No. 07-582

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION OF NBC UNIVERSAL, INC. AND NBC TELEMUNDO LICENSE CO.

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the Commission had failed to explain adequately the abrupt reversal of its longstanding determination that fleeting and isolated utterances of expletives generally fall outside the Commission's definition of broadcast indecency.

RULE 29.6 STATEMENT

NBC Universal, Inc. operates the NBC and Telemundo broadcast networks, as well as nonbroadcast television networks. NBC Universal, Inc. is owned by National Broadcasting Company Holding, Inc. (which is a wholly owned subsidiary of General Electric Company) and by Vivendi Universal, S.A., a publicly traded company.

NBC Telemundo License Company is the licensee or controlling parent entity of the licensees of several full-power, television broadcast stations. It is a wholly owned subsidiary of NBC Telemundo, Inc., which is owned by both NBC Telemundo Holding Company (a wholly owned subsidiary of General Electric Company), and by NBC Universal, Inc.

General Electric Company has no parent company, and no publicly held company owns 10 percent or more of its stock.

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JURISDICTION

The judgment of the court of appeals was entered on June 4, 2007. Justice Ginsburg twice extended the time within which to file a petition for certiorari, the first time on August 23, 2007, to and including October 4, 2007, and then again on September 24, 2007, to and including November 1, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case involves nothing more than a routine application of a foundational principle of administrative law: that, under the Administrative Procedure Act (APA), when an agency undertakes "a reversal of policy," it must "adequately explain[] the reasons" for the change. *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

For 30 years, the Commission held that fleeting utterances of expletives generally fell outside its definition of indecent material because they did not depict or describe sexual or excretory activities. In the rare instance in which the "F-Word" or the "S-Word" was used literally to describe sexual or excretory activity, the fleeting nature of the utterance ordinarily compelled a finding that it was not "patently offensive." In the Order at issue here, the Commission has reversed course entirely, deeming any and every use of the "F-Word" and the "S-Word"

to fall within the subject matter scope of its indecency definition and to be presumptively "patently offensive." As the court of appeals correctly concluded, the Commission proffered no reasonable explanation for this fundamental change in more than 30 years of agency policy. The court of appeals also correctly remanded the proceedings to the Commission so that it could try again.

The court of appeals' remand to the Commission does not warrant this Court's review. There is no division among the court of appeals concerning the principle of administrative law at issue here; the Commission disputes only its application. But this Court generally does not grant review to engage in "error correction." Moreover, an opportunity to attempt to produce an explanation that meets the requirements of the APA remains open to the Commission on remand.

1. The Commission's authority to regulate the content of over-the-air broadcasts dates back to 1927. Section 29 of the Radio Act of 1927 provided that "[n]o person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communications." Radio Act of 1927, ch. 169, 44 Stat. 1173. The statute, relocated to the criminal code, currently provides: "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." 18 U.S.C. § 1464 (2006).

In the early decades of the content restriction's existence, the Commission did not directly enforce it; the Commission mentioned the statute only very rarely in the context of license renewals, and it adopted a restrained enforcement approach. Indeed, the Commission did not seek to impose a forfeiture

on a licensee for violation of Section 1464 *until 1970. See In re WUHY-FM*, 24 F.C.C.2d 408 (Apr. 3, 1970).

The landscape changed in 1975 with the Commission's decision against Pacifica Foundation for its broadcast of comedian George Carlin's "Filthy Words" monologue. The monologue was a 12-minute routine in which Carlin listed "'the words you couldn't say on the public . . . airwaves'"—"'shit, piss, fuck, cunt, cocksucker, motherfucker, and tits'"—and "proceeded to list those words and repeat them over and over again in a variety of colloquialisms." *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978). In its initial decision, the Commission articulated the following definition of broadcast indecency: "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." *In re Citizen's Complaint Against Pacifica Found. Station WBAI*, 56 F.C.C.2d 94, 97–98 ¶ 11 (Feb. 12, 1975). The Commission concluded that Carlin's monologue violated that standard.

Conceding that the "Filthy Words" monologue fit within the Commission's definition of indecent material, the broadcaster challenged the sanction on statutory and First Amendment grounds. Recognizing that the words used in Carlin's monologue were "not entirely outside the protection of the First Amendment," and that even Carlin's "monologue would be protected in other contexts," this Court narrowly upheld the Commission's sanction. The Court emphasized, however, the "narrowness of [its] holding," and stated it "ha[d] *not* decided that an occasional expletive . . . would justify any sanction," much less "a criminal prosecution." *Pacifica*, 438

U.S. at 746, 750 (emphasis added). But "Filthy Words" was tantamount to "verbal shock treatment." *Id.* at 760–61 (Powell, J., concurring).

In the years that followed, the Commission brought enforcement actions only against *sustained and repeated* uses of the "seven particular words that were broadcast in [the] George Carlin monologue." *New Indecency Enforcement Standards*, Public Notice, 2 F.C.C.R. 2726, 2726 (Apr. 29, 1987). Indeed, it expressly disclaimed any authority to adjudge a broadcast "indecent" based on the broadcast of a single expletive: "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." *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 13 (Apr. 29, 1987) (emphases added). Its content restriction was *not* aimed at programs that contained "merely an occasional . . . expletive, but instead" at content that "dwelt on sexual or excretory matters in a pandering and titillating fashion." *In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, 933 ¶ 20 (Dec. 29, 1987). Over the next several years, the Commission repeatedly ruled that the utterance of a single, fleeting expletive was not indecent. *E.g.*, *In re Applications of Lincoln Dellar*, 8 F.C.C.R. 2582, 2585 ¶ 26 (Audio Servs. Div. Apr. 6, 1993).

In 2001, pursuant to a settlement agreement in which the Commission agreed to clarify its indecency policy, the Commission issued an indecency policy statement intended to "provide guidance" to the broadcast community. *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, 8016 ¶ 30 (Apr. 6,

2001) ("*Industry Guidance*").[1] Echoing its decision in *Pacifica*, the Commission set out a two-part test for broadcast indecency: (1) "the material must describe or depict sexual or excretory organs or activities," and (2) it must be "*patently offensive* as measured by contemporary community standards for the broadcast medium." *Id.* at 8002 ¶¶ 7–8. In measuring the offensiveness of any particular broadcast—the second step of its test for indecency—the Commission informed broadcasters that it would look to three factors: "(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*." *Id.* at 8003 ¶ 10.

In accordance with that two-part definition, the *Industry Guidance* cites several cases where the disputed broadcast was determined not to be indecent either because the language, in context, did not have an "'inescapabl[y]'" "'sexual import,'" or because the sexual or excretory reference was "fleeting and isolated." *Id.* at 8006, 8008–09 ¶¶ 15, 18 (citing cases); *see also id.* at 8008 ¶ 17 ("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"). As suggested by the focus on "patent offensiveness"—

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[1] The 2001 *Industry Guidance* document was published pursuant to a *1994* settlement agreement resolving a broadcaster's *1992* vagueness challenge to the Commission's indecency standard. *See Industry Guidance*, 16 F.C.C.R. at 8016 n.23; *see also U.S. v. Evergreen Media Corp. of Chi.*, 832 F. Supp. 1183 (N.D. Ill. 1993).

the second step of its test—the Commission also stressed that indecency determinations may be "highly fact-specific" and that "the *full* context in which the material appeared is critically important." *Id.* at 8002–03 ¶ 9.

2.a. The Commission's approach to fleeting expletives changed abruptly and dramatically after NBC's 2003 live broadcast of the *60th Annual Golden Globe Awards*. Accepting an award, Bono exclaimed: ""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 II*). The Commission received 234 complaints alleging that the live broadcast was "obscene and/or indecent." *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 F.C.C.R. 19,859, 19,859 ¶ 2 (E.B. Oct. 3, 2003) ("*Golden Globe I*"). All but 17 of the 234 complaints were mass-generated by the Parents Television Council. *Id.* at 19,859 n.1.[2]

The Commission's Enforcement Bureau denied all of the complaints. *Golden Globe I*, 18 F.C.C.R. at 19,862 ¶ 7. Applying the indecency standard as it had long been understood, the Bureau held that although "[t]he word 'fucking' may be crude and offensive . . . in the context presented here, [it] *did not de-*

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[2] The Parents Television Council screens television programs and then blankets cyberspace with e-mails about content it finds objectionable. The mass e-mails draw traffic to the Council's website, where anyone can submit a complaint to the Commission—whether they have viewed a program or not. *See, e.g.*, Parents Television Council, *FCC Indecency Complaint Form*, http://www.parentstv.org/ptc/action/lasvegas/mainfcc.asp (last visited Jan. 30, 2008).

scribe sexual or excretory organs or activities. Rather, the performer used the word 'fucking' as an adjective or expletive to emphasize an exclamation." *Id.* at 19,861 ¶ 5 (emphasis added). The Bureau also noted the Commission's consistent view that "fleeting and isolated remarks of this nature do not warrant Commission action." *Id.* at 19,861 ¶ 6.

The Commission reversed the Bureau's decision and introduced a fundamentally new interpretation of its indecency standard. *Golden Globe II*, 19 F.C.C.R. at 4975–82. Where the Enforcement Bureau analyzed whether Bono's words actually depicted or described sexual or excretory activity—as required by the first step of the Commission's test—the Commission held that "*any* use of [the 'F-Word'] or a variation, in *any* context, inherently has a sexual connotation." *Id.* at 4978 ¶ 8 (emphases added). The Commission declared that it was reversing its prior precedents holding that "isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent": "[W]e conclude that any such interpretation is no longer good law." *Id.* at 4980 ¶ 12.[3]

Broadcasters filed petitions for reconsideration. For *years*, however, the Commission took no action on those petitions, precluding judicial review while holding open the threat of enforcement based on the new standard. Even today—three-and-a-half years

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[3] Announcing a "new approach to profanity," the Commission also reversed the Enforcement Bureau's determination that Bono's exclamation was not "profane language." *Id.* at 4982 ¶ 15. Under its new approach, the Commission would regulate as "profane" all "language so grossly offensive to members of the public who actually hear it as to amount to a nuisance," including "the 'F-Word' and those words (or variants thereof) that are as highly offensive as the 'F-Word.'" *Id.* at 4981–82 ¶¶ 13,14.

after they were filed—the Commission *still* has not acted on those petitions.

b. In 2006, while the broadcasters' petitions for reconsideration of *Golden Globe II* remained pending, the Commission issued a new ruling—*In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, 21 F.C.C.R. 2664 (Feb. 21, 2006) (Omnibus Order)—in which the Commission applied to a new set of programs the indecency and profanity standards it adopted in *Golden Globe II*. Applying its "new approach" (of which the Commission's actions had precluded judicial review) the Commission adjudicated as "indecent" and "profane" the broadcast of fleeting expletives in four programs:

- The isolated use of the word "bullshit" by New York City police detective Andy Sipowicz in episodes of ABC's *NYPD Blue*. *Id.* at 2696–98 ¶¶ 125–136.
- The single use of the word "bullshitter" during a live news interview on CBS's *The Early Show*. The word was unexpectedly used by a castaway contestant from *Survivor: Vanuatu* when referring to an unscrupulous competing contestant. *Id.* at 2698–2700 ¶¶ 137–145.
- A single, unscripted use of the phrase "fuck 'em" by the performer Cher during a live broadcast by FOX of the *2002 Billboard Music Awards*. *Id.* at 2690–92 ¶¶ 101–111.
- An unscripted moment during FOX's *2003 Billboard Music Awards* live telecast, during which presenter Nicole Richie stated, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." *Id.* at 2692–95 ¶¶ 112–124.

c. Several broadcasters filed petitions for review in the court of appeals, seeking (at long last) the judicial review that the Commission had thus far managed to evade. Faced with that prospect the Commission asked the court of appeals to remand the case so that the Commission could "reconsider" its omnibus decision. Joint Mot. for Voluntary Remand, at 4 (July 5, 2006). The court of appeals did so.

On remand, the Commission changed course yet again and reached altogether new—and different—conclusions about the purported "indecency" of the very programs addressed in the original Omnibus Order. Where in the Omnibus Order the Commission opined that the word "bullshitter" used by the *Survivor: Vanuatu* contestant "invariably invokes a coarse excretory image," and that the broadcast of this word was patently offensive, indecent, and profane, "particularly during a morning news interview," in the Remand Order, the Commission concluded that the word "bullshitter" was "neither actionably indecent nor profane" *precisely because* it was broadcast as part of a news interview. The Commission suggested, however, that the word would be actionable if the expletive had been uttered during an "entertainment program." *Compare* Omnibus Order, 21 F.C.C.R. at 2699 ¶¶ 138, 139, 141 *with* Pet. App. 128a ¶ 73.

More fundamentally, unlike *Golden Globe II*, where the Commission expressly acknowledged that its decision represented a "depart[ure]" from settled "Commission and staff action[s that] have indicated that isolated or fleeting broadcasts of the 'F-Word' . . . are not indecent," 19 F.C.C.R. at 4980 ¶ 12, and the original Omnibus Order, where the Commission likewise acknowledged that "existing precedent would have permitted this broadcast," 21 F.C.C.R. at

2692 ¶ 111, on remand the Commission purported to discover a "long line of precedent" supporting its position. Pet. App. 73a ¶ 16. Even though *Golden Globe II* expressly acknowledged that it was introducing a new approach, and even though the original Omnibus Order also expressly confirmed that *Golden Globe II* had changed the law, the Remand Order dismissed those statements and concluded that it had not changed its interpretation of its indecency standard at all. Based on that revisionist reading of the regulatory history, the Commission affirmed its earlier conclusion that FOX's live broadcasts of the 2002 and 2003 Billboard Music Awards were actionably indecent and profane. Pet. App. 62a ¶ 1.

Back in front of the court of appeals, the Commission changed its tune yet again. In its brief, the Commission argued that the Remand Order "could hardly have been clearer in acknowledging" a "change in course," but maintained that "the new policy and the old policy led to the same result." FCC C.A. Br. 34, 35. But the Commission abandoned even that view by the time of oral argument, coming full circle to concede, finally and without reservation, that, in fact, in *Golden Globe II*, the Commission had indeed changed its policy with respect to fleeting expletives.

3.a. The court of appeals granted the petition for review, vacated the Remand Order, and remanded the case to the Commission for further proceedings. Pet. App. 144a. Accepting the first of the broadcasters' several administrative law, statutory, and constitutional arguments, the court of appeals held that "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." Pet. App. 18a.

The court of appeals recognized that there were two aspects to the Commission's about-face: First, the Commission changed its view of the *meanings* of the F-Word and S-Word—from ones that depend on whether the words are used to "depict" or "describe" sexual or excretory activities, to ones that, "'*in any context*,'" invariably convey a depiction or description of sexual or excretory activity. Pet. App. 31a (quoting *Golden Globe II*, 19 F.C.C.R. 4975, 4978, ¶ 8) (emphasis supplied by court). Second, the Commission changed its view of the *offensiveness* of the F-Word and the S-Word—from the view that a single, isolated utterance was very unlikely to rise to the level of "patently offensive," to the view that any use of the word was presumptively patently offensive and thus "presumptively indecent and profane." Pet. App. 15a.

The court of appeals concluded that the Commission's explanation for the change in its view as to the meaning of the F-Word or S-Word was inadequate. According to the Commission, it may be "difficult . . . to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions." Pet. App. 83a. According to the court of appeals, the Commission's explanation "defie[d] any commonsense understanding of these words, which, as the general public well knows, are often used in everyday conversation without any 'sexual or excretory' meaning." Pet. App. 29a. "[N]o reasonable person," the court of appeals observed, would have believed that President Bush was referencing excretory activities when he remarked to British Prime Minister Tony Blair "that the United Nations needed to 'get Syria to get Hezbollah to stop doing this shit.'" *Id.* Yet under the Commission's new understanding of its indecency standard, those re-

marks were deemed inescapably to "depict" or "describe" excretory activities.

The court of appeals also held that the Commission's explanation for its revised view of the offensive character of fleeting utterances of the F-Word and S-Word was inadequate. The Commission had argued that "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow.'" Pet. App. 84a (quoting *Pacifica*, 438 U.S. at 748–49). This argument, the court of appeals explained, gave no explanation for "why [the Commission] has changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between *Pacifica* and *Golden Globes*." Pet. App. 25a. Moreover, the Commission's willingness to "subject[] viewers to the same 'first blow'" when it deemed the program to have sufficient social value (such as *The Early Show*'s interview of a reality-show contestant and the film *Saving Private Ryan*) undermined the Commission's new contention that "mere exposure to this language" caused harm. *Id.* at 27a. Thus, the court of appeals concluded, the Commission had failed "to provide the reasoned explanation necessary to justify [its] departure from established precedent." *Id.* at 28a.[4]

b. Judge Leval dissented. He disagreed with the Commission that the "S-Word" and other excretory references could be regulated as indecent, reasoning that "censorship" could be justified only by "potential . . . harm to children resulting from indecent broad-

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[4] The court of appeals also rejected the "Commission's new approach to profanity," finding it to be "supported by even less analysis, reasoned or not." Pet. App. 33a. The Commission does not seek review of that determination. *See* Pet. 11 n.2.

casting," not by a mere "concern for good manners." Pet. App. 59a n.18. "[E]xcrement," which, in Judge Leval's experience, "is a main preoccupation of [children's] early years," could not credibly be said to pose a threat of harm to children. *Id.* "[R]eferences to sex," on the other hand, did pose a sufficiently serious threat to children to warrant "censorship." *Id.* Within that arena, Judge Leval opined that the Commission had provided "a sensible, although not necessarily compelling" rationale for its conclusions that all uses of the "F-Word" are depictions or descriptions of sexual activity and that even a single fleeting use of that word was presumptively patently offensive: "[T]he Commission's central explanation for the change was essentially its perception that the 'F-Word' . . . conveys an inescapably sexual connotation." *Id.* at 49a.

4. The Commission did not ask the court of appeals to rehear the matter en banc.

REASONS FOR DENYING THE PETITION

The Commission acknowledges that, "[o]n 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," and that such remands generally do "not merit this Court's review." Pet. 26. This case presents no basis for an exception to that general rule. There is no division of authority on the question presented by the Commission. Indeed, no court—not even the Second Circuit—has resolved whether the Commission may regulate fleeting expletives as indecent. The Commission is left to contend that the Second Circuit erred in concluding that the Commission's Remand Order failed to provide a reasoned explanation for its rejection of longstanding agency precedent holding that fleeting utterances of expletives are not indecent

in accordance with the commonly accepted interpretation of the APA. But "the misapplication of a properly stated rule of law" generally does not warrant this Court's review. Sup. Ct. R. 10.

In any event, the Second Circuit's decision is entirely correct. Even having been afforded the opportunity to develop its reasoning on remand, rather than forthrightly explain its radical change in course with respect to the regulation of fleeting expletives, the Remand Order *denied* that there had been any change at all. The Commission cannot reasonably explain a change in policy when it refuses to acknowledge that the policy has changed at all. Indeed, at no point did the Remand Order explain how expletives such as the "F-Word"—words that the Commission had recognized for decades to have numerous non-sexual and non-excretory meanings—could be a depiction or description of sexual or excretory activities each and every time they are uttered. In the absence of such an explanation, the Remand Order's conclusion that Cher's and Nicole Richie's uses of the F-Word were "depictions" of "sexual activity" is arbitrary and capricious.

That administrative law holding creates no tension, much less a conflict, with this Court's decision in *Pacifica*. *Pacifica* narrowly rejected a broadcaster's statutory and First Amendment challenges to the Commission's authority to regulate as indecent a 12-minute monologue, aptly-titled "Filthy Words," that the broadcaster *conceded* to be indecent under the Commission's standard. *Pacifica* had nothing to say about the question at the center of this case—whether, under the APA, the Commission sufficiently and reasonably justified its conclusion that any use of the F-Word or the S-Word constitutes

a "depiction" or "description" of sexual or excretory activities and is presumptively patently offensive.

Not only has the Commission failed to advance a sound rationale for Supreme Court review, it has overlooked a substantial basis for denying review. Under its version of the Question Presented, the Commission's petition for certiorari seeks reinstatement of its authority to regulate fleeting utterances of expletives as indecent. To grant the Commission the relief it seeks, this Court would need to address numerous administrative law, statutory, and constitutional challenges advanced by the broadcasters that the court of appeals did not reach. This Court's policy against review of remands and similar interlocutory orders applies with particular force when a grant of review would compel this Court to address issues without the benefit of a lower court decision, as it would here.

A. The Court Of Appeals Correctly Applied This Court's Administrative Law Precedents

The Commission does not dispute that when an agency undertakes "a reversal of policy," the APA's mandate of reasoned decision making requires it to "adequately explain[] the reasons" for the change. *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (when an agency changes policy, it is obligated "to supply a reasoned analysis for the change"). Indeed, "[a]n 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) (Roberts, J.). And where, as here, "an agency is applying a multi-factor test through

case-by-case adjudication," "[t]he need for an explanation is particularly acute." *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (Roberts, J.).

The Commission also does not dispute that the court of appeals identified and applied the correct legal standard. The Commission simply disagrees with the Second Circuit's conclusion that the Remand Order failed to provide an adequate explanation for the Commission's change in policy with respect to fleeting utterances of expletives. The "reality," the Commission asserts, is that it "provided a thorough, reasoned explanation for its change in policy." Pet. 14. For three reasons, the Commission is incorrect.

1. Of course, it is the explanation provided by the agency—not that of its lawyers (or, for that matter, Judge Leval)—that this Court must evaluate. *See State Farm*, 463 U.S. at 50 ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action. . . . [A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself."). So we look to the Remand Order itself for the agency's rationales. And in the Remand Order, far from forthrightly explaining the reasons for its change in policy, the Commission *denied* that it had changed its fleeting expletive policy *at all*. There can be no reasonable explanation for a change in agency policy when the agency refuses to acknowledge even that the policy has changed.

For nearly 30 years, the Commission generally viewed isolated utterances of expletives as falling outside the scope of its definition of indecency—either because the expletive did not depict or describe sexual or excretory activity, or, in the rare cases when the expletive did, in fact, depict or describe such activity, because the isolated and fleeting

nature all but foreclosed a finding of patent offensiveness. In *Golden Globe II* and the Omnibus Order, the Commission abandoned those precedents and held that *any* use of the F-Word and the S-Word is a depiction or description of sexual or excretory activity, and that all such utterances are presumptively patently offensive.

On remand, however, the Commission purported to discover "[a] long line of precedent" supporting the notion that the "F-Word"—even when used only "for emphasis or as an intensifier"—constitutes a depiction or description of sexual activity falling within "the subject matter scope of our indecency definition." Pet. App. 73a ¶ 16; *see also id.* at 83a ("[I]t has long been clear that [expletives] fall within the subject matter scope of our indecency definition, which since *Pacifica* has involved the description of sexual or excretory organs or activities."). The Remand Order similarly dismissed as "staff letters and dicta" the corpus of pre-*Golden Globe* agency precedent establishing that the fact that an expletive was uttered in a passing or fleeting manner and was not repeated weighed forcefully against a finding that the utterance was patently offensive. Pet. App. 79a ¶ 20; *see also* Pet. App. 22a & n.6 (observing that the Remand Order had "backpedal[ed]" from a forthright "recognition that the Commission was departing from prior precedent"). And purporting to discern no change in its policy with respect to fleeting expletives, the Commission rejected the broadcasters' argument that "Nicole Richie's comments would not have been actionably indecent prior to [the Commission's] *Golden Globe* decision." Pet. App. 80a–81a ¶ 22. This is not the grappling with agency precedent that the APA requires to justify a change in policy. It is a stubborn, and absurd, insistence that there had been no change at all.

2. Nor did the Remand Order provide any rationale capable of justifying the Commission's new conclusion that any use of the "F-Word" and the "S-Word" is within the subject matter scope of its indecency definition. Under the first step of the Commission's definition of broadcast indecency, the image or utterance "*must* describe or depict sexual or excretory organs or activities." Pet. App. 71a–72a ¶ 15 (citing *Industry Guidance*, 16 F.C.C.R. at 8002 ¶ 8) (emphasis added). The Commission long has acknowledged that some uses of expletives such as the "F-Word" do not carry a sexual meaning and therefore often fall outside the subject matter scope of the Commission's indecency definition. *See, e.g.*, *In re Applications of Lincoln Dellar*, 8 F.C.C.R. at 2585 ¶ 26 (news anchor exclamation that he had "fucked that one up" held to have no sexual meaning). The Remand Order, however, came to an entirely different conclusion, holding that Cher's and Nicole Richie's obviously non-literal uses of the "F-Word" and, indeed, *any* use of the "F-Word," "falls within the scope of [its] indecency definition." Pet. App. 73a–74a ¶ 16.

The Commission offered the following defense of its conclusion: "Given the core meaning of the 'F-Word,' any use of that word has a sexual connotation even if [it] is not used literally." Pet. App. 73a–74a ¶ 16; *see also Golden Globe II*, 19 F.C.C.R. at 4978 ¶ 8 ("any use of [the 'F-Word'] or a variation, in any context, inherently has a sexual connotation"). Even if one assumes (as the Commission apparently does) that a "sexual connation" constitutes a depiction or description of sexual activity, the Commission's reasoning is just an *ipse dixit*: the word is a depiction because it is a depiction. Noticeably absent is *any* explanation for the *change* in the Commission's view as to the *meanings* of the "F-Word." In

this context, the Commission is obligated to explain how the "F-Word" came to develop the "core meaning" the Commission never seemed to discern before. If the Commission believes the meaning and usage of the "F-Word" has narrowed considerably since 2001, it is obligated at least to say so and to justify its conclusion with reasoned argument and evidence. But three times now—first in *Golden Globe II*, then in the Omnibus Order, and finally in the Remand Order—the Commission failed to do so, in the final iteration failing even to acknowledge that there *had* been any change at all. A "barebones incantation of . . . rationales cannot do service as the requisite 'reasoned basis' for altering its long-established policy." *Action for Children's Television v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987).

The only argument remotely resembling an explanation for the Commission's change in course came to the Commission as an afterthought: "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." Pet. App. 83a ¶ 23. That's it. But far from providing a justification for the Commission's position, this argument illustrates its silliness. The issue is not confusing with respect to the programs in dispute here. For example, no viewer of the 2002 Billboard Awards could reasonably believe that Cher was actually exhorting her audience to have sex with her critics, or that she was otherwise "depicting" or "describing" sexual activity.

If the Commission is not required to justify changes in its views as to the meaning of particular words (which is to say, speech)—if it is permitted to redefine words at its pleasure—there is no effective limit on the subject matter scope of the Commission's

indecency jurisdiction. The court of appeals was right to reject the Commission's transparent efforts to circumvent its own indecency definition and expand its censorship jurisdiction without so much as an attempted, let alone reasonable explanation.

3. The Commission also failed to offer any explanation for its decision to disregard one of the three "principal factors" it previously had identified as pivotal in determining whether material is "patently offensive"—the second step of the Commission's indecency definition. *Industry Guidance*, 16 F.C.C.R. at 8002–03 ¶¶ 8, 10. Quoting this Court's decision in *Pacifica*, the Commission suggests that its policy shift is justified because excusing "'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow.'" Pet. App. 84a ¶ 25. But language that is not indecent threatens no cognizable harm and thus cannot be said to amount to a "blow." The Commission's proffered rationale—that permitting even an isolated expletive forces viewers to absorb the "first blow"—thus takes as an assumption its ultimate conclusion, namely that a fleeting expletive constitutes "indecent language." *Pacifica*, 438 U.S. at 748. A tautology is a grossly inadequate substitute for reasoned explanation.[5]

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[5] In suggesting that broadcasters are urging (and that the decision of the court of appeals requires) "a blanket exemption for isolated expletives," "allowing one free use of any expletive no matter how graphic or gratuitous," Pet. 14, 25, the Commission lampoons both the broadcasters' argument and the decision below. The broadcasters' argument is that, prior to *Golden Globe II*, in cases involving fleeting utterances of expletives, the Commission accorded significant weight to the fact that the material did not "dwell[] on or repeat[] at length" disputed expletives, *see, e.g.*, *Industry Guidance*, 16 F.C.C.R. at 8008 ¶ 17 ("where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has

[Footnote continued on next page]

Even though the Commission's argument that a fleeting expletive constituted a "first blow" to the viewing audience was unsupported by *Pacifica* and contrary to "nearly thirty years" of agency precedent "between *Pacifica* and *Golden Globes*," Pet. App. 25a, the court of appeals nevertheless entertained the notion that it could be sustained if it were appropriately supported by evidence in the administrative record. Such evidence—if any had existed—might have provided some measure of reasoned explanation for the Commission's newly minted view that fleeting expletives were presumptively indecent. But there was no such evidence. Indeed, the Remand Order 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." Pet. App. 32a.[6]

[Footnote continued from previous page]
tended to weigh against a finding of indecency"), and that the Commission's decision to accord *no weight at all* to this "principal factor" was a departure from precedent and change in policy that requires reasoned explanation. And that—not that the Commission must reinstate an "automatic pass" for isolated expletives—is the holding of the court of appeals.

[6] Contrary to the Commission's contention (at 22–23), the Second Circuit's observation in this regard is not the least bit inconsistent, much less "in direct conflict," with the D.C. Circuit's decision in *Action for Children's Television v. FCC*, 58 F.3d 654 (1995) (en banc). That case addressed a facial First Amendment challenge to Section 16(a) of the Public Telecommunications Act of 1992, which limited the hours during which indecent material could be broadcast. *See id.* at 656. Section 16(a) applied only to indecent broadcasts; the questions presented were whether and when the First Amendment permits the government to restrict indecent broadcasts. It was in that context that the D.C. Circuit rejected the argument that the Commission was required to demonstrate that indecent speech caused
[Footnote continued on next page]

If the administrative record was "devoid of any evidence" supporting the Commission's supposition that fleeting expletives cause harm to the viewing audience, there was even less support for the Commission's suggestion that continuing the pre-*Golden Globe II* policy would "permit broadcasters to air expletives at all hours of a day so long as they did so one at a time." Pet. App. 85a. As the court of appeals recognized, this contention was contradicted by the Commission's own order, which recognized that even though broadcasters are *permitted* to air indecent material "during the 10:00 p.m.-6:00 a.m. 'safe harbor,'" "they do not allow the 'F-Word' or the 'S-Word' to be broadcast during that time period." Pet. App. 86a–87a ¶ 29. In the absence of any reasoned explanation for the Commission's change in policy, the court of appeals committed no error in remanding the case to the agency for it to provide a complete explanation of its reasoning.

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harm to minors. *Id.* at 661–62. The questions here are antecedent—whether fleeting expletives always fall within the subject matter scope of the Commission's indecency definition and are always presumptively patently offensive—and the court of appeals was quite correct to inquire into the evidence supporting the Commission's affirmative answer. To argue, as the Commission does (at 23–24), that "Section 1464 does not require the Commission to show that the language to which it applies is otherwise harmful" just skips past the question whether Section 1464 sanctions *all* fleeting expletives. The Commission may not, in the guise of ascertaining "'what is in the public interest,'" Pet. 22 (quoting *State Farm*, 463 U.S. at 57), circumvent the First Amendment by arbitrarily enlarging those categories of speech that currently enjoy less-than-full First Amendment protection.

B. There Is No Conflict With This Court's Decision In *Pacifica*

In an attempt to convert a mundane APA-remand case into something more, the Commission contends that the decision below conflicts with *Pacifica*. It does not. *Pacifica*'s First Amendment holding is not even implicated here because the court of appeals did not reach the broadcasters' First Amendment challenge. *See* Pet. App. 35a ("[W]e refrain from deciding the various constitutional challenges to the Remand Order raised by the Networks"). And to the extent *Pacifica* involved a question of statutory interpretation, the question in *Pacifica* is different from the one presented here.

1. In *Pacifica*, this Court addressed a broadcaster's statutory and First Amendment challenges to the Commission's decision to sanction as indecent a broadcast of George Carlin's 12-minute "Filthy Words" monologue. *See* 438 U.S. at 735. That broadcaster *did not dispute* that the Carlin monologue fell within the Commission's definition of broadcast indecency; the monologue contained *100* separate utterances of the "F-Word" or the "S-Word" (an average of one every seven seconds) and the broadcaster acknowledged that several of them "referred to excretory or sexual activities or organs." *Id.* at 739. Nor did the broadcaster "quarrel with the conclusion that this afternoon broadcast was patently offensive." *Id.*

This Court narrowly rejected the broadcaster's First Amendment challenge. "Words that are commonplace in one setting," Justice Stevens explained, "are shocking in another." *Id.* at 747 (plurality op.). Applying the same nuisance rationale it had applied to other sexually indecent speech, the Court held that the First Amendment permitted the Commis-

sion to zone such speech away from daytime broadcasts when children were likely to be in the audience. *See id.* at 746. The Court stressed, however, that it "ha[d] *not* decided that an occasional expletive . . . would justify any sanction." *Id.* at 750 (emphasis added). Indeed, in providing the decisive vote, Justice Powell stated his view, that "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 [Pacifica] here." *Id.* at 760–61 (Powell, J., concurring).

Unlike *Pacifica*, this case concerns only "isolated use[s] of [] potentially offensive word[s]." *Id.* Unlike *Pacifica*, the broadcasters vigorously dispute that their broadcasts fall within the ambit of the Commission's definition of indecency; they deny that their fleeting broadcasts of the "F-Word" were sexual references; and they most certainly do quarrel with the Commission's conclusion that their broadcasts were patently offensive. And unlike *Pacifica*, this case turns on a routine application of undisputed principles of administrative law, as opposed to a question as sweeping as "whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene." *Id.* at 729. The decision below does not "conflict" with *Pacifica* in any conventional sense of that term.

2. Nevertheless, the Commission maintains that a portion of the reasoning of the decision below is inconsistent with "the context-driven approach governing broadcast indecency that this Court upheld in *Pacifica*." Pet. 15. In scrutinizing the Commission's "first blow" rationale, the Second Circuit observed that the Commission had tolerated expletives when

uttered in an interview of a reality show contestant on *The Early Show* or in *Saving Private Ryan*. *See* Pet. App. 26a–27a. The Commission's willingness to make exceptions—to expose viewers to expletives in some circumstances—the court of appeals reasoned, called into question the Commission's proffered rationale of protecting viewers from the "blows" caused by hearing such language. This line of reasoning, the Commission asserts, "conflicts directly" with *Pacifica*'s "context-driven approach." For at least two reasons, the government is mistaken.

First, *Pacifica* did not announce "the context-driven approach governing broadcast indecency" that the Commission says it did. As noted above, the broadcaster in *Pacifica* did not dispute that the "Filthy Words" monologue was patently offensive. *See* 438 U.S. at 739. "[C]ontext" was relevant in *Pacifica* to determine whether the sanction imposed on repeated, deliberately broadcast, and *concededly indecent* speech violated the First Amendment. *See id.* at 747.

Second, nothing in the decision of the court of appeals prevents the Commission from taking into account the nature of the program that includes a depiction of sexual or excretory activities in determining whether that depiction is patently offensive. The nature of a broadcast is obviously and inescapably relevant to the third "principal factor[]" comprising the test for patent offensiveness—"*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*, 16 F.C.C.R. at 8003 ¶ 10. A lengthy and graphic depiction of genitalia is not patently offensive when presented in an educational program on sexual health. But if one holds constant the audience (as the Commission

does), a practice of excluding a depiction of sexual organs in one setting, while permitting the same depiction in other settings, also obviously and inescapably calls into question whether that depiction is uniformly harmful, a proposition on which the Commission's "first blow" rationale for sanctioning fleeting expletives depends. It is the Commission's "first blow" rationale for abandoning the second "principal factor" of its offensiveness test—not its use of context in analyzing the third factor—that the court of appeals called into doubt.

C. The Second Circuit's Remand To The Agency Does Not Warrant This Court's Review

1. The Commission contends that the decision below, which, "[o]n its face . . . does nothing more than remand the case to the FCC to provide a new explanation for its change in policy" with respect to fleeting expletives, in fact, "effectively reinstitutes an automatic per se exemption for the broadcast of isolated expletives," and "strikes at the heart of [the] broadcast indecency regulatory framework." Pet. 26, 27, 28. Indeed, the Commission construes the decision below as "effectively nullif[ying] the prohibition on indecent language found in Section 1464." Pet. 29; *see also id.* at 15 ("The court has . . . effectively invalidat[ed] much of the Commission's authority to enforce 18 U.S.C. 1464."). If the decision below were nearly as momentous as the Commission now suggests—if it truly did "nullif[y]" an Act of Congress and carve out "the heart of [the] broadcast indecency regulatory framework"—one would think that the Commission would have petitioned for rehearing *en banc* before the Second Circuit. But it did not.

Moreover, the Commission's parade of horribles is entirely of its own making: "*If* the Commission[] . . .

cannot . . . provide a reasoned explanation" for its change in policy, "the FCC *may* find itself unable to fulfill a large portion of its broadcast indecency enforcement obligations." Pet. 29 (emphases added). To be sure, the Second Circuit expressed considerable doubt whether the Commission's new policy—even if accompanied by the requisite reasoned explanation for the change in course—could survive the broadcasters' other challenges. Pet. App. 45a. But the Second Circuit's expression of doubt hardly transforms its remand for a reasoned explanation into a "Sisyphean errand." Pet. 15. Proffering a reasoned explanation will not be futile; it will enable the Second Circuit to finally resolve the broadcasters' other administrative law, statutory, and constitutional challenges to the Commission's new policy. That the Commission doubts its own ability to provide a reasoned explanation for its change in course cannot convert this ordinary agency remand—which the Commission agrees generally "would not merit this Court's review," Pet. 26—into a case that compels immediate review.[7]

2. For related reasons, this case is in a uniquely poor posture for Supreme Court review. This Court could not resolve the question presented by the Commission—"[w]hether the court of appeals erred in striking down the . . . Commission's determination

[7] If the Commission's complaint is that the outcome of those other challenges is predetermined, it should be made to bear at least the burden that it places on those who assert a futility exception to the requirement of administrative exhaustion, which is to say, a "showing that an adverse decision [i]s a certainty." *Nat'l Sci. & Tech. Network, Inc. v. FCC*, 397 F.3d 1013, 1014 (D.C. Cir. 2005). The Commission could not possibly make that showing here, where it failed even to seek rehearing from the other judges on the Second Circuit, any of whom might consider future petitions for review.

that the broadcast of vulgar expletives" may be sanctioned as indecent "when the expletives are not repeated," Pet. i—in favor of the Commission without addressing the broadcasters' half-dozen alternative arguments that the court of appeals found no occasion to resolve. *See* Pet. App. 18a (noting the seven arguments raised by broadcasters). Particularly noteworthy among these arguments is the broadcasters' contention that the Commission's definition of indecent material is unconstitutionally indeterminate and vague. The court of appeals did not reach this question, but to determine that the court of appeals "erred in striking down the [Commission's] determination" that the broadcasts at issue could be sanctioned as indecent, Pet. i, this court would need to address it. That fact alone strongly militates against review.

a. As even Judge Leval recognized, to the extent that the Commission is evaluating and sanctioning speech based upon its content, it is engaged in "censorship." Pet. App. 59a n.18. Unless conducted according to clear standards, and with precision and due regard for precedent, government censorship is necessarily arbitrary and inevitably will chill large amounts of speech. It is for that reason that this Court has held that vague and indeterminate content-based restrictions on speech violate the First Amendment. *See, e.g., Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048–51 (1991).

In *Reno v. ACLU*, 521 U.S. 844 (1997), this Court struck down as unconstitutionally vague an indecency standard in the Communications Decency Act ("CDA") that was materially identical to that employed by the Commission. This Court found the CDA's indecency definition was plagued with "uncertainty" and full of terms that lacked "any textual

embellishment at all" or were barely explained; concluding its vagueness would have had an "obvious chilling effect on free speech," the Court struck down the standard. 521 U.S. at 871 & n.35, 872. As the D.C. Circuit has recognized, "the [*Pacifica*] Court did not address, specifically, whether the FCC's definition was on its face unconstitutionally vague." *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338–39 & n.9 (D.C. Cir. 1988). *Reno*, however, strongly suggests that it is.

The bizarre outcomes produced by the Commission's complaint-driven enforcement regime exemplify the "many ambiguities concerning the scope" of the Commission's indecency standard. *Reno*, 521 U.S. at 870. For example, in its decision concerning *Saving Private Ryan*, the Commission allowed the repeated broadcast of multiple expletives, including "'fuck'" and "'shit' and [their] variations," throughout a three-and-a-half hour movie. The Commission opined that the repeated language was "neither gratuitous nor in any way intended or used to pander, titillate or shock," but instead was "[e]ssential to the ability of the filmmaker to convey" the "horrors of war." *In re Complaints Against Various Television Licensees Regarding Their Broadcast of "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4512–13 ¶¶ 13, 14 (Feb. 3, 2005). But notwithstanding its supposed deference to a filmmaker's "ability . . . to convey" an idea, the Commission sanctioned a Martin Scorsese-produced public-television documentary about blues musicians. *See* Omnibus Order, 21 F.C.C.R. at 2686 ¶ 82. There, the Commission quickly rejected the artist's view that the language was "essential," holding that the *Saving Private Ryan* exception would only operate in "unusual circumstances" that were "not present here." *Id.* Broadcasters cannot possibly predict whether individual Commissioners will pro-

tect a program's message as a "matter of public importance," or impose sanctions because its content was "communicative" but not "essential," *id.* at 2689 ¶ 97, nor can they know beforehand whether the Commission will apply its precedent or pronounce it limited to "unusual circumstances." There could be no better example of a "vague" and imperceptible standard.

b. The Commission previously has sought to distinguish *Reno* on the ground that it was an "Internet" case, and because in dicta it "recognized the 'special justifications for regulation of the broadcast media'" mentioned in *Pacifica*. *Indecency Policy Statement*, 16 F.C.C.R. at 8000 ¶ 4.

That distinction fails for two reasons: First, there is no reason why the "medium" should matter in a vagueness inquiry: Either a standard is vague or it is not. *Reno*'s evaluation of the standard applies with equal force here, regardless of the fact that it is an "Internet" case.

Second, to the extent that *Pacifica* premised its distinction of the broadcast medium from other channels of communication on the "'*unique*' attributes of broadcasting," *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989) (emphasis added)—to wit, that broadcasts were, in 1978, "a *uniquely* pervasive presence in the lives of all Americans" and were "*uniquely* accessible to children" as compared to other types of content, *see* 438 U.S. at 748–49 (emphases added)—it rests, thirty years later, on a moth-eaten foundation. In the age of cable and satellite television and the Internet, broadcasting is now one of many methods of delivering content to Americans in their homes. Broadcast television, like other content in our media-driven age, may be "pervasive," but in 2008, even the Commission has trouble con-

tending that it is "*uniquely*" so.[8] And in our current age of media saturation, where children are likely to have access not only to broadcast television, but also to cable or satellite television, the Internet, and a cell phone, it can no longer be seriously maintained that broadcast content is "uniquely accessible to children" when compared to other media. 438 U.S. at 749. Indeed, in light of post-*Pacifica* technologies—such as ratings systems and the V-Chip—that are capable of withholding indecent material "from the young without restricting the expression at its source," 438 U.S. at 748–49, parents have ultimate control over whether programming is "accessible" to children at all. *Cf. United States v. Playboy Entm't Co.*, 529 U.S. 803, 816, 826–27 (2000).

Thus, there no longer exists any sound basis for according broadcast speech less protection than obtains in other channels of communication. As in other media, restrictions on broadcast indecency must employ the least restrictive available means competent to achieve the government's compelling interest. *See Sable Commc'ns*, 492 U.S. at 126; *see also Ashcroft v. ACLU*, 542 U.S. 656, 666–70 (2004) (striking down the Child Online Protection Act because the government had not demonstrated that its compelling interest in protecting minors could not be well-served by parental installation of Internet filtering software); *Playboy*, 529 U.S. at 816, 826–27 (rejecting a statute requiring full scrambling of explicit cable channels when parents could simply ask the cable company to block certain channels from the home). In light of post-*Pacifica* technologies, the

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[8] The Remand Order acknowledges that *86 percent* of television households subscribe to cable or satellite service and receive numerous channels of both broadcast and non-broadcast programming. Pet. App. 106a–107a ¶ 49.

Commission cannot possibly sustain this burden. Indeed, not only are these new technologies less-restrictive alternatives to direct suppression of expression, but, in the case of the V-Chip, it is a *congressionally-mandated* less restrictive means. *See* 47 U.S.C. § 303(x).[9]

This Court could not grant the Commission the relief it requests—affirmance of its new fleeting expletives policy—without first addressing the vagueness and narrow tailoring issues and the others deferred by the court of appeals. The fact that the court of appeals has not yet found occasion to address these issues counsels strongly against immediate review.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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9 To the extent that the Commission argues that the so-called "scarcity rationale" dictates that this Court apply a more permissive standard of review to its content-based restrictions of broadcasters' speech, this proffered rationale may make it necessary for this Court to reconsider its decision in *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), the foundations of which are even more moth-eaten than those of *Pacifica*.