study authors called "a signal that the ratings are misleading." David A. Walsh & Douglas A. Gentile, *A Validity Test of Movie, Television, and Video-Game Ratings*, 107 Pediatrics 1302, 1306 (2001).

Academics who have studied the television rating system share parents' assessment that the ratings are often inaccurate. A 2002 study found that many shows that should carry content descriptors do not, therefore leaving parents unaware of potentially objectionable material. *See* Dale Kunkel, *et al., Deciphering the V-Chip: An Examination of the Television Industry's Program Rating Judgments*, 52 Journal of Communications 112 (2002). For example, the study found that 68 percent of prime-time network shows without an "L" descriptor contained "adult language," averaging nearly three scenes with such language per show. *See id.* at 132; *see also id.* at 131 (finding that 20 percent of shows rated TV-G—supposedly appropriate for all ages—included objectionable language, including "bastard," "bitch," "shit," and "whore"). In fact, "in all four areas of sensitive material—violence, sexual behavior, sexual dialogue, and adult language—the large majority of programs that contain such depictions are not identified by a content descriptor." *Id.* at 136. The study's authors concluded that "[p]arents who might rely solely on the content-based categories to block their children's exposure to objectionable portrayals would be making a serious miscalculation, as the content descriptors actually identify only a small minority of the full range of violence, sex, and adult language found on television." *Id.*

52. Broadcast television is also significantly different from the Internet. The Internet, unlike television, is not

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A 2004 study also raised serious questions about the accuracy of television ratings. It found that there was more coarse language broadcast during TV-PG programs than those rated TV-14, just the opposite of what these age-based ratings would lead a viewer to believe. Barbara K. Kaye & Barry S. Sapolsky, *Offensive Language in Prime-Time Television: Four Years After Television Age and Content Ratings*, 48 Journal of Broadcasting & Electronic Media 554, 563-64 (2004); *see also* Parents Television Council, *The Ratings Sham*: *TV Executives Hiding Behind A System That Doesn't Work* (April 2005) (study of 528 hours of television programming concluding that numerous shows were inaccurately and inconsistently rated); *Effectiveness of Media Rating Systems: Subcommittee of Science, Technology, and Space of the Senate Comm. On Commerce, Science & Transp.*, 107th Congress (2004) (statement of Ms. Patti Miller, director, Children and the Media Program for Children Now) ("Can parents depend on the accuracy of the ratings systems? Sadly, the answer is no.").

An economist studying the question of why broadcasters consistently "underlabel" their programs concluded that they are likely responding to economic incentives. *See* James T. Hamilton, *Who Will Rate the Ratings?, in The V-Chip Debate: Content Filtering from Television to the Internet* 133, 143, 149 (Monroe E. Price, ed. 1998). He found that programs with more restrictive ratings command lower advertising revenues. *See id.* at 143. The desire to charge more for commercials and fear of "advertiser backlash" over shows with more restrictive ratings "means that networks have incentives to resist the provision of content-based information." *Id.* at 149; *see also* Kunkel, 52 Journal of Communications at 114 ("[T]he prospect that applying 'higher' ratings to a program could reduce audience size raises a self-interest concern regarding the accuracy with which judgments about program ratings are determined.").

Finally, even assuming *arguendo* that the content descriptors were accurately applied, they would not assist the majority of parents because they are not sufficiently understood. The Kaiser Survey found that only 51% of parents understand that "V" stands for violence; only 40% understand "L" stands for language; only 37% understand "S" stands for sex; and only 4% understand that "D" stands for suggestive or sexual dialogue. Kaiser Survey at 6.

accessible to children "too young to read."[163] And parents who wish to control older children's access to inappropriate material can use widely available filtering software—an option that, whatever its flaws, lacks an effective analog in the context of broadcast television[164] in light of the numerous problems with the V-chip and program ratings discussed above.[165]

53. *No Sanction Proposed.* For the reasons stated above, we conclude that "The 2003 Billboard Music Awards" contained indecent and profane material in violation of Section 1464 and our rules. Fox stations broadcast indecent and profane language in an awards show that aired between 6 a.m. and 10 p.m. and was watched by people of all ages. Under the circumstances,

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[163] *Pacifica*, 438 U.S. at 749. *See, e.g., Youth, Pornography, and the Internet*, ed. by Dick Thornburgh and Herbert S. Lin, p. 115 (National Academy Press 2002) ("As a general rule, young children do not have the cognitive skills needed to navigate the Internet independently. Knowledge of search strategies is limited if not nonexistent, and typing skills are undeveloped.").

[164] *See Reno*, 521 U.S. at 877. Filtering software, for example, can block access to a website based on the software's evaluation of the site's content. The V-chip, in contrast, does not evaluate television programs itself and therefore is only effective if the programs have been given accurate ratings. However, to the extent that filtering software is ineffective and children are still able to access indecent material on the Internet, we note that Congress has sought to address this problem through the Child Online Protection Act, a statute whose validity is still being litigated. *See Ashcroft v. ACLU*, 542 U.S. 656 (2004) (affirming preliminary injunction). We note that the Networks also refer to the availability of video game consoles as another medium that, in their view, is as pervasive as television. *See Joint Comments* at 21-22. Video games differ from broadcast television in that games must be purchased individually, so a parent who purchases a video game console for a child retains the ability to determine which games the child will play.

[165] *See supra* para. 51 and nn. 159-162.

however, we propose no forfeiture here. We originally declined to propose a sanction in this case because the broadcast occurred prior to the *Golden Globe Awards Order*. As discussed above, we believe on further consideration that the complained-of language was actionable under Commission decisions preceding the *Golden Globe Awards Order*. Nevertheless, we still decline to propose a forfeiture here. To begin with, proposing a sanction would require issuance of a notice of apparent liability, which would not be "a further final or appealable order of the FCC," as required by the *Remand Order*.[166] In addition, even absent the requirement that we issue a "final or appealable order," we would not exercise our enforcement discretion to propose a forfeiture here given the limited remand under which we are proceeding. Accordingly, we find that no forfeiture is warranted in this case.[167] In light of our decision not to impose a forfeiture, we will not require the licensees of any of the stations that broadcast the material to report our finding here to us as part of their renewal applications, and we will not consider the broadcast to have an ad-

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[166] *Remand Order* at 2. *See* 47 U.S.C. § 503(b)(4)(C); *ACT IV*, 59 F.3d at 1254, citing *Pleasant Broadcasting Co. v. FCC*, 564 F.2d 496 (D.C. Cir. 1977).

[167] In light of recent legislation, the Networks raise the prospect of future fines in excess of $65 million for "a single, fleeting instance of indecent speech." *Joint Comments* at 16. We do not believe, however, that a case similar to "The 2003 Billboard Music Awards" arising in the future would merit the maximum fine permitted under the Broadcast Decency Enforcement Act. *See* Pub. L. 109-235, 102 Stat. 491 (June 15, 2006), *to be codified* at 47 U.S.C. § 503(b)(2)(C)(ii). While that Act, once we adopt implementing regulations, will provide the Commission with the flexibility to impose appropriate fines in egregious cases, the Commission will continue to follow a restrained enforcement policy in imposing forfeitures in this area.

verse impact upon such licensees as part of the renewal process or in any other context.

54. In light of our decision not to impose a forfeiture, we need not address whether the violations of Section 1464 and our rule were willful within the meaning of Section 503(b).[168] We disagree with the Networks, however, that Section 1464 is not violated unless a broadcaster acts with the state of mind required for a criminal conviction.[169] The Supreme Court has squarely rejected the argument that the FCC's civil authority to enforce Section 1464 must be interpreted in accordance with rules that apply to criminal statutes, explaining: "The legislative history of the provisions establishes their independence. As enacted in 1927 and 1934, the prohibition on indecent speech was separate from the provisions imposing civil and criminal penalties for violating the prohibition . . . Although the 1948 codification of the criminal laws and the addition of new civil penalties

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[168] *See* 47 U.S.C. §§ 503(b)(1)(B) & (D). We also need not address whether responsibility would lie with independent Fox affiliates in addition to the licensees owned by Fox. *Cf. Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 19230, 19240-41 ¶ 25 (2004).

[169] *Joint Comments* at 24-26. We also reject, as contrary to the plain meaning of the Act, the Networks' contention that we may not impose forfeitures for violations of our indecency rule under section 503(b)(1)(B). While the Networks suggest that the Commission's indecency rule, 47 C.F.R. § 73.3999, merely represents a decision by the Commission to restate 18 U.S.C. § 1464, the indecency rule was adopted by the Commission pursuant to the direction of Congress. *See* Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949, Section 16 (1992).

changed the statutory structure, no substantive change was apparently intended . . . Accordingly, we need not consider any question relating to the possible application of § 1464 as a criminal statute."[170] Thus, the *mens rea* necessary for a criminal conviction is not a prerequisite to the Commission's finding a Section 1464 violation.[171]

B. "The 2002 Billboard Music Awards"

55. *The Programming.* The Commission received a complaint alleging that WTTG(TV), Washington, DC, broadcast indecent material during "The 2002 Billboard Music Awards" program which aired at 8 p.m. Eastern Standard Time on December 9, 2002.[172] Specifically, the

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[170] *Pacifica*, 438 U.S. at 739 n.13.

[171] The Networks' reliance on *FCC v. ABC*, 347 U.S. 284, 296 (1954), for the proposition that "'[t]here cannot be one construction for the Federal Communications Commission and another for the Department of Justice'" is misplaced. *Joint Comments* at 24. In that case, the Court rejected the broad construction urged by the Commission of a statutory prohibition against a "lottery, gift enterprise, or similar scheme" in part because "the same construction would likewise apply in criminal cases." *FCC v. ABC*, 347 U.S. at 296. In contrast, the intent required to impose civil penalties for Section 1464 violations has no impact on its possible application as a criminal statute. *See Pacifica*, 438 U.S. at 739 n. 13.

[172] FCC File No. EB-03-IH-0460. *See* Letter from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (August 22, 2003). As noted in the *Golden Globe Awards Order*, the Commission's Enforcement Bureau had dismissed an earlier complaint concerning the same broadcast on the same station eight months earlier. *See* Letter from Charles Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, FCC to RadioEsq@aol.com, EB-02-IH-0861-MT (December 18, 2002), *cited in Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12 n.32 (noting Bureau dismissal

complainant alleged that while accepting an award, Cher stated: "People have been telling me I'm on the way out every year, right? So fuck 'em."[173] The "2002 Billboard Music Awards" was broadcast nationwide on the Fox Television Network.

56. Examination of a videotape of the broadcast reveals that Cher, a singer and actress, was presented with an "Artist Achievement Award" during "The 2002 Billboard Music Awards" program. Cher had been selected to receive this award at least three weeks before the broadcast.[174] In the course of her remarks accepting the award, she stated as follows: "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."

57. Following the Second Circuit's remand, the Bureau sent Fox a letter of inquiry on September 7, 2006 concerning "The 2002 Billboard Music Awards" broad-

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of complaint). However, Fox has raised no claim of administrative res judicata, and thus, because that defense has been waived, we need not consider it. *Cf. Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 840 F.2d 730, 735 (9th Cir. 1988).

[173] *See* Letter from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (August 22, 2003).

[174] *See* Press Release, "Cher to Receive the Artist Achievement Award on the 2002 Billboard Music Awards Monday, Dec. 9 on Fox" (Nov. 14, 2002), attached to Letter from John C. Quale, Counsel of Fox, to Benigno E. Bartolome, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, File No. EB-03-IH-0460 (September 21, 2006) ("Fox Response to 9/7/2006 LOI").

cast.[175] Fox responded on September 21, 2006.[176] Fox's response confirms that it broadcast the material described in the complaint.[177] Nevertheless, Fox argues that its broadcast of the "F-Word," in context, did not depict or describe sexual activities but rather, "at most," was a "vulgar expletive directed as an insult toward an individual or group against whom the speaker held deep-seated feelings of ill-will," and thus is outside the scope of the Commission's indecency definition.[178] Further, Fox argues that the complained-of material was not actionably indecent because it "contained at most the passing use of an expletive used to convey an insult," it "lasted only a couple of seconds out of a two-hour program," and Fox did not present it to pander to or titillate the audience, or for shock value.[179] Therefore, Fox contends that the dialogue is not actionably indecent.[180]

58. *Indecency Analysis*. With respect to the first prong of the indecency test, Fox contends that Cher's

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[175] *See* Letter from Benigno E. Bartolome, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Fox Television Stations, Inc., File No. EB-03-IH-0460 (September 7, 2006).

[176] *See* Fox Response to 9/7/2006 LOI.

[177] *Id*. at 2.

[178] *Id*. at 10.

[179] *Id*.

[180] Fox also suggests that the complaint should be dismissed because it fails to specifically allege that the complainant viewed "The 2002 Billboard Music Awards." *See id*. at 2. We disagree. Our practice has never been to require such an allegation in order for a complaint to be considered. It is sufficient that the complaint originated from within the market of the station against which the complaint is filed. *See Indecency Policy Statement*, 16 FCC Rcd at 8015 ¶ 24; *see also Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6665 ¶ 30.

statement "fuck 'em" does not describe sexual activities and thus falls outside the scope of our indecency definition. We disagree. As discussed above, a long line of precedent indicates that both literal and non-literal uses of the "F-Word" come within the subject matter scope of our indecency definition.[181] Given the core meaning of the "F-Word," any use of that word has a sexual connotation.[182] Moreover, it hardly seems debatable that the word's power to insult and offend derives from its sexual meaning.[183] Here, for example, Cher's use of the "F-Word" to reference a sexual act as a metaphor to express hostility to her critics is inextricably linked to the sexual meaning of the term.[184] Accordingly, we conclude that, as we stated in *Golden Globe*,[185] its use falls within the scope of our indecency definition. The material thus warrants further scrutiny to determine whether it is patently offensive as measured by contemporary community standards for the broadcast medium. Looking at the three principal factors in our contextual analysis, we conclude that it is.

59. We will first address the first and third principal factors in our contextual analysis—the explicit or graphic nature of the material and whether the material panders to, titillates, or shocks the audience. As we

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[181] *See supra* note 38.

[182] *See supra* para. 16.

[183] *See supra* note 40.

[184] *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 224 (1994) (explaining the sexual meaning of the metaphorical use of the "F-Word" as a verb).

[185] *See Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 8.

have previously concluded, the "F-Word" is one of the most vulgar, graphic, and explicit words for sexual activity in the English language.[186] Moreover, the gratuitous use of this language during a live broadcast of a popular music awards ceremony when children were expected to be in the audience was vulgar and shocking. The complained-of material was broadcast in prime time, and the program was designed to draw a large nationwide audience that could be expected to include many children interested in seeing their favorite music stars.[187] As in the case of "The 2003 Billboard Music Awards,"[188] a significant portion of the viewing audience for this program was under 18. According to Nielsen ratings data, during an average minute of "The 2002 Billboard Music Awards" broadcast, 2,608,000 (27.9%) of the 9,361,000 people watching the program were under 18, and 1,186,000 (12.7%) were between the ages of 2 and 11. In addition, the program's TV-PG rating[189] would *not* have put parents or others on notice of such vulgar language, and the broadcast contained no other warnings to viewers that it might contain material highly unsuitable for children.[190] Furthermore, Fox does not argue that there

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[186] *See id*.

[187] *See Pacifica*, 438 U.S. at 749-51 (identifying as relevant contextual factors the time of day of the broadcast, program content as it affects "the composition of the audience," and the nature of the medium). *See also supra* para. 18.

[188] *See supra* para. 18.

[189] Fox Response to 9/7/2006 LOI at 6.

[190] *See supra* n. 47. In the context of a broadcast rated "TV-PG," an "L" content description warning would not have alerted parents to the use of the "F-word." *See id*. Nonetheless, the "2002 Billboard Music Award," unlike the 2003 version of the same show, did not include even that inadequate "L" content descriptor. So parents relying on the

was any justification for Cher's comment.[191] In light of all of these factors, we conclude that the first and third factors in our contextual analysis weigh in favor of a finding that the material is patently offensive.[192]

60. We next turn to the second factor in our contextual analysis—whether the complained-of material was sustained or repeated. Fox argues that this factor precludes a finding of indecency. As reviewed above, Commission dicta and Bureau-level decisions issued before our *Golden Globe* decision had suggested that expletives had to be repeated to be indecent but that such a repetition requirement would not apply to "descriptions or depictions of sexual or excretory functions." In this case, Cher did more than use the "F-Word" as a mere interjection or intensifier. Rather, she used the word to describe or reference a sexual act as a metaphor to express hostility to her critics. The fact that she was not literally suggesting that people engage in sexual activities does not necessarily remove the use of the term from the realm of descriptions or depictions. This case thus illustrates the difficulty in making the distinction between expletives on the one hand and descriptions or depictions on the other. Particularly in light of this lack

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ratings would not have expected even mild "coarse" language, much less the "F-Word."

[191] For instance, Fox does not contend that Cher's comment had any artistic merit or was necessary to convey any message.

[192] Fox's argument that it did not present Cher's comment for "shock value" misunderstands the contextual analysis employed by the Commission, under which "we examine the material itself and the manner in which it is presented, not the subjective state of mind of the broadcaster." *Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6657-58 ¶ 12.

of clarity, we acknowledge that it was not apparent that Fox could be penalized for Cher's comment at the time it was broadcast. This case also shows that the inquiry into whether a word is used an expletive rather than a description or depiction is wholly artificial. Whether used as an expletive, or as a description or depiction, the offensive nature of the "F-Word" is inherently tied to the term's sexual meaning.

61. In any event, under our *Golden Globe* precedent, the fact that Cher used the "F-Word" once does not remove her comment from the realm of actionable indecency.[193] We stated in *Golden Globe* that 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."[194] To be sure, the fact that material is not repeated does weigh against a finding of indecency, and in certain cases, when all of the relevant factors are considered together, this factor may tip the balance in a decisive manner. This, however, is not one of those cases.

62. We believe that Cher's use of the "F-Word" here during a program aired in prime time was patently offensive under contemporary community standards for the broadcast medium. The patent offensiveness is compounded by the fact that the warnings accompanying the broadcast were inadequate and misleading.[195] We do not believe that the Commission should ignore "the first blow" to the television audience in the particular circum-

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[193] *See Golden Globe Awards Order,* 19 FCC Rcd at 4980 ¶ 12.

[194] *Id*.

[195] *See supra* para. 59.

stances presented here.[196] Our determination, moreover, is consistent with the networks' own broadcast standards during the "safe harbor," which would not allow the broadcast of a single use of the "F-Word" under these circumstances.[197] Such standards reflect the networks' recognition that even a single use of the "F-Word" under most circumstances is not consistent with contemporary community standards for the broadcast medium. Indeed, Fox edited out Cher's comment in its broadcasts to the Mountain and Pacific Time Zones.

63. In sum, we conclude that, given the explicit, graphic, vulgar, and shocking nature of Cher's use of the "F-Word," Fox's broadcast was patently offensive under contemporary community standards for the broadcast medium.

64. Fox also argues that it should not be held responsible for airing Cher's comment. In particular, Fox argues that Cher's remarks were unscripted and that the five-second delay and editing system that it used for "The 2002 Billboard Music Awards" previously had been effective in preventing the airing of objectionable material.[198] We need not address these arguments, however, because we decide that it would not be equitable to sanction Fox for a different reason. Specifically, as discussed above, it was not clear at the time that broadcasters could be punished for the kind of comment at issue here.[199]

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[196] *Pacifica*, 438 U.S. at 748-49.

[197] *See supra* para. 29.

[198] *See* Fox Response to 9/7/06 LOI at 4-6, 10.

[199] *See supra* para. 60; *see also Golden Globe Awards Order*, 19 FCC Rcd at 4982 ¶ 15.

65. *Profanity Analysis.* Consistent with our decisions in the *Golden Globe Awards Order* and the *Omnibus Order*, we also find that Cher's use of the "F-Word" in the program at issue violated Section 1464's prohibition on the broadcast of "profane" utterances.[200] In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" was profane within the meaning of Section 1464 because, in context, it constituted vulgar and coarse language "'so grossly offensive to members of the public who actually hear it as to amount to a nuisance.'"[201] In certain cases, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[202] However, such circumstances are not present here: Fox does not contend that Cher's profane language was essential to informing viewers on a matter of public importance or that modifying the language would have had a material impact on its function as a source of news and information. On the contrary, Fox maintains that it attempted to delete the profane language, and did remove it before the program aired on time delay in the Mountain and Pacific Time Zones.[203] It is undisputed that the "F-Word" was broadcast within the 6 a.m. to 10 p.m. time frame relevant to

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[200] 18 U.S.C. § 1464.

[201] *Golden Globe Awards Order,* 19 FCC Rcd at 4981 ¶ 13, *quoting Tallman*, 465 F.2d at 286.

[202] *Omnibus Order* at 2669 ¶ 19, *citing Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan*," Memorandum Opinion and Order, 20 FCC Rcd 4507, 4512-14 ¶¶ 13-18 (2005).

[203] Fox Response to 9/7/2006 LOI at 10.

a profanity determination.[204] Because it was broadcast at a time of day when there was a reasonable risk of children's presence in the audience (indeed, as detailed above, over two-and-a-half million viewers of the broadcast were under the age of 18),[205] the broadcast is legally actionable.

66. *No Sanction Proposed.* For the reasons stated above, we conclude that "The 2002 Billboard Music Awards" contained indecent and profane material in violation of Section 1464 and our rules. Fox stations broadcast indecent and profane language in an awards show that aired between 6 a.m. and 10 p.m. and was watched by people of all ages. Under the circumstances, however, we find that no forfeiture is warranted in this case for the reason set forth above.[206] In light of our decision not to impose a forfeiture, we will not require the licensees of any of the stations that broadcast the material to report our finding here to us as part of their renewal applications, and we will not consider the broadcast to have an adverse impact upon such licensees as part of the renewal process or in any other context.[207]

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[204] *See Omnibus Order*, 21 FCC Rcd at 2666 ¶ 8.

[205] *See supra* para. 59 (noting that, according to Nielsen ratings data, 27.9% of the people watching an average minute of "The 2002 Billboard Music Awards" broadcast were under 18, and 12.7% were between the ages of 2 and 11); *see also Pacifica*, 438 U.S. at 749-50 (discussing government's interest in protecting children from "offensive expression")

[206] *See supra* para. 64. In light of our decision not to impose a forfeiture, we need not address whether the violations of Section 1464 and our rule were willful within the meaning of Section 503(b).

[207] The constitutional arguments raised by the Networks relating to the application of our indecency framework to "The 2002 Billboard Music Awards" are the same as the constitutional arguments that we

C. "The Early Show"

67. "The Early Show" is a two-hour morning program that airs weekdays on the CBS Television Network. On December 13, 2004, the program devoted significant coverage to discussion of the CBS program "Survivor: Vanuatu," which had crowned its winner the prior evening. As part of that coverage, "The Early Show" co-host Julie Chen conducted a live interview with the final four contestants from "Survivor: Vanuatu." During that interview, Ms. Chen asked runner-up Twila Tanner whether she agreed with fourth-place finisher Eliza Orlins that Chris Daugherty, the winner of the program, would have prevailed had he been matched up in the finals against Ms. Orlins. Ms. Tanner then responded, "Not necessarily. I knew he was a bullshitter from Day One."

68. A viewer subsequently filed a complaint with the Commission that Station KDKA-TV, Pittsburgh, Pennsylvania, which is licensed to CBS Broadcasting Inc., aired Ms. Tanner's comment at approximately 8:10 a.m. Eastern Standard Time, on December 13, 2004, and alleged that the comment was indecent and profane.[208] In response to the Commission's letter of inquiry, CBS does not deny that the comment in question was broadcast on KDKA-TV.[209] However, CBS argues, among

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have already addressed with respect to the "2003 Billboard Music Awards" broadcast. We reject those arguments for the same reasons given above. *See supra* para. 42-52.

[208] FCC File No. EB-05-IH-0007.

[209] *See* Letter From Robert Corn-Revere, Counsel to CBS, to Marlene H. Dortch, Secretary, FCC, File No. EB-05-IH-0007 (Sept. 21, 2006), at 1 ("CBS Response to 9/7/2006 LOI").

other things, that the material is not actionable because it was spoken during a *bona fide* news interview.[210]

69. In the *Omnibus Order*, we "recognize[d] the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment's free press guarantee."[211] Indeed, when we denied an indecency complaint regarding material that was aired during "The Today Show," which is a competitor of "The Early Show," we reiterated the need for the Commission to exercise caution with respect to news programming.[212]

70. This restrained approach is consistent with a long line of Commission precedent. For example, in *Peter Branton*, the Commission held that an NPR news story on John Gotti, which included a wiretap of a conversation in which Gotti repeatedly used variations of the "F-Word," was not indecent because "it was an integral part of a bona fide news story."[213] The Commission explained that "we traditionally have been reluctant to intervene in the editorial judgments of broadcast licens-

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[210] *See id*. at 4.

[211] *Omnibus Order*, 21 FCC Rcd at 2668 ¶ 15.

[212] *Id*. at 2717 ¶ 218.

[213] *Peter Branton*, 6 FCC Rcd at 610. *See Infinity Broadcasting Corp. of Pennsylvania*, Memorandum Opinion and Order, 3 FCC Rcd 930, 937 n. 31 (1987), *vacated on other grounds sub nom. ACT I*, (noting that "context will always be critical to an indecency determination and . . . the context of a bona fide news program will obviously be different from the contexts of the three broadcasts now before us, and, therefore, would probably be of less concern."); *Indecency Policy Statement*, 16 FCC Rcd at 8002-03 (stating that "[e]xplicit language in the context of a bona fide newscast might not be patently offensive.").

ees on how best to present serious public affairs programming to their listeners."[214]

71. In today's Order, we reaffirm our commitment to proceeding with caution in our evaluation of complaints involving news programming. To be sure, there is no outright news exemption from our indecency rules.[215] Nevertheless, in light of the important First Amendment interests at stake as well as the crucial role that context plays in our indecency determinations, it is imperative that we proceed with the utmost restraint when it comes to news programming.

72. Some critics have questioned whether the segments of "The Early Show" devoted to "Survivor: Vanuatu" are legitimate news programming or instead are merely promotions for CBS's own entertainment programming.[216] CBS nevertheless maintains in its LOI

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[214] *Peter Branton*, 6 FCC Rcd at 610.

[215] *See, e.g., Evergreen Media Corporation of Chicago AM*, Memorandum Opinion and Order, 6 FCC Rcd 5950, 5951 (Mass Media Bur. 1991) (finding talk show segment discussing pornographic photographs of Vanessa Williams to be indecent and concluding that "[e]ven if it had been argued that the [show] in question was comparable to a news program, the Vanessa Williams segment contained vulgar material presented in a pandering and titillating manner unlike anything found in the *Branton* case."); *Pacific and Southern Company Inc. (KSD-FM)*, Notice of Apparent Liability, 6 FCC Rcd 3689 (Mass Media Bur. 1990) (forfeiture paid) (finding that "exceptionally explicit and vulgar" material that was "presented in a pandering manner" was indecent even though it "arguably concerned an incident that was at the time 'in the news.'").

[216] *See, e.g.*, Howard Rosenberg, *The Fact Is, the Joke is the News*, Broadcasting & Cable, Nov. 1, 2004, at 32 ("Even more common is the venerable, widespread practice of cross-promotion, as on The Early Show, a production of CBS News, which each Friday devotes a lengthy segment to 'covering' the previous night's Survivor episode on the

response that its interview of the "Survivor: Vanuatu" contestants was a "*bona fide* news interview." "The Early Show" is produced by CBS News and addressed a variety of other topics that morning, including a suicide bombing in Iraq, the withdrawal of Bernard Kerik as a candidate to serve as Secretary of Homeland Security, and the apparent poisoning of then-Ukrainian opposition leader Viktor Yushchenko, which clearly fall under the rubric of news programming. In light of these factors and our commitment to exercising caution in this area, we believe it is appropriate in these circumstances to defer to CBS's plausible characterization of its own programming. Accordingly, we find that, in the *Omnibus Order*, we did not give appropriate weight to the nature of the programming at issue (i.e., news programming).

73. Turning to the specific material that is the subject of the complaint, we can certainly understand that viewers may have been offended by Ms. Tanner's coarse language. Nevertheless, given the nature of her comment and our decision to defer to CBS's characterization of the program segment as a news interview, we conclude, regardless of whether such language would be actionable in the context of an entertainment program, that the complained-of material is neither actionably indecent nor profane in this context. Accordingly, we deny the complaint.

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network, as if who got bumped off was an actual news story. As a bonus, The Early Show folds itself into this fantasy from a special set outfitted to resemble Survivor.").

D. "NYPD Blue"

74. As discussed above, the Commission received complaints regarding several "NYPD Blue" episodes that aired on KMBC-TV, Kansas City, Missouri, and other unidentified ABC Television Network affiliates beginning at 9:00 p.m. Central Standard Time, in which the "S-Word" was used.[217] In the *Omnibus Order*, the Commission found those broadcasts containing the "S-Word" to be apparently indecent and profane.[218] In its response to the Commission's letter of inquiry, KMBC Hearst-Argyle Television, Inc. ("Hearst"), licensee of KMBC-TV, does not dispute that it aired the complained-of material. Hearst argues, however, that the complaints should either be dismissed on procedural grounds or denied on the merits.

75. Raising an argument that we did not previously consider, Hearst contends that the Commission should dismiss the complaints as insufficient under the enforcement policy set forth in the *Omnibus Order*.[219] One complaint was filed against each of the "NYPD Blue" broadcasts at issue, and each of these complaints was filed by the same person. All of these complaints stated that the complained-of broadcast "originally aired at 9:00 p.m. CST on Kansas City affiliate KMBC" and was "also seen in homes across the country on ABC affiliates."[220] How-

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[217] FCC File No. EB-03-IH-0355.

[218] *Omnibus Order*, 21 FCC Rcd at 2696-98 ¶¶ 125-36.

[219] KMBC Hearst-Argyle Television, Inc. Response to Letter of Inquiry and Memorandum of Law, File No. EB-03-IH-0355 at 8 (Sept. 21, 2006) ("Hearst Response to 9/7/2006 LOI").

[220] *See* Letters from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC, to David Solomon, Chief, Enforcement Bureau, dated July 1 and July 3, 2003.

ever, as Hearst accurately maintains, none of the complaints was filed by anyone residing in the market served by KMBC-TV. Nor were any of the complaints filed by anyone residing in a market where the complained-of material aired outside of the 10:00 p.m.-6:00 a.m. safe harbor. Instead, each complaint was filed by the same individual from Alexandria, Virginia, where, as Hearst points out,[221] the material was aired during the safe harbor.[222] In addition, none of the complaints contains any claim that the out-of-market complainant actually viewed the complained-of broadcasts on KMBC-TV or any other ABC affiliate where the material was aired outside of the safe harbor.[223] Thus, there is nothing in the record either to tie the complaints to Station KMBC-TV's local viewing area (or the local viewing area of any station where the material was aired outside of the safe harbor), or to suggest that the broadcast programming at issue was the subject of complaints from anyone who viewed the programming on any station that aired the material outside of the safe harbor.

76. We therefore agree with Hearst that we should dismiss the complaints regarding "NYPD Blue" pursuant to the enforcement policy that we announced in the *Omnibus Order*. There, the Commission stated that it would propose forfeitures only against licensees and stations whose broadcasts of actionable material were the subject of a viewer complaint filed with the Commis-

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[221] Hearst Response to 9/7/2006 LOI at 11, n.9.

[222] *See supra* note 217 and accompanying text. The letterhead of each complaint identified contact information for PTC's office in Alexandria, Virginia, as well as a PTC office in Los Angeles, California.

[223] *See id*.

sion,[224] explaining that "[i]n the absence of complaints concerning the program filed by viewers of other stations, it is appropriate that we sanction only the licensee of the station whose viewers complained about that program."[225] In addition to demonstrating appropriate restraint in light of First Amendment values, this enforcement policy preserves limited Commission resources, while still vindicating the interests of local residents who are directly affected by a station's airing of indecent and profane material.

77. Based on consideration of Hearst's arguments, we agree that consistent application of our restrained enforcement policy requires us to apply the same approach to this case that we applied to the notices of apparent liability in the *Omnibus Order*. While this case does not involve the imposition of forfeitures against KMBC-TV or any other licensee, the sufficiency of a complaint is the first step rather than the last step in the Commission's analysis. Thus, as Hearst puts it, "[o]nly the dismissal of the NYPD Blue complaints will bring [this case] into harmony with the Commission's announced enforcement policy."[226] Accordingly, we dismiss these complaints.

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[224] *Omnibus Order*, 21 FCC Rcd at 2673 ¶ 32, 2676 ¶ 42, 2687 ¶ 86.

[225] *Id*. at 2687 ¶ 86. *See Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6665 ¶ 30 (under the enforcement policy announced in the *Omnibus Order*, "it is sufficient that viewers in markets served by each of the CBS Stations filed complaints with the Commission identifying the allegedly indecent program broadcast by the CBS Stations.").

[226] Hearst Response to 9/7/2006 LOI at 11.

IV. ORDERING CLAUSES

78. Accordingly, IT IS ORDERED that Section III.B of the *Omnibus Order* is VACATED in its entirety.

79. IT IS FURTHER ORDERED that the complaints referenced in this Order involving "The 2003 Billboard Music Awards" and "The 2002 Billboard Music Awards" are GRANTED to the extent set forth herein and OTHERWISE DENIED.

80. IT IS FURTHER ORDERED that the complaints referenced in this Order involving "The Early Show" are DENIED.

81. IT IS FURTHER ORDERED that the complaints referenced in this Order involving "NYPD Blue" are DISMISSED.

82. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Susan L. Fox, Esq., Vice President, Government Relations, The Walt Disney Company, 1150 17th Street, N.W., Suite 400, Washington, D.C. 20036.

83. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to John W. Zucker, Esq., Senior Vice President, Law-Regulation, ABC, Inc., 77 West 66th Street, New York, N.Y. 10024.

84. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Seth Waxman, Esq., Counsel to The Walt Disney Company, Wilmer, Cutler, Pickering, Hale & Dorr, LLP, 2445 M Street, N.W., Washington, D.C. 20037.

85. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Anne Lucey, Esq., Senior Vice President, Regulatory Policy, CBS Corporation, 601 Pennsylvania Ave., N.W., Suite 540, Washington, DC 20004.

86. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Robert Corn-Revere, Counsel to CBS Corp., Davis Wright Tremaine, LLP, 1500 K Street, N.W., Suite 450, Washington, D.C. 20005-1272.

87. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Mark J. Prak, Esq., Counsel to Hearst-Argyle Television, Inc., Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, 150 Fayetteville Street, Suite 1600 Wachovia Capitol Center, Raleigh, North Carolina 27601.

88. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Maureen A. O'Connell, Esq., News Corporation, 444 North Capitol Street, N.W., Suite 740, Washington, D.C. 20001.

89. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to John Quale, Esq., Counsel to Fox Television Stations, Inc., Skadden, Arps, Slate, Meagher & Flom, LLP, 1440 New York Ave., N.W., Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
CONCURRING IN PART, DISSENTING IN PART

Re: Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Order

Today's *Order* is pursuant to a grant from the United States Court of Appeals for the Second Circuit of the Commission's voluntary remand request to reconsider portions of the March 15, 2006, *Omnibus Order*.[1] In that decision, I concurred in part and dissented in part because I believed the Commission had failed to develop a consistent and coherent indecency enforcement policy. It was my hope that the Commission would use this remand to clarify and rationalize our indecency regime,[2] but regulatory convenience and avoidance have prevailed instead. I am, therefore, compelled again to concur in part and dissent in part.

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[1] *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664 (2006) ("*Omnibus Order*").

[2] Today's decision presumes that the general statement that the Commission's "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens," *and nothing more*, is sufficient to inform the public and broadcasters what we believe are the national, contemporary community standards of the broadcast medium. *In re Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 (2004); *compare, Reno v. ACLU*, 521 U.S. 844 (1997) (finding the terms "indecent", "patently offensive" and "in context" were so vague that criminal enforcement would violate the fundamental constitutional principles, but while recognizing "the history of extensive government regulation of broadcasting").

The proverbial "elephant in the room" looming over today's decision is the *Golden Globe Awards Order*,[3] which inexplicably has been pending reconsideration for more than two and one-half years. While the Commission has simply refused to review the *Golden Globe* case, we have relied upon, expanded and applied it more than any other indecency case in the past two years. As the foundational basis for the Commission's decision in the cases involved in this remand, we should review and finalize this watershed decision.[4]

As I stated in the *Omnibus Order*, "by failing to address the many serious concerns raised in the *Golden Globe Awards* case, before prohibiting the use of additional words, we fall short of meeting the [appropriate] constitutional standard and walking the tightrope of a restrained enforcement policy."[5] Today, we fail again. Litigation strategy should not be the dominant factor guiding policy when First Amendment protections are at stake.

In its remand request, the Commission asked the Second Circuit for an opportunity to consider the con-

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[3] *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 18 FCC Rcd 19859 (Enf. Bur. 2003), *reversed*, 19 FCC Rcd 4975 (2004) ("*Golden Globe Awards Order*"), *petitions for stay and recon. pending* (since April 2004).

[4] *Golden Globe Awards Order* at ¶¶ 9, 12 and 14 (eviscerating our longstanding standard for "isolated or fleeting" expletives, establishing that any use of the "F-word" or a variation, in any context, "invariably invokes a coarse sexual image," and changing our 30-year standard of what constitutes profanity).

[5] *Omnibus Order*, Statement of Commissioner Jonathan S. Adelstein, concurring in part, dissenting in part, 21 FCC Rcd *at* 2726.

cerns of broadcasters before issuing a final decision. Yet squandering this opportunity, the Commission fails to consider fully all concerns relating to an August 22, 2003, complaint against the December 9, 2002, broadcast of "The Billboard Music Awards" by WTTG(TV) in Washington, D.C. This *Order* does not adequately address the Enforcement Bureau's December 18, 2002, decision letter, which denied the same complaint on the merits.[6] No one filed either a petition for reconsideration or an application for review and, consequentially, the decision letter became a final order. It seems patently unfair for the Commission to re-adjudicate the same complaint, involving the same parties on the same cause of action, first in the initial decision letter, then in the *Omnibus Order*, and then again in today's *Order*. The Supreme Court has held that the principle of *res judicata* applies to an adjudicative administrative proceeding where the agency has properly resolved disputes of fact and the parties have had an adequate opportunity to litigate.[7] The Commission should not have re-adjudicated this complaint a second time in the *Omnibus Order*. Certainly today, the third time around, this complaint should be dismissed, or the Commission should reverse the Enforcement Bureau's decision letter and the resultant final order.

More broadly, today's *Order* notes that the Supreme Court in *Pacifica* stressed context and we have repeatedly said "the full context in which the material ap-

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[6] The decision letter dismissing a complaint against the December 9, 2002, broadcast of "The Billboard Music Awards" by WTTG (TV), Washington, D.C., was referenced in footnote 32 of the *Golden Globe Awards Order*, and in footnote 9 of my Statement in that *Order*.

[7] *United States v. Utah Constr. & Min. Co.*, 384 U.S. 394, 422 (1966).

peared is critically important." Yet the Commission's analyses of the 2002 and 2003 broadcasts of "The Billboard Music Awards" are limited exclusively to a few seconds of a two-hour program. No consideration whatsoever is given to the entirety of the program. While it is perfectly reasonable to conclude that, after considering the entire program, the vulgarity and shock value of a particular scene permeated and dominated the program, the Commission should consider the totality of the program, rather than limit our consideration to an isolated programming segment.

Similarly, the Commission's justification for denying the complaint against the December 12, 2004, broadcast of "The Early Show," and reversing its indecency and profanity findings reflect the arbitrary, subjective and inconsistent nature of the Commission's decision-making.[8] In the *Omnibus Order*, the Commission concluded that the use of the s-word was shocking "*particularly* during a morning news interview,"[9] and that this "vulgarity in a morning television interview is *of particular concern* and *weighs heavily* in our analysis."[10] Today, without any legal support found in American jurisprudence, the Commission, *sua sponte*, creates a new "plau-

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[8] In the *Omnibus Order*, with respect to "The Early Show," the Commission said: "In rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance. We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are clearly not present here." *Omnibus Order*, ¶ 144.

[9] *See Omnibus Order*, 21 FCC Rcd at 2699 ¶ 141 [emphasis added].

[10] *Id.* [emphasis added].

sible"[11] standard to determine the threshold question of whether a particular program segment qualifies as a "*bona fide* news interview."[12] While the Commission admits that "there is no outright news exemption from our indecency rules," it will nevertheless defer to a broadcaster's "plausible characterization of its own programming." I not only fail to find a legal basis for the Commission's latest invention,[13] I also fail to understand the justification for such a shift in reasoning. While the creation of this "infotainment" exception that can be invoked by a broadcaster's plausible characterization" may be convenient in this order today, it will surely create unintended consequences in future cases.

Even as applied, this new "plausible" standard is problematic. In this case, the CBS "Early Show" interview of contestants from the CBS program "Survivor: Vanuatu" was a cross promotion of a network's primetime entertainment programming on the same network's morning show. It stretches the bounds to argue this is legitimate news or public affairs programming. It is unreasonable to say that the latest contestant to be voted off the island or the latest contestant to hear "you're fired" or even "come on down" is "serious public affairs programming."[14] The network creates its own "reality" on a reality show, and we are somehow to be-

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[11] ¶ 72, supra.

[12] *Id*. [emphasis in original].

[13] Looking at this contorted reasoning one must wonder whether the Commission is attempting to avoid reconsideration of its policy enunciated in the *Omnibus Order* that, consistent with *Golden Globe*, any variant, of the S-word is inherently excretory. *Omnibus Order* at 2699 ¶ 139.

[14] *Peter Branton*, 6 FCC Rcd 610 (1991).

lieve that developments within its own artificial world are news? The only news here is how far this Commission is willing to stretch the definition of "news."

I also dissent in part from the Commission's decision to dismiss numerous complaints against several nationally televised episodes of the ABC network program "NYPD Blue" because the complaints did not come from viewers who resided in the station's media market. While the Commission has not changed its decision on the merits of the complaints, it has relied on an arbitrary procedural change in our enforcement policy that creates an unnecessary disconnect between the basis of our indecency authority and our enforcement policy, and encourages letter-writing campaigns, which will further burden Commission resources.

The Commission has long maintained, and does not now dispute, that we enforce a national, contemporary community standard, not a local one. For instance, in an effort to justify its authority in today's *Order*, the Commission observes that the broadcast medium has a "special nature" and "a uniquely pervasive presence in American life."[15] The Commission points out the "the Supreme Court emphasized the 'pervasive presence [of the broadcast medium] in the lives of all Americans' and that indecent broadcasts invade the privacy of the home."[16] Yet, the Commission's new enforcement policy is inconsistent with the national standard we impose and the pervasiveness of the medium we regulate.

This new enforcement policy is also inconsistent with the Commission's reasoning in other sections of today's

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[15] *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

[16] *See id.*, citing *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970).

Order. For example, as an important factor weighing in support of its finding that the 2002 and 2003 broadcasts of "The Billboard Music Awards" are indecent, the Commission cites Nielsen rating data on the total number of children under 18 and children between ages 2 and 11 who watched the programs, nationally. Yet based on our enforcement policy, the Commission will actually only protect children in the particular local media market where there is a complaint.[17]

The consequences of this new policy reveal its lack of logic. When the Commission determines a *national* network broadcast violates our *national* community standards, we will only fine the *local* station that has a complaint filed against it by a viewer in its media market. Although our obligation is to enforce the law to protect all children, we will only fine a local station that has the misfortune of being in a market where a parent or an adult made the effort to complain. This policy is misguided because a sufficient and valid complaint is truly the first, and an important, step in our indecency enforcement regime. The complaint and the complainant serve an important role, but the real party in interest is the Commission, acting on behalf the public, rather than the specific individual or organization that brings allegedly indecent material to our attention.

According to the new enforcement policy, even after we have determined the complained-of material is indecent, we will willfully blind ourselves to the potentially millions of children and households that watched the indecent program. The new policy would fine only the local station and only if the complainant is in its cover-

[17] *Order*, ¶¶ 18, 59 and 65.

age area. Other stations will essentially be "sitting ducks," waiting for an in-market viewer to file a complaint about the same program, in order for the Commission to act. I do not understand how we can say we are faithfully enforcing the law when we are aware of violations of the law that we simply choose to ignore.

This is not the restrained enforcement policy encouraged by the Supreme Court in *Pacifica*.[18] Restraint applies to the standard we use in our decision-making and the manner in which we decide what constitutes actionable, indecent material.[19] Restraint applies to the development of a coherent framework that is based on rational and principled distinctions.

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[18] *Pacifica*, 438 U.S. at 763, POWELL J, *concurring in part and concurring in judgment.*

[19] The Commission claims that "the sufficiency of a complaint is the first step rather that the last step in the Commission's analysis." *Order*, ¶ 77. However, in the single complaint filed against the "The 2002 Billboard Music Awards," for example, the complainant does not even aver that she watched the program. Quite the contrary, the complaint was filed "on behalf of the Parents Television Council and its over 800,000 members." The complainant alleges, the broadcast "was seen in homes across the country on the Fox network, and in Washington DC." Based on the Commission's reasoning in today's *Order* and the *Golden Globe Awards Order*, this complaint does not state a *prima facie* case to justify Commission action. *See Order*, ¶¶ 40 and 65 (stating that "[i]n the *Golden Globe Awards Order*, the Commission concluded that the F-Word was profane within the meaning of Section 1464 because, in context, it contained vulgar and coarse language 'so grossly offensive to members of the public who *actually hear* it as to amount to a nuisance'") (emphasis added). *See also Order*, ¶ 75 (stating that complaints against "NYPD Blue" are justifiably dismissed because "none of the complaints contains any claim that the out-of market complainant actually viewed the complained-of broadcasts") (emphasis added).

The power to limit speech should be exercised responsibly, and with the utmost caution. While I agree with some aspects of today's *Order*, I respectfully cannot support our reasoning. For that reason, I concur in part and dissent in part.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NUMBERS: 06-1760-ag (L),
06-2750-ag (CON), 06-5358-ag (CON)

FOX TELEVISION STATIONS, INC., CBS BROADCASTING, INC., WLS TELEVISION, INC., KTRK TELEVISION, INC., KMBC HEARST-ARGYLE TELEVISION, INC., ABC, INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, RESPONDENTS,

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., ABC TELEVISION AFFILIATES ASSOCIATION, INTERVENORS

[Filed: June 4, 2007]
[Issued as Mandate: July 7, 2007]

JUDGMENT

Before: Hon. PIERRE N. LEVAL, Hon. ROSEMARY S. POOLER, Hon. PETER W. HALL, *Circuit Judges*.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 4th day of June, two thousand and seven.

Petitions for review of an order from the Federal Communications Commission.

This cause came on to be heard on the transcript of record from the Board of Immigration Appeals and was submitted by counsel.

On consideration whereof, it is hereby ORDERED, ADJUDGED and DECREED that the petitions for review of said Federal Communications Commission be and they hereby are GRANTED, the order of the FCC is VACATED, and the matter is REMANDED for further proceedings in accordance with the opinion of this Court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE,
Clerk

by

/s/ TRACY W. YOUNG
TRACY W. YOUNG
Motions Staff Attorney

APPENDIX D

1. 18 U.S.C. 1464 provides:

Broadcasting obscene language

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.

2. 47 U.S.C. 312 provides in relevant part:

Administrative sanctions

(a) Revocation of station license or construction permit

The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission

authorized by this chapter or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

(6) for violation of section 1304, 1343, or 1464 Title 18; or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) Cease and desist orders

Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter, or section 1304, 1343, or 1464 Title 18, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

* * * * *

3. 47 U.S.C. 503 provides in relevant part:

Forfeitures

* * * * *

(b) Activities constituting violations authorizing imposition of forfeiture penalty; amount of penalty; procedures applicable; persons subject to penalty; liability exemption period

(1) Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have—

(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;

(B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;

(C) violated any provision of section 317(c) or 509(a) of this title; or

(D) violated any provision of section 1304, 1343, or 1464 of Title 18;

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be

in addition to any other penalty provided for by this chapter; except that this subsection shall not apply to any conduct which is subject to forfeiture under subchapter II of this chapter, part II or III of subchapter III of this chapter, or section 507 of this title.

* * * * *

4. Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, provides:

> FCC REGULATIONS.—The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming—
>
> (1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and
>
> (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).
>
> The regulations required under this subsection shall be promulgated in accordance with section 553 of title 5, United States Code, and shall become final not later than 180 days after the date of enactment of this Act.

5. 47 C.F.R. 73.3999 provides:

> **Enforcement of 18 U.S.C. 1464 (restrictions on the transmission of obscene and indecent material).**
>
> (a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene.

(b) No 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.