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 Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF NATIONAL RELIGIOUS BROADCASTERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Amicus adopts the question presented as presented by Petitioner. The question presented for review is as follows:

> 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.

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INTEREST OF AMICUS CURIAE[1]

National Religious Broadcasters is a non-profit, membership association with offices in Manassas, Virginia and Washington, D.C., that represents the interests of Christian broadcasters throughout the nation. Its President and CEO is Frank Wright, Ph.D. The vast majority of our approximately fourteen hundred member broadcasters is made up of radio stations, radio networks, television stations, television networks, and the executives, principals, and production and creative staff of those broadcast entities. Our member broadcasters are both commercial and non-commercial entities. For more than half a century, the mission of National Religious Broadcasters ("NRB") has been to help protect and defend the rights of Christian media and to insure that the channels of electronic communication stay open and accessible for Christian broadcasters to proclaim the Gospel of Jesus Christ. In addition, NRB seeks to effectively minister to the spiritual welfare of the United States of America.

NRB supports the Petitioners in this case because the U.S. Court of Appeals for the Second Circuit

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[1] Counsel of record to the parties in this case have consented to the filing of this *amicus curiae* brief by National Religious Broadcasters, and letters reflecting that consent have been filed with this Brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus curiae* National Religious Broadcasters, its members, or its counsel, made a monetary contribution to its preparation or submission.

committed serious errors in vacating that Order of the Federal Communications Commission ("FCC" or "Commission") which is the subject of this case. More specifically, the court's decision erroneously raises the bar for the FCC so high that in order for the agency to successfully enforce indecency standards for television and radio, it will be forced to achieve a near-Olympian feat. Admittedly, NRB believes, as a general rule, that the Commission should leave broadcasters, including religious broadcasters, free to produce and generate broadcast content without unnecessary or unreasonable interference. On the other hand, NRB also believes that the welfare of America, its families, and its youth, will be detrimentally affected by electronic mass communications which contain unrestrained indecency, whether in language or imagery. The FCC's clarified policy on indecent expletives was a rational means to carry out the mandate of Congress that "indecent … language …" be prohibited over the public airwaves, 18 U.S.C. § 1464. This is particularly the case where, as here, that prohibition is enforced by the FCC *only* with respect to broadcasts where children are most likely in the viewing audience, to-wit: between the hours of 6 a.m. and 10 p.m. 47 C.F.R. § 73.3999(b) (adopted under the Public Telecommunications Act of 1992 § 16(a), Pub. L. No. 102-356, 106 Stat. 954).

STATEMENT OF THE CASE

This brief incorporates by reference the statements of fact contained in the principal brief of the Petitioners, Federal Communications Commission and United States of America.

SUMMARY OF THE ARGUMENT

The court of appeals' opinion failed to grant the FCC, a federal agency, the deference and latitude that is required when a federal court reviews the policies of an agency that are promulgated within the scope of its administrative authority. The court imposed a requirement that the FCC show why its new rule effectuates the applicable statute on indecency at least as well if not better than the prior rule, and further explain why the original reasons for the older policy are no longer dispositive. This erroneous standard usurps much of the administrative decision-making authority of the agency and elevates the bar so high that indecency enforcement may not be possible.

The FCC gave a reasoned explanation for its new policy clarification: the prior staff policy on so-called 'fleeting expletives' gave a *carte-blanche* pass to unrepeated expletives, regardless of the context in which they were uttered, and was based on a faulty reading of *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Further, the prior policy created untenable distinctions between expletives which were used without a primary sexual or excretory meaning (which had to be used repeatedly in order to qualify as indecent) and expletives which had sexual or excretory meaning (which need not be repeated in

order to be held to be indecent). This distinction is illogical given the fact, as the FCC noted, that the power of an expletive lies in its sexual or excretory shock value in the first place.

The prior policy also treated expletives with sexual or excretory meanings differently from actual descriptions or depictions of sexual or excretory functions during broadcasts, another distinction which the FCC found impossible to rationally apply. The court of appeals' rejection of this reasoned explanation was based on the court's own *subjective* review of the use of the f-word at issue here; the court concluded, based on a purely *subjective interpretation*, that it could be used without any sexual or excretory meaning. The FCC, on the other hand, rightly relied on an *objective*, commonly understood dictionary definition of the word as having an intrinsically sexual core meaning, a reasoned analysis that the court rejected out of hand.

The court's opinion eviscerates this Court's jurisprudence in the *Pacifica* case, which had set forth the rule that the FCC could prohibit indecent words communicated at times when children would most likely be in the audience, as long as the FCC's evaluation took into consideration the context in which the word(s) were communicated. The court of appeals' decision requires the FCC to make a distinction between literal and non-literal uses of a given expletive, parsing the analysis down to a microscopic level, and thus eliminating the necessary flexibility the Commission needs to formulate policy in a delicate area where the First Amendment needs to be balanced against the FCC's statutory mandate. The FCC decided that the particular words at issue in the music awards programs here, from an

objective basis, have an inherently sexual or excretory connotation, and because there was no proffered justification for their utterances based on context, both could fall within the sanction of its newly articulated policy. The court of appeals, arrogating to itself the authority of a super-agency, usurped the FCC's authority to make that determination.

When the FCC made a determination that in the absence of its rule, there would be a *potential* for escalation of verbal broadcast indecency, the court of appeals pigeon-holed the FCC's evaluation as "divorced from reality." Yet there is ample evidence, much of it cited by the FCC itself pursuant to its own expertise, that there has been a rise in verbal crudity and indecent language in broadcasts in the post-*Pacifica* years during which the FCC staff had given a free-pass to single episodes of an indecent expression.

The court of appeals also burdened the FCC with an unrealistic and precedent-ignoring requirement to show actual harm to children by exposure to the indecent expletive at issue here. This Court has never required this kind of strenuous, empirical evidence when the protection of children is involved. Yet our review of recent American cultural responses to the expletive involved in this case shows that, in a variety of different professional settings, our society has generally condemned the very expletive that the FCC found to be indecent when featured in adult situations. Nevertheless, the court of appeals inexplicably found no evidence of harm to children.

Further, the court erroneously opined in *dicta* that the FCC's indecency policy is constitutionally

flawed. It noted that the policy would likely be found to violate the First Amendment, but reached that conclusion by citing a Supreme Court case dealing with internet speech, a substantially different communications species than the regulated television and radio airwaves at issue here. The court of appeals also failed to note that the expletive here is entitled to only the merest level of free speech protection, and failed to appreciate that at the time of day when the programs aired, the indecent expression was exposed to a maximum number of child viewers.

Finally, the court's opinion not only conflicts with this Court's decision in *Pacifica*, but also conflicts with the rule in several other Supreme Court cases that the First Amendment provides no shield for conduct that negatively impacts the moral or social welfare of children.

ARGUMENT

I. THE FCC'S REASONS FOR ADJUSTING ITS INDECENCY POLICY WERE RATIONAL AND REASONABLE

A. The Court of Appeals Failed to Give the Required Deference and Latitude to the FCC

The court of appeals, in considering the Commission's articulated reasons for adjusting its indecency policy, failed to give the FCC either the administrative latitude or the deference to its agency expertise that was duly required. As a result, the court's conclusion that the FCC failed to provide an adequately reasoned explanation for the adjustment in its indecency policy is fatally flawed.

It is well settled that federal agencies, such as the FCC, "must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'" *Motor Vehicle Manuf. Ass'n of the U.S., Inc. v. State Farm Auto. Mut. Ins. Co.*, 463 U.S. 29, 42 (1983) (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)); see also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-845 (1984); *Massachusetts v. EPA*, 549 US __, 127 S. Ct. 1438, 1459 (2007). While the Administrative Procedure Act (hereinafter the "APA"), empowers courts to determine if agency decisions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), "[t]he scope of [such] review . . . is narrow and a court is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43. All that is required of the agency is that "[it] examine the relevant data and articulate a

satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

The court of appeals should have simply "'consider[ed] whether the [FCC's] decision was based on a consideration of the relevant factors and whether there ha[d] been a clear error of judgment.'" *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) (*internal citations omitted*). Yet, as demonstrated throughout its opinion, the court elected to apply its own more exacting test, imposing a standard of needle-threading precision upon the FCC -- in essence requiring it to "explain why the original reasons for adopting the rule or policy are no longer dispositive… [and to give a] … reasoned explanation of why the new rule effectuates the statute as well as or better than the old rule." *Fox Television Stations, Inc. v. FCC*, 489 F.3d 456, 457 (2007) (citing *N.Y. Council, Ass'n of Civilian Technicians v. Fed. Labor Rel. Auth.*, 757 F.2d 502, 508 (2d Cir. 1985)).

This standard of proof, mandating that the FCC show that its newly clarified rule is at least as good if not "better than the old rule", erroneously places the court of appeals in the position of being a super-agency and final arbiter of the efficacy and wisdom of the FCC's policies. The net effect of the court's misconstrued standard was to "sen[d] the Commission back to run a Sisyphean errand while effectively invalidating much of the Commission's authority to enforce 18 U.S.C. § 1464." FCC, *Petition for A Writ of Certiorari*, 2007 WL 3231567, at 15 (Nov. 1, 2007).

B. The FCC Gave Sufficient and Adequate Reasoning for Why its Prior Indecency Policy Regarding Fleeting Expletives was Unworkable and Required Adjustment

The FCC rejected Fox's argument that Ms. Richie's utterances of the f-word and the s-word were fleeting and isolated and, therefore, could not be actionably indecent under the policy as applied by the staff prior to 2004. In rejecting this reasoning, the FCC cited to, affirmed, and then further clarified its disavowal of the staff's policy, first articulated in its 2004 *Golden Globes Order*.[2] Fox based its argument upon staff letters[3] and Commission dicta[4], contending that because Ms. Richie's expletives were fleeting, isolated and used outside of their core sexual or excretory meaning, they were not actionable.

The court of appeals found that the FCC did not adequately explain what the court had deemed to be a "180-degree turn regarding its treatment of 'fleeting expletives'…." *Fox Television*, 489 F.3d at 455. In so doing, the court rejected and criticized the well-reasoned explanations that the FCC provided for its adjustment and harmonization of its policy.

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[2] Memorandum Opinion and Order, *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the 'Golden Globe' Awards Program*, 19 F.C.C.R. 4975 (2004) (hereinafter "2004 *Golden Globes Order*").

[3] *See* 2004 *Golden Globes Order*, 19 F.C.C.R. at 4980, nn. 31 & 32 for a listing of some of these decisions.

[4] *Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 (1987) ("If a complaint focuses solely on the use of expletives, we believe that … deliberate and repeated use in a patently offensive manner is a requisite to a finding of indecency…"). It was this *dicta* upon which the Staff based its 'fleeting utterance' enforcement policy.

1. The prior policy created artificial and untenable distinctions that could no longer be maintained

Under the prior FCC staff policy, expletives used outside of their core sexual or excretory meaning had to be used "deliberate[ly] and repeated[ly]" to be considered indecent, while expletives used to describe or depict sexual or excretory functions were indecent even if they were not repeated. See *Pacifica Foundation*, 2 F.C.C.R. at 2699; Order, *In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, 21 F.C.C.R. 13299, 13306-13307 (2006) (hereinafter the "*Remand Order*"). The Commission, while continuing to carefully consider and weigh the First Amendment rights of broadcasters, clarified in the *Remand Order* that "this [old staff] guidance was seriously flawed." *Id.* at 13308.

First, the FCC rightly explained that the prior staff policy created an artificial and irrational distinction between 'expletives' on the one hand and 'descriptions or depictions of sexual or excretory function' on the other; the FCC concluded that this distinction was inapposite to the fact that, "an 'expletive's' power to offend derives from its sexual or excretory meaning." *Id.* In other words, the f-word and the s-word are categorically indecent no matter how they are used in a sentence because their meanings are inherently either sexual or excretory.[5]

[5] As the FCC stated in its 2004 *Golden Globes Order*, "we 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, and therefore falls within the first prong of our indecency definition." 2004 *Golden Globes Order*, 19 F.C.C.R. at 4978.

Second, the FCC pointed out that, in certain cases, this distinction set forth in the prior staff policy was virtually impossible to apply given the difficulties in determining whether a word was being used as an expletive or as a literal description. *Id.*

The court of appeals rejected the FCC's second reason on the grounds that these words are often used in the public lexicon without any sexual or excretory meaning, thus it should not be difficult to tell them apart. *Fox Television*, 489 F.3d at 459. In support of this statement, the court cited with approval to NBC's proffered anecdotes of world leaders using expletives apparently without having any sexual or excretory connotation. *Id.* at 459-60 (citing Brief of Intervenor NBC at 31-32 and n.3). Moreover, the court faulted the FCC for failing to provide proper record evidence of its own. *Id.* at n.10. Yet in its Order, the Commission had cited the *American Heritage College Dictionary* (*Remand Order*, 21 F.C.C.R. 13304 at n.39) as providing a common definition of the f-word as having a primarily sexual meaning. Further, the FCC also cited an article in a law review journal where the author concluded that the usage of the word "has at least an implicit sexual meaning." *Id.* at 13305 n.40.

The court of appeals was not free to substitute its own speculations for the reasoned analysis of a federal agency on matters within the scope of that agency's expertise. Whether language is 'indecent' in the context of national broadcasts during the family viewing hour is not a matter that is judicially self-evident; rather, it is a matter to be assessed by the Commission which has been vested with that regulatory authority. The FCC reasonably exercised

its appropriate sphere of legal authority. The court of appeals, however, did not.

2. The 'fleeting utterance' exception ignored context, which was inconsistent with this Court's decision in *Pacifica*

As a further reasoned explanation for adjusting its indecency policy, the FCC recognized that the prior policy essentially, and illogically, required an exception for those fleeting utterances that did not describe or depict sexual or excretory functions; yet, as the FCC recognized, this approach ignored the important, long-standing tradition of taking context into account. *Remand Order*, 21 F.C.C.R. at 13304. The Commission's adjustment of the policy harmonized the approach to be taken toward *all expletives* to ensure that each is fully reviewed in context. This was no radical, unexplained departure from prior indecency decisions. Rather, the FCC merely recognized that continuing to review indecency complaints without contextual distinctions was inconsistent with its statutory mandate and further conflicted with this Court's decision in *Pacifica*.

The court of appeals, however, did not find this rationale persuasive, concluding that this justification actually *ignored* rather than *emphasized* the context of broadcast content. According to the court, "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.'" *Fox Television*, 489 F.3d at 460 (quoting *Remand Order*, 21 F.C.C.R. at 13308 and referencing

2004 *Golden Globes Order*, 19 F.C.C.R. at 4978). Yet, in the same paragraph of the 2004 *Golden Globes Order* referenced by the court of appeals in the quote above, the Commission explained that the question of whether a word has an inherent sexual connotation is part of the first prong of the indecency review, while the contextual analysis is present in the second prong. Thus, regardless of whether the word at issue is inherently sexual in nature, the Commission would still review its context in the second prong analysis as part of its deliberations.

Further, the Commission's policy creates the flexibility necessary to balance its enforcement authority with the legitimate concerns of free speech under the First Amendment. This strenuous balancing act was recognized by this Court in its 1973 decision in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, when it stated that, "[t]o perform its statutory duties, the Commission must oversee without censoring. This suggests something of the difficulty and delicacy of administering the Communications Act – a function calling for *flexibility* and the capacity to adjust and readjust the regulatory mechanism to meet changing problems and needs." 412 U.S. 94, 118 (1973) (emphasis added).

Indeed, the FCC's modified policy at issue here, which employs a contextual analysis for *all* broadcast content that is challenged as indecent, utilizes this kind of "flexibility," thus preventing the FCC's policy from becoming an absolute and inflexible bar on speech. At the same time, the policy ensures that the FCC comports with its statutory duty to ensure that no one utters "any obscene, indecent or profane language by means of radio communication." 18

U.S.C. § 1464. The court of appeals has rendered an entire universe of indecent content unsanctionable, and in particular the f-word, a word commonly recognized as indecent.[6] This is hardly the "flexibility" approach envisioned by this Court in *Columbia Broadcasting System*.

3. Contextual analysis is not new to the Commission

The Commission has been considering context in its indecency enforcement as early as the policy that was endorsed by this Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). There, the Court explained that, "[t]he Commission's decision rested entirely on a nuisance rationale under which *context is all-important*…." *Id.* at 750 (emphasis added). Indeed, in its 2001 *Policy Statement* on indecency, the Commission outlined its historical use of context as an all-important factor in its indecency determinations.[7] *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, 8002 (2001) (hereinafter "*Policy Statement*").

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[6] See footnotes 18-24 *infra* for multiple examples in which our society has condemned this particular word.

[7] *See Narragansett Broadcasting Co. of Cal., Inc. (KSJO(FM))*, 5 F.C.C.R. 3821 (1990); *S.F. Century Broadcasting, L.P. (KMEL(FM))*, 7 F.C.C.R. 4857 (1992); *In re Application for Review of the Dismissal of an Indecency Complaint Against King Broadcasting Co. (KING-TV)*, 5 F.C.C.R. 2971 (1990).

4. There are several factors within the contextual analysis that may justify or condemn fleeting expletives

Further, the FCC's adjusted policy was rational and reasonable because it applies a host of fact-intensive criteria that focus on the context in which the expletives were used, thus not only avoiding a blunt, inflexible rule that would impinge on the First Amendment but also helping to create a more nuanced approach in determining whether a given expletive is 'indecent' in the context of a particular broadcast. Indeed, the policy itself recognizes that the three main factors[8] in the contextual analysis "must be [weighed and] balanced to ultimately determine whether the [broadcast] material is patently offensive … [because] [e]ach indecency case presents its own particular mix of these, and possibly other, factors." *Policy Statement*, 16 F.C.C.R. at 8003. In addition to the three main factors, other factors are to be used in the contextual analysis by the FCC, such as whether the material has artistic merit,[9] if the material is presented as part of a news

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[8] These are: 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. *Policy Statement*, 16 F.C.C.R. at 8004.

[9] *Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 F.C.C.R. 4507, 4512-13 (2005) (broadcast of numerous expletives in "Saving Private Ryan" not indecent because "deleting all of such language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers.")

interview or *bona fide* news story,[10] if the material is of communicative necessity,[11] if the material was merely a spontaneous slip of the tongue,[12] and whether the material was deliberately gratuitously presented.[13] The application of these fact-intensive criteria in various cases is strong evidence of how nuanced, thoughtful and cogent the Commission's overall policy is, particularly with respect to balancing broadcasters' First Amendment rights with the necessity to keep indecent material off of the airwaves at certain times of the day.

Perhaps one of the most important factors that the FCC is allowed to consider is the makeup of the

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[10] *Peter Branton*, 6 F.C.C.R. 610 (1991) (broadcast of wiretap recordings of John Gotti that featured numerous expletives, as part of *bona fide* news story not indecent); *Remand Order*, 21 F.C.C.R. at 13327 (broadcast of news interview on *The Early Show* in which interviewee used "s-word" not indecent); *Merrel Hansen, Pac. & So. Co., Inc. (KSD-FM)*, 6 F.C.C.R. 3689 (1990) (broadcast of excerpts from *Playboy* interview with Jessica Hahn regarding her alleged rape found to be indecent as exceptionally explicit and vulgar and presented in pandering manner).

[11] *In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, 21 F.C.C.R. 2664, 2665 (2006) (broadcast of numerous expletives in "The Blues: Godfathers and Sons" indecent, in part because "we disagree that the use of such language was necessary to express any particular viewpoint in this case").

[12] *In re Applications of Lincoln Dellar, Renewal of the Licenses of Stations KPRL(AM) and KDDB(FM), Paso Robles, Cal.*, 8 F.C.C.R. 2582, 2585 (1993) (news announcer's use of single expletive isolated and accidental, thus not indecent); *L.M. Commc'ns of S.C., Inc. (WYBB(FM))*, 7 F.C.C.R. 1595 (1992).

[13] *Remand Order*, 21 F.C.C.R. at 13307-13308 (Richie's comments deemed deliberate in light of admonition from Hilton to "watch the bad language" and Richie's confident and fluid delivery).

audience at the time of the program. This Court recognized in *Pacifica* that the time of day in which the broadcast was made as well as the makeup of the audience could be considered. *Pacifica*, 438 U.S. at 750. The FCC most certainly took the time of day and the makeup of the audience into account in its analysis of the 2002 and 2003 *Billboard Music Awards*. Indeed, the Commission cited to *Pacifica* when it stated that according to Nielsen ratings data, "during an average minute of 'The 2003 *Billboard Music Awards*' broadcast, … 23.4 percent of the 9,871,000 people watching the program were under 18, and … 11 percent were between the ages of 2 and 11.'" *Remand Order*, 21 F.C.C.R. at 13305-06. This data also supports the concern that during primetime, children are a plentiful component of the TV audience, hence the prohibition on indecent material being aired between 6 a.m. and 10 p.m. 47 C.F.R. § 73.3999(b).

Yet in its decision, the court of appeals misconstrued the Commission's use of these contextual factors. Rather than viewing these as factors to be considered by the FCC in its overall judgment and decision-making, the court intimated that, with the exception only of the makeup of the audience, they constituted outright exemptions. *Fox Television*, 489 F.3d at 458-59. To reach that myopic conclusion, the court of appeals ignored what should have been obvious -- that these various factors are merely *considerations* to be weighed within the total contextual analysis, not categorical exclusions.

Indeed, the nature and plethora of these factors adopted by the Commission for consideration in indecency cases shows that its policy advances, rather than conflicts with, a balancing approach that

weighs both the guarantees of the First Amendment as well as the FCC's statutory mandate. The court of appeals' decision, while decrying the Commission's analytical scheme, actually *eliminates flexibility* by ruling that every expletive, no matter how grossly indecent, is given one free pass from any FCC sanction or enforcement.

C. The FCC's Observation that the Prior Policy Wrongly Required Viewers and Listeners to Endure the "First Blow" of Indecency was a Well-Reasoned Justification in Support of the Policy Adjustment

The FCC also observed that the prior policy essentially required viewers and listeners to endure what this Court coined the "first blow"[14] of indecency before the FCC could act. *Remand Order*, 21 F.C.C.R. at 13308 (quoting *Pacifica*, 438 U.S. at 748-49). The court of appeals rejected the FCC's use of the "first blow" theoryto support the change in its policy, reasoning that the theory bears no rational connection with the actual policy. In the court's opinion, the "first blow" theory would appear to protect viewers and listeners from all indecent material while the FCC's actual policy would "permit even numerous and deliberate uses of [the f-word] in certain contexts." *Fox Television*, 489 F.3d 459 n.9.

What that reasoning fails to recognize, however, is that the "first blow" theory only applies to material that is *indecent*, not non-indecent and therefore

[14] "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." 438 U.S. at 748-49.

permitted, uses "of the [f-word] in certain contexts." *Id.* When the policy is applied, including the contextual analysis, and the material is found not to be indecent, no one endures a "first blow" of indecency because the material is not indecent. The court's logic in finding that the FCC's reliance on the "first blow" theory to be inconsistent because it permitted some uses of the f-word, therefore completely ignored the premise of the "first blow" theory – indecent material. Contrary to the court's criticism, the FCC's policy adjustment to ensure that non-repeated expletives did not induce a "first blow" was actually a rational and well-reasoned decision that was never contradictory.

Within this discussion of the "first blow" theory, the Commission determined that, absent its new rule, there could be an increase in expletives during those hours in which children would likely be in the audience. *Remand Order*, 21 F.C.C.R. at 13309. In other words, broadcasters would have little incentive to ensure that their programming was free of indecent material until the 'second blow' was about to hit. *Id.* The court of appeals viewed this portion of the FCC's discussion about the "first blow" theory as a separate and distinct reason for the change in its policy and declared that such a reason was "divorced from reality." *Fox Television*, 489 F.3d at 460. As far as the court was concerned, since the FCC itself stated in its *Remand Order* that even during the 'safe harbor' provision of 10:00 p.m. to 6:00 a.m., "with rare exceptions, [broadcasters] do not allow the 'F-Word' or the 'S-Word' to be broadcast during that time period…" (21 F.C.C.R. at 13310), this meant that the Commission acknowledged that there was not a barrage of expletives on the

airwaves. 489 F.3d at 460. Further, the court decided that the FCC was unable to make this argument because it contradicts prior experience and the FCC failed to provide record evidence to show that its "prediction" will likely come true. *Id.* at n.11.

Yet, the court misconstrued the actual statement made by the FCC. The FCC did not, in fact, make a "prediction" about what would happen in the future. Rather, it merely considered the *potential* for increased indecency should the policy as it was remain in place, specifically stating that "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." *Remand Order*, 21 F.C.C.R. at 13309.[15] Indeed, the Commission prefaced its remarks by stating, "it 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." *Id.* (emphasis added).

Moreover, even if the court properly construed the FCC's statements as a "prediction" of increased indecency absent its policy clarification, the court should have deferred to the agency's expertise and agreed, as we do, with the dissent of Judge Leval that "if obligated to choose, I would bet my money on

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[15] The FCC made a similar statement in its 2004 *Golden Globes Order*: "If the Commission were routinely not to take action against isolated and gratuitous uses of such language on broadcasts when children were expected to be in the audience, this would *likely* lead to more widespread use of the offensive language." 19 F.C.C.R. at 4979 (emphasis added).

the agency's prediction." *Fox Television*, 489 F.3d at 472 (Leval, J., dissenting).

Nevertheless, the FCC did cite evidence on this point. Specifically, in the 2004 *Golden Globes Order*, it cited to a study that found a significant increase in offensive language on broadcast television between 1990 and 2001 in support of its reasoning that an adjustment in its policy was required and necessary. 19 F.C.C.R. at 4979 (citing 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)). Further, in the *Remand Order*, the Commission cited to examples of the numerous complaints that were received by stations from parents who were blatantly outraged at the expletives used in the 2003 *Billboard Music Awards* that they watched with their children. *Remand Order*, 21 F.C.C.R. at 13310. The FCC more than adequately documented what it saw as signs of a worsening problem.

D. The FCC's Concern Regarding the Potential Escalation of Broadcast Indecency Was Reasonable

Moreover, the FCC's concern about the potential for escalations in the use of expletives during times when children are likely to be in the audience is well-documented in numerous other studies. The Pew Research Center for the People and the Press issued a study in April 2005 showing that "[f]ully 68 percent [of those surveyed] believe that children seeing so much sex and violence on TV gives them the wrong

idea about what is acceptable in society."[16] Also, "a two-thirds majority (66 percent) say that entertainment TV shows *are worse now than they were five years ago*…." *Id.* at 4 (emphasis added). Of that 66 percent of responders, 22 percent complain most about the sexual content and another 16 percent cite to the "depiction of immoral behavior and a lack of good values." *Id.* And, while this study showed that the vast majority (79 percent) of those surveyed blamed lack of parental oversight or supervision for those times when children are exposed to sex and violence on television, 91 percent of the parents surveyed stated that they watch television with their children, ranging from half of the time or occasionally (47 percent) to usually (35 percent) to always (9 percent). Only 8-9 percent of parents reported never watching television with their children. *Id.* at 15.

Furthermore, the court's condemnation of the Commission's logic was an impermissible substitution of its own judgment for that of the agency. As this Court clearly stated in *State Farm*, "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." 463 U.S. at 50 (cited in *Fox Television*, 489 F.3d at 457). The Commission – not the court – is in the best position to evaluate current viewing and listening trends.

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[16] The Pew Research Center for The People & The Press, *New Concerns about Internet and Reality Shows – Support for Tougher Indecency Measures, But Worries About Government Intrusiveness*, April 19, 2005 at 2, http://people-press.org/reports/pdf/241.pdf.

E. Empirical Evidence of Harm Was Not Required to Justify the FCC's Indecency Policy Adjustment

The court of appeals found that "the FCC's decision … 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." *Fox Television*, 489 F. 3d at 461 (citing *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 822-23 (2000) for the notion that proof of such "harm" is a *sine qua non* for regulation of indecency over the airwaves.)

This Court's decision in *Playboy*, however, dealt with Congress's novel attempt to prohibit "signal bleed" from the imperfect scrambling of sexually explicit content during broadcasts over *cable television*. Congress required cable programmers to either "fully scramble" the signal (an impracticality for most cable programmers and companies) or to alternatively refrain from providing the sexual programming content during daytime hours when children might be watching. Most cable companies chose the later course. This Court found was available, but because Congress had not chosen it, the cable law unnecessarily burdened the First Amendment rights of viewers. In stressing this issue, this Court illustrated why the *Playboy* decision, which dealt with *cable television and not* (as here) *public spectrum television broadcasting*, is inapposite to the case under review:

> There is, moreover, a key difference between cable television and the broadcasting media, which is the point on which this case turns: Cable systems have the capacity to block

> unwanted channels on a household-by-household basis.
>
> *Playboy Entm't Group, Inc.*, 529 U.S. at 815.

Further, the court of appeals in this case implies that there must be proof of an empirical 'problem' arising from "first blow" indecent speech during family viewing hours to support the FCC's decision to tighten its restrictions on non-repeated indecency. *Fox Television*, 489 F.3d at 461. This level of proof conflicts with decided cases where regulations are enforced to protect children. In upholding a child pornography statute, this Court recently noted (without empirical data) that the distribution of child pornography "increases 'the harm to the child.'" *United States v. Williams*, 553 U.S. ___ (2008), slip op. at 17, (citing *New York v. Ferber*, 458 U.S. 747, 759 (1982)).

But beyond that, the court of appeals' reliance on *Playboy* for its insistence on empirical proof of harm is entirely misplaced. The alleged 'problem' identified by this Court in *Playboy* was *not* the potential harm to children from viewing sexually explicit material, without parental consent. In fact, the presence of such harm was clearly presumed. The District Court in *Playboy* found that Congress had a "compelling" interest in trying to restrict that kind of juvenile viewing from occurring, and further observed that "[w]e recognize that the Supreme Court's jurisprudence does not require empirical evidence." *Playboy Entm't Group, Inc. v. United States*, 30 F. Supp 2d 702, 716 (D. Del. 1998), *aff'd*, 529 U.S. 803 (2000).

In affirming, this Court made the similar observation that:

> First, we shall assume that many adults themselves would find the material highly offensive; and when we consider the further circumstance that the material comes unwanted into homes where children might see or hear it against parental wishes or consent, there are legitimate reasons for regulating it.

Playboy Entm't Group, Inc., 529 U.S. at 811. Here, the court of appeals failed to appreciate that the real 'problem' that Congress did not sufficiently document in *Playboy*, was that, "[h]ere, there is no probative evidence in the record which differentiates among the extent of bleed at individual households and no evidence which otherwise *quantifies the signal bleed problem*." *Id.* at 821 (emphasis added).

This Court's recognition of the presumed potential for harm to children when exposed to sexual content in the *Playboy* decision is simply one more example of the fact that certain indecent (though not legally "obscene") content can be judged potentially harmful to children even though not susceptible of the kind of empirical 'evidence' that the court of appeals erroneously required.[17] The FCC cited, as an example, the Nielsen ratings data that a large number of children were watching the 2003 *Billboard Music Awards* during which Ms. Richie uttered her gratuitous f-word; and over a million viewers between the ages of two and 11 were among them. *Remand Order*, 21 F.C.C.R. at 13305-

[17] See also the judicial recognition of the potential harm to children from exposure to indecency, in the cases cited in this brief at section II. B. 3. *infra*.

13306. While we would suggest that even this 'evidence' of harm is not necessary here, the FCC's reference to it, at a minimum, dispels the court's characterization of the Commission's decision as void of evidentiary support.

Nevertheless, there is strong evidence that our society, as a whole, departs from the court of appeals' unrealistic view of indecent speech and its supposed neutral effect on children. When it comes to indecent language in movies at the theater, as an example, parents tend to avoid attending films with their children that have indecent language, while supporting those with cleaner language.[18]

Even in the adult professional world, there is a general intolerance for indecent speech. The National Football League fined Atlanta Falcon running back Michael Vick $20,000 for making an indecent gesture during a game that simulated the f-word.[19] NASCAR racing officials fined and assessed driving champion Dale Earnhardt Jr. penalty points

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[18] "*Study: Less Cussing = More $$ for PG Films*," CBSnews.com, carrying a Mar. 13, 2008 Associated Press article at http://www.cbsnews.com/stories/2008/03/13/business/main3933843.shtml. ("A new study by The Neilsen Co. found that the PG-rated movies with the least profanity made the most money at the U.S. box office … 'Parents are choosing PG films for their kids that have very, very low levels of profanity,'" referencing a Nielsen study of 400 films in general release from the fall of 2005 until fall of 2007) (last visited May 1, 2008).

[19] "*N.F.L. ROUNDUP; Obscene Hand Gesture Toward Fans Costs Vick $20,000*," The New York Times.com, Nov. 30, 2006, http://query.nytimes.com/gst/fullpage.html?res=9B02ED613EF933A05752C1A9609C8B63&scp.

for using indecent language during an interview.[20] Even newspapers, usually the bastions of free speech, draw the line at indecent language in their blogs: *The Washington Post* decided to close down one of its online blogs, in part, because of "profanity" aimed at its ombudsman.[21] In May, 2008, a television news anchor in New York who uttered an indecent word, found it necessary to give a quick, very public, and visibly pained apology; and another reporter was terminated when he shouted an expletive at hecklers while he was on the air in 2005.[22]

Children who are exposed regularly to that kind of indecent fare will inevitably have a harder time appreciating the fine line that sometimes divides lawful from unlawful use of indecency when it is directed at others. As one commentator has pointed out, the f-word here, when used under some circumstances, can be viewed as the equivalent of that a less restrictive technological option (channel blocking) verbal rape.[23] Courts and juries have held that the use of that word can be part of complex of

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[20] Viv Bernstein, "*Earnhardt Fined For Checkered Language*" The New York Times.com, Oct. 6, 2004, http://www.nytimes.com /2004/10/06/sports/othersports/06nascar.html.

[21] Katharine Q. Seelye, "*Paper Decides To Close Blog, Citing Vitriol*," The New York Times.com, Jan. 20, 2006, http://www.nytimes .com/2006/01/20/business/media/20blog.html.

[22] James Barron, "*When an Anchor Curses on the Air, She Becomes the Night's Top Story*," New York Times.com, May 14, 2005, http://www.nytimes.com/2008/05/14/nyregion/14simmons.html?_r=2&oref=slogin&ref=n.

[23] Stephen L. Carter, *Civility – Manners, Morals, and the Etiquette of Democracy* 149 (Basic Books 1999).

facts creating an illegal, hostile work environment.[24] In this Court's well-known "fighting words" decision in *Chaplinksy v. New Hampshire*, 315 U.S. 568 (1942), a state disorderly conduct conviction was upheld for the defendant's use of terms "damned racketeer" and "damned Fascist" when he directed them at another person.[25]

Admittedly, in the context of the adult world at least, we are often cautioned that exposure to offensive ideas, even those laced with indecency and vitriol, is the price we must pay for freedom of speech. Yet surely that does not mean that our nation's youth must also be required to sacrifice a measure of their childhood as a part of the bargain.

II. THE COURT OF APPEALS' *DICTA* OPINION ON CONSTITUTIONAL ISSUES WAS ERRONEOUS

The court of appeals' comments on the constitutional issues in this case, even though characterized as *dicta*, prove to be the proverbial 'elephant in the room'. Those comments improvidently restrict the FCC's statutory authority and also eviscerate this Court's indecency precedent.

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[24] *See Beach v. Yellow Freight Sys.*, 312 F.3d 391, 394-95 (8th Cir. 2002); *Tutman v. WBBM-TV, Inc.*, 209 F.3d 1044, 1046-47 (7th Cir. 2000); *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 482-83 (3rd Cir. 1997).

[25] It is noteworthy that this Court in *Chaplinsky* recognized that when offensive "utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth … any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." 315 U.S. at 572.

A. The Court of Appeals' *Dicta* Opinion on the Constitutionality of the Commission's Policy Directly Conflicts with this Court's Decision in *Pacifica*

The court of appeals sided with the networks' argument that the FCC's indecency standard is unconstitutionally vague, partly in light of this Court's 1997 decision in *Reno v. ACLU* (521 U.S. 844), in which the Court struck down an Internet indecency standard. *Fox Television*, 489 F.3d at 464. The court of appeals opined that it was unlikely that the FCC's standard could withstand scrutiny under *Reno*. *Id.* The court's conclusion in that regard is clearly erroneous for reasons explained below. But, the court of appeals' *dicta* on the constitutional issue is also misguided because it failed to fully comprehend, or apply, the ruling in *Pacifica*.

As recognized by this Court in *Pacifica*, the presence of children in the audience creates a special area of regulatory authority for the FCC. 438 U.S. at 749-750. Moreover, this Court has also recognized that the government has a compelling interest "in protecting the physical and psychological well-being of minors [including] …shielding minors from the influence of literature that is not obscene by adult standards." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (citing *Ginsberg v. New York*, 390 US. 629, 639-40 (1968); *Ferber*, 458 U.S. at 756-57). As demonstrated in *Pacifica*, this governmental interest also applies to the broadcast medium, and has particular applicability in that arena in ways that may not apply to other forms of communication. The court of appeals, however, failed to appreciate this critical and important factor regarding a television audience populated by children. As a

result, it erroneously endorsed the networks' view that *Pacifica* was a dead letter in light of *Reno*.

B. The Court of Appeals Misapplied the *Reno* case

1. The court of appeals, in siding with the networks, ignored the fact that the broadcast medium is subject to much more regulation than other types of speech

The networks argued in their petitions to the Commission regarding the television programs at issue in the *Remand Order*, that the FCC's very definition of indecency was unconstitutionally vague.[26] They pointed to the 1997 decision of this Court in *Reno v. ACLU* in which this Court struck down a similarly-worded definition in the Communications Decency Act of 1996 ("CDA") because of "the many ambiguities concerning the scope of its coverage…." 521 U.S. at 870. However,

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[26] The networks also argued that the limited First Amendment protection provided to indecent broadcast content must now be expanded in light of the marked changes in the marketplace since 1978 when *Pacifica* was decided, with the dramatic increase in original programming on cable and satellite providers. The Commission rejected this argument, noting that there are still millions of households, many presumably with children, that have televisions that only receive broadcast signals. *Remand Order*, 21 F.C.C.R. at 13319-13319. Thus, the "broadcast media continue to have 'a uniquely pervasive presence' in American life." *Id.* at 13318. Moreover, over-the-air broadcast television still remains uniquely accessible to children since there are few technological mechanisms that parents can use to block broadcast signals into the home. Even the v-chip is proving to be less effective than hoped where many of the ratings provided by the networks for use with the v-chip are erroneous. *Id.* at 13320-13321 n.162.

like the critical distinction in the *Playboy* case between cable and spectrum broadcasting, so also in *Reno* this Court's treatment of the CDA, an Internet regulation, has no application to broadcasting.

A higher degree of indecency regulation is permitted in broadcasting, unlike the Internet, due to the invasiveness of radio and television.[27] Further, broadcast spectrum continues to be a scare commodity. These factors that allow for greater regulation of broadcast speech are not present with the Internet; thus, this Court found that a web-based media should not be subjected to the level of regulation as is applied to the broadcast medium. See *Reno*, 521 U.S. at 870.

By relying on the *Reno* case, the court of appeals failed to take into account the vast differences between broadcasting and other media of expression.

2. Expletives such as those at issue here are entitled to only limited First Amendment protection

The court of appeals also failed to recognize the very limited constitutional protection afforded to the kind of indecent and gratuitous expressions involved in this case. As this Court observed in *Pacifica*: "[w]hile some … [patently offensive] references [to excretory and sexual organs and activities] may be protected, they surely lie at the periphery of the First Amendment concern." 438 U.S. at 743. Not only did the court of appeals fail to recognize this principle, but it went so far as to suggest that indecency

[27] See *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 637-38 (1994); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

regulations imposed by the FCC on broadcasters may have to withstand the highest kind of judicial scrutiny in order to survive:

> [w]e 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.

489 F.3d at 465 (citing this Court's decision in *Playboy*, *supra*). There is simply nothing in *Pacifica*, nor in the unrelated progeny of *Playboy* or *Reno*, that remotely suggests the applicability here of a "strict scrutiny" analysis.

Lastly, to the extent that the court of appeals is implying that the FCC's burden of proof under a "strict scrutiny" standard might also require a showing that a *less restrictive* means is *unavailable* to achieve the desire regulatory effect, it is noteworthy that satisfactory alternatives to the FCC's present indecency rule simply do not exist.[28]

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[28] See note 26 *supra* regarding the inadequacies of "v-chip" technology as a means of screening out objectionable television content. Also, the television "rating" system done by the television industry, while admirable and helpful in making general selections of program viewing, is not an adequate method to prevent children from being exposed to indecent language. One study in 2002 determined that 68 percent of prime-time network programs which *did not* carry the television rating of "L" (crude and indecent language) nevertheless had such language included in no less than three scenes per program. Dale Kunkel, *et al.*, *Deciphering the V-Chip: An Examination of the Television Industry's Program Rating Judgments*, 52 J. of Commc'ns 112, 132 (2002).

3. The presence of children is also a compelling factor for the increased regulation of indecency carried over the airwaves

The potential impact of television, the medium at issue in this case, on the perceptions, values, and morals of children is massive. On average, children watch between two and four hours of television per day.[29] Some 30 percent of children three years old and younger have a television set in their bedrooms, and 43 percent of children between the ages of four and six have a television in their bedroom.[30]

As such, the court of appeals' decision is also at odds with the analogous jurisprudence of this Court which recognizes the delicate balance to be struck when the interests of children are at stake. Cf. *Ginsberg*, 390 U.S. 629 (Court upheld NY statute banning sale of sexually-oriented materials to minors even if it could not similarly prohibit the sale to adults); *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986) (upholding suspension of student who used indecent speech in school assembly with audience of 'captive' 14-year olds, noting "the otherwise absolute interest of the speaker in reaching an unlimited audience [may be limited] where the speech is sexually explicit and the audience may include children." *Id.* at 684); *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (school board may remove books that are 'vulgar'); *Morse v. Frederick*, 551 U.S. ___, 127 S. Ct. 2618 (2007) (banner interpreted as violating school's

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[29] Nielsen Media Research (2004-2005 season).

[30] Kaiser Family Foundation, *Zero to Six: Electronic Media in the Lives of Infants, Toddlers, and Preschoolers* 7 (Fall 2003).

ban on pro-drug messages, not subject to First Amendment protection).

The breathtaking pronouncements of *dicta* by the court of appeals seem to presage its opinion that nearly any attempt by the FCC to prohibit single, gratuitous expressions of indecency during children's viewing hours will be unconstitutional. Not only is that in violent conflict with settled Supreme Court law in *Pacifica*, but it also shows a callous disregard for the powerful influence, for good or for evil, of the medium of television on the hearts and minds of America's children.

CONCLUSION

For the reasons set forth above, National Religious Broadcasters urges this Court to reverse the decision of the U.S. Court of Appeals for the Second Circuit, and to reinstate the Order of the Federal Communications Commission in its entirety.

Respectfully submitted,

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