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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 07-582, Federal Communications Commission versus Fox Television Stations.

Mr. Garre. Solicitor General Garre.

ORAL ARGUMENT OF GEN. GREGORY G. GARRE

ON BEHALF OF THE PETITIONERS

GENERAL GARRE: Thank you, Mr. Chief Justice, and may it please the Court:

This case involves a challenge to the efforts of the Federal Communications Commission to carry out its statutory mandate under 18 U.S.C. 1464, and more even-handedly address indecent material that is broadcast directly into the home during the time of day when children are likely to be in the viewing audience.

After reconsidering its policy in this area, the Commission determined that an enforcement action may be appropriate in the case of indecent language that is isolated as well as repeated. Because the Commission provided a reasoned explanation for that change in course, the court of appeals erred in invalidating its action under the Administrative Procedures Act.

JUSTICE SCALIA: Did it -- did it reconsider

1 its policy? In the first order, I would -- I would have
2 gathered that it had, but its second order said
3 basically, we've never had a policy that single use of
4 these expletives is okay. Which is it? Are they
5 changing their policy or not?

6 GENERAL GARRE: They did change the policy,
7 Justice Scalia, and the Commission directly acknowledged
8 that in paragraph 12 of the Golden Globe Awards order,
9 which is not reprinted in the petition appendix. In
10 that paragraph, the Commission said, "We now depart from
11 cases holding that isolated or fleeting use of the
12 F-Word was not indecent."

13 JUSTICE SCALIA: The latest order, the one
14 that's up here, says that all of the statements to that
15 effect in the past were simply staff statements and that
16 the Commission had never held to that effect before.

17 GENERAL GARRE: Well, the court of appeals
18 recognized, and we think correctly so, that the
19 Commission did change its position on that. The
20 Commission had never brought an enforcement action
21 against a broadcaster for the isolated use of an
22 expletive, and the Commission made clear in the orders
23 it issued in this case, beginning with the Golden Globe
24 Awards order and the particular omnibus and remand
25 orders before this Court, that it was taking a change in

1 regulatory course in determining that it was appropriate
2 to bring an enforcement action where there was an
3 isolated incident of an expletive if the context
4 suggested that it would be indecent in that situation.

5 JUSTICE KENNEDY: Well, is the agency's
6 position that its policy has changed or that it has not
7 changed?

8 GENERAL GARRE: That it has changed,
9 Justice Kennedy, and the court of appeals recognized
10 that at pages 20a to 21a of the decision. And we think
11 this Court has recognized --

12 JUSTICE KENNEDY: Well, the court
13 recognized, but it seems to me the FCC -- and this is
14 what Justice Scalia's questions go in part to -- in the
15 remand order at first it said its policy hadn't changed.

16 GENERAL GARRE: Well, I think there were
17 some statements, we would acknowledge that, in different
18 places. But if you go to the heart of where the FCC
19 grappled with this, paragraph -- paragraph 12 of the
20 Golden Globe Awards order, it specifically disavowed its
21 prior decisions in which it had said that isolated
22 expletives would not warrant an enforcement action under
23 1464, and it specifically said, "we are departing from
24 our policy." And -- after all, it didn't impose --

25 JUSTICE SCALIA: But I think it rewrote that

1 in its last order, and I think it even explained away
2 the Golden Globe statement by saying it was not as
3 categorical as it might appear.

4 GENERAL GARRE: I think if you look at maybe
5 pages 82 to 83 of the petition appendix here, where we
6 discuss that as well, I think it made clear with respect
7 to the indecency finding involving the 2003 Billboard
8 Music Awards and the 2002 Billboard Music Awards, that
9 in applying its contextual analysis in the past it
10 focused on whether or not expletives were repeated or
11 dwelled upon. In this case, the Commission determined
12 that it was not going to be guided exclusively by that
13 consideration and that it was going to take into account
14 all contextual factors, including the explicit and
15 graphic nature of the language used.

16 CHIEF JUSTICE ROBERTS: Do you think, in
17 terms of our legal review, it makes a difference whether
18 it's a change or whether it's a continuation of a prior
19 policy?

20 GENERAL GARRE: Certainly, I would be
21 defending it if the Court thought that it wasn't a
22 change, and it would have been inappropriate for the
23 Second Circuit to invalidate that as arbitrary and
24 capricious. We have -- we think it was a change. The
25 language that the Commission used indicated that it was

1 departing from its prior understanding, and we are here
2 defending -- either way, we are here defending --

3 CHIEF JUSTICE ROBERTS: I guess my question
4 is, do you think a different legal standard applies when
5 an agency changes a prior position as opposed to
6 articulating its position for the first time?

7 GENERAL GARRE: Well, this Court has said
8 that it's desirable for agencies to reconsider and to
9 change its policy from time to time, but when --

10 JUSTICE GINSBURG: Wasn't the Commission --
11 the Commission asked the Second Circuit, said: We've
12 changed our policy; we want you to remand the case to
13 the Commission so the Commission can explain what its
14 new policy. I mean, isn't that how this whole thing
15 arose? The case was in the Second Circuit and the
16 Commission said it wanted to have an opportunity to
17 explain its position more fully?

18 GENERAL GARRE: It is, and it did in the
19 remand order reprinted in the petition appendix.

20 Mr. Chief Justice, I think either way the
21 ultimate standard is arbitrary and capriciousness. Now,
22 the Respondents have focused on whether or not we have
23 complied with the criteria that the Court has looked to
24 in determining whether or not a change in agency
25 position is arbitrary and capricious. And we think that

1 there are three factors here that must lead to the
2 conclusion that it was not arbitrary and capricious.

3 One, we think that the Commission did
4 directly acknowledge its change in position. Two, the
5 Commission provided a concrete explanation for that
6 change. And, three, that explanation is at a minimum
7 plausible and consistent with the Commission's statutory
8 mandate. This Court has never invalidated a change in
9 agency position where those three factors have been
10 present.

11 And if you look at the three principal
12 justifications that the agency used in explaining its
13 change in position, I think it's absolutely clear that
14 this was at a minimum a rational policy choice that the
15 agency was committed -- was permitted to take under the
16 Administrative Procedures Act.

17 JUSTICE GINSBURG: One of the problems is
18 that, seeing it in operation, there seems to be no rhyme
19 or reason for some of the decisions that the Commission
20 has made. I mean, the "Saving Private Ryan" case was
21 filled with expletives, and yet the film about jazz
22 history, the words were considered a violation of the
23 Commission's policies. So that there seems to be very
24 little rhyme or reason to when the Commission says that
25 one of these words is okay and when it says it isn't.

1 GENERAL GARRE: Well, we do think, of
2 course, that there is rhyme or reason to its
3 determination. First, let me say that much of the
4 vagueness type of arguments that the Respondents are
5 making similar to your question could be made equally
6 with respect to the Commission's policy with respect to
7 repeated utterances as well as isolated utterances.

8 If you take the "Saving Private Ryan" and
9 the blues documentary example, those were repeated-
10 utterances cases. We are here because they challenged
11 the Commission's change in policy to go from repeated
12 utterances to consider enforcement actions in the case
13 of isolated expletives where they met its contextual
14 analysis and where it was explicit, graphic, shocking or
15 pandering in the context.

16 Now, I think certainly there are going to be
17 situations and this Court has indicated that the
18 vagueness inquiry doesn't turn about coming up with
19 hypotheticals at -- at the outer margins of a
20 standard.

21 I think in the Pacifica case our reading of
22 the Court's decision is similar to the D.C. Circuit's
23 reading of that decision in the Action for Children's
24 Television case, that implicit in the Court's decision
25 in Pacifica was it had rejected a vagueness challenge

1 to the Commission's definition of "indecent," which is
2 the same definition that the Commission is applying
3 today.

4 CHIEF JUSTICE ROBERTS: I suppose the most
5 difficult case for you is the "Early News" case where
6 you have just a fleeting expletive, unlike "Saving
7 Private Ryan" and the others. I mean, how do you
8 distinguish the "Early News" case from the ones before
9 us?

10 GENERAL GARRE: The Commission has
11 determined that news programming would be treated
12 differently, with greater restraint, because of the
13 different values present in that situation.

14 CHIEF JUSTICE ROBERTS: So the same -- if
15 you had a news report about Nicole Richey and the Cher
16 exhibits, they -- they could use the actual language,
17 even though they can't during the -- the awards shows?

18 GENERAL GARRE: Yes. And, similarly, if
19 there were a news report about the argument today in
20 this Court and there were reports about the actual
21 language used, that's right. The Commission has
22 exercised restraint in that area, recognizing that there
23 are different values at stake than in the -- in the
24 utterance of indecent language during a prime-time
25 broadcast where there are a substantial number of children in

1 the viewing audience.

2 For the broadcast in this case, up to 24 to
3 28 percent of the viewing audience comprised children
4 under the age of 18. This language was concededly
5 gratuitous in the context in which it was used. In the Nicole
6 Richey example in 2003, there was an element of
7 pandering as part of the dialogue consisted of Paris
8 Hilton saying, "Watch your language," before Nicole
9 Richey launched into dropping the S-Word and the F-Word
10 in -- in a context that was, the FCC reasonably
11 determined, was shocking and gratuitous and explicit and
12 graphic; and, therefore, in the context in which it was
13 presented, indecent under the agency's longstanding
14 definition of "indecentcy."

15 JUSTICE GINSBURG: Are there only those two
16 words in the FCC's new policy or are there other words
17 on the list?

18 GENERAL GARRE: Well, certainly, the FCC's
19 action in this case focuses on the use of the F-Word and
20 the S-Word, and I think everyone acknowledges that a
21 word like the F-Word is one of the most graphic,
22 explicit, and vulgar words in the English language for
23 sexual activity. And I think even the networks here
24 concede that it was -- its use was gratuitous and
25 inappropriate here. And the networks themselves --

1 JUSTICE STEVENS: Isn't it true that --
2 isn't it true that that is a word that often is used
3 with -- with no reference whatsoever to the -- the
4 sexual connotation?

5 GENERAL GARRE: It can be -- it certainly
6 can be used in a non-literal way. It can be used in a
7 metaphorical way, as Cher used it here, to say "F them"
8 to her critics. But the -- the non-literal/literal
9 distinction is not unique to the isolated expletives
10 versus the repeated effort -- expletives.

11 JUSTICE STEVENS: You think it's equally --
12 it's equally subject to being treated as indecent within
13 the meaning of the statute regardless of which meaning
14 was actually apparent to everybody who listened to it?

15 GENERAL GARRE: I wouldn't say equally,
16 Justice Stevens, but what we would say is that it can
17 qualify as indecent under the -- under the Commission's
18 definition, because even the non-literal use of a word
19 like the F-Word, because of the core meaning of that
20 word as one of the most vulgar, graphic, and explicit
21 words for sexual activity in the English language, it
22 inevitably conjures up a core sexual image.

23 JUSTICE SCALIA: Which is, indeed, why it's
24 used.

25 GENERAL GARRE: Which is, indeed, why it's

1 used as an intensifier or as an insult, and it's why the
2 networks themselves -- and this is reprinted, I believe,
3 at 86 of the petition appendix -- have a 24-hour rule
4 that the F-Word generally should not be used on TV.

5 CHIEF JUSTICE ROBERTS: But that is an
6 entirely voluntary -- I mean, the Commission would have
7 no objection if the F-Word were used on a regular basis
8 after 10:00 o'clock?

9 GENERAL GARRE: Outside of the safe harbor
10 under this Court's decision, the -- the Commission
11 recognizes that networks can use indecent language.

12 JUSTICE SCALIA: Although they don't, I
13 gather.

14 GENERAL GARRE: Although they don't. Their
15 policies are not to use indecent language.

16 JUSTICE SCALIA: Because they find it
17 offensive, I gather.

18 GENERAL GARRE: Because I think they
19 recognize that it contravenes community standards for
20 appropriateness in the broadcast medium, and that --
21 those policies are reprinted at pages 86a to 88a of the
22 petition --

23 JUSTICE GINSBURG: How are the contemporary
24 community standards determined in this context? Does
25 the FCC survey any particular audience to find out what

1 their standards are?

2 GENERAL GARRE: Well, first of all, the
3 community standards are community standards for the
4 broadcast medium. And this is set out a little bit at page
5 33 of the joint appendix at footnote 13. Second of all,
6 they look to community standards for the average
7 listener. And, third of all, the -- the Commission
8 applies its expressly -- collective experience here,
9 looking to statements from lawmakers, from courts, from
10 broadcasters, from public interest groups, and from
11 citizens to determine what is consistent with community
12 standards. And certainly the --

13 CHIEF JUSTICE ROBERTS: Well, I suppose the
14 broadcasters' own voluntary determination not to use
15 that -- that language 24 hours is a reflection of what
16 they think about community standards.

17 GENERAL GARRE: Absolutely. I think it is
18 an irrefutable reflection of what they think the
19 appropriate community standards are.

20 JUSTICE KENNEDY: Are you talking about
21 community standards for broadcasting?

22 GENERAL GARRE: Community standards for
23 broadcasting, that's right. And, in that respect, this
24 case is much different than the Reno case, for example,
25 where one of the criticisms this Court had was

1 uncertainty about what community standards would apply.

2 Another difference is -- is that here you
3 have the Commission, an expert agency, making these
4 determining -- making these determinations, drawing in
5 part on the policies and practices of the regulated
6 industry itself; for example, the self-imposed rule not
7 to use the F-Word at particular times of day.

8 And, of course, you have the fact that
9 broadcast television has always been subject to a lesser
10 standard of First Amendment scrutiny. Now --

11 CHIEF JUSTICE ROBERTS: Still, I gather
12 that's at issue with the constitutional questions. Does
13 that still have the same force today when the broadcast
14 medium is only one of several that are -- that are
15 available? In other words, it seems to me that the
16 Commission might not be accomplishing terribly much if
17 it regulates a particular medium when all sorts of other
18 media, media, are available that don't have the
19 Commission's oversight.

20 GENERAL GARRE: We think it is, and we think
21 it is reflected in the Court's cases. Let me -- and let
22 me explain why. But let me first say that obviously we
23 think that this Court does not need to, and should not,
24 delve into the constitutional issues in resolving the
25 case before it today.

1 The only issue that we have presented and
2 the only issue decided below is whether or not the
3 Commission has provided a reasoned explanation of the
4 Administrative Procedures Act.

5 JUSTICE BREYER: Can I -- can I ask? You
6 can go ahead. Are you finished?

7 GENERAL GARRE: Well, if -- if I can answer
8 the question as to the force of the Court's precedents,
9 this Court has repeatedly affirmed in cases like Sable,
10 in cases like Reno, in cases like Turner and Denver
11 Area, that broadcasting is subject to a different and
12 lesser First Amendment standard.

13 The Commission in this case looked to the
14 considerations that underlie that jurisprudential
15 doctrine and concluded that they were still apposite,
16 and that is at pages 108 to 110 of the petition
17 appendix.

18 Most Americans still get their information
19 and entertainment from broadcast TV. Most children --
20 broadcast TV is extremely accessible to children because
21 all they have to do is turn it on, and then you have
22 network shows that they can have access to. And
23 broadcast television is still broadcast in a way that
24 invades the home, the place -- the one place where
25 people typically don't expect to have uninvited,

1 offensive --

2 JUSTICE STEVENS: Yes, but wasn't the
3 rationale for the lesser standard largely the scarcity
4 of the frequencies?

5 GENERAL GARRE: I think that was the
6 rationale in Red -- Red Lion. This is Court in Pacifica
7 didn't rely on that rationale in discussing --

8 JUSTICE STEVENS: But it relied on it in Red
9 Lion?

10 GENERAL GARRE: Well, I -- as we read the
11 decision, Justice Stevens -- and I understand that you
12 wrote the plurality decision there. But, as we read the
13 decision, the Court did not rest so much on the scarcity
14 rationale, but, yet, on the unique pervasiveness of
15 broadcasting, the unique accessibility to children, and
16 the fact that broadcasting invades the home in a way
17 that other technologies do not.

18 JUSTICE GINSBURG: That was before the
19 Internet. Pacifica was in 1978.

20 GENERAL GARRE: It was, Your Honor. Now, in
21 the Turner case this Court said at page 190 that
22 broadcast medium is still the principal source of
23 information in entertainment in affirming the lesser
24 standard that this Court applies.

25 We actually think that the fact that there

1 are now additional mediums like the internet and cable
2 TV, if anything, underscores the appropriateness of a
3 lower First Amendment standard or safety zone for
4 broadcast TV, because Americans who want to get indecent
5 programming can go to cable TV, they can go to the
6 Internet.

7 But broadcast TV is, as Congress designed
8 that to be, the one place where Americans can turn on
9 the TV at 8:00 o'clock and watch their dinner and not be
10 expected to be bombarded with indecent language, either
11 in an isolated basis or repeated basis. That's a
12 societal expectation that has grown up over the last
13 30 years since Pacifica. And it would be a remarkable
14 thing to adopt the world that the networks are asking
15 you to adopt here today, where the networks are free to
16 use expletives, whether in an isolated or repeated
17 basis, 24 hours a day, going from the extreme example of
18 Big Bird dropping the F-bomb on Sesame Street, to the
19 example of using that word during Jeopardy or opening
20 the episode of American Idol --

21 JUSTICE BREYER: I just have a practical
22 question. I'm just curious about this. What are the
23 networks supposed to do, or the television stations?
24 They cover a lot of live events. They're not just
25 sports events. They're also like but the Golden -- you

1 know, the Emmys, the Oscars, and you deal with a
2 cross-section of humanity. And my experience is some
3 parts of that cross-section swear.

4 (Laughter.)

5 JUSTICE BREYER: So, what is it -- what are
6 they supposed to do when the event is live, and lo and
7 behold, they have a few people in front of them who
8 swear, using these words? What is their -- what can
9 they do?

10 GENERAL GARRE: With respect to live
11 entertainment programming, Justice Breyer, you can do
12 what the networks now do, which is to have a tape delay
13 which permits you to bleep out isolated or offensive --

14 JUSTICE BREYER: So, what they -- what they
15 now -- they now do this? In other words, whenever they
16 cover a baseball game, whenever they cover anything
17 live, they have to have some kind of tape system or for
18 the Emmys, everything is on tape and it's all delayed
19 five seconds?

20 GENERAL GARRE: No. It varies based on the
21 type of programming. For example, the Commission has
22 acknowledged -- and this is at pages 94 to 95a of the
23 petition appendix -- that their -- that breaking news
24 coverage is different and that it will not approach it
25 the same way --

1 JUSTICE BREYER: I'm not talking about
2 breaking news coverage. I guess I'm talking about, you
3 know, any one of -- they cover the wrestling matches,
4 they cover -- you see what I'm driving at. And I would
5 like to know what is the state of the art? You are
6 saying the state of the art is right now when I turn on
7 my television set, they all use a delay.

8 GENERAL GARRE: Well, I don't think --
9 that's not --

10 JUSTICE BREYER: Or are you saying they all
11 have to use a delay?

12 GENERAL GARRE: In a show like the Billboard
13 Music Awards, they will use a delay. And since the
14 incidents in this case, the 2003 and 2002 instances, the
15 networks have gotten more people who are on hand to
16 bleep isolated expletives.

17 JUSTICE SCALIA: They had a 5-second delay
18 at the time these things occurred, didn't they?

19 GENERAL GARRE: They did, and I think --

20 JUSTICE SCALIA: And it wasn't -- it wasn't
21 that they weren't fast enough or something?

22 GENERAL GARRE: Right. Well, if you look at the
23 Nicole Richie example, they actually bleeped one word
24 that was used, I believe --

25 JUSTICE SCALIA: Right, right.

1 GENERAL GARRE: -- before she got to the
2 other two words. But at that time they only had one
3 person working the bleeping machine or whatever it is
4 they call it.

5 (Laughter.)

6 JUSTICE SCALIA: It depends on whom you are
7 dealing with, right?

8 GENERAL GARRE: I think that's right. But
9 certainly there is an understanding that this is -- that
10 these isolated --

11 JUSTICE BREYER: Did the FCC explain all
12 this in its opinion when it said, we understand that now
13 we're going to have to -- every incident is going to
14 have to be -- have a 5-second delay and they will have
15 to have tapes, and we think it's worth the cost? Did
16 they explain all that?

17 GENERAL GARRE: It explained it --

18 JUSTICE BREYER: I didn't see it.

19 GENERAL GARRE: -- in its decision in the
20 petition appendix here as to the basis why enforcement
21 action would be appropriate. Because here you are
22 dealing with individuals who have used inappropriate in
23 the past -- Nicole Richie had used inappropriate
24 language in the past. You had an inappropriate tape
25 delay, you had inappropriate measures in place to ensure

1 that expletives were not used, which in the Commission's
2 judgment meant that this would be an appropriate
3 situation.

4 If you had a different context, say a
5 sporting event where there is an isolated expletive as
6 part of a post-game news interview, the Commission as it
7 would under its context-based approach, would look to
8 all the contextual factors and determine whether or not
9 it was indecent in that situation.

10 JUSTICE SCALIA: This Paris Hilton incident
11 was scripted. The use of the indecent word was almost
12 invited, wasn't it?

13 GENERAL GARRE: Certainly our view is that
14 it was pandering and invited. It could have been
15 expected.

16 JUSTICE GINSBURG: Wasn't there a different
17 word? Wasn't there a euphemism in the script? I
18 thought there was a euphemism in the script.

19 GENERAL GARRE: The euphemism in the script
20 I think was "freaking", and another euphemism for the
21 S-Word, but they obviously departed from that. And I
22 think the Commission --

23 JUSTICE SCALIA: But it was sort of an
24 invitation. I mean, before she was introduced, said,
25 "Now we're on live television, you have to watch your

1 mouth", or something like that.

2 GENERAL GARRE: That's what Paris Hilton
3 said. I mean, I think the whole thing was set up to be
4 pandering --

5 JUSTICE SCALIA: It was a setup.

6 GENERAL GARRE: -- to invite this kind of
7 abuse, which is one of the contextual factors that the
8 Commission looked at, along with the extremely shocking
9 and graphic nature of using this language at 9:00 p.m.
10 on an eastern night.

11 JUSTICE SCALIA: But you didn't fine them,
12 anyway, did you?

13 GENERAL GARRE: We did not fine them because
14 we exercised restraint in making -- in attempting to
15 make clear that the FCC going forward was going to
16 consider isolated --

17 JUSTICE GINSBURG: Because you had gone from
18 Pacifica until 2004 with a different policy, where this
19 kind of thing would have been okay?

20 GENERAL GARRE: We had gone from Pacifica
21 until 1987, approximately, in the Action for Children's
22 Television case, where the Commission determined that
23 that approach limited only to the seven dirty words in
24 Pacifica was unduly narrow and inconsistent with its
25 enforcement responsibilities.

1 JUSTICE GINSBURG: Remind me about that,
2 because there was -- the statement that the networks
3 don't do this at all at the time of Action for
4 Children's Television, the fight was, was it going to be
5 from midnight 'til whatever it was. The networks wanted
6 more hours for adult viewing. They said the only hours
7 that the Commission gave them were hours when most
8 everybody is asleep.

9 GENERAL GARRE: But I don't -- my
10 understanding was that was not pertaining to use of the
11 F-Word. The networks' policies are at 86 to 88a, the
12 petition appendix, and described there. The D.C.
13 Circuit found with respect to that change in position
14 that the Commission had supplied an adequate explanation
15 under the APA simply by saying that its prior practice,
16 enforcement practice, was unduly narrow and not
17 consistent with its enforcement responsibility.

18 We think that the even more detailed
19 explanation here clearly satisfies the APA standard that
20 applied to the Commission's change in position.

21 JUSTICE STEVENS: Maybe I shouldn't ask
22 this, Mr. Garre, is there ever appropriate for the Commission
23 to take into consideration at all the question whether
24 the particular remark was really hilarious, very, very
25 funny? Some of these things --

1 (Laughter.)

2 JUSTICE STEVENS: -- you can't help but
3 laugh at. Is that -- is that a proper consideration, do
4 you think?

5 GENERAL GARRE: Yes, insofar as the
6 Commission takes into account whether it's shocking,
7 titillating, pandering --

8 JUSTICE SCALIA: Oh, it's funny. I mean,
9 bawdy jokes are okay if they are really good.

10 (Laughter.)

11 GENERAL GARRE: Well, my point is that we
12 will take it into account, but I think you can recognize
13 the potentially greater harmful impact on children where
14 you have celebrities using particularly graphic, vulgar,
15 explicit, indecent language as part of the comedic
16 routine during a show that children are comprising a
17 substantial part of the viewing audience.

18 And that is one of the factors that is
19 appropriate under this Court's decision in *Pacifica* and
20 the Commission's policy to take into account the time of
21 day and the viewing audience.

22 JUSTICE BREYER: Could you refer me to one
23 thing in the record if it's there, or just tell me. I
24 did find an explanation for the agencies deciding that
25 "fleeting" is not going to be an automatic exemption.

1 They've talked about that.

2 What I didn't find is an explanation for a
3 second thing, which had to do with their first prong of
4 their former test, and that was the distinction that
5 used to be made between using these words as swear words
6 and using them as descriptive words. Now that, I think,
7 showed up in their former policy because they said if
8 they were used as a swear word we are not going to go
9 after them, at least not immediately. So that had to do
10 with prong 1, not prong 2.

11 GENERAL GARRE: Right.

12 JUSTICE BREYER: So is there an explanation
13 why they made that change?

14 GENERAL GARRE: Well, prong 1 hasn't
15 changed, Justice Breyer, since the time --

16 JUSTICE BREYER: It hasn't?

17 GENERAL GARRE: -- of Pacifica. It has not.
18 It's the same definition, whether descriptions or
19 depictions of sexual or excretorial organs or
20 activities, the same definition before the Court in
21 Pacifica.

22 And as the Pacifica monologue makes clear,
23 there were many both literal and non-literal uses of the
24 F-Word and S-Word and other words in that monologue.
25 So, I think the Commission's position is this kind of

1 language has always been indecent, which is -- what has
2 changed is it's now going to consider enforcement action
3 when is it's used in an isolated basis on a context-
4 based approach.

5 If I can reserve the remainder of my time --

6 JUSTICE GINSBURG: May I just ask one
7 question? It's about the bottom line in your brief.
8 This whole argument has an air of really futility,
9 because the Second Circuit more than tipped its hand
10 when it said: And even as they gave a reasoned
11 explanation, we have grave doubts whether this would be
12 constitutional.

13 You suggested in your brief a remand for
14 briefing and a hearing in the Second Circuit on the
15 constitutional issue. So, is there a way that we can
16 say, well, really, this issue that's before us now is
17 ignoring the big elephant in the rule, room; we have to
18 get to that anyway?

19 GENERAL GARRE: Well, that approach would be
20 consistent with this Court not deciding issues that
21 haven't been decided below and the general practice of
22 constitutional avoidance. Now, the Second Circuit at
23 three different places in its decision, on page 2a and
24 page 35a, and at the end of its decision, made clear
25 that it was not deciding the constitutional issues.

1 Judge Laval who dissented didn't say anything about the
2 constitutional issues. So we certainly want another
3 crack at those issues before the Second Circuit, and
4 Respondents after all are not simply asking this Court
5 to hold the regulation of isolated expletives is
6 unconstitutional, but that any broadcast indecency
7 regulation is unconstitutional; and at a minimum before
8 this Court entertains that kind of radical
9 constitutional shift, it ought to have the benefit of a
10 court of appeals decision which actually decides those
11 issues.

12 JUSTICE GINSBURG: Could that be -- could
13 that be done without deciding this APA or are we forced
14 to decide that?

15 GENERAL GARRE: Well, we think the Court is
16 forced to decide that because that's the basis that the
17 court of appeals has invalidated the Commission's
18 action. The Court should reject that decision which is
19 incorrect under the APA and send it back for
20 consideration of the networks' other arguments.

21 CHIEF JUSTICE ROBERTS: Thank you, General
22 Garre.

23 Mr. Phillips.

24 ORAL ARGUMENT OF CARTER G. PHILLIPS

25 ON BEHALF OF THE RESPONDENTS

1 MR. PHILLIPS: Thank you, Mr. Chief Justice,
2 and may it please the Court:

3 I think I would like to start with
4 Justice Scalia's narrowest question in terms of the
5 easiest way to resolve this case, which is did the FCC
6 in its remand order in fact recognize that it had made a
7 change in policy and therefore dealt forthrightly with
8 the fact that it had made a change in policy. While it
9 is true that the Second Circuit was prepared to accept
10 the idea that the Commission had changed, the reality is
11 you will read that opinion without any ability to
12 discern that. And the need --

13 JUSTICE SOUTER: Yes, but doesn't -- doesn't
14 the ability to discern it come from the reasons given
15 for not assessing fines? They said: We are not
16 assessing fines. This is something new, and this is in
17 effect a warning to everybody that things have changed.
18 Isn't that a pretty clear indication that they are
19 adopting a new policy?

20 MR. PHILLIPS: It -- well, that they are in
21 fact adopting a new policy, I think that is probably
22 right, Justice Souter. I think the problem here is that
23 ordinarily when you are in fact forthrightly changing
24 your policy it is incumbent upon the agency to say: We
25 are changing our policy, we recognize we are changing

1 our policy, and here is the explanation for why we are
2 changing our policy.

3 JUSTICE SCALIA: Are they -- are they
4 supposed to be more virtuous than courts?

5 MR. PHILLIPS: Yes.

6 JUSTICE SCALIA: I mean, courts all the
7 time, you know, distinguish prior cases by saying,
8 "well, you know, it was dictum, or we really didn't hold
9 that and whatnot." And I read their opinion as somewhat
10 the same -- somewhat the same thing. They acknowledge
11 at the end, and that's why they didn't impose a fine,
12 that although this, you know, nothing that they had done
13 up till now -- although their staff had -- would have
14 misled anybody; still and all, it wasn't all that clear,
15 and therefore we won't impose a fine. It seems to me --

16 MR. PHILLIPS: The only thing that's
17 strikingly different about that, Justice Scalia, is they
18 are very express in dealing with that issue in the Golden
19 Globes order, which --

20 JUSTICE SCALIA: It --

21 MR. PHILLIPS: -- General Garre specifically
22 identifies. It's interesting, when you say where is it
23 in the order under review when they say they are going
24 to do that, he says look in paragraph 12 of the Golden
25 Globes order. And Justice Ginsburg is absolutely right:

1 this case came to the Second Circuit; the Commission
2 said No, send it back; give us a full opportunity to
3 explain exactly what we are doing. They take it back and
4 they come in and they don't deal with this issue.

5 JUSTICE SCALIA: Well, it wasn't just to explain.
6 It was also, they said, you know, we sort of made this change
7 without getting comments from the affected parties.

8 MR. PHILLIPS: That was part of it.

9 JUSTICE SCALIA: Give us a chance to receive
10 comments and then -- and then explain.

11 MR. PHILLIPS: And then provide a final
12 reviewable order from the Commission, presumably that
13 defends in all respects that decision. But as I say --

14 CHIEF JUSTICE ROBERTS: What the Commission
15 said is that the prior decisions or guidance was
16 seriously flawed and we reaffirmed that it was
17 appropriate to disavow it.

18 It seems to me that is recognizing a change
19 and rejecting it. It's at page 82a.

20 MR. PHILLIPS: Right. All -- all I am
21 suggesting, Mr. Chief Justice, is that there is equally
22 an opposite language in which the Commission -- and the
23 Second Circuit acknowledged this, too -- in which the
24 Commission seems to back off whether or not it thinks it
25 has made a change in this particular order. And it

1 seems unreliable --

2 CHIEF JUSTICE ROBERTS: That seems to me to
3 be the same question that I asked your friend: does it
4 matter? Don't we look at the Commission's order and
5 determine whether it's a reasonable explanation, whether
6 they view it as a change or not? It seems to me that
7 they kind of said you can view it as a change because
8 the staff had these decisions, and there was dicta; or
9 it's not a change. But the point -- important point is
10 whether or not they provided a reasonable explanation
11 for their current position.

12 MR. PHILLIPS: This Court said in State Farm
13 that when an agency changes its position it is incumbent
14 upon the agency to provide more of an explanation in
15 that context than -- than if it were adopting the
16 position in the first instance. So I think yes, if
17 there is --

18 CHIEF JUSTICE ROBERTS: What it says in
19 State Farm -- what it says in State Farm is that an
20 agency's view of what is in the public interest may
21 change either with or without a change in circumstances.

22 MR. PHILLIPS: Right.

23 CHIEF JUSTICE ROBERTS: The reason there is
24 a change is they looked at it and they decided it was
25 wrong.

1 MR. PHILLIPS: Yes. Well, I -- I think it
2 -- we wouldn't be having this debate if the Commission
3 had simply dealt with this issue in the same forthright
4 fashion that it did with respect to the Golden Globes
5 order. But even if the Court accepts the idea that
6 there is a change, it seems to me quite clear that the
7 Commission has not even remotely satisfied its -- its
8 obligation to demonstrate that that change is not
9 arbitrary and capricious. And I think it's important --

10 CHIEF JUSTICE ROBERTS: You agree it's
11 enough of a justification for the change that they think
12 the other policy was wrong? They don't have to say
13 circumstances have changed, the facts are different;
14 it's enough to say, "well, whatever the Commission used
15 to thing, we think differently"?

16 MR. PHILLIPS: And then explain why.

17 CHIEF JUSTICE ROBERTS: And then explain
18 why.

19 MR. PHILLIPS: And that goes into what I
20 think is the next point that I would like to make which
21 is the answer to the Justice Breyer's question, which is
22 where in the opinion does the Commission explain the
23 change in position with respect to the -- to the first
24 prong of the indecency standard, which is whether or not
25 these words inherently mean either sexual or excretory

1 activities; and there, it seems to me, there is a --
2 whether there is a change or not, the reality is that
3 from 1978 until 2004 this kind of language was used
4 routinely, without the Commission remotely suggesting
5 that every time it was used, it necessarily had a
6 particular meaning. And then suddenly in 2004, this
7 language has changed its tone completely, and there is
8 no explanation for what is different or what is the
9 reason for adopting that particular view. The fact is
10 that the reading of that is so fundamentally at odds
11 with the way the Court --

12 JUSTICE SCALIA: They said that. They gave
13 the reason for their current belief. They said even
14 when it is used just as a swear word or as an expletive,
15 the reason it has its impact is precisely because it
16 refers to these excretory or sexual activities; that's
17 what -- that's what gives -- gives it its zing.

18 MR. PHILLIPS: This Court expressly said in
19 Cohen v California, in talking about exactly the same
20 word, that it cannot plausibly be maintained that this
21 vulgar allusion would conjure up such -- up such psychic
22 stimulation. And if the Court would say that in 1970,
23 it applies with even more force in 2008.

24 CHIEF JUSTICE ROBERTS: But that's not the
25 Commission's position. The Commission's position here

1 is not that when these words were used, people necessarily
2 thought of a literal meaning; instead, its position is
3 that the reason these words shocked is because of its
4 association with the literal meaning. That's a
5 different question than what was being addressed in
6 Cohen.

7 MR. PHILLIPS: Well, all that Cohen says is
8 that you cannot immediately jump to the -- you -- it wouldn't
9 even remotely strike you that the reason the language is
10 being used is for its particular sexual meaning.

11 CHIEF JUSTICE ROBERTS: Then why -- why do
12 you think the F-Word has shocking value or emphasis or
13 force?

14 MR. PHILLIPS: The same reason the S-Word
15 does; it's because in some circles it is inappropriate.

16 CHIEF JUSTICE ROBERTS: Because it is
17 associated with sexual or excretory activity. That's
18 what gives it its -- its force.

19 MR. PHILLIPS: I mean, I -- to say that, I
20 suppose you can say it, but I don't understand on what
21 basis. There is no empirical support for that. There's
22 no --

23 JUSTICE SCALIA: Of course there is.

24 MR. PHILLIPS: -- anything in the record
25 that remotely suggests that.

1 JUSTICE SCALIA: Don't use golly waddles in
2 -- instead of the F-Word.

3 (Laughter.)

4 MR. PHILLIPS: People use all kinds of
5 euphemisms for it, and nobody blinks about it. The
6 point is -- is that for 20-some years the Commission
7 didn't draw that inference, didn't reach that conclusion
8 and nothing has changed over those 20-some years.

9 JUSTICE SOUTER: Well, one thing has
10 changed. One thing has changed, I think, from the
11 record. And let me ask you whether if the Commission
12 had given this explanation it would in your judgment
13 satisfy the arbitrary and capricious standard?

14 What if the Commission said, you know, our
15 touchstone under prong 1 is community broadcast
16 standards. And we have assumed over the years that
17 people really didn't get too exercised by the usage that we
18 have permitted. But we are now getting all of this mail
19 from people who are very angry about it, and they find
20 it extremely offensive. And therefore, I guess our
21 prior community broadcast standards were wrong. We
22 weren't taking into consideration the way people
23 actually felt. Now we know how they felt, because of
24 the mail we are getting and we are changing our policy
25 for that reason.

1 Leaving aside the Constitutional sufficiency
2 of that, in the matter of arbitrary and capricious
3 standards, would it satisfy it?

4 MR. PHILLIPS: I think it probably would, if
5 all you are doing is looking at just the sort of raw
6 Administrative Procedure Act standard, as it would
7 normally apply to non-content.

8 JUSTICE SOUTER: Well, the raw APA standard
9 issue is what we've got here.

10 MR. PHILLIPS: Well, I -- I don't think
11 that's a fair way to -- to look at this case. Because I
12 don't see how you can -- it seems to me a completely
13 artificial inquiry to look at this as if you're regulating
14 the price of oil going through a pipeline. At the end
15 of the day you are regulating the content of speech, and
16 therefore the First Amendment ought to inform
17 everybody's assessment of what can the Commission do as
18 it moves --

19 JUSTICE SOUTER: If that's --

20 MR. PHILLIPS: In a more content-restrictive
21 way.

22 JUSTICE SOUTER: If that's the case, then
23 the concept of constitutional avoidance is -- is somehow
24 out of this case and similar First Amendment cases,
25 because we are always going to -- and I -- when you say

1 you really cannot separate that precisely, we were
2 always going to be getting into the constitutional
3 issue, either expressly because we accept your view or
4 covertly because we said, boy, we know what's around the
5 corner. And so, if --

6 MR. PHILLIPS: But that would only be --

7 JUSTICE SOUTER: -- if we accept your
8 argument, we have to change the constitutional avoidance
9 doctrine.

10 MR. PHILLIPS: No, I don't think that's
11 exactly right, Justice Souter, because the
12 constitutional avoidance doctrine is not going to be
13 much of a problem obviously unless there is a grave
14 constitutional threat. So, it's not every assertion of
15 the existence of a constitutional issue that suddenly
16 triggers withdrawal.

17 When you are dealing in this area, which is
18 content regulation and restriction on the basis of
19 content, it seems to me that's inherently a First
20 Amendment problem. And when you are in that world, then
21 it seems to me the agency, even in the APA context, has
22 more of a responsibility, or at least the Court should
23 say it has more of a responsibility to explain.

24 JUSTICE SCALIA: And I thought we've held
25 that the Court can't engage in such expansion of and

1 additions to the Administrative Procedure Act. I
2 thought that was --

3 MR. PHILLIPS: Well, the Administrative
4 Procedure Act expressly says --

5 JUSTICE SCALIA: -- one of our landmark
6 decisions that what it says, it says, and we cannot add
7 additional procedures. You are suggesting we add an
8 additional procedure that when it deals with speech, the
9 explanation has to be really good.

10 MR. PHILLIPS: Well, the --

11 JUSTICE SCALIA: Not just --

12 MR. PHILLIPS: The Administrative Procedure
13 Act also says "not in accordance with law," which also
14 refers to other statutes and obviously the Constitution.
15 So, it's not as though I am asking you to add more to
16 what the -- to the statute.

17 JUSTICE SCALIA: You are asking for a higher
18 standard than the APA --

19 MR. PHILLIPS: Yes, I am asking for a higher
20 standard under the APA because we are talking about
21 content-based restrictions on free speech.

22 CHIEF JUSTICE ROBERTS: How is that
23 consistent with Vermont Yankee?

24 MR. PHILLIPS: Because it was not talking
25 about restrictions on speech, Mr. Chief Justice.

1 CHIEF JUSTICE ROBERTS: So, you are saying
2 that we add to the APA when we are dealing with a
3 particular area. Which of our cases --

4 MR. PHILLIPS: Well, it --

5 CHIEF JUSTICE ROBERTS: Which of our cases
6 supports that?

7 MR. PHILLIPS: This Court hasn't had to hold
8 that in any particular context, but the reality is, as a
9 logical matter, if you are thinking about -- you know,
10 there is an -- a restriction on "in accordance with
11 law." The First Amendment is obviously with law, so you
12 have that limitation. And then you have --

13 CHIEF JUSTICE ROBERTS: Well, maybe sometime
14 --

15 MR. PHILLIPS: And in order to avoid those
16 issues --

17 CHIEF JUSTICE ROBERTS: -- to be in a
18 position to argue your constitutional issue, but we
19 can't assume that you are right on the Constitution in
20 applying the APA.

21 MR. PHILLIPS: All I'm saying is that it
22 seems to me a remarkably artificial inquiry, to look at
23 this as if you are regulating the price of oil going
24 through, to a pipeline as opposed to what you are
25 talking about --

1 JUSTICE SCALIA: You should have complained
2 to the lower court about that. You should have said,
3 please don't decide this on the APA issue. This is a
4 First Amendment case. You should reach the
5 constitutional issue.

6 MR. PHILLIPS: But --

7 JUSTICE SCALIA: But you went on the APA
8 issue, and then you come up here and say: I don't want
9 to -- I don't want to discuss the APA; I want to
10 discuss, you know, the First Amendment.

11 MR. PHILLIPS: Well, Justice Scalia, I am
12 perfectly content to talk about the APA, because at the
13 end of the day, the APA --

14 JUSTICE SCALIA: The APA simpliciter; not
15 the APA, you know --

16 MR. PHILLIPS: I like the more complicated
17 version, but I am happy to deal with the simpliciter one
18 as well.

19 (Laughter.)

20 MR. PHILLIPS: But the reality that goes
21 back to Justice Breyer's question, at the end of the day
22 the important part of this is what explains this
23 fundamental shift.

24 Now, I think Justice Souter, you know, has
25 probably made a respectable argument on APA grounds.

1 JUSTICE SOUTER: Thank you. Thank you.

2 (Laughter.)

3 MR. PHILLIPS: But unfortunately that's not
4 the position that the FCC took.

5 JUSTICE SCALIA: He does good stuff now and
6 then.

7 (Laughter.)

8 MR. PHILLIPS: I have nothing but the
9 highest regard for him.

10 But the other -- the other part of this case
11 that seems to have gotten lost track of is that this is
12 not a statute that -- that the Commission has the
13 responsibility to enforce. This is a criminal statute.
14 This is section 1464. And through section 503, the
15 Commission doesn't have broad-based discretion to define
16 for itself these terms. The Commission has to decide
17 what is indecent within the meaning of a Federal
18 criminal statute, which means we are entitled to the
19 rule of lenity, which means we are entitled to an
20 interpretation of that first prong which, in dealing
21 with indecency, says that it has to describe or depict
22 sexual activities.

23 CHIEF JUSTICE ROBERTS: Well, when you talk
24 about the rule of lenity, I mean, the point is that this
25 change -- if there is a change in policy or whether it's

1 adequately explained -- simply gets you in the door.
2 They say then, once you are there, we just look at all
3 of the circumstances and the context. So, we don't --
4 it seems to me in their enforcement decisions, their
5 decision not to impose sanctions, their decision not to
6 have this count against you in future proceedings, they
7 are being very lenient.

8 MR. PHILLIPS: Well, they are being lenient
9 in one sense. I think you have to step back,
10 Mr. Chief Justice, and recognize what the -- what we've
11 got here. We are talking about an extraordinary in
12 terrorem regime that the FCC has created. And I would
13 commend to you all the amicus briefs from the NAB, from
14 the former FCC officials, and from others who describe
15 in exquisite detail the chilling effect that this
16 particular scheme may have.

17 To be sure, you know, Fox isn't being
18 immediately penalized by this, but to go back to
19 Justice Breyer's question of General Garre, where he said
20 -- you know, does everybody have everything on tape and
21 delaying? No, of course not. And why not? Because it
22 may be one thing for Fox to be able to put a show like
23 this on a delayed basis, but if you are dealing with a
24 local television station that is just getting by
25 hand-to-mouth, and they want to televise a football

1 game, and in the middle of that football game some
2 student decides to express himself in ways that
3 nobody anticipated --

4 CHIEF JUSTICE ROBERTS: And this is where
5 the context comes in. At least with impressionable
6 children, that's dramatically different from saying here
7 is an awards show, here is a celebrity, I want to listen
8 to what they are going to say because I listen to their
9 music, and he comes out with that, as opposed to a
10 football game. They know that, you know, somebody says a bad
11 word in the middle of the interview. The context makes
12 all the difference in the world.

13 MR. PHILLIPS: Well, I'm not sure that -- I
14 mean, I don't remember the FCC being in a position to
15 describe how children are able to perceive one set of
16 uses of the word as opposed to another set of uses of
17 the word. But what I think this Court --

18 CHIEF JUSTICE ROBERTS: They perceive that.
19 They know. I mean, it's one thing to use the word in,
20 say, Saving Private Ryan, when your arm gets blown off.
21 It's another thing to do it when you are standing up at
22 an awards ceremony.

23 MR. PHILLIPS: You can't seriously believe
24 that the average nine-year-old, first of all, who is
25 probably more horrified by the arm being blown off to

1 begin with, but putting that aside, you -- it cannot
2 possibly be that the child has more of a reaction to
3 that word in that context than if a young high school
4 football player is running down the field screaming a
5 particular expletive.

6 CHIEF JUSTICE ROBERTS: Why -- the young
7 football player is not a celebrity that they follow.

8 MR. PHILLIPS: The young high school player
9 actually might be more of a celebrity in some
10 communities than -- at least than where I live, and --

11 CHIEF JUSTICE ROBERTS: The point is whether
12 they are or not is the contextual determination that the
13 FCC can undertake. All they are saying is that just
14 because it's used once doesn't mean you are out of the
15 -- out of the woods altogether. Let's look at it, and
16 if it turns out there's no -- I mean, this is the point
17 they make, that in one context, it's completely
18 gratuitous; in the other context, it's not.

19 MR. PHILLIPS: But the problem is,
20 Mr. Chief Justice, once you open the door, then you end
21 up with all of the vagueness and overbreadth problems
22 that are inherent in this regime.

23 JUSTICE SCALIA: These arguments apply not
24 just to the isolated, once-upon-a-time use, but even to
25 continued use. You could say the same thing about just

1 filling a program with these expletives, right?

2 MR. PHILLIPS: Justice Scalia, you could say
3 the same thing --

4 JUSTICE SCALIA: That's not --

5 MR. PHILLIPS: -- but we're not saying the
6 same thing.

7 JUSTICE SCALIA: That's not, I suppose, what
8 you are arguing against here, is it?

9 MR. PHILLIPS: No, because the point we are
10 making here is that we haven't asked this Court to
11 revisit *Pacifica*. And the point is that when you move
12 away from *Pacifica*, which is the verbal shock treatment
13 formulation, and say, you know, that's perfectly
14 consistent with the First Amendment and with everything
15 that agency decisionmaking requires, and say that's all
16 right -- when you shift from that, which is an enormous
17 switchover, and go into fleeting expletives, then it's a
18 fundamental -- all we're saying is that's a
19 fundamentally different issue and that implicates more
20 serious First Amendment issues, because everybody knows
21 what is something that is verbal shock treatment or at
22 least we know how to stay pretty far away from it;
23 whereas, if I say every fleeting expletive potentially
24 exposes every broadcaster to \$325,000 fines made solely
25 at the discretion of five individuals, unelected, that

1 impresses me, Your Honors, as simply an inappropriate
2 problem, and one that just follows naturally,
3 Mr. Chief Justice, from saying, well, all we are going
4 to do is open that door. Because once you open the door,
5 it is clearly a Pandora's box we are talking about.

6 CHIEF JUSTICE ROBERTS: Then why do your
7 clients not use these words between 10:00 p.m. and
8 6:00 a.m.?

9 MR. PHILLIPS: Because it affects audience
10 share. There are some people --

11 CHIEF JUSTICE ROBERTS: Why do you think it
12 affects audience share?

13 MR. PHILLIPS: Because some people are
14 offended by it; not the whole community. There are
15 probably a lot of people who would actually prefer to
16 have more of it. But for some members of the --

17 CHIEF JUSTICE ROBERTS: If you can take that
18 into consideration, why can't the FCC make the same
19 determination, that there may be some people offended by
20 this, and if there are some people, as part of our
21 statutory responsibility, we are going to look at it.
22 Not that they automatically impose --

23 MR. PHILLIPS: But that's a heckler's veto.

24 CHIEF JUSTICE ROBERTS: Not that they
25 automatically impose a sanction, but that they're going

1 to look at it.

2 MR. PHILLIPS: Well, first of all, that's a
3 heckler's veto, and there have been long holdings in
4 this Court that suggest simply pandering to one small
5 segment of the population is no way to enforce First
6 Amendment rights. So that's -- I mean, that's my
7 primary answer to that.

8 JUSTICE SCALIA: There goes Pacifica.

9 MR. PHILLIPS: No, I don't think there goes
10 Pacifica, because Pacifica was only one person --

11 JUSTICE SCALIA: Isn't that a --

12 MR. PHILLIPS: I'm sorry.

13 JUSTICE SCALIA: Isn't that a heckler's
14 veto?

15 MR. PHILLIPS: No. What --

16 JUSTICE SCALIA: What if people like, you
17 know, going on and on with expletives and offensive
18 words? Are those of us who are offended by that
19 hecklers and you can't take our positions into account
20 because you're giving effect to a heckler? I mean -- I
21 don't think so.

22 MR. PHILLIPS: But the problem is that the
23 Chief Justice's question was: Why do we have a 24-hour
24 rule.

25 And the answer is: It's one thing for us to

1 voluntarily assume that. I think it is a mistake, and I
2 don't know that -- and I don't think -- I didn't read
3 anything in the Commission's opinion that reflects this.
4 But they say that fact suddenly defines the community
5 standards for purposes of what is indecent and what is
6 not indecent. That simply reflects our own best
7 judgment about how to serve our audience.

8 JUSTICE STEVENS: If there is -- if there is
9 a change in the community standards, does that justify a
10 change in the FCC's policies?

11 And the second question and the reason I ask
12 that is: Do you think today the community generally is
13 more offended by these words or more tolerant of these
14 words --

15 MR. PHILLIPS: Well --

16 JUSTICE STEVENS: -- as compared to what
17 Pacifica was concerned with?

18 MR. PHILLIPS: I mean I -- I believe that
19 society is significantly more tolerant of these words
20 today than it was in -- 30 years ago.

21 JUSTICE SCALIA: Do you think your clients
22 have had anything to do with that?

23 (Laughter.)

24 MR. PHILLIPS: In -- in the scheme of
25 things, probably very, very little to do with that

1 compared to the way the language is used. Go to a
2 baseball game, Justice Scalia. You hear these words
3 every -- every time you go to a ballgame.

4 JUSTICE SCALIA: You do, indeed, but you
5 don't have them presented as something that is -- is
6 normal in polite company, which is what happens when it
7 comes out in -- in television shows. This is a
8 coarsening of manners that is -- that is produced by --
9 by the shows. So I am -- you know, I -- I am not
10 persuaded by the argument that people are more
11 accustomed to hearing these words than they were in the
12 past.

13 MR. PHILLIPS: But the -- I mean I think
14 what Justice Stevens is getting at is: What has changed
15 over the last 30 years? And if anything has changed, it
16 would be exactly the opposite, which is they are going
17 to be more and more tolerant of this language; not that
18 they are less tolerant of this language. And,
19 therefore, there is even less reason for the Commission
20 to have taken the position that it did in this
21 particular context.

22 JUSTICE SCALIA: More tolerant or more used
23 to hearing it?

24 MR. PHILLIPS: I think both, candidly.

25 JUSTICE SCALIA: I think there is

1 a difference.

2 MR. PHILLIPS: Well, I am not saying there
3 is not a difference, but I am suggesting that there are
4 -- that the -- that the change over time has -- has made
5 this less of a compelling argument than it would have
6 been, at least in my judgment, in -- in 1978.

7 I would like to make a couple of different,
8 additional points. Another thing that has changed since
9 1978 is that there is much more opportunity for parents
10 to control access for their children because of the V-
11 chip. That's available.

12 Second, in terms of this effort to try to
13 lessen the coarsening of American discourse --

14 JUSTICE KENNEDY: I'm not sure that works.
15 I haven't looked at the statistics on one-parent
16 families, working parents, and so forth. Those factors
17 also have to be considered.

18 MR. PHILLIPS: Well, but if you put in a
19 V-chip, it doesn't matter whether your parents are
20 working or not. The truth is if you had had a V-chip
21 for the 2003 version of this, which would have said PGL,
22 which is for language, children couldn't have gotten on
23 there whether the parents were at home or not. The
24 V-chip is a usable and feasible technology and is a less
25 restrictive alternative than the one that we have on the

1 -- on the table under these particular circumstances.

2 The -- I wanted to go back to the -- to the
3 statute, the fact that this is a criminal statute.

4 Again, the Commission is not arguing here for broad --
5 recognizing, or accepting, or arguing for, that they
6 have a broad delegation of authority. They don't have
7 the authority to decide what decent and decency is.

8 JUSTICE BREYER: And you were -- you were
9 pursuing the practical thing about the tapes, and so
10 forth, when you got on to a different subject, which was
11 the -- the nature of the program. I just wanted to be
12 certain you are finished with what you wanted to say
13 there. I -- because I am interested in the practical
14 question of: Do all the stations have tapes? And leave
15 sports events out of it, and leave news out of it. Are
16 there other events that these small stations might want
17 to cover that don't have the tape or that now don't use
18 the tape; anything else you want to say about that?

19 MR. PHILLIPS: Well, I --

20 JUSTICE BREYER: I am interested in the
21 practical problem as part of this. Where do I look to
22 find out some facts?

23 MR. PHILLIPS: Well, the NAB amicus brief
24 actually has a pretty good description of a variety of
25 different instances in which this has -- has occurred.

1 And, of course, the NAB represents obviously the large
2 networks but also all of the individual stations. And
3 that, to me at least, makes a compelling argument that
4 you -- you cannot simply have one rule that says: Let's
5 just impose additional costs on everybody. Because the
6 answer to that is that those stations will simply refuse
7 to broadcast.

8 And to me the best illustration of it, and
9 the one that the public interest, I would hope, would
10 command or demand the Court take account of, is the
11 Vermont public station that refused to broadcast a
12 debate or -- or allow a member of Senatorial candidate
13 to participate in a debate because that candidate had
14 used expletives in a previous public forum, and,
15 therefore, didn't think it could allow that broadcast
16 and take that risk because it can't afford to have the
17 tape-delayed technology that you are talking about.

18 And -- and that to me is the quintessential
19 example. But there are loads of them, and it's just
20 going to get worse once you decide to get past the
21 notion that a fleeting expletive, no matter how it
22 arises, requires to you to justify it.

23 Because we went from a system that said: We
24 will, in general, never condemn fleeting expletives to
25 the system that exists now, which is we routinely

1 condemn them unless we think its okay. And that's a
2 system, it seems to me, this Court ought not to
3 countenance. It is embedded in the Second Circuit's
4 decision.

5 The Court should affirm that decision and
6 vacate back to the Commission so that it can go forward
7 -- or to remand back to the Commission so it can do the
8 best it can to try to come up with a justification that
9 satisfies both the APA and the First Amendment that it
10 has not done so far.

11 JUSTICE GINSBURG: Mr. Phillips, this --
12 this is similar to the question that I asked General
13 Garre. The Commission asked for a remand so it could
14 provide a reasoned explanation. But you had or your
15 clients had -- in their complaint they made an APA claim
16 as well as a First Amendment claim, didn't they?

17 MR. PHILLIPS: Yes, we did.

18 JUSTICE GINSBURG: Yes.

19 MR. PHILLIPS: I mean it wasn't a complaint.
20 Actually, it was -- it was a petition for review --

21 JUSTICE GINSBURG: Correct.

22 MR. PHILLIPS: -- going right to the Second
23 Circuit.

24 JUSTICE GINSBURG: Yes.

25 MR. PHILLIPS: So it doesn't have the same

1 bill of particulars that you might otherwise have.

2 JUSTICE GINSBURG: You could have just done
3 the First Amendment, but you -- you did put the APA into
4 it.

5 MR. PHILLIPS: Yes, Justice Ginsburg. We --
6 we do believe that the Commission changed its position,
7 and -- and, again, we had to file a separate petition
8 for review from the remand order over and above the
9 petition for review we filed from the first order.

10 So, you know, we took into account this
11 assessment in saying we don't think the agency had
12 adequately justified its change in position.

13 JUSTICE STEVENS: May I ask this question,
14 Mr. Phillips? I guess in the -- in the last analysis we
15 are trying to decide what the word "indecent" means.

16 MR. PHILLIPS: Yes, Justice.

17 JUSTICE STEVENS: And do you think that the
18 word "indecent" can have -- that -- that a fleeting
19 expletive could be not indecent, but the same words
20 could be indecent if they are repeated several times?

21 MR. PHILLIPS: I think it -- at least to me
22 it's hard. I don't think so, but I -- I can understand
23 that Pacifica could be read that way, although in
24 Pacifica, itself, George Carlin does, in fact, use the
25 fleeting expletive in an explicitly sexual way at -- at

1 times.

2 But I -- I think the hardest case, candidly,
3 is the situation where you have a string of expletives,
4 all of which are clearly not designed to reflect
5 anything about sexual activity and what you do in that
6 situation. That is the hardest case.

7 JUSTICE STEVENS: Yes, but I -- I am not --
8 not sure I make my question as clear as I should. If we
9 are trying to define the term "indecent" --

10 MR. PHILLIPS: Yes.

11 JUSTICE STEVENS: -- does the -- does the
12 number of times the word is used in a particular context
13 make a difference in the definition?

14 MR. PHILLIPS: I apologize. I didn't -- I
15 misunderstood your question. No, I don't think so. I
16 think the question -- the first prong of the indecency
17 inquiry is whether or not the particular language used
18 does, in fact, describe or depict sexual or excretory
19 activities or organs. And that's the No. 1 inquiry.
20 And I don't think the number of times in which you use
21 it affects the --

22 JUSTICE STEVENS: As a matter of statutory
23 definition, if a particular word can describe those
24 activities, it is equally indecent if used for a
25 different purpose?

1 MR. PHILLIPS: I -- I would have thought
2 that, since you were dealing with a statute that is --
3 that imposes criminal sanctions, that if you have those
4 two alternative interpretations available, you have to
5 choose the one that is more favorable to the defendant.
6 And, therefore, you would -- you would say that the --

7 JUSTICE STEVENS: -- would not be indecent.
8 That is the interpretation --

9 MR. PHILLIPS: I am sorry?

10 JUSTICE STEVENS: -- you should accept.
11 Let's say because one interpretation of an ambiguous
12 word would not be indecent, you are saying the rule of
13 lenity in that sort of approach would require in a
14 criminal case to just adopt that -- that definition?

15 MR. PHILLIPS: That would be my argument,
16 yes, Justice Stevens.

17 JUSTICE SOUTER: But that -- I mean you are
18 just -- correct me if I am wrong, but your colloquy with
19 Justice Stevens sort of is a way of phrasing the issue
20 in the case. Because you are saying, I think, prior to
21 this -- prior to the change, the Commission interpreted
22 "indecency" in terms of indecent practice. And what the
23 Commission is now doing is defining "indecency" in terms
24 of the meaning of a word. It's -- it's relatively going
25 from saying indecency is a practice, i.e., a repetition

1 of certain kinds of words, to saying "indecent" is --
2 is the use of any word which is itself indecent.

3 MR. PHILLIPS: Well, I -- I agree with that
4 completely, Justice Souter. No. That is exactly how
5 you can characterize it. I mean it may not be the
6 precise verbal formulation we used, but, candidly, that
7 is essentially the way Judge Leval looked at it.
8 And he just said at the end of the day, because I have
9 to defer to the agency, I am going to let them have that
10 interpretation. But that is not the appropriate approach.

11 JUSTICE SCALIA: Let me ask about deferring
12 interpretation. You seem to be suggesting that since there is
13 a
14 criminal penalty for a violation of this statute, the
15 agency has no role in -- in defining what -- what the
16 terms of the statute mean.

17 MR. PHILLIPS: Justice Scalia, the language
18 of the statute itself would suggest that, because the
19 statute says that the Commission may find violate -- may
20 impose certain enforcement actions for people who
21 violate section 1464. That, of course, is a criminal
22 statute.

23 Therefore, it is not a statute that has been
24 delegated to the agency's broad discretion to decide
25 what falls within that language. It is within the
26 agency's discretion to choose a penalty that, in fact,

1 enforces that criminal dictate.

2 And to go back to Justice Stevens's
3 position -- I shouldn't give it as your position, it is
4 my position -- but the point, I think, we were
5 discussing, if you have a choice of two ways to read
6 indecency, you have to read it in a way more favorable
7 to the defendant, that precludes the approach that the
8 government has taken in this particular case.

9 If there are no further questions, Your
10 Honor, I would --

11 CHIEF JUSTICE ROBERTS: Thank you, Mr.
12 Phillips.

13 General Garre you have 2 minutes remaining.

14 REBUTTAL ARGUMENT OF GENERAL GREGORY G. GARRE
15 ON BEHALF OF THE PETITIONERS

16 GENERAL GARRE: Thank you, Mr. Chief
17 Justice.

18 First, Justice Scalia, it's on page 82a of
19 the petition appendix where the Commission acknowledges
20 the change in the order at issue in this case.

21 Justice Breyer, going back to your question
22 about whether the Commission's definition of indecency
23 has changed, it is not and that is made clear at page
24 73a of the petition appendix where the Commission says,
25 quote, "a long line of precedence indicates that the use

1 of the F-Word for emphasis or as an intensifier comes
2 within the subject matter scope of our indecency
3 definition."

4 JUSTICE BREYER: It explained -- I mean, the
5 change I saw was that previously the use of these words
6 as a swear was treated differently from the use of these
7 words as a description. And that after the event, it's
8 not treated differently.

9 GENERAL GARRE: It explains on page 74 why
10 the Commission has determined that these words are
11 indecent. The Commission has treated those literal and non-
12 literal uses of these words as potentially indecent under its
13 contextual analysis.

14 We think that Justice Ginsburg's decision
15 for the D.C. Circuit in the Action for Children's
16 Television case provides a road map for resolving this
17 case, where the Court separately addressed the APA
18 question of whether the agency had provided a reasonable
19 explanation and then separated out the constitutional
20 issues, which this Court need not address.

21 JUSTICE STEVENS: Could I ask one question
22 that just occurred to me? Do you think the use of the
23 word dung, D-U-N-G, would be indecent?

24 GENERAL GARRE: I think it would probably
25 qualify under the subject matter definition, but it

1 probably wouldn't be patently offensive under community
2 standards for broadcasting.

3 The one thing that can't be disputed seriously in
4 this case is that the F-Word is patently offensive under
5 community standards for the broadcast medium. This
6 Court should reverse the decision below on the APA
7 question presented and remand the case for consideration
8 under --

9 JUSTICE GINSBURG: You have the F-Word in
10 there too, and even Judge Leval says he didn't
11 understand why that word should be on the list.

12 GENERAL GARRE: Well, we certainly think
13 that under community standards that that word is
14 patently offensive as well. And certainly, but we think
15 that the F-Word itself is clearly patently offensive.
16 We think that the S-Word is patently offensive. This
17 Court did so -- we think had that view in the Pacifica
18 case as well, because that, of course, is one of the
19 seven dirty words at issue in that case.

20 If there are no further questions.

21 CHIEF JUSTICE ROBERTS: Thank you, General.

22 The case is submitted.

23 (Whereupon, at 11:05 a.m., the case in the
24 above-entitled matter was submitted.)

25

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