

No. 07-582

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

REPLY BRIEF FOR PETITIONERS

PAUL D. CLEMENT
*Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217*

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The decision below invalidates a determination of the Federal Communications Commission (FCC or Commission) that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of “any obscene, indecent, or profane language,” 18 U.S.C. 1464, even when the expletives are not repeated. Respondents emphasize that the court of appeals remanded the case to the agency, and they suggest that this Court defer its review until the remand is complete. But the remand would be a pointless exercise. The court of appeals made clear that its decision rests on a hostility to the Commission’s contextual approach to indecency determinations, an approach that this Court held to be constitutionally required when it upheld Section 1464 in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). As a re-

sult, there is little the Commission could say on remand—short of abandoning much of the authority that Congress has directed it to exercise—that would not likely result in another vacatur by the court of appeals.

The decision below attempts to coerce the Commission to choose between allowing one free use of any expletive no matter how offensive or gratuitous, or adopting a blanket prohibition on any use of expletives. It has significant consequences because it severely undermines the Commission’s ability to enforce Section 1464, even in cases involving repeated expletives. The decision warrants this Court’s review.

A. The Decision Below Cannot Be Reconciled With *Pacifica*

Respondents stress the petition’s concession (Pet. 15, 26) that, in an ordinary case, a remand to an agency would not warrant this Court’s attention. But as the petition also emphasized, this is not an ordinary case. Contrary to respondents’ suggestion, the decision below is hardly a “garden-variety” (Fox Br. in Opp. 11) or “routine” (NBC Br. in Opp. 1) remand under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* The court of appeals made clear that it was not simply sending the case back to the Commission for some APA housekeeping. Rather, it believed that the Commission’s regulation of indecent broadcasts—regulation undertaken in pursuance of a statutory authority upheld by this Court in *Pacifica* and by the D.C. Circuit in *Action for Children’s Television v. FCC*, 58 F.3d 654, 662 (D.C. Cir. 1995) (en banc), cert. denied, 516 U.S. 1043 (1996) (*ACT*)—suffered from fundamental defects that no amount of explanation could cure. Indeed, the court made no secret of its view that even by “proffering a

reasoned analysis for its new approach to indecency,” the FCC would likely be unable to “adequately respond to the constitutional and statutory challenges raised by the Networks.” Pet. App. 45a.

That the decision below took the form of a remand to the Commission does not insulate it from this Court’s review. The Court often reviews remand judgments when the cases involve legal issues that otherwise merit its attention. See, e.g., *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1*, No. 06-1457 (to be argued Feb. 19, 2008); *NCTA v. Brand X Internet Servs.*, 545 U.S. 967 (2005). In this case, the decision of the court of appeals is predicated on a fundamentally erroneous legal analysis, an analysis that warrants review because it is in direct conflict with this Court’s decision in *Pacifica*.

According to the court of appeals, the FCC’s explanation of its indecency policy was inadequate because the Commission’s reasoning “bears no rational connection to the Commission’s actual policy regarding fleeting expletives.” Pet. App. 26a. Specifically, the court faulted the Commission because it did not “take the position that *any* occurrence of an expletive is indecent.” *Ibid.* In other words, the decision below appears to rest on the premise that, in order for the Commission to determine rationally that *some* uses of expletives are offensive and should be deemed indecent, the Commission must find that *all* uses of expletives are indecent. But as explained in the petition (at 26-27), *Pacifica* does not permit, let alone require, such a blanket prohibition. To the contrary, it requires that the Commission look not only at the words themselves but also at the context in which they appear. See *Pacifica*, 438 U.S. at 750; *id.* at 746 (plurality opinion). Indeed, even the court of ap-

peals appeared to be aware of the whipsaw to which its decision subjected the FCC. Pet. App. 26a n.7 (“per se ban” on expletives “would likely raise constitutional questions above and beyond the concerns raised by the current policy”).

Respondents contend (Fox Br. in Opp. 13) that the decision below simply requires the FCC “to provide a better explanation of its new policy,” but that ignores the reality that the court of appeals’ flawed premise appears to doom any effort to prohibit single expletives in some contexts, but not others. In its order, the Commission stated that “categorically requiring repeated use of expletives in order to find material indecent is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context.” Pet. App. 83a. The Commission has already explained the significance of context in determining whether the use of an expletive (or multiple expletives) in a broadcast is indecent. See, e.g., *id.* at 127a; *In re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network’s Presentation of the Film “Saving Private Ryan,”* 20 F.C.C.R. 4507, 4513 ¶ 14 (2005). And the Commission has noted the relationship between its contextual analysis and this Court’s holding in *Pacifica*. Pet. App. 76a (“[T]he Supreme Court stressed the importance of context in *Pacifica*.”). The court of appeals found itself unable to follow the Commission’s reasoning only because the court refused to follow *Pacifica*.

According to respondents (Fox Br. in Opp. 10 & n.2), the decision below can be reconciled with *Pacifica* because *Pacifica* did not specifically address the case of isolated expletives, and therefore any conflict with *Pacifica* involves only the court of appeals’ “reasoning,” not

its “judgment.” Respondents are incorrect. The court’s judgment vacates the Commission’s order, Pet. App. 46a, precisely because the Commission’s policy (with respect to both isolated and repeated expletives) makes indecency determinations turn on context and therefore, in the view of the court of appeals, cannot be based on “concern with the public’s mere exposure to this language on the airwaves,” *id.* at 27a-28a. Under the terms of the remand, if the Commission’s next order is not to meet the same fate as its last one, the Commission evidently must either abandon its reliance on context in making indecency determinations or adopt a lowest-common-denominator approach that expressly permits in every context what would be permissible in some contexts. Either option deprives the Commission of the option of considering context. Thus, the judgment of the court of appeals seeks to prevent the Commission from doing what *Pacifica* requires it to do.

Respondents assert (Fox Br. in Opp. 11) that the court of appeals “was *not* faulting the FCC for a failure to adopt an all-or-nothing approach.” Instead, they say, the court simply concluded that “the Commission’s preferred rationale is disconnected from the actual policy implemented by the Commission.” *Ibid.* (quoting Pet. App. 28a n.8). But the “disconnect[]” identified by the court was nothing more than the Commission’s failure to “take the position that *any* occurrence of an expletive is indecent.” Pet. App. 26a. The court’s analysis is incompatible with the contextual inquiry that *Pacifica* commands.

B. The Decision Below Disregards Settled Principles Of Administrative Law And Conflicts With A Decision Of The D.C. Circuit

Although the court of appeals gave several additional reasons for its rejection of the Commission's explanation of its new policy, those reasons are inconsistent with settled principles of administrative law and conflict with the D.C. Circuit's decision in *ACT*. Respondents' efforts to defend the court's holding are unavailing.

1. Respondents contend (Fox Br. in Opp. 15) that the Commission said in its order that "its indecency policy had not changed and that no reasoned basis for that change was required." The claim is puzzling, because the Commission forthrightly acknowledged that it had changed its prior policy of giving a free pass to the use of expletives that are not repeated. See Pet. App. 82a (describing previous decisions stating "that expletives had to be repeated to be indecent" as "seriously flawed," and "reaffirm[ing] that it was appropriate to disavow" them). And the Commission acknowledged its change in policy not only in its words but also in its actions. It did not sanction Fox for either broadcast at issue here, and, in the case of the 2002 Billboard Music Awards, the *only* reason for its forbearance was its recognition that "it was not clear at the time that broadcasters could be punished for the kind of comment at issue here." *Id.* at 122a; see *id.* at 124a & n.206.

2. Respondents repeat the court of appeals' error in characterizing the Commission's order as resting primarily or exclusively on a "first blow' theory." Fox Br. in Opp. 15; see NBC Br. in Opp. 20; Pet. App. 25a. In fact, the Commission's "most important[]" reason for changing its policy was that "categorically requiring repeated use of expletives in order to find material inde-

cent is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context.” *Id.* at 83a. As the Commission explained, its former approach was anomalous because it made one factor—whether material was repeated—dispositive in a subset of indecency cases. *Ibid.* Judge Leval recognized this to be the Commission’s rationale for its change of policy and observed that the new policy “made the Commission more consistent rather than less, because under the new rule, the same context-based factors will apply to all circumstances.” *Id.* at 54a. NBC is therefore incorrect when it asserts (Br. in Opp. 21 n.5) that the Commission now gives “*no weight at all*” to whether a word is repeated. In fact, the Commission considers that factor, along with all other relevant factors, in determining whether a broadcast is indecent. Pet. App. 82a-83a. But certainly nothing in that contextual approach demands that the Commission permit one free expletive or ignore the potential consequences of a single expletive.

3. According to the court of appeals, the Commission was required to present “evidence that suggests a fleeting expletive is harmful” and that “this harm is serious enough to warrant government regulation.” Pet. App. 32a; see NBC Br. in Opp. 21. As explained in the petition (at 22-24), that holding conflicts not only with *Pacifica* but also with the D.C. Circuit’s decision in *ACT*, which affirmed the Commission’s authority to regulate broadcast indecency, and which emphasized that “Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material.” 58 F.3d at 662.

Respondents attempt to distinguish *ACT* on the grounds that it involved a constitutional challenge and that it arose under the FCC's old policy. Fox Br. in Opp. 16-17. Neither of those distinctions is relevant here. As *ACT* makes clear, Congress has found that indecent material is harmful to children, and that finding is entitled to deference. The Commission's responsibility is to enforce the statute that Congress enacted, not to second-guess the evidentiary basis for the findings that led Congress to act.

C. This Court's Review Is Warranted

1. As explained in the petition (at 27-29), the decision below warrants review not only because it conflicts with *Pacifica* and *ACT*, but also because it will have a significant effect on the FCC's enforcement of 18 U.S.C. 1464, an effect that extends well beyond the regulation of isolated expletives. Respondents assert that the court of appeals' rejection of the FCC's contextual approach was limited to the agency's proscription of expletives that are not repeated. That is incorrect. The court looked to the Commission's finding that the use of expletives in a broadcast of "Saving Private Ryan" did not make the broadcast indecent, and it inferred that the Commission must not be "concern[ed] with the public's mere exposure to this language on the airwaves." Pet. App. 27a-28a; see Fox Br. in Opp. 12. But the expletives in "Saving Private Ryan" were repeated. Accordingly, if the non-indecency finding with respect to the repeated expletives in "Saving Private Ryan" makes the Commission's indecency finding with respect to the Billboard Music Awards broadcasts irrational, it would equally make the indecency finding with respect to the Carlin monologue irrational. Indeed, Judge Leval in dissent

correctly noted that the majority’s criticism of the Commission’s contextual approach was in no way limited to non-repeated material. Pet. App. 53a-54a.

Respondents embrace the court of appeals’ suggestion that “non-literal” uses of expletives may not be deemed indecent. See Fox Br. in Opp. 17 n.7; NBC Br. in Opp. 18-20. They do not dispute that under the court’s decision, the FCC apparently will have no power to regulate even the repeated broadcast of expletives as long as none of the expletives is used in a “literal” sense. Under that logic, the Commission would be unable to find large portions of the Carlin monologue indecent, since Carlin principally used the expletives in a “non-literal” sense. See *Pacifica*, 438 U.S. at 754 (Carlin noting that the F-Word “leads a double life,” literal and non-literal). Nor, conversely, is it clear that all the uses involved here were not literal. See Pet. App. 73a. And, in all events, the extent to which single uses are literal, non-literal, vulgar, or explicit is best considered as part of a contextual inquiry.

Thus, respondents err in suggesting (Fox Br. in Opp. 20) that the case does not warrant review because the “vacatur of the FCC’s order merely reinstates the regime that governed for 30 years prior to the *Golden Globes Awards Order*, in which only the sort of ‘verbal shock treatment’ found in *Pacifica* was actionable.” The court of appeals rejected the Commission’s contextual approach to evaluating expletives—the very approach that the Commission used in finding indecent the “verbal shock treatment” of *Pacifica*. Its decision therefore does not “reinstate[]” the pre-*Golden Globes* regime; it substantially hobbles effective enforcement of an Act of Congress.

2. Fox contends (Br. in Opp. 19) that certiorari is unwarranted because deciding the question presented in favor of petitioners would still leave some issues, such as those raised by respondents' constitutional claims, to be decided by the court of appeals on remand. NBC goes further (Br. in Opp. 27-28), arguing that the Court "could not resolve the question presented" without first addressing the constitutional claims. But of course this Court is not required to address constitutional questions when the case before it can be resolved on other grounds. In fact, its practice is just the opposite. Cf. *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). The Court often grants certiorari to decide one question presented by a case and then remands to the court of appeals for further proceedings, which may include the resolution of issues not addressed by this Court. See, e.g., *Ashcroft v. ACLU*, 535 U.S. 564 (2002). Petitioners seek a ruling only on the APA issues addressed by the court below; this Court could then remand to allow the court of appeals to consider the remaining issues in the case.

Fox also asserts (Br. in Opp. 20) that the best course would be for the Commission to accept the court of appeals' remand so that it can address Fox's constitutional arguments, which it supposedly "evaded" in its order. How the Commission "evaded" those arguments is mysterious, since it devoted 11 paragraphs of its order to them. See Pet. App. 103a-104a (vagueness challenge); *id.* at 105a-112a (claim that *Pacifica* is no longer good law); see also *id.* at 114a-115a (claim that finding of indecency requires scienter). Respondents' constitutional claims—which, in any event, are foreclosed by *Pacifica*—have already been addressed by the Commission and provide no basis for denying review.

3. Finally, respondents contend (Fox Br. in Opp. 21) that a circuit conflict “remains possible,” and they urge the Court to “postpone review until” one emerges. But even though the networks *could* “bring a future case in the D.C. Circuit” (*id.* at 21 n.9), there is no reason for them to do so as long as the decision below remains the law of the Second Circuit. Indeed, it is hard to understand how the networks’ lawyers could explain such a course to their clients. Tellingly, respondents do not deny that they could avoid a circuit conflict by bringing all future challenges to indecency findings with respect to network programming in the Second Circuit. While it is true that FCC forfeiture orders are issued against individual licensees, each network owns and operates a number of its own licensees and therefore can choose the Second Circuit as a venue by filing first in that court and then transferring later-filed petitions there. See 28 U.S.C. 2112(a)(1) and (5). Even if the United States filed forfeiture enforcement actions against individual licensees in district courts outside the Second Circuit, see 47 U.S.C. 504(a), a network could simply pay the forfeitures under protest in order to moot those actions and allow it to file a petition for review in the Second Circuit, see *AT&T v. FCC*, 323 F.3d 1081 (D.C. Cir. 2003).

As noted in the petition, the decision below puts the Commission in a wholly untenable position. Congress has charged the Commission with eliminating indecency on the airwaves during daytime and evening hours, and *Pacifica* holds that there is no constitutional obstacle to executing that congressional charge. The decision below effectively prevents the Commission from carrying out its charge, and yet it is the Commission that will be held

accountable for the coarsening of the airwaves. This Court's review at this juncture is clearly warranted.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

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