Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* FOX TELEVISION STATIONS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 07–582. Argued November 4, 2008—Decided April 28, 2009

Federal law bans the broadcasting of "any . . . indecent . . . language," 18 U. S. C. §1464, which includes references to sexual or excretory activity or organs, see *FCC* v. *Pacifica Foundation*, 438 U. S. 726. Having first defined the prohibited speech in 1975, the Federal Communications Commission (FCC) took a cautious, but gradually expanding, approach to enforcing the statutory prohibition. In 2004, the FCC's *Golden Globes Order* declared for the first time that an expletive (nonliteral) use of the F-Word or the S-Word could be actionably indecent, even when the word is used only once.

This case concerns isolated utterances of the F- and S-Words during two live broadcasts aired by Fox Television Stations, Inc. In its order upholding the indecency findings, the FCC, *inter alia,* stated that the *Golden Globes Order* eliminated any doubt that fleeting expletives could be actionable; declared that under the new policy, a lack of repetition weighs against a finding of indecency, but is not a safe harbor; and held that both broadcasts met the new test because one involved a literal description of excrement and both invoked the F-Word. The order did not impose sanctions for either broadcast. The Second Circuit set aside the agency action, declining to address the constitutionality of the FCC's action but finding the FCC's reasoning inadequate under the Administrative Procedure Act (APA).

Held: The judgment is reversed, and the case is remanded.

489 F. 3d 444, reversed and remanded.

JUSTICE SCALIA delivered the opinion of the Court, except as to Part III–E, concluding:

1. The FCC's orders are neither "arbitrary" nor "capricious" within

the meaning of the APA, 5 U. S. C. §706(2)(A). Pp. 9–19.

(a) Under the APA standard, an agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43. In overturning the FCC's judgment, the Second Circuit relied in part on its precedent interpreting the APA and *State Farm* to require a more substantial explanation for agency action that changes prior policy. There is, however, no basis in the Act or this Court's opinions for a requirement that all agency change be subjected to more searching review. Although an agency must ordinarily display awareness that it *is* changing position, see *United States* v. *Nixon*, 418 U. S. 683, 696, and may sometimes need to account for prior factfinding or certain reliance interests created by a prior policy, it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one. It suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change adequately indicates. Pp. 9–12.

(b) Under these standards, the FCC's new policy and its order finding the broadcasts at issue actionably indecent were neither arbitrary nor capricious. First, the FCC forthrightly acknowledged that its recent actions have broken new ground, taking account of inconsistent prior FCC and staff actions, and explicitly disavowing them as no longer good law. The agency's reasons for expanding its enforcement activity, moreover, were entirely rational. Even when used as an expletive, the F-Word's power to insult and offend derives from its sexual meaning. And the decision to look at the patent offensiveness of even isolated uses of sexual and excretory words fits with *Pacifica*'s context-based approach. Because the FCC's prior safe-harbor-for-single-words approach would likely lead to more widespread use, and in light of technological advances reducing the costs of bleeping offending words, it was rational for the agency to step away from its old regime. The FCC's decision not to impose sanctions precludes any argument that it is arbitrarily punishing parties without notice of their actions' potential consequences. Pp. 13–15.

(c) None of the Second Circuit's grounds for finding the FCC's action arbitrary and capricious is valid. First, the FCC did not need empirical evidence proving that fleeting expletives constitute harmful "first blows" to children; it suffices to know that children mimic behavior they observe. Second, the court of appeals' finding that fidelity to the FCC's "first blow" theory would require a categorical ban on *all* broadcasts of expletives is not responsive to the actual policy under review since the FCC has always evaluated the patent offensive-

ness of words and statements in relation to the context in which they were broadcast. The FCC's decision to retain some discretion in less egregious cases does not invalidate its regulation of the broadcasts under review. Third, the FCC's prediction that a *per se* exemption for fleeting expletives would lead to their increased use merits deference and makes entire sense. Pp. 15–18.

(d) Fox's additional arguments are not tenable grounds for affirmance. Fox misconstrues the agency's orders when it argues that that the new policy is a presumption of indecency for certain words. It reads more into *Pacifica* than is there by arguing that the FCC failed adequately to explain how this regulation is consistent with that case. And Fox's argument that the FCC's repeated appeal to "context" is a smokescreen for a standardless regime of unbridled discretion ignores the fact that the opinion in *Pacifica* endorsed a context-based approach. Pp. 18–19.

2. Absent a lower court opinion on the matter, this Court declines to address the FCC orders' constitutionality. P. 26.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A through III–D, and IV, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined, and an opinion with respect to Part III–E, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment. STEVENS, J., and GINSBURG, J., filed dissenting opinions. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined.