No. 07-582

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., *et al.*,
Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENTS FOX TELEVISION STATIONS, INC., CBS BROADCASTING INC., AND ABC, INC.

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QUESTION PRESENTED

Whether the court of appeals correctly held as a matter of administrative law that the FCC failed to provide a reasoned basis for reversing its longstanding indecency enforcement policy with respect to isolated and fleeting expletives.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Sup. Ct. R. 29.6, Respondents make the following disclosures:

Fox Television Stations, Inc. states that its parent corporation is News Corporation, and that Liberty Media Corporation owns more than 10 percent of News Corporation stock.

CBS Broadcasting Inc. states that CBS Corporation, a publicly held company, owns an interest of 10 percent or more in CBS Broadcasting Inc.

ABC, Inc. is an indirect, wholly owned subsidiary of The Walt Disney Company, a publicly-traded corporation.

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INTRODUCTION

Petitioners seek this Court's review of a decision of the Second Circuit that did nothing more than remand the case to the Federal Communications Commission ("FCC" or "Commission") to provide a fuller explanation for a policy reversal. As petitioners correctly concede, such a case does not typically merit this Court's review. Pet. 15, 26. There is nothing unusual about this case that changes that conclusion. There is no conflict among the courts of appeals on the straightforward administrative law issue decided by the Second Circuit. Nor did the Second Circuit decide any important question of administrative law in a way that conflicts with this Court's precedents. Certiorari should be denied.

Petitioners' principal claim is their erroneous assertion that the Second Circuit's decision regarding the FCC's indecency policy with respect to fleeting and isolated expletives conflicts with this Court's decision in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). In fact, the *Pacifica* court expressly declined to address whether the federal indecency statute, 18 U.S.C. § 1464, would permit a ban on isolated and fleeting expletives; thus, no conflict with *Pacifica* is even possible. Petitioners nonetheless argue that the Second Circuit has prohibited the FCC from taking "context" into account when applying the indecency ban, which petitioners assert is inconsistent with *Pacifica*. But that is a fundamental misreading of the decision below. The Second Circuit merely remanded the case for lack of explanation; it did not substantively hold that the FCC could not consider context. This Court reviews judgments, not statements in opinions, and the remand order in this

case does not present any question warranting this Court's review.

Petitioners' contention that the Second Circuit's decision conflicts with principles of administrative law is equally unfounded. The Second Circuit applied routine administrative law principles in determining that the FCC had failed to provide a reasoned basis for reversing nearly 30 years of precedent with respect to isolated and fleeting expletives. Petitioners in reality are claiming that the Second Circuit misapplied properly stated rules of law—an issue that the FCC did not even ask the court of appeals to rehear and that plainly does not warrant this Court's review. Sup. Ct. R. 10. In addition, contrary to petitioners' suggestion, there is no circuit conflict between the Second Circuit's administrative law decision and a quite different decision of the D.C. Circuit on an issue of constitutional law.

Finally, petitioners argue that the Court should reach out to hear this case now instead of waiting for the FCC to provide a fully articulated explanation and justification for its new indecency enforcement policy. There is no reason for the Court to do so, particularly where, as here, the Second Circuit did not even reach Fox's statutory and constitutional challenges to the FCC's expanded policy. The lower court's remand provides the FCC with an opportunity to address the numerous issues that it evaded in the order under review (in which the FCC tried to argue that it was not changing its policy at all), and to attempt to address the statutory and constitutional issues Fox has raised (which the FCC also evaded). If the FCC attempts such an order and it survives basic scrutiny under the Administrative Procedure Act ("APA"), then Fox's statutory and constitutional challenges would more likely be presented and the

Court could consider whether certiorari is appropriate at that time.

STATEMENT OF THE CASE

1. When the FCC first began to regulate so-called "indecent" speech under § 1464 in the mid-1970's, the agency adopted an extremely cautious and limited enforcement policy. Historically, the FCC viewed this restrained policy as implicitly required by the narrowness of this Court's decision initially upholding the FCC's authority to regulate indecency. *FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978). In supplying the fifth vote to uphold that authority, Justice Powell relied in part on the fact that "the Commission may be expected to proceed cautiously, as it has in the past." *Id.* at 756, 760, 761 n.4 (Powell, J., concurring). Significantly, a central feature of the FCC's cautious approach to indecency enforcement was to refrain from punishing unintentional and isolated expletives, in no small part because the Court emphasized in *Pacifica* that its decision did "not speak to cases involving the isolated use of a potentially offensive word." *Id.* at 750 (1978) (opinion of the Court); *id.* at 760-61 (Powell, J., concurring).

Indeed, the FCC strongly reaffirmed the limited scope of the indecency ban only weeks after *Pacifica*, when the Commission rejected an indecency challenge to a broadcast license renewal. The FCC explained:

> We intend strictly to observe the narrowness of the *Pacifica* holding. In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the "indecent" words in question. The opinion of the Court specifically stated that it was not ruling

> that "an occasional expletive . . . would justify any sanction . . . ." . . . Further, Justice Powell's concurring opinion emphasized the fact that the language there in issue had been "repeated over and over as a sort of verbal shock treatment." . . . He specifically distinguished "the verbal shock treatment [in *Pacifica*]" from "the isolated use of a potentially offensive word in the course of a radio broadcast."

WGBH Educ. Found., 69 F.C.C.2d 1250, ¶ 10 (1978).

For almost 30 years following Pacifica, the FCC did not consider fleeting, isolated or inadvertent expletives to be indecent. In 1987, the FCC adopted what it called a "generic enforcement policy" for broadcast indecency, articulated in three declaratory orders finding that the definition of "indecency" included speech that was the functional equivalent of the "verbal shock treatment" of the George Carlin routine even without using the specific "seven dirty words." See *Pacifica Found., Inc.*, 2 FCC Rcd. 2698, *aff'd sub nom. Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. 930 (1987), *aff'd in relevant part, rev'd in part sub nom. Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988); *Regents of the Univ. of Cal.*, 2 FCC Rcd. 2703 (1987) (same subsequent history); *Infinity Broad. of Pa.*, 2 FCC Rcd. 2705 (1987) (same subsequent history). The FCC's companion orders all involved repeated and intentional broadcasts of material that the Commission deemed to be indecent under its generic standard; none presented the question of whether non-repetitive utterances violated § 1464. The Commission recognized that "analysis of whether particular speech is indecent cannot turn on a mechanistic classification of language," *Infinity Broad. of Pa.*, 2 FCC Rcd. 2705, ¶ 8, and it reaffirmed

that isolated or fleeting utterances would not be considered actionable. *Id.* ¶ 7 ("Speech that is indecent must involve more than the isolated use of an offensive word."); *Regents of the Univ. of Cal.*, 2 FCC Rcd. 2703, ¶ 3 (same). Thus, the FCC's adoption of the "generic" standard wrought no substantive change in its indecency enforcement policy.

As recently as 2001, the FCC reaffirmed its restrained approach, identifying as a "principal factor" whether the material was dwelt upon or repeated as opposed to fleeting and isolated. *Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999, ¶ 10 (2001) ("*Indecency Policy Statement*"). Indeed, to provide a "sense of the weight" given to whether broadcast expletives were fleeting or unintentional, the *Indecency Policy Statement* cited prior decisions that had dismissed indecency complaints solely on that basis. *Id.* ¶¶ 10, 18.

2. The FCC abruptly reversed course in 2004. During a broadcast of the "Golden Globe Awards," the singer Bono declared that his receipt of an award was "really, really fucking brilliant." *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975 (2004) ("*Golden Globe Awards Order*"). Under longstanding precedent, this isolated and fleeting expletive would not have been actionably indecent, as the FCC's own Enforcement Bureau recognized in its initial ruling on the broadcast. *"Golden Globe Awards"*, 18 FCC Rcd. 19859, ¶ 5 (Enforcement Bureau 2003). The full Commission, however, reversed the Enforcement Bureau's decision, expressly overruled previous FCC decisions to the contrary, and stressed that "[t]he fact that the use of

[an indecent] word may have been unintentional is irrelevant." *Golden Globe Awards Order*, 19 FCC Rcd. 4975, ¶ 9 (overruling prior holdings that "isolated use of expletives is not indecent" and disavowing prior statements to the contrary, including the original *Pacifica* decision); see also *id.* ¶ 12 n.32 (overruling cases cited in the *Indecency Policy Statement*). In recognition of this sharp break with its longstanding restrained enforcement policy, the FCC declined to issue a civil penalty for the indecency violation at issue in the *Golden Globe Awards Order*. *See id.* ¶ 15 (noting that "existing precedent would have permitted this broadcast").

The FCC's unexpected expansion of the ban on "indecency" created considerable confusion and uncertainty about the scope of the new policy, which was exacerbated by the FCC's inconsistent enforcement decisions. For example, the FCC found that the broadcast of the uncut film *Saving Private Ryan* was not actionable, even though it contained numerous, repeated uses of the words "fuck" and "shit" and their variants. *Complaints Against Various Television Licensees Regarding Their Broad. on Nov. 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 FCC Rcd. 4507 (2005) ("*Saving Private Ryan Order*"). The FCC offered no explanation for its disparate treatment of various broadcasts, other than vague assertions that it took "context" into account.

3. Recognizing that its dramatic expansion of the indecency regime had created widespread confusion and uncertainty, the FCC issued an Omnibus Order in 2006 to "provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard" by making findings about

approximately 30 television programs with a "broad range of factual patterns." *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 FCC Rcd. 2664, ¶ 2 (2006) ("*Omnibus Order*"). As relevant here, the FCC concluded that Fox's broadcasts of the 2002 and 2003 "Billboard Music Awards" violated § 1464. On the 2002 broadcast, Cher received an award and spontaneously said that "People have been telling me I'm on the way out every year, right? So fuck 'em." *Id.* ¶ 101. On the 2003 broadcast, presenter Nicole Richie deviated from the script and ad-libbed, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." *Id.* ¶ 112 & n.164. The FCC found both broadcasts to be actionably indecent, even though the potentially offensive language in both was unscripted and it was undisputed that Fox had no foreknowledge or intention that the words would be broadcast. *Id.* ¶¶ 105, 118. The FCC did not, however, issue notices of apparent liability against these two broadcasts for the express reason that both broadcasts pre-dated the *Golden Globe Awards Order* and were not actionable under prior precedent. *Id.* ¶¶ 111, 124.

Fox and other broadcasters petitioned for review of the *Omnibus Order* in the Second Circuit, arguing *inter alia* that the FCC's dramatic change in its indecency policy lacked an adequate explanation and that the FCC's application of its new policy was arbitrary and capricious. The FCC sought and received a voluntary remand in return for a stay of the Commission's enforcement of its new indecency policy. On remand, the FCC reaffirmed its indecency findings against Fox's broadcasts. Pet. App. 112a-113a. Surprisingly, and despite having consistently acknowledged that the *Golden Globe Awards Order*

represented a sea change in its approach to indecency regulation, the FCC suddenly claimed that it had never changed its indecency policy with respect to isolated and fleeting expletives. Pet. App. 79a. It recast contrary prior precedent as mere "staff letters and dicta," *id.*, and it even implied that the issue of isolated and fleeting expletives had been one of first impression in the *Golden Globe Awards Order*. *Id.* at 80a. The FCC also contended, for the first time, that it could have fined Fox for its broadcasts based on prior FCC decisions. *Id.* at 113a.

4. Following the remand, the Second Circuit granted Fox's petition for review on administrative law grounds. In its brief on appeal, the FCC abandoned its stance that it had not changed the indecency enforcement policy, Pet. App. 22a, and the Second Circuit sought to discern a possible justification for the reversal of course in a *Remand Order* that had refused to acknowledge any such change. The primary justification identified by the court was the FCC's "first blow" theory—the claim that even an isolated and fleeting expletive constituted an immediate "blow" to the broadcast audience that the FCC could prohibit. *Id.* at 25a. The Second Circuit rejected this reasoning for multiple reasons. First, the FCC had provided "no reasonable explanation for why it has changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between *Pacifica* and *Golden Globes*." *Id.* Second, and more importantly, the first blow theory made sense only if the FCC presumed that mere exposure to potentially offensive language harmed the broadcast audience. The FCC nonetheless permitted some isolated and fleeting (or even repeated) expletives if, for example, they occurred during a "*bona fide* news interview" or

were deemed "integral" to the broadcast. The Commission had not explained how it made those determinations or why such broadcasts constituted lesser "blows" that the broadcast audience should be permitted to suffer, thereby undermining the first blow theory as a justification. *Id.* at 26a-28a.[1]

After concluding that the FCC had failed to articulate a reasoned justification for the change in its indecency policy, the Second Circuit declined to rule on any of the other arguments Fox had raised. In particular, the Second Circuit did not consider Fox's statutory argument that the FCC's indecency findings were invalid because Fox did not have the requisite *scienter* under § 1464. See Pet. App. at 18a. The Second Circuit also did not rule on Fox's First Amendment claims, although it did offer some preliminary thoughts in a section expressly labeled as dicta. *Id.* at 35a-43a & n.12.

Judge Leval dissented. He too recognized that the FCC had, in fact, changed its indecency policy. *Id.* at 47a. In his view, however, the FCC had adequately explained the change with respect to the word "fuck" based on his belief that that word "conveys an inescapably sexual connotation." *Id.* at 49a. Judge Leval did not consider the FCC's policy with respect to the word "shit," although he strongly suggested that he did not consider the term to be indecent. *Id.* at 59a n.18. And even though Judge Leval would

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[1] The Second Circuit also identified other purported justifications to which the *Remand Order* made "passing reference"—including, for example, the supposed difficulty of distinguishing expletives from literal descriptions of sexual or excretory functions and the FCC's fear that broadcasters would air isolated expletives at all hours of the day—but it found all of those ephemeral rationales insufficient as well. Pet. App. 29a-31a.

have rejected Fox's administrative law challenges to the new indecency regime, he curiously declined to address Fox's statutory and constitutional challenges. *Id.* at 60a n.19.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT BETWEEN THE SECOND CIRCUIT'S DECISION AND *PACIFICA*.

Petitioners' principal argument for certiorari is that the Second Circuit's decision allegedly "conflicts" with *Pacifica*. Pet. 15-19. There is no such conflict, nor could there be. The Second Circuit was considering the FCC's new policy of punishing the broadcast of isolated and fleeting expletives and found that the FCC's explanation of the change in policy was inadequate. This Court, however, has never considered whether the FCC can punish isolated and fleeting expletives under § 1464; indeed, the Court emphasized in *Pacifica* that it was *not* considering that issue. See *Pacifica*, 438 U.S. at 750 (opinion of the Court) ("We have not decided that an occasional expletive . . . would justify any sanction . . . ."); *id.* at 760-61 (Powell, J., concurring) ("The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here.").[2]

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[2] To the extent petitioners are claiming that the "reasoning" of the Second Circuit's administrative law decision conflicts with the reasoning underlying the "approach governing broadcast indecency" upheld in *Pacifica*, Pet. 15, their position is equally unavailing. This Court reviews judgments, not reasoning. *Pacifica*, 438 U.S. at 734 (opinion of the Court); *Black* v. *Cutter*

Petitioners nonetheless try to manufacture a conflict by claiming that the Second Circuit rejected the "context-driven approach governing indecency that this Court upheld in *Pacifica*." Pet. 15. Petitioners' argument assumes that the Second Circuit prohibited the FCC from taking context into account when considering indecency and has "put the FCC to a choice" between a "per se rule of either prohibition or license" with respect to isolated expletives. Pet. 14, 16, 19, 26. This alleged "hostility to a contextual analysis" is said to be "at bottom, an attack on this Court's decision in *Pacifica*." *Id.* at 18.

No fair reading of the Second Circuit's opinion supports this claim. The Second Circuit's decision is simply a garden-variety remand for lack of explanation; it contains no substantive holding with respect to "context." In fact, the Second Circuit made clear that it was *not* faulting the FCC for a failure to adopt an all-or-nothing approach. See Pet. App. 28a n.8; see also *id.* at 45a. Rather, the court concluded only that "the Commission's proffered rationale is disconnected from the actual policy implemented by the Commission." *Id.* at 28a n.8.

As the Second Circuit recognized, the FCC's proffered rationale for its new, expanded policy was the "so-called 'first blow' theory"—the notion that permitting the broadcast of single, isolated expletives would force listeners to accept a "first blow." Pet. App. 25a.[3] The Second Circuit correctly held that

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Labs., 351 U.S. 292, 297 (1956). There is no conflict between *Pacifica* and the Second Circuit's judgment.

[3] The FCC's argument was derived from a passage in *Pacifica* in which the Court was addressing the very different question of the constitutional relevance of the broadcast media's "uniquely pervasive presence in the lives of all Americans." *Pacifica*, 438 U.S. at 748-49 (opinion of the Court) ("To say that one may

this could not serve as either an explanation or a justification for the new policy, both because the FCC had not explained why after 30 years isolated expletives were suddenly a "first blow" at all (*id.* at 25a), and because the first blow theory "bears no rational connection to the Commission's actual policy concerning fleeting expletives." *Id.* at 26a. The FCC's actual policy on isolated expletives varied considerably, as the Second Circuit recognized. In some cases, such as the Fox broadcasts at issue, the mere inadvertent broadcast of a single word could subject the broadcaster to fines that could reach into the tens of millions of dollars (as well as revocation of its licenses). In other cases, such as the *Saving Private Ryan* case, the FCC deemed even the deliberate broadcast of multiple instances of "fuck" and "shit" and their variants not to be indecent at all. *Compare id.* at 98a, 123a-124a (finding fleeting and isolated uses of such words to be actionably indecent), *with Saving Private Ryan Order*, 20 FCC Rcd. 4507, ¶ 13 (concluding that "numerous expletives and other potentially offensive language" were not actionably indecent). See Pet. App. 25a-28a. The "first blow" theory simply makes no sense as a justification for a policy that often permits many such "blows," and therefore the Second Circuit remanded the case to the agency with the chance to try again to explain its new policy.

That conclusion is unremarkable as a matter of administrative law and merits no further review by

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avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."). In this analogy, the Court was not equating isolated words with "blows"; indeed, its opinion made clear that it was not considering whether the isolated use of potentially offensive words could be deemed "indecent" at all.

this Court. Indeed, the need for an adequate agency explanation for an expanded policy is especially important in this context, because indecent speech is fully protected under the First Amendment. See, *e.g.*, *Sable Commc'ns Inc.* v. *FCC*, 492 U.S. 115, 126 (1989); *Omnibus Order*, 21 FCC Rcd. 2664, ¶¶ 7, 11. In the absence of such an explanation, broadcasters have no guidance as to which broadcasts the FCC will subject to multi-million dollar fines, and in light of the size of the penalties authorized by Congress, broadcasters have no choice but to err on the side of self-censorship.[4]

The Second Circuit has now afforded the FCC an opportunity either to provide a better explanation of its new policy or to modify or retract that new policy. It is hard to imagine a more mundane application of well-settled principles of administrative law. The FCC should be allowed to respond to the court's remand in the first instance; there is no reason for this Court to step in at this early stage of the litigation merely to reconsider that routine administrative law analysis. But in all events, this case does not present the question whether *Pacifica*

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[4] For example, when CBS announced that it would broadcast the Peabody Award-winning *9/11* documentary on the fifth anniversary of the September 11 attacks without editing potentially offensive words, numerous affiliates serving roughly 10% of U.S. households decided they would either not air the program at all, or else delay its start until after the 10 p.m. safe harbor. John Eggerton, *Pappas Won't Air CBS' 9-11 Doc*, Broadcasting & Cable, Sept. 7, 2006 (describing affiliate's decision to preempt the *9/11* documentary, which contains "unedited swearing from the first responders caught in the maelstrom of Ground Zero," because affiliate believed that, "in the current regulatory climate, stations that air network programming with indecent or profane content are subject to significant fines and the threat of license revocation").

permits the FCC to take context into account, nor does the Second Circuit's mere remand for lack of explanation directly raise any issue under *Pacifica*.[5]

II. THE SECOND CIRCUIT'S DECISION IS CONSISTENT WITH SETTLED PRINCIPLES OF ADMINISTRATIVE LAW AND DOES NOT CONFLICT WITH *ACTION FOR CHILDREN'S TELEVISION*.

Petitioners also assert a hodgepodge of purported inconsistencies with principles of administrative law. Pet. 19-26. None of these claims, however, raises any important issue of administrative law; rather, petitioners simply disagree with how the Second Circuit applied legal principles that are, in fact, well-settled. Accordingly, petitioners ask this Court to expend its limited judicial resources to do nothing more than engage in error correction. Petitioners' request of this Court is particularly curious because they did not even ask the court of appeals to rehear the case. While rehearing is not a jurisdictional requirement, the failure of the government to seek rehearing makes its request for error correction particularly suspect.

1. Petitioners' main "administrative law" argument is that the Second Circuit's "refusal to accept the

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[5] In addition, most of the key passages from *Pacifica* concerning "context" that petitioners believe to be in conflict with the Second Circuit's opinion are from the plurality opinion joined by only three Justices. *See* Pet. 17-18. The two concurring Justices refused to join those passages because they "[did] not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection." *Pacifica*, 438 U.S. at 461 (Powell, J., concurring).

Commission's reasoned and reasonable explanation for its change in policy" was "inconsistent with the deferential standard mandated by *State Farm*." Pet. 20-21. That claim is not only patently unworthy of further review (cf. *id.* at 26), it is ironic in light of the FCC's view in the *Remand Order* that its indecency policy had not changed and that no reasoned basis for that change was required. See Pet. App. 22a. Indeed, most of Petitioners' alleged administrative law conflicts are based on relatively minor passages in the Second Circuit's opinion in which the court was charitably attempting to tease out other possible justifications for the FCC's change in policy based on mere "passing reference to other reasons that purportedly support its change in policy." *Id.* at 29a.

As explained above, the Second Circuit in fact considered what little explanation the FCC gave—the "first blow" theory—and rejected it because it had no logical connection to the FCC's actual policy. Pet. App. 25a-26a. That assessment was entirely consistent with settled principles of administrative law and warrants no further review. *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 374 (1998) ("[T]he process by which [an agency] reaches [its decreed] result must be logical and rational. Courts enforce this principle with regularity when they set aside agency regulations which . . . are not supported by the reasons that the agencies adduce.").[6]

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[6] The passages of the *Remand Order* that petitioners quote at 20-21 are drawn from the FCC's attempt to explain why the Fox broadcasts at issue had always been punishable under the pre-*Golden Globe* regime. In fact, isolated expletives could not be punished under the prior policy except in extremely rare, unusually egregious cases. *Compare Indecency Policy Statement*, 16 FCC Rcd. 7999, ¶ 19 (providing examples of such indecent broadcasts), *with Pacifica Found.*, 2 FCC Rcd. 2698,

2. In keeping with its effort to portray its actions as consistent with prior policy, the FCC made no attempt in the *Remand Order* to explain what change in circumstances required abandonment of the restrained indecency policy that had served the public interest for 30 years (and which previous Commissions had believed to be implicitly required by *Pacifica*, see *supra* at 3-4). Not surprisingly, the Second Circuit faulted the FCC for this failure to comply with the most fundamental principles of administrative law. Pet. App. 31a-33a ("the Remand Order provides no reasoned analysis of the 'problem' it is seeking to address with its new indecency policy from which this court can conclude that such regulation of speech is reasonable").

Petitioners, however, try to turn the Second Circuit's ruling into a purported conflict with the D.C. Circuit's opinion in *Action for Children's Television* v. *FCC*, 58 F.3d 654 (1995) (en banc) ("*ACT*"). In *ACT*, the D.C. Circuit reasoned that Congress did not need scientific studies to establish harm to minors from exposure to sexually explicit material, see Pet. 23 (citing *ACT*, 58 F.3d at 662), and petitioners contend that this reasoning "directly conflicts" with the Second Circuit's view that the FCC had not explained why a change in its indecency policy was warranted.

There is no conflict with *ACT* for at least two reasons. First, *ACT* involved a constitutional challenge to a speech regulation, 58 F.3d at 656, 659, and the court found that scientific studies were unnecessary to substantiate a compelling govern-

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¶¶ 3, 17-18 (broadcast of "Shocktime, U.S.A." not indecent). Moreover, before the Second Circuit, the FCC abandoned its position that there had been no change in its policy and conceded that the *Remand Order* was a sharp break from the prior regime. *See* Pet. App. 22a; *accord id.* at 44a (dissent).

mental interest for purposes of strict scrutiny review. *Id.* at 662. That constitutional decision cannot conflict with the Second Circuit's decision on administrative law grounds that the FCC had offered no justification for its change in policy. Second, the D.C. Circuit was considering the FCC's prior policy, in which isolated and fleeting expletives were permitted. The D.C. Circuit made clear that its analysis was assuming the broadcast of hard-core pornography—not isolated words. *Id.* at 660.

3. Petitioners' two remaining administrative law grounds for certiorari are makeweights. First, petitioners criticize the Second Circuit's discussion of the difficulty and significance of distinguishing between expletives and literal descriptions of sexual or excretory functions, Pet. 24, but as the court explained, petitioners' position that such words "always" have a sexual or excretory meaning (even if true) cannot serve as a justification for the FCC's actual policy, because the FCC often permits "even numerous and deliberate" uses of such words to be broadcast. Pet. App. 28a n.9.[7]

Second, petitioners seek review of the Second Circuit's criticism that that the FCC did not adequately consider the fact that "broadcasters have never barraged the airwaves with expletives even prior to *Golden Globes*," Pet. 25 (quoting Pet. App. 30a), but the APA clearly required the FCC to confront that undisputed fact in explaining why a radical expansion in its indecency policy was

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[7] On this point, it makes no difference that one theme of George Carlin's famous monologue was that "many of the expletives he used had non-literal meanings," Pet. 24, because many of the offensive words he employed were, in fact, used in their sexual or excretory senses. *See Pacifica*, 438 U.S. at 751-55.

necessary. See *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (internal quotation marks omitted).[8]

III. THE SECOND CIRCUIT'S REMAND TO THE FCC DOES NOT WARRANT THIS COURT'S REVIEW.

Petitioners candidly acknowledge that the Second Circuit's decision remanding this case to the FCC to provide a new explanation for its change in policy ordinarily "would not merit this Court's review." Pet. 26. Petitioners' claim that the Court nonetheless should grant certiorari because of its "immediate and significant effect" is based entirely on petitioners' mischaracterization of the Second Circuit's remand as a substantive holding that the FCC's "regulation of isolated expletives [was] unjustified because it takes account of context, rather than a per se rule of prohibition." Pet. 26-27. As explained above, this is a plain distortion of what the Second Circuit actually held. See *supra* at 11-13. To be sure, the court of appeals identified several issues that a non-arbitrary FCC would have to address in any justification for such a dramatic expansion of its indecency regime, but in that respect the Second Circuit's decision is no different than any other case remanding an arbitrary agency decision for further explanation. Such a

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[8] In any event, both the panel majority and the dissent concluded that the risk of broadcasters airing expletives at all hours of the day was "at most a small part" of the *Remand Order*'s unarticulated rationale for the FCC's change in its indecency policy. *See* Pet. App. 30a n.11 (majority); *id.* at 57a (dissent).

remand hardly constitutes a "Sisyphean errand" (Pet. 15) or something so unusual that this Court's immediate review is required.

Indeed, granting certiorari prematurely merely to review a remand for further explanation would be particularly ill-advised here because the Second Circuit did not even reach Fox's additional substantive challenges to the FCC's new indecency regime. For example, Fox argued that a broadcaster can violate § 1464 only if it has *scienter*—*i.e.*, if it knowingly broadcasts the words. In the two Fox broadcasts at issue here, Fox did not have the requisite *scienter* because it had no such intention and took reasonable steps consistent with industry practices to prevent broadcasting potentially offensive words. Fox also argued that the FCC's attempt to regulate the isolated use of potentially offensive words was unconstitutional on several grounds. Pet. App. 18a. The Second Circuit did not decide any of these issues. *Id.* at 35a ("we refrain from deciding the various constitutional challenges to the Remand Order raised by the Networks"). Thus, even if this Court were to accept this case and reverse the Second Circuit's administrative law holding, the Court would still have to remand the case to the Second Circuit to permit it to consider Fox's scienter and constitutional arguments. *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) ("We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed . . . ."); *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397-98 (1971) (declining to consider a question not passed on by the court of appeals).

The more prudent course is to permit the FCC to respond to the Second Circuit's remand in the first

instance. Indeed, in the *Remand Order* the FCC did not even acknowledge that it was changing its policy, much less address the numerous practical, statutory, and constitutional considerations that would be relevant to such an important expansion of its regulation of protected speech. If the FCC now wishes to readopt some version of its expanded policy, it has the opportunity to confront the issues the Second Circuit has identified, and it can also address the *scienter* and constitutional arguments head-on (both of which it evaded in the *Remand Order*). If the FCC issues such an order and it survives an APA challenge, the important statutory and constitutional challenges to the FCC's expanded regime are more likely to be properly presented and this Court can assess at that time whether certiorari is warranted. There is no need for this Court to insert itself into this case at this juncture just to review the Second Circuit's garden-variety remand.

In the meantime, the sky will not fall if the FCC is required to respond to the Second Circuit's decision. The court's vacatur of the FCC's order merely reinstates the regime that governed for 30 years prior to the *Golden Globe Awards Order*, in which only the sort of "verbal shock treatment" found in *Pacifica* was actionable. Contrary to petitioners' overheated rhetoric (see, *e.g.*, Pet. 27-28), the FCC itself conceded in the *Remand Order* that the networks typically do not broadcast the words at issue here even during the "safe harbor" after 10:00 p.m., when the FCC's rules have long permitted indecent broadcasts. Pet. App. 86a-88a. Nor does the remand create "confusion" for broadcasters or the FCC (see Pet. 30); rather, the return to the pre-*Golden Globe* regime *dispels* the rampant confusion caused by the FCC's abandonment of its restrained enforcement policy. And, the vacatur

significantly reduces the pressure for excessive self-censorship that has reigned since the *Golden Globe Awards Order*.

Finally, petitioners' contention that a circuit conflict is unlikely to develop because all the major television networks can bring future challenges to the indecency regime in the Second Circuit pursuant to 28 U.S.C. § 2343 is incorrect. Pet. 30. In fact, challenges to future indecency enforcement actions could arise in any circuit. The FCC typically issues notices of apparent liability against broadcast licensees—not broadcast networks, as suggested in the petition—for their alleged indecency violations. *See generally Omnibus Order*. Such licensees reside throughout the country, therefore making it possible in different cases for them to bring challenges in other circuits.[9] A future circuit conflict therefore remains possible, and the Court would do well to postpone review until one happens.

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[9] Indeed, a challenge to another FCC indecency order is currently pending in the Third Circuit, *see CBS* v. *FCC*, No. 06-3575 (3d. Cir. argued Sept. 11, 2007) (concerning the Janet Jackson incident at the 2004 Super Bowl), and the broadcast networks can always bring a future case in the D.C. Circuit, as one network initially did in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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