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## Out on a Limb Without Direction: How the Second Circuit's Decision in Fox v. FCC Failed to Adequately Address Broadcast Indecency and Why the Supreme Court Must Correct the Confusion

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**OUT ON A LIMB WITHOUT DIRECTION: HOW THE SECOND  
CIRCUIT'S DECISION IN *FOX v. FCC* FAILED TO ADEQUATELY  
ADDRESS BROADCAST INDECENCY AND WHY THE SUPREME  
COURT MUST CORRECT THE CONFUSION**

INTRODUCTION

During a live broadcast of the 2003 Golden Globe Awards, Bono, the lead singer of the band U2, accepted his award by exclaiming, “[t]his is really, really fucking brilliant. Really, really great.”<sup>1</sup> These words sparked a firestorm between the Federal Communications Commission (FCC) and the viewers who found Bono’s statement to be indecent and obscene.<sup>2</sup> While it may be potentially shocking, how many times have you watched a live interview on television and the response contained curse words or an inappropriate statement? Perhaps the respondent was elated about a sporting event, angered by an accident or simply, just plain crude. Does the Constitution protect these statements as free speech?<sup>3</sup> The answer is maybe. As broadcasters continued to push the envelope with more controversial programming, the FCC began to significantly tighten regulations for what constituted an acceptable broadcast.<sup>4</sup>

The primary purpose of the FCC is to regulate “communications by radio, television, wire, satellite and cable.”<sup>5</sup> Until 2003, the FCC generally practiced a restrained enforcement policy toward indecent broadcasts.<sup>6</sup> Between 2002 and 2003, the FCC filed zero notices of apparent liability (NAL) regarding

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1. In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 18 F.C.C.R. 19859 (2003) [hereinafter Golden Globes].

2. *See id.*

3. *See* U.S. CONST. amend. I [hereinafter First Amendment] (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”).

4. *See infra* notes 131–136 and accompanying text.

5. About the FCC, Fed. Communications Comm’n, <http://www.fcc.gov/aboutus.html> (last visited Feb. 10, 2008).

6. *See* Matthew C. Holohan, *Politics, Technology, & Indecency: Rethinking Broadcast Regulation in the 21<sup>st</sup> Century*, 20 BERKELEY TECH. L.J. 341, 345 (“Indecency was essentially a non-issue for the first three years of former FCC Chairman Michael Powell’s tenure, as the Commission worked to relax ownership restrictions in the broadcast industry.”).

television broadcasts.<sup>7</sup> This lax policy changed after Bono's statement during the 2003 Golden Globe Awards<sup>8</sup> and the infamous Super Bowl half-time show in 2004 when Janet Jackson's breast was exposed to millions of viewers of all ages.<sup>9</sup>

In response to the statement made by Bono during the Golden Globe Awards, the Parents Television Council filed a complaint stating that the material violated the FCC's regulations against obscenity and indecency.<sup>10</sup> The Enforcement Bureau rejected this complaint on two grounds. First, they found that the F-word, while potentially crude or offensive, was not used to "describe or depict sexual and excretory activities and organs."<sup>11</sup> Second, the Bureau cited past precedent that "fleeting and isolated remarks of this nature do not warrant Commission action."<sup>12</sup>

Nearly six months later, the full FCC Board overruled the Enforcement Bureau's decision which prompted a new policy on fleeting expletives.<sup>13</sup> This policy abolished the protection given to networks when isolated or fleeting expletives were used.<sup>14</sup> The Commission also declared that "given the core meaning of the F-word, any use of that word or a variation, in any context, inherently has a sexual connotation."<sup>15</sup> Despite overturning the Enforcement Board's decision and finding Bono's statements indecent, the FCC did not fine NBC because its ruling represented a change in FCC policy.<sup>16</sup> This revised policy strengthened the FCC's power to hold networks liable for the use of fleeting expletives.<sup>17</sup> With broadcasters now on notice for the new policy, Fox, CBS and ABC, among others, brought suit against the FCC.<sup>18</sup> On June 4, 2007, the Second Circuit Court of Appeals ruled against the FCC's revised policy calling it "arbitrary and capricious."<sup>19</sup> While the court came to a logical conclusion, the reasoning behind the decision merely presented a short-term solution to a long-term issue. By failing to decide whether the FCC could

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7. Indecency Complaints and NALS, <http://www.fcc.gov/eb/broadcast/ichart.pdf> (last visited Feb. 10, 2008).

8. See Golden Globes, *supra* note 1.

9. See Katherine A. Fallow, *The Big Chill? Congress and the FCC Crack Down on Indecency*, 22 SPG COMM. LAW 1, 9 (2004). During the 2004 Super Bowl half time performance, Justin Timberlake removed a piece of Janet Jackson's bustier exposing her right breast. *Id.*

10. See Golden Globes, *supra* note 1.

11. *Id.* at 19861.

12. *Id.*

13. See *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975 (2004) [hereinafter Golden Globes II].

14. See *id.* at 4980.

15. *Id.* at 4978.

16. *Id.* at 4981-82.

17. See *id.* at 4982.

18. See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007).

19. *Id.* at 455.

regulate fleeting expletives, the court left broadcasters to twist in the wind. Television and radio stations were forced to choose between the increasingly restrictive FCC policies or the more ‘broadcast friendly’ ruling in the Second Circuit’s decision in *Fox v. FCC*. On March 17, 2008, the Supreme Court acknowledged this dilemma and granted the Solicitor General’s petition for certiorari.

In this article, I argue that in order to remove the cloud of confusion over broadcast indecency, the Supreme Court must address and clarify the substantive rights afforded to broadcasters by the Constitution. Part I explores the basic regulatory functions of the FCC. Part II traces the extensive history of the FCC and how its power to regulate broadcasts evolved up until the 2003 Golden Globe Awards. Part III discusses the Golden Globe Awards decision along with the major shifts in FCC policy leading up to *Fox v. FCC*. Part IV summarizes the majority and dissenting opinion in *Fox v. FCC*. Part V analyzes the reasoning of the case’s majority and dissenting opinion. Part VI discusses how the court should have decided the case on constitutional grounds and why the court’s failure to do so negatively impacted broadcasters and forced future litigation. Part VII outlines the arguments each party made to the Supreme Court for and against granting the writ of certiorari. Finally, this article analyzes these arguments and discusses the possible routes the Supreme Court may go when the case is heard this fall. If the Supreme Court intends to address the confusion resulting from the decision in *Fox*, it must address the substantive challenges presented by the networks.

### I. THE BASIC REGULATORY FUNCTIONS OF THE FCC

The FCC’s power to enforce regulations against indecent speech emanates from 18 U.S.C. § 1464 which states “whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”<sup>20</sup> While television broadcasts do not use radio transmissions, the FCC still regulates these broadcasts.<sup>21</sup> Satellite transmissions, on the other hand, are not regulated by the FCC because they are subscription services.<sup>22</sup> The FCC is only able to regulate indecent broadcasts between the hours of 6:00 a.m. and 10:00 p.m.<sup>23</sup>

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20. 18 U.S.C. § 1464 (2004) [hereinafter § 1464] “Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.” *Id.*

21. 18 U.S.C. § 1468(a) (2004).

22. Matthew S. Schwartz, *A Decent Proposal: The Constitutionality of Indecency Regulation on Cable and Direct Broadcast Satellite Services*, 13 RICH. J.L. & TECH. 17 (2007).

23. *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995).

Any broadcasts outside of these times is protected and constitutes a “safe harbor period.”<sup>24</sup>

The FCC’s regulatory power is limited by both the First Amendment to the Constitution<sup>25</sup> and § 326 of the Communications Act of 1934.<sup>26</sup> The First Amendment protects the freedom of speech;<sup>27</sup> however, not all speech is prohibited from regulation.<sup>28</sup> Section 326 explicitly denies the FCC the right to censor speech, stating:

nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.<sup>29</sup>

As the FCC has become more active in regulating broadcasts in the past decade, tensions have increased over what the FCC can and cannot regulate. This creates an interplay between Congress and the courts to determine the authority that the FCC derives from 18 U.S.C. § 1464.

## II. HISTORICAL BACKGROUND UNTIL 2003 GOLDEN GLOBES DECISION

To fully grasp the significance of the FCC’s changed policies and the resulting broadcaster confusion, it is imperative to have a strong understanding

24. *Id.* at 669–70.

25. U.S. CONST. amend. I.

26. Communications Act of 1934, 47 U.S.C. § 326 (2004) [hereinafter Communications Act].

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

*Id.*

27. *Id.*

28. *FCC v. Pacifica Found.*, 438 U.S. 726, 744–45 (1978) (quoting Justice Holmes in *Schenck v. United States*, 249 U.S. 47, 52 (1919):

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words \*745 that may have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.)

29. Communications Act of 1934, *supra* note 26.

of the history of the FCC's regulatory power. This historical background begins with the Supreme Court decision in *FCC v. Pacifica* in 1978. Continuing from this monumental decision, this section will trace significant Bureau, FCC and Court decisions leading up to the 2003 Golden Globes decision.

A. *FCC v. Pacifica—Supreme Court Sets Early Standards for Regulation*

In this landmark decision, the Supreme Court upheld the FCC's authority to sanction broadcasters for airing indecent material, opening the door for an increase in FCC and judicial involvement in the regulation of indecent communications.<sup>30</sup> In 1973, George Carlin, a satirist, went before a live California audience and recorded a monologue entitled "Filthy Words."<sup>31</sup> This 12-minute piece was premised, as Carlin put it, as "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever."<sup>32</sup>

On October 30, radio station WBAI-FM in New York, broadcast Carlin's monologue at 2:00 p.m. as part of a discussion about language.<sup>33</sup> Before the broadcast, the station issued a disclaimer stating that the monologue featured "sensitive language which might be regarded as offensive to some."<sup>34</sup> On November 28, 1973, John Douglas sent a complaint to the FCC regarding the monologue.<sup>35</sup> Douglas's concern arose when he heard the monologue while driving in his car with his young son.<sup>36</sup> While acknowledging some social value, Douglas complained that the broadcast was not appropriate for that time of the day given the ability of children to listen to the program.<sup>37</sup>

In response to the complaint, *Pacifica* highlighted the purpose of the program<sup>38</sup> and the explicit warning of sensitive language.<sup>39</sup> *Pacifica* even went on to describe Carlin as "a significant social satirist" who "like Twain and Sahl before him, examines the language of ordinary people . . . Carlin is not

30. See RICHARD PARKER, *FREE SPEECH ON TRIAL: COMMUNICATION PERSPECTIVES ON LANDMARK SUPREME COURT DECISIONS* 222 (2003). (citing *Ginsberg v. State of New York*, 390 U.S. 629 (1968); *Ginzburg v. United States*, 383 U.S. 463 (1968); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Roth v. United States*, 354 U.S. 476 (1957)).

31. *Fox Television Stations, Inc. v. FCC*, 489 F.3d at 726.

32. *Id.* at 751. ("The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and maybe, even bring us, God help us, peace without honor . . . and a bourbon.")

33. *Id.* at 729–30.

34. *Id.* at 730.

35. *FCC v. Pacifica Found.*, 438 U.S. 726, 730 (1978).

36. *Id.*

37. *Id.*

38. *Id.* The broadcast was played "during a program about contemporary society's attitude toward language." *Id.*

39. *Id.* Before the program was broadcast, listeners had been warned that it included "sensitive language which might be regarded as offensive to some." *Id.*

mouthed obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words.”<sup>40</sup> In a declaratory order, the FCC responded that Pacifica “could have been the subject of administrative sanctions.”<sup>41</sup> No sanctions were ever imposed. The FCC found that the monologue was not obscene; however, the language used was determined to be “patently offensive.”<sup>42</sup> The FCC articulated that the concept of decency “is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.”<sup>43</sup> Using this standard, the FCC found that the broadcast of Carlin’s monologue was “indecent and prohibited by 18 U.S.C. § 1464.”<sup>44</sup> In a separate comment issued shortly thereafter, the FCC stated that “[i]n some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing. Under these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language.”<sup>45</sup> On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed the FCC Order on a 2-1 vote.<sup>46</sup> The United States Supreme Court subsequently granted the FCC’s petition for certiorari.<sup>47</sup>

In a 5-4 decision, the Supreme Court found the FCC Order to be constitutional. Justice Stevens, writing for the majority, analyzed whether the FCC’s Order was a form of censorship forbidden by § 326 of the Communications Act,<sup>48</sup> whether the broadcast of Carlin’s monologue was indecent,<sup>49</sup> and if so, whether the FCC’s Order violated the First Amendment to the Constitution.<sup>50</sup>

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40. *Pacifica Found.*, 438 U.S. at 730.

41. *Id.*

42. *Id.* at 731.

43. *Id.* at 731–32.

44. *Id.* at 732.

45. *Pacifica Found.*, 438 U.S. at 733.

46. *Id.* Each judge wrote separately. Judge Tamm felt that the order was essentially censorship violating § 326 of the Communications Act. Chief Judge Bazelon’s, while concurring with the result, reasoned that § 326 was inapplicable to broadcasts forbidden by § 1464. Judge Leventhal, as the lone dissent, reasoned that the FCC could regulate the language “as broadcast.” *Id.*

47. *Id.* at 734.

48. *See* Communications Act, *supra* note 26.

49. *Pacifica Found.*, 438 U.S. at 740. Indecent defined as “a: altogether unbecoming; contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: unseemly: not conforming to generally accepted standards of morality. . . .” Webster’s Third New International Dictionary (1966).

50. *See* U.S. CONST. amend. I.

First, Justice Stevens found that the FCC Order was not forbidden by § 326.<sup>51</sup>

It was clear that the FCC could not edit broadcasts before they were shown.<sup>52</sup> However, the Court found that it was not censorship for the FCC to look to past program content when making the decision whether to renew a licensee agreement.<sup>53</sup> Section 326 also carved out an exception to the censorship rule giving the FCC the power to sanction those broadcasts which contained “obscene, indecent or profane language.”<sup>54</sup> Thus, the FCC Order was not forbidden by § 326.<sup>55</sup>

Justice Stevens then analyzed whether Carlin’s monologue was considered indecent under § 1464.<sup>56</sup> Section 1464 forbade the broadcasting of any “obscene, indecent, or profane language.”<sup>57</sup> Since the FCC acknowledged that the monologue was not obscene, Pacifica argued that indecent and obscene mean virtually the same thing.<sup>58</sup> Justice Stevens rejected this theory by pointing to the disjunctive nature of § 1464.<sup>59</sup> The Court found that a normal definition of indecent “refers to nonconformance with accepted standards of morality.”<sup>60</sup> The Court left the task of determining the standards of morality to the FCC. Using the FCC’s indecency standard, the broadcast of Carlin’s monologue was found to be indecent.<sup>61</sup>

Justice Stevens quickly dismissed Pacifica’s claim that the First Amendment prohibited any regulation on public broadcasts.<sup>62</sup> The issue facing

51. *Pacifica Found.*, 438 U.S. at 738; *see also* Communications Act, *supra* note 26.

52. *Pacifica Found.*, 438 U.S. at 738.

53. *Id.* at 746 (citing *KFKB Broadcasting Assn. v. Federal Radio Comm’n*, 60 App. D.C. 79, 47 F.2d 670 (1931); *Trinity Methodist Church, South v. Federal Radio Comm’n*, 61 App. D.C. 311, 62 F.2d 850 (1932)).

54. *Id.* at 737. *See also* Communications Act, *supra* note 26.

55. *Pacifica Found.*, 438 U.S. at 738.

56. *Id.* at 738–39.

57. 18 U.S.C. § 1464 (2004).

58. *Pacifica Found.*, 438 U.S. at 739. Pacifica, knowing that their broadcast was not considered indecent, tried to get the Court to conflate the terms indecency and obscenity so that they would not be in violation of 18 U.S.C. § 1464. *Id.*

59. *Id.* at 739–40. Justice Stevens stated that “the words ‘obscene, indecent, or profane’ are written in the disjunctive, implying that each has a separate meaning.” *Id.*

60. *Id.* at 740.

61. *Id.* In finding the monologue indecent, “the Commission identified several words that referred to excretory or sexual activities or organs, stated that the repetitive, deliberate use of those words in an afternoon broadcast when children are in the audience was patently offensive.” *Id.*

62. *Id.* at 745. The Court pointed to numerous examples where First Amendment regulation was valid:

The government may forbid speech calculated to provoke a fight. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031. It may pay heed to the “‘commonsense differences’ between commercial speech and other varieties.” *Bates v.*



the Court was whether “a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content.”<sup>63</sup> The Court looked to two different themes to analyze this First Amendment issue. First, broadcast media in the United States had become uniquely pervasive.<sup>64</sup> Media broadcasting, unlike someone speaking out in public, cannot be easily avoided.<sup>65</sup> Due to this pervasiveness, Stevens suggested that “[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”<sup>66</sup> Secondly, “broadcasting is uniquely accessible to children, even those too young to read.”<sup>67</sup> Carlin’s monologue aired at 2:00 p.m.<sup>68</sup> There was no indication that the FCC tried to prohibit this monologue.<sup>69</sup> The Court concluded that the FCC’s decision was based on a nuisance rationale.<sup>70</sup> This approach emphasized the context of the broadcast.<sup>71</sup> Justice Sutherland wrote that a “nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard.”<sup>72</sup> The Court held that this nuisance was within the realm of the FCC’s authority to sanction a broadcaster.<sup>73</sup>

In Justice Powell’s concurrence, he emphasized the narrowness of the holding. Pertinent to this essay, Powell wrote that “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.”<sup>74</sup>

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*State Bar of Arizona, supra*, 433 U.S., at 381, 97 S.Ct., at 2707. It may treat libels against private citizens more severely than libels against public officials. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789. Obscenity may be wholly prohibited. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419. And only two Terms ago we refused to hold that a “statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment.” *Young v. American Mini Theatres, Inc.*, *supra*, 427 U.S., at 52, 96 S.Ct., at 2443.

*Id.*

63. *Pacifica Found.*, 438 U.S. at 745.

64. *Id.* at 748.

65. *See id.* at 749.

66. *Id.* at 748.

67. *Id.* at 749.

68. *Pacifica Found.*, 438 U.S. at 729–30.

69. *See id.* at 749. The Court compares this regulation with children being prohibited from certain bookstores or movie theatres. *Id.*

70. *Id.* at 750.

71. *See id.*

72. *Id.* (quoting Justice George Sutherland in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

73. *See Pacifica Found.*, 438 U.S. at 750.

74. *Id.* at 760–61.

*B. Interpretations post-Pacifica- Bureau Institutes Passive Approach*

For the next several years, a finding of indecency required a situation very similar to Carlin's monologue. This high burden made it virtually impossible for a station or network to be penalized. The first test came less than a year after the *Pacifica* decision. Morality in Media of Massachusetts, Inc. filed a petition to deny a license renewal application for the WGBH Educational Foundation<sup>75</sup> alleging that WGBH-TV "failed in its responsibility to the community by consistently broadcasting offensive, vulgar, and otherwise material harmful to children without adequate supervision or parental warnings."<sup>76</sup> The Enforcement Bureau of the FCC denied Morality's petition finding that material believed to be offensive by some is not enough to warrant the abandonment of a license.<sup>77</sup>

In 1981, the American Legal Foundation (ALF) filed a petition to deny a license renewal application for Pacifica Foundation, licensee of Station WPFW (FM).<sup>78</sup> ALF alleged several violations including a violation of 18 U.S.C. § 1464. In one example, ALF stated that on January 18, 1979 at 8:20 a.m., "a male announcer repeatedly used such words as 'motherfucker,' 'fuck' and similar indecent language."<sup>79</sup> Despite the frequent use of the language, the Enforcement Bureau found that "ALF has not shown that such use was more than isolated use in the course of a three year license term."<sup>80</sup> Therefore, ALF's petition for this complaint was denied.<sup>81</sup>

*C. The Reconsideration Order—The FCC Gets Aggressive With Broadcast Regulation*

From 1975 to 1987, the FCC did not take any action against a single licensee for indecent broadcasts.<sup>82</sup> This changed with a string of decisions

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75. See *In Re Application of WGBH Educational Foundation For Renewal of License for Noncommercial Educational Station WGBH-TV, Boston, Massachusetts*, 69 F.C.C. 1250 (1978) [hereinafter *WGBH*].

76. *Id.*

77. See *id.* at 1251.

78. See *In Re Application of Pacifica Foundation For Renewal of License for Noncommercial Station WPFW (FM), Washington, D.C.*, 95 F.C.C. 2d 750 (1983) [hereinafter *WPFW*].

79. *Id.* at 757. ALF also alleged that:

WPFW's complaint file at the Commission contains two letters which indicate that on October 10, 1979, at 11:50 a.m. such language as 'mother fucker' and 'shit' was broadcast; and on May 21, 1978, from 9:30 am to 11:30 a.m., an album which contains the words 'fuck', 'shit' and 'assholes' was broadcast.

*Id.*

80. *Id.*

81. *Id.* at 758.

82. See *In the Matter of Infinity Broadcasting Corporation, et al.*, 3 F.C.C.R. 930 (1987) [hereinafter *Reconsideration Order*].

made in April, 1987.<sup>83</sup> The result was a significant change in policy that made it easier for the FCC to regulate broadcasts.<sup>84</sup> To give broadcasters guidance for its new enforcement standard, the FCC issued the Reconsideration Order, using the April cases as examples.<sup>85</sup> The FCC began its discussion of indecency by emphasizing the importance of “specific factual settings because of the crucial role of context to the issue.”<sup>86</sup> The FCC stated that the indecency standard was the same one laid out in *Pacifica* in 1978.<sup>87</sup> To determine whether language was “patently offensive,” the FCC would consider variables such as:

an examination of the actual words or depictions in context to see if they are, for example, ‘vulgar’ or ‘shocking,’ a review of the manner in which the language or depictions are portrayed, an analysis of whether allegedly offensive material is isolated or fleeting, a consideration of the ability of the medium of expression to separate adults from children, and a determination of the presence of children in the audience.<sup>88</sup>

While § 1464 gave the FCC the authority to prohibit obscene and indecent material, the Supreme Court had emphasized that this power may only be used during a reasonable time.<sup>89</sup> Before the Reconsideration Order, 10:00 p.m. to 6:00 a.m. was generally considered to be a safe harbor period for indecent broadcasting because children were not presumed to be in the audience.<sup>90</sup> In the Reconsideration Order, however, the FCC explicitly rejected this bright line rule, stating that penalties depended on the “available data for that market” and whether there is a “reasonable risk that children may have been in the radio audience at the time of the broadcast.”<sup>91</sup> Rather than maintain a passive approach to broadcast regulation, the FCC broadened its regulatory power by making it clear that a violation did not require a scenario similar to Carlin’s

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83. *Id.* See *Pacifica Foundation, Inc.*, 2 FCC Rcd 2698 (1987) (KPFK-FM); *The Regents of the University of California*, 2 FCC Rcd 2703 (1987) (KCSB-FM); *Infinity Broadcasting Corp. of Pa.*, 2 FCC Rcd 2705 (1987) (WYSP(FM)).

84. See Reconsideration Order *supra* note 82, at 934.

85. *Id.*

86. *Id.*

87. *Id.* The *Pacifica* decision found that a broadcast would be considered indecent if the language describes “in terms patently offensive as measured by community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience.” *Id.*

88. *Id.* at 932.

89. Reconsideration Order *supra* note 82, at 931. MIM was trying to persuade the court to apply § 1464 in a way that would prohibit certain sexually explicit broadcasts at all times during the day. The court rejected this approach. *Id.*

90. See *id.* at 930.

91. *Id.* at 932.

monologue.<sup>92</sup> The three cases in the Reconsideration Order highlighted this major shift in policy.<sup>93</sup>

For the next decade, the FCC continued to struggle to create definite standards. In response to a ruling by the D.C. Court of Appeals that vacated the decisions punishing broadcasts occurring after 10 p.m., Congress directed the FCC to “enforce the provisions of . . . § 1464 on a 24 hour per day basis.”<sup>94</sup> The FCC followed this directive and banned all broadcasts that contained indecent material.<sup>95</sup> In 1991, this total ban was struck down.<sup>96</sup> In 1995, the court ruled that a “safe harbor” time period between 10:00 p.m. and 6:00 a.m. was both narrowly tailored and satisfied a compelling public interest.<sup>97</sup> During these times, indecent material is allowed to be broadcast without regulation.<sup>98</sup>

#### D. *New FCC Order Further Muddies the Water on What Is Considered Indecent*

In 2001, the FCC issued a “Policy Statement to provide guidance to the broadcast industry regarding our case law interpreting 18 U.S.C. § 1464 and

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92. *Id.* at 930.

93. *See id.* at 930–33.

The first case, against KPFK-FM and Pacifica, dealt with a broadcast which occurred after 10:00 p.m. and contained portions of a long-running play from Los Angeles. The FCC found that these excerpts were full of “vulgar and shocking language” that “were more than fleeting or isolated” and determined the language patently offensive, along with the reasonable risk that children might hear the broadcast, the FCC which amounted to “actionable indecency within the meaning of Section 1464.” *Id.*

The second case, against WYSP-FM and Infinity Broadcasting Corporation of Pennsylvania, dealt with the *Howard Stern Show*, which was broadcast between 6:00 a.m. and 10:00 a.m. While this show contained indecent material and was aired at a time when there was a reasonable risk that children could be listening, the FCC emphasized the nature of the material. Although the language “involved innuendo and double entendre” and that this sort of dialogue was susceptible to multiple interpretations by listeners, the FCC stated that the “sexual import of certain references in the material was inescapable and understandable given the surrounding context of the discussion.” Therefore, the FCC found the material to be actionable indecency. *Id.*

The final case, against KCSB-FM and the Regents of the University of California, dealt with a musical recording broadcast. This broadcast recording contained material deemed patently offensive and was broadcast at a time when children may have been listening. Despite the fact that the broadcast was a musical recording, the FCC emphasized that it was still subject to regulation. *Id.*

94. *Action for Children’s Television v. FCC*, 58 F.3d 654, 658 (D.C. Cir. 1995).

95. *See id.*

96. *Action for Children’s Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991). The court reasoned that “our previous holding in Act I that the Commission must identify some reasonable period of time during which indecent material may be broadcast necessarily means that the Commission may not ban such broadcasts entirely.” *Id.*

97. *Action for Children’s Television*, 58 F.3d at 669.

98. *Id.*

our enforcement policies with respect to broadcast indecency.”<sup>99</sup> The FCC offered an analytical approach coupled with numerous examples.<sup>100</sup>

To determine broadcast indecency, the FCC created a two-prong test where (1) “material must describe or depict sexual or excretory organs or activities”<sup>101</sup> and (2) “the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium.”<sup>102</sup> To determine whether material was patently offensive, the full context of the broadcast must be considered.<sup>103</sup> The FCC listed three principal factors that are important in its decision-making process. These factors included:

- (1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.*<sup>104</sup>

The FCC repeatedly emphasized that context was critical and that no single factor automatically made a broadcast indecent.<sup>105</sup>

For the first factor, the FCC noted that descriptions which are more graphic or explicit are more likely to be found patently offensive.<sup>106</sup> The FCC then gave twelve examples of broadcasts that were either issued a warning or a fine for being patently offensive.<sup>107</sup> For the second factor, the FCC emphasized that fleeting sexual or excretory references are generally not found to be indecent.<sup>108</sup> For example, during a South Carolina broadcast, one individual said “[t]he hell I did, I drove mother-fucker.”<sup>109</sup> The FCC found that the “broadcast contained only a fleeting and isolated utterance which, within the context of live and spontaneous programming, does not warrant a Commission sanction.”<sup>110</sup> However, some fleeting references found to be patently offensive

99. See In the Matter of Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement, 16 F.C.C.R. 7999 (2001) [hereinafter Policy Statement].

100. *Id.* at 8004.

101. *Id.* at 8002. (quoting WPBN/WTOM License Subsidiary, Inc., 15 FCC Rcd 1838, 1840–41 (2000)).

102. *Id.* (quoting WPBN/WTOM License Subsidiary, Inc., 15 FCC Rcd 1841(2000)).

103. *Id.* The court articulates that the “standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant” when determining whether patently offensive. *Id.*

104. Policy Statement, *supra* note 99, at 8003.

105. *Id.*

106. *Id.*

107. See *id.* at 8004–07.

108. *Id.* at 8008.

109. Policy Statement, *supra* note, at 8009.

110. *Id.*

could be considered indecent.<sup>111</sup> For the third factor, the FCC stressed that the presentation of the material is an important consideration.<sup>112</sup> While this Order attempted to clarify FCC standards, the open-ended nature caused some difficulty for broadcasters to precisely know whether a broadcast would be considered appropriate.

### III. 2003 GOLDEN GLOBE AWARDS AND SUBSEQUENT SHIFTS IN FCC POLICY

#### A *The Initial Golden Globe Decision—Keeping with the Past*

By 2006, after several policy changes, the FCC had reached the height of its indecency crackdown.<sup>113</sup> Broadcasters were challenged to keep current with the ever-changing FCC indecency standards. These new policies had allowed the FCC to regulate and penalize more broadcasts than ever before. So what happened between 2001 and 2006 to cause such a dramatic shift in approach to regulating broadcasts? While one specific broadcast did not lead to all of the changes witnessed before *Fox v. FCC*, it is clear that several decisions altered the FCC's policies toward indecency regulation.

In 2003, after Bono stated “this is really, really fucking brilliant” during a live broadcast, the Parents Television Council filed a complaint alleging a violation of the FCC's obscenity and/or indecency policy.<sup>114</sup> The Enforcement Bureau rejected the complaint<sup>115</sup> and immediately found that the material was not obscene.<sup>116</sup> To determine if the broadcast was indecent, the Bureau looked to the definition of indecent found in the FCC's Policy Statement released in 2001.<sup>117</sup> The Bureau found that the F-word used here did not “describe or

111. *Id.* at 8009–10. Fleeting references to sexual activities with children can be found indecent. For example a NAL was issued for this joke: “What is the best part of screwing an eight-year-old? Hearing the pelvis crack. *Id.* at 8009. Also, extreme explicit references can be found indecent such as “suck my dick you fucking cunt.” These cases show that a single fleeting expletive can be enough to justify receiving a NAL. *Id.* at 8010.

112. *Id.* A presentation on sex education may not be indecent whereas a skit for shock value could be. *See id.*

113. *See* Indecency Complaints and NALS, at <http://www.fcc.gov/eb/oip/ComplStatChart.pdf> (last visited Feb. 10, 2008).

114. *See* Golden Globes, *supra* note 1, at 19859.

115. *Id.* at 19862.

116. *Id.* at 19861. To determine obscenity the Bureau looked to three factors found in *Miller v. California*:

(1) the average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest; (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political or scientific value. *Id.*

117. *Id.* at 19860–61. The two factors necessary for indecency: “First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the

depict sexual and excretory activities and organs.”<sup>118</sup> Rather, the word was used as an “adjective or expletive to emphasize an exclamation.”<sup>119</sup> The Bureau also emphasized that “fleeting remarks of this nature do not warrant Commission action.”<sup>120</sup> This situation was nearly identical to an example in the 2001 Policy Statement where an individual said the F-word over a live broadcast.<sup>121</sup> Because the use of the F-word was determined to not be obscene or indecent, the airing of the program did not violate FCC regulations.<sup>122</sup> This decision reflected the view that a fleeting expletive, especially without referencing sexual activities or excretory functions, does not generally warrant an FCC sanction.<sup>123</sup> This position was the culmination of precedent established after the original *Pacifica* decision.

*B. 2004 Super Bowl half-time Fiasco—The Winds of Change Begin to Blow*

On February 1, 2004, during the Super Bowl half-time performance, Justin Timberlake removed a piece of Janet Jackson’s bustier briefly exposing her right breast.<sup>124</sup> This widely viewed incident garnered both the attention of the FCC and Congress.<sup>125</sup> Powell, the Chairman of the FCC, immediately commented that the incident was a “classless, crass, and deplorable stunt.”<sup>126</sup> On February 11, 2004, hearings on broadcast indecency took place in the Senate.<sup>127</sup> Both the House and the Senate worked extensively to give the FCC the power to fine violators more significantly than in the past.<sup>128</sup> The FCC was becoming more vigilant toward broadcast regulation and was using its teeth to inflict damaging fines.<sup>129</sup> Shortly thereafter, the FCC revisited the Enforcement Bureau’s Golden Globe decision.<sup>130</sup>

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material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium.” *Id.*

118. *Id.* at 19861.

119. Golden Globes, *supra* note 1, at 19861.

120. *Id.*

121. *See* Policy Statement, *supra* note 99, at 8009.

122. Golden Globes, *supra* note 1, at 19862.

123. *See* Policy Statement, *supra* note 99, at 8009.

124. Fallow, *supra* note 9, at 1.

125. *Id.* at 2.

126. Holohan, *supra* note 6 at 347.

127. *Id.*

128. *See id.* The House passed a bill “enabling the Commission to fine offenders up to \$500,000 per offensive (up from the previous maximum of \$27,500).” *Id.*; Fallow, *supra* note 9, at 3. (“The Senate version would increase the statutory maximum to \$275,000 for the first indecency violation with increasing fines up to \$500,000 for the third.”).

129. *See id.*

130. *See* Golden Globes II, *supra* note 13, at 4975.

C. *Revisiting the Golden Globes—The FCC Changes Course*

In light of the public outcry and Congressional efforts after the Super Bowl fiasco, the FCC decided to review the Enforcement Bureau's decision for the 2003 Golden Globe Awards.<sup>131</sup> In reviewing the Bureau's decision, the FCC used the same indecency standard that required indecent material to "describe or depict sexual or excretory organs or activities" and be "*patently offensive* as measured by contemporary community standards for the broadcast medium."<sup>132</sup> The FCC, contrary to the Bureau's decision, found that the F-word "in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition."<sup>133</sup> This was a major change in policy because past decisions had made it clear that a fleeting use of the F-word without sexual connotation generally did not fulfill this first prong.<sup>134</sup> The FCC also stated that the F-word "is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language. Its use invariably invokes a coarse sexual image."<sup>135</sup> Therefore, the F-word automatically fulfills the second prong of the indecency standard. With both of these prongs met, the FCC found Bono's remark actionably indecent.<sup>136</sup>

The major change in this decision was the abrupt halt to the past FCC policy on fleeting expletives when the F-word was used. The FCC found that any interpretation indicating that fleeting expletives are non-actionable is "no longer good law."<sup>137</sup> The FCC also emphasized that specific words do not need to be repeated to be considered patently offensive.<sup>138</sup> Noting the policy to protect children, the FCC found that even the isolated use of this language could enlarge "a child's vocabulary in a second."<sup>139</sup> Further, the FCC found that without action against isolated expletives, the use of this language would become more widespread.<sup>140</sup> Finally, the FCC pointed out that there have been numerous technological advances which make it possible to delay broadcasting by several seconds, enabling these expletives to be bleeped out.<sup>141</sup>

While the FCC argued that this decision was "not inconsistent with the Supreme Court ruling in *Pacifica*," the change of course by the FCC was

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131. *See id.*

132. *Id.* at 4977.

133. *Id.* at 4978. The Enforcement Bureau, on the other hand, found the word 'fuck' to be an adjective or an intensifier. *Id.*

134. *See id.*

135. Golden Globes II, *supra* note 13, at 4979.

136. *Id.* at 4982.

137. *Id.* at 4980.

138. *Id.*

139. *Id.* at 4982.

140. Golden Globes II, *supra* note 13, at 4979.

141. *Id.* at 4980.



clear.<sup>142</sup> This decision put broadcasters on “clear notice that, in the future, they will be subject to potential enforcement action for any broadcast of the F-word or variation thereof in situations such as the one described here.”<sup>143</sup> NBC, Viacom and Fox, among others, filed suit against the FCC’s new policy raising both statutory and constitutional issues.<sup>144</sup> While this litigation was pending, the FCC applied its Golden Globes ruling to several subsequent cases.

*D. Omnibus Order- The FCC Tries to Clarify New Standards*

In 2006, the FCC acknowledged that many broadcasters felt its standards lacked certainty.<sup>145</sup> On March 15, 2006, the FCC released a memorandum (Omnibus Order) filled with examples to provide “substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard.”<sup>146</sup> The Omnibus Order was divided into three categories.<sup>147</sup> The first category had six examples where the FCC issued a Notice of Apparent Liability.<sup>148</sup> The second category had four examples where the broadcasts were determined to be indecent, but nevertheless, no forfeiture was imposed.<sup>149</sup> Finally, the third category contained twenty-eight examples of broadcasts that were not in violation of FCC indecency regulations.<sup>150</sup>

In line with the recent Golden Globes decision, the FCC made it clear that any use of the F-word was presumptively indecent.<sup>151</sup> In addition, the FCC

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142. *Id.* at 4982. The FCC’s change in policy is a clear departure from the Policy Statement issued in 2001.

143. *Id.*

144. *See* Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007).

145. *See* Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664 (2006) [hereinafter Omnibus Order].

146. *Id.* at 2665.

147. *See id.* at 2670–2721.

148. *See id.* at 2670–90. Examples include: “The Surreal Life 2,” “Con El Corazon En La Mano,” Fernando Hidalgo Show,” Video Musicales,” “The Blues: Godfathers and Sons,” and “The Pursuit of D.B. Cooper.”

149. *See id.* at 2690–2700. Examples include: “The 2002 Billboard Music Awards,” “The 2003 Billboard Music Awards,” “NYPD Blue” and “The Early Show.”

150. *See* Omnibus Order, *supra* note 145, at 2700–21. Examples include: “Alias,” “Will and Grace,” “Two and a Half Men,” “Committed,” “Golden Phoenix Hotel & Casino Commercial,” “The Oprah Winfrey Show,” “Political Advertisement,” “The Amazing Race 6,” “Various Programs Containing Expletives (various dates between August 31, 2004 and February 28, 2005),” “Family Guy,” “The Academy Awards,” “8 Simple Rules,” “The Today Show,” “The Simpsons,” “America’s Funniest Home Videos,” “Green Bay Packers v. Minnesota Vikings” and “Medium.”

151. *Id.* at 2685. In each of these examples, the FCC pointed out that the word “fuck” was used and therefore, the broadcast was indecent. “The Blues: Godfathers and Sons.” *Id.* at 2684–2685. “The 2002 Billboard Music Awards.” *Id.* at 2691. “The 2003 Billboard Music Awards.” *Id.* at 2693.

found that the word “shit” is a “vulgar excretory term so grossly offensive” that it, too, was to be considered presumptively indecent.<sup>152</sup> For these words to be broadcast without penalty, the broadcaster must show that their use was “essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.”<sup>153</sup> This heightened scrutiny was not equally applied to other controversial curse words.<sup>154</sup> With many broadcasters unsure about the parameters of FCC indecency regulations, the FCC had hoped that this Order would provide clarity to this murky subject.<sup>155</sup>

*E. Remand Order—The FCC Takes Another Look at the Omnibus Order*

On September 7, 2006, the D.C. Circuit Court granted a request by the FCC for a voluntary remand to review and address petitioner’s arguments.<sup>156</sup> Nearly two months later, on November 6, 2006, the FCC issued a new order (Remand Order) which revisited the second category within the Omnibus Order.<sup>157</sup> This category addressed the four broadcasts that the FCC found to be indecent even though no fine was issued.<sup>158</sup> This Remand Order is especially important because of its future role in *Fox v. FCC*.

The first broadcast was the 2002 Billboard Music Awards.<sup>159</sup> In this particular program, Cher proclaimed in her acceptance speech that “[p]eople have been telling me I’m on the way out every year, right? So fuck ‘em.”<sup>160</sup> Fox argued that Cher’s use of the F-word was meant as a vulgar insult, not one

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152. *Id.* at 2686. In each of these examples, the FCC pointed out where the word “shit” was used and therefore, the broadcast was indecent. “The Blues: Godfathers and Sons.” *Id.* at 2684-2685. “The Pursuit of D.B. Cooper.” *Id.* at 2688. “The 2002 Billboard Music Awards.” *Id.* at 2691. “The 2003 Billboard Music Awards.” *Id.* at 2693. “NYPD Blue.” *Id.* at 2693. “The Early Show.” *Id.* at 2699.

153. *Id.* at 2700.

154. *Id.* at 2710. The FCC looked at twenty complaints containing the words or phrases: “hell,” “damn,” “bitch,” “pissed off,” “up yours,” “ass,” “for Christ’s sake,” “kiss my ass,” “fire his ass,” “ass is huge” and “wiping his ass.” They concluded that, while these words may upset some viewers, in the given circumstances their use did not rise to an actionable level of indecency. *Id.*

155. Omnibus Order, *supra* note 145, at 2724. Then Commissioner of the FCC, Michael J. Copps, wrote, “Although it may never be possible to provide 100 percent certain guidance because we must always take into account specific and often-differing contexts, the approach in today’s orders can help to develop such guidance and to establish precedents.” *Id.*

156. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 453 (2d Cir. 2007).

157. See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 13299 (2006) [hereinafter Remand Order].

158. *Id.*

159. *Id.* at 13322.

160. *Id.*

discussing sexual activities.<sup>161</sup> The FCC rejected this claim and proceeded to explain their policy regarding the F-word and how it is presumptively indecent.<sup>162</sup> This was the same method of application as applied in the new Golden Globe decision. The FCC also rejected Fox's claim that because the word was fleeting, it should not be actionably indecent.<sup>163</sup>

The second broadcast was the "2003 Billboard Music Awards" where Nicole Richie asked the audience, "[h]ave you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."<sup>164</sup> Similar arguments were made here by Fox regarding the use of the F-word and S-word.<sup>165</sup> The FCC again rejected these arguments.<sup>166</sup>

The third broadcast was "The Early Show."<sup>167</sup> During an interview, guest Twila Tanner responded to a question saying, "I knew he was a bullshitter from Day One."<sup>168</sup> The FCC acknowledged a more restrained position when dealing with news programming.<sup>169</sup> The FCC explained that the strong ties between the First Amendment and news programming require a more deferential standard.<sup>170</sup> In a change from the Omnibus Order, the FCC found that the F-word's use in the news program was not actionably indecent.<sup>171</sup>

Finally, several broadcasts of "NYPD Blue" were found to be indecent due to the words "bullshit," "dick" and "dickhead" being said numerous times.<sup>172</sup> The FCC, however, reversed this ruling because they found that the complaint was filed for episodes that aired after 10:00 p.m. and before 6:00 a.m.<sup>173</sup>

161. *Id.* at 13323 (reasoning that the comment did not reach an actionable level).

162. Remand Order, *supra* note 157, at 13324. ("The fact that she was not literally suggesting that people engage in sexual activities does not necessarily remove the use of the term from the realm of descriptions or depictions. This case thus illustrates the difficulty in making the distinction between expletives on the one hand and descriptions or depictions on the other.")

163. *Id.* ("As reviewed above, Commission dicta and Bureau-level decisions issued before our Golden Globe decision had suggested that expletives had to be repeated to be indecent but that such a repetition requirement would not apply to descriptions or depictions of sexual or excretory functions.")

164. *Id.* at 13304.

165. *See id.*

166. *Id.* at 13305.

167. Remand Order, *supra* note 157, at 13326.

168. *Id.*

169. *Id.* at 13328. ("In today's Order, we reaffirm our commitment to proceeding with caution in our evaluation of complaints involving news programming.")

170. *Id.* at 13327. ("In the *Omnibus Order*, we "recognize[d] the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment's free press guarantee.")

171. *Id.* at 13328.

172. Omnibus Order, *supra* note 145, at 2696.

173. *See* Remand Order, *supra* note 157, at 13329-30.

Therefore, they fell in the safe harbor zone protected by the First Amendment.<sup>174</sup>

With the Remand Order released as the updated FCC policy, Fox petitioned the Second Circuit Court of Appeals on November 8, 2006, to review the Remand Order.<sup>175</sup> Fox also consolidated the appeal with another one pending before the court.<sup>176</sup> Finally, CBS and NBC successfully filed motions to intervene.<sup>177</sup> With all of the confusion regarding the flurry of FCC indecency policies, this was the time for the Second Circuit to clarify the law for broadcasters. Unfortunately, the court's decision was ultimately a short-term solution to a long term issue.

#### IV. FOX V. FCC

The networks (Fox, CBS and NBC) raised several arguments against the validity of the FCC's Remand Order. These arguments included:

(1) the Remand Order is arbitrary and capricious because the Commission's regulation of "fleeting expletives" represents a dramatic change in agency policy without adequate explanation; (2) the FCC's "community standards" analysis is arbitrary and meaningless; (3) the FCC's indecency findings are invalid because the Commission made no finding of scienter; (4) the FCC's definition of "profane" is contrary to law; (5) the FCC's indecency regime is unconstitutionally vague; (6) the FCC's indecency test permits the Commission to make subjective determinations about the quality of speech in violation of the First Amendment; and (7) the FCC's indecency regime is an impermissible content-based regulation of speech that violates the First Amendment.<sup>178</sup>

The court found the first argument persuasive and therefore did not reach any of the other claims made by the networks.<sup>179</sup>

##### A. *The Majority Opinion*

The court began by looking at the Administrative Procedure Act.<sup>180</sup> Under this Act, courts are to set agency decisions aside if found to be "arbitrary,

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174. *See id.* at 13329.

175. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 454 (2d Cir. 2007).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Fox*, 489 F.3d at 454. 5 U.S.C. § 706 states:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>181</sup>  
 Agency action is considered arbitrary and capricious:

if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise.<sup>182</sup>

The networks argued that the FCC’s change in policy for fleeting expletives, as supported in the Remand Order, was arbitrary and capricious for its lack of reasoned explanation.<sup>183</sup>

The court looked to past decisions to determine whether there was a change in the FCC’s policy toward fleeting expletives.<sup>184</sup> After a brief analysis, the court agreed with the networks that “there is no question that the FCC has changed its policy.”<sup>185</sup> While agencies can change their policies, this change must be accompanied by “reasoned analysis for departing from prior

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—  
 (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

181. *Id.*

182. *Id.* at 455. (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

183. *Id.*

184. *Id.*

185. *Fox*, 489 F.3d at 455.

First, there is no question that the FCC has changed its policy. As outlined in detail above, prior to the Golden Globes decision the FCC had consistently taken the view that isolated, non-literal, fleeting expletives did not run afoul of its indecency regime. See, e.g., *Pacifica Clarification Order*, 59 F.C.C.2d 892, at 4 n. 1 (advising broadcasters that “it would be inequitable for us to hold a licensee responsible for indecent language” that occurred during a live broadcast without an opportunity for journalistic editing); *Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, at 10 & n. 6 (distinguishing between the “verbal shock treatment” of the George Carlin monologue and “the isolated use of a potentially offensive word” and finding that the single use of an expletive in a program “should not call for us to act under the holding of *Pacifica*”); *Pacifica Foundation, Inc.*, 2 F.C.C.R. 2698, at 13 (“If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency.” (emphasis added)); *Industry Guidance*, 16 F.C.C.R. 7999, at 17–18 (distinguishing between material that is repeated or dwelled on and material that is “fleeting and isolated”) (citing *L.M. Communications of S.C., Inc.*, 7 F.C.C.R. 1595 (Mass Media Bureau 1992) (finding the single utterance of “mother-fucker” not indecent because it was a “fleeting and isolated utterance which, within the context of live and spontaneous programming, does not warrant a Commission sanction”)); *Lincoln Dellar, For Renewal of the Licenses of Stations KPRL(AM) and KDDB(FM)*, 8 F.C.C.R. 2582 (Audio Serv. Div.1993) (news announcer’s remark that he “fucked that one up” not indecent because the “use of a single expletive” did not warrant further review “in light of the isolated and accidental nature of the broadcast”). This consistent enforcement policy changed with the issuance of Golden Globes.

*Id.*

precedent.”<sup>186</sup> If an agency fails to do so, the agency’s action could be set aside as arbitrary and capricious.<sup>187</sup>

The FCC’s primary explanation for the change in policy toward fleeting expletives was the ‘first blow’ theory.<sup>188</sup> This theory was outlined in the original *Pacifica* Supreme Court decision.<sup>189</sup> In *Pacifica*, the Court found that broadcast media, unlike other types of speech, enters the privacy of the home without warning.<sup>190</sup> There, the Court rejected the argument that one could just turn off the radio if offensive material was being broadcast.<sup>191</sup> The Court likened that argument to “saying that the remedy for an assault is to run away after the first blow.”<sup>192</sup> Similarly, the FCC argued here that “fleeting expletives unfairly forces viewers to take the first blow.”<sup>193</sup> The Second Circuit did not accept this explanation as being a reasoned enough basis for the FCC’s change in policy.<sup>194</sup>

The majority found that this ‘first blow’ theory was contrary to the FCC’s policy for fleeting expletives.<sup>195</sup> The inconsistency was located in an FCC exception where some fleeting expletives were considered actionably indecent in certain broadcasts but not in others. In the Remand Order, the FCC found the statement “I knew he was a bullshitter from day one” to not be actionable because it was said in a news program.<sup>196</sup> The FCC has also held that expletives aired during the movie *Saving Private Ryan*<sup>197</sup> were not indecent

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186. *Id.* at 456. The court explains what is necessary for reasoned analysis:

When an agency reverses its course, a court must satisfy itself that the agency knows it is changing course, has given sound reasons for the change, and has shown that the rule is consistent with the law that gives the agency its authority to act. In addition, the agency must consider reasonably obvious alternatives and, if it rejects those alternatives, it must give reasons for the rejection, sufficient to allow for meaningful judicial review. (quoting *N.Y. Council, Ass’n of Civilian Technicians v. Fed. Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir.1985)).

*Id.*

187. *Id.*

188. *Id.* at 457.

189. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

190. *Fox*, 489 F.3d at 457 (describing the majority opinion in *Pacifica*).

191. *Id.* at 457–58.

192. *Id.* (“To say that one may 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.”) (quoting *FCC v. Pacifica Found.*, 438 U.S. at 748).

193. *Id.* at 458 (quoting Remand Order, *supra* note 157 at 13309).

194. *See id.* at 459.

195. *Fox*, 489 F.3d at 459.

196. *Id.* at 458. (quoting Remand Order, *supra* note 157, at 13326). *See also infra* notes 212–16 along with accompanying text.

197. *Saving Private Ryan* is an explicitly graphic movie depicting World War II. Directed by Steven Spielberg, this movie won five academy awards in 1998. The Internet Movie Database, <http://www.imdb.com/title/tt0120815/awards>.

because of their importance to the artistic nature of the work.<sup>198</sup> However, at both the 2002 and 2003 Billboard Music Awards, the use of the word “shit” was actionably indecent.<sup>199</sup> In all of these scenarios, the listener was forced to suffer the ‘first blow’ from the broadcasted expletive.<sup>200</sup> The inconsistency, the majority pointed out, was that only in certain circumstances was that ‘first blow’ considered actionably indecent.<sup>201</sup>

The FCC’s defense was that they wanted to protect viewers from being forced to hear these expletives.<sup>202</sup> The majority reasoned that if this were the case, why were fleeting expletives considered perfectly acceptable in certain circumstances?<sup>203</sup> Viewers, especially children, may not be able to differentiate when an expletive is used for an exception listed above.<sup>204</sup> The majority concluded that this lenient policy did not comport with the ‘first blow’ theory<sup>205</sup> and that the FCC’s “proffered rationale [was] disconnected from the actual policy implemented by the Commission.”<sup>206</sup>

The FCC also defended its policy that the F-word and S-word are presumptively indecent. The FCC argued that even non-literal expletives were indecent due to the “difficult[y] to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions.”<sup>207</sup> The majority rejected this argument as contrary to common sense.<sup>208</sup> Pointing to several examples, the court illustrated that in numerous circumstances, a reasonable person would be able to know if the language referred to sexual activities or excretory organs.<sup>209</sup>

The FCC claimed that the requirement of repeated use of expletives ignored the critical nature of context and that if a per se exemption of fleeting expletives were instituted, the result would be a significant increase in their use in future broadcasts.<sup>210</sup> The majority pointed out that the FCC failed to

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198. *Fox*, 489 F.3d at 458. See *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 (2005).

199. *Id.* See also *supra* notes 159–66 along with accompanying text.

200. *Id.* at 459.

201. *Id.* at 458.

202. See *id.*

203. *Fox*, 489 F.3d at 458. (highlighting the different treatment between *Saving Private Ryan* and the 2002 and 2003 Music Billboard Awards).

204. *Id.* at 459.

205. *Id.* (“Thus, the record simply does not support the position that the Commission’s new policy was based on its concern with the public’s mere exposure to this language on the airwaves.”).

206. *Id.*

207. *Id.* (quoting Remand Order, *supra* note 157 at 13308).

208. *Fox*, 489 F.3d at 459.

209. See *id.* at 459–60.

210. *Id.* at 460 (quoting Remand Order, *supra* note 157 at 13309).

provide convincing evidence that this increase would likely occur.<sup>211</sup> The court even brought up an admission by the FCC acknowledging that fleeting expletives “never barraged the airwaves” before the Golden Globes decision.<sup>212</sup> While the majority did agree with the FCC that the nature of context is critical, the court criticized the FCC for not taking context into consideration when declaring that all variants of certain words would be presumptively indecent.<sup>213</sup>

The majority finally found that the FCC failed to explain why they enacted this new policy after nearly thirty years of precedent.<sup>214</sup> The FCC claimed a primary interest in protecting children from indecent broadcasts.<sup>215</sup> The majority, however, argued that this intention has remained the same since *Pacifica* was decided.<sup>216</sup> Despite this continued interest, the FCC failed to explain how a fleeting expletive is harmful and why there was a need to regulate its use.<sup>217</sup> Because the FCC failed to justify its changed policy regarding fleeting expletives, the court held that the Golden Globes decision, as applied in the Remand Order, was invalid under the Administrative Procedure Act as arbitrary and capricious.<sup>218</sup> The Remand Order was thereby vacated and the matter was sent back to the FCC.<sup>219</sup>

#### B. *Majority Opinion’s Dicta*

Recognizing the narrow scope of the holding, the court spent considerable time analyzing potential constitutional challenges as dicta. While the dictum lacks the weight of the holding, the majority made several observations which could aid judicial efficiency if further litigation ensued.<sup>220</sup> The court immediately announced their skepticism about whether the FCC would be able to create a reasoned explanation regarding their policy for fleeting expletives.<sup>221</sup>

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211. *See id.*

212. *Id.*

213. *Fox*, 489 F.3d at 460 (referencing the FCC’s standard that the words “fuck” and “shit” are presumptively indecent).

214. *See id.* at 461.

215. *Id.*

216. *Id.*

217. *Id.* at 462.

218. *Fox*, 489 F.3d at 462.

219. *Id.*

220. *Id.*

221. *Id.*



Generally, regulations of speech that are protected by the First Amendment must withstand strict scrutiny.<sup>222</sup> There is, however, an exception for broadcast media, requiring only that the regulation be “narrowly tailored to further a substantial government interest.”<sup>223</sup> While the Supreme Court has approved the FCC’s ability to regulate indecent material, the FCC’s indecency standard has been attacked as “undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague.”<sup>224</sup> Detailing the inconsistencies of the FCC’s indecency policy, the court made it clear that they were sympathetic to the argument that the policy was not narrowly tailored.<sup>225</sup> The court also looked to *Reno v. ACLU*,<sup>226</sup> a 1997 Supreme Court decision that dealt with an indecency regulation for the internet.<sup>227</sup> This similarly worded regulation<sup>228</sup> was found to have violated the First Amendment since it was too vague and “it unquestionably silences some speakers whose messages would be entitled to constitutional protection.”<sup>229</sup> While internet regulations are different from broadcast regulations, the court mentioned their skepticism that the FCC’s indecency standard could survive a similar constitutional attack.<sup>230</sup> The majority also found potential constitutional issues with the subjectivity of the FCC’s ability to sanction speech,<sup>231</sup> the level of scrutiny used,<sup>232</sup> and the

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222. *Id.* at 462–63. For strict scrutiny, “the government must both identify a compelling interest for any regulation it may impose on indecent speech and choose the least restrictive means to further that interest”. *Id.* at 463.

223. *Fox*, 489 F.3d at 462-63. Broadcast media is an exception because it is uniquely pervasive. *See also supra* notes 78–81 and accompanying text.

224. *Id.*

225. *See id.* The court looks to the differential treatment between Saving Private Ryan and the 2002 and 2003 Music Billboard Awards to highlight the potential vagueness of the standard. *Id.*

226. *Reno v. ACLU*, 521 U.S. 844 (1997). The Court struck down an internet indecency regulation for being unconstitutionally vague. *Id.*

227. *Fox*, 489 F.3d at 463.

228. The regulation covered speech that “in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.” *Id.*

229. *Id.*

230. *Id.* at 464.

231. *See id.* (“The Supreme Court has cautioned against speech regulations that give too much discretion to government officials.”) (quoting *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992)).

232. *Id.* (“We recognize there is some tension in the law regarding the appropriate level of First Amendment scrutiny.”). Currently, the court doesn’t use strict scrutiny for media broadcasts. However, the networks argue that perhaps strict scrutiny should be used. While broadcast media is not as uniquely pervasive as it used to be, current constitutional precedent has established that broadcast media faces an intermediate level of scrutiny. *Id.* at 465.

FCC's construction of the word 'profane.'<sup>233</sup> After this discussion, the court concluded that it is "doubtful that by merely proffering a reasoned analysis for its new approach to indecency and profanity, the Commission can adequately respond to the constitutional and statutory challenges raised by the networks."<sup>234</sup>

### C. *Dissenting Opinion*

In Judge Leval's dissent, he argued that the FCC satisfied its requirement by giving adequate reasoning for changes under the Administrative Procedure Act.<sup>235</sup> Ultimately, Judge Leval found that the FCC "gave a sensible, although not necessarily compelling, reason" for the change in policy regarding fleeting expletives.<sup>236</sup> The FCC reasoned that the F-word "is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language" and that "its use invariably invokes a coarse sexual image."<sup>237</sup> Thus, its use, even if isolated, violated § 1464.<sup>238</sup> This explanation, the Judge argued, should be enough to satisfy the requirements of the Administrative Procedure Act.<sup>239</sup>

Judge Leval next addressed the argument that the FCC's standard lacked consistency.<sup>240</sup> Acknowledging that the new policy did not follow an all-or-nothing policy,<sup>241</sup> Judge Leval pointed out that the FCC is applying standards based on the context of the broadcast.<sup>242</sup> Thus, the policy actually increased the consistency of FCC rulings by drawing clear lines for specific contexts.<sup>243</sup>

The majority argued that the FCC was "divorced from reality" when they claimed that a major increase of expletives would occur without the implementation of their new policy.<sup>244</sup> The dissent argued that these are just two different predictions and that the court must be deferential to the agency's judgment.<sup>245</sup>

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233. See *Fox*, 489 F.3d at 465–66. The court suggests that the FCC's use of profane may have difficulty passing constitutional muster. This is due to the FCC's current interpretation of profane meaning essentially the same thing as indecent. *Id.*

234. *Id.* at 467.

235. *Id.*

236. *Id.* at 469.

237. *Id.* at 470 (citing *Golden Globes II*, supra note 13 at 4979).

238. See *Fox*, 489 F.3d at 470; § 1464, supra note 20.

239. *Fox*, 489 F.3d at 470.

240. *Id.* at 471.

241. Fleeting expletives that are integral to a piece of work or that occur on a bona fide news program could be excused whereas the same expletive on a regular broadcast would be considered indecent. *Id.*

242. *Id.*

243. *Id.*

244. *Fox*, 489 F.3d at 460.

245. *Id.* at 472. Judge Leval even goes on to say that the FCC's prediction is probably more accurate.

Finally, the dissent addressed the FCC's argument that the F-word communicates "inherently. . . sexual connotation [and] invariably invokes a coarse sexual image."<sup>246</sup> Judge Leval agreed with the majority that the F-word can be used without referring to sexual activities.<sup>247</sup> However, he stressed that the majority misinterpreted the FCC's reasoning.<sup>248</sup> A correct reasoning, he argued, was that "even when the speaker does not intend a sexual meaning, a substantial part of the community, and of the television audience, will understand the word as freighted with an offensive sexual connotation."<sup>249</sup> Therefore, given the nature of the F-word, this interpretation of the FCC policy was not irrational, arbitrary or capricious.<sup>250</sup> After analyzing these multiple factors, Judge Leval concluded that the FCC had a reasoned explanation for their changed policy regarding fleeting expletives.<sup>251</sup>

#### V. ANALYSIS OF THE *FOX* DECISION

The decision in *Fox v. FCC* failed to answer many questions that had plagued broadcasters since the FCC began cracking down on indecent broadcasts. While the court came to a logical conclusion, the majority opinion failed to adequately address the true issue of whether a fleeting expletive could ever be constitutionally regulated. As a result of the court's decision, many broadcasters were left confused regarding what constituted an acceptable broadcast.

This analysis will begin with a discussion of the majority and dissenting opinion in *Fox v. FCC*. Specifically, I will address the following issues: the 'first blow' theory, the presumptive indecency of the F-word and S-word, and the policy regarding fleeting expletives. This discussion will include a short recap of the court's findings and examine whether the court's conclusions were logical.

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First, the words proscribed by the Commission's decency standards are much more common in daily discourse today than they were thirty years ago. Second the regulated networks compete for audience with the unregulated cable channels, which increasingly make liberal use of their freedom to fill programming with such expletives. The media press regularly reports how difficult it is for networks to compete with cable for that reason. It seems to me the agency has good reason to expect that a marked increase would occur if the old policy were continued.

*Id.* at 472-73.

246. *Id.*

247. *Id.* at 473. Judge Leval lists several examples where the word "fuck" was not used literally. "A student who gets a disappointing grade on a test, a cook who burns the roast, or a driver who returns to his parked car to find a parking ticket on the windshield." *Id.*

248. *Fox*, 489 F.3d at 473.

249. *Id.*

250. *Id.* at 474.

251. *Id.*

### A. 'First Blow' Theory

The majority reasoned that the FCC's policy was incompatible with the 'first blow' theory because under certain circumstances, fleeting expletives were acceptable for some broadcasts while in others, the same words were considered indecent.<sup>252</sup> Originating from the *Pacifica* decision, the 'first blow' theory emphasized that in the privacy of the home, one has the right to be left alone from indecent material.<sup>253</sup> Here, the majority ignored the initial critical question of whether the material was indecent. When determining indecency, both the Supreme Court and the FCC have made it clear that context is an important consideration.<sup>254</sup> The FCC has found that expletives used in bona fide news programming or expletives which are integral to a piece of work are generally outside of the definition of indecent material.<sup>255</sup> Therefore, the use of these words in these particular contexts falls outside the 'first blow' theory because the use of the words was not indecent. Curiously, the majority appeared to ignore this contextual analysis. Instead, the majority focused on how viewers may lack the requisite understanding that the expletives were integral or part of a news program. Regardless of the validity of this claim, the 'first blow' theory emphasizes that an individual in the privacy of his own home only has the right to be left alone from indecent material. The majority mistakenly combined both decent and indecent broadcasts when finding the FCC policy to be inconsistent. However, when separated properly, the 'first blow' theory used by the FCC is consistent in that the FCC regulates broadcasts so that listeners are not forced to withstand indecent material.

As the dissent illustrates, this approach is an attempt by the FCC to reconcile conflicting values.<sup>256</sup> Without a flexible approach focused on the context of the broadcast, the FCC's approach would have to follow an all-or-nothing standard. After all, if one word was determined to be indecent, its use at any time outside of the safe harbor period of 10:00 p.m. and 6:00 a.m. would not be acceptable regardless of its context. This sort of policy is contrary to both the FCC's policy and the past precedent of the Supreme Court.

### B. Presumptive Indecency of the F-word and S-word

While the majority incorrectly analyzed the 'first blow' theory, it correctly pointed out the logical inconsistency in the FCC's finding that the F-word and the S-word are presumptively indecent.<sup>257</sup> The use of the F-word and S-word

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252. *See id.* at 457–58.

253. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

254. *See id.* at 742–43. *See* Policy Statement, *supra* note 99, at 8002.

255. *See supra* notes 167–71 and accompanying text.

256. *Fox*, 489 F.3d at 472.

257. The FCC found that the F-word and S-word are presumptively indecent because it is "difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a

can vary greatly in meaning, depending on the context. For example, Bono's statement "really, really, fucking brilliant" is a clear, non-literal use of the word "fuck." As the Bureau initially contended, this word was used as an adjective or intensifier.<sup>258</sup> Even in the review of the Golden Globes decision, the FCC stated that the "full context in which the material appeared is critically important."<sup>259</sup> By having a list of presumptively indecent words, the FCC's policy altogether ignores the importance of context when determining whether material is indecent.

The dissent argued that the F-word and S-word is loaded with an offensive sexual or excretory connotation and that no matter the literal or non-literal use, viewers will understand it as such.<sup>260</sup> This interpretation is too general to be applicable. In numerous examples, a reasonable person would be able to conclude that the F-word or S-word is used non-literally. The FCC's broad generalization of these words could lead to suppression of protected speech.

The FCC's policy is also contrary to past precedent. In *Pacifica*, the Supreme Court found George Carlin's monologue to be indecent because of the "repetitive, deliberate use" of certain words.<sup>261</sup> Several Bureau decisions later relied on this precedent.<sup>262</sup> Shortly after *Pacifica*, the Bureau made it clear that material believed to be offensive by some is not enough to warrant regulation.<sup>263</sup> In 2001, the FCC issued a Policy Statement to help broadcasters understand what the FCC found to be indecent.<sup>264</sup> In one included example, the F-word was used.<sup>265</sup> The FCC found that this single usage of the F-word was just a fleeting expletive and that, given the context, was not indecent.<sup>266</sup> While this policy changed in the Golden Globes decision, the explanation for that change lacked a reasonable basis. As mentioned above, common sense and context dictate the meaning behind the uses of these so called presumptively indecent words. Therefore, this component of the FCC policy was arbitrary and capricious.

### C. *Fleeting Expletives*

The majority also rejected the FCC's argument that a per se exemption on fleeting expletives would result in a significant increase in their use during

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literal description of sexual or excretory functions." *Id.* at 459 (quoting Remand Order, *supra* note 157, at 13308).

258. Golden Globes, *supra* note 1, at 19861.

259. Golden Globes II, *supra* note 13, at 4977-78.

260. *See Fox*, 489 F.3d at 473.

261. *See FCC v. Pacifica Found.*, 438 U.S. 726, 739 (1978).

262. *See WGBH*, *supra* note 78, at 1251.

263. *Id.*

264. Policy Statement, *supra* note 99, at 7999.

265. *Id.* at 8009.

266. *Id.*

future broadcasts.<sup>267</sup> The Remand Order provided no information indicating that fleeting expletives were harmful to viewers.<sup>268</sup> In fact, no evidence was given indicating that an increase was likely to occur.<sup>269</sup> The dissent correctly noted that these predictions are speculative at best.<sup>270</sup> Nevertheless, the FCC's concern that excessive fleeting expletives will flood the airwaves lacks particular merit. Even if the FCC is correct, an increase in fleeting expletives could take their use out of the realm of fleeting altogether. If numerous controversial words were said during a broadcast, the FCC could look to the context of the entire broadcast and find that the language was not fleeting, but rather, that a pattern permeated the program. This type of scenario would make the broadcast actionably indecent.

For the twenty-five years before the review of the Golden Globes decision, both the courts and the FCC had a clear policy that fleeting or isolated expletives were generally not actionable. In *Pacifica*, the "repetitive, deliberate use" of certain words was determined to be indecent.<sup>271</sup> Justice Powell, in his concurrence, distinguished the FCC's power to regulate verbal shock treatment found in Carlin's monologue from isolated use of a potentially offensive word.<sup>272</sup> Shortly after *Pacifica*, the Enforcement Bureau rejected an allegation that WGBH's broadcasts were indecent.<sup>273</sup> It reasoned that more than just an expletive had to be found to warrant an indecent broadcast.<sup>274</sup> In 1979, the Bureau found that an announcer repeatedly using variants of the F-word was not indecent because of its isolated use.<sup>275</sup> In 1987, the Reconsideration Order factored into its patently offensive analysis the question of whether material was isolated or fleeting.<sup>276</sup> In 2001, the FCC's new Policy Statement gave an example where a man said "mother-fucker" during a broadcast.<sup>277</sup> The FCC found this to be fleeting and isolated and not enough to warrant a sanction.<sup>278</sup> Finally, in 2003, Bono said "fucking brilliant" during his acceptance speech at the Golden Globe Awards.<sup>279</sup> The initial Enforcement Bureau decision stated that this was not actionably indecent because it was

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267. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 460 (2d Cir. 2007).

268. *Id.* at 462.

269. *Id.* at 460.

270. *Id.* at 472.

271. *See FCC v. Pacifica Found.*, 438 U.S. 726, 739 (1978).

272. *Id.* at 760\_61.

273. WGBH, *supra* note 75, at 1251.

274. *Id.*

275. WPFW, *supra* note 78, at 757.

276. Reconsideration Order, *supra* note 82, at 932.

277. Policy Statement, *supra* note 99, at 8009.

278. *Id.*

279. Golden Globes, *supra* note 1, at 19859.

fleeting and isolated and that the word was used as an intensifier.<sup>280</sup> This standard, which enjoyed a long line of precedent, was subsequently reversed in the review of the Golden Globe decision.<sup>281</sup>

Because the *Fox* court correctly found that the F-word and S-word should not be considered presumptively indecent, the FCC's explanation for fleeting expletives completely crumbles. The FCC can no longer claim that the use of the F-word or S-word automatically is indecent and that their single use fulfills the two prong indecency requirement.

## VI. CONSTITUTIONAL APPROACH

While policy considerations are important, the subtle, yet underlying conflict lies in the broadcaster's constitutional rights versus the FCC's right to regulate indecency. "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere."<sup>282</sup> In the dictum accompanying the decision in *Fox*, the majority confessed their skepticism that the FCC could "provide a reasoned explanation for its fleeting expletive regime that would pass constitutional muster."<sup>283</sup> All indecent speech is protected under the First Amendment.<sup>284</sup> The FCC, however, can regulate this speech if there is both a substantial governmental interest and the FCC is utilizing the least restrictive means to further that interest. The majority in *Fox* appeared sympathetic to an argument that the FCC's indecency test is overbroad.<sup>285</sup> With so many caveats for when certain expletives could be broadcast, the indecency standard lacked the clarity constitutionally required by the First Amendment.<sup>286</sup> In *Reno v. ACLU*, a regulation similarly worded to the FCC's indecency standard was found to violate the First Amendment because of its indirect effect on speech.<sup>287</sup> Like *Reno*, the FCC's vague and overbroad standard could violate the First Amendment by effectively silencing speech that is entitled to protection.

The court should have used this constitutional approach when deciding the outcome of this case. During oral arguments, the court was fully briefed on the

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280. *Id.* at 19862.

281. Golden Globes II, *supra* note 13, at 4982.

282. Ian J. Antonoff, *You Don't Like It . . . Change the (Expletive Deleted) Channel!: An Analysis of the Constitutional Issues that Plague FCC Enforcement Actions and a Proposal for Deregulation in Favor of Direct Consumer Control*, 15 SETON HALL J. SPORTS & ENT. L. 253, 263 (2005).

283. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 462 (2d Cir. 2007).

284. *Id.*

285. *Id.* at 463. The networks contend that the FCC indecency test "is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague." *Id.*

286. *Id.*

287. *Id.*

constitutional issues regarding the updated FCC policy.<sup>288</sup> Rather than rule on constitutional grounds, the court found that the FCC violated the Administrative Procedure Act.<sup>289</sup>

The majority's conclusion was problematic in that the FCC could have revisited the Remand Order and created a more reasonable explanation for their altered policy, satisfying the requirements laid out in the Administrative Procedure Act. If this scenario had hypothetically occurred, the broadcasters would have been in the same position that they were pre-*Fox*. The networks would then put forth the same argument that the FCC's policy violated their rights. The majority's dictum indicated that a change to the FCC's reasoning would likely not be enough to survive constitutional scrutiny.<sup>290</sup> This warning by the court, however, was not enough. Assume the FCC had come up with a new explanation for their change in policy. The result would have meant significant confusion among the broadcasting community. Broadcasters would have had to decide whether to follow the new FCC policy or rely on a potential constitutional claim that the FCC was exceeding their power to regulate broadcasts.

Had the Supreme Court not granted certiorari, broadcaster confusion coupled with increasing fines for indecency could have led to a chilling effect on protected speech. This is because broadcasters could become hesitant to release material which might be considered indecent because of the threat of significant fines.<sup>291</sup> This also could lead to others not speaking on the air for fear of penalty.<sup>292</sup> Furthermore, news programming and informational broadcasts could have faced more scrutiny by editors which could have led to distorted information.<sup>293</sup> It goes against a good public policy of encouraging a variety of ideas.<sup>294</sup> Each of these possible scenarios would have negatively affected both networks and viewers. This subtle assault on the freedom of speech would not have gone unnoticed by the networks.

The *Fox* court stated that “[a] fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.”<sup>295</sup> The court failed to recognize that the FCC and broadcasting industry had hit a crossroads where fundamental questions arose to the legality of the FCC policies. For resolution of these issues, it was necessary for the court to determine the constitutionality of the

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288. *Fox*, 489 F.3d at 462.

289. *Id.*

290. *Id.* at 462. (“We are skeptical that the Commission can provide a reasoned explanation for its ‘fleeting expletive’ regime that would pass constitutional muster.”).

291. Fallow, *supra* note 9, at 30.

292. Antonoff, *supra* note 282, at 264.

293. *Id.*

294. *Id.*

295. *Fox*, 489 F.3d at 462.



FCC's regulatory policies. Since this was not accomplished, the scenario that these same parties would meet in the courtroom was inevitable.

## VII. SUPREME COURT GETS INVOLVED

Inevitable it was. Rather than create a new explanation on remand or request an en banc rehearing, the FCC appealed directly to the Supreme Court.<sup>296</sup> On March 17, 2008, the Supreme Court granted the Solicitor General's petition for certiorari.<sup>297</sup> With oral arguments by the parties scheduled for fall of 2008, the Supreme Court appears poised to provide the clarity that the Second Circuit decision failed to impart. First, I will outline the arguments that the FCC, Fox and NBC provided in their certiorari petitions on why *Fox v. FCC* should or should not be revisited. Then, I will discuss these positions and analyze some possible scenarios and outcomes that could take place when the Supreme Court hears this case.

After a weak decision in *Fox* and the continued confusion that has ensued, it is essential that the Supreme Court address the substantive challenges to the controversial FCC policy to get to the heart of the FCC's authority to regulate fleeting expletives. Otherwise, broadcasters will continue to question what constitutes an acceptable broadcast. With an increasingly vigilant eye towards punishment and ever-increasing fines for indecent broadcasts, the result could lead to the suppression of protected speech out of a fear for potential indecency findings.

### A. *FCC's Argument for Why Certiorari Should Be Granted*

The question presented by the FCC to the Supreme Court was "whether the court of appeals erred in striking down the Federal Communications Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of 'any obscene, indecent, or profane language,' when the expletives are not repeated."<sup>298</sup> The FCC proffered three reasons why the Supreme Court's review was warranted.<sup>299</sup>

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296. Brief in Opposition of Respondents, *FCC v. Fox Television Stations, Inc.*, 2008 WL 320502 at \*14 (Feb. 1, 2008).

297. *FCC v. Fox Television Stations, Inc.*, 128 S.Ct. 1647 (2008).

298. Petition for Writ of Certiorari, *FCC v. Fox Television Stations, Inc.*, 2007 WL 3231567 at \*1 (Nov. 1, 2007).

299. *Id.*

1. The Decision in *Fox v. FCC* Conflicted With the “Context Driven Approach Governing Broadcast Indecency” Upheld in the Supreme Court Decision in *Pacifica*.

The FCC first argued that the Second Circuit failed to adequately take a broadcast’s context into consideration.<sup>300</sup> Countervailing interests, such as First Amendment concerns, have led the FCC to not penalize the use of the F-word during bona fide news programming.<sup>301</sup> This contextually based exception is premised on the notion that First Amendment concerns force the FCC to “proceed with the utmost restraint.”<sup>302</sup>

The *Pacifica* decision focused on the FCC’s authority to regulate indecent broadcasts.<sup>303</sup> Justice Stevens emphasized that “we must consider [a broadcast’s] context in order to determine whether the Commission’s action was constitutionally permissible.”<sup>304</sup> In *Fox*, the court found that the ‘first blow’ theory of protecting broadcast audiences did not comport with the FCC’s contextual approach to fleeting expletives.<sup>305</sup> The FCC claimed that this conflicts with the *Pacifica* decision, in which the Supreme Court recognized the ‘first blow’ theory while simultaneously emphasizing the importance of context.<sup>306</sup> The FCC pointed out that “[o]nce it is recognized that (1) a particular graphic utterance can service as a ‘first blow’ that can cause immediate damage, and (2) context matters, it follows logically that there is no mandate for a per se rule of either prohibition or license.”<sup>307</sup> The FCC tried to take context into consideration for those words they deemed could “serve as a ‘first blow.’”<sup>308</sup> The Second Circuit’s decision, the FCC argued, failed to recognize this necessary contextual component and therefore was contrary to the *Pacifica* decision.<sup>309</sup>

2. The Second Circuit’s Decision was “Inconsistent with Settled Principles of Administrative Law and Conflicts with a Decision of the D.C. Circuit.”

The Second Circuit found that the FCC violated the Administrative Procedure Act by failing to give a reasoned basis for its change in policy regarding fleeting expletives.<sup>310</sup> The Second Circuit maintained that the FCC

300. *Id.* at 15.

301. *Id.* at 17.

302. *Id.*

303. *See* Petition for Writ, 2007 WL 3231567 at \*17.

304. *Id.* (quoting Justice Stevens in *FCC v. Pacifica*, 438 U.S. 726, 747 (1978)).

305. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 459 (2d Cir. 2007).

306. *See* Petition for Writ, 2007 WL 3231567 at \*18.

307. *Id.* at \*19.

308. *See id.*

309. *Id.*

310. *Id.*

needed to explain “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*.”<sup>311</sup> The FCC defended their policy as another step in protecting children from indecent broadcasts.<sup>312</sup> The Second Circuit, however, wanted “record evidence” to support their contentions.<sup>313</sup> The FCC countered, arguing that this requirement was above and beyond what was necessary under the Administrative Procedure Act.<sup>314</sup> The FCC pointed to previous decisions that found that an “agency’s view of what is in the public interest may change, either with or without a change in circumstances”<sup>315</sup> and that an agency may reconsider “the wisdom of its policy on a continuing basis.”<sup>316</sup> Therefore, an agency may rationally change their policy if the “prior policy failed to implement properly the statute.”<sup>317</sup> The FCC argued that their change in policy regarding fleeting expletives was in recognition that their prior policy failed to adequately implement § 1464.<sup>318</sup> Also, in *Action for Children’s Television v. FCC*, the court stated, “the Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech.”<sup>319</sup> The FCC contended that the Second Circuit’s requirement for record evidence in addition to a fuller explanation to their change in a thirty year policy was more than was required under the Administrative Procedure Act.<sup>320</sup>

### 3. Importance of the Question Presented

The FCC acknowledged that generally, when a case is remanded back to an agency, such a decision does not usually warrant the Supreme Court’s review.<sup>321</sup> However, this situation, the FCC claimed, presented a unique set of facts.<sup>322</sup> The FCC argued that they had already fully explained their reasoning for changing their policy.<sup>323</sup> Not only this, but the Second Circuit indicated

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311. Petition for Writ, 2007 WL 3231567 at \*21.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* at \*22 (quoting *State Farm v.*, 463 U.S. 29, 57 1983)).

316. Petition for Writ, 2007 WL 3231567 at \*22 (quoting *Brand X*, 545 U.S. at 981).

317. *Id.* (quoting *Rust v. Sullivan*, 500 U.S. 173, 187 (1990)).

318. *Id.* (Argued that the problem was that “it rested on an ‘artificial’ distinction between ‘expletives’ and ‘descriptions or depictions of sexual or excretory activity’ that ignored the fact that ‘an expletive’s power to offend derives from its sexual or excretory meaning.’”).

319. *Id.* at 23 (quoting *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995)).

320. *See id.* at 21–23.

321. Petition for Writ, 2007 WL 3231567 at \*26.

322. *See id.*

323. *Id.*

their belief that the FCC would not be able to adequately respond to the court's concerns on remand.<sup>324</sup> This put the FCC in a no-win situation. Additionally, the decision in *Fox* struck down the FCC's policy, effectively instituting a per se exemption for fleeting expletives.<sup>325</sup> The FCC claimed that:

at a minimum, the decision of the court of appeals is likely to generate considerable confusion for the commission- which has pending before it hundreds of thousands of complaints regarding the broadcast of expletives, both isolated and repeated- and for broadcasters, leaving them uncertain as to the standards that are to govern the Commission's enforcement of the statutory prohibition on broadcast indecency.<sup>326</sup>

Without a clear avenue for clarification through the Second Circuit, the FCC argued that the Supreme Court should get involved.<sup>327</sup>

#### B. *Fox's Argument for Why Certiorari Should Be Denied*

The question presented by Fox to the Supreme Court was "[w]hether the court of appeals correctly held as a matter of administrative law that the FCC failed to provide a reasoned basis for reversing its long-standing indecency enforcement policy with respect to isolated and fleeting expletives."<sup>328</sup> Fox offered three reasons why the Supreme Court should deny the petition.<sup>329</sup>

##### 1. There is No Conflict Between the Second Circuit's Decision and *Pacifica*

Fox immediately pointed out that the Supreme Court has never ruled on the issue of the FCC's authority to regulate fleeting expletives under § 1464.<sup>330</sup> In *Pacifica*, the Court explicitly stated that "[w]e have not decided that an occasional expletive . . . would justify any sanction."<sup>331</sup> In Justice Powell's concurring opinion, he stated that "[t]he 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."<sup>332</sup> The FCC argued that the majority in *Fox* rejected the "context-driven approach governing indecency that this Court upheld in *Pacifica*."<sup>333</sup> Fox rejected this

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324. *Id.*

325. *Id.* at \*27.

326. Petition for Writ 2007 WL 3231567 at \*30.

327. *Id.*

328. Brief in Opposition of Respondents, *FCC v. Fox Television Stations, Inc.*, 2008 WL 320502 at \*1 (Feb. 1 2008).

329. *Id.*

330. *Id.* at \*10.

331. *Id.* (quoting *FCC v. Pacifica*, 438 U.S. 726, 750 (1978)).

332. *Id.* (quoting Justice Powell, Concurring Opinion in *FCC v. Pacifica*, 438 U.S. at 760–61).

333. Brief in Opposition, 2008 WL 320502 at \*11.

contention by arguing that the decision in *Fox* was “simply a garden-variety remand for lack of explanation; it contains no substantive holding with respect to ‘context.’”<sup>334</sup> The *Fox* court found that “the Commission’s proffered rationale [first blow theory] is disconnected from the actual policy implemented by the Commission.”<sup>335</sup> The principle behind the ‘first blow’ theory, that individuals should not be forced to withstand the initial blow of indecent language, failed to mesh with the policy where numerous ‘blows’ were permitted.<sup>336</sup> A reasoned explanation for the FCC’s change in policy is especially important because the regulation strikes at the heart of the First Amendment.<sup>337</sup> When little to no explanation is given, confusion and self-censorship could permeate the networks.<sup>338</sup> Since the Second Circuit remanded the case back to the FCC on administrative grounds, *Fox* argued that *Pacifica* was neither implicated nor contradicted.<sup>339</sup>

2. “The Second Circuit’s Decision is Consistent With Settled Principles of Administrative Law and Does Not Conflict with Action for Children’s Television”

“The 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 reason that the agencies adduce.”<sup>340</sup> *Fox* asserted that the Second Circuit appropriately applied the legal principles found in the Administrative Procedure Act.<sup>341</sup> The court reviewed and rejected the FCC’s change of policy because it failed to give a reasoned explanation for its departure from past precedent.<sup>342</sup> *Fox* argued that this was standard judicial protocol.<sup>343</sup>

The FCC argued that the Second Circuit’s decision conflicted with the decision in *Action for Children’s Television v. FCC*.<sup>344</sup> The D.C. Circuit Court did not require Congress to present record evidence that minors were being harmed from “exposure to sexually explicit material.”<sup>345</sup> *Fox* distinguished this case for two reasons. First, “ACT [Action for Children’s Television]

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334. *Id.*

335. *Id.* (citation omitted).

336. *See id.* at 11–12. (These permitted blows are the examples of the F-word being used in Saving Private Ryan and a Bona Fide News Program without being considered indecent.).

337. *Id.* at \*13.

338. Brief in Opposition, 2008 WL 320502 at \*13.

339. *See id.* at \*\*13–14.

340. *Id.* at \*15.

341. *See id.* at \*\*14–15.

342. *Id.* at \*16.

343. Brief in Opposition, 2008 WL 320502 at \*15.

344. *See id.*

345. *Id.* at \*16.

involved a constitutional challenge to a speech regulation.”<sup>346</sup> Here, the issue was administrative. Second, the decision in *ACT* dealt with “hard-core pornography- not isolated words.”<sup>347</sup> Therefore, the decision by the Second Circuit, Fox argued, was consistent with both administrative law and past precedent.<sup>348</sup>

Fox’s final argument was that the remand does not warrant Supreme Court review.<sup>349</sup> This argument, however, failed to gain traction with the Supreme Court.

### C. *NBC’s Argument for Why Certiorari Should Be Denied*

The question presented by NBC to the Supreme Court was “[w]hether the court of appeals erred in holding that the Commission had failed to explain adequately the abrupt reversal of its longstanding determination that fleeting and isolated utterances of expletives generally fall outside the Commission’s definition of broadcast indecency.”<sup>350</sup> NBC proffered three reasons why the Supreme Court should deny the petition.<sup>351</sup>

#### 1. “The Court of Appeals Correctly Applied This Court’s Administrative Law Precedents”

NBC argued that there was no conflict between the FCC and the Second Circuit on whether the correct legal standard was applied.<sup>352</sup> Rather, the conflict arose out of a disagreement on whether the explanation given by the FCC was adequate.<sup>353</sup> This explanation, NBC claimed, had to be provided by the agency because “[c]ourts may not accept appellate counsel’s post hoc rationalizations for agency action.”<sup>354</sup> NBC pointed to the Remand Order and the FCC’s initial insistence that there was never a policy change regarding

346. *Id.* at \*\*16–17.

347. *Id.* at \*17.

348. *See* Brief in Opposition., 2008 WL 320502 at \*\*14–17.

349. *Id.* at \*\*18–22. Fox argued that the FCC incorrectly read the Second Circuit’s decision as a substantive holding that prohibits the regulation of fleeting expletives. Rather, the case was remanded back to the FCC to come up with a reasoned explanation for their change in policy. A review by the Supreme Court, Fox argued, would be premature because the Second Circuit has not ruled on any of the “substantive challenges” to the FCC indecency policy. If the FCC could create a reasoned explanation for their policy change, the Second Circuit would address these substantive issues first. Fox also argued that the Supreme Court should wait until a circuit conflict occurs. By remaining patient, the Supreme Court may be in a better position to grant certiorari.

350. Brief in Opposition of NBC, et al., *FCC v. Fox Television Stations, Inc.*, 2008 WL 320501 at \*1.

351. *Id.*

352. *Id.* at\* 15.

353. *Id.* at \*16.

354. *Id.* (quoting *State Farm*, 463 U.S. at 50).

fleeting expletives.<sup>355</sup> The FCC reasoned that the F-word should be considered presumptively indecent because “[g]iven the core meaning of the F-word, any use of that word has a sexual connotation even if it is not used literally.”<sup>356</sup> NBC argued that the FCC failed to “explain how the F-word came to develop the ‘core meaning’ the Commission never seemed to discern before” and to “justify its conclusion with reasoned argument and evidence.”<sup>357</sup> Without the requirement of proper explanation, the FCC could redefine words on a whim without any limit to their power.<sup>358</sup>

NBC also pointed out that the Remand Order was “devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation.”<sup>359</sup> Distinguishing this case from *Action for Children’s Television v. FCC*, NBC argued that “it was in that context that the D.C. Circuit rejected the argument that the Commission was required to demonstrate that indecent speech caused harm to minors.”<sup>360</sup> Without a reasoned basis behind the FCC’s change in policy, NBC argued that no error was committed in remanding the case back to the FCC.<sup>361</sup>

## 2. There is No Conflict With This Court’s Decision in *Pacifica*

Similarly to the petition by Fox, NBC highlighted how the decision in *Pacifica* had “not decided that an occasional expletive. . . would justify any sanction.”<sup>362</sup> That issue has yet to be decided by the Supreme Court.<sup>363</sup> NBC also argued that the First Amendment holding in *Pacifica* “is not even implicated here because the court of appeals did not reach the broadcasters’ First Amendment challenge.”<sup>364</sup> Nevertheless, the FCC claimed that the Second Circuit’s decision conflicted directly with the “context-driven approach” found in *Pacifica*.<sup>365</sup> NBC argued that there were two flaws in this argument. First, “*Pacifica* did not announce ‘the context-driven approach governing broadcast indecency’ that the Commission says it did.”<sup>366</sup> There was no disagreement, as in *Fox*, over whether the language used was “patently offensive.”<sup>367</sup> Rather, “context was relevant in *Pacifica* to determine whether

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355. Brief in Opposition of NBC, 2008 WL 320501 at \*16.

356. *Id.* at \*18.

357. *Id.* at \*\*18–19.

358. *See id.* at \*\*19–20.

359. *Id.* at \*21.

360. Brief in Opposition of NBC, 2008 WL 320501 at \*21.

361. *Id.* at \*22.

362. *Id.* at \*24 (quoting *FCC v. Pacifica*, 438 U.S. 726, 746 (1978)).

363. *Id.*

364. *Id.* at \*23.

365. Brief in Opposition of NBC, 2008 WL 320501 at \*23.

366. *Id.* at \*25.

367. *Id.*

the sanction imposed on repeated, deliberately broadcast, and concededly indecent speech violated the First Amendment.”<sup>368</sup> NBC’s second argument was that the Second Circuit’s decision does not prohibit the FCC from considering the nature of the program when determining whether the broadcast is patently offensive.<sup>369</sup> The third factor in the patent offensiveness test is “whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.”<sup>370</sup> For example, certain broadcasts that show genitalia are not ‘patently offensive’ when shown educationally.<sup>371</sup> The ‘first blow’ theory does not address this contextual analysis. The ‘first blow’ theory, NBC argued, failed to give adequate reasoning for the abandonment of the second factor of the patent offensiveness test which focused on “whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities.”<sup>372</sup>

NBC, like Fox, also failed to convince the court that the remand does not warrant the Supreme Court’s review.<sup>373</sup>

As a validation to the confusion and problems resulting from the Second Circuit’s decision in *Fox*, the Supreme Court announced their decision to grant certiorari and review the case.<sup>374</sup> While the Supreme Court is by no means bound to the question presented and arguments found in the FCC’s petition, these will serve as a guidepost for what the Court may be interested in hearing during oral arguments next fall.

#### *D. Issues the Supreme Court Will Likely Address*

The FCC’s question presented to the Court was “[w]hether the court of appeals erred in striking down the Federal Communications Commission’s determination that the broadcast of vulgar expletives may violate federal

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368. *Id.*

369. *Id.*

370. Brief in Opposition of NBC, 2008 WL 320501 at \*25.

371. *Id.*

372. *Id.* at \*26.

373. *Id.* at \*\*26–32. NBC, like Fox, argued that the remand to the FCC gave the agency an opportunity to come up with a reasoned explanation for their change in policy. Had the FCC created a new reasoning, then the Second Circuit would have been able to review the substantive challenges to the policy. Without any of these issues having been ruled on, the Supreme Court would need to address “the broadcasters’ half-dozen alternative arguments that the court of appeals found no occasion to resolve.” NBC argued that the issue of whether the “Commission’s definition of indecent material is unconstitutionally indeterminate and vague” is particularly noteworthy. In *Reno v. ACLU*, the Supreme Court struck down a standard nearly identical to the FCC’s indecency standard as “unconstitutionally vague.” NBC argued that the FCC’s indecency standard could face a similar fate for being both a “vague and imperceptible standard.” Without the Second Circuit having addressed any substantive issues in *Fox*, NBC argued that the Supreme Court should deny immediate review.

374. *FCC v. Fox Television Stations, Inc.*, 128 S.Ct. 1647 (2008).



restrictions on the broadcast of ‘any obscene, indecent, or profane language,’ when the expletives are not repeated.”<sup>375</sup> The very fact that the Court granted certiorari indicates some dissatisfaction toward the Second Circuit’s decision.<sup>376</sup> The Supreme Court will likely first address the Second Circuit’s decision to remand the case for the FCC’s failure to satisfy the Administrative Procedure Act. For the Supreme Court to adequately resolve the confusion plaguing broadcasters and the FCC alike, the Court must determine whether the FCC satisfied the Administrative Procedure Act or whether there are policy considerations to bypass this administrative hurdle.

### 1. Administrative Procedure Act

“The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.”<sup>377</sup> The FCC reasoned that their change in policy was based on the belief that the F-word “is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language” and that “its use invariably invokes a coarse sexual image.”<sup>378</sup> Therefore, its use, even if isolated, violated § 1464.<sup>379</sup> The FCC argued in their petition that an agency is permitted to change their policy if the “prior policy failed to implement properly the statute.”<sup>380</sup> Here, the FCC determined that their pre-Golden Globes policy failed to adequately regulate indecent speech because fleeting expletives received nearly a ‘free pass’ from regulation.<sup>381</sup> The networks, on the other hand, will contend that the change in FCC policy was not accompanied by the requisite reasoned basis.<sup>382</sup> The FCC failed to give any explanation for their decision to overrule thirty years of precedent.<sup>383</sup> Also, the rationale for why the F-word and S-word became presumptively indecent lacks common sense given the plethora of differing definitions in differing contexts.<sup>384</sup> Both the FCC and the network’s arguments are persuasive. While the Second Circuit laid out a strong explanation for why the FCC failed this administrative hurdle, the Supreme Court will most likely give more deference to agency decision-making.

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375. Petition for Writ, 2007 WL 3231567 at \*1.

376. Only four Justices need to agree to accept a case through a writ of certiorari.

377. Petition for Writ, 2007 WL 3231567 at \*20 (quoting *Motor Vehicle v. State Farm*, 463 U.S. 29, 43 (1983)).

378. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 470 (2d Cir. 2007) (citing *Golden Globes II*, *supra* note 13 at 4979).

379. *See id.*; § 1464, *supra* note 20.

380. Petition for Writ, 2007 WL 3231567 at \* 22.

381. *See id.*

382. *See* Brief in Opposition of Respondents, 2008 WL 320502 at \*15.

383. *Id.* at \*16.

384. *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 459 (2d Cir. 2007).

The Court might find alternative reasons to bypass the administrative hurdle altogether. Despite its seemingly innocent logic, Fox and NBC harbor an impractical view regarding the Second Circuit's decision. Both networks argued that the FCC should come up with a reasoned explanation for their change in policy. If the FCC were to satisfactorily do this, the court would move past the Administrative Procedure Act and would reach the substantive challenges in this case. The problem with this logic is that it ignores the reality of the Second Circuit's position. In the dictum accompanying the *Fox* opinion, the majority wrote "we are doubtful that by merely proffering a reasoned analysis for its new approach to indecency and profanity, the Commission can adequately respond to the constitutional and statutory challenges raised by the networks."<sup>385</sup> In the FCC's petition for certiorari, the FCC outlines the position the *Fox* court left them:

The court has thus sent the Commission back to run a Sisyphean errand while effectively invalidating much of the Commission's authority to enforce 18 U.S.C. 1464. In the meantime, the Commission is left in the untenable position of having a grant of authority that the public expects it to exercise, and that *Pacifica* allows it to exercise, but that the Second Circuit has indicated cannot be meaningfully exercised consistently with that court's view of the APA and the First Amendment.<sup>386</sup>

While the networks are correct in stating that the Second Circuit never substantively addressed the FCC's regulatory authority, a fair reading of the entire opinion illustrates the court's view that the FCC's policy regarding fleeting expletives would most likely not survive judicial scrutiny.

Had the Supreme Court not accepted review, the FCC would have likely come up with a new explanation for their change in policy regarding fleeting expletives. This situation would have resulted in significant confusion among broadcasters. After all, broadcasters would have had to decide whether to abide by the updated FCC policy or rely on a potential constitutional claim outlined in the Second Circuit's dictum. This confusion could have lasted for several years due to the time it takes for a case to be reheard along with a potential request to the Supreme Court on appeal. With the Supreme Court granting certiorari, the Court must move beyond this administrative issue and address the substantive challenges to the FCC indecency policy.

## 2. Does *Fox v. FCC* Conflict With *Pacifica*?

One of the most heavily briefed issues was whether the Second Circuit's decision conflicted with *Pacifica*. The FCC contends that the Second Circuit's decision conflicted with the "context-driven approach governing broadcast

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385. *Id.* at 467.

386. Petition for Writ, 2007 WL 3231567 at \*15.

indecently upheld in *Pacifica*.<sup>387</sup> Specifically, the FCC reasons that the Second Circuit decision incorrectly rejects the FCC's contextual approach to determining whether a broadcast is indecent.<sup>388</sup>

In *Pacifica*, Justice Stevens wrote that "we must consider its [a broadcast's] context in order to determine whether the Commission's action was constitutionally permissible."<sup>389</sup> The FCC argues that the *Pacifica* decision supports the notion that countervailing concerns regarding First Amendment protection and artistic importance must be taken into consideration when determining indecency.<sup>390</sup> After all, in *Pacifica*, the Court recognized simultaneously the 'first blow' theory and the importance of context.<sup>391</sup> Using this contextual approach, the FCC found that the use of the F-word during a bona fide news program could be excused whereas the same word used during an awards show could be considered indecent.<sup>392</sup> Similarly, the FCC found that the use of the F-word and S-word in the airing of the movie *Saving Private Ryan* was not indecent because of their importance to the artistic nature of the work.<sup>393</sup> The FCC argues that this approach, rather than a per se prohibition or exemption of specific words altogether, represents a better approach to public policy.<sup>394</sup> This cleverly put together argument, however, fails to properly frame the issue.

The FCC's argument is both misdirected and fundamentally flawed. The argument is misdirected because the FCC focuses too squarely on the Second Circuit's criticism of the 'first blow' theory. In *Fox*, the majority emphasized how the rationale behind the 'first blow' theory did not comport with the FCC's actual policy. This disconnect occurred because viewers were forced to suffer the 'first blow' of the F-word or S-word even in broadcasts that the FCC determined to be appropriate due to their context. Viewers, especially children, may not be able to differentiate the difference between the use of expletives in a typical action movie compared to their use in *Saving Private Ryan*. The FCC misconstrues this discussion to mean that the Second Circuit advocated a per se exemption for fleeting expletives without any consideration toward context. This is not correct. Rather, the Second Circuit was explaining how the reasoning behind the FCC's change in policy failed to satisfy the requirements of the Administrative Procedure Act.

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387. *Id.*

388. *See id.* at \*\*15–19.

389. Petition for Writ, 2007 WL 3231567 at \*17 (quoting Justice Stevens in *FCC v. Pacifica*, 438 U.S. 726, 747 (1978)).

390. *See* Petition for Writ, 2007 WL 3231567 at \*17.

391. *Id.* at \*18.

392. *Id.* at \*16.

393. *Id.*

394. *See id.* at \*\*18–19.

The FCC's policy regarding fleeting expletives is also fundamentally flawed. Ironically, the FCC's policy, rather than the Second Circuit's decision, ignores the importance of context laid out in *Pacifica* and its progeny. By instituting a policy where the F-word and S-word are presumptively indecent, the FCC is effectively eliminating the necessary contextual component. The FCC claims that it is "difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions."<sup>395</sup> The Second Circuit rightly found that this lacks common sense. The F-word and S-word carry a variety of meanings when used in different contexts. By making these words presumptively indecent, the FCC is disregarding the base of their very own argument: that contextual analysis is critical. For these reasons, I do not believe the Supreme Court will find the Second Circuit's decision directly contrary to the *Pacifica* decision.

### 3. Supreme Court Must Address the Substantive Issues to Assuage Broadcaster Confusion

As both Fox and NBC emphasized in their petitions, the Supreme Court has never directly ruled on the issue of the FCC's authority to regulate fleeting expletives under § 1464.<sup>396</sup> Justice Stevens and Justice Powell both made it clear in *Pacifica* that their holding did not speak to fleeting and isolated expletives.<sup>397</sup> For the thirty years after *Pacifica*, the FCC practiced a policy where fleeting expletives were not generally actionable.<sup>398</sup> With the FCC's abrupt change in policy, the Supreme Court will likely determine whether the FCC has the authority under § 1464 to regulate fleeting expletives.

Because the Second Circuit never ruled on any of the substantive challenges to the FCC indecency policy, the Supreme Court may approach this issue from a variety of angles. This makes the case very hard to predict. Issues such as the congruency between the FCC policy and Congressional intent, the constitutionality of the FCC's indecency test and the level of scrutiny broadcast speech receives, for example, could come to the foreground of the discussion regarding the FCC's regulatory authority. For the Court to adequately resolve the issue of the FCC's authority, it must not sidestep the network's substantive challenges. After all, if the Supreme Court fails to address these challenges, broadcasters will continue to question the FCC's authority, leading to an excess of Enforcement Bureau appeals and unnecessary future litigation.

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395. Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 459 (2d Cir. 2007) (quoting Remand Order, *supra* note 157, at 13308).

396. Brief in Opposition of Respondent, FCC v. Fox Television Stations, Inc., 2008 WL 320502 at \*10.

397. See *Pacifica Found.*, 438 U.S. at 747; see *id.* at 760–61.

398. See *supra* notes 271–81.

## CONCLUSION

When people think of U2's lead singer Bono, most think of either his musical career or his charitable efforts around the world. The FCC, on the other hand, sees Bono in a different light. Because of his remark during the 2003 Golden Globe Awards, Bono set off a firestorm which became part of the catalyst for the FCC's dramatic departure from past regulatory policy. Seeking to punish broadcasters for any fleeting uses of the words "fuck" and "shit," the new FCC Policy did not sit well with the networks, resulting in the case being heard before the Second Circuit Court of Appeals. Rather than addressing the FCC's constitutional boundaries for regulating broadcasts, the *Fox* Court ruled against the FCC on administrative grounds. By rejecting the FCC's policy as "arbitrary and capricious," the court found that the policy lacked the adequate reasoning necessary for a shift in agency policy. The decision failed to create clear guidance for broadcasters, resulting in a short-term solution to a long-term problem. With a temporarily invalidated Remand Order, a decision that continued to keep networks guessing and the threat of speech being chilled, the Supreme Court stepped in and granted certiorari. This very act of granting certiorari most likely indicates some level of dissatisfaction with the Second Circuit's decision. With a bevy of potential issues, the Court will face the task of outlining the boundaries of the FCC's regulatory authority. If the Supreme Court is serious about addressing the confusion regarding the FCC's ability to regulate fleeting expletives, they must address the issues that the Second Circuit unfortunately shied away from in 2007.

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\* J.D. Candidate, Saint Louis University School of Law, 2009; B.A. Miami University, 2006. This Comment was voted Best Student Comment for 2007–2008 by the Editorial Board of the Saint Louis University Public Law Review. I would like to give thanks to Professor Ann Scarlett and the editors and staff of the Saint Louis University Public Law Review for their hard work and insightful comments. I would also like to thank all of my wonderful friends I have made over the years. Finally, and most importantly, I want to give special thanks to my family. I am forever grateful for everything you have done for me!