



## SECOND CIRCUIT REVIEW

## Expert Analysis

# Court Strikes Down FCC's 'Fleeting Expletives' Policy

This month we discuss *Fox Television Stations, Inc. v. FCC*,<sup>1</sup> a decision in which the U.S. Court of Appeals for the Second Circuit, following remand from the U.S. Supreme Court, struck down the Federal Communications Commission's (FCC) indecency policy as unconstitutionally vague. In its earlier decision, the Second Circuit had found the policy—which, in certain contexts, proscribed the broadcast of a single expletive—arbitrary and capricious under the Administrative Procedure Act (APA).<sup>2</sup> The Supreme Court reversed and remanded for consideration of the petitioners' constitutional challenges.<sup>3</sup>

In its decision on remand, written by Judge Rosemary S. Pooler and joined by Judges Pierre N. Leval and Peter W. Hall, the Second Circuit granted the petition for review and vacated the FCC's order against the petitioners. The court found the policy underlying the order unconstitutional because it failed to provide adequate guidance, thereby creating a chilling effect that extended beyond the "fleeting expletives" the agency intended to regulate. "By prohibiting all 'patently offensive' references to sex, sexual organs, and excretion without giving adequate guidance as to what 'patently offensive' means," the court wrote, "the FCC effectively chills speech, because broadcasters have no way of knowing what the FCC will find offensive."<sup>4</sup>

### Procedural History

The FCC has regulated indecent speech in television and radio broadcasts for the past 45 years pursuant to 18 U.S.C. §1464, which provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." In 1978, the Supreme Court affirmed the FCC's limited power to regulate broadcasts of non-obscene but indecent language in *FCC v. Pacifica Foundation*,<sup>5</sup> which concerned a radio broadcast of George Carlin repeating seven expletives for 12 minutes. For many years after *Pacifica*, the FCC limited its indecency policy to broadcasts of the seven expletives used by Mr. Carlin. Even after it adopted a more flexible standard for determining indecent speech in 1989, the commission repeatedly held that the non-literal and isolated use of



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an expletive—a so-called "fleeting expletive"—was not actionable.

The FCC reversed this policy in 2004, however, in the wake of public complaints about the repeated use of expletives by performers during live broadcasts of awards shows. Responding to a 2003 Golden Globe awards broadcast during which Bono, lead singer of the band U2, uttered an expletive, the agency concluded for the first time that a single expletive could render a broadcast indecent. The FCC did not impose a penalty in that case, acknowledging that the broadcaster had no notice of its policy change.

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Two years later, however, the FCC issued notices of liability to the 2002 and 2003 Billboard Music Awards broadcasts, a broadcast of CBS's "The Early Show," and multiple episodes of "NYPD Blue." The FCC found these programs indecent and profane, reiterating its 2004 position that even the isolated use of certain expletives was presumptively indecent. Although the broadcasts occurred before the ruling on the Golden Globes, the FCC held that these broadcasts would have been actionably indecent before that order. Furthermore, the FCC stated that the immunity for fleeting expletives in place prior to its pre-Golden Globes order was based only on staff rulings and dicta, and therefore, it had never held that isolated expletives were not actionable. Several networks and affiliates filed petitions for review of the order, and the FCC moved for voluntary remand, which the Second Circuit granted.

In its Remand Order, the FCC rejected the petitioners' argument that non-literal uses of expletives were not

indecent, but carved out two exceptions to its new indecency presumption: first, a fleeting expletive may not be indecent if it was "integral" to a work of art, and second, depending on context, a fleeting expletive may not be indecent if it occurs during a "bona fide news interview." Applying this analysis, the FCC reversed its earlier decision regarding "The Early Show" and then dismissed the complaint against "NYPD Blue" on procedural grounds. The FCC affirmed, however, its rulings against the broadcasters of the two Billboard Music Awards.

These broadcasters petitioned the Second Circuit for review, challenging the commission's findings on a variety of administrative, statutory, and constitutional grounds. With Judge Leval dissenting, the court held that the FCC's indecency policy was arbitrary and capricious under the APA. The court found that the agency had failed to explain why it had changed its long-standing policy on fleeting expletives. The court declined to reach the constitutional challenges brought by the petitioners, but sympathized with their argument that the policy was "undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague."<sup>6</sup>

The Supreme Court reversed and remanded to the Second Circuit in an opinion written by Justice Antonin Scalia, and joined by Chief Justice John G. Roberts Jr. and Justices Samuel A. Alito Jr., Clarence Thomas, and Anthony M. Kennedy. The Supreme Court held that under the APA, the FCC was not required to demonstrate "that the reasons for the new policy are better than the reasons for the old one," but rather, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and the agency believes it to be better."<sup>7</sup>

The Court found that the FCC's conclusions regarding the power of expletives to offend were rational and that its decision to examine "patent offensiveness of even isolated uses of the sexual and excretory words fits with the context-based approach we sanctioned in *Pacifica*."<sup>8</sup> Whether the policy is unconstitutional, the Supreme Court predicted, "will be determined soon enough, perhaps in this very case."<sup>9</sup>

### Second Circuit Decision

On remand, the Second Circuit first addressed whether the traditional level of review for restrictions on broadcast speech was the appropriate standard of review. Indecent speech is fully protected by the First Amendment, and therefore, restrictions on indecent speech are typically subject to strict scrutiny, the highest level of review.

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Under strict scrutiny, courts inquire whether the restrictions are (a) narrowly tailored to address a compelling government interest, and (b) the least restrictive means of addressing that interest. In the past, however, courts have generally applied a lower standard—"something akin to intermediate scrutiny"—to regulation of indecent speech that is broadcast on television and radio. Intermediate scrutiny requires only that a regulation furthers an important government interest in a way that is substantially related to that interest.

The decision to treat speech on broadcast television and radio differently arises from the fact that, historically, these media were pervasive in our society and easily accessible to children. Due to recent changes in media and technology, however, the Second Circuit questioned the continued applicability of these rationales.<sup>10</sup> Broadcast speech is no longer as pervasive as it once was, particularly given a media spectrum that includes cable television and the Internet, and widely available V-chip technology that allows parents to block selected broadcasts.

The court further noted that the Supreme Court had relied on the availability of similar blocking technology in applying strict scrutiny to regulation of cable television speech.<sup>11</sup> Notwithstanding the Second Circuit's view that this same reasoning should now apply to broadcast speech, it acknowledged that it was bound by Supreme Court precedent to apply intermediate scrutiny. Even under this less restrictive standard, however, the court concluded that the FCC's policy was impermissibly vague.<sup>12</sup>

The court then considered the applicability of the Supreme Court's decision in *Reno v. ACLU*,<sup>13</sup> a case cited by both the petitioners and the FCC in support of their positions. In *Reno*, the Supreme Court had found unconstitutionally vague the Communications Decency Act (CDA), which proscribed the transmission of indecent material to minors over the Internet.<sup>14</sup> Petitioners argued that FCC's indecency definition was substantially similar to the CDA definition that the Supreme Court had rejected, and therefore required the same outcome. The FCC argued that because the Supreme Court favorably distinguished regulation of broadcast speech from regulation of Internet speech in *Reno*, *Reno* actually foreclosed the petitioners' vagueness challenge.

The Second Circuit rejected both arguments. The court found that although the FCC's definition of indecency was similar to the CDAs, the FCC had further expanded its definition. In particular, the FCC had established factors for determining whether a broadcast was "patently offensive"—a term left undefined by the CDA—and had also held that certain expletives are presumptively indecent. The court concluded, therefore, that the outcome in *Reno* was not dispositive in this case.<sup>15</sup>

The court also found *Reno* equally unhelpful to the FCC, noting that the Supreme Court had distinguished the regulation of broadcast speech from Internet speech with respect to the appropriate level of scrutiny, but not to its vagueness analysis. *Reno* was inapposite, the court held, because whether a statute's language was constitutionally lucid was unrelated to the speaker's medium. The court also rejected the FCC's assertion that the vagueness challenge was foreclosed by the Supreme Court's decision in *Pacifica*. The court characterized the *Pacifica* opinion as narrow and based on the FCC's then "restrained" enforcement policy. The court concluded that the FCC's new, broadened policy implicated questions not addressed in *Pacifica*.<sup>16</sup>

Turning to its vagueness analysis, the Second Circuit identified two problems with the FCC's policy. First, the court focused on the FCC's determination of which expletives are patently offensive, addressing seemingly inconsistent determinations made by the agency. The court observed, for example, that the FCC found some expletives in an "NYPD Blue" episode patently offensive, but not others. The court found that the FCC's reasoning—namely, that a certain expletive was indecent because it was "vulgar, graphic and explicit" while others were not because they were "not sufficiently vulgar, explicit, or graphic"—failed to provide broadcasters sufficient guidance as to how the commission would make such determinations in the future.

The court further rejected the FCC's rationale that it needed a flexible indecency standard because it could not foresee how broadcasters would seek to skirt the prohibition on indecent speech in the future. Taking issue with the FCC's characterization of broadcasters as envelope-pushers, the court wrote that "if the FCC cannot anticipate what will be considered indecent under its policy, then it can hardly expect broadcasters to do so."<sup>17</sup>

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The court then turned to the bona fide news and the artistic necessity exceptions to the FCC's presumption of indecency. The court sharply criticized both the FCC's definition of the bona fide news exception, which, it concluded, "the FCC has failed to explain except to say that it is not absolute," as well as its application to "The Early Show."<sup>18</sup> Noting that the FCC had first found the expletive uttered on "The Early Show" "shocking and gratuitous" because it occurred during a morning show interview, and later reversed course in its Remand Order on the grounds that the broadcast was a "bona fide news interview," the court concluded, "the FCC reached diametrically opposite conclusions at different stages of the proceedings for precisely the same reason."<sup>19</sup>

The court also criticized the commission's application of the artistic necessity exception, which excuses fleeting expletives "demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance."<sup>20</sup> The court noted that the FCC excused expletives in a broadcast of the film "Saving Private Ryan" as integral to the "realism" of the film, but not expletives in a documentary called "The Blues." The court questioned how expletives "could be more essential to the 'realism' of a fictional movie than to the 'realism' of interviews with real people about real life events."<sup>21</sup>

Responding to the FCC's claim that its context-based approach to the exception complied with *Pacifica*, the court held that although context was important, the FCC policy lacked "discernible standards by which individual contexts are judged."<sup>22</sup> Moreover, without

such standards, the court found, broadcasters were forced to censor or not air controversial material rather than risk large fines.

The court concluded its analysis by reviewing the "ample evidence in the record that the FCC's indecency policy has chilled protected speech."<sup>23</sup> The court noted that certain CBS affiliates declined to air a "9/11" documentary due to expletives uttered by first responders in the World Trade Center, and that a radio station had cancelled a reading of Tom Wolfe's book, "I Am Charlotte Simmons." In the context of the live award show broadcasts at issue in this case, the court reviewed the extensive precautions taken by Fox, and concluded that the only certain way to avoid sanction in these situations would be to give up live broadcasting altogether. The court then cited examples of stations that had refused to air live events for fear of sanction, including a station that had ceased live news coverage in response to the FCC's new policy. "As these examples illustrate," the court concluded, "the absence of reliable guidance in the FCC's standards chills a vast amount of protected speech."<sup>24</sup>

### Conclusion

In *Fox*, the Second Circuit invalidated the FCC's "fleeting expletives" policy for the second time, setting up a possible return trip to the Supreme Court. The court decisively ruled that the FCC's current policy chills protected speech, while suggesting that the FCC could create a policy sufficiently clear to pass constitutional muster. The court also raised, but did not answer, the question of whether a less strict level of scrutiny typically applied to regulation of television and radio broadcasts was still appropriate.

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1. Docket Nos. 06-1760-ag, 06-2750-ag, 06-5358-ag, 2010 WL 2736937 (2d Cir. July 13, 2010).

2. *Fox Television Stations, Inc. v. FCC* ("Fox I"), 489 F.3d 444, 462 (2d Cir. 2007).

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

4. *Fox*, 2010 WL 2736937, at \*16.

5. 438 U.S. 726 (1978).

6. *Fox I*, 489 F.3d 444, 463.

7. FCC, 129 S. Ct. at 1811.

8. *Id.* at 1812.

9. *Id.* at 1819.

10. See *Fox*, 2010 WL 2736937, at \*7-8.

11. 2010 WL 2736937, at \*8 (citing *United States v. Playboy Entm't Group*, 529 U.S. 803, 815 (2000)).

12. *Id.*

13. 521 U.S. 844 (1997).

14. *Id.* at 870.

15. *Fox*, 2010 WL 2736937, at \*10.

16. *Id.*

17. *Id.* at \*12.

18. *Id.* at \*12-13.

19. *Id.* at \*13.

20. *Id.* at \*12 (quoting *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C. Rcd. 2664, at ¶ 82 (2006)).

21. *Id.* at \*14.

22. *Id.*

23. *Id.*

24. *Id.* at \*16.