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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." We -- 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 the
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 that it 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 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 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 "indecent."

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 that would control --

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 use 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 --

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

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

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

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

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

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

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

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

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

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

25 The only issue that we have presented and

1 the only issue decided below is whether or not the
2 Commission has provided a reasoned explanation of the
3 Administrative Procedures Act.

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

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

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

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

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

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

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

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

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

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

24 We actually think that the fact that there
25 are now additional mediums like the internet and cable

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

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

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

1 cross-section of humanity. And my experience is some
2 parts of that cross-section swear.

3 (Laughter.)

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

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

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

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

25 JUSTICE BREYER: I'm not talking about

1 breaking news coverage. I guess I'm talking about, you
2 know, any one of -- they cover the wrestling matches,
3 they cover -- you see what I'm driving at. And I would
4 like to know what is the state of the art? You are
5 saying the state of the art is right now when I turn on
6 my television set, they all use a delay.

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

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

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

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

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

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

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

24 JUSTICE SCALIA: Right, right.

25 GENERAL GARRE: -- before she got to the

1 other two words. But at that time they only had one
2 person working the bleeping machine or whatever it is
3 they call it.

4 (Laughter.)

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

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

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

16 GENERAL GARRE: It explained that --

17 JUSTICE BREYER: I didn't see it.

18 GENERAL GARRE: -- in its decision in the
19 petition appendix here as to the basis why enforcement
20 action would be appropriate. Because here you are
21 dealing with individuals who have used inappropriate in
22 the past -- Nicole Richie had used inappropriate
23 language in the past. You had an inappropriate tape
24 delay, you had inappropriate measures in place to ensure
25 that expletives were not used, which in the Commission's

1 judgment meant that this would be an appropriate
2 situation.

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

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

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

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

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

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

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

4 JUSTICE SCALIA: It was a setup.

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

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

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

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

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

25 JUSTICE GINSBURG: Remind me about that,

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

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

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

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

25 (Laughter.)

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

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

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

9 (Laughter.)

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

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

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

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

10 GENERAL GARRE: Right.

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

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

15 JUSTICE BREYER: It hasn't?

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

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

1 changed is it's now going to consider enforcement action
2 when is it's used in an isolated basis on a context-
3 based approach.

4 If I can reserve --

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

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

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

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

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

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

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

22 Mr. Phillips.

23 ORAL ARGUMENT OF CARTER G. PHILLIPS

24 ON BEHALF OF THE RESPONDENTS

25 MR. PHILLIPS: Thank you, Mr. Chief Justice,

1 and may it please the Court:

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

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

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

1 changing our policy.

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

4 MR. PHILLIPS: Yes. Yes.

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

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

19 JUSTICE SCALIA: It --

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

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

4 JUSTICE SCALIA: Well -- it was also, they
5 said, you know, we sort of made this change without
6 getting comments from the affected parties.

7 MR. PHILLIPS: That was part of it.

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

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

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

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

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

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

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

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

21 MR. PHILLIPS: Right.

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

25 MR. PHILLIPS: Yes. Well, I -- I think it

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

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

15 MR. PHILLIPS: And then explain why.

16 CHIEF JUSTICE ROBERTS: And then explain
17 why.

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

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

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

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

23 CHIEF JUSTICE ROBERTS: But that's not the
24 Commission's position. The Commission's position here
25 is not when these words were used, people necessarily

1 thought of a literal meaning; instead, its position is
2 that the reason these words shocked is because of its
3 association with the literal meaning. That's a
4 different question than what was being addressed in
5 Cohen.

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

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

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

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

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

22 JUSTICE SCALIA: Of course there is.

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

25 JUSTICE SCALIA: Don't use golly waddles in

1 -- instead of the F-Word.

2 (Laughter.)

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

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

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

25 Leaving aside the Constitutional sufficiency

1 of that, in the matter of arbitrary and capricious
2 standards, would it satisfy it?

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

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

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

18 JUSTICE SOUTER: If that's --

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

21 JUSTICE SOUTER: If that's the case, then
22 the concept of constitutional avoidance is -- is somehow
23 out of this case and similar First Amendment cases,
24 because we are always going to -- and I -- when you say
25 you really cannot separate that precisely, we were

1 always going to be getting into the constitutional
2 issue, either expressly because we accept your view or
3 covertly because we said, boy, we know what's around the
4 corner. And so, if --

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

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

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

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

23 JUSTICE SCALIA: And I thought we've held
24 that the Court can't engage in such expansion of and
25 additions to the Administrative Procedure Act. I

1 thought that was --

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

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

9 MR. PHILLIPS: Well, the --

10 JUSTICE SCALIA: Not just --

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: So, you are saying

1 that we add to the APA when we are dealing with a
2 particular area. Which of our cases --

3 MR. PHILLIPS: Well, it --

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

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

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

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

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

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

25 JUSTICE SCALIA: You should have complained

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

5 MR. PHILLIPS: But --

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

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

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

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

18 (Laughter.)

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

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

25 JUSTICE SOUTER: Thank you. Thank you.

1 (Laughter.)

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

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

6 (Laughter.)

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

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

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

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

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

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

1 student decides to express himself in ways that
2 nobody anticipated --

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

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

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

22 MR. PHILLIPS: You can't seriously believe
23 that the average nine-year-old, first of all, who is
24 probably more horrified by the arm being blown off to
25 begin with, but putting that aside, you -- it cannot

1 possibly be that the child has more of a reaction to
2 that word in that context than if a young high school
3 football player is running down the field screaming a
4 particular expletive.

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

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

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

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

22 JUSTICE SCALIA: These arguments apply not
23 just to the isolated, once-upon-a-time use, but even to
24 continued use. You could say the same thing about just
25 filling a program with these expletives, right?

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

3 JUSTICE SCALIA: That's not --

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

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

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

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

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

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Not that they
24 automatically impose a sanction, but that they're going
25 to look at it.

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

7 JUSTICE SCALIA: There goes Pacifica.

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

10 JUSTICE SCALIA: Isn't that a --

11 MR. PHILLIPS: I'm sorry.

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

14 MR. PHILLIPS: No. What --

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

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

24 And the answer is: It's one thing for us to
25 voluntarily assume that. I think it is a mistake, and I

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

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

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

14 MR. PHILLIPS: Well --

15 JUSTICE KENNEDY: -- as compared to what
16 *Pacifica* was concerned with?

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

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

22 (Laughter.)

23 MR. PHILLIPS: In -- in the scheme of
24 things, probably very, very little to do with that
25 compared to the way the language is used. Go to a

1 baseball game, Justice Scalia. You hear these words
2 every -- every time you go to a ballgame.

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

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

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

23 MR. PHILLIPS: I think both.

24 JUSTICE SCALIA: Candidly, I think there is
25 a difference.

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

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

11 Second, in terms of this effort to try to
12 lessen the coarsening of America --

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

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

1 The -- I wanted to go back to the -- to the
2 statute, the fact that this is a criminal statute.
3 Again, the Commission is not arguing here for broad --
4 recognizing, or accepting, or arguing for, that they
5 have a broad delegation of authority. They don't have
6 the authority to decide what indecency is.

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

18 MR. PHILLIPS: Well, I --

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

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

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

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

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

22 Because we went from a system that said: We
23 will, in general, never condemn fleeting expletives to
24 the system that exists now, which is we routinely
25 condemn them unless we think its okay. And that's a

1 system, it seems to me, this Court ought not to
2 countenance. It is embedded in the Second Circuit's
3 decision.

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

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

16 MR. PHILLIPS: Yes, we did.

17 JUSTICE GINSBURG: Yes.

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

20 JUSTICE GINSBURG: Correct.

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

23 JUSTICE GINSBURG: Yes.

24 MR. PHILLIPS: So it doesn't have the same
25 bill of particulars that you might otherwise have.

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

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

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

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

15 MR. PHILLIPS: Yes, Justice Kennedy.

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

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

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

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

9 MR. PHILLIPS: Yes.

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

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

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

25 MR. PHILLIPS: I -- I would have thought

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

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

8 MR. PHILLIPS: I am sorry?

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

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

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

1 is the use of any word which is itself indecent.

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

10 CHIEF JUSTICE ROBERTS: But that is not the
11 appropriate approach.

12 JUSTICE SCALIA: Let me ask about deferring
13 there. You seem to be suggesting that since there is 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

1 agency's discretion to choose a penalty that, in fact,
2 enforces that criminal dictate.

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

10 If there are no further questions, Your
11 Honor, I would reserve.

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

14 General Garre you have two minutes.

15 REBUTTAL ARGUMENT OF GEN. GREGORY G. GARRE

16 ON BEHALF OF THE PETITIONERS

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

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

22 Justice Breyer, going back to your question
23 about whether the Commission's definition of indecency
24 has changed, it is not and that is made clear at page
25 73-A of the petition appendix where the Commission says,

1 quote, a long line of precedence indicates that the use
2 of the F-Word for emphasis or as an intensifier comes
3 within the subject matter scope of our indecency
4 definition.

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

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

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

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

25 GENERAL GARRE: I think it would probably

1 qualify under the subject matter definition, but it
2 probably wouldn't be patently offensive under community
3 standards for broadcasting.

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

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

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

21 If there are no further questions.

22 CHIEF JUSTICE ROBERTS: Thank you, General.

23 The case is submitted.

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

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