The Federal Communication Commission's New Enforcement Policy, Which Penalizes Broadcasters for Airing Even a "Fleeting Expletive" in Violation of the Statutory Indecency Ban, is Not Arbitrary and Capricious under the Administrative Procedure Act: 

*FCC v. Fox Television Stations, Inc.*

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Administrative Law and Procedure—Judicial Review of Administrative Decisions—Scope of Judicial Review—The Supreme Court of the United States held that an independent government agency, such as the FCC, must only show good reason for changing its prior policy to be in compliance with the Administrative Procedure Act. The agency is not required to articulate why the new policy is, in fact, a better choice than its prior policy.


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I. THE FACTS OF FCC v. FOX

An estimated 2.5 million children were tuned into Fox Television’s live broadcast of the 2002 Billboard Music Awards, when singer Cher uttered, “I’ve had unbelievable support in my life and I’ve worked really hard. . . . I’ve also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck ‘em.” 1 Just one year later, during the 2003 broadcast of the Billboard Music Awards, minor viewers were again exposed to the foul language of reality television star Nicole Richie, when she exclaimed, “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.” 2 The present case, FCC v. Fox Television Stations, Inc., 3 stems from these two broadcasts, which the Federal Communications Commission (FCC) has classified as “actionably indecent” under a federal statute banning the broadcast of “any obscene, indecent, or profane language” (hereinafter Indecency Ban). 4

2. Remand Order, 21 F.C.C.R. at 13303.
4. Fox, 129 S. Ct. at 1809. The statute reads, “Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.” 18 U.S.C. § 1464 (2006). Through this statute, Congress also delegated power to the FCC to “promulgate regulations for the enforcement” of the Indecency Ban. Id. (Obscene Language; Promulgation of Regulations); see also 47 U.S.C. § 303 (2006).
II. THE PROCEDURAL HISTORY OF FCC v. FOX

Although the Notice of Apparent Liability for Forfeiture (NAL)\(^5\) issued against Fox Television Stations, Inc. in this case did not penalize the broadcaster for violating the Indecency Ban, it solidified the fact that the FCC would no longer tolerate even isolated, “fleeting expletives” uttered during live media broadcasts.\(^6\) This new policy, which was first established by the FCC’s *Golden Globe Order* in 2004,\(^7\) marked a drastic change from the once lenient policy of the FCC.\(^8\) The change was so significant that it prompted Fox and multiple other licensed broadcasting companies to petition the United States Court of Appeals for the Second Circuit for judicial review of the NAL.\(^9\) However, because no penalty was enforced against Fox, and the parties had not yet challenged the decision before the FCC, the case was voluntarily remanded for an Agency decision.\(^10\)

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5. A Notice of Apparent Liability for Forfeiture is a decision issued by the FCC against a person or entity that has violated the indecency ban and is potentially liable for a forfeiture penalty. Obscenity, Indecency & Profanity—Frequently Asked Questions, http://www.fcc.gov/eb/oip/FAQ.html (last visited May 24, 2010). In order to impose such a forfeiture penalty, which is “a monetary sanction paid to the United States Treasury,” the FCC must first issue a NAL against the violating person or entity. *Id.* A NAL contains the following: (1) the FCC’s preliminary findings as to why the person or entity has apparently violated the Indecency Ban; and (2) the amount of the proposed forfeiture. *Id.*


7. *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program,* 19 F.C.C.R. 4975 (2004) [hereinafter *Golden Globe Order*]. The *Golden Globe Order* was issued after the live broadcast of the 2004 Golden Globe Awards, when U2 singer Bono exclaimed, “This is really, really, **f***king brilliant.” *Fox,* 129 S. Ct. at 1807 (citing *Golden Globe Order,* 19 F.C.C.R. at 4976, n.4). The *Golden Globe Order* declared the broadcast of Bono’s fleeting expletive “actionably indecent” and, for the first time, made clear that even the occasional, unplanned use of a non-literal expletive could be punished as a violation of the Indecency Ban. *Id.* at 1808.

8. *Fox,* 129 S. Ct. at 1806-07. The FCC’s initial approach to enforcing the indecency ban required broadcasters to refrain from the “deliberate” and “repetitive occurrence” of indecent words. *Id.* at 1806. The enforcement policy was later expanded to make a distinction between the “literal” and “non-literal” use of indecent words, only retaining the deliberate and repetitious requirements for an expletive used in the non-literal sense. *Id.* at 1807. Before arriving at its latest policy (the issue of dispute in the present case), the FCC’s enforcement policy focused on the context in which the utterance was made and generally found that expletives that were “passing or fleeting in nature . . . tended to weigh against a finding of indecency.” *Id.* (internal quotation omitted).

9. *Id.* at 1808.

10. *Id.*
A. The Second Circuit Reverses the FCC's Remand Order

In upholding its initial decision on remand, the FCC relied primarily on the context in which the utterances occurred and noted that both incidents would have been actionably indecent under prior FCC policy. The FCC took the opportunity, however, to clarify that the Golden Globe Order was the new policy of the FCC and that fleeting expletives could be found actionably indecent.

The FCC's Remand Order was then appealed to the Court of Appeals for the Second Circuit, and was ultimately reversed upon a finding that the Agency's reasoning was insufficient under the Administrative Procedure Act. The FCC then appealed to the Supreme Court of the United States, which granted certiorari to determine whether the FCC's new policy making fleeting expletives actionably indecent was "arbitrary" or "capricious," thus justifying the Second Circuit's setting aside of the Agency decision under the Administrative Procedure Act.

B. The Supreme Court Reverses the Second Circuit

1. Justice Scalia's Majority Opinion

In a narrow 5-4 decision, the Supreme Court held that the FCC's new enforcement policy was neither arbitrary nor capri-
cious, and thus the judicial action taken by the Second Circuit was improper. Writing for the majority, Justice Scalia criticized the elevated standard of review employed by the Second Circuit, which demanded greater explanation from the FCC simply because it was changing policy. The majority found no support for this interpretation of the Administrative Procedure Act, and instead concluded that an agency must only show *good reason* for a change in policy. The Court found this standard satisfied, as the FCC’s reasoning for expanding its enforcement policy was “entirely rational.” That is to say the Court validated the following reasons proffered by the FCC for changing its policy: (1) the new policy will protect the nation’s children from offensive language; (2) new technology makes it easier for broadcasters to bleep out a single offensive word, and; (3) the FCC no longer read a prior Supreme Court decision as setting a constitutional bar against the punishment of fleeting expletives and the new policy was not inconsistent with this new reading.

Justice Scalia then responded to the opposing views of the Second Circuit Court of Appeals, the Respondent broadcasters, and the Supreme Court dissenters, each in turn. In addressing the Second Circuit’s reasoning for finding the FCC’s action arbitrary and capricious, Justice Scalia pointed to three critical errors. First, the empirical data that was demanded by the circuit court to explain why the FCC had not previously banned fleeting expletives was near impossible to obtain, and the government’s interest in protecting the nation’s youth outweighed the need for such data. Second, the circuit court’s fear that the FCC’s “first blow” theory would require a ban on virtually all broadcasts of

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16. *Fox*, 129 S. Ct. at 1810. This case produced six separately written opinions: (1) Justice Scalia authored the majority opinion, in which parts I, II, III-A through III-D, and IV were joined by the Chief Justice Roberts, Justice Kennedy, Justice Thomas, and Justice Alito (only Justices Roberts, Thomas, and Alito joined with respect to Part III-E); (2) Justice Thomas filed a concurring opinion; (3) Justice Kennedy filed an opinion concurring in part and concurring in the judgment; (4) Justice Stevens filed a dissenting opinion; (5) Justice Ginsburg filed a dissenting opinion; and (6) Justice Breyer filed a dissenting opinion, which Justices Stevens, Souter, and Ginsburg all joined.

17. *Id.*

18. *Id.*

19. *Id.* at 1812.


22. *Id.* at 1813-14.

23. *Id.* at 1813. Justice Scalia described the Court of Appeals need for empirical data as “insist[ing] upon obtaining the unobtainable.” *Id.* “Here it suffices to know that children mimic the behavior they observe . . . . Programming replete with one-word expletives will tend to produce children who use (at least) one word indecent expletives.” *Id.*
expletives, was not relevant to the policy being reviewed and ignored the FCC's decision to review each incident on a case-by-case basis.\textsuperscript{24} Third, the majority found unpersuasive the Second Circuit's argument against the FCC's prediction that an exemption for fleeting expletives would lead to increased use.\textsuperscript{25}

Next, the Court deemed it necessary to address some of the arguments made by the Respondent broadcasters, but not adopted by the Court of Appeals.\textsuperscript{26} First, the argument that the FCC did not acknowledge the change in policy was without merit, according to the Court, as the \textit{Remand Order}, which sets forth the new policy, explicitly stated that all prior policies are "no longer good law."\textsuperscript{27} Next, the Court determined that the second argument pushed by the broadcasters, that the FCC had adopted a "presumption of indecency," ignored the FCC's continual emphasis on context in determining whether or not a fleeting expletive is actionably indecent.\textsuperscript{28} Finally, the Court interpreted the broadcasters' reading of the Supreme Court's prior decision in \textit{FCC v. Pacifica Foundation}\textsuperscript{29} to be inaccurate.\textsuperscript{30}

With the Court divided by only one vote, five of the fourteen pages of Justice Scalia's opinion were dedicated to addressing the opposing views of the dissenters.\textsuperscript{31} Justice Scalia first disagreed with Justice Breyer's claim that the FCC, as an independent

\begin{itemize}
\item \textsuperscript{24} Id. at 1814.
\item \textsuperscript{25} Id. Justice Scalia noted, "To predict that complete immunity for fleeting expletives...will lead to a substantial increase in fleeting expletives seems to us an exercise in logic rather than clairvoyance." \textit{Id.}
\item \textsuperscript{26} \textit{Fox}, 129 S. Ct. at 1814-15.
\item \textsuperscript{27} \textit{Id.} at 1814 (citing \textit{Golden Globe Order}, 19 F.C.C.R. at 4980). The FCC's \textit{Remand Order} also reiterated this point: "Commission dicta and Bureau-level decisions issued before [the \textit{Golden Globe Order}] had suggested that expletives had to be repeated to be indecent but...this guidance was seriously flawed." \textit{Remand Order}, 21 F.C.C.R. at 13300 (emphasis added).
\item \textsuperscript{28} \textit{Fox}, 129 S. Ct. at 1815.
\item \textsuperscript{29} 438 U.S. 726 (1978). In \textit{Pacifica} the Supreme Court, for the first time, upheld the FCC's enforcement of the Indecency Ban against a radio station for airing comedian George Carlin's "Filthy Words" monologue and concluded that the FCC could punish broadcasters for airing the seven indecent words actually used by Carlin. \textit{Id.} The Court emphasized, however, that it had not decided that an "occasional expletive...would justify any sanction." \textit{Id.} at 750. It was this statement from the Supreme Court in 1978 that provided support for the FCC's policy against punishment for "fleeting expletives" for nearly forty years. \textit{Fox}, 129 S. Ct. at 1833 (Breyer, J., dissenting).
\item \textsuperscript{30} \textit{Fox}, 129 S. Ct. at 1815. Though Fox would like to treat \textit{Pacifica} as setting the "outer limits of permissible regulation" that is not what the case stands for, and there is presently no authority that prohibits an agency from gradually expanding its enforcement policies. \textit{Id.}
\item \textsuperscript{31} \textit{Id.} at 1815-1819. While there was a majority with respect to all other Parts of Justice Scalia's opinion, the portion addressing the arguments of the dissenters, Part III-E, represented only a plurality of the Court.
\end{itemize}
agency, should be protected from political oversight. Justice Scalia explained that independent agencies are protected from presidential oversight and not politics, and as a result there is more pressure from Congress on the agencies. Here, Justice Scalia cited a House of Representatives Subcommittee hearing to suggest that the FCC's new enforcement policy was actually urged by Congress. Justice Scalia also attacked Justice Breyer's argument that the FCC's new policy will have a detrimental impact on small local broadcasters who cannot afford the expensive technological equipment that would be necessary to "bleep out" fleeting expletives and stay in compliance with FCC regulations. Again, however, Justice Scalia reiterated that the FCC has retained discretion to decide each incident on a case-by-case basis, and thus the FCC would likely take the plight of the small local broadcaster into consideration when deciding whether to impose sanctions for an actionably indecent broadcast.

Justice Scalia then addressed what he believed to be the flawed reasoning behind Justice Stevens's dissent, which characterized the relationship between the FCC and Congress as that of a principal and agent. Because of this relationship, Justice Stevens believed that the FCC owed Congress a greater explanation for its change in policy. The majority, however, disagreed.

Finally, addressing an argument common to both Justice Breyer and Justice Stevens, the majority found that the FCC's failure to discuss the constitutional implications of its new policy did not justify an "arbitrary" or "capricious" finding. According to the majority, this argument ignored the attention paid to this issue in

32. Id. at 1815-16.
33. Id. at 1815.
34. Id. at 1816, n.4 (citing "Can You Say that on TV?": An Examination of the FCC's Enforcement with respect to Broadcast Indecency, Hearing Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce, 108th Cong. 2-4, 17, 19 (2004)). To make his point, Justice Scalia referenced a Subcommittee Hearing on the FCC's enforcement of the Indecency Ban, in which several Representatives expressed disapproval in the prior policy and the need for stricter enforcement. Id.
35. Fox, 129 S. Ct. at 1818.
36. Id.
37. Id. at 1816. Quoting Justice Stevens, Justice Scalia explained, "In his judgment, the FCC is 'better viewed as an agent of Congress' than as part of the Executive." Id.
38. Id. at 1825 (Stevens, J., dissenting).
39. Id. at 1816. "[I]t seems to [the Court] that Justice Stevens' conclusion does not follow from his premise. If the FCC is indeed an agent of Congress, it would seem an adequate explanation of its change of position that Congress made clear its wishes for stricter enforcement." Id.
40. Fox, 129 S. Ct. at 1817.
the FCC's Remand Order\textsuperscript{41} and the fact that the Court had never laid down a constitutional standard by which the FCC must abide.\textsuperscript{42}

Before concluding, the Court discussed the constitutional challenge raised by Fox in this case, but declined to address the question of whether the FCC's new policy violates the First Amendment rights of licensed broadcasters, since it was not decided by the Court of Appeals below.\textsuperscript{43} While recognizing that there would likely be First Amendment implications, Justice Scalia believed it will only be a matter of time before the issue was properly before the Court and could be addressed at that time.\textsuperscript{44}

2. Justice Thomas's Concurrence

Writing separately from the majority, but concurring in the decision, Justice Thomas expressed concern over the FCC's reliance on two prior Supreme Court cases, Red Lion and Pacifica.\textsuperscript{45} Justice Thomas argued that the flaw with these two cases is that they considered the constitutionality of FCC enforcement action in light of the type of broadcast medium (broadcast or cable) at issue—a distinction that is not found in the First Amendment.\textsuperscript{46} Such justification, Justice Thomas believed, is unsound for two reasons: (1) it is unsupported by the text of the Constitution; and (2) modern technological advances have eliminated the need to make the "factual assumptions" necessary to those decisions.\textsuperscript{47}

\begin{itemize}
\item \textsuperscript{41} Id. Justice Scalia stressed the fact that the FCC's Remand Order "devote[d] four full pages of small-type, single-spaced text (over 1,300 words not counting footnotes) to explaining why the Commission believes that its indecency-enforcement regime (which includes its change in policy) is consistent with the First Amendment ...." Id.
\item \textsuperscript{42} Id. The majority explained that the dissenters' view of Pacifica as drawing a "constitutional line" was erroneous, and there is no rule prohibiting the FCC from adopting a "more restrictive rule" without an in depth-explanation for the change. Id. at 1817-18.
\item \textsuperscript{43} Id. at 1819.
\item \textsuperscript{44} Id. Justice Scalia, writing for the majority, explained: "This Court . . . is one of final review, not of first review. . . . We see no reason to abandon our usual procedures in a rush to judgment without a lower court opinion." Id. (internal citation omitted).
\item \textsuperscript{45} Fox, 129 S. Ct. at 1820 (Thomas, J., concurring). Justice Thomas questioned the use of Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) and Pacifica to support the FCC's "assertion of constitutional authority." Id. "Red Lion and Pacifica were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity." Id.
\item \textsuperscript{46} Fox, 129 S. Ct. at 1821. Justice Thomas explained, "The justifications relied on . . . in Red Lion and Pacifica—spectrum scarcity, intrusiveness, and accessibility to children—neither distinguish broadcast from cable, nor explain the relaxed application of the principles of the First Amendment to broadcast." Id. (internal quotation omitted).
\item \textsuperscript{47} Id. at 1820-21. The "factual assumptions" identified by Justice Thomas included, \textit{inter alia}, broadcast scarcity and pervasiveness. Id. at 1821-22.
\end{itemize}
3. Justice Kennedy’s Concurrence

Justice Kennedy, concurring in part and concurring in the judgment, wrote separately to express his disagreement with the standard articulated by the majority—only requiring the FCC to show *good reason* for departing from prior policy. On this point, Justice Kennedy agreed with the dissenters, in that the FCC must provide a more detailed explanation when changing its policy. Recognizing, however, that the prior FCC enforcement policy was based on the 1978 *Pacifica* decision, and since the FCC acknowledged that its reading of *Pacifica* had changed, Justice Kennedy believed that the elevated standard was met.

4. Justice Stevens’s Dissent

Writing in dissent, Justice Stevens pointed out two critical errors that he believed were present in the majority’s reasoning. First, he disagreed with the majority’s view that the FCC need not provide greater explanation when departing from prior policy. Justice Stevens supported the need for greater explanation by comparing the FCC-Congress relationship with that of an agent-principal. Justice Stevens reasoned that because the FCC’s power to enforce the Indecency Ban was derived from Congress, its decisions reflect the views of the legislature, and thus a greater explanation was owed. Second, Justice Stevens believed that the majority erred in reading *Pacifica* as supporting the new FCC policy making even fleeting expletives punishable. Justice Stevens explained that *Pacifica* did not hold that any word with sexual or excretory origin could be found actionably indecent, and that “customs of speech” must be considered when determining indecency.

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48. *Id.* at 1822-24 (Kennedy, J., concurring).
49. *Id.* at 1822.
50. *Id.* at 1824. Justice Kennedy explained that the reasoning offered by the FCC was “quite sufficient” to uphold its change in policy and avoid an “arbitrary” or “capricious” finding under the Administrative Procedure Act. *Id.*
51. *Fox,* 129 S. Ct. at 1824-28 (Stevens, J., dissenting).
52. *Id.* at 1825.
53. *Id.*
54. *Id.* at 1826.
55. *Id.* at 1826-27.
56. *Fox,* 129 S. Ct. at 1827 (Stevens, J., dissenting). Justice Stevens gave the following example:

As any golfer who has watched his partner shank a short approach knows, it would be absurd to accept the suggestion that the resultant four-letter word uttered on the golf course describes sex or excrement and is therefore indecent. But that is the absurdity the FCC has embraced in its new approach to indecency.
For these reasons, Justice Stevens would have found the new policy arbitrary and capricious, and subject to a judicial set-aside under the Administrative Procedure Act.57

5. Justice Ginsburg's Dissent

A second dissent, written by Justice Ginsburg focused exclusively on the majority's refusal to consider the First Amendment challenge urged by the broadcasting companies.58 Justice Ginsburg explained that this case dealt with a restriction placed upon speech by the government, and the expletives at issue in this case are often used simply as intensifiers or as a means of expressing emotion.59 Justice Ginsburg warned that this type of restriction on what has become "commonplace" speech must be made with caution to avoid infringement of constitutional guarantees.60

6. Justice Breyer's Dissent

The final dissent of the case, written by Justice Breyer and joined by the other three dissenting justices, again emphasized the need for a more satisfactory explanation from the FCC as to why it chose to deviate from its prior policy.61 Justice Breyer noted that the three reasons set forth by the FCC for its new course were insufficient in light of its failure to address two matters of critical

57. Id. at 1827.
58. Id. at 1828.
59. Id. (Ginsburg, J., dissenting). Justice Ginsburg explained that she agreed with the reasoning in Justice Breyer's dissent, but wrote separately "only to note that there is no way to hide the long shadow the First Amendment casts over what the Commission has done [and] today's decision does nothing to diminish that shadow." Id.
60. Fox, 129 S. Ct. at 1829 (Ginsburg, J., dissenting).
61. Id. at 1830 (Breyer, J., dissenting). Justice Breyer rationalized the need for greater explanation by way of the following example:

An (imaginary) administrator explaining why he chose a policy that requires driving on the right-side, rather than the left-side, of the road might say, "Well, one side seemed as good as the other, so I flipped a coin." But even assuming the rationality of that explanation for an initial choice, that explanation is not at all rational if offered to explain why the administrator changed driving practice, from right-side to left-side, 25 years later.

Id. at 1830-31.
importance. The two omissions that led the four dissenting justices to conclude that the FCC's new policy was "arbitrary" and "capricious" under the Administrative Procedure Act included: (1) the failure to explain how the new policy was consistent with the constitutional line drawn in *Pacifica*, and (2) how the new policy would impact local broadcasting coverage.

As to the inconsistency with the *Pacifica* decision, Justice Breyer recalled that the initial FCC enforcement policy was tailored to match the narrow language endorsed by the Court—deliberate and repetitive use of expletives. The FCC's only explanation for its departure from its previous understanding of *Pacifica* was that the Court's opinion failed to address the question of whether a fleeting expletive could be actionably indecent, and this left the door open for stricter enforcement of the Indecency Ban, without crossing the constitutional line.

The second omission from the FCC's rationale that Justice Breyer identified as casting doubt among the dissenters was the FCC's failure to consider the effect that the new policy would have on local broadcasting. Justice Breyer explained that all the FCC had to do was consider how the new policy would impact live, local broadcasting coverage by small companies that could not afford the expensive "bleeping out" technology. The FCC received numerous complaints over this issue, and Justice Breyer suggested that if it had used its traditional "administrative notice-and-comment procedures," this critical omission would not be an issue.

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62. *Id.* at 1829.
63. *Id.* at 1833.
64. *Id.* at 1835.
65. *Fox*, 129 S. Ct. at 1833 (Breyer, J., dissenting).
66. *Id.* at 1834. According to Justice Breyer, the FCC's only attempt to explain its departure from *Pacifica* was through twenty-eight words found in the agency's Remand Order (only noting that the Court did not address the issue). *Id.* The dissenters were unsatisfied with this explanation, as it failed to adequately answer why its reading of the case had drastically changed. *Id.*
67. *Id.* at 1835.
68. *Id.* Referencing an amici curiae brief, Justice Breyer noted that "the costs of bleeping/delay systems, up to $100,000 for installation and annual operation, place that technology beyond the financial reach of many smaller independent local stations." *Id.* at 1835-36 (citing Brief for Amici Curiae Former FCC Commissioners and Officials in Support of Respondents at 14, *Fox*, 129 S. Ct. 1800 (No. 07-582)).
69. *Id.* at 1837. The traditional "notice and comment rulemaking procedure" requires the FCC to respond to all significant comments raised by the public before enacting a new policy. *Id.* By following this procedure and responding to all public concerns, the FCC may have developed a more rational explanation for its change in policy, which the dissenters believed was required under the Administrative Procedure Act to avoid being "arbitrary or
Finally, Justice Breyer addressed the majority's decision to reserve the First Amendment challenges raised in this case. Here, Justice Breyer also disagreed with the majority and would have remanded this issue for reconsideration, rather than completely strike it down as the majority did. Taking all of these factors together, the dissenting Justices concluded that the FCC's new policy was arbitrary and capricious under the Administrative Procedure Act, and a remand to the FCC would be the proper course of action.

III. HOW THE FCC'S ENFORCEMENT POLICY HAS "GRADUALLY EXPANDED" OVER TIME

Since 1960, when Congress first granted the FCC power to enforce the statutory Indecency Ban, the agency has taken a gradually expanding approach to stricter enforcement. Prior to arriving at its current policy, which makes even fleeting expletives actionably indecent, the FCC made clear that a broadcaster was unlikely to be penalized for airing only an occasional expletive. The new policy of the FCC, however, marked such a drastic change from prior enforcement policies that the Second Circuit Court of Appeals and four Supreme Court Justices believed it was "arbitrary and capricious" and should have been set aside under the Administrative Procedure Act.

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70. Fox, 129 S. Ct. at 1840 (Breyer, J., dissenting).
71. Id. at 1841.
72. Fox, 489 F.3d at 447.
74. In re Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency, 16 F.C.C.R. 7999 (2001) [hereinafter Policy Statement]. The FCC asserted, "Where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency." Policy Statement, 16 F.C.C.R. at 8008 (emphasis added).
75. Fox, 489 F.3d at 447; Fox, 129 S. Ct. at 1841 (Breyer, J., dissenting).
A. 1975–1987: Strict Adherence to the Supreme Court’s Holding in Pacifica

The first exercise of the FCC’s enforcement power was in 1975 against a radio station owned by the Pacifica Foundation.77 By way of a declarative order, the FCC deemed Pacifica’s daytime broadcast of comedian George Carlin’s prerecorded “Filthy Words” monologue actionably indecent.78 The FCC’s order, which was challenged all the way to the Supreme Court, defined “indecency” in terms of patent offensiveness and laid the foundation for the agency’s initial enforcement policy, which required deliberate and repetitive use of an expletive to be considered actionably indecent.79

In *Pacifica* the Supreme Court responded to the challenge against the FCC’s definition of indecency and determined whether the FCC, in fact, had the power to regulate the broadcast of language that was indecent, but not obscene.80 Relying on the plain language of the Indecency Ban, a narrowly divided Court upheld the FCC’s indecency definition and found that the daytime broadcast of “Filthy Words” was actionably indecent.81 The Court adopted the FCC’s reasoning that enforcement of the Indecency Ban should be regarded in the same way as the tort of nuisance, taking into consideration the context, i.e. time, content of program, and broadcast medium, in which the indecent statement was made.82 Though Pacifica was not penalized for its indecent broadcast, the Supreme Court’s decision to uphold the FCC’s order put broadcasters on notice that they could be penalized for similar broadcasts in the future.83

77. *In re Citizen’s Complaint Against Pacifica Found. Station WBAI (FM)*, 56 F.C.C.2d 94 (1975) [hereinafter *Citizen’s Complaint*].
78. *Citizen’s Complaint*, 56 F.C.C.2d at 94. In the monologue Carlin identified seven offensive words that should not be said in public, and then continued to repeat them throughout the broadcast. See *FCC v. Pacifica*, 438 U.S. at 751 (Appendix to Opinion of the Court) (reproducing the text of the actionably indecent broadcast).
79. *Citizen’s Complaint*, 56 F.C.C.2d at 98. The FCC defined “indecency” as “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.” *Id.*
81. *Id.* at 750-51.
82. *Id.* at 750. Justice Stevens explained, “‘[N]uisance may be merely a right thing in the wrong place, like a pig in the parlor instead of a barnyard.’ . . . [W]hen the [FCC] finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.” *Id.* at 750-51 (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).
83. *Id.* at 730.
In the years following the *Pacifica* decision, the FCC made clear that it would strictly adhere to the narrowness of the Supreme Court’s holding in exercising its enforcement power. In 1978 the FCC issued an agency decision, *In re Application of WGBH Educational Foundation*, granting a license renewal to WGBH-TV over an objection that the station continually violated the Indecency Ban by broadcasting material, such as nudity and profanity, that was harmful to children. In its Memorandum Opinion, the FCC explained that its enforcement power was limited to the seven words actually found indecent in *Pacifica* and, even then, the occasional, non-deliberate broadcast of such words was beyond the reach of the FCC.

**B. 1987–2001: A Period of Slight Expansion**

It was not until 1987 when the FCC again invoked its enforcement power and declared a broadcast actionably indecent—this time under a revised standard. In *In re Infinity Broadcasting Corp. of Pa.*, which consolidated three challenged rulings, the FCC disavowed its strict adherence to the *Pacifica* holding and expanded its enforcement policy to cover indecent words not actually contained in the “Filthy Words” monologue. The FCC blamed the absence of any actionably indecent findings in the twelve years following *Pacifica* on the unfounded belief that the broadcast had to closely resemble that of the George Carlin monologue.

In one of the challenged rulings upheld by *Infinity*, the FCC also dropped its deliberate and repetitive use requirements when an expletive is expressed in the literal sense, i.e., it relates to sexual or excretory activities or organs. Recognizing that expletives are

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84. *See In re Application of WGBH Educ. Found.,* 69 F.C.C.2d 1250, 1254 (1978). The FCC clarified that it “intend[ed] to strictly observe the narrowness of the *Pacifica* holding [which] stated that [the Court] was not ruling that ‘an occasional expletive . . . would justify any sanction.’” *WGBH,* 69 F.C.C.2d at 1254.
85. *Id.* at 1250.
86. *Id.* at 1254.
89. *Infinity,* 3 F.C.C.R. at 930. “Unstated, but widely assumed . . . was the belief that only material that closely resembled the George Carlin monologue would satisfy the indecency test articulated by the FCC in 1975.” *Id.*
90. *Pacifica,* 2 F.C.C.R. at 2699. “We take this opportunity to state that, notwithstanding any prior contrary indications, we will not apply the *Pacifica* standard so narrowly in the future.” *Id.* “While speech that is indecent *must involve more than an isolated use of an offensive word,* repetitive use . . . is not an absolute requirement.” *Id.* (emphasis added).
often used in their non-literal sense as intensifiers or to express emotion, the FCC determined that the once mandatory deliberate and repetitive use requirements only applied to the broadcast of non-literal expletives.\textsuperscript{91} These expanded enforcement standards encompassed in \textit{Infinity} were later upheld by the United States Court of Appeals for the District of Columbia.\textsuperscript{92}

In 1989 the Supreme Court again reviewed an action by the FCC, this one declaring Sable Communication's "dial-a-porn" telephone service indecent under the Communications Act of 1934.\textsuperscript{93} The Court revisited its prior decision in \textit{Pacifica} to ascertain the appropriate standard for an indecency finding.\textsuperscript{94} The Court, however, found that the ban at issue in \textit{Sable}, which amounted to an outright prohibition against indecent interstate commercial telephone communication, was unconstitutional as it limited the content of private adult telephone conversations.\textsuperscript{95} Writing for the majority, Justice White carefully distinguished the ban involved in \textit{Sable} from that involved in \textit{Pacifica} by noting that the latter did not involve an absolute ban against the broadcast of any indecent language, whereas the ban at issue in \textit{Sable} involved a total ban against indecent telephone communications.\textsuperscript{96}

Throughout the 1990s the FCC's indecency policy remained substantially unaltered.\textsuperscript{97} The FCC retained its literal/non-literal distinction, only requiring deliberate and repetitive use for a non-literal expletive.\textsuperscript{98} As a result of the stricter enforcement policy, the FCC issued a total of thirty-four NALs against broadcasters for violating the Indecency Ban from 1993 to 2000.\textsuperscript{99}

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\item \textsuperscript{91} \textit{Id.}
\item \textsuperscript{92} \textit{Action for Children's Television v. FCC}, 852 F.2d 1332, 1338-40 (D.C. Cir. 1988) [hereinafter \textit{Act I}], \textit{superseded in part} by \textit{Action for Children's Television v. FCC}, 58 F.3d 654 (D.C. Cir. 1995).
\item \textsuperscript{93} \textit{Sable Commc'ns of Cal. v. FCC}, 492 U.S. 115, 118 (1989). The specific statutory provision at issue in \textit{Sable} was 47 U.S.C. § 223(b) (1988).
\item \textsuperscript{94} \textit{Sable}, 492 U.S. at 127.
\item \textsuperscript{95} \textit{Id.} at 131.
\item \textsuperscript{96} \textit{Id.} at 127 ("\textit{Pacifica} is readily distinguishable ... most obviously because it did not involve a total ban on broadcasting indecent material."). The Court further explained its holding in \textit{Sable} by noting that "the government may not 'reduce the adult population ... to ... only what is fit for children.'" \textit{Id.} at 128 (quoting \textit{Butler v. Michigan}, 352 U.S. 380, 383 (1957)).
\item \textsuperscript{97} \textit{Fox}, 129 S. Ct. at 1807.
\item \textsuperscript{98} \textit{Id.}
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In 2001 the FCC clarified its enforcement policy when it issued an official Policy Statement. Through its Policy Statement the FCC explained that indecency determinations required the following two conditions to be satisfied: (1) the alleged indecent language must be made in the literal sense, i.e., describe or depict sexual or excretory organs or activities; and (2) the broadcast must be patently offensive as measured by community standards for the broadcast medium. The Policy Statement also emphasized the need to consider the full context of the alleged indecent broadcast before making an indecency determination and noted that no single factor is dispositive. For the first time, however, the FCC expressed that as a general rule a fleeting expletive should not be deemed actionably indecent.


The view expressed in the FCC's 2001 Policy Statement did not survive long, however, as the FCC officially declared in its 2004 Golden Globe Order that even a fleeting expletive could be deemed actionably indecent. The Golden Globe Order was issued against the National Broadcasting Company ("NBC") for airing the “F-word” during a live broadcast of the Golden Globe Awards. Though it was argued that the “F-word” was not used in its literal sense and failed to meet the deliberate and repetitive requirements maintained for such non-literal expletives, the FCC nonetheless found NBC's broadcast indecent. The FCC articulated the primary reasons for its change in policy as being the protection of the nation's children, the availability of new technology making it possible to bleep out a single offensive word, and a dif-
ferent reading of the Supreme Court’s *Pacifica* decision.\textsuperscript{107} It is this new policy of the *Golden Globe Order* that was challenged in *FCC v. Fox* as arbitrary and capricious under the Administrative Procedure Act.\textsuperscript{108}

**IV. HOW THE SUPREME COURT HAS INTERPRETED THE SCOPE OF REVIEW FOR AGENCY DECISIONS UNDER THE ADMINISTRATIVE PROCEDURE ACT**

A major point of disagreement among the majority in *FCC v. Fox* and the Court’s dissenters, as well as the Second Circuit Court of Appeals, was the appropriate standard under which the FCC’s policy change should be judged.\textsuperscript{109} Case law in this area can be traced all the way back to the 16th century, when the English Common Pleas court handed down its decision in *Rooke’s Case* in 1598, a case relied on by Justice Stevens in his dissent.\textsuperscript{110} In *Rooke’s Case*, the court was asked to determine the scope of a sewer commission’s discretion in issuing a decision to drain the English fens.\textsuperscript{111} Writing for the court, Justice Coke set forth the notion that agencies are not permitted to act arbitrarily according to their own discretion, but rather they must justify their actions through reason.\textsuperscript{112}

In construing the Administrative Procedure Act, which allows courts to set aside agency decisions that are arbitrary and capricious,\textsuperscript{113} American courts also seemed to follow the early English

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\textsuperscript{107} Id. at 4978-82. “[O]ur decision is not inconsistent with the Supreme Court ruling in *Pacifica*. The Court explicitly left open the issue of whether an occasional expletive could be considered indecent.” Id. at 4982 (footnote omitted).

\textsuperscript{108} *Fox*, 129 S. Ct. at 1804-05.

\textsuperscript{109} Id. at 1810-11. Justice Scalia, writing for the majority, explained, “[T]he agency must show that there are good reasons for the new policy. But it need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one.” Id. at 1811; *but sec contra* Id. at 1831 (Breyer, J., dissenting) (“[The standard] requires the agency here to focus upon the reasons that led the agency to adopt the initial policy, and to explain why it comes to a new judgment”); *Fox*, 489 F.3d at 456 (“Agencies are of course free to revie [sic] their rules and policies. Such a change, however, must provide a reasoned analysis for departing from prior precedent”).

\textsuperscript{110} *Fox*, 129 S. Ct. at 1830 (Breyer, J., dissenting) (citing *Rooke’s Case*, (1598) 77 Eng. Rep. 209, 210 (C.P.)).


\textsuperscript{112} *Rooke’s Case*, 77 Eng. Rep. at 210. The early English judge explained: “[N]otwithstanding the words of the commission giv[ing] authority to the commissioners to do according to their discretions . . . their proceedings ought to be limited and bound with the rule of reason and law . . . and not to do according to their wills and private affections.” Id. at 211.

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notion that agencies must provide reasoning for their policy decisions.\footnote{114} The following two cases highlight this point, as they involve the Supreme Court’s interpretation of the scope of review under the Administrative Procedure Act and the depth of reasoning agencies must provide to avoid having their policies set aside as “arbitrary or capricious.”

A. Citizens to Preserve Overton Park (1971)

In 1971 the Supreme Court considered the issue of whether the Department of Transportation’s spending of federal funds for the construction of a six-lane highway through a public park was a valid exercise of agency authority in 

\textit{Citizens to Preserve Overton Park, Inc. v. Volpe}.\footnote{115} Those challenging the Department of Transportation’s authority argued that the agency simply relied on the judgment of the local city council, without making independent factual determinations as to the availability of alternative routes or design changes that would decrease the impact on the public park.\footnote{116} This failure was claimed to be a violation of the Federal-Aid Highway Act of 1968,\footnote{117} and the Court was asked to review the agency’s decision.\footnote{118} Because the Court was presented with an incomplete record, it could not decide the outcome of the case, but it did consider the appropriate scope of review for agency decisions under the Administrative Procedure Act.\footnote{119} The Court expressed that such review is narrow, and that a reviewing court should be satisfied if the agency shows that it considered relevant factors in reaching its decision.\footnote{120}
B. State Farm (1983)

Another case relied on by both the majority and the Court's dissenter in *FCC v. Fox* was the 1983 *State Farm* case, with each reading the case as setting forth a different standard for determining the validity of an agency decision that changes prior policy.\(^{121}\) In *State Farm*, the Supreme Court addressed the issue of whether an order of the National Highway Traffic Safety Administration ("NHTSA"), rescinding the requirement that all newly manufactured vehicles be equipped with either automatic seatbelts or airbags, was arbitrary or capricious under the Administrative Procedure Act.\(^{122}\) The NHTSA's rescission marked a drastic change from its prior policy, which mandated the installation of such crash protection devices.\(^{123}\)

In a narrowly divided 5-4 decision, the Court found that the order of the NHTSA was arbitrary and capricious and thus subject to being set aside under the Administrative Procedure Act.\(^{124}\) The Court explained that a change in policy is subject to the same test as the adoption of the initial policy ("arbitrary or capricious"), but that the NHTSA failed to provide adequate reasoning for its change in course.\(^{125}\) The Court found NHTSA's reasoning inadequate and unreasonable in several respects: (1) the agency gave no consideration to modifying the standard, rather than rescinding it; (2) NHTSA was "too quick" to dismiss the benefits of the safety devices; (3) the data acquired from field tests was not indicative of real world experiences; and (4) the agency failed to explain why continuing the requirement would receive negative public reaction.\(^{126}\) Given these shortcomings in the NHTSA's order, the Supreme Court chose to set aside the agency's elimination of the

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121. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). Writing for the majority in *FCC v. Fox*, Justice Scalia reasoned, "[State Farm], which involved the rescission of a prior regulation, said only that such action requires 'a reasoned analysis for a change beyond that which may be required when an agency does not act in the first instance.'" 129 S. Ct. at 1810 (emphasis added) (quoting *State Farm*, 463 U.S. at 42). On the other hand, Justice Breyer read *State Farm* as requiring an agency "to focus upon the reasons that led [it] to adopt the initial policy, and to explain why it now comes to a new judgment." *Id.* at 1831 (Breyer, J., dissenting).

122. *State Farm*, 463 U.S. at 34.

123. *Id.* at 57.

124. *Id.* at 48-57.

125. *Id.* at 42. "[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Id.* (emphasis added).

126. *Id.* at 48-57.
passive restraint requirement in new automobiles as arbitrary and capricious.\textsuperscript{127}

The dissenters in \textit{State Farm} took the opposite view, however, finding that NHTSA’s new policy, with respect to the detachable seatbelts, was not arbitrary or capricious.\textsuperscript{128} Justice Rehnquist, writing in dissent, explained that an agency must only provide a \textit{rational explanation} when it changes policy.\textsuperscript{129} Justice Rehnquist, joined by three other justices, would have concluded that the NHTSA met this standard and would have given greater deference to the agency’s decision.\textsuperscript{130}

\section*{V. Why the Supreme Court Erred in Upholding the FCC’s “Fleeting Expletive” Policy and Reversing the Second Circuit}

Given the varying interpretations of the Supreme Court's prior cases dealing with the Administrative Procedure Act's scope of judicial review, it is fairly easy to see why the Court in \textit{FCC v. Fox} was so narrowly divided. This case, however, settled once and for all the confusion surrounding the proper scope of judicial review for agency decisions that effectuate a change in prior policy. Under the majority's interpretation, an agency must only provide a \textit{reasoned explanation} for its change in policy to be in compliance with the Administrative Procedure Act.\textsuperscript{131} According to Justice Scalia and the majority, the FCC met this standard, as it “adequately” explained its reasons for departing from prior policy and making fleeting expletives actionably indecent.\textsuperscript{132}

\subsection*{A. Inconsistency with State Farm}

Justice Scalia's opinion in \textit{FCC v. Fox} seemed to echo the words of Justice Rehnquist who, along with three other justices, dis-

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\textsuperscript{127} \textit{State Farm}, 463 U.S. at 57.  \\
\textsuperscript{128} \textit{Id.} at 58 (Rehnquist, J., concurring in part and dissenting in part).  \\
\textsuperscript{129} \textit{Id.}.  \\
\textsuperscript{130} \textit{Id.} Justice Rehnquist was joined in dissent by Chief Justice Burger, Justice Powell, and Justice O'Connor. \textit{Id.} at 57.  \\
\textsuperscript{131} \textit{Fox}, 129 S. Ct. at 1811. Justice Scalia explained that an agency need not show better reasons for its new policy, as “it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency \textit{believes} it to be better.” \textit{Id.}  \\
\textsuperscript{132} \textit{Id.} at 1812. The majority concluded that the FCC “forthrightly acknowledged that its recent actions have broken new ground” and “the agency’s reasons for expanding the scope of its enforcement activity were entirely rational.” \textit{Id.} Thus, the FCC's new enforcement policy was neither arbitrary nor capricious under the standard adopted by the Court. \textit{Id.}
sent in the 1983 *State Farm* case. In *State Farm*, Justice Rehnquist claimed that the NHTSA's broad and conclusory rejection of an empirical study showing an increase in seatbelt usage in cars equipped with automatic seatbelts was adequate reasoning for the agency to drop the once mandatory automatic seatbelt requirement. The majority of the Court in *State Farm* disagreed with Justice Rehnquist, however, and set aside the NHTSA's new policy for failing to provide a more reasoned explanation.

Oddly enough, Justice Scalia asserted that the decision in *FCC v. Fox* was not inconsistent with any prior decisions of the Court. How then can one reconcile the drastically different outcomes between the present case and *State Farm*? In both situations, the agencies offered, at best, conclusory explanations for their departure from prior policy, and yet opposite results were achieved. Two judges on the Second Circuit Court of Appeals and four Justices on the Supreme Court also struggled with this reconciliation. While recognizing that *State Farm* does not impose a "heightened standard" on courts reviewing an agency's policy change, these legal scholars believed that the case stands for the proposition that an agency must reasonably explain why it changed its prior policy to be adequate, and, in their opinion, the FCC failed to meet this standard.

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133. *State Farm*, 463 U.S. at 58 (Rehnquist, J., concurring in part and dissenting in part). Justice Rehnquist explained, "The agency's obligation is to articulate a 'rational connection between the facts found and the choice made'. . . . I believe it has met this standard." *Id.* at 59 (quoting *Burlington Truck Lines*, 371 U.S. at 168).

134. *Id.* at 57 (majority opinion). The Court concluded, "an agency changing its course must supply a reasoned analysis . . . [and] the agency has failed to supply the requisite 'reasoned analysis' in this case." *Id.* (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971)) (internal quotation omitted).

135. *Fox*, 129 S. Ct. at 1817. Justice Scalia explained:

> We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard. And our opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.

*Id.* at 1810.

136. *Id.* at 1832 (Breyer, J., dissenting); *Fox*, 489 F.3d at 455.

137. *Fox*, 129 S. Ct. at 1831 (Breyer, J., dissenting). As Justice Breyer, writing in dissent, noted, the following questions must be answered: "Why does [the FCC] now reject the considerations that led it to adopt that initial policy? What has changed in the world that offers justification for the change? What other good reasons are there for departing from the earlier policy?" *Id.*
B. Response to Criticism

Prior to the Supreme Court's resolution of the FCC v. Fox case, the Second Circuit's decision to set aside the FCC's fleeting expletive policy was met with great criticism and a prediction that the Supreme Court would ultimately reverse.\textsuperscript{138} It was argued that the Second Circuit impermissibly replaced the FCC's judgment with its own and that the decision was inconsistent with prior court rulings upholding earlier expansions of the FCC's enforcement policy, even though far less explanation was offered for those changes.\textsuperscript{139} Specifically, it was claimed that the FCC's decision in 1987 to expand its enforcement policy beyond the seven words actually contained in George Carlin's monologue was not an insignificant change, and yet the expansion was upheld by the District of Columbia Circuit in Act 1.\textsuperscript{140} For this reason, critics argued that the Second Circuit erred in striking down the FCC's fleeting expletive policy, as it was only a further expansion of the enforcement policy and well-reasoned in light of prior expansions.\textsuperscript{141}

It is important to note, however, that it was then-Judge Ginsburg who authored the District of Columbia Circuit Court's Act 1 opinion in 1988, upholding the initial expansion of the FCC's enforcement policy beyond George Carlin's seven "Filthy Words."\textsuperscript{142} Ironically, Justice Ginsburg, now sitting on the Supreme Court, was among the four dissenters in the present case who would have judicially set aside the FCC's most recent "expansion" as arbitrary and capricious.\textsuperscript{143} There is only one possible explanation for Justice Ginsburg's discrepant treatment of the two expanded enforcement policies—the FCC's latest policy is not a mere "expansion," but rather a 180-degree change in position. For the past three decades, and most recently in the 2001 Policy Statement, the FCC made clear that a fleeting expletive would not be considered


\textsuperscript{139} Winquist, supra note 138, at 760.

\textsuperscript{140} Id. at 739. Winquist explained, “Given that the policy change in Act 1 was considerably more expansive than the one at issue in Fox Television, the Fox Television court should have given more deference to the FCC and should have found its explanation adequate to defeat the arbitrary and capricious challenge.” Id.

\textsuperscript{141} Id.

\textsuperscript{142} Act 1, 852 F.2d at 1332.

\textsuperscript{143} Fox, 129 S. Ct. at 1828 (Ginsburg, J., dissenting).
“actionably indecent,” and that deliberateness and repetition were requisites for such a finding.144 In the stroke of a pen, however, the FCC’s thirty year policy was overturned with little explanation, which is why Justice Ginsburg and her fellow dissenters reached the superior conclusion in FCC v. Fox.

C. Why the Dissenters in FCC v. Fox were Correct

As the dissenters in FCC v. Fox explained, common sense requires a more rational explanation when an agency implements a new policy that marks such a drastic change from its prior position.145 When this is the case, it is not sufficient for an agency to simply say, “We like the new policy better,” as Justice Breyer suggested the FCC did here.146 Although numerous explanations for the FCC’s change of course have been advanced by outside parties, i.e., the change was urged by Congress,147 the word “any” in the Indecency Ban indicates that Congress did not intend a “safe harbor,”148 etc., the FCC failed to advance any such reasoning. Rather, the FCC supported the overturn of its thirty-year policy in twenty-eight words, encompassing two sentences, as to why its reading of Pacifica had changed.149

The only other theory advanced by the FCC in support of the policy change was the idea that tolerating fleeting expletives unfairly forced viewers, especially children, to take the “first blow.”150 While the interest in protecting America’s youth is great, the FCC cannot lose sight of the First Amendment rights of broadcasters. Although the Supreme Court declined to address the First Amendment challenge in FCC v. Fox, it cannot be forgotten that enforcement of the Indecency Ban should not have the effect of limiting the content of the adult population to only that which is suitable for children.151 As the Court has already suggested, such enforcement would be “burn[ing] the house to roast the pig” and

144. Policy Statement, 16 F.C.C.R. at 8008.
145. Fox, 129 S. Ct. at 1841 (Breyer, J., dissenting).
146. Id.
147. Winquist, supra note 138, at 748-51 (explaining that the FCC’s new policy was supported by both houses of Congress, which issued resolutions “urging the FCC to continue its policy of sanctioning indecent speech”).
148. Fox, 129 S. Ct. at 1838 (Breyer, J., dissenting) (explaining that the Solicitor General set forth an adequate explanation for the FCC’s policy change, but the “fatal flaw” with the explanation was that it was made by the Solicitor General, not the FCC).
149. Id. at 1834.
150. Remand Order, 21 F.C.C.R. at 13309.
151. Sable, 492 U.S. at 131.
unconstitutional.\textsuperscript{152} So, while the majority was content with finding the “first blow” theory as reason enough to uphold the FCC’s absolute ban against fleeting expletives under the Administrative Procedure Act, the same result is unlikely under the looming constitutional challenge.

VI. CONCLUSION

After reviewing the controversial FCC \textit{v. Fox} decision in light of the history of the FCC’s enforcement policy and the interpretation of the Administrative Procedure Act, it is clear that the Supreme Court’s decision was unsound for two reasons. First, the Court may have correctly interpreted the scope of review for agency decisions under the Administrative Procedure Act, but it improperly applied that standard to the FCC’s new fleeting expletive policy. The FCC did not provide a \textit{reasoned explanation} for the drastic change of its thirty year policy, which was required under the majority’s interpretation.\textsuperscript{153} Second, the Court’s refusal to address the First Amendment rights of broadcasters only postponed the inevitable constitutional challenge in FCC \textit{v. Fox}. It is only a matter of time before the Supreme Court recognizes, as Justice Ginsburg predicted, that there is no way to escape the “long shadow the First Amendment casts over what the [FCC] has done.”\textsuperscript{154} For now, the broadcasting community can only patiently await the release of the Second Circuit’s opinion on remand to see how the Supreme Court’s opinion will be interpreted and what the Supreme Court will face when it revisits the constitutional issue in a future term.\textsuperscript{155}

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\item[152.] Id. (quoting Butler, 352 U.S. at 383).
\item[153.] Fox, 129 S. Ct. at 1811.
\item[154.] Id. at 1828 (Ginsburg, J., dissenting).
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