

FCC v. FOX: A DECISION THAT DOES LITTLE TO CLEAR THE AIR IN REGULATION OF FLEETING EXPLETIVES IN NEWS BROADCASTS

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A broadcast reporter is embedded in Afghanistan. During his live, on-air interview of an American general, a grenade explodes nearby, and the general drops a four-letter bomb of his own. The Federal Communications Commission (“FCC”) levies a \$73 million fine against the network.¹ A top executive responds with an impassioned tirade against the FCC:

I won't pay a \$73 million fine. I won't pay a 73-cent fine. I won't time-delay the news, and I won't say I'm sorry. I no longer recognize the authority of the FCC on this matter. I'm going to have to be ordered by a federal judge. And when they come to get my transmitter, they better, they better send a group a hell of a lot more scary than the Foundation for Friendly Families or whatever they are.²

Although this plot line is fictional, it is a strong illustration of the so-called “fleeting expletive” — the isolated utterance of profanity or image of nudity in the course of a radio or television broadcast — and the not-so-uncommon scenario in which a fleeting expletive finds its way into a news broadcast.

The story line also reflects a not-too-subtle trend among broadcasters in recent years — a growing frustration with an indecency regime marked by shifting standards that virtually eliminate the ability to predict the type of speech the FCC will deem

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1. *Studio 60 on the Sunset Strip: The Christmas Show* (NBC television broadcast Dec. 4, 2006).

2. *Id.*

actionable and the type of speech the FCC will find protected from indecency sanctions. For that reason, advocates on both sides of the issue cheered when the U.S. Supreme Court in June 2011 agreed to decide whether the FCC's fleeting expletive policy violated the Constitution.³ "[S]ome Court watchers speculate[d] that the high Court . . . [would] take the opportunity to overturn a thirty-plus-year rationale some claim is now irrelevant in light of modern modes of communication."⁴ Such a change would drastically alter how the FCC regulates indecent programming in broadcast media. But rather than providing clear guidelines on what material is protected, the Supreme Court's narrowly decided opinion in *FCC v. Fox Television Stations, Inc.*,⁵ leaves largely unanswered significant questions about what constitutes indecent programming on the public airwaves. Consequently, further review by the Supreme Court on this issue is likely.

Part I of this Article examines the regulatory and jurisprudential background that led to the Court's much-anticipated opinion in *FCC v. Fox* and then analyzes its holding. This Part will focus on broadcasting in the news context. Part II discusses the effects of the ruling and the FCC's actions in the months since the decision. Part III concludes by proposing a solution that provides broadcasters the certainty they expected, but did not receive, from the Court — the adoption of a bright-line rule exempting fleeting expletives, in whatever format presented, from broadcast indecency regulations. Such a standard is the only means to ensure that the news media, as they exist in a modern media landscape, can fulfill their constitutionally protected role as a vital source of information about matters of significant public interest and concern.

I. A DECISION MORE THAN THIRTY YEARS IN THE MAKING

Since its 1978 landmark indecency decision,⁶ the Supreme Court has consistently relied on the broadcast medium's twin pillars of pervasiveness and accessibility to children to justify limited First

3. See Edward Wyatt, *Justices Agree to Consider F.C.C. Rules on Indecency*, N.Y. TIMES, June 28, 2011, at B3.

4. See *id.*; see also Kristen Rasmussen, *Supreme Court to Decide Constitutionality of Broadcast Indecency Rules in FCC v. Fox*, NEWS MEDIA & THE L., Fall 2011, at 10, 10, available at <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2011/supreme-court-decide-constitu>.

5. 567 U.S. ____, 132 S. Ct. 2307 (2012).

6. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (plurality opinion).

Amendment protection for speech uttered over the public airwaves.⁷ Differences in the characteristics of broadcasting and other media have for many years warranted disparate constitutional standards such that a restriction on speech that likely would be struck down if applied to the print media,⁸ cable television,⁹ or the Internet¹⁰ would often be allowed to stand in the broadcast context. Recently, broadcasters, media advocates, legal scholars, and even courts have begun questioning the validity of the reasoning underlying this distinction.

[W]e face a media landscape that would have been almost unrecognizable in 1978. Cable television was still in its infancy. The Internet was a project run out of the Department of Defense with several hundred users. Not only did Youtube, Facebook, and Twitter not exist, but their founders were either still in diapers or not yet conceived. In this environment, broadcast television undoubtedly possessed a uniquely pervasive presence in the lives of all Americans.

The same cannot be said today. The past thirty years has seen an explosion of media sources, and broadcast television has become

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7. See, e.g., *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996) (noting “[t]he importance of the interest at stake here — protecting children from exposure to patently offensive depictions of sex[.]” in the Court’s analysis of the regulation of speech).
 8. Compare *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that a Florida statute requiring newspapers that attack the character of a political candidate to provide free space to the candidate for a reply violates the First Amendment’s guarantee of a free press), with *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396 (1969) (upholding a strikingly similar right of reply applicable to the broadcast media). About thirteen years after the FCC abandoned its so-called fairness doctrine, the U.S. Court of Appeals for the D.C. Circuit ordered the agency to repeal its personal-attack and political-editorializing rules, which were particular applications of the fairness doctrine. See *Radio-Television News Dirs. Ass’n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000). Less than a month later, the FCC officially removed the language implementing the doctrine. See *Repeal or Modification of the Personal Attack and Political Editorial Rules*, 65 Fed. Reg. 66,643, 66,644 (Nov. 7, 2000).
 9. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 639 (1994) (holding that so-called “must-carry” provisions requiring cable television systems to dedicate some of their channels to local broadcast television stations are subject to intermediate First Amendment scrutiny; “[i]n light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in . . . broadcast cases is inapt when determining the First Amendment validity of cable regulation.”).
 10. See *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (striking down as unconstitutional provisions of the Communications Decency Act, which attempted to protect minors from explicit material on the Internet, after “application of the most stringent [First Amendment] review”).

only one voice in the chorus. . . . Moreover, technological changes have given parents the ability to decide which programs they will permit their children to watch.¹¹

Nonetheless, the Second Circuit noted it was bound by earlier Supreme Court jurisprudence and was required to apply the broadcast context's lower standard, "regardless of whether it reflects today's realities."¹² Such an observation by the appellate court teed up the issue for review by the nation's highest Court, offering it "the chance to go all the way back and rethink whether the basis for regulating broadcast media still makes sense."¹³

A. *Fleeting Indecency from George Carlin to Bono to Nicole Richie*

The Supreme Court's opinion in *FCC v. Fox* was preceded by a storied background that involved vamped and revamped policies, an earlier Supreme Court ruling on the matter that many thought — wrongfully, it turned out — would foreshadow this most recent decision, and inexplicable about-faces by the FCC. A discussion of this history is helpful in providing context to the ruling.

In 1960, Congress vested the FCC with the authority to assess fines on those who "utter any obscene, indecent, or profane language by means of radio communication,"¹⁴ in violation of federal law.¹⁵ The FCC got its first chance to do so in 1975, two years after a radio station aired in mid-afternoon comedian George Carlin's "Filthy Words" monologue, a 12-minute string of expletives.¹⁶ The FCC found that Pacifica Foundation, the broadcaster that aired the Carlin monologue, had engaged in indecent speech.¹⁷ The FCC defined indecent speech 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."¹⁸ Pacifica appealed the ruling to the U.S. Court of Appeals for the D.C. Circuit, which declared the FCC's indecency regime

11. Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 326 (2d Cir. 2010) (citation and internal quotation marks omitted), *vacated*, 132 S. Ct. 2307 (2012).

12. *Id.* at 327.

13. Rasmussen, *supra* note 4 (quoting Professor Stephen Wermiel).

14. 18 U.S.C. § 1464 (2012).

15. 47 U.S.C. § 503(b)(1)(D) (2012).

16. Citizen's Complaint Against Pacifica Found. Station WBAI (FM), N.Y., 56 F.C.C. 2d 94, 95 (1975), *rev'd*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

17. *Id.* at 99.

18. *Id.* at 98. That definition remains in use to this day.

invalid.¹⁹ In finding the FCC's order both vague and overbroad, the court held that the FCC's definition of indecent speech would prohibit "the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the Bible."²⁰ Such a result, the court concluded, amounted to unconstitutional censorship.²¹

In a plurality opinion authored by Justice Stevens, the Supreme Court reversed, expounding a rationale that afforded the FCC more regulatory authority over broadcasting than was permissible for other media: "[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection[]" because of its "uniquely pervasive presence in the lives of all Americans."²² Moreover, the nature of broadcast television — as opposed to print materials — made it "uniquely accessible to children, even those too young to read."²³ In what it emphasized was a narrow holding, the *Pacifica* Court limited its review to the Carlin monologue and declined to rule on the broader issues of whether the regulation was overbroad and would chill protected speech.²⁴ Rather, the Court stressed the "specific factual context" of the Carlin monologue, particularly its deliberate and repetitive use of expletives to describe sexual and excretory activities.²⁵ Justices Powell and Blackmun, who concurred in a separate opinion, made clear that the holding did not "speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here."²⁶ They also took the FCC at its word that it would "proceed cautiously" with enforcement of the indecency policy, which they reasoned would minimize any chilling effect that might otherwise result.²⁷

In the years following *Pacifica*, the FCC pursued a "restrained enforcement policy," limiting its indecency enforcement authority to

19. *Pacifica Found. v. FCC*, 556 F.2d 9, 10–11 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

20. *Id.* at 14.

21. *Id.* at 18.

22. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (plurality opinion).

23. *Id.* at 749.

24. *Id.* at 734–35, 750–51.

25. *Id.* at 742–51.

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

27. *Id.* at 761 n.4.

the seven specific words in the Carlin monologue.²⁸ The FCC abandoned this policy in 1987, however, reasoning that under the standard, patently offensive material was permissible as long as it avoided certain words — a result that “made neither legal nor policy sense.”²⁹ The FCC instead decided to use the definition it had used in its *Pacifica* order.³⁰ In 2001, the FCC, in an attempt to provide broadcasters with guidance about the indecency policy and enforcement regime, issued a statement further explaining the standard.³¹ According to the FCC, an indecency finding involved the following two determinations: (1) whether the material “describe[s] or depict[s] sexual or excretory organs or activities”; and (2) whether the broadcast is “*patently offensive* as measured by contemporary community standards for the broadcast medium.”³² The FCC further explained that it considered the following three factors in determining whether a broadcast is patently offensive:

- (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities;
- (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities;
- (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.³³

This order reiterated that under the second prong of the patently offensive test, “fleeting and isolated” expletives were not actionably indecent.³⁴

The FCC enforced these guidelines until 2004 — the year after U2 frontman Bono exclaimed during a live broadcast of the 2003 Golden Globe Awards, “This is really, really, fucking brilliant. Really, really, great,” upon his band’s receipt of the award for best original song.³⁵ In response to complaints filed after the incident, the FCC issued its

28. See *FCC v. Fox Television Stations, Inc.*, 613 F.3d 317, 321 (2d Cir. 2010), *vacated*, 132 S. Ct. 2307 (2012).

29. *Infinity Broad. Corp.*, 3 FCC Rcd. 930, 930–31 (1987).

30. *Id.*

31. *Indus. Guidance on the Comm’n’s Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency*, 16 FCC Rcd. 7999, 8002 (2001).

32. *Id.*

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

34. *Id.* at 8008–09 (listing cases in which the material “was not found to be indecent because it was fleeting and isolated”).

35. *Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 FCC Rcd. 4975, 4976 n.4 (2004) [hereinafter *Golden Globes Order*].

Golden Globes Order, declaring for the first time that a single, nonliteral use of an expletive could be deemed actionably indecent speech.³⁶ Finding that the “‘F-Word’ is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language”³⁷ and thus “inherently has a sexual connotation,”³⁸ the FCC concluded that the fleeting and isolated use of the word was irrelevant and overruled all prior decisions in which the fleeting use of an expletive was held per se not indecent.³⁹ Around the same time the FCC expanded its enforcement efforts, it also began issuing record fines for indecency violations.⁴⁰ The FCC announced it would impose monetary penalties on broadcasters based on each indecent utterance in a broadcast, rather than issue a single monetary penalty for the entire broadcast.⁴¹ In addition, Congress increased the maximum fine permitted by a factor of ten — from \$32,500 to \$325,000.⁴²

In an attempt to provide guidance about what it considered indecent under the new policy, the FCC applied the standard it adopted in the Golden Globes Order to numerous broadcasts.⁴³ In this order, the FCC found four programs indecent, all of which involved fleeting expletives: (1) Cher’s unscripted statement during her acceptance speech at the 2002 Billboard Music Awards that “[p]eople have been telling me I’m on the way out every year, right? So fuck ‘em.”;⁴⁴ (2) Nicole Richie’s unscripted remark while presenting an award at the 2003 Billboard Music Awards: “Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.”;⁴⁵ (3) episodes of “NYPD Blue” in which “bullshit” was uttered several

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36. *Id.* at 4978–80 (describing how Bono’s use of the “F-Word” violated the *Pacifica* standard). The agency had begun increased enforcement efforts just a couple months earlier, after the broadcast of the 2004 Super Bowl, during which Justin Timberlake exposed Janet Jackson’s breast for a fraction of a second during the pair’s halftime show. *See Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 322 n.2 (2d Cir. 2010), *vacated*, 132 S. Ct. 2307 (2012).
37. Golden Globes Order, *supra* note 35, at 4979.
38. *Id.* at 4978.
39. *Id.* at 4978–80.
40. *Fox*, 613 F.3d at 322 & n.3.
41. *Id.* at 322.
42. 47 U.S.C. § 503(b)(2)(C)(ii) (2006); *see also* Frank Ahrens, *The Price for On-Air Indecency Goes up*, WASH. POST, June 8, 2006, at D1.
43. Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005, 21 FCC Rcd. 2664, 2665 (2006).
44. *Id.* at 2690–92.
45. *Id.* at 2692–93 & n.164.

times;⁴⁶ and (4) a description by a guest on CBS' "The Early Show" of a fellow contestant on the reality television show "Survivor" as a "bullshitter."⁴⁷ On reconsideration, the FCC affirmed its finding of indecency as to both awards shows but reversed itself on "The Early Show" order and dismissed the "NYPD Blue" complaint on procedural grounds.⁴⁸ In its discussion of "The Early Show," the FCC conceded that expletives that are "an integral part of a bona fide news story" might not run afoul of the indecency standard.⁴⁹ It made clear, however, that "there is no outright news exemption from our indecency rules."⁵⁰

B. *Fleeting Indecency and the News*

In reversing its earlier decision about "The Early Show" because the utterance of the word "bullshitter" occurred "during a *bona fide* news interview," the FCC recognized that matters presented in news and public affairs programming are at the core of the First Amendment's free press guarantee.⁵¹ As such, the FCC declared it "imperative that [it] proceed with the utmost restraint when it comes to news programming."⁵² Unfortunately, the FCC's subsequent indecency findings belie this claim of restrained approach. Indeed, these decisions reveal that the FCC has made determinations of indecency based on an assessment of the quality of the programming — an unconstitutionally discriminatory manner of enforcement in which favored speech is permitted and disfavored speech is sanctioned.

The FCC claims that the exemption from indecency liability for statements made during a bona fide news interview should adequately alleviate broadcasters' fear that news programming could be subject to fines.⁵³ Yet, the FCC has explicitly emphasized that news status does not absolve a broadcast from a finding of indecency, noting: "To be sure, there is no outright news exemption from our indecency rules."⁵⁴ Even absent this unequivocal assertion of the FCC's

46. *Id.* at 2696.

47. *Id.* at 2699.

48. Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005, 21 FCC Rcd. 13299, 13299 (2006) [hereinafter Remand Order].

49. *Id.* at 13327 (citation and quotation marks omitted).

50. *Id.*

51. *Id.*

52. *Id.*

53. See *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 334 (2d Cir. 2010), *vacated*, 132 S. Ct. 2307 (2012).

54. Remand Order, *supra* note 48, at 13327.

discretion to decline to apply the news exemption, its indecency decisions sufficiently strip broadcasters of any assurance that news programming is immune from liability. For example, the FCC first deemed content in a news program indecent in 2004, when it imposed a fine for the momentary airing of a penis during a live interview on a morning news show with performers from a comedy stage.⁵⁵ The news program's hosts repeatedly warned viewers of the subject matter of the upcoming interview segment and immediately apologized after the accidental and unintentional exposure, which lasted less than a second.⁵⁶ Further, the morning show's management suspended the personnel involved with the incident.⁵⁷ Nonetheless, the FCC found the broadcast to be "pandering, titillating and shocking."⁵⁸ Similarly, broadcasts featuring "shock jock" Howard Stern have amassed \$2.5 million in indecency fines or settlements over the years,⁵⁹ despite a declaratory statement that his on-air interviews were "bona fide news interview" programming.⁶⁰

Moreover, the FCC has expressed a willingness to rely on broadcasters' characterizations of their own programming as news programming in making indecency determinations.⁶¹ Yet, the FCC has seemingly tasked itself with distinguishing between plausible and implausible broadcaster claims about the nature of the programming, making its own assessment of the newsworthiness, or lack thereof, of any news story with a sexual component.⁶² For example, the FCC

55. See *Young Broad. of S.F., Inc.*, 19 FCC Rcd. 1751, 1751-52 (2004).

56. *Id.* at 1752-53.

57. *Id.*

58. *Id.* at 1757.

59. More than half of the \$4.5 million in indecency fines the FCC assessed between 1990 and April 2004 were against stations that carried the controversial New York-based disc jockey. Clear Channel Communications permanently dropped the show, which drew about eight million listeners weekly, from its broadcast lineup in April 2004. See John Dunbar, *Indecency on the Air*, CTR. FOR PUB. INTEGRITY (updated Aug. 7, 2012, 2:00 PM), <http://www.publicintegrity.org/2004/04/09/6588/indecency-air>.

60. See *Infinity Broad. Operations Inc.*, 18 FCC Rcd. 18603, 18604 (2003).

61. See *Remand Order*, *supra* note 48, at 13328 (deferring to CBS' "plausible characterization" of an interview of a reality television contestant as a bona fide news interview).

62. See Lili Levi, *The FCC's Regulation of Indecency*, 7 FIRST REPS. 1, 26 & n.142 (2008), available at http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FirstReport.Indecency.Levi_.final_.pdf (describing the FCC's focus on the "risqué" nature of the choreography in its indecency analysis of the 2004 Super Bowl halftime show).

denied an application to review an Enforcement Bureau's finding that a discussion of whether and how a penis could be used to lift or pull objects was indecent.⁶³ Although the station claimed the non-sexual references to male genitalia were made "in the context of a genuine news story," and the Enforcement Bureau conceded the discussion concerned a news item, its chief nonetheless concluded "the material [was] not a *bona fide* newscast."⁶⁴ The FCC also rejected the San Francisco station's claim that it should not find the station's penis puppetry segment indecent because it aired during a morning news show.⁶⁵ Instead, the FCC's analysis turned on what the material was apparently intended to do.⁶⁶

The FCC's contention about the type of programming at issue in *FCC v. Fox* strongly demonstrates this problem. In briefing, the FCC stated that uncertainty regarding its application of indecency standards to news programming was irrelevant to the proper disposition of the case because "there is no serious argument that the live broadcast of a Billboard Music award for 'Top 40 Mainstream Track' by Nicole Richie and Paris Hilton was 'news' or 'public affairs programming.'"⁶⁷ This assertion indicates that the broadcast indecency policy relies on the FCC's subjective judgments, including its estimation of whether material qualifies as news or public affairs programming and is subject to the news exemption.

Perhaps more significantly, though, this discriminatory manner of enforcement has severely restrained the ability to effectively report on matters of public interest and concern. Under the FCC's boundless discretion, a news broadcaster's journalistic discretion to choose how it will inform its audience is replaced by the FCC's own highly subjective belief about whether a particular program is of high or low quality, tasteful or distasteful. That is, the policy severely restricts a news broadcaster's ability to report on matters that, although of significant public interest, may displease or offend the FCC — a restraint on publication that this country, consistent with its

63. Entercom Seattle License, LLC, 19 FCC Rcd. 9069, 9071 (2004).

64. Entercom Seattle License, LLC, 17 FCC Rcd. 18349, 18349–50 (2002).

65. See *Young Broad. of S.F., Inc.*, 19 FCC Rcd. 1751, 1757 (2004).

66. See *id.* at 1755 ("[A]lthough the actual exposure of the performer's penis was fleeting in that it occurred for less than a second, the manner in which the station presented this material establishes, under the third factor, that, in its overall context, the material was apparently intended to pander to, titillate and shock viewers.").

67. Brief of Petitioners-Appellants at 31, *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (No. 10-1293).

recognition “that a press that is alert, aware, and *free* most vitally serves the basic purpose of the First Amendment,”⁶⁸ cannot tolerate.

This impossible-to-predict and discriminatory manner of indecency enforcement means protection for broadcasts about matters of public concern extends no further than a mere government assurance that “we may or may not fine you for indecent comments.” The lack of reliable guidance as to what material is protected by the indecency law’s news exemption effectively grants the government a seat in the editing rooms of news broadcasters nationwide. Much like other important considerations — the timing of a particular event or the public status of the subject of a report, for example — the potential to incur large fines influences the daily decisions about what information is widely disseminated and what information is withheld from public view. The ultimate effect leaves viewers and listeners less than fully informed. Choices about the content of broadcast news reports and their treatment of public issues are “exercise[s] of editorial control and judgment.”⁶⁹ Yet, when indecency regulations coerce news broadcasters so that their decisions are not guided by their discretion to publish over the airwaves that “which their ‘reason’ tells them should . . . be published,”⁷⁰ but rather by a concern about massive indecency fines or even loss of their licenses, the government impermissibly “meddle[s] in the internal editorial affairs” of broadcasters.⁷¹ Interference with “this crucial process,”⁷² often results in self-censorship of serious news programming about matters of public concern — speech that “occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”⁷³

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68. *N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1971) (per curiam) (Stewart, J., concurring) (emphasis added).
 69. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (Brennan, J. concurring).
 70. *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945).
 71. *Tornillo*, 418 U.S. at 259 (White, J., concurring). In other contexts, regulations that infringe the news media’s ability to exercise editorial discretion have, as a constitutional matter, exempted the press. For example, even before the Supreme Court’s ruling in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Bipartisan Campaign Reform Act of 2002 expressly exempted the news media from its prohibition on corporate electioneering communications. 2 U.S.C. § 434(f)(3)(B)(i) (2006).
 72. *Tornillo*, 418 U.S. at 258 (Brennan, J. concurring).
 73. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (citation and internal quotation marks omitted).

C. *Fleeting Indecency in the Courts*

Fox, other broadcast networks, and local affiliates asked the U.S. Court of Appeals for the Second Circuit to review the 2006 Remand Order, a request that raised a variety of administrative, statutory, and constitutional arguments.⁷⁴ The court found that the policy was arbitrary and capricious under the Administrative Procedure Act because the FCC had failed to adequately explain why it had changed its nearly-thirty-year policy on fleeting expletives.⁷⁵ Since the court struck down the policy on administrative grounds, it declined to address the constitutional issues, though it noted it was “skeptical that the Commission [could] provide a reasoned explanation for its ‘fleeting expletive’ regime that would pass constitutional muster.”⁷⁶

In a five to four decision in April 2009, the Supreme Court reversed the Second Circuit’s ruling.⁷⁷ The Court held that the fleeting expletives policy was not arbitrary and capricious because “[t]he Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children.”⁷⁸ The high Court declined to address the broadcasters’ constitutional arguments, “see[ing] no reason to abandon our usual procedures in a rush to judgment without a lower court opinion,”⁷⁹ and remanded the case to the Second Circuit for its consideration of those issues.⁸⁰ Yet, grave concerns about the First Amendment implications of the indecency standard appeared in the Court’s analysis, namely in Justice Thomas’ concurrence and Justice Ginsburg’s dissent. Justice Thomas noted “the questionable viability of the two precedents that support the FCC’s assertion of constitutional authority to regulate the programming at issue in this case. . . . ‘The text of the First Amendment makes no distinctions among print, broadcast, and cable media, but we have done so’ in these cases.”⁸¹

74. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 446 (2d Cir. 2007), *rev’d*, 556 U.S. 502 (2009).

75. *Id.* at 446–47, 467.

76. *Id.* at 462.

77. *FCC v. Fox Television Stations, Inc. (Fox I)*, 556 U.S. 502, 529–30 (2009).

78. *Id.*

79. *Id.* at 529.

80. *Id.* at 530.

81. *Id.* at 530 (Thomas, J., concurring) (quoting *Denver Area Ed. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 812 (1996) (Thomas, J., concurring in part and dissenting in part)).

Justice Ginsburg expressed disdain for the FCC's "bold stride beyond the bounds" of *Pacifica's* narrow holding, stating, "[T]here is no way to hide the long shadow the First Amendment casts over what the Commission has done."⁸² She also took issue with the FCC's sanctioning of speech that, unlike Carlin's "verbal shock treatment," was "neither deliberate nor relentlessly repetitive [nor] . . . used to describe sexual or excretory activities or organs," but rather may reflect language that some at the FCC find distasteful.⁸³ In what some interpreted to foreshadow what the Court, or at least Justice Ginsburg, would consider when evaluating the constitutionality of the indecency rule three years later, the Justice wrote, "If the reserved constitutional question reaches this Court . . . we should be mindful that words unpalatable to some may be 'commonplace' for others, 'the stuff of everyday conversations.'"⁸⁴

On remand, the Second Circuit was likewise troubled by the indecency rule's lack of discernible standards.⁸⁵ The court expressed concern that the rule would be enforced in a discriminatory manner to permit favorable and suppress unfavorable expression, noting that:

We have no reason to suspect that the FCC is using its indecency policy as a means of suppressing particular points of view. But even the risk of such subjective, content-based decision-making raises grave concerns under the First Amendment. . . . [N]othing would prevent the FCC from applying its indecency policy in a discriminatory manner in the future.⁸⁶

The court ultimately agreed with the broadcasters that the indecency standard was impermissibly vague and left them with no degree of certainty as to what the policy was or how they could comply with it.⁸⁷ Thus, the broadcasters had no choice but to self-censor or risk massive fines, thereby chilling protected speech.⁸⁸

In June 2012, the Supreme Court, in a narrowly decided opinion, voided the fines imposed for the instances of fleeting expletives at issue in the appeal, ruling that the FCC violated constitutional due process procedures by not providing adequate notice of increased

82. *Id.* at 545 (Ginsburg, J., dissenting).

83. *Id.* at 545–46 (citation omitted).

84. *Id.* at 546 (citation omitted) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 776 (1978) (Brennan, J., dissenting)).

85. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 327 (2d Cir. 2010), *vacated*, 132 S. Ct. 2307 (2012) ("For we conclude that, regardless of where the outer limit of the FCC's authority lies, the FCC's indecency policy is unconstitutional because it is impermissibly vague.").

86. *Id.* at 333.

87. *Id.* at 332–33.

88. *Id.* at 332.

efforts to enforce its indecency rules before imposing the fines.⁸⁹ The Court specified that:

[R]egulated parties should know what is required of them so they may act accordingly; . . . precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. . . . When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

These concerns are implicated here because, at the outset, the broadcasters claim they did not have, and do not have, sufficient notice of what is proscribed. . . . [nor] fair notice of what was forbidden.⁹⁰

In announcing the Court's decision from the bench, Justice Kennedy stated that because the Court resolved the matter on fair notice grounds under the Due Process Clause, there was "no need to address the constitutionality" of the vaguely worded policy's ban on isolated utterances of profanities and images of nudity.⁹¹ Only Justice Ginsburg — not surprisingly, given her dissent in *Fox I*⁹² — was prepared to address these and broader issues.⁹³ She stated in her one-paragraph concurrence that she would have reached the First Amendment issues and overruled *Pacifica*, which "was wrong when it issued" and in need of reconsideration, particularly in light of "[t]ime, technological advances, and the Commission's untenable rulings in the cases now before the Court."⁹⁴ As a final note, the Court explicitly authorized the FCC to modify its current indecency policy and lower courts to review that or any modified policy in light of its content and application.⁹⁵

89. *FCC v. Fox Television Stations, Inc. (Fox II)*, 132 S. Ct. 2307, 2320 (2012).

90. *Id.* at 2317–18 (citation omitted).

91. *Supreme Court Rules Against FCC in Nicole Richie Profanity Case*, METRO (June 21, 2012), <http://www.metro.us/newyork/news/national/2012/06/21/supreme-court-rules-against-fcc-in-nicole-richie-profanity-case>. Indeed, the opinion itself demonstrates the narrowness of its holding: Only about seven of the nearly eighteen pages discuss the legal issues.

92. *See supra* notes 82–84 and accompanying text.

93. *Fox II*, 132 S. Ct. at 2321 (Ginsburg, J., concurring).

94. *Id.*

95. *Id.* at 2320.

II. THE AFTERMATH

Shortly after the Court issued its ruling, a “disappointing” and “frustrating” reality set in for broadcasters and other media advocates: After three years and two Supreme Court opinions, no greater certainty exists about what type of speech the indecency policy restricts and how it is applied.⁹⁶ The opinion does provide a couple of takeaways, but they are of dubious value.

If nothing else, the ruling makes clear that broadcasters must have some kind of notice that their speech could be actionably indecent before the FCC imposes sanctions.⁹⁷ For news broadcasters, the FCC’s 2006 Remand Order, which is the FCC’s most recent discussion of indecency regulation in the context of news

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96. See Kristen Rasmussen, *Fox “Fleeting Expletives” Decision Does Little to Clear the Air in Regulation of Indecency*, NEWS MEDIA & THE L., Summer 2012, at 16, 16–17 (quoting Professor Stephen Wermiel), available at <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2012/fox-%E2%80%9Cfleeting-expletives%E2%80%9D-d> (describing how this uncertainty is largely due to the Court’s reliance on due process, rather than First Amendment, vagueness considerations: “Vagueness in this context simply means that Fox and ABC didn’t have adequate notice of what the standard was in order to be able to conform their practices to the law. The Court did not say for sure that there is anything wrong with the FCC’s indecency standard. It was just not clear enough to be applied to the actions of the broadcasters[.] . . . An indecency standard that is too vague [under the First Amendment] means the standard is not valid and cannot be valid.”).
97. See *Fox II*, 132 S. Ct. at 2320. Chief Justice Roberts underscored the importance of this notice requirement in his opinion concurring with the Court’s denial of the FCC’s request to consider the Third Circuit decision that relieved CBS of a \$550,000 fine for the Super Bowl halftime show, which, like the broadcasts at issue in *Fox*, aired before the policy change on fleeting images of nudity and utterances of expletives. See *FCC v. CBS Corp.*, 132 S. Ct. 2677, 2678 (2012) (“Even if the Third Circuit is wrong that sanctioning the Super Bowl broadcast constituted an unexplained departure from the FCC’s prior indecency policy, that error has been rendered moot going forward . . . because the FCC no longer adheres to the fleeting expletive policy. It is now clear that the brevity of an indecent broadcast — be it word or image — cannot immunize it from FCC censure.”) (citations omitted). But as this example demonstrates, even in cases where notice of potential indecency liability has been adequately provided, sufficient certainty may still be lacking. See Rasmussen, *supra* note 96, at 18 (remarking that although Chief Justice Roberts strongly emphasized that “wardrobe malfunctions” will not be protected, “broadcasters and others have no idea just what a ‘wardrobe malfunction’ is”); see also *id.* (quoting media attorney Kathleen Kirby, who submitted an *amicus* brief in *Fox* on behalf of the Radio-Television Digital News Association: “Is whipped cream on a nipple covering it up or not? . . . There really aren’t any good guidelines.”).

programming, may provide some comfort. A strong argument exists that the FCC's decision to reverse its prior decision about "The Early Show" — a decision made after consideration of the context in which the fleeting expletive occurred and acknowledgement of the need to exercise restraint in cases involving news programming — provides sufficient notice that fleeting expletives uttered during news broadcasts are not actionably indecent.⁹⁸ Nevertheless, considering the unconstitutionally discriminatory manner in which the FCC historically has enforced the indecency policy in the news programming context,⁹⁹ it would be unwise for news broadcasters to rely on the Supreme Court's recent announcements about the notice requirement as an assurance of immunity from liability.

In addition to requiring notice, *FCC v. Fox* makes clear that regulation of indecency over the public airwaves remains well within the FCC's enforcement authority.¹⁰⁰ Despite this affirmation, actions by the FCC in the months since the June 2012 opinion indicate that the current FCC is unlikely to enforce regulations as aggressively as it has done in the past.¹⁰¹

Hours after the Court announced the *FCC v. Fox* ruling, all five FCC commissioners issued statements, most of which acknowledged the narrowness of the decision and expressed their intent to protect young viewers and listeners, and to adhere to the constitutional principles the Court enunciated.¹⁰² Commissioners Robert McDowell and Ajit Pai said the agency would now "get back to work" to expeditiously process and resolve the complaints that amassed since the litigation began — a backlog of nearly 1.5 million indecency

98. See Remand Order, *supra* note 48, at 13327–28.

99. See *supra* Part I.B.

100. See *Fox II*, 132 S. Ct. at 2320.

101. Last September, the FCC dropped its legal pursuit of Fox over nonpayment of a 2003 indecency fine for "Married by America," dismissing a suit in federal court in Washington, D.C. Then-FCC Chairman Julius Genachowski also announced that he had directed the Enforcement Bureau "to focus its resources on the strongest cases that involve egregious indecency violations." John Eggerton, *DOJ, FCC Drop Pursuit of Fox 'Married by America' Indecency Fine*, BROAD. & CABLE (Sept. 21, 2012, 5:09 PM), http://www.broadcastingcable.com/article/489505-DOJ_FCC_Drop_Pursuit_of_Fox_Married_by_America_Indecency_Fine.php.

102. See Press Release, Statement of FCC Comm'r Mignon L. Clyburn on the Decision of the U.S. Supreme Court in *FCC v. Fox Television Stations, Inc.* (June 21, 2012), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-314769A1.pdf.

complaints, some of which dated to 2003, involving nearly 10,000 television broadcasts, and more than 300 pending license renewal applications.¹⁰³ Thus far, that expeditious work has seemingly paid off: In the nearly six months after the *FCC v. Fox* ruling, the number of backlogged indecency complaints fell to about 500,000, involving about 5,500 broadcasts.¹⁰⁴ These dismissals, however, have been based, not on substantive evaluations of whether the material at issue is indecent under *FCC v. Fox*, but rather on a number of procedural grounds. Specifically, indecency complaints have been dismissed in cases where:

- The five-year statute of limitations had expired or would have soon,¹⁰⁵
- The broadcast occurred during late-night and early-morning shows that fell within the “safe harbor” period,¹⁰⁶
- The complaint fell outside the statute of limitations by way of a voluntary agreement with the licensee. However, the broadcast was nonetheless not actionable because it involved the airing of a fleeting

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103. See Press Release, Statement of FCC Comm’r Robert M. McDowell on the U.S. Supreme Court’s Decision in *FCC v. Fox Television Stations, Inc.* (June 21, 2012), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-314761A1.pdf; Press Release, Statement of FCC Comm’r Ajit Pai on the U.S. Supreme Court’s Decision in *FCC v. Fox Television Stations, Inc.* (June 21, 2012), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-314762A1.pdf (“Today’s narrow decision by the U.S. Supreme Court . . . highlights the need for the Commission to make its policy clear. I look forward to working with my colleagues to provide the clarity that both parents and broadcasters deserve.”). The license renewal issue is particularly crucial since the FCC will not grant a broadcast license renewal, nor may a station be bought or sold, when an indecency complaint against the broadcaster is pending. See Rasmussen, *supra* note 96, at 18. In 2005, the agency adopted a policy that authorizes license renewals despite pending indecency complaints in certain circumstances. Nonetheless, unresolved complaints can negatively affect the value of the license and inhibit the owner’s refinancing and recapitalization. *Id.* (citing Kathleen Kirby).
104. *Keeping the New Broadband Spectrum Law on Track: Hearing Before the Subcomm. on Commc’ns & Tech. of the H. Comm. on Energy & Commerce*, 112th Cong. 17 (2012) (statement of Robert M. McDowell, Commissioner, FCC).
105. See Jonathan Make, *FCC Staff Slash Indecency Backlog by Dismissing Old Complaints*, COMMS. DAILY, Jan. 14, 2013, at 1.
106. *Id.* The “safe harbor” period refers to the period between 10 p.m. and 6 a.m. local time when a station may legally air indecent material. See *Action for Children’s Television v. FCC*, 58 F.3d 654, 664 (D.C. Cir. 1995) (en banc).

expletive some time before the 2004 Golden Globes Order declaring that instances of such could result in fines,¹⁰⁷ and

• A licensee that renewed or transferred its license agreed to extend the time during which the FCC may act on indecency complaints pending against it in exchange for the FCC's dismissal of other pending complaints.¹⁰⁸

Although this process of filtering out the easy cases¹⁰⁹ is undoubtedly beneficial, it does nothing to address the lingering questions about whether a particular broadcast can be ruled indecent post-*FCC v. Fox*. That answer, one that could provide news broadcasters with the guidance they need to make editorial decisions free from the chilling effects of self-censorship, remains unknown and could for some time.¹¹⁰

To the extent news broadcasters have a reprieve from the FCC's previous strict enforcement, which may provide some assurance that their programming will be immune under the post-*FCC v. Fox* fleeting expletive indecency standard, that guarantee will likely be short-lived. With Genachowski's exit expected before the end of the ninety-day comment period, formally easing up on broadcast indecency enforcement "almost certainly has to be the call of the next chairman,"¹¹¹ who may or may not be interested in making this hotly debated directive permanent policy. Regardless of whether the FCC

107. Make, *supra* note 105, at 2.

108. *Id.*

109. Most of these dismissed complaints likely could not have been deemed indecent under current law.

110. On April 1, the FCC issued a public notice that detailed the reduction in the complaint backlog, discussed the Enforcement Bureau's directive from Genachowski last fall to apply the "egregious" standard, and sought comment about whether that standard should be adopted as the FCC's new approach to indecency post-*FCC v. Fox*. Advocacy groups like the Parents Television Council and American Family Association immediately and strongly denounced the proposal, and by April 15, more than 50,000 Americans had filed comments with the FCC. Because Genachowski has announced his resignation, "[i]t remains unclear who will ultimately decide what the FCC policy should be and when that decision will be made." Jamshid Ghazi Askar, *Nudity, Profanity and Broadcast TV: The Future Hangs in the Balance Right Now*, DESERET NEWS (Apr. 14, 2013, 7:45 PM), <http://www.deseretnews.com/article/print/865578258/Nudity-profanity-and-broadcast-TV-The-future-hangs-in-the-balance-right-now.html>.

111. John Eggerton, *FCC Seeks Comment on 'Egregious Complaint' Indecency Enforcement Regime*, BROAD. & CABLE (Apr. 1, 2013, 4:25 PM), http://www.broadcastingcable.com/article/492626-FCC_Seeks_Comment_on_Egregious_Complaint_Indecency_Enforcement_Regime.php.

adopts the codification of Genachowski's enforcement directive, it is incumbent on the commission to develop, sooner rather than later, a new policy statement with specific examples of the types of speech the agency would and would not deem indecent. Otherwise, "you're just on a never-ending, merry-go-round where you have all these fine lines of what is and what is not acceptable."¹¹² In the absence of such guidance, the indecency policy and its enforcement remain subject to the political and social whims of the FCC commissioners and will likely produce decisions that yet again end up before the Supreme Court.

III. A SOLUTION TO PROVIDE THE CERTAINTY THE COURT DENIED

Despite the lengthy events and anticipation leading up to the ruling, the U.S. Supreme Court's decision in *FCC v. Fox* failed to provide broadcasters generally and those who produce news programming specifically with the degree of certainty that the First Amendment requires. Going forward, the FCC should adopt a bright-line rule stating that broadcast indecency regulations cannot be applied to instances of fleeting expletives, regardless of the format in which they are presented. Such a standard is the only means to ensure that the news media, as they exist in a modern media landscape, can fulfill their constitutionally protected role as a vital source of public information, while still allowing the government to punish unscrupulous broadcasters who air profane material in a manner akin to Carlin's "verbal shock treatment."¹¹³ This policy, however, must not be guided by increasingly difficult-to-qualify exemptions, but rather by the recognition that constitutionally protected speech about important public issues is now disseminated in a variety of formats that reflect technological changes in the modern media industry.

The increased blurring of the distinction between news and entertainment programming indicates that the current broadcast indecency enforcement scheme is unworkable. As the Supreme Court recently noted, "the advent of the Internet and the decline of print and broadcast media" have "blurred" lines in the media landscape in ways that must be considered when evaluating regulations that affect the gathering and dissemination of news.¹¹⁴ Indeed, this evolution in the industry is highly relevant to an analysis of the FCC's regulatory

112. Rasmussen, *supra* note 96, at 18 (quoting Kathleen Kirby).

113. *FCC v. Pacifica Found.*, 438 U.S. 726, 757 (1978) (Powell, J., concurring).

114. *See Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 905-906 (2010).

power.¹¹⁵ Technological changes in the modern media industry and the economic consequences of those changes have drastically affected news reporting.¹¹⁶ One of the most significant, and criticized, aspects of this changed environment is a blurring of the distinction between news and entertainment programming, a trend caused largely by twenty-four-hour cable news services.¹¹⁷ Despite allegations that economic pressures have negatively affected the quality of broadcast news reports, the reality remains that matters of public importance are increasingly presented in formats that resemble entertainment as much as journalism.

To be sure, this Article does not contend that an utterance about cow excrement in a designer handbag¹¹⁸ necessarily constitutes a matter of public importance. The incident is, however, a strong example of the danger, given technological advancements that have changed the ways in which news is disseminated, of authoritative assertions that certain kinds of material cannot “serious[ly]” be considered news.¹¹⁹ Undoubtedly, bestowing awards that signify success and prestige in a multi-billion dollar industry constitutes a matter of public importance. Would the same material be considered news if it were presented not as live entertainment programming but

115. The FCC’s authority to regulate may be expanding in light of its proposal to regulate broadband services in a manner that could impose common carrier-style requirements on the companies that provide access to the Internet. The FCC did abandon its “Third Way” of regulation, which would have reclassified broadband Internet access service as a “telecommunications service” under Title II of the Communications Act, saying it could achieve its goal of “preserv[ing] the freedom and openness of the Internet” without the negative consequences of broad application of Title II. See Julius Genachowski, Chairman, FCC, Remarks on Preserving Internet Freedom and Openness (Dec. 1, 2010). Yet, questions remain about the FCC’s authority to impose network management obligations on broadband providers under Title I, raising suspicion that the FCC may revisit its earlier proposal to regulate broadband services under the more stringent Title II. Howard W. Waltzman, *Federal Communications Commission Lacks the Authority to Reclassify Broadband Services As Information Services*, 14 J. INTERNET L. 1, 10 (Apr. 2011).

116. Lili Levi, *A New Model for Media Criticism: Lessons From the Schiavo Coverage*, 61 U. MIAMI L. REV. 665, 683–84 (2007).

117. *Id.* at 688; see also Jonathan Yardley, *Entertainment? That’s News to Me*, WASH. POST, Feb. 3, 1997, at D2 (“[T]he likes of ABC’s ‘PrimeTime Live’ are ‘not journalism but entertainment, not news reports but shows.’ . . . Television, a medium of images and emotions rather than words and ideas, by its very nature reduces everything it touches to show business[.]”).

118. See *supra* text accompanying note 45.

119. See *supra* text accompanying note 67.

as a syndicated program that provided spot news coverage and news interviews about entertainment? In another context, the FCC found that such programming was a bona fide newscast.¹²⁰

These questions indicate that it is imperative that broadcast indecency determinations be governed by more than a summary conclusion about a program's news status. More than anything, the FCC needs to recognize that constitutionally protected speech about important public issues is now disseminated in a variety of formats dictated by an ever-evolving media landscape. This recognition must be reflected in the FCC's policies in order to ensure that vital reporting about matters of public interest and concern remains robust. As such, the FCC should adopt — and the courts should uphold — a bright-line rule that broadcast indecency regulations cannot be applied to instances of fleeting expletives, in whatever format presented. Concededly, “speech that many citizens may find shabby, offensive, or even ugly” or that the government concludes is not very important¹²¹ may reach the public airwaves under this standard. However, as the distinction between news and other types of programming promises to become even murkier as the practices, methods, and modes of journalism continue to evolve alongside future technological advancements, such a clearly enunciated standard is necessary to protect important speech on public issues. Absent this bright-line rule, the indecent broadcast policy “threat[ens] . . . the free and robust debate of public issues; . . . potential[ly] interfere[s] with a meaningful dialogue of ideas” and poses the risk of “a reaction of self-censorship on matters of public import.”¹²²

120. Request for Declaratory Ruling by Paramount Pictures Corp., 3 FCC Rcd. 245, 246 (1988) (holding that “Entertainment Tonight” and “Entertainment This Week” were exempt from the equal opportunities requirement of § 315 of the Communications Act).

121. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 826 (2000).

122. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215–16 (2011) (citation and internal quotation marks omitted).