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## Note

### ***FCC v. FOX TELEVISION STATIONS, INC.: DIRTY WORDS AND MESSY LOGIC—THE SUPREME COURT’S FAILURE TO FIX BROADCAST MEDIA REGULATION***

EDWARD J. REILLY\*

In *FCC v. Fox Television Stations, Inc.*,<sup>1</sup> the Supreme Court of the United States considered whether the Federal Communication Commission’s (“FCC”) new policy allowing sanctions on fleeting and isolated expletives was arbitrary and capricious pursuant to the Administrative Procedure Act (“APA”).<sup>2</sup> The Court held that the FCC provided a reasoned basis and explanation for its new policy and therefore ruled that the policy was not arbitrary and capricious.<sup>3</sup> In finding that the FCC’s new policy was not arbitrary and capricious, the Court failed to require the FCC to sufficiently explain why its longstanding policy was no longer adequate.<sup>4</sup>

In addition, the Court erred in accepting the FCC’s unreasonable reliance on outdated and anachronistic precedents such as *Red Lion Broadcasting Co. v. FCC*<sup>5</sup> and *FCC v. Pacifica Foundation*,<sup>6</sup> cases that relied on circumstances of broadcast media that no longer apply, to justify the FCC’s unique regulations on broadcast media.<sup>7</sup> Furthermore, the Court failed to review and invalidate the FCC’s enforcement regime on

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1. 129 S. Ct. 1800 (2009).
2. 5 U.S.C. §§ 551–559, 701–706 (2006).
3. *Fox*, 129 S. Ct. at 1812.
4. *See infra* Part V.A.
5. 395 U.S. 367 (1969).
6. 438 U.S. 726 (1978).
7. *See infra* Part V.B.

constitutional grounds despite the fact that its regime is based on unsound and invalid constitutional precedents.<sup>8</sup>

## I. THE CASE

Bono, lead singer of the band U2, exclaimed, ““This is really, really, f[\*\*\*\*\*] brilliant,”” as he accepted a Golden Globe Award during NBC’s live broadcast of the event on January 19, 2003.<sup>9</sup> Despite allegations from the Parents Television Council that the broadcast was obscene and indecent under FCC regulations, the Enforcement Bureau of the FCC (“Bureau”) denied the complaints on the basis that the speech was neither obscene nor indecent, in part because “the utterance was fleeting and isolated.”<sup>10</sup> Five months later, the full Commission reversed the Bureau’s decision in its *Golden Globes Order*, ruling that any use of the “F-word” inherently had sexual connotation and, in contrast to prior FCC decisions, isolated or fleeting broadcasts of the “F-word” or similar utterances would henceforth be indecent and therefore actionable.<sup>11</sup>

Although NBC, Fox, and Viacom, Inc. raised a variety of challenges to the *Golden Globes Order*, the FCC has yet to address the complaints while this policy remains in place.<sup>12</sup> The present case concerns a series of utterances during live broadcasts aired by Fox Television Stations, Inc. (“Fox”) between 2002 and 2003. On February 21, 2006, the FCC issued an order (“*Omnibus Order*”) addressing various complaints against networks, including Fox, that were responsible for broadcasts actionable under its new policy.<sup>13</sup> One incident occurred during the 2002 Billboard Music Awards,

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8. See *infra* Part V.C.

9. *In re* Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program (*Golden Globes Order*), 19 F.C.C.R. 4975, 4975, 4976 n.4 (2004).

10. *Id.* at 4975–76.

11. *Id.* at 4978–80.

12. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 452 (2d Cir. 2007), *rev’d*, 129 S. Ct. 1800 (2009). The major broadcast networks challenged the FCC’s new policy on multiple grounds. They argued that the new rule represents a “zero-tolerance” policy that contradicts the bedrock First Amendment principle that speakers have “breathing space.” Brief of Petitioner CBS Broad., Inc. at 13, *Fox*, 489 F.3d 44 (No. 06-1760-ag(L)), 2006 WL 4900577. The networks also argued that the FCC’s decision violated due process and was arbitrary and capricious in violation of the Administrative Procedure Act. *Id.* In addition, they suggested that the FCC’s decision created a new definition of the word “profane” that Congress did not approve and argued that the FCC policy failed to justify such a dramatic change in policy regarding isolated expletives. Brief for Intervenors NBC Universal, Inc. & NBC Telemundo License Co. at 22–23, *Fox*, 489 F.3d 44 (No. 06-1760-AG), 2006 WL 5100107. The networks also suggested that less restrictive means are available to accomplish the FCC’s aims. *Id.* at 23–24.

13. *In re* Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005 (*Omnibus Order*), 21 F.C.C.R. 2664, 2665 (2006). The FCC dismissed complaints against ABC and CBS on remand. *In re* Complaints Regarding Various Television

when the singer Cher exclaimed, “People have been telling me I’m on the way out every year, right? So f[\*\*\*] ‘em.”<sup>14</sup> The second incident occurred during the 2003 Billboard Music Awards in a segment featuring Nicole Richie, who asked the audience, “Why do they even call it ‘The Simple Life’? Have you ever tried to get cow s[\*\*\*] out of a Prada purse? It’s not so f[\*\*\*\*\*] simple.”<sup>15</sup> The FCC found the language in these two incidents to be actionably indecent.<sup>16</sup>

Fox and CBS sought judicial review of the *Omnibus Order* by the United States Court of Appeals for the Second Circuit and ABC filed a petition for review in the D.C. Circuit.<sup>17</sup> ABC’s petition was transferred to the Second Circuit and consolidated with the petition filed by Fox and CBS.<sup>18</sup> Before any briefing, the FCC obtained a voluntary remand from the Second Circuit to allow the networks to air their objections.<sup>19</sup> On remand, however, the FCC upheld the indecency findings for the Fox broadcasts.<sup>20</sup>

In its *Remand Order*, the FCC found that the 2003 Billboard Music Awards incident was actionably indecent, both under its old policy and its new policy announced in the *Golden Globes Order*, because the potentially offensive material was “repeated” and because Nicole Richie used “two extremely graphic and offensive words” that were “deliberately uttered.”<sup>21</sup> The FCC acknowledged, however, that at the time of the broadcast of Cher’s comment in 2002, it was not apparent from the FCC’s stated policies or precedent that Fox could be penalized.<sup>22</sup> Although the FCC previously gave immunity to isolated indecent expletives, such as those uttered by Cher and Nicole Ritchie,<sup>23</sup> the FCC claimed that this practice rested upon staff rulings and dicta rather than binding precedent.<sup>24</sup> Thus, the FCC rejected such staff rulings and dicta and affirmed the appropriateness of its

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Broadcasts Between February 2, 2002 and March 8, 2005 (*Remand Order*), 21 F.C.C.R. 13,299, 13,299 (2006).

14. *Omnibus Order*, 21 F.C.C.R. at 2690.

15. *Id.* at 2693 n.164.

16. *Id.* at 2691, 2694.

17. *Fox*, 489 F.3d at 453.

18. *Id.*

19. *Id.*

20. *Remand Order*, 21 F.C.C.R. 13,299, 13,299 (2006).

21. *Id.* at 13,307–08.

22. *Id.* at 13,324.

23. *Id.* at 13,308 (reiterating the position articulated in the *Golden Globes Order* that isolated and fleeting expletives are actionable and disavowing prior agency dicta to the contrary).

24. *Id.* at 13,306 (“Fox’s argument that a ‘fleeting and isolated utterance’ is not actionably indecent is based largely on staff letters and dicta in decisions predating the Commission’s *Golden Globe Awards Order*.”).

new policy, first articulated in the *Golden Globes Order*, holding that fleeting and isolated expletives could be actionably indecent.<sup>25</sup>

The FCC declined to order any forfeitures or sanctions on Fox,<sup>26</sup> but the television network, along with CBS and NBC, sought review of the *Remand Order* by the Second Circuit.<sup>27</sup> The Court of Appeals reversed the agency's *Remand Order*, finding that the FCC's policy regarding "'fleeting expletives'" represented a "significant departure from positions previously taken by the agency and relied on by the broadcast industry."<sup>28</sup> The court also held that the agency failed to articulate a reasoned basis for its new policy and did not properly address constitutional challenges raised by the networks.<sup>29</sup> Therefore, the court reasoned that the FCC's new policy was arbitrary and capricious under the APA.<sup>30</sup> Because the court vacated the FCC's order on APA grounds, it did not reach the other challenges raised by petitioners, intervenors, and amici.<sup>31</sup>

The Supreme Court of the United States granted certiorari to decide whether the FCC's decision, and the reasoning behind it, violated the APA's prohibition on arbitrary and capricious agency action.<sup>32</sup>

## II. LEGAL BACKGROUND

The Communications Act of 1934 first established the FCC and its ability to regulate broadcast media.<sup>33</sup> In 1978, the Supreme Court cemented the FCC's authority to regulate indecent broadcasts in *FCC v. Pacifica Foundation*.<sup>34</sup> Since then, the FCC has been committed to a narrow enforcement regime that does not issue sanctions for isolated and fleeting expletives.<sup>35</sup> The restrictions on broadcast media have been based

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25. *Id.* at 13,307.

26. *Id.* at 13,321–26.

27. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 454 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1800 (2009).

28. *Id.* at 446–47. Although the FCC suggested several independent rationales for the new policy, the court determined that the reasons were neither logical nor based on factual considerations that existed at the time of the prior policy's formation and therefore did not justify a new policy. *Id.* at 458–62.

29. *Id.* at 447, 467. The court shared concerns raised by the networks that the new policy was unconstitutionally vague, gave too much discretion to government officials, was inconsistent with Supreme Court decisions on indecency, and was based on outdated factual considerations surrounding televised broadcasts. *Id.* at 462–66.

30. *Id.* at 446–47.

31. *Id.*; *see also supra* note 12 (discussing other challenges raised).

32. *Fox*, 129 S. Ct. at 1805.

33. 47 U.S.C. § 151 (2006).

34. 438 U.S. 726 (1978).

35. *See infra* Part II.A.

on the unique factual circumstances surrounding broadcast media since its inception, and therefore these restrictions have not been imposed on other forms of media.<sup>36</sup> In formulating or changing its policies, the FCC must provide adequate justifications for its policy decisions to satisfy the APA's "arbitrary and capricious" standard of review.<sup>37</sup> Furthermore, although the Supreme Court had traditionally sought to avoid addressing constitutional issues if it could resolve a case without doing so, the Court recently demonstrated a willingness to ignore this practice under certain circumstances.<sup>38</sup>

*A. The FCC Traditionally Has Not Found Isolated and Fleeting Expletives to Be Actionable*

The Communications Act of 1934 created the FCC and granted the agency the authority to regulate broadcast as a check against the chaos of unregulated broadcast.<sup>39</sup> In the 1978 *Pacifica* decision, the Supreme Court cemented the FCC's narrow authority to regulate indecent speech under certain circumstances.<sup>40</sup> After *Pacifica*, the FCC remained committed to a narrow understanding of its authority to regulate indecent speech, specifically exempting isolated and fleeting expletives.<sup>41</sup> Even as the FCC sought to expand its authority to regulate indecent speech, it continued to provide a safe harbor for isolated and fleeting expletives.<sup>42</sup>

*1. The FCC's Authority to Regulate Indecency on Broadcast Mediums Stems from the Communications Act of 1934*

The Communications Act of 1934<sup>43</sup> created the FCC by centralizing several authorities<sup>44</sup> and granted the FCC regulatory authority over interstate and foreign commerce in wire and radio communication.<sup>45</sup> The Act authorized the FCC to establish a system of broadcast licenses to "maintain the control of the United States over all the channels of radio

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36. *See infra* Part II.B.

37. *See infra* Part II.C.

38. *See infra* Part II.D.

39. *See infra* Part II.A.1.

40. *See infra* Part II.A.2.

41. *See infra* Part II.A.3.

42. *See infra* Part II.A.4.

43. 47 U.S.C. §§ 151–614 (2006).

44. *Id.* § 151 (centralizing authority previously held by several wire and radio agencies into the FCC).

45. *Id.*

transmission.”<sup>46</sup> These licenses grant a broadcaster an exclusive part of the public domain and, along with it, enforceable public obligations.<sup>47</sup> One such obligation is the prohibition against “utter[ing] any obscene, indecent, or profane language by means of radio communication.”<sup>48</sup>

*2. Historically, the FCC Has Not Found Isolated and Fleeting Expletives to Be Actionably Indecent*

The first significant challenge to the FCC’s broadcast regulations related to indecency was the 1978 case of *FCC v. Pacifica Foundation*, in which the Supreme Court upheld the FCC’s decision to sanction indecent broadcast, but emphasized the narrow nature of the ruling and did not declare that isolated and fleeting expletives were actionably indecent.<sup>49</sup> In that case, a New York radio station owned by Pacifica Foundation played comedian George Carlin’s twelve-minute monologue entitled *Filthy Words* around 2:00 p.m.<sup>50</sup> After receiving a complaint regarding the broadcast, the FCC “issued a declaratory order granting the complaint and holding that Pacifica ‘could have been the subject of administrative sanctions.’”<sup>51</sup> The FCC found the power to sanction broadcasters in 18 U.S.C. § 1464, which forbids the use of “any obscene, indecent, or profane language by means of radio communication.”<sup>52</sup> The FCC argued that Carlin’s monologue fit within the scope of “‘indecent’” language because it included certain words that depicted sexual and excretory activities in a patently offensive manner.<sup>53</sup> The FCC also found that the timing and manner of the broadcast supported its decision, noting that the monologue was “broadcast at a time when children were undoubtedly in the audience,” and that the offensive language was “repeated over and over” and “deliberately broadcast.”<sup>54</sup>

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46. *Id.* § 301.

47. *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981).

48. 18 U.S.C. § 1464 (2006). The FCC revised its regulations to permit the broadcasting of indecent material between the hours of 10:00 p.m. and 6:00 a.m. *Action for Children’s Television v. FCC*, 58 F.3d 654, 668–69 (D.C. Cir. 1995).

49. 438 U.S. 726, 750–51 (1978).

50. *Id.* at 729–30.

51. *Id.* at 730 (quoting *In re Citizen’s Complaint Against Pacifica Foundation Station WBAI (FM)*, 32 Rad. Reg. 2d (P & F) 1331, 1337 (1975)). The complaint was made by a man who “stated that he had heard the broadcast while driving with his young son, [and] wrote a letter complaining to the Commission.” *Id.*

52. 18 U.S.C. § 1464. The statute provides for a fine of not more than \$10,000 or imprisonment not more than two years, or both. *Id.*

53. *Pacifica*, 438 U.S. at 732.

54. *In re Citizen’s Complaint Against Pacifica Foundation Station WBAI (FM)*, 32 Rad. Reg. 2d (P & F) at 1337.

The D.C. Circuit reversed the FCC's decision,<sup>55</sup> and the Supreme Court granted certiorari to decide whether the language was indecent and whether the order violated the First Amendment.<sup>56</sup> The FCC clearly stated in its brief to the Supreme Court that its ruling was intended to narrowly apply only to the facts of Carlin's monologue during the daytime broadcast.<sup>57</sup> As a result, the Supreme Court confined its review to facts of Carlin's monologue rather than undertaking a broader review of the FCC's authority in similar situations.<sup>58</sup>

The Supreme Court, reversing the circuit court's decision,<sup>59</sup> held that the FCC was permitted to sanction indecent speech without showing that it satisfied the elements of obscenity.<sup>60</sup> The Court also ruled that broadcast communication received the least amount of First Amendment protection of all forms of communication because it is "uniquely pervasive . . . in the lives of all Americans" and is "uniquely accessible to children."<sup>61</sup>

The Court went to great lengths to emphasize the narrowness of the ruling, noting specifically that this decision does not address whether "an occasional expletive . . . would justify any sanction."<sup>62</sup> Justices Powell and Blackmun, the two concurring Justices who supplied the votes necessary for the 5-4 decision, also expressed the narrowness of their review.<sup>63</sup> They pressed this point, noting that the "Commission's holding, and certainly the

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55. *Pacifica Found. v. FCC*, 556 F.2d 9, 18 (D.C. Cir. 1977) ("As we find that the Commission's *Order* is in violation of its duty to avoid censorship of radio communications . . . we must reverse the *Order*."), *rev'd*, 438 U.S. 726 (1978).

56. *Pacifica*, 438 U.S. at 734 (granting certiorari on the following issues: (1) whether the scope of judicial review encompassed more than the Commission's determination that the monologue was indecent as broadcast; (2) whether the Commission's order was a form of censorship forbidden by Communications Act of 1934 § 326; (3) whether the broadcast was indecent within the meaning of Communications Act of 1934 § 1464; and (4) whether the order violates the First Amendment).

57. Brief of FCC at 42, *Pacifica*, 438 U.S. 726 (No. 77-529), 1978 WL 206838 ("[T]he Commission's decision must be read narrowly, limited to the language 'as broadcast' in the early afternoon. . . . The Commission believes its order should have been read narrowly and reviewed as an *ad hoc* ruling.").

58. *See supra* text accompanying note 49 (emphasizing the narrowness of the Court's review); *see also infra* text accompanying notes 62-64.

59. Justice Stevens delivered the opinion of the Court and was joined by Chief Justice Burger and Justice Rehnquist with Justice Powell and Justice Blackmun concurring in the judgment. *Pacifica*, 438 U.S. at 726-29.

60. *Id.* at 740-41.

61. *Id.* at 748-49.

62. *Id.* at 750.

63. *Id.* at 755-56 (Powell, J., concurring in part and concurring in the judgment) ("The Court today reviews only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion.").



Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast."<sup>64</sup>

Justice Brennan, joined by Justice Marshall, dissented on the grounds that the plurality's justifications suffered from a "lack of principled limitation on their use as a basis for FCC censorship."<sup>65</sup> Justice Brennan also noted that "[n]o such limits come readily to mind, and neither of the opinions constituting the Court serve to clarify the extent to which the FCC may assert the privacy and children-in-the-audience rationales as justification."<sup>66</sup> Justice Brennan also criticized Justice Powell for "rely[ing] upon the judgment of the Commission" to "insure that the FCC's regulation of protected speech does not exceed" the boundaries of the facts of the case.<sup>67</sup>

### 3. *In the Wake of Pacifica, the FCC Followed the Narrow Guidance of the Court's Holding*

In subsequent decisions, the FCC followed the narrow guidance of *Pacifica* and did not find isolated and fleeting expletives to be actionably indecent. For example, in *In re Application of WGBH Educational Foundation*,<sup>68</sup> in which petitioners challenged the license renewal of WGBH-TV for broadcasting indecent words and images, the FCC denied the petitioner's request to deny the license renewal, basing its decision on the narrow guidance of *Pacifica*.<sup>69</sup> Although the FCC determined that WGBH-TV had broadcast indecent programming, the circumstances, specifically the lack of respective indecent content and the time of the broadcast, were insufficiently similar to the facts of *Pacifica* to justify

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64. *Id.* at 760–61.

65. *Id.* at 770 (Brennan, J., dissenting).

66. *Id.* Justice Brennan also added, "Taken to their logical extreme, these rationales would support the cleansing of public radio of any 'four-letter words' whatsoever, regardless of their context." *Id.* at 770–71.

67. *Id.* at 771–72. Justice Powell expected the Commission "to proceed cautiously, as it has in the past." *Id.* at 761 n.4 (Powell, J., concurring in part and concurring in the judgment). Justice Stewart, joined by Justices Brennan, White, and Marshall, filed a dissenting opinion in which he argued that Congress only intended to prohibit obscene speech through Communications Act of 1934 § 1464. *Id.* at 777–80 (Stewart, J., dissenting).

68. 43 Rad. Reg. 2d (P & F) 1436 (1978).

69. *Id.* at 1437. Petitioner, Morality in Media of Massachusetts, Inc., challenged the license renewal based on various incidents of indecency, including a program entitled Rock Follies, broadcast at 11:00 p.m. on March 14, 1977, which it described as "'vulgar,' and as containing 'profanity' (i.e., 'The name of God (six times)'), 'obscenities' such as 's[\*\*\*],' 'bulls[\*\*\*],' etc., and action indicating some sexually-oriented content in the program and other programs which allegedly contain nudity and/or sexually-oriented material." *Id.* at 1438 (internal punctuation and numbering omitted).

denying the license renewal, which would be the equivalent of a sanction for indecent broadcasts.<sup>70</sup>

The FCC noted that the Court's decision in *Pacifica* "affords this Commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast . . . . We intend strictly to observe the narrowness of the *Pacifica* holding."<sup>71</sup> The FCC specifically relied upon its interpretation of *Pacifica* to refuse sanctions of a broadcaster for an isolated expletive.<sup>72</sup> The FCC also found compelling Justice Powell's emphasis on the verbal shock treatment and repetitive nature of the Carlin monologue as dispositive in *Pacifica*, and therefore concluded that WGBH-TV's indecent programming did not garner the same distinction.<sup>73</sup>

Five years after the *Pacifica* decision, the FCC affirmed its commitment to overlooking occasional expletives by denying a challenge for a license renewal where the factual circumstances in the case were sufficiently similar to *Pacifica*. In *In re Application of Pacifica Foundation*,<sup>74</sup> petitioners challenged the license renewal of the Pacifica Foundation on the grounds that several early morning broadcasts involved the use of indecent language including "motherf[\*\*\*\*\*]," "s[\*\*\*]," and "a[\*\*]holes."<sup>75</sup> The FCC, however, declined the petitioner's challenge since it was "clear that the petitioner ha[d] failed to make a *prima facie* case that [Pacifica Foundation] ha[d] violated 18 U.S.C. 1464" because the language "d[id] not amount to . . . repetitious 'verbal shock treatment'" and the petitioner had not shown that such use was more than "'isolated use in the course of' a three year license term."<sup>76</sup> The FCC's insistence on not holding isolated and fleeting expletives to be actionably indecent demonstrates the agency's dedication to narrowly following the *Pacifica* case's guidance.<sup>77</sup>

#### 4. *Even as the FCC Expanded Its Enforcement Powers, It Did Not Question the Safe Harbor for Isolated and Fleeting Expletives*

Although it maintained its policy for several years that fleeting expletives were not actionable, the FCC began in 1987 to slowly expand its

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70. *Id.* at 1441 n.6.

71. *Id.* at 1441 (italics added).

72. *Id.*

73. *Id.*

74. 95 F.C.C.2d 750 (1983).

75. *Id.* at 759–60. The petitioner, American Legal Foundation, sought to prevent the license renewal of Pacifica for Station WPFW(FM). *Id.* at 759.

76. *Id.* at 760–61.

77. *See id.*

authority over indecent language. In *In re Infinity Broadcasting Corp. of Pennsylvania (Infinity Order)*,<sup>78</sup> the FCC affirmed three earlier FCC decisions that found certain broadcasts to be indecent.<sup>79</sup> In doing so, the FCC explained that it would no longer take the narrow view that only use of the seven words found in Carlin's monologue were actionable.<sup>80</sup> Instead, the FCC pledged to "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."<sup>81</sup> Although this clarification of its definition of indecency had the effect of expanding its power, the FCC maintained its practice, pursuant to *Pacifica*, of not sanctioning fleeting expletives.<sup>82</sup>

Broadcasters challenged the FCC's attempt to expand its power.<sup>83</sup> The D.C. Circuit, however, rejected the challenge to the *Infinity Order*, noting that the FCC's definition of indecency was "virtually the same definition the Commission articulated in the order reviewed by the Supreme Court in the *Pacifica* case."<sup>84</sup> In making this decision, the circuit court relied on the FCC's assurances that it would maintain a restrained enforcement policy.<sup>85</sup>

The FCC continued to clarify and expand its enforcement regime while providing a safe harbor for isolated and fleeting expletives through its

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78. 3 F.C.C.R. 930 (1987). The FCC, in the *Infinity Order*, affirmed three earlier FCC decisions: *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698 (1987), *In re Regents of the Univ. of Cal.*, 2 F.C.C.R. 2703 (1987), and *In re Infinity Broad. Corp. of Pa.*, 2 F.C.C.R. 2705 (1987). *Infinity Order*, 3 F.C.C.R. at 934.

79. *Infinity Order*, 3 F.C.C.R. at 934 ("The Commission, therefore, reaffirms each of the above-captioned rulings.").

80. *Id.* at 930 (concluding that the former standard could lead to unjustifiable, anomalous results because it ignored an entire category of speech by focusing exclusively on specific words rather than the generic definition of indecency).

81. *Id.*; see *In re Citizen's Complaint Against Pacifica Foundation Station WBAI (FM)*, 32 Rad. Reg. 2d (P & F) 1331, 1336 (1975) (describing indecent speech as speech that is offensive to contemporary community standards for the broadcast medium or references sexual or excretory activities and organs and is broadcast at times of the day when there is a reasonable risk that children may be in the audience).

82. See *In re Regents of the Univ. of Cal.*, 2 F.C.C.R. at 2703 ("Speech that is indecent must involve more than an isolated use of an offensive word."); see also *In re Pacifica Found.*, 2 F.C.C.R. at 2699 ("If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency." (emphasis added)).

83. See *Action for Children's Television v. FCC*, 852 F.2d 1332, 1334 (D.C. Cir. 1988) ("Petitioners maintain that the FCC's broadened indecency enforcement standard is facially invalid because [it is] unconstitutionally vague.").

84. *Id.* at 1338.

85. *Id.* at 1340 n.14 ("[T]he FCC has assured this court, at oral argument, that it will continue to give weight to reasonable licensee judgments when deciding whether to impose sanctions in a particular case. Thus, the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy." (citation omitted)).

*Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency.*<sup>86</sup> Its goal was to “provide guidance to the broadcast industry regarding [the FCC’s] case law interpreting 18 U.S.C. § 1464 and [the FCC’s] enforcement policies with respect to broadcast indecency.”<sup>87</sup> An indecency finding, according to the FCC, is based on two determinations: (1) whether the material “describe[s] or depict[s] sexual or excretory organs or activities”;<sup>88</sup> and (2) whether the broadcast is “patently offensive as measured by contemporary community standards for the broadcast medium.”<sup>89</sup> The FCC claimed to consider three factors in determining whether material is patently offensive:

- (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities;
- (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities;
- (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.<sup>90</sup>

Regarding the second factor in that analysis, the FCC noted that isolated and fleeting expletives were characteristics that tended to weigh against a finding of indecency.<sup>91</sup>

*B. The Supreme Court Has Justified Stronger Restrictions on Broadcast Communications Than on Other Mediums Because of Spectrum Scarcity and the Unique Pervasiveness of the Broadcast Media*

The FCC’s authority to regulate broadcast media resulted from the chaos and spectrum scarcity that hallmarked the beginning of broadcast media.<sup>92</sup> In the *Pacifica* decision, the Supreme Court articulated two additional justifications for the restrictions to the First Amendment protections on broadcast media—unique pervasiveness and unique accessibility by children.<sup>93</sup> These arguments, however, have failed to

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86. 16 F.C.C.R. 7999 (2001) [hereinafter *Industry Guidance*].

87. *Id.* at 7999.

88. *Id.* at 8002.

89. *Id.* (emphasis omitted).

90. *Id.* at 8003 (emphasis omitted).

91. *Id.* at 8008.

92. *See infra* Part II.B.1.

93. *See infra* Part II.B.2.

justify restricted First Amendment protections for other forms of media such as cable television and the Internet.<sup>94</sup>

*1. The FCC's Authority to Issue Broadcast Licenses and Regulate Airwaves Was Historically Based on the Limited Nature of the Broadcast Spectrum*

The chaos caused by broadcast spectrum scarcity was the original justification for the FCC's regulatory regime on broadcast media.<sup>95</sup> The Radio Communications Act of 1912<sup>96</sup> conferred upon the Secretary of Commerce the power to regulate frequencies and hours of operation, but not the power to enforce those regulations.<sup>97</sup> Concluding that broadcast frequencies were a "scarce resource" that would require control and regulation to prevent a "cacophony of competing voices,"<sup>98</sup> the government established the Federal Radio Commission in 1927 to allocate frequencies among competing applications in a manner responsive to the public interest.<sup>99</sup>

Not long after, the Radio Commission used spectrum scarcity to justify the "Fairness Doctrine," which required radio stations to provide an opportunity for opposing views on issues of importance to the public.<sup>100</sup> In 1969, Red Lion Broadcasting Company challenged the Fairness Doctrine after the FCC declared that Red Lion had failed to meet its obligation to supply time for a rebuttal to a personal attack.<sup>101</sup> The D.C. Circuit upheld

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94. See *infra* Part II.B.3.

95. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 376 (1969). Spectrum scarcity refers to the problem of having more people wishing to broadcast than there are available frequencies. *Id.* at 388–89.

96. Pub. L. No. 62-264, 37 Stat. 302, *repealed by* Radio Act of 1927, Pub. L. No. 69-632, § 39, 37 Stat. 1162, 1174.

97. See *Red Lion*, 395 U.S. at 375 n.4 (citing generally *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926) (ruling that statutory language regarding radio station regulation controlled when in conflict with specific license regulations imposed by the Secretary of Commerce)); *cf.* 35 Op. Att'y Gen. 126, 126–32 (1926) (discussing the Secretary of Commerce's lack of power to cover broadcasting issues developing after passage of the Radio Communications Act of 1912). See Laurence H. Winer, *The Signal Cable Sends—Part I: Why Can't Cable Be More Like Broadcasting?*, 46 MD. L. REV. 212, 216–17 (1987), for a more detailed discussion on the government's impotence in regulating broadcast during this time period.

98. *Red Lion*, 395 U.S. at 376.

99. *Id.* at 376–77. Eventually, the powers of the Federal Radio Commission would be absorbed by the FCC. See 47 U.S.C. § 301 (2006).

100. *Red Lion*, 395 U.S. at 377.

101. *Id.* at 371–73. Fred J. Cook requested time on Radio Station WGCB to respond to a personal attack made by the Reverend Billy James Hargis as part of a program series entitled *The Christian Crusade*. *Id.* at 371–72. "[T]he FCC declared that the Hargis broadcast constituted a personal attack on Cook; [and] that Red Lion had failed to meet its obligation under the fairness doctrine." *Id.* at 372.

the FCC's position as constitutional.<sup>102</sup> The Supreme Court affirmed the decision and the importance of the Fairness Doctrine.<sup>103</sup>

To uphold the Fairness Doctrine and the doctrine's inherent limitation on free speech, the Supreme Court relied on the premise that the unique circumstances of broadcast media called for special restrictions.<sup>104</sup> The Court reasoned that broadcast's potential for chaos meant that the spectrum must be regulated and licensed to select individuals "[i]f intelligible communications is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology."<sup>105</sup> The broadcast spectrum's scarcity demanded that the government reserve some of the spectrum for public functions—aircraft, police, defense, navigation, and so on—and refuse to permit others the chance to broadcast.<sup>106</sup>

According to the Court, in certain circumstances, spectrum scarcity justified requiring licensees to broadcast the views of those without licenses.<sup>107</sup> Without the Fairness Doctrine, broadcast station owners could choose to broadcast a message or opinion and an opposing party would have no opportunity for rebuttal.<sup>108</sup> Therefore, the Court ruled that "[i]t does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern."<sup>109</sup>

The Red Lion Broadcasting Company challenged the notion that spectrum scarcity still existed, but the Court saw circumstances that suggested otherwise.<sup>110</sup> The Court pointed to evidence that showed that

102. *Red Lion Broad. Co. v. FCC*, 381 F.2d 908, 930 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969).

103. *Red Lion*, 395 U.S. at 375 ("Believing that the specific application of the fairness doctrine in *Red Lion* . . . [is] authorized by Congress and enhance[s] rather than abridge[s] the freedoms of speech and press . . . we hold [it] valid and constitutional . . .").

104. *Id.* at 389 ("It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum."). The Court cited the example of new technologies that "produce sounds more raucous than those of the human voice" and argued that they "justif[y] restrictions on the sound level, and on the hours and places of use . . . so long as the restrictions are reasonable and applied without discrimination." *Id.* at 387 (citing *Kovacs v. Cooper*, 336 U.S. 77 (1949)).

105. *Id.* at 388.

106. *Id.*

107. *Id.* at 390.

108. *Id.* at 392 ("[S]tation owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed.").

109. *Id.* at 394.

110. *Id.* at 396–97. The Court observed, "Portions of the spectrum must be reserved for vital uses . . . such as radio-navigational aids used by aircraft and vessels" as well as police,

despite technological advances that have led to a more efficient utilization of the frequency spectrum, the demand for such space had also grown, leading to conflicts and spectrum congestion.<sup>111</sup> The Court was content to rely on this evidence, but suggested, based on legislative history, that if the number of radio and television stations were not limited by available frequencies, the Court would consider removing the restrictions requiring equal time.<sup>112</sup>

*2. Through Pacifica, the Supreme Court Used Broadcast Media's Unique Pervasiveness and Access to Children to Justify the FCC's Authority to Regulate Broadcast Media*

Through the 1960s and 1970s, restrictions on broadcast were based primarily on the factual circumstances of broadcast media rather than on timeless, articulable principles. In *Pacifica*, the Supreme Court articulated two factual circumstances that justified unique restrictions on broadcast media: (1) broadcast media's "uniquely pervasive presence in the lives of all Americans," and (2) its "unique[] accessib[ility] to children, even those too young to read."<sup>113</sup>

The *Pacifica* Court argued that broadcast media was "uniquely pervasive" because indecent material presented over the airwaves could invade the privacy of the individual in his home.<sup>114</sup> The Court believed that an individual's right to privacy outweighed the broadcaster's right to indecent speech.<sup>115</sup> The Court also articulated its "First Blow" theory, arguing that because a broadcast audience is constantly tuning in and out, a prior warning cannot completely protect a listener from the "first blow" of unexpected program content.<sup>116</sup>

The Court also argued that broadcast media was uniquely accessible and therefore potentially harmful to children because an indecent broadcast

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ambulances, fire departments, and public utilities. *Id.* at 397. The Court also noted spectrum congestion caused by "licensed amateur radio operators' equipment" and "5,000,000 transmitters operated on the 'citizens' band.'" *Id.*

111. *Id.* at 396–97.

112. *Id.* at 399 n.26 (citing S. REP. NO. 562, at 8–9 (1959) (reiterating the justification for the fairness doctrine)).

113. FCC v. *Pacifica Found.*, 438 U.S. 726, 748–49 (1978) (plurality).

114. *Id.* at 748.

115. *Id.* (deciding that "the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder" in the privacy of the home).

116. *Id.* at 748–49 ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.").

“could have enlarged a child’s vocabulary in an instant.”<sup>117</sup> The Court likened a restriction on broadcast to restrictions on other offensive expressions, such as regulations of bookstores and movie theaters, to protect children from indecent material.<sup>118</sup> The Court argued that the government’s interest in the well-being of youth and a parent’s right to ensure that well-being, through restricted access to broadcast media justified regulation of broadcast media.<sup>119</sup>

3. *Justifications for Limiting First Amendment Protections for Broadcast Media Do Not Apply to Similar Regulations on Internet and Cable Speech*

Although the factual circumstances of broadcast media in *Red Lion* and *Pacifica* justified specific regulations, the absence of similar circumstances doomed similar regulations of Internet and cable media. In *Reno v. ACLU*,<sup>120</sup> the Supreme Court held that the justifications for limiting First Amendment rights in the broadcast media context are based on circumstances that do not apply to the Internet, and therefore broadcast media regulations limiting First Amendment rights may not apply to the Internet.<sup>121</sup> *Reno* involved the 1996 Communications Decency Act, which sought to prohibit the “knowing transmission of obscene or indecent messages to any recipient under 18 years of age.”<sup>122</sup> After President Clinton signed the legislation, multiple plaintiffs, including the ACLU, filed suit against the Attorney General and the Department of Justice, challenging the constitutionality of the Act.<sup>123</sup>

The United States District Court for the Eastern District of Pennsylvania enjoined the Attorney General from enforcing the prohibitions in the Act in so far as the Act related to indecent communications.<sup>124</sup> The Government argued that prior decisions such as *Pacifica* demonstrated the constitutionality of the Act.<sup>125</sup> The Supreme

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117. *Id.* at 749; *see also id.* at 750 (noting the ease with which children may access broadcast material).

118. *Id.* at 749.

119. *Id.* at 758 (“[C]onstitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.” (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968))).

120. 521 U.S. 844 (1997).

121. *Id.* at 870 (“[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”).

122. *Id.* at 859 (quoting 47 U.S.C. § 223(a) (2006)).

123. *E.g.*, *ACLU v. Reno*, 929 F. Supp. 824, 827 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997).

124. *Id.* at 883–84.

125. *Reno*, 521 U.S. at 864.



Court, however, affirmed the district court's decision and distinguished *Pacifica* from the instant case.<sup>126</sup> The Court argued that cyberspace did not present the same issues of scarcity and invasiveness that justified the uniquely stringent regulations of broadcast media.<sup>127</sup> The Court reasoned that the Internet's sheer size in terms of users and the variety of communication categories allow "any person with a phone line [to] become a town crier with a voice that resonates farther than it could from any soapbox."<sup>128</sup> The Court further determined that the "Internet is not as 'invasive' as radio or television" because, as the district court stated, "'communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden.'"<sup>129</sup> As a result, the Court agreed with the district court's assessment of the Internet and found that prior cases failed to justify increased restrictions on Internet speech protected by the First Amendment.<sup>130</sup>

In a similar case regarding cable television, *Turner Broadcasting System, Inc. v. FCC*,<sup>131</sup> the Supreme Court ruled that First Amendment restrictions on broadcast media did not apply to cable television because cable did not have the same technological limitations that justified the broadcast regulations.<sup>132</sup> In *Turner*, the FCC attempted to justify the "must-carry"<sup>133</sup> provisions in the Cable Television Consumer Protection and Competition Act of 1992<sup>134</sup> by arguing that the regulation of cable television should be analyzed "under the same First Amendment standard that applies to regulation of broadcast television."<sup>135</sup> The Court found, however, that the technological advances of cable ensured no spectrum scarcity issues as well as no danger of physical interference between

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126. *Id.* at 868 ("These precedents, then, surely do not require us to uphold the CDA.").

127. *Id.* at 868-69.

128. *Id.* at 868-70 ("The Government estimates that as many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999." (internal quotation marks omitted)).

129. *Id.* at 868-69 (quoting *Reno*, 929 F. Supp. at 844).

130. *Id.* at 870 (citing *Reno*, 929 F. Supp. at 842).

131. 512 U.S. 622 (1994).

132. *Id.* at 639 ("In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation.").

133. The "must-carry" provisions "require[d] cable television systems to devote a portion of their channels to the transmission of local broadcast television stations." *Id.* at 626.

134. Pub. L. No. 102-385, 106 Stat. 1460, *superseded by* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

135. *Turner*, 512 U.S. at 637.

broadcasters.<sup>136</sup> As a result of the technological differences among cable and broadcast, the Court found that cable could not receive the same limited First Amendment protection as broadcast.<sup>137</sup>

*C. Courts Can Set Aside Agency Decisions Deemed to Be Arbitrary and Capricious*

The APA,<sup>138</sup> which establishes the mechanism for judicial review of agency decisions, empowers courts to set aside agency decisions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>139</sup> The “arbitrary and capricious” standard calls for a “narrow” review in which “a court is not to substitute its judgment for that of the agency.”<sup>140</sup> Agencies are required to review relevant information and articulate an adequate explanation for their action.<sup>141</sup> The agency must “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>142</sup>

The Court has discussed several agency actions that would qualify as arbitrary and capricious: Normally, an agency rule would be arbitrary and capricious if the agency relied on factors that Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>143</sup> When an agency rescinds a rule, it is obligated to provide an explanation for the change “beyond that which may be required” for an agency act in the first instance.<sup>144</sup> When an agency makes a “[s]udden and unexplained change” or “does not take account of legitimate reliance on prior interpretation,” the policy change may be arbitrary and capricious.<sup>145</sup>

136. *Id.* at 638–39 (rejecting the relaxed standard of scrutiny that had been applied in *Red Lion* for these reasons).

137. *Id.* at 639.

138. 5 U.S.C. §§ 551–559, 701–706 (2006).

139. *Id.* § 706(2)(A).

140. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

141. *Id.* at 43 (“In reviewing that explanation, we must ‘consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’” (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974))).

142. *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

143. *Id.*

144. *Id.* at 42.

145. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996).

*D. Although the Supreme Court Traditionally Will Avoid Addressing a Constitutional Question When Possible, the Court Has Recently Illustrated the Flexibility of This Practice*

Traditionally, the Supreme Court limits its review of final decisions to issues on which a lower court has already passed judgment.<sup>146</sup> In January 2010, however, the Court made a rare exception to this practice and ruled on constitutional grounds not decided upon by the lower court while another non-constitutional ground existed to resolve the issue. In *Citizens United v. FEC*,<sup>147</sup> the Court overruled, on constitutional grounds, Section 203 of the Bipartisan Campaign Reform Act of 2002's ("BCRA")<sup>148</sup> prohibition on corporations' and unions' ability to use general treasury funds to make expenditures to advocate the election or defeat of a candidate.<sup>149</sup> In reaching this ruling, the Court made the unusual decision to reach a decision on constitutional grounds in spite of the non-constitutional ruling of the lower court.<sup>150</sup> Although advocates of judicial restraint would insist on avoiding such constitutional issues, the Court determined that it would be failing in its responsibilities if it were to adopt an unsound statutory argument to avoid the constitutional question.<sup>151</sup>

To justify this unusual decision, the Court relied on three primary arguments: (1) the Supreme Court may address issues that were "passed upon" by the lower court even if not specifically ruled upon,<sup>152</sup> (2) *Citizens United* raised the claim that the FEC violated its First Amendment right to free speech, and therefore, ruling on the constitutional issue would not

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146. See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here."); *Cooper Indus., Inc., v. Aviall Servs., Inc.*, 543 U.S. 157, 168–69 (2004) ("We ordinarily do not decide in the first instance issues not decided below." (citation and internal quotation marks omitted)); *Rescue Army v. Mun. Ct. of City of L.A.*, 331 U.S. 549, 570 n.34 (1947) ("It has long been the Court's 'considered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision.'" (citation omitted)).

147. 130 S. Ct. 876 (2010).

148. Pub. L. No. 107-155, § 203, 116 Stat. 81, 91 (codified as amended at 41 U.S.C. § 441b (2006)), *invalidated by Citizens United*, 130 S. Ct. 876.

149. *Citizens United*, 130 S. Ct. at 917.

150. *Id.* at 891–92 (declining to rule on the statutory issue because the majority was convinced that a corporation has a constitutional right to political speech).

151. *Id.* at 892.

152. *Id.* at 892–93 ("Our practice 'permit[s] review of an issue not pressed [below] so long as it has been passed upon . . .'" (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995))). The Court, however, determined that the district court "passed upon" the issue in a manner that satisfied *Lebron*. *Id.*

require a new claim,<sup>153</sup> and (3) the distinctions between facial and as-applied are insufficiently defined to control related constitutional challenges.<sup>154</sup> The Court buttressed these justifications to reach the constitutional issue with three considerations regarding its judicial responsibilities: (1) not reaching the constitutional issue would lead to substantial uncertainty in the law for future litigation,<sup>155</sup> (2) the considerable time necessary to clarify the meaning of the statutory provisions,<sup>156</sup> and (3) the importance of free speech for the election process.<sup>157</sup> The Court determined that the limited treatment of the constitutional issues by the lower court, combined with the equitable interests in free political speech, demanded that the Court reconsider the constitutional precedents of the BCRA.<sup>158</sup>

### III. THE COURT'S REASONING

In *FCC v. Fox Television Stations, Inc.*,<sup>159</sup> the Supreme Court of the United States, by a 5-4 margin, held that the FCC's change in policy—making isolated utterances of indecent language actionable—was not an arbitrary or capricious decision within the meaning of the APA.<sup>160</sup> Writing for the majority, Justice Scalia first addressed the legal standard of

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153. *Id.* at 893 (“Once a federal claim is properly presented, a party can make any argument in support of that claim.” (quoting *Lebron*, 513 U.S. at 379)). The Supreme Court reasoned that because Citizens United raised the First Amendment issue below, it was not a new claim and therefore it could be examined by the Court. *Id.*

154. *Id.* The Court determined that parties' conduct could not preclude the Court from exploring certain remedies or broader issues. *See id.* (“[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly as-applied cases.” (internal quotation marks omitted) (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third Party Standing*, 113 HARV. L. REV. 1321, 1339 (2000))).

155. *Id.* at 894–95. The Government suggested an alternative ground on which the case could be resolved without reaching the constitutional issue, but the Court failed to adopt this view. *Id.* (“When the Government holds out the possibility of ruling for Citizens United on a narrow ground yet refrains from adopting that position, the added uncertainty demonstrates the necessity to address the [constitutional question].”).

156. *Id.* at 895. The Court feared that litigation stemming from the BCRA would be troublesome because it would likely impact a speaker's political speech and because once the litigation extended past the election date (which would be likely), neither party would have an incentive to resolve the claims. *Id.*

157. *Id.* The Court believed that without addressing the constitutional issues, the current law would serve as the functional equivalent of a prior restraint. *Id.* (“[A] speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak.”). The Court determined that this “unprecedented governmental intervention” justified reviewing the constitutional precedents that supported the statute in question. *Id.* at 896.

158. *Id.*

159. 129 S. Ct. 1800 (2009).

160. *Id.* at 1812.

“arbitrary and capricious” for reviewing the case.<sup>161</sup> Specifically, Justice Scalia argued that the APA does not call for a more searching review or a heightened standard of review beyond requiring that the agency show that there were good reasons for the policy change and that the agency believed these changes improved upon the previous policy.<sup>162</sup> Justice Scalia declined to address the constitutional issue altogether because the Second Circuit had ruled solely on the APA issue.<sup>163</sup>

Justice Scalia, disagreeing with the Second Circuit, argued that the FCC acknowledged that its recent policy represented a break with old laws and explicitly disavowed them as good law.<sup>164</sup> Justice Scalia further argued that the FCC’s decision fit within the context-based approach of *Pacifica*.<sup>165</sup> Justice Scalia found that advances in technology that allow broadcasters to “bleep out” easily offending words support the Commission’s broader enforcement policy.<sup>166</sup> He also found that the agency’s decision not to impose any sanctions illustrated that the FCC did not act arbitrarily.<sup>167</sup> Justice Scalia also argued that the FCC’s decision not to sanction isolated and fleeting expletives did not preclude it from doing so in the future.<sup>168</sup> Furthermore, Justice Scalia argued that the Second Circuit failed to appreciate the logic inherent in the agency’s argument that a per se exemption for fleeting expletives would lead to increased use of expletives.<sup>169</sup>

Justice Scalia also dismissed the respondents’ argument that the FCC did not acknowledge that its action represented a change in policy because he believed the FCC explicitly had done so.<sup>170</sup> He further argued that, contrary to the respondents’ position, this policy fit within the guidance of

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161. *Id.* at 1810–11.

162. *Id.*

163. *Id.* at 1819 (“The Second Circuit did not definitely rule on the constitutionality of the Commission’s orders, but respondents nonetheless ask us to decide their validity under the First Amendment. This Court, however, is one of final review, ‘not of first view.’” (quoting *Cutter v. Wilkinson*, 554 U.S. 709, 718 n.7 (2005))). Justice Scalia criticized the dissent’s decision to punish the agency for not discussing the constitutional implications of the policy change and argued that such explanation had not been traditionally required for agency policy changes. *Id.* at 1817–18.

164. *Id.* at 1812.

165. *Id.*

166. *Id.* at 1813.

167. *Id.*

168. *Id.* In addition, Justice Scalia argued that the Second Circuit’s finding of the policy as too extreme failed to appreciate the role context would play in the FCC’s policy determination. *Id.* at 1814.

169. *Id.* at 1812–13.

170. *Id.* at 1814–15.

*Pacifica* because that decision did not explicitly act as a bright-line rule against broader findings of indecency.<sup>171</sup>

Justice Scalia also responded to the arguments raised by the dissenting Justices,<sup>172</sup> but these arguments were joined only by Chief Justice Roberts, Justice Thomas, and Justice Alito.<sup>173</sup>

Justice Thomas, concurring, wrote separately to address the constitutional issues outside the scope of the APA analysis.<sup>174</sup> Justice Thomas questioned the viability of Court precedents such as *Pacifica* and *Red Lion*.<sup>175</sup> He argued that these precedents, which are partially based on the nature of the medium, seem less persuasive in light of technological advances.<sup>176</sup> Justice Thomas suggested that “dramatic changes in factual circumstances” surrounding these mediums support a departure from these precedents and their justifications for the FCC’s enforcement regime, but he believed that a review of the constitutional validity of *Pacifica* and *Red Lion* ought to be made at a different time.<sup>177</sup>

Justice Kennedy, concurring, wrote separately to address the need for an agency to explain a change in policy and why it has chosen to reject considerations that prompted it to adopt the initial policy.<sup>178</sup> Justice Kennedy argued that an agency’s decision to change course may be

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171. *Id.* at 1815.

172. *Id.* at 1815–19 (plurality opinion). Justice Scalia, in response to Justice Breyer’s claim that the independent nature of agencies required the judiciary to be more vigilant of their activities, argued that oversight of the FCC had shifted from the President to Congress, which put pressure on the FCC to expand its enforcement. *Id.* Justice Scalia also reasoned that if Congress controls the FCC, as Justice Stevens posited in his dissent, Congress’s desire for stronger enforcement supports a finding that the new policy is not arbitrary and capricious. *Id.* at 1816. Justice Scalia also argued that Justice Breyer failed to acknowledge the role that context would play in alleviating concerns that a stronger enforcement regime would hurt smaller local broadcasters lacking the technology to prevent isolated expletives and would lead to a chill on live broadcasts. *Id.* at 1818–19.

173. *Id.* at 1805.

174. *Id.* at 1819–20 (Thomas, J., concurring) (“I write separately, however, to note the questionable viability of the two precedents that support the FCC’s assertion of constitutional authority to regulate the programming at issue in this case.” (citing *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969))).

175. *Id.*

176. *Id.* at 1820–22.

177. *Id.* at 1822 (“These dramatic changes in factual circumstances might well support a departure from precedent under the prevailing approach to *stare decisis*. . . . I am open to reconsideration of *Red Lion* and *Pacifica* in the proper case.”).

178. *Id.* at 1822 (Kennedy, J., concurring).

arbitrary and capricious if the agency ignores earlier factual findings without a reasoned explanation.<sup>179</sup>

Justice Stevens dissented, based on two perceived flaws in the Court's reasoning. First, Justice Stevens argued that because the FCC's initial policy was developed with expert and congressional input, its new policy should reflect Congress's wishes and the agency must show why the prior policy is no longer sound.<sup>180</sup> Second, he asserted that the Court improperly assumed that *Pacifica* endorsed a construction of "indecent" that would include any expletive with sexual or excretory origin.<sup>181</sup> Justice Stevens argued that the *Pacifica* decision was narrow, finding that a twelve-minute, expletive-filled monologue was indecent.<sup>182</sup> The FCC's new policy, he reasoned, expands this scope beyond repetitive expletives without adequate justification, and therefore is arbitrary and capricious.<sup>183</sup>

Justice Ginsburg dissented and wrote separately to emphasize that the FCC's new policy raised many of the concerns first voiced in *Pacifica* and that if the constitutional issue were revisited, the Court "should be mindful that words unpalatable to some may be 'commonplace' for others, 'the stuff of everyday conversations.'"<sup>184</sup>

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented because the FCC's change in policy was based on factors that were preexisting when the prior policy was formed, and the FCC failed to explain why the agency decided to reevaluate those factors.<sup>185</sup> Because an agency must act consistently, Justice Breyer argued, any agency must justify a policy change when its original policy was based on logic, reason, and factual circumstances.<sup>186</sup>

Justice Breyer found the FCC's lack of explanation of First Amendment concerns to be dispositive, not because the agency is obligated to discuss the Constitution, but rather because the First Amendment's boundaries had played such a prominent role in the formation of the

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179. *Id.* at 1824. Justice Kennedy also determined, however, that the FCC based its policy on the *Pacifica* decision rather than on factual findings and that its reasons for the change are the sort of reasons an agency may consider and act upon. *Id.*

180. *Id.* at 1826 (Stevens, J., dissenting).

181. *Id.*

182. *Id.* at 1827.

183. *Id.* at 1828.

184. *Id.* at 1829 (Ginsburg, J., dissenting) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 776 (1978) (Brennan, J., dissenting)).

185. *Id.* (Breyer, J., dissenting). Justice Breyer noted that the FCC had previously followed *Pacifica* in a narrow manner and therefore did not adequately justify, on constitutional grounds, its expanded scope. *Id.* at 1833–34.

186. *Id.* at 1830.

original policy.<sup>187</sup> According to Justice Breyer, the FCC failed to rely on empirical evidence for several of its justifications and failed to explain why many of its concerns regarding increasing rates of isolated utterances had yet to materialize under the former policy.<sup>188</sup>

Finally, Justice Breyer argued that a remand would give the FCC an opportunity to review its policy in light of the constitutional concerns raised through the prior proceedings, whereas the Court would prefer to foreclose such a discussion.<sup>189</sup>

#### IV. ANALYSIS

In *FCC v. Fox Television Stations, Inc.*, the Supreme Court of the United States held that the FCC provided a reasoned basis and explanation for its new policy, and therefore, ruled that the change in policy was not arbitrary and capricious.<sup>190</sup> In so holding, the Court failed to require the FCC to provide an adequate justification for its new policy that would satisfy the arbitrary and capricious standard.<sup>191</sup> In addition, the Court should have found the agency's policy to be arbitrary and capricious because it improperly relies upon cases whose factual underpinnings no longer justify limited First Amendment protection on broadcast media.<sup>192</sup> The Court also should have taken this opportunity to address the glaring weaknesses in the FCC's constitutional authority to limit First Amendment rights of broadcast media because that authority is based on historical circumstances of broadcast media that no longer exist and therefore cannot provide a constitutional basis for limiting First Amendment rights of broadcast media.<sup>193</sup>

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187. *Id.* at 1832–33. Because the FCC “works in the shadow of the First Amendment,” Justice Breyer reasoned, the FCC therefore must adequately explain its change in policy in constitutional terms as well. *Id.* at 1835.

188. *Id.* at 1839. Justice Breyer also criticized the FCC for failing to consider the policy's potential impact on smaller broadcasters as well as a potential chill in coverage that might result. *Id.* at 1835.

189. *Id.* at 1840 (“And a remand here would do no more than ask the agency to reconsider its policy decision in light of concerns raised in a judicial opinion.”).

190. *Id.* at 1812 (majority opinion).

191. *See infra* Part IV.A.

192. *See infra* Part IV.B.

193. *See infra* Part IV.C.



*A. The Court Should Have Found the FCC's New Policy to Be Arbitrary and Capricious Because the Agency Failed to Provide an Adequate Explanation for the Change*

The Court failed to require the FCC to provide an adequate explanation for its change in policy, which now allows the FCC to find isolated and fleeting expletives actionable. Although the FCC has argued that the new policy is not a change in policy, precedent demonstrates that the agency has never before sanctioned isolated and fleeting expletives.<sup>194</sup> The FCC's primary reason for the new policy, specifically the consequences of the "First Blow" theory, fails adequately to justify the new policy because the FCC neglected to explain why this theory, thirty years after its first articulation, has suddenly become so compelling as to require a significantly different policy.<sup>195</sup>

*1. Regardless of the FCC's Characterization of the Golden Globes Order, Its Action Announced a New Policy that Requires a Proper Explanation*

The FCC's decision to find fleeting expletives actionable represents a significant change in policy that must be properly explained.<sup>196</sup> The agency itself acknowledged this change when it issued the *Golden Globes Order*.<sup>197</sup> The agency also acknowledged the change in policy in both its *Omnibus Order* and its brief to the Court of Appeals.<sup>198</sup> The *Remand*

194. See *infra* Part IV.A.1.

195. See *infra* Part IV.A.2.

196. See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 447 (2d Cir. 2007) ("[T]he FCC has failed to articulate a reasoned basis for this change in policy."), *rev'd*, 129 S. Ct. 1800 (2009); see also *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 (1987) ("If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency."); *In re Application of WGBH Educ. Found.*, 43 Rad. Reg. 2d (P & F) 1436, 1441 & n.6 (1978) (distinguishing between the "verbal shock treatment" of the George Carlin monologue and "the isolated use of a potentially offensive word" and finding that the single use of an expletive in a program "should not call for us to act under the holding of *Pacifica*" (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 757, 760–61 (1978))); *Industry Guidance*, *supra* note 86, at 8008–09 (distinguishing between material that is repeated or dwelled on and material that is "fleeting and isolated" (quoting *Letter to L.M. Comm'ns of S.C., Inc.*, 7 F.C.C.R. 1595, 1595 (1992))); *Letter to L.M. Comm'ns of S.C., Inc.*, 7 F.C.C.R. at 1595 (finding that the single utterance of an expletive is not indecent because it was a "fleeting and isolated utterance which, within the context of live and spontaneous programming, does not warrant a Commission sanction").

197. See *Golden Globes Order*, 19 F.C.C.R. 4975, 4980 (2004) ("We now depart from this portion of the Commission's 1987 *Pacifica* decision . . . and any similar cases holding that isolated or fleeting use of the 'F-Word' or a variant thereof in situations such as this is not indecent . . .").

198. See *Omnibus Order*, 21 F.C.C.R. 2664, 2692 (2006) ("[W]e recognize that our precedent at the time of the broadcast indicated that the Commission would not take enforcement action against isolated use of expletives."); see also Respondent's Brief at 33, *Fox*, 489 F.3d 444 (06-

*Order*, however, seems to backtrack on this admission and instead suggests that the agency has not previously ruled on the issue of isolated expletives.<sup>199</sup>

The FCC's description of its previous lack of sanctions on isolated expletives fails to acknowledge how significantly the narrow holding in *Pacifica* impacted and shaped the FCC's "restrained enforcement policy" of the past.<sup>200</sup> The *Remand Order* fails to fully discuss the agency's shift from the narrow *Pacifica* holding.<sup>201</sup> Furthermore, the FCC suggested its new policy cannot conflict with *Pacifica* since *Pacifica* did not address the question of isolated and fleeting expletives.<sup>202</sup> This representation of *Pacifica* as leaving open the question of fleeting expletives represents a far cry from thirty years of narrow obedience to the case's holding.<sup>203</sup> More importantly, the FCC has taken advantage of the good faith courts have placed in the agency. For instance, Justice Powell's concurrence in *Pacifica* relied on the FCC's commitment to following the plurality's holding narrowly, and the court in *Action for Children's Television* also

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1760-ag), 2006 WL 5486967 ("In the *Golden Globe Order*, the Commission made clear that it was changing course with respect to the treatment of isolated expletives.").

199. See *Remand Order*, 21 F.C.C.R. 13299, 13307 (2006) ("Then, in 2004, the Commission itself considered for the first time in an enforcement action whether a single use of an expletive could be indecent. And in evaluating the broadcast of the F-Word during 'The Golden Globe Awards,' we overturned the Bureau-level decisions holding that an isolated expletive could not be indecent and disavowed our 1987 dicta on which those decisions were based.").

200. See *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 n.14 (D.C. Cir. 1988) ("[T]he FCC has assured this court, at oral argument, that it will continue to give weight to reasonable licensee judgments when deciding whether to impose sanctions in a particular case. Thus, the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy." (citation omitted)); see also *Fox*, 489 F.3d at 450 (describing the FCC's enforcement policy as "restrained").

201. See *Fox*, 129 S. Ct. at 1834 (Breyer, J., dissenting) (explaining that the FCC's order does not "acknowledge that an entirely different understanding of *Pacifica* underlay the FCC's earlier policy; they do not explain why the agency changed its mind about the line that *Pacifica* draws or its policy's relation to that line").

202. See *Remand Order*, 21 F.C.C.R. at 13,308–09 ("[I]t is significant that the 'occasional expletive' contemplated by the [*Pacifica*] Court was one that occurred in 'a two-way radio conversation between a cab driver and a dispatcher,'—a conversation not broadcast to a wide audience—or a telecast of an Elizabethan comedy,' settings far removed from the broadcast at issue here." (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978))); see also *Pacifica*, 438 U.S. at 760–61 ("The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast.").

203. See *In re Application of WGBH Educ. Found.*, 43 Rad. Reg. 2d (P & F) 1436, 1441 (1978) (noting that the Court's decision in *Pacifica* "affords this Commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast" and stating that "[w]e intend strictly to observe the narrowness of the *Pacifica* holding." (italics added)); see also *supra* note 196 (listing instances of narrow obedience to *Pacifica*).

relied on the agency's commitment to a "restrained enforcement policy."<sup>204</sup> Regardless of how the FCC interprets the policy it announced in the *Golden Globes Order*, either as a new policy or not, the Supreme Court has concluded that this new policy demands a sufficient explanation that meets the "arbitrary and capricious" test.<sup>205</sup>

2. *The "First Blow" Theory Is an Insufficient Explanation for a Policy Change Because the Theory Existed at the Time of the Original Policy's Development*

The primary reason<sup>206</sup> for new policy posited by the FCC, the "First Blow" theory,<sup>207</sup> fails to adequately justify the new policy because the FCC did not explain why such a theory, which has existed since *Pacifica*, only now justifies a wider enforcement of isolated and fleeting expletives.<sup>208</sup> The FCC justified the change by arguing that "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow.'"<sup>209</sup> The "First Blow" theory, however, fails to justify the change in policy because the concept of the "first blow" has existed since *Pacifica*, but it has never before been used to justify a stronger regulatory regime.<sup>210</sup> Although the Court suggested that

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204. See *supra* note 67 and accompanying text (discussing the FCC's cautious approach to enforcement actions); see also *Action for Children's Television*, 852 F.2d at 1340 n.14 ("[T]he FCC has assured this court, at oral argument, that it will continue to give weight to reasonable licensee judgments when deciding whether to impose sanctions in a particular case. Thus, the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy." (citation omitted)).

205. See *supra* text accompanying note 164 (acknowledging that the FCC's decision to find isolated and fleeting expletives actionable represents a shift in policy).

206. Petitioners stated that the two other reasons to justify the change in policy were (1) it replaces a purportedly per se rule with a contextual, case-by-case approach to fleeting expletives, and (2) it prevents the risk that broadcasters would air isolated expletives more frequently. Brief for the Petitioners at 23–26, *Fox*, 129 S. Ct. 1800 (No. 07-582), 2008 WL 2308909. There was, however, "never a per se rule against liability for isolated expletives; the FCC's contextual approach that followed from *Pacifica* required that an utterance, whether repeated or not, constitute 'verbal shock treatment.'" Brief of Respondent at 19, *Fox*, 129 S. Ct. 1800 (No. 07-582), 2008 WL 3153439; see also *supra* note 188 and accompanying text (criticizing the FCC for failing to produce evidence that the new policy was needed to stop an increase of expletives over the airwaves).

207. See *supra* note 116 and accompanying text (discussing the "First Blow" theory).

208. See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 458 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1800 (2009) ("[T]he Commission provides no reasonable explanation for why it has changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between *Pacifica* and *Golden Globes*."); see also Brief of Respondent at 28, *Fox*, 129 S. Ct. 1800 (No. 07-582), 2008 WL 3153439 (same).

209. *Remand Order*, 21 F.C.C.R. 13299, 13309 (2006).

210. See *supra* note 208 and accompanying text (discussing the FCC's silence on the question of why the "first blow" of an isolated expletive is more harmful than it was thirty years ago).

the agency “could rationally decide it needed to step away from its old regime where nonrepetitive use of an expletive was *per se* nonactionable,”<sup>211</sup> the FCC is still required to account for its new interpretation of the harms presented by the first blow—a requirement that was not satisfied in the present case.<sup>212</sup> The FCC also failed to explain why the original reasons for not finding isolated expletives as actionable based on the “First Blow” theory are no longer dispositive.<sup>213</sup> The agency’s mere recitation of the “First Blow” theory without any additional information or reasoning that would suggest why, after thirty years, this theory now warrants an entirely different policy, can only be described as a “sudden and unexplained change,” and therefore, is arbitrary and capricious.<sup>214</sup>

*B. The Court Failed to Acknowledge that the Factual Circumstances that Originally Justified Restricting Broadcast Media’s First Amendment Rights No Longer Exist, and Therefore the FCC’s Policy, Relying on Case Law Based on Those Circumstances, Is Arbitrary and Capricious*

In addition to lacking an adequate explanation for its change in policy, the FCC’s new policy is arbitrary and capricious because it “failed to consider an important aspect of the problem,”<sup>215</sup> namely that modern technology has eroded the circumstantial justifications for the unique First Amendment limitations on broadcast media. First, the factual circumstances that prompted the rulings in *Red Lion* and *Pacifica* have changed and are vestiges of the past, and the logic of such limits on First Amendment protection has been entirely rejected with regard to other forms of media.<sup>216</sup> Second, as the similarities between broadcast media and other forms of media grow, the justifications for placing special restrictions on broadcast media grow weaker and more illogical.<sup>217</sup>

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211. *Fox*, 129 S. Ct. at 1813.

212. *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 458 (2d Cir. 2007) (“[T]he Commission provides no reasonable explanation for why it has changed its perception that a fleeting expletive was not a harmful ‘first blow’ for the nearly thirty years between *Pacifica* and *Golden Globes*.”).

213. *See supra* note 208 and accompanying text; *see also Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (“Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be ‘arbitrary, capricious [or] an abuse of discretion.’” (citations omitted)).

214. *See supra* note 208 and accompanying text.

215. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also supra* text accompanying note 143 (discussing possible reasons why an agency policy may be arbitrary and capricious).

216. *See infra* Part IV.B.1.

217. *See infra* Part IV.B.2.

1. *Red Lion and Pacifica Are No Longer Viable Precedents to Justify the FCC's Restrictions on Broadcast Media's First Amendment Rights*

The FCC improperly bases its enforcement regime on decisions, such as *Red Lion* and *Pacifica*, that no longer justify restrictions on broadcast media's First Amendment rights.<sup>218</sup> *Red Lion* found that the government was justified in regulating broadcast media because “[w]ithout government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.”<sup>219</sup> The Court in *Pacifica* went beyond the argument of spectrum scarcity and justified greater regulation based on broadcast media's “uniquely pervasive presence” and its “unique[] accessib[ility] to children.”<sup>220</sup> Thirty years later, however, “dramatic technological advances have eviscerated the factual assumptions underlying those decisions.”<sup>221</sup>

Broadcast spectrum scarcity is no longer the problem it had been in the past.<sup>222</sup> For instance, the number of over-the-air broadcast stations grew from 7411 in 1969 to more than 15,000 by the end of 2004.<sup>223</sup> Justice Thomas, in his concurrence, noted that “the trend should continue with broadcast television's imminent switch from analog to digital transmission, which will allow the FCC to ‘stack broadcast channels right beside one another along the spectrum, and ultimately utilize significantly less than the 400 MHz of spectrum the analog system absorbs today.’”<sup>224</sup> These advances indicate that modern technology has created spectrum abundance where there once was spectrum scarcity—a development that undermines the validity of cases such as *Red Lion*.<sup>225</sup>

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218. See *The Supreme Court 2008 Term—Leading Cases*, 123 HARV. L. REV. 352, 361 (2009) (“In light of these factual and legal developments, an FCC revision of its constitutional position probably should have counseled relaxation of its enforcement policy, rather than expansion.”).

219. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 376 (1969).

220. *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978) (plurality).

221. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1821 (2009) (Thomas, J., concurring).

222. See generally *supra* Part II.A.1 (discussing the beginnings of broadcast media without regulation).

223. *Fox*, 129 S. Ct. at 1821 (citing Brief of Respondents NBC Universal, Inc., NBC Telemundo License Co., CBS Broad, Inc., and ABC, Inc. at 37–38, *Fox*, 129 S. Ct. 1800 (No. 07-582), 2008 WL 3153438; see also Adam Thierer, *Why Regulate Broadcasting?: Toward a Consistent First Amendment Standard for the Information Age*, 15 COMM.LAW CONSPETCUS 431, 438 (2007) (stating that the number of broadcast television stations and radio stations has doubled since 1969).

224. *Fox*, 129 S. Ct. at 1821 (quoting *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 294 (D.C. Cir. 2003)).

225. See *supra* notes 218, 222 and accompanying text (arguing that factual circumstances have eroded the justifications for limiting the First Amendment rights of broadcast media); see also

The FCC has acknowledged many of these arguments. John Berresford, a staff attorney in the FCC's Media Bureau, concluded that the scarcity rationale "is based on fundamental misunderstandings of physics and economics, efficient resource allocation, recent field measurements, and technology," and "is outmoded in today's media marketplace."<sup>226</sup> The eroding validity of spectrum scarcity directly weakens the FCC's justification for its enforcement regime, which has relied on this concept to regulate broadcast media.<sup>227</sup>

Recent spectrum abundance is coupled with access to cable and satellite television, satellite radio, the Internet, and blogs, all of which suggest that no one source of information, even broadcast media, is dominant or deserving of unique restrictions.<sup>228</sup> The dual developments of spectrum abundance and the explosion of alternative media forms mean that "traditional broadcast television and radio are no longer the 'uniquely pervasive' media forms they once were."<sup>229</sup> When considering the variety of sources of information available to the average American, "[s]carcity is the last word that would come to mind in regard to the vast array of communications outlets available today."<sup>230</sup>

Although the FCC presented evidence suggesting that broadcasting remains "a principal source of information and entertainment for a great part of the Nation's population,"<sup>231</sup> broadcast media is no longer uniquely

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Winer, *supra* note 97, at 239 ("[T]he scarcity rationale for regulation of broadcasting was flawed on factual, legal, and policy grounds as well as in its application.").

226. John W. Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed* ii (FCC Media Bureau Staff, Research Paper, 2005), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-257534A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257534A1.pdf).

227. See *supra* notes 218, 222 and accompanying text.

228. Cf. *In re* 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996, 18 F.C.C.R. 13,620, 13,634 (2003) ("In 1979, the vast majority of households had six or fewer local television stations to choose from, three of which were typically affiliated with a broadcast network."). "In 2002, for the first time, cable television collectively had more primetime viewers on average over the course of the year than broadcast programming (48% share for cable programming versus 46% share for broadcast programming)." *Id.* at 13,665. Today, approximately eighty-six percent of U.S. households subscribe to cable or satellite television. *In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 21 F.C.C.R. 2503, 2506–07 (2006). Satellite radio, an industry that did not even exist prior to December 2001, boasted around fourteen million subscribers nationwide between the two providers, Sirius and XM, by the end of 2006. Sarah McBride, *What a Difference a Year Has Made for Once-Highflying Satellite Radio*, WALL ST. J., Dec. 8, 2006, at B1. Roughly three-quarters of Americans are now online and spend an average of nine hours weekly on the Internet. *In re* 2002 Biennial Regulatory Review, 18 F.C.C.R. at 13,765.

229. *Fox*, 129 S. Ct. at 1822.

230. Steve Chapman, *You Will Watch the Debates on Airwaves, Feds Don't Know Best*, CHI. TRIB., Oct. 15, 2000, at C19.

231. *Remand Order*, 21 F.C.C.R. 13,299, 13,318 (2006) (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 190 (1997)). The Kaiser Family Foundation reports that "68 percent of

pervasive as it was in the time of *Red Lion* and *Pacifica*. Many Americans still rely on broadcast televisions and radios, but the ubiquitous presence of a host of other forms of information and entertainment means that broadcast media no longer has a unique hold on the American eye and ear.<sup>232</sup>

Abundance does not necessitate a finding of unique pervasiveness, nor does it justify restrictions on First Amendment rights. A media comparison study in 2008 found that just under forty percent of people surveyed used broadcast as their “primary” news source.<sup>233</sup> This number is substantial, but it hardly can be considered so dominant as to require its own form of regulation when sixty percent of those surveyed primarily use public television, cable, radio, newspapers, and other media as sources of news. Technology has rendered broadcast media no longer unique and it has subsequently eroded the FCC’s ability to rely on unique pervasiveness as a justification for restrictions on broadcast media’s First Amendment rights.<sup>234</sup> As a result, the Court should have found the FCC’s reliance on such anachronistic cases for its new policy as arbitrary and capricious.<sup>235</sup>

Furthermore, broadcast media can hardly be understood as uniquely accessible to children today because they have comparable access to indecent material via broadcast, cable, and the Internet.<sup>236</sup> This technological development demonstrates that broadcast media is no longer “uniquely” accessible to children.<sup>237</sup> It was not broadcast’s abundance, but

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children aged eight to 18 have a television set in their bedrooms, and nearly half of those sets do not have cable or satellite connections.” *Id.* at 13,319 (citing KAISER FAMILY FOUNDATION, GENERATION M: MEDIA IN THE LIVES OF 8–18 YEAR-OLDS 77 (2005)).

232. *See supra* text accompanying note 230 (discussing how various media forms have grown in popularity over the last twenty years).

233. Television Bureau of Advertising, Inc., TVB Media Comparisons Study 2008, Adults 18+, [http://www.tvb.org/rcentral/mediatrendstrack/tvbasics/43\\_PrimaryNewsSource.asp](http://www.tvb.org/rcentral/mediatrendstrack/tvbasics/43_PrimaryNewsSource.asp) (last visited Apr. 16, 2010).

234. *See supra* notes 218, 222 and accompanying text.

235. *See supra* text accompanying notes 226–227.

236. Brief of Respondent at 44, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) (No. 07-582), 2008 WL 3153439 (“As more and more traditional audio and video content is delivered by means of the Internet, broadcasting will become even less unique in its accessibility to children.”). The National Center for Education Statistics (“NCES”) estimates that “about 90 percent of children and adolescents ages 5–17 (47 million persons) use computers, and about 59 percent (31 million persons) use the Internet.” NAT’L CTR. FOR EDUC. STATISTICS, COMPUTER AND INTERNET USE BY CHILDREN AND ADOLESCENTS IN 2001 iv (2004). In addition, the NCES estimates that “about three-quarters of 5-year-olds use computers, and over 90 percent of teens (ages 13–17) do so.” *Id.*

237. *See* Brief of Respondent at 43–44, *Fox*, 129 S. Ct. 1800 (No. 07-582), 2008 WL 3153439 (discussing broadcast media’s decreasingly unique accessibility compared to the Internet and cable); *see also* Jonathan D. Wallace, *The Specter of Pervasiveness: Pacifica, New Media, and Freedom of Speech* I (Cato Institute, Briefing Paper No. 35, 1998), available at <http://www.cato.org/pubs/briefs/bp-035.pdf> (“[T]he logic of pervasiveness could apply to cable television, the Internet, and even the print media. If such logic applies to *any* medium, it could apply to *all* media.”).

rather its dominance, that originally justified its unique regulation.<sup>238</sup> Without this dominance, the FCC has a more difficult case for justifying such unique regulations.<sup>239</sup> Furthermore, advances in technology such as the V-Chip<sup>240</sup> have allowed parents “to use a standardized rating system to pre-set their televisions to block the content of programming and ensure that their children are not exposed to potentially offensive language” and have eliminated the need and justification for government regulation.<sup>241</sup> All of this evidence strongly suggests that in the absence of this dominance, such regulations are no longer justified.<sup>242</sup>

The FCC’s authority to limit the First Amendment rights of broadcast media derives from precedents such as *Red Lion* and *Pacifica*.<sup>243</sup> Modern technology, however, has eroded the validity of these precedents, and therefore the Court erred in determining that the FCC’s new policy finding isolated expletives to be actionable was not arbitrary and capricious.<sup>244</sup>

2. *As the Similarities Between Broadcast Media and Other Forms of Media Grow, the Justifications for Unique Broadcast Regulations Become Increasingly Illogical*

The changing circumstances of broadcast media have driven it closer in appearance and form to cable television and the Internet, and farther away from broadcast media of the 1970s, thereby suggesting that regulating broadcast media in a different manner<sup>245</sup> no longer makes sense.<sup>246</sup> The

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238. See *Industry Guidance*, *supra* note 86, at 8020 (“If the rules regulating broadcast content were ever a justifiable infringement of speech, it was because of the relative dominance of that medium in the communications marketplace of the past.”).

239. See *supra* note 218 and accompanying text; see also *supra* text accompanying note 221.

240. The V-Chip enables television programs to be blocked based on their rating. FCC, V-Chip: Viewing Television Responsibly, <http://www.fcc.gov/vchip> (last visited June 27, 2010).

241. Brief of Respondent at 45–46, *Fox*, 129 S. Ct. 1800 (No. 07-582), 2008 WL 3153439 (citing FCC, *supra* note 240). But see Sibile Morency, *V-Chip for Computers is Proposed*, ABC NEWS, Apr. 17, 2007, <http://abcnews.go.com/Technology/story?id=3488856&page=1> (discussing critics’ beliefs that the V-Chip is a failure).

242. See Thierer, *supra* note 223, at 451 (“In sum, in a world of technological convergence and media abundance, *everything* is pervasive. Consequently, it is illogical to claim that broadcasting holds a unique status among all the competing media outlets and technologies in the marketplace.”).

243. See *supra* Part II.B (explaining the factual circumstances that justified limited First Amendment protection for broadcast media in *Red Lion* and *Pacifica*).

244. See Thierer, *supra* note 223, at 440 (noting that the technological advances in media have rendered regulations outdated and unnecessary, and predicting that the Supreme Court would “drive the final stake through the heart of *Red Lion* and the scarcity rationale”).

245. Although broadcast is regulated more stringently than cable, satellite, and the Internet, those other forms of media are not without substantive regulations. For instance, although the FCC only monitors broadcast for indecent material, the agency enforces prohibitions on obscene material against cable and satellite services. FCC Enforcement Bureau, Obscenity, Indecency &



growing similarity between broadcast media, which is subject to unique restrictions, and cable television<sup>247</sup> and the Internet,<sup>248</sup> subject to much weaker regulations, leaves the Pervasiveness Doctrine<sup>249</sup> at a crossroads: Is the Doctrine applicable to other mediums or has it become an anachronism?<sup>250</sup> Court decisions regarding the regulation of other mediums consistently reject the applicability of the Pervasiveness Doctrine, recognizing that it is a vestige of a period of broadcast long past.<sup>251</sup>

The Court's reasoning in *Reno* and *Turner* distinguishing the Internet and cable television from broadcast scarcity in 1978 also applies to the distinction between the broadcast media of 1978 and the broadcast media of today, demonstrating that unique restrictions on broadcast media lack reasoned support.<sup>252</sup> The Court ruled that *Pacifica* could not justify the Communications Decency Act because the factual circumstances of the Internet are "unlike the conditions that prevailed when Congress first

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Profanity—Frequently Asked Questions, <http://www.fcc.gov/eb/oip/FAQ.html> (last visited June 27, 2010). Congress has enacted several laws intended to combat the spread of objectionable material and conduct on the Internet, namely material and conduct related to child pornography and sexual predators. See PROTECT Our Children Act of 2008, Pub. L. No. 110–401, 122 Stat. 4229 (codified at 42 U.S.C. §§ 17601–17631, 2258A–2258E) (requiring the Department of Justice to aid law enforcement efforts, including Internet Crimes Against Children task forces, to investigate and prosecute child predators); Keeping the Internet Devoid of Sexual Predators Act of 2008, Pub. L. No. 110–400, 122 Stat. 4224 (codified at 42 U.S.C. §§ 16915a–16915b) (requiring sexual offenders to register Internet identifiers, such as e-mails); Child Safe Viewing Act of 2007, Pub. L. No. 110–452, 122 Stat. 5025 (requiring the FCC to investigate and report on the sufficiency of parental blocking technologies for platforms such as the Internet).

246. See Angela J. Campbell, *The Legacy of Red Lion*, 60 ADMIN. L. REV. 783, 788 (2008) ("I do not think it makes sense to apply different First Amendment tests to the same program depending on whether it comes into a home by broadcast, cable, or Internet."); Randolph J. May, *Charting A New Constitutional Jurisprudence for the Digital Age*, 3 CHARLESTON L. REV. 373, 376 (2009) (stating that First Amendment jurisprudence should "accord all the electronic media the same high level of free speech protection that the print media has always enjoyed"); Wallace, *supra* note 237, at 1 ("[T]he logic of pervasiveness could apply to cable television, the Internet, and even the print media.").

247. See *supra* note 132 and accompanying text (concluding that cable television cannot be regulated like broadcast media).

248. See *supra* note 121 and accompanying text (concluding that the Internet cannot be regulated like broadcast media).

249. See *supra* Part II.B.2 (discussing broadcast as "uniquely pervasive").

250. See Wallace, *supra* note 237, at 1 ("[T]he logic of pervasiveness could apply to cable television, the Internet, and even the print media. If such logic applies to *any* medium, it could apply to *all* media.").

251. See *supra* note 132 and accompanying text (disusing case precedent that concluded that cable television cannot be regulated like broadcast media); see also *supra* note 121 and accompanying text (discussing case precedent that concluded that the Internet cannot be regulated like broadcast media).

252. See *supra* note 242 and accompanying text (discussing the lack of logic behind regulating broadcast more stringently than other media).

authorized regulation of the broadcast spectrum.”<sup>253</sup> Similarly, the Court in *Turner* found that the sheer increase in available television and radio stations undermines any characterizations of cable media as being scarce.<sup>254</sup> The factual circumstances of today’s broadcast media share more similarities with the Internet and cable than the scarce commodity of 1978.<sup>255</sup>

As broadcast media comes to resemble the Internet and cable television more, it becomes far less logical and justifiable to regulate broadcast more stringently than other media.<sup>256</sup> The Court should have found the FCC’s new policy arbitrary and capricious because it seeks to differentiate between broadcast media and other forms of media in a manner that is illogical and unjustifiable.<sup>257</sup>

*C. The Court Should Have Reviewed and Invalidated the FCC’s  
Enforcement Regime on Constitutional Grounds Because of Its  
Reliance on the Flawed Justifications of Pacifica and Red Lion*

Although the lower court’s decision was decided on statutory grounds, the Court should have taken this opportunity to resolve the constitutional issues of this case by ruling that the outdated precedents of *Red Lion* and *Pacifica* can no longer provide the constitutional justification for the FCC’s indecency regime.<sup>258</sup> The Court clearly intended to focus solely on the issue of whether the FCC’s change in policy passed the “arbitrary and capricious” test rather than to examine any and all constitutional issues that necessarily exist when discussing the FCC’s ability to regulate speech protected by the First Amendment.<sup>259</sup> The Court’s disinterest in addressing the constitutional validity of policy might also be explained by the Court’s reluctance to review the validity of *Pacifica* and its justifications without

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253. *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

254. *See supra* note 136 and accompanying text.

255. *See supra* note 242 and accompanying text (suggesting that technology has increased the similarities between broadcast and other forms of media).

256. *See supra* note 242 and accompanying text (discussing the lack of logic in regulating broadcast differently from other mediums).

257. *See supra* note 242 and accompanying text.

258. *See The Supreme Court 2008 Term—Leading Cases*, 123 HARV. L. REV. 352, 361–62 (2009) (“At a minimum, in failing to evaluate the constitutional validity of the agency’s position, the Court performed an incomplete review of the FCC’s reasoning and permitted a constitutionally suspect—if not outright invalid—regulatory change.”); *see also* Dave Hutchinson, Note, “*Fleeting Expletives*” Are the Tip of the Iceberg: Fallout from Exposing the Arbitrary and Capricious Nature of Indecency Regulation, 61 FED. COMM. L.J. 229, 249 (2008) (“[T]his case presents an opportunity for the Court to cut through the Gordian knot of indecency rhetoric . . .”).

259. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) (“The Second Circuit did not definitively rule on the constitutionality of the Commission’s orders . . . . We see no reason to abandon our usual procedures in a rush to judgment without a lower court opinion.”).

the input of the FCC or Congress.<sup>260</sup> The Court, however, should have used this opportunity to address whether the change in factual circumstances in broadcast has impacted the validity of important precedents such as *Pacifica*.<sup>261</sup>

In the years since *Pacifica*, the arguments of spectrum scarcity and the Pervasiveness Doctrine have come under significant attack as the number and variety of media outlets, both in broadcast and other mediums such as cable television, satellite radio, and the Internet have increased tremendously.<sup>262</sup> The Court, however, did not see an immediate need to address the constitutional issues, believing that they would be addressed soon and that such interim harms would be insignificant.<sup>263</sup>

The Court's decision to narrowly review only the APA issue conflicts with the FCC's original petition for certiorari.<sup>264</sup> The petitioners sought certiorari not only because of the Second Circuit's ruling on the APA issue, but also to resolve the Second Circuit's claim that the FCC could not "adequately respond to the constitutional . . . challenges" raised below.<sup>265</sup> Ironically, once certiorari was granted, the petitioners then argued that the Court could not consider these issues.<sup>266</sup> As consideration of the

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260. See *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376 n.11 (1984). The Court observed:

The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.

*Id.* (citation omitted).

261. See *supra* note 258 (criticizing the Supreme Court for not addressing the constitutional issues of the present case).

262. See *supra* Part V.B.

263. See *Fox*, 129 S. Ct. at 1819. The Court explained:

It is conceivable that the Commission's order 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 constitutional, will be determined soon enough, perhaps in this very case. Meanwhile, any chilled references to excretory and sexual material "surely lie at the periphery of First Amendment concern."

*Id.* (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978)).

264. See Petition for a Writ of Certiorari at 15, *Fox*, 129 S. Ct. 1800 (No. 07-582), 2007 WL 3231567 (requesting certiorari on the constitutional question because the FCC was concerned that the Second Circuit, on remand, would invalidate its new policy on constitutional grounds).

265. *Id.*

266. Brief for the Petitioners at 43, *Fox*, 129 S. Ct. 1800 (No. 07-582), 2008 WL 2308909 ("Consideration of respondents' constitutional arguments at this stage would be especially inappropriate in light of the rule that a 'cross-petition is required . . . when the respondent seeks to

constitutional issues was at least a part of the petition for certiorari, the Court should consider those issues.<sup>267</sup>

Although the Court usually seeks to avoid addressing constitutional issues when a case can be decided on statutory grounds,<sup>268</sup> its refusal in the present case is an exercise in futility.<sup>269</sup> This decision only delays the inevitable as the Second Circuit's dictum strongly suggests that since the Court was not persuaded by its decision to overrule the FCC's new policy on APA grounds, on remand, it will explicitly reject the new policy as unconstitutional.<sup>270</sup> Justice Thomas all but acknowledged this outcome as well.<sup>271</sup> The Court, however, has achieved a precise, conservative approach to upsetting precedent at the expense of clear and certain laws for broadcasters.<sup>272</sup> In affirming the FCC's new policy, at least temporarily, without ensuring that the policy is constitutionally valid, the Court thereby unnecessarily creates uncertainty for both the FCC's enforcement regime and the broadcast networks.<sup>273</sup>

As the petitioners noted, neither party can move beyond this case not knowing, for how long, this new policy will remain in place.<sup>274</sup> In many cases, the Court's efforts to avoid constitutional issues and resolve a case on

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alter the judgment below.” (quoting *Nw. Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994))).

267. See *supra* note 258 and accompanying text (criticizing the Supreme Court for not addressing the constitutional issues of the present case).

268. See *supra* Part II.D (discussing the Court's tradition, and recent upheaval thereof, of not resolving issues until a lower court passes judgment).

269. See Transcript of Oral Argument at 27, *Fox*, 129 S. Ct. 1800 (No. 07-582) (arguing that remanding on the constitutional question “has an air of real futility” (comment of Ginsburg, J.)).

270. See HELGI C. WALKER & MARTHA E. HELLER, COMMUNICATIONS LAW 2009 317 (2009) (“After the Second Circuit analyzes the Commission’s fleeting indecency policy using a First Amendment lens, the case likely will return to the Supreme Court.”); see also *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 462 (2d Cir. 2007), *rev’d*, 129 S. Ct. 1800 (2009) (“[W]e are skeptical that the Commission can provide a reasoned explanation for its ‘fleeting expletive’ regime that would pass constitutional muster.”). The Second Circuit also implied that the only reason it did not rule on the constitutional issues in this case was because the court had the opportunity and obligation to rule only on the APA issue. *Id.* at 467 (“[B]ecause we can decide on this narrow ground, we vacate and remand so that the Commission can set forth that analysis.”).

271. See *supra* note 177 and accompanying text (suggesting that the constitutional issues of the present case should be reviewed in the future).

272. See Andrew Smith, Comment, *Out on a Limb Without Direction: How the Second Circuit’s Decision in Fox v. FCC Failed to Adequately Address Broadcast Indecency and Why the Supreme Court Must Correct the Confusion*, 27 ST. LOUIS U. PUB. L. REV. 383, 425 (2008) (“[I]f the Supreme Court fails to address these [constitutional] challenges, broadcasters will continue to question the FCC’s authority, leading to an excess of Enforcement Bureau appeals and unnecessary future litigation.”).

273. *Id.*

274. See *supra* note 264 and accompanying text (explaining that FCC requested certiorari because the agency was concerned that the Second Circuit, on remand, would invalidate its new policy on constitutional grounds).

statutory issues are commendable. In the present case, the harms of leaving the FCC and broadcasters in the dark as to the future of the policy outweigh the Court's interest in restrained judicial action, particularly when a review of this case or a case very similar in the near future is likely.<sup>275</sup>

In addition, the Supreme Court's recent decision in *Citizens United v. FEC*<sup>276</sup> demonstrates the Court's ability to review constitutional issues when it could resolve the case on narrow grounds. Although the Court has traditionally sought to avoid addressing constitutional issues not specifically raised by the lower court,<sup>277</sup> *Citizen United* illustrates the Court's inclination to avoid this tradition when determining that it is necessary.<sup>278</sup>

In the present case, the Court held tightly to the practice of avoiding constitutional issues not decided by the lower court,<sup>279</sup> but in *Citizens United* the Court determined that this practice was inappropriate.<sup>280</sup> Although the Court provided multiple justifications for not abiding by this tradition, several of the reasons articulated are equally applicable to the instant case. For instance, the Court relied on the fact that the lower court "passed" on the constitutional issue despite not specifically ruling on it.<sup>281</sup> Similarly, in the instant case, the Second Circuit passed on the constitutional validity of *Pacifica* and *Red Lion*.<sup>282</sup> The Court also

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275. See *supra* note 272 and accompanying text (explaining that the uncertainty regarding the constitutional validity of the FCC's new policy will create unnecessary litigation); see also *Fox*, 489 F.3d at 462 ("[W]e are skeptical that the Commission can provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster.").

276. 130 S. Ct. 876 (2010).

277. See *supra* note 146 and accompanying text (discussing precedents in which the Supreme Court refrained from reaching a constitutional issue when statutory grounds were available).

278. See *Citizens United*, 130 S. Ct. at 932 (Stevens, J., dissenting) ("Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.").

279. See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) ("The Second Circuit did not definitively rule on the constitutionality of the Commission's orders . . . . We see no reason to abandon our usual procedures in a rush to judgment without a lower court opinion.").

280. *Citizens United*, 130 S. Ct. at 892 (majority opinion) ("It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications.").

281. See *supra* note 152 and accompanying text (discussing case precedent that enables the Supreme Court to decide on issues "passed upon" by a lower court).

282. See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 462 (2007), *rev'd*, 128 S. Ct. 1800 (2009). The Court noted:

[W]e refrain from deciding the various constitutional challenges . . . . We note, however, that in reviewing these numerous constitutional challenges, *which were fully briefed to this court and discussed at length during oral argument*, we are skeptical that the Commission can provide a reasoned explanation for its "fleeting expletive" regime that would pass constitutional muster.

determined that reviewing the constitutional issue would not involve a new claim because *Citizens United* had raised it in the lower court.<sup>283</sup> In the instant case, parties challenging the new FCC policy initially raised a constitutional challenge in the lower court,<sup>284</sup> and the FCC referred to the constitutional issues in its writ of certiorari.<sup>285</sup> The Court in *Citizens United* also claimed that the conduct of the parties and the claims they brought to the lower court could not restrict the Court's ability to explore broader remedies,<sup>286</sup> but this contradicts the Court's restrained approach in the present case.<sup>287</sup> Furthermore, two of the equitable considerations relied upon in *Citizens United*—(1) the uncertainty of the law if the Court did not address the constitutional issue,<sup>288</sup> and (2) the substantial amount of time and energy that would be wasted in further challenges to the law<sup>289</sup>—are also compelling considerations in the present case.<sup>290</sup> Although the Court in the present case decided to stay within its tradition of avoiding constitutional issues, its decision in *Citizens United* reveals that this adherence to precedent was a function of its desire rather than its ability.<sup>291</sup>

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*Id.* (emphasis added). The court recognized that its constitutional analysis was dicta, but hoped that it could “clarify a complicated subject” and “guide future courts to adopt fair and efficient procedures.” *Id.* at 426 n.12 (citation omitted).

283. See *supra* note 153 and accompanying text (discussing precedent that allows the Supreme Court to review issues when they are raised earlier in a case even when they are not specifically decided upon by the lower court).

284. Brief of Petitioner CBS Broad., Inc. at 13, *Fox*, 489 F.3d 44 (No. 06-1760-ag(L)), 2006 WL 4900577 (challenging the new FCC policy as contradicting the First Amendment principle of granting speakers “breathing space”).

285. See Petition for a Writ of Certiorari at 15, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) (No. 07-582), 2007 WL 3231567 (requesting certiorari because the FCC was concerned that the Second Circuit, on remand, would invalidate its new policy on constitutional grounds).

286. See *supra* note 154 and accompanying text.

287. *Fox*, 129 S. Ct. at 1819 (refusing to review the constitutional issue because the Second Circuit did not definitively rule on it).

288. See *supra* note 155 and accompanying text (discussing the resulting legal uncertainty of the BCRA if the Court were to not reach the constitutional issue).

289. See *supra* note 156 and accompanying text (discussing the substantial time and energy that would be poured into election speech litigation).

290. See Smith, *supra* note 272, at 425 (“[I]f the Supreme Court fails to address these [constitutional] challenges, broadcasters will continue to question the FCC’s authority, leading to an excess of Enforcement Bureau appeals and unnecessary future litigation.”); see also Petition for a Writ of Certiorari at 15, *Fox*, 129 S. Ct. 1800 (No. 07-582), 2007 WL 3231567 (requesting certiorari because the FCC was concerned that the Second Circuit, on remand, would invalidate its new policy on constitutional grounds).

291. See *Citizens United v. FEC*, 130 S. Ct. 876, 932 (2010) (Stevens, J., dissenting) (“Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.”).

Had the Court decided to review the constitutionality of *Pacifica*, it should have ruled that the changes in factual circumstances undermine the case and justify a departure from its precedent and an invalidation of the FCC's enforcement regime.<sup>292</sup> The original justifications for limiting First Amendment protections—spectrum scarcity, unique pervasiveness, and unique accessibility to children—no longer exist to the same degree as they existed in 1978 because of technological advancements, both with regard to broadcast media and other forms of media.<sup>293</sup> The changing circumstances of broadcast media have undermined the constitutional foundations of the FCC enforcement regime.<sup>294</sup> In his concurrence, Justice Thomas also concluded that analysis of *Pacifica* ought to lead to a departure from precedent.<sup>295</sup> Justice Breyer, in his dissent, also expressed a desire for a review of the constitutional issues in this case on remand.<sup>296</sup> The Court should have reviewed the constitutional validity of *Pacifica* and *Red Lion* and ruled that the changed circumstances of broadcast cannot support the FCC's new enforcement regime.<sup>297</sup>

## V. CONCLUSION

In *FCC v. Fox*, the Supreme Court held that the FCC's new policy allowing sanctions on isolated and fleeting expletives was not arbitrary and capricious.<sup>298</sup> The Court, however, failed to require the FCC to provide a reasonable explanation of the need for changing policy after thirty years of finding isolated and fleeting expletives not actionable.<sup>299</sup> Furthermore, the Court failed to address the FCC's unreasonable reliance on precedents such as *Pacifica* and *Red Lion*, cases based on the factual circumstances of

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292. See May, *supra* note 246, at 376 (“Should the Court take on the constitutional issue, it would have an opportunity to rationalize its First Amendment jurisprudence in a way that would accord all the electronic media the same high level of free speech protection that the print media has always enjoyed.”); see also *supra* note 244 and accompanying text (arguing that the *Red Lion* ruling should be overturned because the scarcity rationale is flawed).

293. See *supra* Part IV.B (discussing how technological advancements have undermined the scarcity, unique pervasiveness, and unique accessibility to children rationales).

294. See *supra* note 292 and accompanying text.

295. *Fox*, 129 S. Ct. at 1822 (Thomas, J., concurring) (“These dramatic changes in factual circumstances might well support a departure from precedent under the prevailing approach to *stare decisis*.”).

296. See *id.* at 1840 (Breyer, J., dissenting) (“And a remand here would do no more than ask the agency to reconsider its policy decision in light of the concerns raised in a judicial opinion. . . . I would not now foreclose, as the majority forecloses, our further consideration of this matter.”).

297. See *supra* note 258 and accompanying text; see also Wallace, *supra* note 237, at 1 (“The Supreme Court should dispel this specter of censorship by rejecting the pervasiveness doctrine as a dangerously broad and vague excuse for speech regulation.”).

298. *Fox*, 129 S. Ct. at 1812 (majority opinion).

299. See *supra* Part IV.A.

broadcast media in the 1970s that no longer apply to modern broadcasting.<sup>300</sup> Finally, the Court should have invalidated the FCC's enforcement regime because it relies on constitutional precedents that are no longer viable.<sup>301</sup> The Court's failure to address the disparity in regulatory stringency between broadcast media and other mediums merely delays the inevitable. The Court's failure to fully address the dramatic changes in the factual circumstances surrounding broadcast media casts a dark and confusing shadow over the legitimacy and scope of the FCC's authority to regulate isolated and fleeting expletives. Going forward, the FCC will warily exercise its new powers, unsure of their constitutional boundaries. Broadcast networks will struggle to adjust to the FCC's new authority, which will likely lead to a "chill" on live broadcast. In the interim, both parties will become embroiled in timely and costly litigation that will one day force the Court to finally answer the questions and challenges it escaped in the present case.

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300. *See supra* Part IV.B.

301. *See supra* Part IV.C.