

INDECENT EXPOSURE: *FCC V. FOX* AND THE END OF AN ERA

DAVID HOUSKA*

I. INTRODUCTION

Primetime broadcasting can be a grisly place. NBC airs kidnappings and rapes on *Law and Order: Special Victims Unit*; CBS presents gruesome murders on *CSI*; and Fox allows Jack Bauer to beat and torture his way through several seasons of *24*. The Federal Communications Commission (FCC)—the federal agency charged with regulating the airwaves—does not have a problem with all of this violence and mayhem. What the FCC does consider unacceptable is the use of seven “filthy words” immortalized by George Carlin: “fuck,” “shit,” “cocksucker,” “piss,” “twat,” “turd,” and “fart.”¹ Although the FCC historically penalized networks only for the repeated use of these words, Janet Jackson’s infamous “wardrobe malfunction” during the 2004 Super Bowl halftime show prompted the FCC to aggressively pursue broadcasters for even the fleeting use of forbidden words and images.² In *FCC v. Fox Television Stations, Inc.*,³ several broadcasters are seeking review of the FCC’s policies and have presented the Supreme Court with the first facial challenge to the FCC’s regulatory power over the airwaves in several decades.⁴

First, this commentary will examine the various incidents at issue in *FCC v. Fox*. After analyzing the legal background and the positions

* 2013 J.D. Candidate, Duke University School of Law.

1. Brief for Petitioners at 4, *FCC v. Fox Television Stations, Inc.*, No. 10-1293 (U.S. Sept. 7, 2011); see also George Carlin, *The Seven Words You Cannot Say on Television*, http://www.youtube.com/watch?v=3_Nrp7cj_tM&feature=youtu.be (last visited Mar. 14, 2012). Initially, the FCC focused its indecency-enforcement policy solely on the sustained and repeated use of the words in the Carlin monologue. Brief for Petitioners at 5. It would later expand its definition of “indecent” in response to broadcasts that eschewed the filthy words but remained extremely offensive. *Id.* at 6.

2. Brief for Petitioners, *supra* note 1, at 10.

3. *Fox Television Stations, Inc. v. FCC*, No. 10-1293 (U.S. argued Jan. 10, 2012).

4. Brief for Petitioners, *supra* note 1, at 8–10.

of the FCC and the Respondents, this commentary argues that the Supreme Court should overrule a decades-old precedent and allow television broadcasters to operate free of almost any restrictions on content.

II. FACTUAL BACKGROUND

Four separate incidents are at issue in this case. Although three of these incidents involved the use of profanity, the fourth concerned a seven-second image of a woman's naked backside. The first violation occurred on December 9th, 2002, during Fox Television's live broadcast of the Billboard Music Awards.⁵ The singer Cher incurred an FCC fine for Fox when she remarked during an improvised acceptance speech: "I've had my critics for the last 40 years saying I was on my way out every year. Right. So fuck 'em. I still have a job and they don't."⁶ Bono, the lead singer of the band U2, provoked the FCC to issue a fine against NBC in January, 2003, when he said, "[t]his is really fucking brilliant" on live television.⁷ On December 10th, 2003, Fox again broadcasted the Billboard Music Awards, this time hosted by Paris Hilton and Nicole Richie. The FCC took issue with one of Richie's offhand remarks about her popular reality show *The Simple Life*, specifically: "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."⁸

The final incident consolidated into *FCC v. Fox* stemmed from the February 25th, 2003, airing of *NYPD Blue*. The episode, titled "Nude Awakening," contained an opening sequence that showed "the side of one of [a woman's] breasts and a full view of her back."⁹ A few seconds later "the camera . . . pan[ned] down to a shot of her buttocks, linger[ed] for a moment, and then pan[ned] up her back."¹⁰ Each of the ABC affiliates that aired the episode incurred a \$27,500 fine from the FCC.¹¹

5. *Id.* at 10.

6. *Id.*

7. *Id.* at 9.

8. *Id.* at 11.

9. *Id.* at 15.

10. *Id.*

11. *Id.* at 16.

III. LEGAL BACKGROUND

There are four sources of authority that will weigh heavily in the Supreme Court's decision. First, the Court will look to the FCC's statutory authority to police the airwaves. Second, the Court will need to consider how well its landmark decision in *FCC v. Pacifica Foundation*¹² has stood the test of time. Third, the Court will examine the FCC's pattern of enforcement over the decades. Finally, two other precedent cases will color the Court's thinking about the reach of *Pacifica*.

A. *The FCC's Statutory Authority*

The Communications Act of 1934, 18 U.S.C. § 1464, both established the FCC and placed limitations on broadcasters, stating that anyone “who 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.”¹³ The original statute, however, specifically stated that the FCC—then simply a radio-licensing agency—would not enjoy the power to censor the airwaves or enforce § 1464.¹⁴ Congress later granted the FCC the authority to levy civil forfeitures against broadcasters or members of the public who violated § 1464 by issuing a fine to the offending party that could be appealed and reviewed in federal court.¹⁵

B. *The Pacifica Decision*

The Supreme Court has long recognized that certain types of “obscene” speech are outside the bounds of First Amendment protection.¹⁶ What constituted acceptable regulation of “indecent” speech on the airwaves that did not rise to the level of obscenity, however, remained an open question until the Supreme Court's

12. 438 U.S. 736 (1978).

13. 18 U.S.C.A. § 1464 (West 2011).

14. 47 U.S.C.A. § 326 (West 2011). Congress did not originally give any executive branch agency an explicit mandate to enforce § 1464, leaving it as a general criminal prohibition. Section 326, however, specifically withheld the authority to censor the airwaves from the FCC, leaving it to the Department of Justice to bring criminal charges. For a discussion of the legislative history of this prohibition, see Brief for Respondents, *infra* note 18, at 3.

15. 47 U.S.C.A. § 503(b) (West 2011).

16. See *Miller v. California*, 413 U.S. 15, 23 (1973). *Miller* established that in order to be considered obscene, speech must depict sexual activities in a manner that an average member of the community would find to be patently offensive. *Id.* at 25. Moreover, the work, taken as a whole, must also lack serious artistic, scientific, literary, or political value. *Id.*

decision in *FCC v. Pacifica Foundation*.¹⁷ In that case, the Pacifica Radio Foundation broadcasted George Carlin's "Filthy Words" monologue, which inquired why certain words were considered to be indecent, prompting the FCC to fine Pacifica for indecency.¹⁸ Pacifica challenged the FCC's decision and claimed that regulation of indecent speech violated its First Amendment rights.

The Supreme Court rejected Pacifica's argument and held that broadcasting does not receive the same level of First Amendment protection afforded to other forms of expression.¹⁹ The Court first found that Carlin's deliberate, repetitive, and provocative use of the "seven words" constituted indecent (but not obscene) speech within the meaning of § 1464.²⁰ The Court further held that regulation of indecent speech on the public airwaves was acceptable under the First Amendment because of two unique features of radio and television broadcasts.²¹ First, radio and television broadcasts were "a uniquely pervasive presence" in the United States, and indecent programming was therefore akin to a public nuisance coming uninvited into homes and private lives.²² Second, because broadcasting was uniquely accessible to children, the government had a legitimate interest in shielding children from programming that could "enlarge [their] vocabulary in an instant."²³

C. The FCC's Enforcement Policy

The Supreme Court limited its holding in *Pacifica* by declining to address whether "the isolated use of a potentially offensive word" could be constitutionally restricted.²⁴ Accordingly, the FCC initially interpreted its authority narrowly by confining its enforcement to cases involving the repeated and sustained use of Carlin's filthy words.²⁵ This under-inclusive policy was problematic, however,

17. See *Pacifica*, 438 U.S. at 749 (holding indecent speech may be regulated on radio and television broadcasts).

18. Brief for Respondents at 4, *FCC v. Fox Television Stations, Inc.*, No. 10-1293 (U.S. May 23, 2011).

19. *Pacifica*, 438 U.S. at 749–50 (holding that the unique characteristics of broadcasting justified a lower level of First Amendment protection from government interference).

20. *Id.* at 739–41.

21. *Id.* at 748–49.

22. *Id.*

23. *Id.* at 749.

24. *Id.* at 760–61 (Powell, J., concurring).

25. Brief for Respondents, *supra* note 18, at 6. The Omnibus Order issued by the FCC in 2006 was both a statement of policy and a historical compilation of different decisions made by

because limiting enforcement to only those specific words allowed for the broadcasting of indecent material through creative, yet still offensive, ways to describe sexual and excretory acts.²⁶ In 1987, the FCC revised its enforcement policy by adopting a context-specific approach that examined the words used in a broadcast, the broadcast's overall message, and the intended effect on the audience.²⁷ Despite this new policy, the FCC maintained a relaxed enforcement protocol, generally issuing fines for only the most egregious cases.²⁸ Starting in 2004, however, the FCC began to pursue perceived indecencies on the airwaves more aggressively, finding for the first time that even the isolated use of one of Carlin's seven words was indecent and worthy of a fine.²⁹ Responding to complaints and confusion from the broadcast networks, the FCC issued a new Omnibus Order in 2006 intended to clearly define the FCC's new indecency definition and enforcement policy.³⁰

D. The Post-Pacifica Cases

Two other cases regarding the FCC's regulation of broadcasters will weigh in the Court's consideration of *FCC v. Fox*. In *FCC v. League of Women Voters*,³¹ the Court struck down a statutory prohibition on publicly funded broadcasters airing editorial content. The Court noted that the government's right to impose restrictions on the speech of broadcasters is not limitless.³² Instead, regulation of broadcasters' First Amendment speech must be narrowly tailored to serve a "substantial government interest."³³

the FCC over the preceding years. *Id.* at 7. The hope was that while the new policy was much more amorphous than the old one, the Omnibus Order could give some clarity to the networks by providing extensive illustrations of when the FCC decided to fine a network and when it decided to forgo censoring a broadcaster. *Id.* at 8. Most of the documents and briefs associated with this case therefore discuss the enforcement history of the FCC and the Omnibus Order somewhat interchangeably.

26. Brief for Petitioners, *supra* note 1, at 6 (describing a Howard Stern monologue that discussed masturbation and bestiality, among other subjects, without ever using the filthy words).

27. *Id.* at 7.

28. Brief for Respondents, *supra* note 18, at 5.

29. *Id.* at 6.

30. *Id.* at 7.

31. 468 U.S. 364 (1984).

32. *Id.* at 377.

33. *Id.* at 379.

There is some tension between this doctrine and a prior Supreme Court case, *Red Lion Broadcasting v. FCC*.³⁴ In *Red Lion*, the Court upheld the “fairness doctrine,” a longstanding set of FCC regulations requiring broadcasters to give those they criticize airtime and an opportunity to rebut accusations made against them.³⁵ The Court first noted that since only a narrow band of the radio spectrum was suitable for broadcasts, and since only one broadcaster could effectively use a given frequency at any time, the broadcasters needed government involvement (in the form of a limited monopoly over certain frequencies) in order to operate effectively.³⁶ Other media do not need comparable levels of government involvement to function properly.³⁷ Because broadcasters need active government intervention, and because the government may set conditions on its aid to private actors, the government has the right to demand certain concessions from those to whom it grants a broadcast license.³⁸ The *Red Lion* “scarcity doctrine” thus established that broadcasters are fundamentally different from others who engage in speech, and their First Amendment freedoms are therefore subject to greater intrusion by the government.

IV. THE RULING BELOW

The networks responded to the 2006 Omnibus Order by suing the FCC in federal court. They alleged that the new policy was unconstitutionally vague in violation of the Fifth Amendment and that it exceeded the FCC’s authority under *Pacifica* to regulate speech protected by the First Amendment.³⁹ The Second Circuit initially invalidated the Omnibus Order under the Administrative Procedure Act, ruling that the FCC had failed to adequately justify its change in policy. The Second Circuit did not, however, rule on the networks’ constitutional claims.⁴⁰ The Supreme Court subsequently reversed the Second Circuit’s judgment and remanded for a ruling on whether the

34. 395 U.S. 367 (1969).

35. *Id.* at 374–75.

36. *Id.* at 376.

37. *See id.* at 387 (finding no need for government licenses and grants of limited monopolies for publishers of print media).

38. *See id.* at 388–89 (discussing how the scarcity of usable radio bandwidth justifies government regulation of the airwaves to promote the public interest).

39. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 446–47 (2d Cir. 2007), *rev’d*, 129 S. Ct. 1800 (2009).

40. *Id.*

FCC's policy violated the Fifth Amendment or exceeded *Pacifica's* restrictions on First Amendment speech.⁴¹

On remand, the Second Circuit ruled that the FCC's current indecency-enforcement policy is unconstitutionally vague in violation of the Due Process clause of the Fifth Amendment.⁴² As the Second Circuit was bound by *Pacifica* to reject the networks' First Amendment challenges, it concluded that "[w]e do not suggest that the FCC could not create a constitutional policy. We hold only that the FCC's current policy fails constitutional scrutiny."⁴³

The court's opinion detailed what the judges believed to be an inexplicable pattern of enforcement by the FCC.⁴⁴ This violated the classic void-for-vagueness test since sophisticated networks, much less a person of ordinary intelligence and understanding, could not predict what the FCC would consider to be indecent programming.⁴⁵ For example, in many episodes of *NYPD Blue*, the FCC found the use of the word "bullshit" to be indecent but allowed the networks to say "dick," "dickhead," "up yours," "pissed off," and "kiss my ass."⁴⁶ Given that these phrases describe far more graphic activities than bovine defecation, these examples are perplexing. Moreover, although the FCC fined broadcasters for the isolated and unscripted use of single expletives, it allowed all of the words on Carlin's list to be used during unedited airings of the film *Saving Private Ryan*.⁴⁷ The FCC justified the distinction on artistic grounds, claiming that the power and realism of *Saving Private Ryan* would be severely diminished if the offensive words were edited out, but the court found that this half-formed "artistic necessity doctrine" merely added another layer of confusion and ambiguity to the enforcement standard.⁴⁸ The court held that the policy's ambiguity not only resulted in fines for the networks but also chilled their legitimate exercise of First Amendment speech.⁴⁹ As an example, the court noted that several CBS affiliates—fearing regulatory action by the FCC—refused to air

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

42. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 461 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 3065 (U.S. June 27, 2011) (No. 10-1293).

43. *Id.* at 335.

44. *Id.* at 330–31.

45. *Id.* at 327 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

46. *Id.* at 330.

47. *Id.* at 331.

48. *Id.* at 333.

49. *Id.* at 335.

an award-winning documentary about the 9/11 terrorist attacks because the film contained expletive-filled radio communications of firefighters and police officers.⁵⁰

V. ARGUMENTS

The Supreme Court will first need to decide whether to uphold the Second Circuit's ruling that the FCC's current policy is unconstitutionally vague. Even if the Court finds that the FCC's policy passes muster under the Fifth Amendment, it will still need to consider the facial challenge to *Pacifica* brought by the networks.

A. *The Fifth Amendment Vagueness Claim*

1. The FCC's Attack on the Second Circuit Ruling

The FCC's central contention on appeal to the Supreme Court is that the Second Circuit improperly applied the test for unconstitutional vagueness. The FCC argues that the Second Circuit should have considered only whether the policy was unconstitutional as applied to the broadcasters in this case, not whether the policy was unconstitutionally vague on its face.⁵¹ The FCC also points out that the networks' own internal guidelines prohibit the use of expletives and images of nudity, implying that the broadcasters were already aware that using those words and images could be considered offensive.⁵² Moreover, in the cases in question, the expletives were not used to advance any kind of artistic, political, or social commentary, but were merely instances of celebrities making fools of themselves on camera.⁵³ Wherever the murky boundaries of indecent language may lie, there was no reason for Fox to believe that allowing Nicole Richie to complain about "cow shit" in her Prada purse was decent broadcasting within the meaning of § 1464.⁵⁴

The FCC gives three reasons why a flexible definition is both harmless and desirable because of the particular nature of broadcasting.⁵⁵ First, the indecency standards are not enforced against members of the general public but only against a handful of large,

50. *Id.*

51. Brief for Petitioners, *supra* note 1, at 17.

52. *Id.* at 28.

53. *Id.* at 29.

54. *Id.* at 31.

55. *Id.* at 33–36.

sophisticated, and well-informed corporations.⁵⁶ Thus, concerns that ordinary citizens cannot distinguish between what a vague statute allows and proscribes are not present here.⁵⁷ Second, any harm done by an amorphous policy is likely to be minimal as the networks' own internal guidelines are actually more restrictive than the FCC's requirements—the broadcasting companies and, in fact, most cable channels (which are not subject to FCC regulation) generally prohibit the use of Carlin's words and voluntarily censor expletives during live broadcasts.⁵⁸ This "self-censorship," combined with the fact that graphic descriptions of sexual and excretory activity are not generally considered within the core of the First Amendment, means that a vague policy "is unlikely to foreclose a substantial amount of broadcast speech."⁵⁹ Third, an inflexible indecency standard would allow broadcasters to air extremely offensive material while avoiding sanction by simply using words, phrases, and images that are not explicitly prohibited by the FCC.⁶⁰ A policy focusing only on particular images and words, without looking at context, would not be able to keep provocateurs from exploiting the malleability of the spoken word and circumventing the purpose of the statutory prohibitions.⁶¹ So long as the FCC is required to police the public airwaves, a certain level of ambiguity in the indecency policy is both necessary and desirable.

2. Respondents' Reply

Although the FCC's Fifth Amendment arguments center on whether the broadcasters had sufficient notice that the isolated use of expletives and nudity might be considered indecent, Respondents contend that the main question for the Court is whether the indecency definition is so vague as to invite arbitrary and capricious enforcement.⁶² Respondents further argue that both the FCC's indecency-enforcement policy and its actual enforcement decisions reveal a pattern of subjective judgments and decisions. Because each

56. *Id.* at 34.

57. *Id.*

58. *Id.* at 35.

59. *See id.* at 35–36 (arguing that even a vague policy will not have any significant chilling effect on speech).

60. *Id.* at 35.

61. *See id.* (pointing out attempts by "shock jocks" to air offensive broadcasts without using any prohibited words).

62. Brief for Respondents, *supra* note 18, at 41.

instance of indecency is determined individually, “the FCC may now decide indecency complaints based on one, some, or all of the factors it had previously announced, or it can decide cases on ‘other’ factors it chooses to invoke at its whim.”⁶³ This level of subjective judgment has led to an enforcement pattern that is difficult to rationalize and even more difficult for the networks to follow without gross amounts of self-censorship. For example, the FCC declared that expletives were acceptable in *Saving Private Ryan* because of the realistic nature of the film but not in other works that strive for high levels of authenticity and realism.⁶⁴

First, Respondents argue that the FCC’s indecency standards are unconstitutionally vague even as applied to the specific incidents in this case.⁶⁵ The FCC had previously declined to hold that the isolated and fleeting use of an expletive constituted indecent speech.⁶⁶ Additionally, Respondents contend that a court need not find that a law was impermissibly vague as applied to a specific case, but only that there is a real and substantial risk that the law’s vagueness would invite arbitrary and capricious enforcement.⁶⁷

Second, Respondents argue that even if the pattern of enforcement could be rationalized, the FCC’s definition is impermissibly vague on its face.⁶⁸ Respondents rely on *Reno v. ACLU*,⁶⁹ in which the Court found that an identical definition of indecency used by another government agency was unconstitutional.⁷⁰ Because the definition of indecency relies on an amorphous appeal to community standards instead of objective criteria,⁷¹ the FCC’s

63. *Id.* at 44 (referencing language from the FCC’s Omnibus Order allowing the agency to use factors not enumerated in agency policy to make indecency judgments).

64. *Id.* at 45 (comparing the FCC’s decision on *Saving Private Ryan* to its decision that Martin Scorsese’s inclusion of expletives in a documentary about Blues performers was “shocking”).

65. *Id.* at 53.

66. *Id.* at 54 (pointing out that all the cases cited by the government as putting the networks on notice were instances of egregiously offensive conduct).

67. *Id.* at 52.

68. *See id.* (noting that the policy does not list any objective definitions but only makes vague appeals to context).

69. 521 U.S. 844 (1997).

70. Brief for Respondents, *supra* note 18, at 40 (citing *Reno*, 521 U.S. at 870–74).

71. *Reno*, 521 U.S. at 872–73 (pointing out that the test for obscenity articulated in *Miller* required not just that a work be considered offensive, but also that it lack any significant redeeming value). Unlike the community standard for offensiveness, whether a work has some larger scientific, political, or social purpose was considered to be a relatively fixed standard that did not vary much either by community or over time. *Id.*

enforcement can change at the whim of the agency. Consequently, broadcasters are unable to predict what the FCC will consider indecent in a given year.⁷²

Respondents agree that the Court should not rely on abstract hypotheticals when conducting this analysis, arguing that the Second Circuit used actual examples of FCC enforcement decisions to conclude that the law is impermissibly vague.⁷³ The FCC's indecency-enforcement policy therefore violates the Fifth Amendment both on its face and as applied.

B. *The First Amendment Claim*

1. Respondents' Attack on *Pacifica*

Beyond the Fifth Amendment issues confronted by the Second Circuit, Respondents invite the Supreme Court to strike down the FCC's indecency policy on First Amendment grounds and to overrule *Pacifica*.⁷⁴ Respondents argue that *Pacifica* rests almost entirely on two factual assumptions—the pervasiveness of broadcasting and its accessibility to children—which were dubious in 1978 and are demonstrably untrue in 2012.⁷⁵ The media market of the 1970s may have been dominated by television and radio broadcasters, making network programming “uniquely pervasive,” but the introduction of cable television and the internet has completely reshaped mass communication.⁷⁶ Respondents cite several statistics to prove this point: nearly ninety percent of American households subscribe to some kind of cable or satellite television package; only a quarter of all primetime viewers watch network television broadcasts; and most teenagers spend vastly more time watching cable programming or surfing the internet than viewing network broadcasts.⁷⁷ Furthermore, these figures do not account for other new media, such as video games, that provide additional entertainment alternatives to traditional broadcasting.⁷⁸ The Court has consistently rejected efforts to limit and regulate speech in these new media, leaving broadcasting

72. Brief for Respondents, *supra* note 18, at 48.

73. *Id.* at 49–50.

74. *Id.* at 16–17.

75. *Id.* at 17.

76. *Id.* at 18.

77. *Id.* at 18–19 (showing that teenagers spend two hours a day watching cable, compared to just thirty-eight minutes on network broadcasts).

78. *Id.* at 20.

in the peculiar position of being the only variety of mass media where the government can regulate speech protected by the First Amendment.⁷⁹ Respondents also argue that although broadcasting remains accessible to children, the internet and other new forms of media are just as easy for a child to view.⁸⁰ In fact, at the same time that new technology such as the V-chip (which limits what programs can be seen on a television) has made broadcasting less accessible to children, the proliferation of smartphones and other mobile devices has made the internet and other new media an omnipresence in most children's lives.⁸¹ *Pacifica* thus is an anachronism and should be overruled so that the law does not continue to be driven by a media market that no longer exists.

Even if the Court decides not to overturn *Pacifica*, Respondents argue that *Pacifica* marks the outer limit of the FCC's authority to regulate the airwaves and that the use of fleeting expletives or images of a woman's back should not be subject to sanction.⁸² Under the *League of Women Voters* test, the FCC may regulate broadcasters' speech only if its policy is narrowly tailored to serve a substantial government interest.⁸³ Respondents argue that the FCC's current enforcement policy fails both prongs of this test: there is neither a substantial government interest nor a narrowly tailored policy. There is no government interest in protecting children and squeamish adults from isolated and fleeting exposure to curse words and brief glimpses of parts of the naked body; children will learn the words eventually and everyone presumably has seen naked buttocks somewhere before.⁸⁴ If *Pacifica* stands, Respondent argues, it should be read to limit the FCC's authority to cover only the most shocking and egregious examples of indecent behavior.

2. The FCC's Defense of *Pacifica*

The FCC contends that despite the post-1970s media revolution, broadcasting remains a uniquely pervasive medium that is particularly accessible to children.⁸⁵ Over nineteen million households have televisions that only receive the broadcast networks, and broadcast

79. *Id.* at 16.

80. *Id.* at 21–22.

81. *Id.* at 22.

82. *Id.* at 26.

83. *Id.*

84. *Id.* at 26–27.

85. Brief for Petitioner, *supra* note 1, at 44.

programming continues to dominate the ratings charts.⁸⁶ The FCC also cites statistics showing that thirty-four percent of children have a television in their bedroom without access to a cable or satellite package.⁸⁷ Broadcasting remains the easiest medium for children to access because only a television and a power source are required to view it, while cable and the internet require other affirmative steps by the user.⁸⁸ The fact that broadcasting might no longer be the nearly exclusive source of at-home entertainment does not preclude its continued dominance.

The FCC also relies on the *Red Lion* scarcity doctrine to justify its continued enforcement of indecency standards. Because broadcasters could not operate without a monopoly on certain frequencies granted and enforced by the government, the government is in turn allowed to require broadcasters to operate in a manner that promotes the public interest.⁸⁹ Just as broadcasters have, in the interests of public discourse and fairness, been required to give equal airtime to those they criticize, so too must the networks preserve their programming as a safe haven from cruder media.⁹⁰ The grant of a broadcast license thus amounts to a bargain between the government and a network, and the FCC is well within its rights to promote the government's side of that deal.

VI. ANALYSIS AND LIKELY DISPOSITION

The FCC is going to lose this case and the only question is how badly. The current indecency-enforcement standards have been applied erratically over the last decade and are impermissibly vague both in general and as applied to the facts of this case. In all likelihood, the Court will issue a limited decision that strikes down the FCC policy on vagueness grounds and does not reach the First Amendment issue. *Pacifica*, however, was explicitly grounded on a set of facts that simply are not true today and the Court should take this opportunity to overrule an antiquated case. Given what the Roberts Court has found to be worthy of First Amendment protection,

86. *Id.*

87. *See id.* at 46 (citing statistics about overall access to broadcast television).

88. *Id.* at 46–47.

89. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 376 (1969); Brief for Petitioner, *supra* note 1, at 42–43.

90. *See* Brief for Petitioner, *supra* note 1, at 43 (citing *Red Lion*, 395 U.S. at 376 (holding that the unique elements of broadcasting allow the government to make special demands on the grantees of broadcast licenses)).

Pacifica should be overruled and the networks should be allowed to broadcast any and all material protected by the Constitution.

A. *Vagueness: In General and As Applied*

The FCC's indecency-enforcement policy embodied in its Omnibus Order is vague on its face. The FCC issued the Omnibus Order so that broadcasters could understand how its new policy would work in practice, but this is impossible given the FCC's erratic pattern of enforcement. For example, the FCC sanctions the networks for the momentary use of expletives but allowed their repeated use in *Saving Private Ryan*.⁹¹ The FCC ruled that the use of those words was artistically necessary in the context of that film, but it found a documentary on the Blues, which contained interviews with musicians using expletives to talk candidly about their lives and works, to be indecent.⁹² There are no objective criteria that make the use of expletives artistically necessary in a work of fiction but not in a documentary. Moreover, any subjective judgments the FCC makes about art would be arbitrary by definition. This vague and ambiguous policy contrasts with the pre-2004 indecency definition, which focused on the sustained repetition of the filthy words or gratuitous and graphic depictions of sexual and excretory activities.⁹³ This policy, in practice, was used only against egregiously offensive broadcasts.⁹⁴

The FCC is correct that any indecency standard that ignores context will inevitably lead to incoherent results. Context, however, is perhaps the opposite of a specific and pre-determined standard, and the FCC provides no uniform set of principles to guide its determinations.⁹⁵ Perhaps the most telling factor is that the FCC does not contend anywhere in its brief that it enforces its indecency policy evenhandedly.⁹⁶ The FCC instead asserts that the central question for

91. Brief for Respondents, *supra* note 18, at 45 (discussing the pattern of enforcement laid out in the Omnibus Order).

92. *Id.*

93. Abigail T. Rom, Note, *From Carlin's Seven to Bono's One: The Federal Communications Commission's Regulation of Those Words You Can Never Say on Broadcast Television*, 44 VAL. U. L. REV. 705, 732–35 (2010) (arguing that the new indecency policy gives unconstitutional levels of discretion when compared with the old regime, and pointing out that the FCC previously had declined to act against broadcasts that contained isolated expletives and only fined networks whose programming approached Carlin levels of offensiveness).

94. *Id.*

95. *Id.*

96. See Brief for Respondents, *supra* note 18, at 47 (arguing that the government has failed to actually argue that the policy is clear and not enforced arbitrarily).

the Court is not arbitrary enforcement in other instances, but whether it was capricious to fine the broadcasters for the incidents at issue here.⁹⁷

Even if the Court adopts the “as applied” framework urged by the FCC, it is still likely to hold that the indecency definition is impermissibly vague. Because for over two decades the FCC explicitly held that the isolated use of an expletive was not indecent, Fox could not have expected to incur liability by allowing Richie to ad lib on live television.⁹⁸ Although the FCC cites several instances where it fined broadcasters for the use of the filthy words, all of those violations involved the deliberate and repeated use of profanity.⁹⁹

The way the FCC approaches other words only further clouds the matter. The word “fuck” is considered presumptively indecent by the FCC because of its sexual connotations,¹⁰⁰ but was used by Bono merely as a point of emphasis and not in a sexual manner. The phrases “kiss my ass” and “up yours” describe graphic sexual activities, but are allowed on television.¹⁰¹ The only defense offered for this distinction is merely that unlike the approved words and phrases, “fuck” and “shit” are intrinsically offensive because of their basic meanings¹⁰²—an odd conclusion given that “up yours” describes an action that involves the core definitions of both “fuck” and “shit.” Furthermore, if the words “fuck” and “shit” are considered offensive in and of themselves, regardless of how they are used, then the FCC should not have permitted the unedited broadcast of *Saving Private Ryan*. There is simply no way to make sense of the totality of the FCC’s new enforcement regime without falling back on the subjective, and therefore unconstitutional, aesthetic judgments of the agency. Nor does this necessarily mean that the FCC must ignore context and publish an exhaustive list of words and phrases that may not be used on television; rather, only that their contextual standard must be limited by clear, objective criteria, similar to those used in *Miller v. California*¹⁰³ to determine what constitutes an obscenity.¹⁰⁴ At a

97. Brief for Petitioner, *supra* note 1, at 25.

98. See Brief for Respondents, *supra* note 18, at 5 (pointing to the FCC’s historical practice of not fining networks for fleeting expletives).

99. *Id.* at 54.

100. See Brief for Petitioner, *supra* note 1, at 28 (discussing the FCC’s awareness that the “F-Word” is inconsistent with contemporary community standards).

101. *Id.* at 28–29.

102. *Id.*

103. 413 U.S. 15 (1973).

minimum, therefore, the Court is likely to find the FCC indecency policy unconstitutionally vague, to dismiss the fines, and to require the agency to promulgate a new policy.¹⁰⁵

B. *The End of Pacifica*

If the Court rules for the Respondents on the vagueness issue, it may decide not to address *Pacifica*. In the last two years, however, the Court has found that shouting homophobic slurs and “thank God for dead soldiers” at a military funeral is fully protected speech,¹⁰⁶ that video games involving lighting school girls on fire and then urinating on them are just as worthy of First Amendment protection as *The Divine Comedy*,¹⁰⁷ and that contributions to political campaigns by corporations cannot be constitutionally restricted.¹⁰⁸ For the Court to then decide to draw a line in the sand at a seven-second image of a naked woman’s posterior would be absurd. The Court should take this opportunity to overrule *Pacifica* and strike down all limitations on First Amendment activities by broadcasters. The decision to overturn *Pacifica* ought to be straightforward given that *Pacifica* was driven entirely by circumstances that simply no longer exist. It probably was fair to characterize broadcasting as a uniquely pervasive medium in 1978. Most houses had televisions or radios and—in the dark days before basic cable—broadcast radio and television were the exclusive forms of mass media that could be consumed in the home.¹⁰⁹ Today, broadcast networks are better known as what you must scroll past on the interactive guide before arriving at HBO, Starz, and the Playboy Channel. DVDs and Netflix have added to what a television set can do, and this is before considering the magnitude of entertainment options available through Xbox 360, PlayStation 3, or Wii. Above all else, though, the internet’s explosive growth guarantees that

104. *Id.* at 24 (outlining a test for obscenity that requires, among other things, a finding that an average and reasonable member of the community would find a work, taken as a whole, to appeal to a prurient interest in sex).

105. See Jerome A. Barron, Comment, *FCC v. Fox Television Stations and the FCC’s New Fleeting Expletive Policy*, 62 FED. COMM. L.J. 567, 584 (2010) (predicting that the Court will uphold *Pacifica* but strike down the new FCC policy).

106. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1213, 1220–21 (2011) (holding that the openly offensive anti-gay protests by the Westboro Baptist Church at military funerals are protected speech).

107. See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2737 n.4, 2738 (2011) (holding that extremely violent video games are protected speech).

108. See *Citizens United v. FEC*, 130 S. Ct. 876, 916–17 (2010) (holding that expenditures on political campaigns by corporations are protected speech).

109. *FCC v. Pacifica Found.*, 438 U.S. 726, 748–50 (1978).

broadcasting will never again be the only form of truly mass media.¹¹⁰

Given the substantially reduced role of broadcast television and radio in the modern media marketplace, it is hard to contend that broadcasting is more accessible to children than the internet. The FCC contends that accessing the internet requires certain “affirmative steps” that accessing broadcasting does not, but even taken at face value this argument only accounts for the home environment and ignores the fact that children have access to the internet almost everywhere—in schools, in libraries, on their smartphones, and even on their friends’ smartphones.¹¹¹ *Pacifica* is an anachronism that only made sense in a world where home entertainment was confined to three channels and a radio set.

If *Pacifica* stands, it is not likely to be expanded to cover the present case.¹¹² The Court ruled in 1978: “It is appropriate, in conclusion, to emphasize the narrowness of our holding We have not decided that an occasional expletive . . . would justify any sanction.”¹¹³ This passage was written before the advent of cable television and the internet, and becomes particularly important when the use of fleeting expletives and images of a woman’s naked back are considered under the *League of Women Voters* test. It is difficult to articulate what actual harm results from children occasionally hearing words they will learn eventually or from briefly seeing familiar parts of the human body in a non-sexual context. Indeed, many high school students now read the classic novel *Ulysses*, once considered obscene because of its use of expletives.¹¹⁴ Revealingly, the FCC does not attempt to articulate any significant government interest in forcing broadcasters into an unnaturally clean style of speech. Instead, the FCC declares that the Court should not require it to articulate why it is so important that children not learn explicit words from the television instead of from their parents, teachers, coaches, or fellow

110. See *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 326 (2d Cir. 2010), cert. granted, 131 S. Ct. 3065 (U.S. June 27, 2011) (No. 10-1293) (pointing out that the internet has already become a dominant form of media and will only become more important in the future).

111. See Brief for Petitioner, *supra* note 1, at 47–48 (illustrating the pervasive presence of the internet today).

112. See Barron, *supra* note 105, at 585 (predicting that the Court will uphold *Pacifica* but strike down the new FCC policy).

113. *Pacifica*, 438 U.S. at 750.

114. Cara L. Newman, Note, *Eyes Wide Open, Minds Wide Shut: Art, Obscenity, and the First Amendment in Contemporary America*, 53 DEPAUL L. REV. 121, 134–35 (2003) (discussing how *Ulysses* caused a shift in what was considered obscene).

third graders.¹¹⁵ The proposed expansion of the *Pacifica* holding to cover fleeting expletives thus clearly runs afoul of *League of Women Voters* and should be rejected.

The Court is also unlikely to agree with the FCC's justifications based on *Red Lion*. As Respondents point out, the requirements upheld in *Red Lion* and similar cases were affirmative duties imposed on broadcasters to allow others access to the airwaves—a natural requirement given the demand for broadcast licenses and the limited number of usable frequencies.¹¹⁶ The scarcity doctrine might impose affirmative duties on license holders, but this does not mean that broadcasters enjoy less First Amendment protection than other actors.¹¹⁷ The FCC's argument requires the Court to actually expand the holding of *Red Lion*, rather than simply follow a controlling precedent. Therefore, the Court is likely to extend to broadcasters the full protection of the First Amendment—a right they have been denied for more than thirty years.

VII. CONCLUSION

It made a certain amount of sense to subject broadcasters to greater regulation when mass media consisted of four television stations, AM and FM radio, and perhaps one or two significant movie releases a week. The world could not be more different today. Broadcast television is a fleeting afterthought in an exploding media marketplace and could become obsolete as the internet generation comes of age. The Court should recognize this new reality and give television the right to be just as absurd and indecent as YouTube.

115. See Brief for Petitioner, *supra* note 1, at 20–21 (discussing how even a single uttered expletive can cause a damaging expansion in a child's vocabulary).

116. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 400–01 (1969) (finding that the number of persons seeking a broadcast license greatly exceeds the available space in the electromagnetic spectrum; broadcast space is therefore a uniquely scarce resource).

117. Brief for Respondents, *supra* note 18, at 37. Respondents also note throughout their discussion of *Red Lion* that the growth of other forms of media has undercut demand for space on the radio frequency and reduced the uniquely pervasive presence of broadcasting. *Id.* This undermines the basic scarcity rationale for *Red Lion* and calls the continued viability of that case into question as well. *Id.* (pointing out that *Red Lion* was always believed to have a “limited shelf life”).