

FOX TELEVISION STATIONS, INC. v. FCC

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

POOLER, Circuit Judge:

Fox Television Stations, Inc., along with its affiliates FBC Television Affiliates Association (collectively "Fox"), petition for review of the November 6, 2006, order of the Federal Communications Commission ("FCC") issuing notices of apparent liability against two Fox broadcasts for violating the FCC's indecency and profanity prohibitions.

BACKGROUND

The FCC's policing of "indecent" speech stems from 18 U.S.C. § 1464, which provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." In 1960, Congress authorized the FCC to impose forfeiture penalties for violations of Section 1464. The FCC first exercised its statutory authority to sanction indecent (but non-obscene) speech in 1975, when it found Pacifica Foundation's radio broadcast of George Carlin's "Filthy Words" monologue indecent and subject to forfeiture. In ruling on this complaint, the FCC articulated the following description of "indecent" content:

[T]he concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience. Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe that such words are indecent within the meaning of the statute and have no place on radio when children are in the audience.

Pacifica appealed the FCC's order to the Court of Appeals for the D.C. Circuit. While that appeal was pending, the FCC issued a "clarification" order in which it specifically noted that its prior order was intended to address only the particular facts of the Carlin monologue as broadcast, and acknowledged the concern that "in some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing." The FCC stated that in such a situation, "we believe that it would be inequitable for us to hold a licensee responsible for indecent language."

Although acknowledging the FCC's clarification, the D.C. Circuit nevertheless concluded that the FCC's indecency regime was invalid. The court found the FCC's order both vague and overbroad, noting that it would prohibit "the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the *Bible*."

The Commission appealed this decision to the Supreme Court, which reversed in a plurality opinion. In its brief to the Supreme Court, the FCC stressed that its ruling was a narrow one applying only to the specific facts of the Carlin monologue. The Court took the Commission at its word and confined its review to the specific question of whether the Commission could find indecent the Carlin monologue as broadcast. The Court found that the FCC could, consistent with the First Amendment, regulate indecent material like the Carlin monologue.

Justices Powell and Blackmun, who concurred in the judgment and supplied two of the votes necessary for the 5-4 majority, also emphasized in their concurring opinion that the Court's holding was a narrow one limited to the facts of the Carlin monologue as broadcast. Foreshadowing the question now before us, they explicitly noted that "[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here." Furthermore, citing the FCC's brief to the Court, Justice Powell stated that he did not foresee an undue chilling effect on broadcasters by the FCC's decision because "the Commission may be expected to proceed cautiously, as it has in the past."

The FCC took the Pacifica Court's admonitions seriously in its subsequent decisions. Shortly after the Pacifica ruling, the FCC stated the following in an opinion rejecting a challenge to a broadcaster's license renewal on the basis that the broadcaster had aired indecent programming:

We intend strictly to observe the narrowness of the Pacifica holding. In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the 'indecent' words in question. The opinion of the Court specifically stated that it was not ruling that 'an occasional expletive . . . would justify any sanction . . .' Further, Justice Powell's concurring opinion emphasized the fact that the language there in issue had been 'repeated over and over as a sort of verbal shock treatment.'

Application of WGBH Educ. Found., 69 F.C.C.2d 1250, at P 10 (1978). The FCC also specifically held that the single use of an expletive in a program that aired at 5:30 pm "should not call for us to act under the holding of Pacifica." A few years later, the Commission again rejected a challenge to a license renewal that complained the broadcaster had aired indecent programming. The FCC acknowledged the complaint that the broadcaster on three separate occasions had aired programming during the morning hours containing language such as "motherfucker," "fuck," and "shit," but nevertheless concluded that "it is clear that the petitioner has failed to make a *prima facie* case that [the broadcaster] has violated 18 U.S.C. 1464" since the language did not amount to "verbal shock treatment" and the complainant had failed to show this was more than "isolated use." *Application of Pacifica Found.*, 95 F.C.C.2d 750, at PP 16, 18 (1983).

It was not until 1987 that the FCC would find another broadcast "indecent" under Section 1464. See *Infinity Broad. Corp.*, 3 F.C.C.R. 930 (1987) ("Infinity Order"). The Commission explained:

In cases decided subsequent to the Supreme Court's ruling [in *Pacifica*], the Commission took a very limited approach to enforcing the prohibition against indecent broadcasts. Thus, no action was taken unless material involved the repeated use, for shock value, of words similar or identical to those satirized in the Carlin "Filthy Words" monologue . . . As a result, the Commission, since the time of its ruling in 1975, has taken no action against any broadcast licensee for violating the prohibition against indecent broadcasts.

Id. at P 4. The Infinity Order affirmed on reconsideration three decisions issued simultaneously by the FCC in April 1987 that found certain programs indecent. The FCC explained in the Infinity Order that it would no longer take the narrow view that a finding of indecency required the use of one of the seven "dirty words" used in Carlin's monologue. The FCC instead would use the generic definition of indecency it had articulated in connection with its prior decision in Pacifica. Under the

Commission's definition, "indecent speech is language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. Such indecent speech is actionable when broadcast at times of the day when there is a reasonable risk that children may be in the audience." The FCC also reaffirmed, however, the prevailing view that a fleeting expletive would not be actionable.

Broadcasters appealed the Infinity Order to the D.C. Circuit, challenging the FCC's definition of indecency as unconstitutionally vague. The D.C. Circuit rejected this argument on the basis that the definition at issue was "virtually the same definition the Commission articulated in the order reviewed by the Supreme Court in the *Pacifica* case." The court concluded that *Pacifica* implicitly rejected any vagueness challenge to the FCC's definition of "indecent." The court explicitly noted that the "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."

This restrained enforcement policy would continue. In 2001, the Commission issued a policy statement to "provide guidance to the broadcast industry regarding our case law interpreting 18 U.S.C. § 1464 and our enforcement policies with respect to broadcast indecency." Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464, 16 F.C.C.R. 7999 (2001) ("Industry Guidance"). The FCC first noted that "indecent speech is protected by the First Amendment, and thus, the government must both identify a compelling interest for any regulation it may impose on indecent speech and choose the least restrictive means to further that interest."

The FCC then explained that an indecency finding involves the following two determinations: (1) whether the material falls within the "subject matter scope of [the] indecency definition - that is, the material must describe or depict sexual or excretory organs or activities"; and (2) whether the broadcast is "*patently offensive* as measured by contemporary community standards for the broadcast medium." The FCC considers the following three factors in determining whether the 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 materials *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.*" In discussing the second factor in the "patently offensive" analysis, the FCC cited examples distinguishing between material that "dwells" on the offensive content (indecent) and material that was "fleeting and isolated" (not indecent).

This restrained enforcement policy would soon change. During NBC's January 19, 2003, live broadcast of the Golden Globe Awards, musician Bono stated in his acceptance speech "this is really, really, fucking brilliant. Really, really, great." *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, at P 3 n.4 (2004) ("*Golden Globes*"). Individuals associated with the Parents Television Council filed complaints that the material was obscene and indecent under FCC regulations. The FCC's Enforcement Bureau, however, denied the complaints on the basis that the expletive as used in context did not describe sexual or excretory organs or activities and that the utterance was fleeting and isolated.

Five months later, the full Commission reversed the Bureau's decision. First, the FCC held that any use of any variant of "the F-Word" inherently has sexual connotation and therefore falls within the scope of the indecency definition. *Golden Globes*, at P 8. The FCC then held that "the 'F-Word' is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English

language" and therefore the use of that word was patently offensive under contemporary community standards. The Commission found the fleeting and isolated use of the word irrelevant and overruled all prior decisions in which fleeting use of an expletive was held not indecent. *Id.* at P 12.

The FCC then held that the material in question was also "profane" under Section 1464. The Commission acknowledged that prior decisions interpreting "profane" had defined that term as blasphemy, but found that nothing in its prior decisions limited the definition of profane in such a manner. The Commission, however, declined to impose a forfeiture because "existing precedent would have permitted this broadcast" and therefore NBC and its affiliates "did not have the requisite notice to justify a penalty." The Commission emphasized, though, that licensees were now on notice that any broadcast of the "F-Word" could subject them to monetary penalties and suggested that implementing delay technology would ensure future compliance with its policy.

NBC, along with other parties including Fox, filed petitions for reconsideration of the Golden Globes order. NBC, Fox, and Viacom also filed a petition to stay the effect of the Golden Globes order. These petitions have been pending for more than two years without any action by the FCC. Nevertheless, the FCC has applied the policy announced in Golden Globes in subsequent cases.

On February 21, 2006, the FCC issued an order resolving various complaints against several television broadcasts. See *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664 (2006) ("Omnibus Order"). Through this order, the FCC intended to "provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard." In the Omnibus Order, the Commission found four programs-Fox's broadcast of the 2002 Billboard Music Awards, Fox's broadcast of the 2003 Billboard Music Awards, various episodes of ABC's NYPD Blue, and CBS's The Early Show-indecent and profane under the policy announced in Golden Globes. The factual situations at issue are as follows:

. **2002 Billboard Music Awards:** In her acceptance speech, Cher stated: "People have been telling me I'm on the way out every year, right? So fuck 'em."

. **2003 Billboard Music Awards:** Nicole Richie, a presenter on the show, stated: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."

. **NYPD Blue:** In various episodes, Detective Andy Sipowitz and other characters used certain expletives including "bullshit," "dick," and "dickhead."

. **The Early Show:** During a live interview of a contestant on CBS's reality show Survivor: Vanuatu, the interviewee referred to a fellow contestant as a "bullshitter."

In finding these programs indecent and profane, the FCC reaffirmed its decision in *Golden Globes* that any use of the word "fuck" is presumptively indecent and profane. The Commission then concluded that any use of the word "shit" was also presumptively indecent and profane. Turning to the second part of its indecency test, the FCC found that each of the programs were "patently offensive" because the material was explicit, shocking, and gratuitous. Citing *Golden Globes*, the Commission dismissed the fact that the expletives were fleeting and isolated and held that repeated use is not necessary for a finding of indecency. The FCC, however, declined to issue a forfeiture in each case for the express reason that the broadcasts in question occurred before the decision in *Golden Globes*, and thus "existing precedent would have permitted this broadcast."

Fox and CBS filed a petition for review of the Omnibus Order in this court. ABC filed a petition for review in the D.C. Circuit, which was then transferred to this court and consolidated with the petition for review filed by Fox and CBS. Before any briefing took place, however, the FCC moved for a voluntary remand in order to give the Commission the first opportunity to address petitioners' arguments. On September 7, 2006, this court granted the FCC's request for remand and stayed enforcement of the Omnibus Order. The Commission was given sixty days to issue a final or appealable order, at which time the pending appeal would be automatically reinstated.

The FCC then issued a new order on November 6, 2006. In the Remand Order, the FCC reaffirmed its finding that the 2002 and 2003 Billboard Music Award programs were indecent and profane, but reversed its finding against *The Early Show*. It also dismissed the complaint against *NYPD Blue* because the only person who complained of the material resided in the Eastern time zone, where *NYPD Blue* aired during the "safe harbor" period after 10pm. In light of the FCC's revised decision regarding *NYPD Blue*, ABC is no longer participating in this appeal.

With regard to the 2003 Billboard Music Awards, the Commission found that it would have been actionably indecent even prior to the decision in *Golden Globes* because the potentially offensive material was "repeated," since Nicole Richie used "two extremely graphic and offensive words," and was "deliberately uttered" because of "Ms. Richie's confident and fluid delivery of the lines." With regard to the 2002 Billboard Music Awards, the Commission "acknowledge[d] that it was not apparent that Fox could be penalized for Cher's comment at the time it was broadcast." In both cases, the FCC rejected Fox's argument that fleeting expletives were not actionable, now characterizing its prior decisions on that issue as "staff letters and dicta." The Commission, however, declined to impose a forfeiture for either broadcast.

Turning to *The Early Show*, the FCC reversed its finding that the expletive used was indecent or profane because it occurred in the context of a "*bona fide* news interview." The Commission stated that in light of *First Amendment* concerns, "it is imperative that we proceed with the utmost restraint when it comes to news programming," and found it "appropriate . . . to defer to CBS's plausible characterization of its own programming" as a news interview. Given this context, the FCC declined to find the comment indecent or profane.

In accordance with our September 6th order, this appeal was automatically reinstated on November 8, 2006. Fox then filed a petition for review of the Remand Order and moved to consolidate that appeal with the one already pending before this court. We granted the motion for consolidation as well as motions to intervene by CBS Broadcasting Inc. ("CBS") and NBC Universal Inc. and NBC Telemundo License Co. (collectively, "NBC").

DISCUSSION

Fox, CBS, and NBC (collectively, "the Networks") raise a variety of arguments against the validity of the Remand Order, including: (1) the Remand Order is arbitrary and capricious because the Commission's regulation of "fleeting expletives" represents a dramatic change in agency policy without adequate explanation; (2) the FCC's "community standards" analysis is arbitrary and meaningless; (3) the FCC's indecency findings are invalid because the Commission made no finding of scienter; (4) the FCC's definition of "profane" is contrary to law; (5) the FCC's indecency regime is unconstitutionally vague; (6) the FCC's indecency test permits the Commission to make subjective determinations about the quality of speech in violation of the First Amendment; and (7) the FCC's indecency regime is an impermissible content-based regulation of speech that violates the First Amendment. The FCC, also supported by several amici, dispute each of these contentions. We agree

with the first argument advanced by the Networks, and therefore do not reach any other potential problems with the FCC's decision.

I. Scope of Review

Before turning to the merits of the Networks' arguments, we first note that we reject the FCC's contention that our review here is narrowly confined to the specific question of whether the two Fox broadcasts of the Billboard Music Awards were indecent and/or profane. The Remand Order applies the policy announced in *Golden Globes*. If that policy is invalid, then we cannot sustain the indecency findings against Fox. Thus, as the Commission conceded during oral argument, the validity of the new "fleeting expletive" policy announced in *Golden Globes* and applied in the Remand Order is a question properly before us on this petition for review.

II. Administrative Procedure Act

Courts will set aside agency decisions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). As the Supreme Court has explained: "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, 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.'" Agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Reviewing courts "may not supply a reasoned basis for the agency's action that the agency itself has not given." The Networks contend that the Remand Order is arbitrary and capricious because the FCC has made a 180-degree turn regarding its treatment of "fleeting expletives" without providing a reasoned explanation justifying the about-face. We agree.

First, there is no question that the FCC has changed its policy. As outlined in detail above, prior to the *Golden Globes* decision the FCC had consistently taken the view that isolated, non-literal, fleeting expletives did not run afoul of its indecency regime. This consistent enforcement policy changed with the issuance of *Golden Globes*:

While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the "F-Word" such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law The staff has since found that the isolated or fleeting use of the "F-Word" is not indecent in situations arguably similar to that here. We now depart from this portion of the Commission's 1987 *Pacifica* decision as well as all of the cases cited in notes 31 and 32 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 and conclude that such cases are not good law to that extent.

Golden Globes, 19 F.C.C.R. 4975, at P 12. The Commission declined to issue a forfeiture in *Golden Globes* precisely because its decision represented a departure from its prior rulings.

Although the Remand Order backpedals somewhat on this clear recognition that the Commission was departing from prior precedent, in its brief to this court, the FCC now concedes that *Golden Globes* changed the landscape with regard to the treatment of fleeting expletives.

Agencies are of course free to revise their rules and policies. Such a change, however, must provide a reasoned analysis for departing from prior precedent. Accordingly, agency action will be set aside as arbitrary and capricious if the agency fails to provide a reasoned explanation for its decision.

Our evaluation of the agency's reasons for its change in policy is confined to the reasons articulated by the agency itself. The primary reason for the crackdown on fleeting expletives advanced by the FCC is the so-called "first blow" theory described in the Supreme Court's *Pacifica* decision. In *Pacifica*, the Supreme Court justified the FCC's regulation of the broadcast media in part on the basis that indecent material on the airwaves enters into the privacy of the home uninvited and without warning. The Court rejected the argument that the audience could simply tune-out: "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." *Id.* at 748-49. Relying on this statement in *Pacifica*, the Commission attempts to justify its stance on fleeting expletives on the basis that "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow.'"

We cannot accept this argument as a reasoned basis justifying the Commission's new rule. First, the 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*. More problematic, however, is that the "first blow" theory bears no rational connection to the Commission's actual policy regarding fleeting expletives. As the FCC itself stressed during oral argument in this case, the Commission does not take the position that *any* occurrence of an expletive is indecent or profane under its rules. For example, although "there is no outright news exemption from our indecency rules," the Commission will apparently excuse an expletive when it occurs during a "*bona fide* news interview" (deferring to CBS's "plausible characterization" of a segment of The Early Show interviewing a contestant on its reality show Survivor: Vanuatu as news programming and finding expletive uttered during that part of the show not indecent or profane). Certainly viewers (including children) watching the live broadcast of The Early Show were "force[d]...to take the 'first blow'" of the expletive uttered by the Survivor: Vanuatu contestant. Yet the Commission emphasized during oral argument that its news exception is a broad one and "the Commission has never found a broadcast to be indecent on the basis of an isolated expletive in the face of some claim that the use of that language was necessary for any journalistic or artistic purpose." The Commission further explained to this court that a broadcast of oral argument in this case, in which the same language used in the Fox broadcasts was repeated multiple times in the courtroom, would "plainly not" be indecent or profane under its standards because of the context in which it occurred. The Commission even conceded that a re-broadcast of precisely the same offending clips from the two Billboard Music Award programs for the purpose of providing background information on this case would not result in any action by the FCC, even though in those circumstances viewers would be subjected to the same "first blow" that resulted from the original airing of this material. Furthermore, the Commission has also held that even repeated and deliberate use of numerous expletives is not indecent or profane under the FCC's policy if the expletives are "integral" to the work. See *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 F.C.C.R. 4507, at P 14 (2005) ("*Saving Private Ryan*") (finding numerous expletives uttered during film *Saving Private Ryan* not indecent or profane because deleting the expletives "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers"). In all of these scenarios, viewers, including children

who may have no understanding of whether expletives are "integral" to a program or whether the interview of a contestant on a reality show is a "*bona fide* news interview," will have to accept the alleged "first blow" caused by use of these expletives. Thus, the record simply does not support the position that the Commission's new policy was based on its concern with the public's mere exposure to this language on the airwaves. The "first blow" theory, therefore, fails to provide the reasoned explanation necessary to justify the FCC's departure from established precedent.

The Remand Order makes passing reference to other reasons that purportedly support its change in policy, none of which we find sufficient. For instance, the Commission states that even non-literal uses of expletives fall within its indecency definition because it is "difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions." This defies any common-sense understanding of these words, which, as the general public well knows, are often used in everyday conversation without any "sexual or excretory" meaning. Bono's exclamation that his victory at the Golden Globe Awards was "really, really fucking brilliant" is a prime example of a non-literal use of the "F-Word" that has no sexual connotation. See *Golden Globes (Bureau Decision)*, 18 F.C.C.R. 19859, at P 5 ("As a threshold matter, the material aired during the 'Golden Globe Awards' program does not describe or depict sexual and excretory activities and organs Rather, the performer used the word 'fucking' as an adjective or expletive to emphasize an exclamation."), rev'd by *Golden Globes*, 19 F.C.C.R. 4975 (2004). Similarly, as NBC illustrates in its brief, in recent times even the top leaders of our government have used variants of these expletives in a manner that no reasonable person would believe referenced "sexual or excretory organs or activities." See Br. of Intervenor NBC at 31-32 & n.3 (citing President Bush's remark to British Prime Minister Tony Blair that the United Nations needed to "get Syria to get Hezbollah to stop doing this shit" and Vice President Cheney's widely-reported "Fuck yourself" comment to Senator Patrick Leahy on the floor of the U.S. Senate).

Similarly, the Commission's warning that a per se exemption for fleeting expletives would "permit broadcasters to air expletives at all hours of the day so long as they did so one at a time," *Remand Order*, at P 25, is equally divorced from reality because the Commission itself recognizes that broadcasters have never barraged the airwaves with expletives even prior to *Golden Globes*. Finally, the Commission's claim that "categorically requiring repeated use...is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context," *Remand Order*, at P 23, also does not provide sufficient justification for its departure from prior precedent. First, the Commission's own policy of treating all variants of certain expletives as presumptively indecent and profane, whether used in a literal or non-literal sense, also fails to comport with this "general approach" that "stresses the critical nature of context." In addition, the Commission's indecency test itself remains unchanged, but the Commission fails to provide a reasoned explanation for why a single, isolated expletive now should fit within the articulation of that test set forth in *Golden Globes*, see *Pacifica Found., Inc.*, 2 F.C.C.R. 2698, at P 13 ("If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency.").

For decades broadcasters relied on the FCC's restrained approach to indecency regulation and its consistent rejection of arguments that isolated expletives were indecent. The agency asserts the same interest in protecting children as it asserted thirty years ago, but until the *Golden Globes* decision, it had never banned fleeting expletives. While the FCC is free to change its previously settled view on this issue, it must provide a reasoned basis for that change. The FCC's decision, however, is devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation. Such evidence would seem to be particularly

relevant today when children likely hear this language far more often from other sources than they did in the 1970s when the Commission first began sanctioning indecent speech. Yet the Remand Order provides no reasoned analysis of the purported "problem" it is seeking to address with its new indecency policy from which this court can conclude that such regulation of speech is reasonable. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1463 (D.C. Cir. 1985) (invalidating FCC regulation because "the Commission has failed entirely to determine whether the evil the rules seek to correct 'is a real or merely a fanciful threat'"); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) ("[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."). The Commission has similarly failed to explain how its current policy would remedy the purported "problem" or to point to supporting evidence.

The Commission's new approach to profanity is supported by even less analysis, reasoned or not. The Commission sets forth no independent reasons that would justify its newly-expanded definition of "profane" speech, aside from merely stating that its prior precedent does not prevent it from setting forth a new definition. To the extent the Commission believes its arguments for expanding its indecency enforcement support its new policy regarding profanity, those arguments are rejected for the reasons stated above. Furthermore, the Commission fails to provide any explanation for why this separate ban on profanity is even necessary. Prior to 2004, the Commission never attempted to regulate "profane" speech. In fact, the Commission took the view that a separate ban on profane speech was unconstitutional. The Commission again has not provided this court with a reasoned analysis of why it has undertaken this separate regulation of speech. Finally, the Commission provides no explanation of what harm this separate enforcement against profane speech addresses that is not already addressed by the FCC's indecency and obscenity enforcement. Particularly considering that the scope of the FCC's new profanity definition appears to be largely (if not completely) redundant with its indecency prohibition, this would seem to be an important question for the Commission to consider. The Remand Order, however, provides no indication that the Commission has engaged in any such analysis.

Accordingly, we find that the FCC's new policy regarding "fleeting expletives" fails to provide a reasoned analysis justifying its departure from the agency's established practice. For this reason, Fox's petition for review is granted, the Remand Order is vacated, and the matter is remanded to the FCC for further proceedings consistent with this opinion. Because we have found that the FCC's new indecency regime, announced in *Golden Globes* and applied in the Remand Order, is invalid under the Administrative Procedure Act, the stay of enforcement previously granted by this court in our September 6th order is vacated as moot.

III. Constitutional Challenges

"A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." Thus, we refrain from deciding the various constitutional challenges to the Remand Order raised by the Networks. 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. Because we doubt that the Networks will refrain from further litigation on these precise issues if, on remand, the Commission merely provides further explanation with no other changes to its policy, in the interest of judicial economy we make the following observations.

As an initial matter, we note that *all* speech covered by the FCC's indecency policy is fully protected by the First Amendment. See *Sable Communs. of California, Inc. v. FCC*, 492 U.S. 115,

126 (1989) (noting that speech "which is indecent but not obscene is protected by the First Amendment"). With that backdrop in mind, we question whether the FCC's indecency test can survive First Amendment scrutiny. For instance, we are sympathetic to the Networks' contention that the FCC's indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague. Although the Commission has declared that all variants of "fuck" and "shit" are presumptively indecent and profane, repeated use of those words in "Saving Private Ryan," for example, was neither indecent nor profane. And while multiple occurrences of expletives in "Saving Private Ryan" was not gratuitous, a single occurrence of "fucking" in the Golden Globe Awards was "shocking and gratuitous." Parental ratings and advisories were important in finding "Saving Private Ryan" not patently offensive under contemporary community standards, but irrelevant in evaluating a rape scene in another fictional movie. The use of numerous expletives was "integral" to a fictional movie about war, Saving Private Ryan, but occasional expletives spoken by real musicians were indecent and profane because the educational purpose of the documentary "could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives," *Omnibus Order*, 21 F.C.C.R. 2664, at P 82 (finding Martin Scorsese's PBS documentary "The Blues: Godfathers and Sons" indecent). The "S-Word" on The Early Show was not indecent because it was in the context of a "*bona fide* news interview," but "there is no outright news exemption from our indecency rules," *Remand Order*, at PP 68, 71-73. We can understand why the Networks argue that FCC's "patently offensive as measured by contemporary community standards" indecency test coupled with its "artistic necessity" exception fails to provide the clarity required by the Constitution, creates an undue chilling effect on free speech, and requires broadcasters to "steer far wider of the unlawful zone," *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

The Networks' position is further buttressed by the Supreme Court's decision in *Reno v. ACLU*, 521 U.S. 844 (1997), which struck down as unconstitutionally vague a similarly-worded indecency regulation of the Internet. The Court found that the statute's use of the "general, undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material with serious educational or other value. Moreover, the 'community standards' criterion as applied to the Internet means that any communication available to a nation wide audience will be judged by the standards of the community most likely to be offended by the message." *Id.* at 877-78. Because of the "vague contours" of the regulation, the Court held that "it unquestionably silences some speakers whose messages would be entitled to constitutional protection," and thus violated the First Amendment. *Id.* at 874. Because *Reno* holds that a regulation that covers speech that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" is unconstitutionally vague, we are skeptical that the FCC's identically-worded indecency test could nevertheless provide the requisite clarity to withstand constitutional scrutiny. Indeed, we are hard pressed to imagine a regime that is more vague than one that relies entirely on consideration of the otherwise unspecified "context" of a broadcast indecency.

We also note that the FCC's indecency test raises the separate constitutional question of whether it permits the FCC to sanction speech based on its subjective view of the merit of that speech. It appears that under the FCC's current indecency regime, any and all uses of an expletive is presumptively indecent and profane with the broadcaster then having to demonstrate to the satisfaction of the Commission, under an unidentified burden of proof, that the expletives were "integral" to the work. In the licensing context, the Supreme Court has cautioned against speech regulations that give too much discretion to government officials.

Finally, we recognize there is some tension in the law regarding the appropriate level of First Amendment scrutiny. In general, restrictions on *First Amendment* liberties prompt courts to apply

strict scrutiny. *FCC v. League of Women Voters*, 468 U.S. 364, 376 (1984). Outside the broadcasting context, the Supreme Court has consistently applied strict scrutiny to indecency regulations. At the same time, however, the Supreme Court has also considered broadcast media exceptional. Restrictions on broadcast "speech" have been upheld "when we [are] satisfied that the restriction is narrowly tailored to further a substantial governmental interest." *Id.* at 380.

The Networks contend that the bases for treating broadcast media "different[ly]" have "eroded over time," particularly because 86 percent of American households now subscribe to cable or satellite services, *Remand Order*, at P 49. As the Networks argue, this and other realities have "eviscerated" the notion that broadcast content is, as it was termed in *Pacifica*, 438 U.S. at 748-49, "uniquely pervasive" and "uniquely accessible to children." Whatever merit these arguments may have, they cannot sway us in light of Supreme Court precedent. See, e.g., *Reno*, 521 U.S. at 867 (noting that "as a matter of history" broadcast television has enjoyed less First Amendment protection than other media, including the internet); *Pacifica*, 438 U.S. at 748-50.

Nevertheless, we would be remiss not to observe that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television. In light of this possibility, the Networks rightly rest their constitutional argument in part on the holding of *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). *Playboy*, which involved a challenge to a statute requiring cable operators who provide channels primarily dedicated to sexually explicit or otherwise indecent programming to either fully scramble these channels or limit their transmission to the 10pm to 6am safe harbor period. The Supreme Court, applying strict scrutiny, invalidated the statute because a less restrictive alternative to the prohibition existed: "One plausible, less restrictive alternative could be found in another section of the Act: § 504, which requires a cable operator, 'upon request by a cable service subscriber . . . without charge, [to] fully scramble or otherwise fully block' any channel the subscriber does not wish to receive." The Court held: This "targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests." In so holding, the Court suggested its decision might go beyond the mechanistic application of strict scrutiny, and rely in part on a notional pillar of free speech—namely, choice. The Court specifically rejected the arguments that parents' ignorance of this option, its underutilization, or its inability to be 100% effective rendered targeted blocking an ineffective alternative: "It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act."

The Networks argue that the advent of the V-chip and parental ratings system¹ similarly provide a less restrictive alternative to the FCC's indecency ban. The FCC counters that the V-chip is an ineffective alternative because, in its view, few televisions feature a V-chip, most parents do not

¹In 1996, Congress mandated that every television, 13 inches or larger, sold in the United States, come equipped with blocking technology commonly known as the V-chip. See 47 U.S.C. § 303(x) (stating that in the case of an "apparatus" designed to receive television signals, "such apparatus [shall] be equipped with a feature designed to enable viewers to block display of all programs with a common rating"). To implement V-chip technology, Congress also required a television ratings system. The industry developed the "TV Parental Guidelines" rating system, which was approved by the FCC. See In the Matter of Implementation of Section 551 of the Telecommunications Act of 1996.

know how to use it, programs are often inaccurately rated, and fleeting expletives could elude V-chip blocking even if the show during which they occurred was otherwise accurately labeled. The FCC's arguments are not without merit, but they must be evaluated in the context of today's realities. The proliferation of satellite and cable television channels-not to mention internet-based video outlets-has begun to erode the "uniqueness" of broadcast media, while at the same time, blocking technologies such as the V-chip have empowered viewers to make their own choices about what they do, and do not, want to see on television. *Playboy* distinguished *Pacifica* on the grounds that "[c]able systems have the capacity to block unwanted channels on a household-by-household basis" and thus "[t]he option to block reduces the likelihood, so concerning to the Court in *Pacifica*, that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem." 529 U.S. at 815. The FCC is free to regulate indecency, but its regulatory powers are bounded by the Constitution. If the *Playboy* decision is any guide, technological advances may obviate the constitutional legitimacy of the FCC's robust oversight.

IV. The FCC's Construction of Profane

The Networks also argue that the FCC employed an improper definition of "profane" under Section 1464. Although we need not reach this argument, on remand, the FCC may desire to explain its gloss on the definition of "profane." In the Remand Order, the FCC applied its new definition of "profane" as set forth in *Golden Globes*. The FCC now defines "profane" as "those personally reviling epithets naturally tending to provoke violent resentment or denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance." *Golden Globes*, 19 F.C.C.R. 4975, at P 13. The FCC, noting that "shit" and "fuck" fall within this definition, ruled that Cher's and Nicole Richie's fleeting expletives were "profane," as well as indecent. Most dictionaries interpret the term "profane" to denote something that pertains to the irreligious, and since 1927, courts-as well as the FCC itself-have assumed that "profane" in the broadcast context refers to sacrilege, and nothing more.

The FCC's definition of "profane" here, would substantially overlap with the statutory term "indecent." This overlap would be so extensive as to render the statutory term "indecent" superfluous. Because our canons of statutory construction do not permit such an interpretation, we do not believe the FCC has proffered a reasonable construction of the term "profane." While we may owe deference to the FCC's construction, the FCC must still demonstrate that its construction is reasonable, particularly in light of Congressional intent, the canons of statutory construction, and the historical view of the plain meaning of this term.

CONCLUSION

As the foregoing indicates, we are doubtful that by merely proffering a reasoned analysis for its new approach to indecency and profanity, the Commission can adequately respond to the constitutional and statutory challenges raised by the Networks. Nevertheless, because we can decide this case on this narrow ground, we vacate and remand so the Commission can set forth that analysis.

DISSENT: Leval, *J.*, *dissenting*:

I respectfully dissent from my colleagues' ruling because I believe the Federal Communications Commission ("FCC" or "Commission") gave a reasoned explanation for its change of standard and thus complied with the requirement of the Administrative Procedures Act, 5 U.S.C. § 706(2)(A).

A television broadcaster, Fox Television Stations, Inc., challenges the lawfulness of a small change made by the FCC in its standards for adjudicating complaints of indecency over the airwaves. Beginning with its adjudication of complaints arising from the broadcast of the Golden Globe

Awards in 2002, the Commission instituted a change in its manner of dealing with "fleeting" expletives. During this broadcast, rock-musician Bono expressed delight over his receipt of an award by saying, "[T]his is really, really, fucking brilliant." Adopting a new standard, which diminished the significance of the fact that the potentially offensive expletive was not repeated, the Commission concluded that the broadcast of Bono's expletive constituted indecency in violation of § 1464.

The occurrences under review in this case followed soon after the Bono incident, during live broadcasts by Fox of Billboard Music Awards shows in 2002 and 2003. In the 2002 Billboard Music Awards, the actress and singer Cher, expressing triumphant delight upon her receipt of an award, said, "People have been telling me I'm on the way out every year, right? So fuck 'em." The incident during the 2003 Billboard Music Awards involved Nicole Richie and Paris Hilton, the co-stars of a serialized televised comedy show entitled, "The Simple Life," as presenters of awards. In joking reference to their own show, Richie said, "Why do they even call it 'The Simple Life?' Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." The Commission received complaints about each incident. Referring to its newly changed policy developed in response to the Bono incident in *Golden Globes*, the Commission found that the two Billboard Music incidents were violations. Fox brought this action seeking to invalidate the Commission's rulings.

In adjudicating indecency complaints the Commission generally employs a context-based evaluation to determine whether the particular utterance is "*patently offensive* as measured by contemporary community standards." A finding of violation is less likely if the broadcast of the utterance involved a genuine news report, or if censorship of the expletive would harm or distort artistic integrity. Under the pre-*Golden Globes* rulings, the fact that an utterance was fleeting was virtually conclusive in assuring it would not be deemed a violation (unless it breached special barriers, such as by referring to sexual activities with children). With its *Golden Globes* adjudication, however, the Commission adopted a less permissive stance. It announced that henceforth fleeting expletives would be judged according to a standard more closely aligned with repeated utterances of expletives. Thus, the Commission has declared that it remains unlikely to find a violation in an expletive that is broadcast in the context of a genuine news report, or where censorship by bleeping out the expletive would compromise artistic integrity, but it will no longer give a nearly automatic pass merely because the expletive was not repeated.

The Commission explained succinctly why lack of repetition of the F-Word would no longer result in a virtual free pass. "[W]e believe that, given the core-meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation The 'F-Word' is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language. Its use invariably invokes a coarse sexual image." "[A]ny use of that word has a sexual connotation even if the word is not used literally."

In explanation of this relatively modest change of standard, the Commission gave a sensible, although not necessarily compelling, reason. In relation to the word "fuck," the Commission's central explanation for the change was essentially its perception that the "F-Word" is not only of extreme and graphic vulgarity, but also conveys an inescapably sexual connotation. The Commission thus concluded that the use of the F-Word - even in a single fleeting instance without repetition - is likely to constitute an offense to the decency standards of § 1464.

Agencies operate with broad discretionary power to establish rules and standards, and courts are required to give deference to agency decisions. A court must not "substitute its judgment for that of the agency." An agency is free furthermore to change its standards. The Supreme Court has made clear that when an agency changes its standard or rule, it is "obligated to supply a reasoned analysis for the change." If an agency without explanation were to make an adjudication which is not

consistent with the agency's previously established standards, the troubling question would arise whether the agency has lawfully changed its standard, or whether it has arbitrarily failed to adhere to its standard, which it may not lawfully do. Accordingly our court has ruled that "an agency . . . cannot simply adopt inconsistent positions without presenting 'some reasoned analysis.'" Such explanation, we have said, is necessary so that the reviewing court may "be able to understand the basis of the agency's action so that it may judge the consistency of that action with the agency's mandate."

In my view, in changing its position on the repetition of an expletive, the Commission complied with these requirements. It made clear acknowledgment that its *Golden Globes* and *Remand Order* rulings were not consistent with its prior standard regarding lack of repetition. It announced the adoption of a new standard. And it furnished a reasoned explanation for the change. Although one can reasonably disagree with the Commission's new position, its explanation is not irrational, arbitrary, or capricious. The Commission thus satisfied the standards of the Administrative Procedures Act.

The Commission explained that the F-Word is "one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language [whose] use invariably invokes a coarse sexual image." *Golden Globes*, at P 9. In other words, the Commission found, contrary to its earlier policy, that the word is of such graphic explicitness in inevitable reference to sexual activity that absence of repetition does not save it from violating the standard of decency.

The majority argues that the Commission's change of standard is irrational because it is inconsistent. The majority is of course correct that the Commission does not follow an all-or-nothing policy. Its standards do attempt to draw context-based distinctions, with the result that no violation will be found in circumstances where usage is considered sufficiently justified that it does not constitute indecency.

This, however, is in no way a consequence of the Commission's change of standard for fleeting expletives. It applies across the board to all circumstances. Regardless of whether the expletive was repeated or fleeting, the Commission will apply context-based standards to determine whether the incident constituted indecency. If anything, the change of standard has made the Commission more consistent rather than less, because under the new rule, the same context-based factors will apply to all circumstances.

Furthermore, while the Commission will indeed allow the broadcast of the same material in some circumstances but not in others, I do not see why this differentiation should be considered irrational. It rather seeks to reconcile conflicting values. On the one hand, it recognizes, as stressed by the Supreme Court in *Pacifica*, the potential for harm to children resulting from exposure to indecency. On the other hand, the Commission has historically recognized that categorical prohibition of the broadcast of all instances of usage of a word generally considered indecent would suppress material of value, which should not be deemed indecent upon consideration of the context. This is not irrationality.² It is an attempt on the part of the Commission over the years to reconcile conflicting values through standards which take account of context.

²Spectators observing the argument of this case would have heard the judges and the lawyers saying "fuck" in open court. Had the case been on another subject, such usage would surely have seemed inappropriate. Because of the issues in this case, the word was central to the issues being discussed. It is not irrational to take context into account to determine whether use of the word is indecent.

The majority then argues that the Commission reasoned irrationally when in its *Remand Order*, as a part of its explanation for its change of position, the Commission observed: "Granting an automatic exemption for "isolated or fleeting" expletives . . . would as a matter of logic permit broadcasters to air expletives at all hours of a day so long as they did so one at a time." The majority asserts that this concern was "divorced from reality." On the majority's view, because broadcasters did not "barrage[] the airwaves with expletives" during the period prior to *Golden Globes* when fleeting expletives received a free pass, they would not do so in the future.

The agency has one prediction of what would likely occur in the future under the pre-*Golden Globes* policy. The majority has another. If obligated to choose, I would bet my money on the agency's prediction. The majority's view presupposes that the future would repeat the past. This fails to take account of two facts. First, the words proscribed by the Commission's decency standards are much more common in daily discourse today than they were thirty years ago. Second, the regulated networks compete for audience with the unregulated cable channels, which increasingly make liberal use of their freedom to fill programming with such expletives.

In any event, even if the majority could reasonably label *this aspect* of the Commission's reasoning "arbitrary and capricious," it still would not matter. The agency's action in changing the standard for fleeting expletives did not depend on the defensibility of this prediction. It is at most a small part of the agency's justification for its action.

Finally the majority disagrees with the Commission's view that the word "fuck" communicates an "inherently . . . sexual connotation [and] invariably invokes a coarse sexual image." The majority notes that the F-Word is often used in everyday conversation without any sexual meaning. I agree with the majority that the word is often used without a necessary *intention on the part of the speaker* to refer to sex.

The majority, however, misunderstands the Commission's reasoning, or in any event interprets it in the manner least favorable to the Commission. In observing that *fuck* "invariably invokes a coarse sexual image," the Commission did not mean that every speaker who utters the word invariably intends to communicate an offensive sexual meaning. A fairer reading of the Commission's meaning is that, even when the speaker does not intend a sexual meaning, a substantial part of the community, and of the television audience, will understand the word as freighted with an offensive sexual connotation. It is surely not irrational for the Commission to conclude that, according to the understanding of a substantial segment of the community, the F-Word is never completely free of an offensive, sexual connotation.

What we have is at most a difference of opinion between a court and an agency. Because of the deference courts must give to the reasoning of a duly authorized administrative agency in matters within the agency's competence, a court's disagreement with the Commission on this question is of no consequence. The Commission's position is not irrational; it is not arbitrary and capricious. I believe that in changing its standard, the Commission furnished a reasoned explanation, and thus satisfied the requirements of the Administrative Procedures Act. I therefore respectfully dissent.