Casenote

THE END OF INDECENCY? THE SECOND CIRCUIT INVALIDATES THE FCC'S INDECENCY POLICY IN *FOX TELEVISION STATIONS, INC. V. FCC*[1]

Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .[2]

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.[3]

I. Introduction

On July 13, 2010, a three-member panel of the United States Court of Appeals for the Second Circuit invalidated the Federal Communications Commission's ("FCC" or "Commission") policy regulating indecency, forbidding the agency from enforcing its prohibition on indecent speech in broadcast media.[4] The interests at stake are numerous and substantial, and include, on the one hand, the First and Fifth Amendment rights of not only broadcasters, but also the media-consuming public.[5] On the other hand are the interests of children and their parents, and also the Government, to

1. 613 F.3d 317, 335 (2d Cir. 2010)

2. U.S. Const. amend. I.

3. 18 U.S.C. § 1464 (2010).

4. *See* Fox Television Stations, Inc. v. FCC (*Fox II*), 613 F.3d 317, 335 (2d Cir. 2010) (striking down FCC's indecency policy for "fail[ing] constitutional scrutiny"). The Second Circuit expressly rejected, however, any suggestion that its holding prevented the FCC from establishing a different indecency policy, one that could pass constitutional muster. *See id.* (noting Second Circuit holding passes constitutional muster). The FCC's indecency enforcement dates back to 1975, when it exercised, for the first time, its authority to regulate speech it found indecent but not obscene. *See id.* at 319 (recounting FCC's enforcement action against Pacifica Foundation for broadcasting comedian George Carlin's "Filthy Words" monologue). *Fox II* addresses only the petition for review filed in Docket No. 06-5358, as the other two petitions were previously dismissed as moot in Fox Television Stations, Inc. v. FCC (*Fox I*), 489 F.3d 444, 447 n.2 (2d Cir. 2007).

5. *See Fox II*, 613 F.3d at 334 ("[T]here is ample evidence in the record that the FCC's indecency policy has chilled protected speech."). *See also* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1819 (2009) ("It is conceivable that the Commission's orders may cause some broadcasters to avoid certain language that is beyond the Commission's reach under the Constitution. Whether that is so, and, if so, whether it is unconstitutional, will be determined soon enough, perhaps in this very case.").

the extent of its permissible role in protecting those interests.[6] In addition, the FCC has recently begun imposing substantial fines against broadcasters, which jeopardizes the ability of many small broadcasters to remain in business.[7]

The Second Circuit held that the FCC's indecency policy violated the First and Fifth Amendments because the policy was unconstitutionally vague, and therefore, impermissibly chilled protected speech.[8] This holding, together with its underlying rea-

6. *See* Mark Hamblett, *Circuit Strikes FCC Profanity Ban as Vague, Overly Broad*, N.Y. L.J., July 14, 2010, at 6 (quoting statement from FCC Chairman, Julius Genachowski, saying, "[w]e're reviewing the court's decision in light of our commitment to protect children, empower parents, and uphold the First Amendment."); *Fox Television Stations*, 129 S. Ct. at 1813 ("Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission."); Edward Wyatt, *F.C.C. Indecency Policy Rejected on Appeal*, N.Y. TIMES, July 14, 2010, at B1 (reporting statement of Ted Lempert, president of Children Now, that court's decision was troubling because "the F.C.C. has been a critical protector of children's interests when it comes to media"); Press Release, The Parents Television Council, PTC Applauds FCC Appeal of Fox Indecency Ruling (Aug. 26, 2010), *available at* http://www.parentstv.org/PTC/news/release/2010/0826.asp (reporting statement of Tim Winter, president of The Parents Television Council, that "[t]he airwaves have become a battleground for networks to out-cuss, out-sex and out-gore each other; and sadly it is children and families who are in the crossfire"); Alison Frankel, *FCC Requests Review of Circuit's Broad Ruling on Fleeting Expletives*, N.Y. L.J., Aug. 30, 2010, at 2 (quoting statement of Austin Schlick, FCC general counsel, that "[t]he three-judge panel's decision in July raised serious concerns about the commission's [sic] ability to protect children and families from indecent broadcast programming. The commission remains committed to empowering parents and protecting children . . .").

7. *See* Hamblett, *supra* note 6, at 6 (reporting that, in 2003, FCC imposed $440,000 in fines, but in 2004, after issuance of its "Golden Globes" order, FCC sought $8 million in sanctions against broadcasters); Mark Taticchi, Essay, *Avoiding the Chill: A Proposal to Impose the Avoidance Canon on the FCC*, 78 GEO. WASH. L. REV. 1102, 1103-04 (2010) ("[L]ocal and independent broadcasters likely will be among the hardest hit by [FCC's indecency policy] because they do not have resources to bleep out indecent material during live programming.") (citing *Fox Television Stations*, 129 S. Ct. at 1835-37 (Breyer, J., dissenting) (discussing support for proposition that small and independent broadcasters will be significantly impacted by FCC's indecency policy)).

8. See *Fox II*, 613 F.3d at 319 (stating holding); s*ee also id.* at 330 (analyzing FCC's policy and concluding it is "impermissibly vague"); *id.* at 335 ("[T]he absence of reliable guidance in the FCC's standards chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature."). The Second Circuit panel did not expressly mention the Fifth Amendment; however, in *United States v. Williams*, the Supreme Court recognized that the "[v]agueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." 553 U.S. 285, 304 (2008). Nevertheless, the vagueness doctrine is related to the First Amendment because, in the context of speech, the Supreme Court has relaxed the restriction against litigants whose conduct is clearly prohibited from raising vagueness arguments on behalf of parties not before the court. *See Williams*, 553 U.S. at 304 (citing Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95 & nn.6-7 (1982)) (recognizing important exception to traditional requirement when vagueness threatens to chill First Amendment speech rights of parties not before the court). For a de-

soning, questions the FCC's entire mission of eliminating indecent broadcasts when children are likely to be in the audience by suggesting that the FCC's desired approach, i.e., flexible and ad hoc, may inherently violate the vagueness doctrine as it is applied in the First Amendment context.[9] Specifically, the First and Fifth Amendments require that government restrictions on speech be sufficiently definite to allow the regulated community a fair opportunity to conform its conduct to the law.[10] Moreover, the vagueness doctrine requires the strictures of a law to sufficiently cabin enforcement officials to prevent arbitrary or discriminatory enforcement.[11] The Second Circuit identified these twin goals of the vagueness doctrine and found the FCC's indecency policy lacking.[12]

---

tailed discussion of the vagueness doctrine in the context of the First Amendment, see *infra* notes 130-141 and accompanying text.

9. *See Fox II*, 613 F.3d at 331 (acknowledging FCC's perceived need for flexible standard, rather than simple list of prohibited words, and concluding that "[t]he observation that people will always find a way to subvert censorship laws may expose a certain futility in the FCC's crusade against indecent speech, but it does not provide a justification for implementing a vague, indiscernible standard"). "If the FCC cannot anticipate what will be considered indecent under its policy, then it can hardly expect broadcasters to do so." Petition of the FCC and the United States for Rehearing and Rehearing En Banc at 10, Fox Television Stations, Inc. v. FCC, No. 06-1760-ag(L) (2d Cir. Aug. 25, 2010), *available at* http://www.fcc.gov/ogc/MCC-fox.html (select link under heading "FCC Rehearing Petition") (arguing that Second Circuit's *Fox II* decision makes it virtually impossible for FCC to develop effective indecency guidelines) [hereinafter Petition for Rehearing]. *But see Fox II*, 613 F.3d at 335 (noting FCC remains free to create policy that is constitutional); Petition for Rehearing, *supra* note 9, at 15 (acknowledging that *Fox II* opinion may allow FCC to return to pre-1987 enforcement policy); Opposition of Petitioner Fox Television Stations, Inc. to Petition for Rehearing and Rehearing En Banc at 14-15, Fox Television Stations, Inc. v. FCC, No. 06-1760-ag(L) (2d Cir. Sept. 21, 2010), *available at* http://www.fcc.gov/ogc/MCC-fox.html (select link "Petitioner Fox Television Stations, Inc." under heading "Rehearing Opposition") [hereinafter Opposition to Rehearing] (arguing, in opposition to FCC's petition for rehearing, that *Fox II* decision does not effectively foreclose creation of indecency policy that is constitutional).

10. *See* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (holding law unconstitutionally vague if persons "of common intelligence must necessarily guess at its meaning and differ as to its application"); Grayned v. Rockford, 408 U.S. 104, 108 (1972) ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."); Smith v. Goguen, 415 U.S. 566, 573 (1974) (recognizing that with laws "capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts") (internal citation omitted).

11. *See Grayned*, 408 U.S. at 108 ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.") (footnote omitted).

12. *See Fox II*, 613 F.3d at 331 ("[T]he Networks have expressed a good faith desire to comply with the FCC's indecency regime. They simply want to know with some degree of certainty what the policy is so that they can comply with it."); *id.* at

Section II of this note presents the factual background and procedural history of Fox Television Stations, Inc. v. FCC (*Fox II*).[13] This covers the circumstances surrounding the specific broadcasts that drew the FCC's attention and the numerous orders the agency generated in response.[14] From there, Section II describes the suit filed by Fox Television Stations, Inc., et al. against the FCC and the road from the Second Circuit to the Supreme Court, and back to the Second Circuit.[15]

Section III provides the legal background necessary for a comprehensive and coherent understanding of the issues presented in *Fox II*. This section begins with a discussion of the statutory, administrative, and case law background of government regulation of the electromagnetic spectrum in the context of broadcast communications.[16] Specifically, the third section discusses the early enforcement efforts of the FCC, including the landmark case of *FCC v. Pacifica Foundation*,[17] in which the United States Supreme Court first held that the Government can restrict "indecent" speech without proof that it is obscene.[18] Following *Pacifica*, the FCC's indecency enforcement efforts were relatively minimal, the period being a sort of "golden age" of clarity, but there were some important developments, such as the agency's "fleeting expletives" policy, which was at issue in *Fox II*.[19] Beginning in approximately 2004, the FCC dramatically changed its enforcement policy and initiated a period of aggressive enforcement that gave rise to the *Fox II* dispute.[20] This third section then discusses the Administrative Procedure Act ("APA") and its "arbitrary and capricious" standard for

332 ("With the FCC's indiscernible standards come the risk that such standards will be enforced in a discriminatory manner.").

13. 613 F.3d 317, 335 (2d Cir. 2010).

14. For a detailed description of the broadcasts at issue in *Fox II*, see *infra* note 43.

15. For a detailed discussion of the historical background of *Fox II*, see *infra* Section II.

16. For a detailed discussion of the statutory background of broadcast communications regulations, see *infra* notes 63-67 and accompanying text.

17. 438 U.S. 726, 750-51 (1978).

18. *See id.* (invoking farm metaphor and holding that "when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene"). For a detailed discussion of the FCC's early indecency enforcement efforts and *Pacifica*, see *infra* notes 68-86 and accompanying text.

19. For a detailed discussion of the FCC's indecency enforcement efforts following *Pacifica* up to approximately 2004, see *infra* notes 88-109 and accompanying text.

20. For a detailed discussion of the period between 2004 and *Fox II*, see *infra* notes 33-62 and accompanying text.

reviewing federal agency action.[21] Finally, the third section discusses the vagueness and overbreadth doctrines in the First Amendment context.[22]

Section IV analyzes the Second Circuit's reasoning and provides critical insights regarding the strengths and weaknesses of the decision.[23] Finally, Section V discusses the importance of the *Fox II* decision and the possibility of review by the Supreme Court.[24]

II. FROM GOLDEN GLOBES TO FOX II

A. The 2003 Golden Globe Awards and Bono's Excited Utterance

Fox II presents a temporally tortuous story of Hollywood awards shows, citizen complaints, FCC inconsistency, and judicial review at the highest level. The story behind *Fox II* essentially begins in January 2003, when Bono, lead singer of the band U2, accepted the Golden Globe Award in the category Best Original Song – Motion Picture.[25] In his acceptance speech, Bono said, "this is really, really, fucking brilliant. Really, really, great."[26] Following the broadcast, individuals associated with the Parents Television Council ("PTC"), among others, filed numerous complaints with the FCC arguing

21. For a detailed discussion of the APA and its application to the FCC, see *infra* notes 110-116 and accompanying text.

22. For a detailed discussion of the vagueness and overbreadth doctrines, see *infra* notes 130-158 and accompanying text.

23. For a detailed discussion of the Second Circuit's decision and reasoning, see *infra* notes 159-207 and accompanying text.

24. For a detailed discussion of the importance of *Fox II* and the developments since its issuance, see *infra* notes 227-244 and accompanying text.

25. *See* Fox Television Stations, Inc. v. FCC (*Fox II*), 613 F.3d 317, 321 (2d Cir. 2010) (describing 2003 Golden Globe Awards show, and particularly Bono's acceptance speech, as catalyst for FCC's dramatic shift in indecency policy); Official Website of Annual Golden Globe Awards: Award Search for Bono, HOLLYWOOD FOREIGN PRESS ASSOCIATION, http://www.goldenglobes.org/browse/member/28459 (last visited Feb. 20, 2011) (reporting Bono as recipient of 2003 Golden Globe Award in category Best Original Song – Motion Picture for song "The Hands that Built America" from motion picture "Gangs of New York"); *see also* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1807 (2009) (describing FCC order addressing Bono's acceptance speech at 2003 Golden Globe Awards show as first time FCC regarded non-literal use of "fuck" and "shit" as actionably indecent); Fox Television Stations, Inc. v. FCC (*Fox I*), 489 F.3d 444, 451 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1800 (2009) (recognizing FCC's response to 2003 Golden Globe Awards broadcast as overruling all prior agency decision wherein fleeting use of an expletive was held not indecent) (citing In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, para. 12 (2004)) [hereinafter *Golden Globes*] (regarding prior interpretations that isolated or fleeting broadcasts of "F-Word" are not indecent as "no longer good law").

26. *Golden Globes*, *supra* note 25, para. 3 n.4.

that Bono's language, and NBC affiliates' broadcasts of the speech, violated Congress's indecency statute and the FCC's rules.[27]

The Enforcement Bureau at the FCC did not agree with the complaints' characterization of Bono's speech as indecent, however, and therefore denied their requests for sanctions in an order dated October 3, 2003.[28] The Enforcement Bureau explained that the Commission defined indecent speech as "language that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium."[29] Bono's language, the Enforcement Bureau explained, did not "describe or depict sexual and excretory activities and organs."[30] Rather, "[Bono] used the word 'fucking' as an adjective or expletive to emphasize an exclamation."[31]

On November 3, 2003, PTC filed an Application for Review with the FCC, asking the FCC to reverse the Enforcement Bureau's decision.[32] The Commission granted the Application for Review and issued a new order on March 18, 2004 that reversed the Enforcement Bureau's order and rejected its interpretation of the Commission's indecency definition.[33] Despite rejecting the Enforcement Bureau's decision, the Commission reaffirmed the validity of the indecency definition that the Bureau interpreted.[34]

---

27. *See* 18 U.S.C. § 1464 (2010) ("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."); 47 C.F.R. § 73.3999(b) (2010) ("No licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent."); In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 FCC Rcd. 19859, para. 5 (2003) [hereinafter *Golden Globes (Bureau Decision)*] (explaining that, of 234 complaints received concerning 2003 Golden Globe Awards show, 217 were from individuals associated with PTC).

28. *See Golden Globes (Bureau Decision)*, *supra* note 27, para. 5 ("[B]ecause the complained-of material does not fall within the scope of the Commission's indecency prohibition, we reject the claims that this program content is indecent.")

29. *Id.* para. 5 (footnotes omitted).

30. *Id.*

31. *Id.*

32. *See Golden Globes*, *supra* note 25, para. 1 (explaining procedural history of *Golden Globes* order).

33. *See id.* para. 12 (reversing all FCC precedent that held fleeting use of "F-Word" not indecent); *see also id.* para. 8 ("[W]e disagree with the Bureau and conclude that use of the phrase at issue is within the scope of our indecency definition because *it does depict or describe sexual activities.*") (emphasis added).

34. *See id.* para. 6 (repeating and explaining FCC's indecency definition). In the *Golden Globes* order, the Commission explained:

> Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter

In opposing the Application for Review, NBC argued that, with respect to the first prong of the FCC's indecency definition, "fucking brilliant," as used by Bono in his acceptance speech, was merely an intensifier.[35] The Commission recognized this argument, but believed 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, and therefore falls within the first prong of [its] indecency definition."[36] Furthermore, regarding the second prong of the Commission's indecency definition, the Commission determined 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."[37] Moreover, Bono's language was "shocking and gratuitous," according to the Commission.[38] Finally, while the Enforcement Bureau did not address the issue of "profanity," the Commission independently determined that Bono's language was also "profane" within the meaning of 18 U.S.C. § 1464.[39]

> scope of our indecency definition–that is, the 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. (omission in original) (quoting Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8002 (2001)) [hereinafter *Indecency Policy Statement*]. The Commission explained that, in making indecency determinations, the Commission considers "'the *full context* of the situation critically important.'" *Id.* para. 7 (emphasis in original) (footnote omitted) (quoting *Indecency Policy Statement*, *supra* note 34, at 8002). Further, the Commission considers three principle factors in its indecency analysis:

> (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.*

Id. (emphasis in original) (quoting *Indecency Policy Statement*, *supra* note 34, at 8003).

35. *See id.* para. 8 n.23 (recognizing NBC's argument that "fucking" can mean "really" and "very").

36. *Id.* para. 8 (emphasis added).

37. *Id.* para. 9 (emphasis added).

38. *Id.* The Commission further explained that "[t]he fact that the use of this word may have been unintentional is irrelevant; it still has the same effect of exposing children to indecent language." *Id.* Despite its past position regarding fleeting expletives, the Commission felt this new interpretation "furthers [its] responsibility to safeguard the well-being of the nation's children from the most objectionable, most offensive language." *Id.*

39. *See id.* para. 13 (defining "profanity" as "'vulgar, irreverent or coarse language'") (quoting Black's Law Dictionary 1210 (6th ed. 1990) (citing 18 U.S.C. § 1464) and American Heritage College Dictionary 1112 (4th ed. 2002)). *But cf.*

In response, NBC Universal, Inc. and several other broadcasters, including Fox, filed petitions for reconsideration of the *Golden Globes* order with the FCC.[40] These petitions were still pending on March 16, 2006, however, when the FCC applied the *Golden Globes* interpretation to a host of other broadcasts in an extensive new "omnibus" order that the FCC believed would "provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under [the] indecency standard."[41]

B. The Omnibus Order & the Remand Order

Two years after issuing its *Golden Globes* order, the FCC issued its sprawling *Omnibus Order*, which applied an expanded *Golden Globes* indecency rationale to hundreds of thousands of complaints related to broadcasts between February 2, 2002 and March 8, 2005.[42] In particular, the Commission addressed the "fleeting expletive" issue in its indecency analyses of four programs, which together generated the specific controversy at issue in *Fox I* & *II*.[43] In

---

id. para. 14 n.37 (recognizing Commission's past focus on "profanity" in context of blasphemy).

40. *See* Fox Television Stations, Inc. v. FCC (*Fox I*), 489 F.3d 444, 452 (2d Cir. 2007) (mentioning petitions for reconsideration of *Golden Globes* order by NBC and several other broadcasters).

41. Complaints Regarding Various Television Broads. between Feb. 2, 2002 and Mar. 8, 2005, 21 FCC Rcd. 2664, para. 2 (2006) [hereinafter *Omnibus Order*]. *See* Fox Television Stations, Inc. v. FCC (*Fox II*), 613 F.3d 317, 323 (2d Cir. 2010) (recognizing "pending" status of broadcasters' petitions for reconsideration of *Golden Globes* order when FCC issued its *Omnibus Order*); *see also Fox I*, 489 F.3d at 452 ("[The broadcasters' petitions for reconsideration of the *Golden Globes* order] have been pending for more than two years without any action by the FCC.").

42. *See, e.g., Omnibus Order*, *supra* note 41, para. 72-74 (addressing complaints about numerous programs, including PBS documentary titled "The Blues: Godfathers and Songs," and applying *Golden Globes* rationale concerning "fuck" to find documentary indecent). Additionally, in its *Omnibus Order*, the FCC determined, for the first time, that the word "shit" has "an inherently excretory connotation." *Id.* para. 74.

43. *See Fox I*, 489 F.3d at 452-53 (discussing four programs specifically: (1) 2002 Billboard Music Awards, (2) 2003 Billboard Music Awards, (3) various episodes of "NYPD Blue," and (4) "The Early Show"); *Fox II*, 613 F.3d at 322 (defining "fleeting expletive" as "a single, nonliteral use of an expletive"). During the 2002 Billboard Music Awards show, singer Cher said, "People have been telling me I'm on the way out every year, right? So fuck 'em." *Omnibus Order*, *supra* note 41, para. 101. During the 2003 Billboard Music Awards show, the following dialogue, from which one utterance of "shit" was blocked by the broadcaster, occurred on-stage between actresses Paris Hilton and Nicole Richie:

Ms. Hilton: Now Nicole, remember, this is a live show, watch the bad language.

Ms. Richie: Okay, God.

Ms. Hilton: It feels so good to be standing here tonight.

deciding that the four programs were "patently offensive," the FCC declared each to be "explicit, shocking, and gratuitous, notwithstanding the fact that the expletives were fleeting and isolated."[44] The FCC chose not to issue fines for any of these programs, however, citing the apparent exception its previous orders had created for the "isolated use of expletive."[45]

Fox Television Stations, Inc., along with several other major broadcasters and their affiliates, side-stepped the FCC and filed petitions for review of the *Omnibus Order* in court.[46] The FCC responded by moving for a voluntary remand, which the Second Circuit granted.[47] After soliciting and reviewing public comments, the FCC issued a second, revised order on November 6, 2006.[48]

The *Remand Order*, in responding to the broadcasters' petitions, limited its analysis to four programs: the 2002 and 2003 Billboard Music Awards shows, "NYPD Blue," and "The Early Show."[49] The *Remand Order* largely reaffirmed the *Omnibus Order*, concluding

---

> Ms. Richie: Yeah, instead of standing in mud and cow [blocked]. Why do they even call it "The Simple Life"? Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.

Id. para. 112 n.164. In various episodes of the police drama "NYPD Blue" that aired between January 14 and May 6, 2003, several different characters used certain expletives, including "bullshit," "dick," and "dickhead." *Id.* para. 125. During a live interview on "The Early Show," which aired December 14, 2004, Twila Tanner, a contestant on the CBS program "Survivor: Vanuatu," referred to a co-contestant as a "bullshitter." *Id.* para. 137. Specifically, in analyzing "The Early Show" under the third of its three principle factors for determining whether a program is "patently offensive," the Commission determined that, because the language occurred in the context of a morning news interview, it was "shocking and gratuitous." *Id.* para. 141. Indeed, CBS's failure to block this language from a morning news interview "[was] of particular concern and weigh[ed] heavily in [the Commission's] analysis." *Id.* For a list of the three principle factors the FCC considers when making a "patently offensive" determination, see *supra* note 34.

44. *Fox II*, 613 F.3d at 323 (citing *Omnibus Order*, *supra* note 41, para. 106, 120, 131, 141).

45. *See Omnibus Order*, *supra* note 41, para. 111, 124, 136, 145 (recognizing, for 2002 and 2003 Billboard Music Awards shows, NYPD Blue episodes, and The Early Show, respectively, that FCC precedent at time of broadcast indicated FCC would not enforce indecency regulation against "isolated use of expletives").

46. *See Fox II*, 613 F.3d at 323 (listing companies that filed petitions). Fox and CBS filed their petitions with the Second Circuit, and ABC filed its petition with the D.C. Circuit. *See id.* at 323 n.4 (detailing filing of petitions). The D.C. Circuit transferred ABC's petition to the Second Circuit, which consolidated the various petitions for a single review. *See id.* (transferring petition to Second Circuit).

47. *See id.* at 323 (explaining why court granted remand).

48. *See id.* (citing Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005, 21 FCC Rcd. 13299 (2006) [hereinafter *Remand Order*]).

49. *See Remand Order*, *supra* note 48, para. 1 (setting out limited scope of order). For the purposes of the *Remand Order*, the FCC referred to the various episodes of "NYPD Blue" collectively as simply "NYPD Blue." *Id.* para. 1 n.1.

that the awards shows were properly characterized as legally indecent.[50] "The Early Show," however, was neither indecent nor profane, according to the *Remand Order*.[51] Regarding "NYPD Blue," the Commission dismissed its order against the program for procedural reasons.[52]

---

50. *See Remand Order, supra* note 48, para. 16-41 (analyzing Nicole Richie's use of "cow shit" and "fucking" during 2003 Billboard Music Awards show and concluding such use to be indecent and profane, notwithstanding its "fleeting and isolated" nature); *Id.* para. 58-65 (analyzing Cher's use of "fuck" during 2002 Billboard Music Awards show and concluding use of word indecent and profane). Moreover, in support of its position that non-literal expletives are still indecent, the Commission reasoned that "any strict dichotomy between 'expletives' and 'descriptions or depictions of sexual or excretory functions' is artificial and does not make sense in light of the fact that an 'expletive's' power to offend derives from its sexual or excretory meaning." *Id.* para. 23. Furthermore, "categorically requiring repeated use of expletives in order to find material indecent is inconsistent with [the Commission's] general approach to indecency enforcement, which stresses the critical nature of context." *Id.* Thus, context is critically important, but contextual analysis cannot save certain words, most notably "fuck" and "shit," which have inherently sexual and excretory meanings, respectively. *See id.* para. 16 ("Given the core meaning of the 'F-Word,' any use of that word has a sexual connotation even if the word is not used literally."); *Omnibus Order, supra* note 41, para. 138 ("[W]e now conclude that the 'S-Word' . . . is a vulgar, graphic, and explicit description of excretory material. Its use invariably invokes a coarse excretory image, even when its meaning is not the literal one.").

51. *See Remand Order, supra* note 48, para. 1 (finding "The Early Show" neither indecent nor profane). Specifically, the Commission cited (1) CBS's argument that the interview, containing a single occurrence of "bullshitter," was a *bona fide* news interview, (2) its own commitment to the First Amendment's free press guarantee, and (3) its traditional reluctance "to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their viewers" before concluding that, in the *Omnibus Order*, "[it] did not give appropriate weight to the nature of the programming at issue (i.e., news programming)." *See id.* para. 67-73 (analyzing "The Early Show" complaint). *But cf. id.* para. 71 ("To be sure, there is no outright news exemption from [the Commission's] indecency rules.").

52. *See id.* para. 75-76 (explaining that Commission's indecency enforcement policy since *Omnibus Order* requires viewer complaint before FCC action is appropriate). In fact, in its *Omnibus Order*, the Commission held that it would only impose forfeitures where it received a complaint regarding a program aired outside the 10:00 p.m. to 6:00 a.m. safe harbor period, citing "an appropriately restrained enforcement policy" as justification for its limited approach. *See Omnibus Order, supra* note 41, para. 32, 42, 86 (declining to impose forfeitures without viewer complaints or where program was aired within safe harbor period). Further, the Commission held, somewhat confusingly, that "in the absence of complaints concerning the program filed by viewers of other stations, it is appropriate that we sanction only the licensee of the station whose viewers complained . . . ." *Id.* para. 86. Given this language, it was not clear whether complaints filed by viewers of other stations would subject a different licensee to forfeiture. *See Remand Order, supra* note 48, para. 73-74 (acknowledging that Court did not address issue of complaints filed by persons residing outside viewing market in *Omnibus Order*). In its *Remand Order*, however, the Commission clarified its policy, holding that complaints from outside the local viewing area of a given station would not qualify, even when that station did air indecent material outside the safe harbor period. *See Remand Order, supra* note 48, para. 75-77 (explaining Commission's require-

C. The Administrative Procedure Act, *Fox Television Stations, Inc. v. FCC*,[53] and the Supreme Court

After the Commission released its *Remand Order*, the broadcasters returned to court for review of the revised order.[54] The broadcasters made a variety of claims, including administrative, statutory, and constitutional arguments against the Commission's *Remand Order*.[55] The Second Circuit sided with the broadcasters, holding that the Commission's indecency policy was "arbitrary and capricious," and thus, violated Section 706(2)(A) of the APA.[56] Critical to the Second Circuit's decision was its recognition that (1) the Commission's new policy on fleeting expletives reversed nearly thirty years of precedent without an adequate explanation and (2) the policy's justification—the "first blow" theory that children are harmed by even a fleeting expletive—was not rationally related to the actual

---

ment of local viewer complaints as element of indecency enforcement policy). In the Commission's words, this enforcement policy "demonstrat[es] appropriate restraint in light of First Amendment values . . . [and] preserves limited Commission resources, while still vindicating the interests of local residents who are directly affected by a station's airing of indecent and profane material." *Id.* para. 76. Thus, an individual living in Alexandria, Virginia was unable to convince the FCC to fine a broadcaster in Kansas City, Missouri, even though the Kansas City audience had been subjected to indecent programming outside the safe harbor period. *See id.* para. 75 (discussing insufficiency of Virginia letter despite indecent and profane nature of programming).

53. 489 F.3d 444 (2d Cir. 2007).

54. *See* Fox Television Stations, Inc. v. FCC (*Fox II*), 613 F.3d 317, 323 (2d Cir. 2010) (explaining procedural history).

55. *See, e.g.*, Reply Brief of Petitioner Fox Television Stations, Inc. at 9-10, Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007) (No. 06-1760-ag(L)), 2006 WL 4900578 (arguing that FCC's new indecency policy is arbitrary, falling short of Administrative Procedure Act's requirements, because policy is dependent on subjective and largely unexplained "contextual" circumstances and "community standards" that FCC has not explained or attempted to define for the benefit of broadcasters attempting to comply with FCC's indecency policy); *id.* at 15-17 (explaining as matter of statutory construction and First Amendment principles that Section 1464 requires finding of scienter before violation can be determined or forfeiture levied); *id.* at 21-25 (discussing vagueness principles in context of First Amendment and arguing that FCC's new indecency policy is unconstitutionally vague, violating free speech clause of First Amendment and due process clause of Fifth Amendment); *see also Fox II*, 613 F.3d at 324 (summarizing petitioners' arguments in their request for review of FCC's *Remand Order*).

56. *See Fox I*, 489 F.3d at 454-55 (outlining APA and concluding that Commission's "180-degree turn regarding its treatment of 'fleeting expletives' without providing a reasoned explanation justifying the about-face" was indeed "arbitrary and capricious" and violated APA requirements for federal administrative agencies); 5 U.S.C. § 706(2)(A) (2009) (requiring, in context of judicial review of federal agency action, that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). For a detailed summary of the APA, see *infra* notes 110-116 and accompanying text.

policy, which did not ban all expletives outright.[57] Finally, because the Court decided the case along narrow, statutory grounds, the Court declined to decide on the broadcasters' constitutional arguments.[58]

Unsatisfied with the Court's decision, the FCC filed a writ of certiorari, which the Supreme Court granted.[59] In a five to four decision, the Supreme Court reversed the Second Circuit, holding that the FCC's new indecency policy was not arbitrary and capricious because "[t]he Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children."[60] Moreover, because the Second Circuit rendered no opinion on the broadcasters' constitutional arguments, the Supreme Court also declined to decide them.[61] The Court did recognize, however, that the Commission's orders may indeed chill protected speech, and for that reason, remanded the case to allow the Second Circuit to directly consider the constitutional issues in *Fox II*.[62]

III. THE UNIQUELY PERVASIVE PRESENCE OF LOW-VALUE SPEECH, "ARBITRARY AND CAPRICIOUS" DECISION-MAKING, AND THE FIRST AMENDMENT

A. Broadcast Speech: The Beginning, *Pacifica*, and the 2003 Golden Globes

In 1927, Congress passed the Radio Act, Section 29 of which simultaneously forbade the licensing authority from censoring radio communications and prohibited all persons within the United States' jurisdiction from "utter[ing] any obscene, indecent, or pro-

57. *See Fox I*, 489 F.3d at 458 (finding Commission's reasons for dramatic reversal and failure to institute blanket ban on expletives to be poorly-explained).

58. *See id.* at 462 (citing judiciary's long-standing canon of constitutional avoidance and declining to decide broadcasters' various constitutional challenges).

59. *See* FCC v. Fox Television Stations, Inc., 552 U.S. 1255 (2008) (granting FCC's writ of certiorari).

60. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1819 (2009).

61. *See id.* at 1819 (citing Court's "usual procedures" of requiring a lower court opinion before issuing decisions).

62. *See id.* at 1819 ("Whether [the Commission's orders chill protected speech], and, if so, whether it is unconstitutional, will be determined soon enough, perhaps in this very case."). *But cf. id.* ("Meanwhile, any chilled references to excretory and sexual material 'surely lie at the periphery of First Amendment concern.'") (quoting in part FCC v. Pacifica Found., 438 U.S. 726, 743 (1978)).

fane language by means of radio communication."[63] Later, the prohibitions on censorship and obscene, indecent, and profane language using radio communications was re-enacted in the Communications Act of 1934.[64] The Federal Radio Commission, its successor the FCC, and courts have long regarded this language as prohibiting the prior restraint of broadcasts while still allowing the licensing authority the power to consider past programming content when making license renewal determinations.[65] In 1948, Congress revised the federal Criminal Code and incorporated therein criminal provisions from other titles of the United States Code, including the prohibition in the Communications Act on uttering obscene, indecent or profane language through broadcasts.[66] Then, in 1960, Congress gave the FCC authority to impose forfeiture penalties for violations of Section 1464.[67]

---

63. *Pacifica*, 438 U.S. at 735 (quoting Radio Act of 1927). Section 29 of the Radio Act reads:

> Nothing in this Act shall be understood or construed to give the licensing authority 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 licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

Radio Act of 1927, ch. 169, § 29, 44 Stat. 1173 (repealed 1934).

64. *See Pacifica*, 438 U.S. at 736 (describing enactment of Communications Act of 1934); Communications Act of 1934, § 326, 48 Stat. 1091 (codified as amended in the Telecommunications Act of 1996, 47 U.S.C. § 326 (1996)) (clarifying that Commission does not have power to censor radio communications or "interfere with the right of free speech by means of radio communication"). The current statute, codified at 47 U.S.C. § 326, does not include the prohibition against obscene, indecent or profane language, which provision was removed from the Communications Act and re-codified in 1948 at 18 U.S.C. § 1464, where it exists today. *See* 18 U.S.C. § 1464 (2010) (codifying prohibition against obscene, indecent or profane language).

65. *See Pacifica*, 438 U.S. at 736-37 (discussing historical interpretation of the dual prohibitions).

66. *See id.* at 738 (providing historical perspective on codification of indecency prohibition into criminal title of United States Code); *see also* 18 U.S.C. § 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.").

67. *See* Fox Television Stations, Inc. v. FCC (*Fox I*), 489 F.3d 444, 447 (2d Cir. 2007) (discussing Congressional action that vested FCC with authority to fine broadcasters for violations of 18 U.S.C. § 1464); 47 U.S.C. § 503(b)(1)(D) (2010) (granting Commission authority to fine persons determined to have violated Section 1464 of Title Eighteen of United States Code).

In 1975, the FCC exercised for the first time its authority to fine a non-obscene but indecent broadcast.[68] A radio station in New York City broadcast, at 2:00 p.m. in the afternoon, a twelve-minute monologue by comedian George Carlin, during which Mr. Carlin repeated the seven words that, he claimed, "you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever . . . ."[69] A man and his young son, while driving in a car, heard the broadcast, and several weeks later, the man wrote a complaint letter to the FCC.[70] The FCC considered the complaint and determined that the broadcast was, indeed, legally indecent.[71] The FCC chose not to sanction the Pacifica Foundation, but rather, to use its order to "clarify the applicable standards."[72]

Pacifica disagreed with the FCC and appealed the FCC's order to the D.C. Circuit.[73] While the case was pending before the D.C. Circuit, the FCC clarified its position in a subsequent order.[74]

---

68. *See Fox I*, 489 F.3d at 447 (discussing FCC's forfeiture action against Pacifica Foundation for its broadcast of George Carlin's "Filthy Words" monologue).

69. *Pacifica*, 438 U.S. at 729. The seven words referenced by Mr. Carlin were "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits." *Id.* app. at 751.

70. *See id.* at 730 (discussing factual background); *see also* A Citizen's Complaint Against Pacifica Found. Station WBAI (FM), New York, N.Y., 56 F.C.C.2d 94, para. 3 (1975) [hereinafter *Pacifica Complaint*] (describing complaint received by FCC in connection with Pacifica's broadcast of "Filthy Words").

71. *See Pacifica Complaint*, *supra* note 70, para. 14 (concluding Pacifica Foundation's broadcast of "Filthy Words" to be "indecent and prohibited by 18 U.S.C. 1464"). The *Pacifica Complaint* provides the FCC's general theory of indecency, which persists to this day, and it reads:

> The concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary 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. Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe that such words are indecent within the meaning of the statute and have no place on radio when children are in the audience. In our view, indecent language is distinguished from obscene language in that (1) it lacks the element of appeal to the prurient interest, . . . and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value.

Id. para. 11 (emphasis added) (footnotes and citations omitted). The italicized language represents the FCC's current general definition of "indecency." *See Remand Order*, *supra* note 48, para. 15 (reiterating FCC's general indecency definition).

72. *Pacifica Complaint*, *supra* note 70, para. 14.

73. *See Fox I*, 489 F.3d at 447 (discussing Pacifica's appeal to D.C. Circuit).

74. *See id.* (describing FCC's clarification order); *see also* Petition for Clarification or Reconsideration of In the Matter of a Citizen's Complaint Against Pacifica Found. Station WBAI (FM), New York, N.Y., 59 F.C.C.2d 892, para. 4 n.1 (1976) [hereinafter *Pacifica Clarification Order*] ("In some cases, public events likely to pro-

Upon review of that subsequent order, the D.C. Circuit concluded that, despite the FCC's clarification, the indecency policy was invalid.[75] The FCC appealed the decision to the Supreme Court, which reversed the D.C. Circuit and upheld the FCC's authority to regulate non-obscene but indecent speech.[76]

As an initial matter, it is important to recognize the limited scope of the Supreme Court's review of the FCC's action. The Court expressly limited its review to "the Commission's determination that the Carlin monologue was indecent as broadcast."[77] Indeed, the Court declined to review directly the merits of the FCC's indecency definition, citing its canon of "review[ing] judgments, not statements in opinions."[78] According to the Court, the FCC's indecency definition was merely a statement in its opinion, and therefore, it was limited to the specific factual context of the Carlin broadcast.[79] Because the Court determined that, under the specific factual circumstances at issue, the Carlin broadcast was indecent under Section 1464, the Court had no occasion to define the extent of the FCC's authority.[80] Furthermore, the plurality portion of the Court's opinion declined to address Pacifica Foundation's overbreadth challenge because its review was limited to "whether the Commission has the authority to proscribe this particular broadcast."[81]

The Court recognized that "of all the various forms of communication, it is broadcasting that has received the most limited First Amendment protection."[82] In justification of such limited protec-

duce 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.") (internal quotations and citations omitted).

75. *See* Pacifica Found. v. FCC, 556 F.2d 9, 18 (D.C. Cir. 1977) *rev'd*, 438 U.S. 726 (holding FCC's order violates its duty to avoid censorship under 47 U.S.C. § 326, and alternately, that its order was vague and overbroad).

76. *See* FCC v. Pacifica Found., 438 U.S. 726, 751 (1978) (stating holding and reversing D.C. Circuit).

77. *Id.* at 735.

78. *Id.* at 734.

79. *See id.* (noting that FCC's indecency definition was specific to broadcast at issue).

80. *See id.* at 734-35 (explaining federal courts' practice of avoiding constitutional determinations and declining to address FCC's indecency authority except insofar as relates to specific broadcast at issue).

81. *See id.* at 742 (plurality opinion) (finding that FCC's *Pacifica* determination could not be overbroad because it was limited to specific factual circumstances at issue, and thus, it could not be applied to future parties).

82. *Id.* at 748. The first major case to find that the characteristics of the broadcast medium warranted special First Amendment analysis was *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). In *Red Lion*, the Supreme Court recog-

tion in the indecency context, the Court acknowledged (1) the "uniquely pervasive presence" of the broadcast media "in the lives of all Americans" and (2) its "unique[ ] accessib[ility] to children, even those too young to read."[83] Indeed, the protection of children from harmful language was the Court's sole concern.[84] The Court was careful to note, however, "the narrowness of [its] holding."[85] Specifically, it recognized that the Commission's own justification rested on a nuisance rationale wherein context is absolutely critical.[86] Furthermore, in the minds of Justices Powell and Blackmun, who provided the two votes to make the Court's judgment a five to four majority, "since the Commission may be expected to proceed cautiously, as it has in the past, . . . [we] do not foresee an undue "chilling" effect on broadcasters' exercise of their rights. [We]

nized that, along with prohibiting censorship and various forms of "low-value" speech in the realm of broadcast communications, the Radio Act of 1927 established a regime by which the Federal Radio Commission would allocate the frequencies of the electromagnetic spectrum. *See* 395 U.S. at 375-76 (explaining need for government control of broadcast communications). As justification for this government control, the Court cited the scarce nature of the broadcast spectrum and noted that, without public control, the "cacophony of competing voices" would render the broadcast spectrum all but useless. *Id.* at 376. At issue in *Red Lion* was the so-call "fairness doctrine," which generally requires broadcasters to present discussions of public issues and that each side of an issue is given fair coverage. *Id.* at 370. The Court held that the "fairness doctrine," despite its affects on speech, is constitutional because it "enhance[s] rather than abridge[s] the freedoms of speech and press protected by the First Amendment." *Id.* at 375. Furthermore, in the plurality part of the *Pacifica* opinion, Justice Stevens extended the concept that broadcast speech receives limited First Amendment protection, explaining that, in his view, while the Commission's *Pacifica* order may lead to some self-censorship, broadcasters would only refrain from broadcasting "patently offensive references to excretory and sexual organs and activities." *Pacifica*, 438 U.S. at 743 (plurality opinion). Moreover, according to Justice Stevens, "[w]hile some of these references may be protected, they surely lie at the periphery of First Amendment concern." *Id.* Thus, Justice Stevens seemed to suggest the existence of a hierarchy of value in the context of speech and that indecent speech was of a relatively low value. Finally, Justice Stevens believed that restrictions on indecent speech would only affect the form, not the content, of the communication because "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language." *Id.* at 743 n.18.

83. *Pacifica*, 438 U.S. at 748-49.

84. *See id.* at 749-50 (recognizing "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household'" as justifications for restrictions on otherwise protected speech) (quoting Ginsberg v. New York, 390 U.S. 629, 638-40 (1968)).

85. *Id.* at 750. The Court's opinion upholding FCC's action against broadcast of Carlin monologue as narrow and expressly reserving judgment on whether "an occasional expletive . . . would justify any sanction." *Id.*

86. *See id.* (identifying nuisance rationale as foundation of Commission's justification for sanctioning broadcast at issue and stressing importance of context to that rationale); *Pacifica Complaint*, *supra* note 70, para. 11 (explaining Commission's belief that broadcast indecency is governed by principles related to nuisance law where absolutes are rejected in favor of contextual analysis).

agree, therefore, that respondent's overbreadth challenge is meritless."[87]

The FCC took the Supreme Court's narrow *Pacifica* holding seriously, and between 1978 and 1987 the Commission brought no enforcement actions against broadcasters, largely due to its focus on the seven words contained in Carlin's monologue.[88] In 1987, however, the FCC issued its *Infinity Order*, reversing its long-standing policy of limiting indecency enforcement to specific words.[89] In the *Infinity Order*, the FCC declared that its focus on seven specific words "made neither legal nor policy sense."[90] Going forward, the Commission explained, it would judge broadcasts by the policy it used in *Pacifica*.[91] Even after this shift in policy, however, the FCC continued to tread lightly.[92] The Commission refused to explain its "patently offensive" criterion beyond reaffirming its commitment to

---

87. *Pacifica*, 438 U.S. at 761 n.4.

88. *See* Fox Television Stations, Inc. v. FCC (*Fox I*), 489 F.3d 444, 449 (2d Cir. 2007) (recognizing that, after Supreme Court's *Pacifica* decision, "[i]t was not until 1987 that the FCC would find another broadcast 'indecent' under Section 1464," mainly because FCC's focus on specific words made conforming to its policy straight-forward); In Re Application of WGBH Educational Foundation For Renewal of License for Noncommercial Educational Station WGBH-TV, Boston, Massachusetts, 69 F.C.C.2d 1250, para. 10 (1978) [hereinafter *WGBH Educational Order*] ("We intend strictly to observe the narrowness of the *Pacifica* holding."); *see also* Infinity Broadcasting Corp., 3 FCC Rcd. 930, para. 5 (1987) [hereinafter *Infinity Order*] (describing April 1987 indecency decisions as first of their kind since 1978 *Pacifica* decision).

89. *See Infinity Order*, *supra* note 88, para. 5 (discussing how focus on specific words, while making enforcement easier, "could lead to anamolous [sic] results that could not be justified").

90. *Id.*

91. *See id.* ("[W]e shall use the generic definition of indecency articulated by the Commission in 1975 and approved by the Supreme Court in 1978 as applied to the Carlin monologue."). Moreover, the Commission reaffirmed its commitment to a restrained approach, concluding that its enforcement of Section 1464 must be consistent with the constitutional principles explained in *Pacifica*. *See id.* para. 12 (discussing enforcement of Section 1464). Specifically, the Commission explained that "[it] may only do that which is necessary to restrict children's access to indecent broadcasts." *Id.*

92. *See, e.g.*, In re Regents of the Univ. of Cal., 2 FCC Rcd. 2703, para. 3 (1987) ("Speech that is indecent must involve more than an isolated use of an offensive word."); L.M. Communications of S.C., Inc., 7 FCC Rcd. 1595, 1595 (1992) (concluding single utterance of "fuck" was "only a fleeting and isolated utterance which, within the context of live and spontaneous programming, does not warrant a Commission sanction"); In re Applications of Lincoln Dellar for Renewal of the Licenses of Stations KPRL(AM) and KDDB(FM) Paso Robles, California, 8 FCC Rcd. 2582, para. 26 (1993) (concluding that, "in light of the isolated and accidental nature of the broadcast," use of single expletive "would not appear to warrant further Commission consideration").

a contextual analysis where a host of variables would guide its judgment.[93]

In addition to the FCC's orders on the subject, several court cases in the late 1980s and early 1990s evaluated the Commission's indecency policy for conformity with the U.S. Constitution.[94] For example, in *Action for Children's Television v. FCC (ACT I)*,[95] then-Circuit Judge Ruth Bader Ginsburg of the Circuit Court of Appeals for the District of Columbia held that the FCC's *Pacifica*-based indecency policy was not unconstitutionally vague.[96] There, the Court reviewed the policy explained in the *Infinity Order*, noted that that policy was nearly identical to the policy in *Pacifica*, and determined that the Supreme Court's *Pacifica* decision had implicitly approved this policy.[97] Moreover, the *ACT I* court relied on an assurance received from the FCC at oral argument that the Commission would continue to exercise restraint in imposing sanctions.[98] Accordingly, the court believed that "the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy."[99]

---

93. *See Infinity Order*, *supra* note 88, para. 14-17 (refusing to provide exhaustive list of indecent words, but recognizing variety of variables considered, including examination of words in context to determine whether they are "vulgar or shocking," manner in which words are used, whether words are isolated or fleeting, ability of medium to separate adults from children, and likely presence of children in audience).

94. *See, e.g.*, Action for Children's Television v. FCC (*ACT II*), 932 F.2d 1504, 1508 (D.C. Cir. 1991) (rejecting vagueness and overbreadth challenges to FCC's indecency policy); Dial Information Services Corp. v. Thornburgh, 938 F.2d 1535, 1541 (2d Cir. 1991) (holding FCC's policy not impermissibly vague); Action for Children's Television v. FCC (*ACT I*), 852 F.2d 1332, 1338-39 (D.C. Cir. 1988), *superseded by* 58 F.3d 654 (D.C. Cir. 1995) (en banc) (addressing broadcaster's vagueness challenge and holding FCC's policy constitutional); United States v. Evergreen Media Corp. of Chi., 832 F.Supp. 1183, 1186-87 (N.D. Ill. 1993) (reviewing *Pacifica*, *ACT I* and *ACT II* and concluding "impact of [those] decisions is that defendants' vagueness challenge to § 1464 must be dismissed").

95. 852 F.2d at 1338-39 (D.C. Cir. 1988), *superseded by* 58 F.3d 654 (D.C. Cir. 1995) (en banc).

96. *See id.* (holding that Supreme Court's *Pacifica* decision foreclosed vagueness challenge to FCC's generic indecency policy).

97. *See id.* (reviewing *Pacifica* decision and holding that while not expressly addressing policy's constitutionality, it implicitly did so by affirming FCC's indecency determination). In addition, the D.C. Circuit said that, if it was wrong about the Supreme Court implicitly approving the FCC's *Pacifica/Infinity Order* indecency policy, it "[had] misunderstood Higher Authority and welcome[d] correction." *Id.* at 1339.

98. *See id.* at 1340 n.14 (recognizing FCC's assurance that it would "continue to give weight to reasonable licensee judgments" regarding their programming before imposing sanctions).

99. *Id.*

In addition, in *Dial Information Services Corp. v. FCC*,[100] the Second Circuit addressed the FCC's indecency definition in the context of so-called "dial-a-porn" pre-recorded telephone messages.[101] The court dismissed the vagueness challenge because it determined that the Commission's indecency definition was clearly defined by a regulation that "track[ed] [an indecency definition] that it developed in the radio broadcast context and that passed muster in the Supreme Court."[102] Furthermore, the Court held that the District Court, which had voided the regulation for vagueness, erred in failing to accord the FCC the deference to which it was entitled as the agency charged by Congress with administering Section 1464.[103]

The next major change in policy at the FCC occurred in 2001, when the Commission issued its *Indecency Policy Statement*.[104] That guidance was a milestone because it explained, in one place and in a comprehensive manner, the three factors the FCC considers when making "patently offensive" determinations: (1) the explicitness or graphic nature of the language; (2) the repetitiveness of the language; and (3) whether the language was merely used to titillate or shock the audience.[105] For each factor, the *Indecency Policy Statement*

---

100. 938 F.2d 1535, 1536-37 (2d Cir. 1991).

101. *See id.* (discussing "dial-a-porn" indecency).

102. *Id.* at 1541.

103. *See id.* (holding that District Court failed to afford FCC required level of deference) (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984)).

104. *See Indecency Policy Statement*, *supra* note 34, para. 1 (explaining purpose to provide broadcasters with additional guidance regarding FCC's indecency policy and detailing steps in Commission's indecency analysis).

105. *See id.* para. 8-10 (summarizing Commission's case law dealing with indecency and discussing principle factors that have proved significant). The FCC's own language is important and reads:

> The principal factors that have proved significant in our decisions to date are: (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. In assessing all of the factors, and particularly the third factor, the overall context of the broadcast in which the disputed material appeared is critical. Each indecency case presents its own particular mix of these, and possibly other, factors, which must be balanced to ultimately determine whether the material is patently offensive and therefore indecent. No single factor generally provides the basis for an indecency finding.

Id. para. 10 (emphasis added). The Commission's obvious emphasis of the importance of context, including the importance of considering the specific factual circumstances of each case, is particularly troublesome because of the Commission's decision, in *Golden Globes*, that the word "fuck," including its myriad variations, is inherently sexual, regardless of the context. *See Golden Globes*, *supra* note 25, para. 8 (explaining its understanding of "fuck"). Thus, according to the FCC, even the

provided several examples of material that violated the policy.[106] Furthermore, the FCC reiterated its belief that "fleeting expletives" were not actionably indecent because of the second factor.[107] In 2004, however, the FCC dramatically changed its indecency policy with its *Golden Globes* order.[108] It declared that, going forward, "fleeting expletives" would be actionable, and that reversal of policy precipitated the litigation at issue in *Fox II*.[109]

B. The Administrative Procedure Act

The APA sets forth the full extent of judicial authority to review federal, executive agency action for procedural accuracy.[110] Furthermore, the APA permits the setting aside of agency action that is "arbitrary and capricious."[111] Under this standard, the Supreme Court has required an agency to "examine the relevant data and articulate a satisfactory explanation for its action."[112] The Court has made clear, however, that a reviewing court cannot substitute its

---

use of "fuck" in its interjectory form, such as after one runs into a pane-glass door, is inherently sexual. *See id.* (noting use of "fuck" is inherently sexual).

106. *See Indecency Policy Statement*, *supra* note 34, para. 13-23 (providing examples and analyses under each factor). When considering the first factor, the explicitness or graphic nature factor, the FCC explained that even the use of double entendre and innuendo might not save a program if the reference to sexual or excretory activities is unmistakable. *See id.* para. 12 (analyzing explicitness or graphic nature facture). In addition, the first factor considers the audibility of the material, where less audible or garbled language is less likely to be indecent. *See id.* para. 16 (discussing indencency likeliness). Regarding the second factor, the repetition factor, the Commission explained that a fleeting quality would weigh against a finding of indecency. *See id.* para. 17 (detailing repetition factor). Even fleeting language may be sanctioned, however, such as when language references sexual activity with children or is otherwise explicit or graphic. *See id.* para. 19 (noting possibility of sanctioning fleeting language). Finally, in considering the third factor, the shock-value factor, the Commission explained that the apparent purpose of the language weighs heavily in the indecency analysis. *See id.* para. 20 (analyzing shock-value factor). For that reason, "even where language is explicit, the matter is graphic, or where there is intense repetition of vulgar terms, the presentation may not be pandering or titillating, and the broadcast may not be found actionably indecent." *Id.* para. 21.

107. *Id.* para. 18.

108. *See* Fox Television Stations, Inc. v. FCC (*Fox I*), 489 F.3d 444, 451-52 (2d Cir. 2007) (discussing FCC's dramatic change in policy following 2003 Golden Globe Awards show).

109. *See id.* (identifying FCC's decision to treat "fleeting expletives" as actionably indecent as significant impetus of *Fox I* litigation).

110. *See* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 545-49 (1978) (discussing permissible scope of judicial review of executive agency action).

111. *See* 5 U.S.C. § 706(2)(A) (2009) (listing standard of review for overturning agency action).

112. Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

own judgment in place of the agency's reasoning.[113] Moreover, the reviewing court should uphold an agency's decision where the agency's reasoning can be reasonably understood, even though lacking perfect precision.[114] Supreme Court case law generally assumes that federal agencies possess a certain level of expertise in the industry that Congress has charged them with regulating.[115] For this reason, courts must exercise deference towards an agency's decisions and the reasoning contained therein.[116]

C. The First Amendment, Vagueness, and Overbreadth

1. *Indecent Speech and the First Amendment*

Indecent speech is fully protected by the First Amendment.[117] Nevertheless, because of the special circumstances attendant to broadcast speech, the Government may place restrictions on such speech that would not be constitutional in other situations.[118] The Supreme Court, most notably in *Pacifica*, has held that broadcast speech requires special attention because of its pervasiveness in society, its ability to penetrate into the homes of Americans without their exact permission, and its accessibility to children.[119] Moreo-

113. *See id.* ("[A] court is not to substitute its judgment for that of the agency.").

114. *See* Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974) (holding that reviewing court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.").

115. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) (recognizing importance of expert administrative bodies and that "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

116. For a discussion of the Supreme Court's assumption of an agency's expertise in its assigned field and its vital role to the modern American state, see *supra* notes 110-115 and accompanying text.

117. *See* Reno v. ACLU, 521 U.S. 844, 874 (1997) ("[W]e have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'" (quoting Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 126 (1989))).

118. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) ("[B]roadcast media[ ] presents unique problems, which inform our assessment of the interests at stake, and which may justify restrictions that would be unacceptable in other contexts." (citing Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 744 (1996) (plurality))); *see also* FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978) (recognizing that broadcasting has received most limited First Amendment protection, primarily because (1) "broadcast media have established a uniquely pervasive presence in the lives of all Americans" and (2) "broadcasting is uniquely accessible to children, even those too young to read.").

119. *See Pacifica*, 438 U.S. at 748-49 (discussing unique characteristics of broadcast media).

ver, the Supreme Court has recently reaffirmed the central reasoning of *Pacifica*.[120]

In contexts other than broadcast speech, restrictions on indecent speech are considered context-based, and therefore, subject to strict scrutiny.[121] For example, in *United States v. Playboy Entertainment Group, Inc.*,[122] the Supreme Court considered a provision of the Telecommunications Act of 1996 that required cable channels whose content was primarily sexually-oriented to either fully block their services, unless requested by the household, or else limit their transmissions to hours when children were unlikely to be in the audience, set by administrative regulation to between 10 p.m. and 6 a.m.[123] The Court recognized that, while both cable and broadcast media present similar problems, cable television must be treated differently because targeted blocking technology exists.[124] The Court held that "targeted blocking is less restrictive than banning,

120. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 *passim* (2009) (recognizing nuisance rationale of *Pacifica* and all-importance of context).

121. *See* Fox Television Stations, Inc. v. FCC (*Fox II*), 613 F.3d 317, 325 (2d Cir. 2010) ("In most contexts, the Supreme Court has considered restrictions on indecent speech to be content-based restrictions subject to strict scrutiny."); *Fox Television Stations*, 129 S. Ct. at 1821 (Thomas, J., concurring) ("[T]he Court has declined to apply the lesser standard of First Amendment scrutiny imposed on broadcast speech to federal regulation of telephone dial-in services, cable television programming, and the Internet.") (internal citations omitted). *Compare Playboy*, 529 U.S. at 813 (holding, in context of cable television, content-based restrictions "must be narrowly tailored to promote a compelling government interest" (citing *Sable*, 492 U.S. at 126)), *Reno*, 521 U.S. at 870 (holding "no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]"), *and Sable*, 492 U.S. at 126 (holding, in context of indecent commercial telephone messages, government ban subject to strict scrutiny); *with* FCC v. League of Women Voters, 468 U.S. 364, 376 (1984) ("[B]ecause broadcast regulation involves unique considerations, our cases have not followed precisely the same approach that we have applied to other media and have never gone so far as to demand that such regulations serve "compelling" governmental interests." *id.* at 380 ("[Broadcast] restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a *substantial* governmental interest . . . .") (emphasis added)), *Pacifica*, 438 U.S. at 748 ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection."), *and* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969) ("Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them.") (footnote and internal citation omitted).

122. 529 U.S. 803, 813 (2000).

123. *See id.* at 806 (discussing factual background).

124. *See id.* at 813-15 (comparing cable and broadcast media and concluding: "There is . . . a key difference between cable television and the broadcasting media, *which is the point on which this case turns*: Cable systems have the capacity to block unwanted channels on a household-by-household basis. The option to block reduces the likelihood, so concerning to the Court in *Pacifica*, that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem. . . . [I]f a less restrictive means is available for the Govern-

and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests."[125] For that reason, the Government's requirement of either total blocking or day-time blackout was not less restrictive than targeted blocking, and therefore, failed strict scrutiny.[126]

Normally, the Government bears the burden of proving that its speech restriction is narrowly tailored to achieve a compelling governmental interest.[127] Broadcast speech is different, however.[128] As the Second Circuit noted in *Fox II*, *Pacifica* did not explain exactly which level of scrutiny applies to restrictions on broadcast speech, but subsequent cases have applied a level of review resembling "intermediate scrutiny."[129]

2. *The Vagueness Doctrine*

To some extent, many if not most laws are necessarily of uncertain scope, for as Mr. Justice Holmes put it, "between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach, and . . . the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust."[130] But it may be taken for granted that laws must exist, and that we must live day to day among them, on which point Justice Holmes adds, "[t]he conditions are as permanent as anything human, and a great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy for common

---

ment to achieve its goals, the Government must use it." *Id.* (emphasis added) (internal citations omitted)).

125. *Id.* at 815.

126. *See id.* at 827 (concluding Government failed to show that's its speech restriction was least restrictive means of addressing its interests).

127. *See id.* at 816 ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.") (citations omitted).

128. *See supra* note 121 and accompanying text.

129. *See* Fox Television Stations, Inc. v. FCC (*Fox II*), 613 F.3d 317, 326 (2d Cir. 2010) (citing FCC v. League of Women Voters, 468 U.S. 364, 380 (1984)) (recognizing that *Pacifica* did not expressly specify which level of scrutiny applies to broadcast media, but that *League of Women Voters* used language associated with intermediate scrutiny); FCC v. League of Women Voters, 468 U.S. 364, 374-80 (1984) (analyzing standard of review issue in broadcast media and balanced-coverage-of-public-issues context and concluding that "[broadcast speech] restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest . . . ") (citations omitted).

130. Int'l Harvester Co. of Am. v. Kentucky, 234 U.S. 216, 223 (1914).

sense to keep to what is safe."[131] Even so, said Justice Holmes, the law must be more than an "illusory form of words."[132]

Where there is not "a great body of precedents," however, nor "familiar practice," the vagueness doctrine serves as a vital safeguard against laws that would compel citizens to guess, at their own peril, whether their conduct or speech comports with the law.[133] Specifically, unconstitutionally vague laws violate the Due Process Clause of the Fifth Amendment for "fail[ure] to provide a person of ordinary intelligence fair notice of what is prohibited," or for being "so standardless that [they] authorize[ ] or encourage[ ] seriously discriminatory enforcement."[134]

The vagueness doctrine addresses two principle concerns, and an additional concern when laws implicate the First Amendment.[135] First, the doctrine requires that a given law adequately provide the regulated community with notice of what behavior is prohibited, thereby providing the community with a fair chance at conforming to the law's mandates.[136] Second, and perhaps most importantly,

---

131. *Id.*

132. *Id.* at 222. In *International Harvester*, Justice Holmes was considering an antitrust statute that made express price-fixing combinations of farmers of certain crops lawful, "unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article." *Id.* at 221. The plaintiff in error, i.e., petitioner, argued that the law, as construed, "offer[ed] no standard of conduct that it is possible to know." *Id.* Justice Holmes, speaking for the majority, agreed and noted that, although legally sanctioned, combination there "[was] required to guess at its peril what its product would have sold for if the combination had not existed and nothing else violently affecting values had occurred." *Id.* at 222. The fixed price could be no greater and no less than the price of the article "in an imaginary world." *Id.* After all, noted Justice Holmes:

> Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact, and generally is more or less easy to ascertain. But what it would be with such increase of a never extinguished competition as it might be guessed would have existed had the combination not been made, with exclusion of the actual effect of other abnormal influences, and, it would seem, with exclusion also of any increased efficiency in the machines, but with inclusion of the effect of the combination so far as it was economically beneficial to itself and the community, is a problem that no human ingenuity could solve.

Id. at 222-23.

133. *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.").

134. United States v. Williams, 553 U.S. 285, 304 (2008) (citations omitted). *See id.* (noting that vagueness doctrine is rooted in Fifth Amendment's Due Process Clause, not First Amendment).

135. *See Grayned*, 408 U.S. at 108 (discussing three important values that vague laws offend).

136. *See id.* ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a

the doctrine prohibits laws that, through ill-defined terms, provide government officials an opportunity to exercise arbitrary or discriminatory enforcement.[137] Finally, vagueness intertwines with the overbreadth doctrine when, in the context of the First Amendment, the ordinary requirement limiting challengers to defending their own actions is discarded, and challengers are allowed to attack a statute's scope, even when their actions are clearly proscribed.[138]

---

reasonable opportunity to know what is prohibited, so that he may act accordingly."); *see also* United States v. Harriss, 347 U.S. 612, 617 (1954) ("[N]o man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.") (footnote omitted); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.") (footnote omitted); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.") (citation omitted).

137. *See* Kolender v. Lawson, 461 U.S. 352, 357-58 (1983) ("Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine-the requirement that a legislature establish minimal guidelines to govern law enforcement.'" (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974))); *see also Goguen*, 415 U.S. at 575 (holding, with regard to "treats contemptuously" language in flag desecration statute, "[s]tatutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law.") (citations omitted); *Grayned*, 408 U.S. at 108-09 ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.") (footnote omitted); *Cf.* United States v. Reese, 92 U.S. 214, 221 (1875) (recognizing separation of powers concern when legislature enacts vague law). The Court states:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.

Id.

138. *See Williams*, 553 U.S. at 304 (discussing relationship between vagueness and overbreadth doctrines in First Amendment context, saying:

> Although ordinarily "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others," we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech.

Id. (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982))). *But see* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2719 (2010) (holding rule, that plaintiff whose conduct is plainly prohibited cannot attack law's vagueness as applied to others, "makes no exception for conduct in the form of speech") (citing Parker v. Levy, 417 U.S. 733, 755-57 (1974). The Court in *Holder* went further, saying, "even to the extent a heightened vagueness standard

Nevertheless, as Justice Holmes suggested, common sense plays an important role, even when laws restrict speech, and "perfect clarity and precise guidance have never been required . . . ."[139] But when potentially vague language eludes a common sense understanding, the speech may have an "obvious chilling effect on free speech."[140] Moreover, vague laws "inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."[141]

3. *The Overbreadth Doctrine*

The overbreadth doctrine, which is often intertwined with the vagueness doctrine, is essentially a special exception to the traditional standing requirement of a personalized injury.[142] Normally, litigants are prohibited from raising as a defense the effects of a given law on third parties not before the court.[143] In the First Amendment context, however, the traditional requirement is waived in favor of allowing parties to litigate the chilling effects of a given law on third parties.[144] The belief is that third parties will be reluctant to speak if they think they can be prosecuted, even if their

---

applies, a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice. And he certainly cannot do so based on the speech of others." *Id.* Even so, the *Holder* court highlighted the relation and ultimate distinction between vagueness and overbreadth, saying, "[s]uch a plaintiff may have a valid overbreadth claim under the First Amendment, but our precedents make clear that a Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected speech." *Id.*

139. *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989)).

140. Reno v. ACLU, 521 U.S. 844, 872 (1997).

141. *Grayned*, 408 U.S. at 109 (footnote omitted).

142. *See* Virginia v. Hicks, 539 U.S. 113, 118 (2003) ("The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges."). *See also* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("[T]he Court has altered its traditional rules of standing to permit-in the First Amendment area-attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.") (internal quotations and citation omitted); *Grayned*, 408 U.S. at 114 ("Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish [a challenger's] standing to raise an overbreadth challenge.").

143. *See* RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 114-15 (6th ed. 2009) (discussing standing doctrine and recognizing traditional requirement of personalized injury-in-fact).

144. *See* Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) ("[A]n individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face because it also threatens others not before the court . . . .") (internal quotations and citation omitted).

speech is most likely lawful.[145] Thus, to protect these interests, the overbreadth doctrine allows litigants, who in fact may be penalized, to raise, as a complete defense, the law's intolerable effects on the interests of third parties.[146]

Generally speaking, laws are overbroad when, by their terms, they sweep in a substantial amount of protected speech.[147] Even "[a] clear and precise enactment may nevertheless be overbroad if in its reach it prohibits constitutionally protected conduct."[148] For example, "a statute making it a crime to use the words 'kill' and 'President' in the same sentence is not vague, but is clearly overbroad."[149]

The first step in an overbreadth analysis is to determine what the challenged statute actually prohibits.[150] After all, "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers."[151] In determining the statute's reach, the court "should evaluate the ambiguous as well as the unambiguous scope of the enactment."[152] Thus, in this sense the vagueness and overbreadth relate to each other.[153]

Additionally, it is not enough that a statute reach some protected activity; the statute must be substantially overbroad before a court will invalidate it.[154] The common reason given for the substantiality requirement is that facial invalidation is "manifestly,

145. *See id.* (recognizing primary purpose of overbreadth doctrine is to protect rights of "those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.") (internal quotations and citation omitted).

146. *See* FALLON ET AL., *supra* note 143, at 168-69 (discussing rationale for overbreadth doctrine).

147. *See* United States v. Williams, 553 U.S. 285, 292 (2008) ("According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech.").

148. Grayned v. City of Rockford, 408 U.S. 104, 114 (1972) (footnote omitted).

149. FALLON ET AL., *supra* note 143, at 168.

150. *See Williams*, 553 U.S. at 293 ("The first step in overbreadth analysis is to construe the challenged statute.").

151. *Id.*

152. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.6 (1982).

153. *See id.* (recognizing overlap between vagueness and overbreadth doctrines).

154. *See* FALLON ET AL., *supra* note 143, at 169-70 (discussing substantiality requirement of overbreadth doctrine); *see also* Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) ("A statute may be invalidated on its face . . . only if the overbreadth is 'substantial.'") (citations omitted); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) ("[T]he overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.").

strong medicine."[155] Thus, the overbreadth doctrine serves to balance two competing interests: the protection of constitutional speech from the chilling effects of an overbroad law on the one hand, and the invalidation of a law with some permissible reach on the other.[156] Finally, the lawful speech reached by the statute must be substantial as compared to the speech properly prohibited.[157] After reviewing the statute, the FCC's regulation, and the FCC's policy changes since *Pacifica* in 1978, the Second Circuit, in *Fox II*, found that the Commission's policy could not survive the Networks' vagueness challenge and invalidated the policy.[158]

IV. ANALYSIS

A. Fox II

Judge Rosemary Pooler's unanimous decision in *Fox II* began with a description of the background of the case, particularly the Supreme Court's *Pacifica* decision and the FCC's history of enforcing the prohibition against indecency in the broadcast communications context.[159] Judge Pooler then discussed the historical interplay between broadcast media and indecent speech in First Amendment jurisprudence.[160] In particular, the court identified

155. *Broadrick*, 413 U.S. at 613. The Court held that, without valid, limiting construction, overbroad laws are void in total and recognizing such invalidation as "manifestly, strong medicine." *Id. See Williams*, 553 U.S. at 293 (recognizing overbreadth doctrine as "strong medicine") (internal quotations and citation omitted); Virginia v. Hicks, 539 U.S. 113, 119-20 (2003) (explaining necessary precautions before applying "strong medicine" of overbreadth invalidation) (citation omitted); *Jews for Jesus*, 482 U.S. at 574 ("The requirement that the overbreadth be substantial arose from our recognition that application of the overbreadth doctrine is 'manifestly, strong medicine.'") (citation omitted).

156. *See Williams*, 553 U.S. at 292 (discussing balance sought by proper application of overbreadth doctrine).

157. *See id.* ("In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.") (emphasis in original) (citations omitted).

158. For a detailed discussion of the Second Circuit's *Fox II* decision, see *infra* Part IV. The Second Circuit's decision, which invalidated the FCC's indecency policy in its entirety, only applies to the Second Circuit; therefore, the Commission's policy remains valid in every state except Connecticut, New York and Vermont. *See* Taticchi, *supra* note 7, at 1104 (recognizing that *Fox II* has precedential value in Second Circuit only).

159. *See* Fox Television Stations, Inc. v. FCC (*Fox II*), 613 F.3d 317, 319-25 (2d Cir. 2010) (discussing background of case). For a detailed discussion of the background of *Fox II*, see *supra* notes 63-158 and accompanying text.

160. *See Fox II*, 613 F.3d at 325-27(discussing legal treatment of indecent speech, particularly in broadcast media).

the "twin pillars of pervasiveness and accessibility to children" on which the *Pacifica* decision rested.[161]

The Networks argued that the world had substantially changed since the *Pacifica* decision and that *Pacifica's* rationale for treating broadcast television as unique no longer applied.[162] While the Court agreed with the Networks that the current media environment was dramatically different in 2010 than it was in 1978, the Court nevertheless felt bound by Supreme Court precedent to continue to recognize and apply special rules in the context of indecent broadcasts.[163] The conclusion that *Pacifica* still applies, however, did not resolve this dispute.[164]

The FCC interpreted *Pacifica* as sanctioning broad regulatory authority to prohibit indecent speech, with Carlin's monologue being an extreme example of a broad category of speech the Commission could prohibit as indecent.[165] The Networks, on the other hand, viewed the decision as establishing the limit of the Commission's authority.[166] In the Court's view, however, *Pacifica* was "an intentionally narrow opinion," and therefore, "d[id] not provide . . . a clear answer to [the] question."[167] The Court did not believe it necessary, however, to "wade into the brambles in an attempt to answer it [itself]."[168] "Regardless of where the outer limit of the FCC's authority lies," the Court held, "the FCC's indecency policy is unconstitutional because it is impermissibly vague."[169]

---

161. *Id.* at 326.

162. *See id.* (acknowledging petitioner's argument that *Pacifica's* rationale no longer applied in today's media environment).

163. *See id.* at 327 ("[A]s we stated in our previous decision, we are bound by Supreme Court precedent, regardless of whether it reflects today's realities."). The Court considered the argument that V-chip technology, which allows targeted channel blocking on a household-by-household basis, essentially makes broadcast television like cable, and therefore, under Reno v. ACLU, 521 U.S. 844 (1997), the same level of scrutiny should apply to both. *See id.* (reviewing *Reno* holding and concluding "[w]e can think of no reason why [*Reno's*] rationale for applying strict scrutiny in the case of cable television would not apply with equal force to broadcast television in light of the V-chip technology that is now available."). Nevertheless, the Court felt that it was "not at liberty to depart from binding Supreme Court precedent 'unless and until the Court reinterprets' that precedent." *Id.* (citations omitted).

164. *See id.* ("There is considerable disagreement among the parties . . . as to what framework Pacifica established.").

165. *See id.* (summarizing FCC's broad view of its own authority to regulate speech determined to be indecent).

166. *See id.* (summarizing Networks' narrow view of *Pacifica* holding).

167. *Id.*

168. *Id.*

169. *Id.*

The Court reviewed relevant case law related to the vagueness doctrine before considering the parties' respective vagueness arguments.[170] The Networks' argued that the FCC's policy was unconstitutionally vague because it failed to provide a consistent, knowable standard, thereby forcing individuals either to guess, at their peril, what would be deemed indecent, and thus prohibited, or avoid the line altogether, thereby potentially chilling lawful speech.[171] Moreover, the Networks relied on the Supreme Court's decision in *Reno*, which struck down as vague the same language contained in the Commission's indecency policy.[172] Thus, because the FCC's indecency policy for broadcast media uses the same definition struck down by the Supreme Court in *Reno*, the Networks argued, the Commission's broadcasting definition must be struck down as well.[173] The FCC argued that the *Reno* Court's Internet speech holding does not apply to the broadcasting context, and moreover, that the Court there essentially foreclosed a vagueness challenge to the Commission's broadcast media indecency defini-

170. *See id.* at 327-28 (summarizing vagueness doctrine). Specifically, the Court recognized that the vagueness doctrines serves to void laws that fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Id.* (internal quotations and citations omitted). Additionally, the Court recognized that the Government bears the burden of proving that its restrictions satisfy the Fifth Amendment's definiteness requirement. *Id.* (citations omitted). Additionally, when a law implicates First Amendment rights, the law "will generally be subject to a more stringent vagueness test." *Id.* (quotations and citations omitted). Furthermore, the Court recognized that, while precision is not required, some specificity is necessary in order to provide "fair notice," limit any possible chilling effect and guard against "subjectivity and discriminatory enforcement." *See id.* (discussing vagueness doctrine's principles and goals).

171. *See id.* (summarizing Networks' vagueness argument).

172. *See id.* (characterizing Networks' reliance on *Reno*); *Remand Order*, *supra* note 48, para. 15 (stating FCC's patently-offensive-description-of-sexual-or-excretory-activities indecency definition for broadcast media); Reno v. ACLU, 521 U.S. 844, 859-60 (1997) (quoting 47 U.S.C. § 223(d)(2006)) (discussing Communications Decency Act (CDA), which contains same language as FCC's broadcast media indecency definition). In *Reno*, the Supreme Court considered Sections 223(a) and (d) of the CDA, subsection (a) of which prohibited Internet transmissions of "indecent" material to minors, while subsection (d) defined indecent material that which "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." *See id.* at 859-60 (quoting 47 U.S.C. § 223(d)) (discussing CDA). There, the Court held that "[r]egardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render[ed] it problematic for purposes of the First Amendment." *Id.* at 870. Specifically, the *Reno* Court found that the "general, undefined terms indecent and patently offensive cover[ed] large amounts of nonpornographic (sic) material with serious educational or other value." *Id.* at 877. Thus, the CDA "unquestionably silence[d] some speakers whose messages would be entitled to constitutional protection." *Id.* at 874.

173. *See Fox II*, 613 F.3d at 328 (summarizing Networks' *Reno* argument).

tion.[174] The Second Circuit rejected both parties' *Reno* arguments and determined that neither *Pacifica* nor *Reno* directly controlled.[175] The Court also rejected the FCC's argument that *Pacifica* itself foreclosed a vagueness challenge to its indecency policy.[176] At this point, the Second Circuit set off to determine "whether the FCC's indecency policy provides a discernable standard by which broadcasters can accurately predict what speech is prohibited."[177]

The Court set forth the Commission's indecency policy after reviewing the 2001 *Indecency Policy Statement* and the *Golden Globes* order.[178] The FCC argued that its policy, as explained in its *Indecency Policy Statement* and subsequent adjudicative decisions, pro-

174. *See id.* at 329 (discussing FCC's *Reno* argument). In *Reno*, the Government attempted to support its indecency definition by relying on the *Pacifica* decision. *See Reno*, 521 U.S. at 864 (discussing Government's *Pacifica* argument). The *Reno* Court rejected the Government's *Pacifica* argument because, unlike the Internet, the FCC had been regulating the broadcast media for decades; the CDA presented a total ban, while the broadcasting regulations only limited indecent broadcasts to specific times of the day; the *Reno* case involved a punitive order, while the *Pacifica* decision did not; and finally, Internet speech, even if indecent, receives full First Amendment protection, while broadcast media occupies a unique place in First Amendment jurisprudence. *See id.* at 867 (distinguishing situation in *Pacifica* from that before Court in *Reno*).

175. *See Fox II*, 613 F.3d at 329-30 (discussing merits of each parties' *Reno* arguments and concluding that neither *Pacifica* nor *Reno* controlled). The Court rejected the Commission's argument that *Reno* foreclosed a vagueness challenge in the broadcast media context because it found that, in *Reno*, the Supreme Court did not directly consider the vagueness question, but rather, merely the level of scrutiny to be applied to the Internet speech restrictions. *See id.* at 329 (finding that *Reno* Court only addressed question of whether Internet speech was similar to broadcast speech, justifying lesser level of First Amendment scrutiny). In *Fox II*, the Court held that "[b]roadcasters are entitled to the same degree of clarity as other speakers, even if restrictions on their speech are subject to a lower level of scrutiny." *Id.* The *Fox II* Court also rejected the Networks' *Reno* argument, that the same language considered unconstitutionally vague in *Reno* must be vague in the broadcast media context, because "unlike in *Reno*, the FCC has further elaborated on the definition of indecency . . . ." *Id.* In distinguishing *Reno* from prior cases, the Second Circuit acknowledged the additional factors the Commission uses to determine whether a broadcast is patently offensive and the fact that the Commission has declared "fuck" and "shit" to be presumptively indecent. *See id.* (distinguishing *Reno*). *See generally Golden Globes*, *supra* note 25, para. 7 (discussing "patently offensive" factors); *Omnibus Order*, *supra* note 41, para. 74 (recognizing presumptively indecent nature of both "fuck" and "shit").

176. *See Fox II*, 613 F.3d at 329 (rejecting FCC's argument that *Pacifica* foreclosed Networks' vagueness challenge because (1) *Pacifica* did not reach vagueness issue, (2) its expressly narrow holding relied on FCC's "'restrained'" enforcement, and (3) FCC's indecency policy changed dramatically since *Pacifica* and was no longer "'restrained'") (quoting FCC v. Pacifica Found., 438 U.S. 726, 761 (1978) (Powell J., concurring).

177. *Id.* at 330.

178. *See id.* (quoting *Indecency Policy Statement*, *supra* note 34, at 8002-03). *See generally Golden Globes*, *supra* note 25, para. 6-7 (explaining Commission's indecency policy).

vides broadcasters with sufficient knowledge of what constitutes prohibited broadcast speech.[179] In determining the policy to be unconstitutionally vague, the Court analyzed the policy's application to numerous hypothetical situations not immediately at issue.[180]

For example, the FCC declared that the word "bullshit" in an episode of "NYPD Blue" was "patently offensive," but "dick" and "dickhead" were not.[181] According to the Court, the FCC's explanation of these outcomes, despite referencing one or more of the "patently offensive" factors, failed to explain *how* the factors applied, and thus amounted to little more than a finding that "'bullshit' is indecent because it is 'vulgar, graphic and explicit' while the words [sic] 'dickhead' was not indecent because it was 'not sufficiently vulgar, explicit, or graphic.'"[182] The Second Circuit cited this outcome as an example of how the FCC's "patently offensive" language can be used to arrive at any position the agency desires, without a discernable standard that would allow broadcasters to judge their programs for compliance.[183]

The court also addressed the FCC's argument that a flexible standard was necessary because, when it enforced only the seven words from Carlin's monologue, "broadcasters simply found offensive ways of depicting sexual or excretory organs or activities without using any of the seven words."[184] The court turned this argument against the FCC, however, recognizing that "[i]f the FCC cannot anticipate what will be considered indecent under its policy, then it can hardly expect broadcasters to do so."[185] In addition, in a not-so-rare moment of apparent contempt for the FCC's indecency policy, the Court observed that people will always find ways to subvert censorship laws and this fact of human nature "may expose a certain futility in the FCC's crusade against indecent speech."[186]

179. *See Fox II*, 613 F.3d at 330 (summarizing FCC's argument that its policy is not impermissibly vague).

180. *See id.* at 330-33 (analyzing Commission's indecency policy in light of vagueness principles).

181. *See id.* at 330 (citing *Omnibus Order*, *supra* note 41, para. 127-28) (analyzing Commission's application of indecency policy to language in episode of "NYPD Blue").

182. *See id.* (quoting *Omnibus Order*, *supra* note 41, para. 127-28) (criticizing FCC's failure to explain sufficiently-vulgar-explicit-or-graphic-or-not test).

183. *See id.* (finding that Commission's "not sufficiently vulgar, explicit, or graphic" test "hardly gives broadcasters notice of how the Commission will apply the factors in the future").

184. *Id.* at 331.

185. *Id.*

186. *Id.*

The Court further explained that the fact that people will attempt to subvert such rules "does not provide a justification for implementing a vague, indiscernible standard."[187] Moreover, in the face of the FCC's charge that all broadcasters consciously tried to push the limits, the court defended the Networks, recognizing that they "have expressed a good faith desire to comply with the FCC's indecency regime."[188]

In addition to criticizing the FCC's three-factor approach, which essentially allowed arbitrary decision-making, the court also found the Commission's near-absolute prohibitions on "fuck" and "shit," and the exceptions, to be vague.[189] Specifically, the Court compared the FCC's treatment of several programs, including Saving Private Ryan, The Blues, and The Early Show.[190] In Steven Spielberg's movie Saving Private Ryan, soldiers are depicted fighting the Nazis in France, and as one might expect, they use coarse language at times to express themselves.[191] The FCC found ABC's unedited broadcast of the film not indecent because the film's vulgar language was "integral to the film's objective of conveying the horrors of war."[192] Martin Scorsese's documentary, The Blues, which portrays interviews with numerous Blues musicians who occasionally use unscripted, coarse language, did not qualify for the exception, however; the FCC not only found this language to be indecent but also fined broadcasters $15,000 for airing the speech.[193] One Commissioner dissented from that finding, however, noting that "[i]t is clear from a common sense viewing of the

187. *Id.*

188. *Id.*

189. *See id.* at 331-32 (discussing FCC's near-absolute prohibition on "fuck" and "shit" and the exceptions, which were also deemed vague). The first exception is the so-called "bona fide news" exception, which the court found the FCC had not explained "except to say that it is not absolute." *Id.* at 12. The second is the "artistic necessity" exception, wherein fleeting expletives are allowed if "'demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.'" *Id.* (quoting *Omnibus Order, supra* note 41, para. 82). The "artistic necessity" exception looks largely to "whether the material has any social, scientific or artistic value." In re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan", 20 FCC Rcd. 4507, para. 11 (2005) [hereinafter *Saving Private Ryan*].

190. *See Fox II*, 613 F.3d at 331-32 (reviewing FCC's indecency analysis of three broadcasts and determining that "[t]here is little rhyme or reason to these decisions").

191. SAVING PRIVATE RYAN (Paramount Pictures 1998).

192. *Saving Private Ryan, supra* note 189, para. 14.

193. *See Omnibus Order, supra* note 41, para. 74-78 (analyzing and determining The Blues indecent because "the expletives in the program are vulgar, explicit, graphic," and they are "dwelled upon and shocking to the audience"); *Id.* para. 85

program that coarse language is a part of the culture of the individuals being portrayed."[194] The court identified these apparently conflicting determinations and found that "broadcasters are left to guess whether an expletive will be deemed 'integral' to a program."[195] Moreover, the court observed that the exceptions create a standard that "even the FCC cannot articulate or apply consistently."[196] As the court noted, this problem directly implicated the vagueness doctrine, which forbids rules that allow discriminatory or arbitrary enforcement.[197]

The Court also addressed the FCC's argument that its context-based approach was consistent with, and even required by, *Pacifica*.[198] Judge Pooler countered this argument, however, by noting that *Pacifica* was an intentionally narrow opinion that, while emphasizing the importance of context, did not purport to thoroughly define the contours of the FCC's authority to define indecent speech.[199] Of course context is important, the Court admitted, "[b]ut the FCC still must have discernible standards by which individual contexts are judged."[200] The FCC also argued that other cases, namely *ACT I* and *Dial Information Services*, precluded the Networks' vagueness challenges.[201] The Court summarily dismissed those arguments in a footnote, however, citing the *ACT I* decision's reliance on FCC restraint, which, in the Second Circuit's view, it had abandoned.[202] The court also recognized that the Supreme Court's *Reno* decision overruled *Dial Information Services*.[203]

The Court then discussed the possible chilling effect of the FCC's indecency policy through several examples of broadcasters refraining from airing certain programs.[204] The FCC's policy, with

(concluding fine of $15,000 for "conscious and deliberate" broadcast appropriate); THE BLUES (Road Movies Filmproduktion and Vulcan Productions 2003).

194. *Omnibus Order*, *supra* note 41, at 2728.

195. *Fox II*, 613 F.3d at 332.

196. *Id.*

197. *See id.* (discussing goal of vagueness doctrine to prevent arbitrary or discriminatory enforcement).

198. *See id.* at 333 (addressing FCC's argument that *Pacifica* required the Commission's context-based approach).

199. *See id.* (rejecting FCC's argument that *Pacifica* required any specific policy).

200. *Id.*

201. *See id.* at 329 n.8 (acknowledging FCC's case law argument that Networks' vagueness challenge must be dismissed).

202. *See id.* (rejecting FCC's argument that either *ACT I* supported Commission's position).

203. *Id.*

204. *See id.* at 333-35 (reviewing instances of third parties choosing not to air programs because concerned about possible fines). One such program was the

its ill-defined exception for bona fide news broadcasts, chilled speech "at the heart of the First Amendment."[205] Moreover, as the Court noted, the record contained numerous examples of chilled broadcasts that contained no expletives.[206] In a sweeping statement about the effect of the Commission's policy, the Court summarized:

> [T]he absence of reliable guidance in the FCC's standards chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature. Sex and the magnetic power of sexual attraction are surely among the most predominant themes in the study of humanity since the Trojan War. The digestive system and excretion are also important areas of human attention. By prohibiting all "patently offensive" references to sex, sexual organs, and excretion without giving adequate guidance as to what "patently offensive" means, the FCC effectively chills speech, because broadcasters have no way of knowing what the FCC will find offensive. To place any discussion of these vast topics at the broadcaster's peril has the effect of promoting wide self-censorship of valuable material which should be completely protected under the First Amendment.[207]

B. Critical Remarks

The Second Circuit's decision champions a central element of our liberty—free speech—and for that reason, it is hard to disagree with the outcome.[208] Furthermore, the Court's vagueness analysis appears to rely primarily on commonsense logic attendant to a nat-

---

Peabody Award-winning "9/11," which contains some expletives present in real footage of firefighters at the World Trade Center on September 11th. *See id.* at 334 (describing Peabody Award-winning film "9/11"). Another was a radio station's planned reading of Thomas Wolfe's *I Am Charlotte Simmons*, which the station pulled because of a single complaint about the novel's "adult" language and fear of FCC reprisal. *See id.* (discussing reading of Wolfe's *I Am Charlotte Simmons*).

205. *See id.* at 334-35 (discussing chilling impact of FCC's policy on speech related to issues central to human experience).

206. *See id.* at 335 (discussing some broadcasters' decisions not to air programs dealing with sexual health, including episode of "That 70s Show" that subsequently won award from Kaiser Family Foundation for its "honest and accurate depiction of a sexual health issue").

207. *Id.*

208. For a summary of the Court's take on the FCC's policy in relation to the First Amendment, and free speech in particular, see *supra* note 207 and accompanying text.

ural reading of the FCC's interpretations of its policy.[209] In short, the decision is probably correct in concluding that the FCC must be consistent in its application of the indecency policy.[210] Nevertheless, its analysis suffers from some weaknesses.[211]

For example, one issue with the court's analysis is that it does not discuss previous vagueness challenges to the rules of other federal agencies.[212] This is problematic because, as mentioned above, federal agencies are generally given extreme latitude in their decision-making.[213] It is not inconceivable that the Supreme Court, given its decision above, would reverse the Second Circuit on this point, citing the assumed expertise of the agency.[214] Moreover, the Supreme Court's decision above expressly found that the FCC's policy did not violate the APA's "arbitrary and capricious" standard, and thus, it may be the case that the Commission's orders are not vague under the Fifth Amendment.[215]

---

209. For example, the court's reasoning highlights the fact that, while the FCC recognizes a "bona fide news" exception, especially for fleeting expletives, the exception is not absolute and the FCC failed to provide sufficient guidance about its applicability and contours. *See Fox II*, 613 F.3d at 331-32 (noting existence of "bona fide news" exception but finding that broadcasters are left to guess, at their peril, whether an exception would apply). Perhaps the most striking example of the FCC's failure to define the "bona fide news" exception is the FCC's treatment of The Early Show interview of a Survivor contestant. *Compare Omnibus Order*, *supra* note 41, para. 141 (finding The Early Show's broadcast of "bullshitter" to be "shocking and gratuitous" because it occurred "during a morning television interview"), *with Remand Order*, *supra* note 48, para. 68 (reversing The Early Show "bullshitter" finding because broadcast was "a bona fide news interview").

210. For a discussion of the vagueness doctrine's prohibition against laws and regulations that invite inconsistency through arbitrary or discriminatory enforcement, see *supra* notes 130-141 and accompanying text.

211. For a discussion of *Fox II's* analytical weaknesses, see *infra* notes 212-226 and accompanying text.

212. Aside from mentioning the Supreme Court's Administrative Law decision reversing *Fox I*, the Second Circuit's *Fox II* opinion did not cite another Administrative Law opinion. *See generally Fox II*, 613 F.3d 317 (addressing Administrative Law decision above, but no others).

213. For a discussion of the deference federal courts give administrative agencies, see *supra* notes 110-116 and accompanying text.

214. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1819 (2009) (rejecting Second Circuit's argument that pervasiveness of other forms of media, to which today's children have nearly unlimited access, undercuts *Pacifica's* rationale treating broadcasting as unique, and therefore, properly treated differently from cable, internet, commercial telephone messages and other forms of media); *id.* ("The Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children.").

215. *See id.* ("We decline to 'substitute [our] judgment for that of the agency,' and we find the Commission's orders neither arbitrary nor capricious." (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983))).

An additional weakness of the Second Circuit's decision is its failure to discuss the overbreadth doctrine, despite directly addressing the policy's effect on third parties.[216] As the Supreme Court has said, the overbreadth doctrine in the First Amendment context allows a party to challenge a regulation on its face where a substantial amount of protected speech is potentially swept in under the regulation's prohibitions.[217] The Second Circuit did not confine its holding merely to the FCC's "fleeting expletive" policy, but rather, it found the Commission's "patently offensive" rule in its entirety to be unconstitutionally vague because of the numerous legitimate topics that it swept up by virtue of its ill-defined contours and exceptions.[218] This is essentially an overbreadth approach, and yet, the court did not acknowledge the overbreadth doctrine.[219]

The Court also refused to discuss the extent of the FCC's authority under the Supreme Court's *Pacifica* opinion, but it essentially did evaluate the extent to which *Pacifica* supports the FCC's authority.[220] Furthermore, the Court believed that *FCC v. League of Women Voters*[221] required application of intermediate scrutiny to broadcast speech, but this belief fails to recognize that *League of Women Voters* only applied intermediate scrutiny to the broadcast balance-of-views context, which *Red Lion Broadcasting Company. v.*

---

216. *See Fox II*, 613 F.3d at 332-35 (discussing application of FCC's indecency policy to third party and hypothetical programming).

217. *See* Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987).

> Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face 'because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.'

Id. (citation omitted).

218. *See Fox II*, 613 F.3d at 335 ("By prohibiting all 'patently offensive' references to sex, sexual organs, and excretion without giving adequate guidance as to what 'patently offensive' means, the FCC effectively chills speech . . . .").

219. *See* Petition for Rehearing, *supra* note 9, at 13 (arguing that while abandonment of restrained enforcement policy might have relevance in overbreadth analysis, panel did not engage in such analysis).

220. See *Fox II*, 613 F.3d at 329 (regarding question of extent of FCC authority under *Pacifica*, "we do not need to wade into the brambles in an attempt to answer it ourselves"). *But see id.* at 329, 333 (recognizing reliance of *Pacifica* concurrence, which created 5-4 majority judgment, on FCC's assurance restrained enforcement policy would be maintained). Thus, despite its statement that it would not "wade into the brambles" of defining *Pacifica*, the court actually determined, rather simply, that *Pacifica* did not support the FCC's broad assumption of authority because *Pacifica* itself was narrow and specifically relied on the FCC's assurances of a restrained enforcement policy.

221. 468 U.S. 364 (1984).

FCC[222] allowed under the scarce-resource theory.[223] The two standards are not necessarily the same, however, especially given the different justifications for restrictions on indecent broadcast speech, which potentially harms children and undermines parents' authority in the home, and restrictions on all broadcast speech as a class by virtue of the scarce nature of the broadcast spectrum.[224] In this sense, the Court missed the opportunity directly to address the ongoing validity of the FCC's strict regulation of indecency in the broadcast medium, despite that medium's trend away from uniqueness and towards the characteristics of cable television, which, in *Playboy*, the Supreme Court said receives the highest First Amendment protection.[225] The special significance of such a finding lies in the recognition that, in today's era of television ratings systems and V-chip technology, the FCC's policy is no longer the least restrictive means of accomplishing its goals of protecting children and supporting parents.[226]

---

222. 395 U.S. 367 (1969).

223. *See Fox II*, 613 F.3d at 324-25 (acknowledging that *Pacifica* did not specify level of review for restrictions on broadcast speech, but finding that *League of Women Voters* used intermediate scrutiny); *League of Women Voters*, 468 U.S. at 374-80) (analyzing speech restrictions of broadcast speech under *Red Lion's* scarce-resource justification).

224. *Compare Red Lion*,, 395 U.S. at 376 (discussing need for government regulation of broadcasting, including "fairness doctrine," due to scarce nature of electromagnetic spectrum), *with* FCC v. Pacifica Found., 438 U.S. 726, 748-50 (1978) (identifying protection of children from harmful language, support of parents' prerogative to control language present in their home and unique ability for broadcast speech to enter home without permission as justifications for restrictions on indecent broadcast speech).

225. *See* FCC v. Fox Television Stations, Inc. (*Fox Television Stations*), 129 S. Ct. 1800, 1819-20 (2009) (Thomas, J., concurring) ("*Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity. The text of the First Amendment makes no distinctions among print, broadcast, and cable media, but we have done so in these cases.") (internal quotations and citations omitted); In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 24 FCC Rcd. 542, para. 8 (2009) (highlighting that today viewers can often alternate between broadcast and non-broadcasts stations with click of remote control); In re Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming, 24 FCC Rcd. 11413, para. 126 (2009) [hereinafter *CSVA Report*] (discussing how broadcasting is no longer unique in its ability to reach into Americans' homes); *Id.* para. 11,n.20 (explaining that every television in United States sold after January 1, 2000 contains V-chip technology, allowing parents to set restrictions on type of programming children can access, and that older televisions have access to V-chip technology through digital converter boxes).

226. *See CSVA Report*, *supra* note 225, para. 10-24 (evaluating V-chip technology and finding chip very useful for allowing parents to control their children's access to certain programming); *Id.* para. 24 (identifying primary method of increasing V-chip effectiveness will be educating public about device).

V. THE FUTURE OF INDECENCY

The *Fox II* decision is a significant development in the law of indecency.[227] The decision is especially important because it deals, head on, with a confluence of issues that face millions of Americans every day.[228] Among these issues is the free speech guarantee of the First Amendment, the importance of which cannot be overstated.[229] One effect of this ruling may be to force the FCC to acknowledge that the First and Fifth Amendments forbid the Commission the discretion to decide what will qualify as a "bona fide news interview" without providing broadcasters with a consistent explanation.[230] In addition, by declaring the FCC's indecency enforcement policy unconstitutionally vague, the Second Circuit has potentially eviscerated a linchpin of the FCC's existence—regulation of indecent speech on broadcast television and radio communications.[231] On the other hand, the ruling's precedential value is limited to the Second Circuit, and because the Petitioners did not ask for an injunction, the FCC may continue to apply its indecency policy outside the Second Circuit.[232]

The controversy is not over, however. On August 25, 2010, the FCC filed a petition with the Second Circuit for rehearing, or alternatively, rehearing en banc.[233] According to the Federal Rules of Appellate Procedure, such a petition should be granted only when rehearing is necessary to "secure or maintain uniformity of the Court's decisions" or "the proceeding involves a question of excep-

227. *See* Taticchi, *supra* note 7, at 1104 (recognizing that *Fox II* struck down FCC's indecency regulation in total, at least within Second Circuit).

228. For a discussion of the significance of indecency regulations and the competing interests of Americans with respect to them, see *supra* note 6 and accompanying text.

229. *See supra* note 6 and accompanying text and Part III.C for a discussion of the interests at stake and consequences of vague laws on First Amendment rights.

230. *See* Fox Television Stations, Inc. v. FCC (*Fox II*), 613 F.3d 317, 332 (2d Cir. 2010) (noting FCC's inconsistent application of "*bona fide* news interview" exception to indecency policy).

231. *See supra* note 6 and accompanying text for a discussion of the breadth and importance of the FCC's regulation of broadcast media.

232. *See* Petitioner's Brief on Remand, Fox Television Stations, Inc. v. FCC, No. 06-1760-ag(L) (2d Cir. Aug. 25, 2010), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0813/DOC-300908A1.pdf (requesting only that Second Circuit panel vacate FCC's *Remand Order*); Taticchi, *supra* note 7, at 1104 (noting limited effect of Second Circuit's decision).

233. *See* Petition for Rehearing, *supra* note 9, at 15 (petitioning Second Circuit to rehear case either with original panel or en banc); *see also* Dan Kirkpatrick, *Fox v. FCC: FCC Concentrates and Asks Again*, COMMLAWBLOG (Aug. 29, 2010), http://www.commlawblog.com/2010/08/articles/broadcast/fox-v-fcc-fcc-concentrates-and-asks-again (discussing FCC's rehearing petition and rehearing procedure generally).

tional importance."[234] In its petition for rehearing, the FCC argued that rehearing was necessary because the Second Circuit's decision (1) effectively precludes the Commission from enforcing Section 1464, preventing the agency from fulfilling its congressionally-mandated mission; (2) conflicts with *Pacifica*, *ACT I*, and *Dial Information Services*; and (3) goes beyond the scope of the litigation by evaluating the entire policy, rather than limiting its review specifically to the FCC's "fleeting expletive" policy.[235]

In response, Fox Television Stations, Inc. argued each of the FCC's points in turn: (1) the FCC is not precluded from enforcing Section 1464, which it did without serious attack for more than twenty years; (2) the cases on which the FCC relies do not dictate the outcome of this case because they were either extremely narrow (*Pacifica*), unpersuasive (D.C. Circuit's *ACT I*), or overruled (*Dial Information Services*); and (3) the panel necessarily went beyond the "fleeting expletive" policy because the real source of the dispute was the "patently offensive" definition.[236] On November 22, 2010, the Second Circuit summarily denied the FCC's motion for rehearing or rehearing en banc.[237] Widespread news of the denial was delayed until January 4, 2011, however, apparently because the Court filed the denial under one of the companion dockets that many people were not actively following.[238] Thus, many only re-

234. Fed. R. App. P. 35(a)(1)-(2). Petitions for rehearing en banc are generally disfavored, and in evaluating them, all the active judges on a circuit consider the merits of rehearing and vote on whether to grant the petition. *See* Fed. R. App. P. 35(a) (stating that rehearing petitions shall be evaluated by active judges in given circuit and dispensed with by majority vote, and also that rehearing and rehearing en banc are disfavored procedures).

235. *See* Petition for Rehearing, *supra* note 9, at 10-15 (summarizing arguments favoring grant of petition for rehearing). The Second Circuit did recognize that the "fleeting expletives" policy was at issue, however, and it further acknowledged that the Commission's policy regarding "fleeting expletives" was based upon its "patently offensive" definition. *See Fox II*, 613 F.3d at 331-32 (evaluating FCC's "fleeting expletive" policy relating to "fuck" and "shit"). Therefore, a complete review of the FCC's "fleeting expletives" policy necessarily required the court to evaluate the "patently offensive" policy as well. *See id.* (reviewing FCC's "fleeting expletives" policy).

236. *See* Opposition to Rehearing, *supra* note 9, at 10-15 (arguing against FCC's petition for rehearing).

237. *See* Order Denying Federal Communications Commission's Petition for Rehearing or Rehearing En Banc [hereinafter Order Denying Rehearing], 613 F.3d 317 (No. 06-5358), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0112/DOC-304064A1.pdf (denying FCC's petition for rehearing or rehearing en banc).

238. *See* John Eggerton, *Second Circuit Denies Full-Court Review of Fox Decision*, BROADCASTING AND CABLE (Jan. 4, 2011, 4:40 PM), http://www.broadcastingcable.com/article/461782-Second_Circuit_Denies_Full_Court_Review_Of_Fox_Decision.php (reporting that court apparently filed all documents under companion

ceived the news when the Second Circuit handed down a summary order vacating a fine against ABC for scripted nudity in the television show "NYPD Blue."[239]

In the view of the FCC, the Second Circuit's *Fox II* decision was an unnecessarily broad and disruptive ruling.[240] In fact, one unidentified FCC official recently told Broadcasting & Cable's John Eggerton that "[t]he Second Circuit decision was so broad in scope that it leaves us little or no ability to address broadcast indecency at this time."[241] That may not be enough to place the issue before the

---

docket, thereby eluding some observers). Both the FCC and Fox apparently agree that there are three docket numbers associated with *Fox II*: 06-1760-ag, 06-2750-ag, and 06-5358-ag. *See* Petition for Rehearing, *supra* note 9 (listing three docket numbers on title page); Opposition to Rehearing, *supra* note 9 (same). According to the title pages of both the FCC's petition for rehearing and Fox's brief in opposition to rehearing, both parties also apparently believed that docket number 06-1760-ag was the lead case. *See id.* (indicating on title pages of each document that 06-1760-ag is lead case by making its font many times larger than fonts of other docket numbers and including an "(L)" after docket number, indicating this to be lead case). Despite the apparent fact that the parties recognized 06-1760-ag as the lead case, the Second Circuit filed the November 22 denial under only one docket number: 06-5358-ag. *See* Order Denying Rehearing, *supra* note 237 (including only 06-5358-ag docket number).

239. *See* Eggerton, *supra* note 238 (explaining that, for many, first news of denial in *Fox II* came because Second Circuit's summary order in ABC v. FCC included a weight-of-authority parenthetical following a citation to the *Fox II* case); Summary Order Vacating Fine in ABC, Inc., et al v. FCC [hereinafter ABC Summary Order], No. 08-0841-ag(L) (Jan. 4, 2011) (citing *Fox II* in order vacating indecency fine against ABC and affiliates and including weight-of-authority parenthetical indicating that Second Circuit had denied rehearing and rehearing en banc in *Fox II*). *See also* Press Release, The Parents Television Council, PTC Calls Out Second Circuit Court for "Covert Jurisprudence" (Jan. 4, 2011), *available at* http://www.parentstv.org/PTC/news/release/2011/0104a.asp (criticizing Second Circuit for filing rehearing denial under companion docket number and thus failing to properly notify counsel involved in case).

240. *See* Petition for Rehearing, *supra* note 9, at 2 ("[T]he panel decision threatens to have a wide-ranging adverse impact on the FCC's ability to enforce federal statutory restrictions on the broadcast of indecent material. Rehearing . . . is thus necessary . . . to address exceptionally important questions about the agency's ability to enforce federal law.") (citation omitted). *See also id.* at 15 (arguing extreme importance of panel's decision, saying, "the . . . decision threatens to transform the public airwaves from a 'relatively safe haven for . . . children' to a medium that mirrors the 'pervasiveness of foul language, and the coarsening of public entertainment' that characterize 'other media, such as cable.'"). The Networks agree that *Fox II* implicates very important issues, but they believe the Second Circuit's decision is correct under the law. *See* Opposition to Rehearing, *supra* note 9, at 15 (arguing that burden to "articulate some reasonably clear indecency standard" should remain on FCC's shoulders).

241. *See* John Eggerton, *FCC Source: Justice Undecided on Fox Profanity Appeal*, BROADCASTING AND CABLE (Mar. 29, 2011, 4:00 AM), http://www.broadcastingcable.com/article/465888-FCC_Source_Justice_Undecided_On_Fox_Profanity_Appeal.php (quoting anonymous FCC official regarding FCC's ability to enforce indecency laws and regulations in wake of Second Circuit's *Fox II* decision).

Supreme Court, however.[242] The Solicitor General's office has recently requested, and received, two thirty day extensions to file a petition for certiorari, giving the Government until April 21, 2011 to make an appeal decision.[243] As this article goes to the printer, the Government has not yet made an appeal decision and still has approximately three weeks to consider the matter. If the Government does decide to appeal the ruling, however, the Justices may well grant review, given the importance of the issues at stake, the Supreme Court's suggestion in the opinion above that the FCC's policy may unconstitutionally chill protected speech, and the serious questions regarding the continued viability of the FCC's authority to restrict broadcast speech.[244]

*John V. O'Grady**

---

242. *See* Eggerton, *FCC Source: Justice Undecided on Fox Profanity Appeal*, *supra* note 241 (discussing Solicitor General's requests for extensions on filing deadline for petition for certiorari and statement from FCC source that Justice Department is undecided on whether to appeal *Fox II* decision); *see also* The Parents Television Council, Demand Appeal of 2nd Circuit Ruling, *available at* https://www.parentstv.org/PTC/action/DecencyAppeal/main.asp (last visited Apr. 4, 2011) (urging citizens to contact President Obama and demand that he direct Department of Justice to appeal *Fox II* decision to Supreme Court).

243. *See* DOCKET NO. 10A794, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10a794.htm (last visited Apr. 4, 2011) (listing Feb. 10 and Mar. 10 requests for filing extensions, and grants of those requests by Justice Ginsburg, as first docket entries in potential case of FCC v. Fox Television Stations, Inc.); *see also* John Eggerton, *Government Seeks More Time to Appeal Fox Profanity Decision*, BROADCASTING AND CABLE (Feb. 11, 2011, 3:32 PM), http://www.broadcastingcable.com/article/463835-Government_Seeks_More_Time_to_Appeal_Fox_Profanity_Decision.php?rssid=20065 (reporting on Solicitor General's request to Supreme Court for time extension to file Government's petition for certiorari in *Fox II*).

244. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1819 (2009) (ordering remand to consider Petitioner Fox's constitutional arguments, saying, "It is conceivable that the Commission's orders may cause some broadcasters to avoid certain language that is beyond the Commission's reach under the Constitution. Whether that is so, and, if so, whether it is unconstitutional, will be determined soon enough, perhaps in this very case."); Press Release, Federal Communications Commission, Statement of Commissioner Michael J. Copps (July 13, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-299761A1.pdf (expressing shock at Second Circuit's decision and highlighting importance of FCC indecency regulation in safe-guarding public airwaves for benefit of millions of American parents and children); Harry Cole, *Indecency in a Post-Fox World: What's Up Next?*, COMMLAWBLOG (July 16, 2010), http://www.commlawblog.com/2010/07/articles/broadcast/indecency-in-a-postfox-world-whats-up-next/ (forecasting possible outcomes depending on FCC's future moves on *Fox II* case and discussing Supreme Court's possible interest in reviewing *Fox II*).

* J.D. candidate, May 2011, Villanova University School of Law; B.A. in English & Economics, *magna cum laude*, 2006, University of Georgia.