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## The Battle for the Remote Control—Has the FCC Indecency Policy Worn Out its Welcome in America's Living Room?

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# The Battle for the Remote Control—Has the FCC Indecency Policy Worn Out its Welcome in America’s Living Room?

Sarah Herman\*

## I. INTRODUCTION

The Supreme Court granted certiorari to decide whether the Federal Communications Commission’s (the “FCC” or the “Commission”) indecency policy violates the First and Fifth Amendments (*Fox IV*).<sup>1</sup> Oral argument was heard on January 10, 2012.<sup>2</sup> The case is on appeal from the Second Circuit, which struck down the FCC’s indecency policy in *Fox Television Stations, Inc. v. Federal Communications Commission* (*Fox III*) as impermissibly vague in violation of free speech.<sup>3</sup>

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1. *FCC v. Fox Television Stations, Inc.* (*Fox IV*), 131 S. Ct. 3065 (2011). The scope of this Note will be limited to general First Amendment concerns.

2. Transcript of Oral Argument, *Fox IV*, 131 S. Ct. 3065 (2011) (argued Jan. 10, 2012) (No. 10-1293), 2012 WL 72459. The Court’s decision is pending as this Note goes to press.

3. *Fox Television Stations, Inc., v. FCC* (*Fox III*), 613 F.3d 317 (2d Cir. 2010). In response to the decision, the FCC petitioned the Second Circuit for rehearing or alternatively, rehearing *en banc*, on August 26, 2010. Petition of the FCC and the U.S. for Rehearing and Rehearing En Banc, *Fox III*, 613 F.3d 317 (2d Cir. 2010), available at [http://www.fcc.gov/Daily\\_Releases/Daily\\_Business/2010/db0910/DOC-301400A1.pdf](http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0910/DOC-301400A1.pdf) [hereinafter Petition for Rehearing]. The FCC argued that the Second Circuit reached its “sweeping conclusion even though the Supreme Court approved the Commission’s contextual approach in *FCC v. Pacifica Foundation* . . . and even though the D.C. Circuit and this Court have previously rejected vagueness challenges to the Commission’s indecency standard.” *Id.* at 1. Additionally, the FCC argued that rehearing was needed in order to maintain uniformity in the court’s decisions regarding indecency and allow for consistency in the way the Commission enforces its policy. *Id.* at 2. The Second Circuit denied the petition. Petition for reh’g denied, *Fox III*, 613 F.2d 317 (2d Cir. 2010), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-304064A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304064A1.pdf).

When the FCC indecency policy was first implemented, it was very benign and rarely enforced against the media.<sup>4</sup> It was not until the George W. Bush administration that a surge of activity came from the FCC Enforcement Bureau. First, in 2001, the Commission issued a Policy Guideline purporting to explain its indecency-enforcement regime.<sup>5</sup> Then, in 2004, the FCC for the first time punished the airing of a fleeting expletive.<sup>6</sup>

The Commission has struggled with how narrowly to define what is “indecent.” The FCC has already discovered the ineffectiveness of a narrow policy that proscribes airing specific words.<sup>7</sup> Now, the Commission is struggling with how to salvage an overbroad policy to ensure that it remains constitutional.

The Supreme Court has skirted the constitutional issue since the first indecency case came before it. In *FCC v. Pacifica Foundation*,<sup>8</sup> the Court’s review was limited to whether the FCC could impose a civil penalty for the challenged speech. The Court explicitly declined to address the argument raised by *Pacifica* that the indecency regulation was overbroad and would chill protected speech.<sup>9</sup> However, the Court made clear that the holding was meant to be narrow.<sup>10</sup> Shortly following *Pacifica*, the FCC declared its intention to follow the Court’s instruction for limited enforcement.<sup>11</sup>

The FCC indecency policy has had a great impact on the media and broadcasting industries. The policy’s de facto censorship is a

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4. The first case to address the FCC indecency policy was *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). In the ten years following *Pacifica*, the FCC focused exclusively on regulating the seven words identified in the opinion. Lili Levi, *The FCC’s Regulation of Indecency*, 7 FIRST REPORTS 1 (2008), available at [http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FirstReport.Indecency.Levi\\_final\\_.pdf](http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FirstReport.Indecency.Levi_final_.pdf).

5. See Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C. Rcd. 7999 (2001) [hereinafter *2001 Policy Statement*].

6. See Dave E. Hutchinson, Note, “*Fleeting Expletives*” Are the Tip of the Iceberg: Fallout from Exposing the Arbitrary and Capricious Nature of Indecency Regulation, 61 FED. COMM. L.J. 229, 231 (2008) (“In 2004, the FCC announced the ‘fleeting expletives’ policy—that the isolated use of an offensive expletive could be actionable.”).

7. See *infra* note 35.

8. 438 U.S. 726 (1978).

9. *Fox III*, 613 F.3d 317, 320 (2d Cir. 2010). In *Pacifica*, the Court reversed the D.C. Circuit’s declaration that the FCC’s indecency policy was invalid. See *Pacifica*, 438 U.S. 726.

10. *Fox III*, 613 F.3d at 321.

11. See WGBH Educ. Found., 69 F.C.C.2d 1250, 4 (1978).

large concern.<sup>12</sup> Enhanced penalties force broadcasters to self-censor in order to avoid extremely hefty fines.<sup>13</sup> Today, this policy-induced censorship is even more egregious because of widely available technology capable of screening television programming that was not available when the indecency policy and its subsequent jurisprudence were first formulated.

One area of debate that reaches beyond the scope of the question granted review by the Supreme Court in *Fox IV* is, given the available technology that can be used to prevent indecent material from being viewed, who is responsible for utilizing it? Should parents<sup>14</sup> ultimately be responsible for learning how to use blocking technology and effectively use it to screen and monitor what their children view on television? If so, then who, if anyone, has the burden of educating the public about these technologies, the media industry or the government? On the other hand, should the burden be placed on the media industry for screening programming, specifically live broadcasts, where unplanned fleeting expletives could potentially be aired? In answering these questions, this Note examines the FCC's current indecency-enforcement regime and questions whether FCC regulation of indecent programming on broadcast television is necessary in the twenty-first century when abundant user empowerment technology available as weapons against indecency is at the disposal of parents.<sup>15</sup>

If the Supreme Court rules that the current enforcement regime violates the First Amendment, the FCC will essentially have two choices. First, it could entirely scrap its indecency policy and remove such regulation entirely. Alternatively, the FCC could restructure its policy to make it comport with the First Amendment. As to the

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12. The Supreme Court defines censorship as “any examination of thought or expression in order to prevent publication of ‘objectionable’ material.” *Becker v. FCC*, 95 F.3d 75, 82 (D.C. Cir. 1996) (quoting *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525, 527 (1959)).

13. See 47 U.S.C. § 503(b)(2)(C)(ii) (2010). This provision allows a maximum fine of \$325,000 to be issued for one solitary fleeting expletive during a broadcast. *Id.*

14. The term parent throughout this Note refers generally to adult heads of households.

15. See David L. Hudson Jr., *2nd Circuit questions ‘twin pillars’ of Pacifica*, FIRST AMENDMENT CENTER (July 14, 2010), <http://www.firstamendmentcenter.org/blog-2nd-circuit-questions-twin-pillars-of-pacifica> (posing the question, in light of *Fox III*, “[D]oes *Pacifica* still make sense in a vastly different media world?”).

former, I propose that parents can and should make use of the available user empowerment technologies, making government regulation unnecessary. As to the latter, I propose several viable options which could help alleviate First Amendment and censorship concerns.<sup>16</sup> First, the FCC could terminate its fleeting expletives policy. Second, the FCC could reduce fees for fleeting expletives and other “indecent” content. Third, broadcasters could air two versions of live broadcasts, one live, and one on a delay. Fourth, the media industry and the FCC could implement a collaborative educational campaign to instruct adults on how to use the existing user empowerment technologies.<sup>17</sup>

Part I of this Note traces the history of the FCC’s indecency policy.<sup>18</sup> It discusses relevant technological advances that are useful in filtering television programming to safeguard children from indecent material.<sup>19</sup> Part II of this Note examines the strengths and weaknesses of the FCC’s indecency policy and the case law that has helped shape it into its current form.<sup>20</sup> This analysis includes arguments for and against maintaining, eliminating, or modernizing the policy.<sup>21</sup> Part III of this Note discusses my proposals for resolving the First Amendment and censorship issues arising from the FCC indecency policy as it stands today.<sup>22</sup>

## II. HISTORY

### A. Regulation of Indecent Speech

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”<sup>23</sup> Indecent speech is protected

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16. *See infra* Part IV.

17. This proposal could also be implemented if the FCC abolishes its indecency policy entirely.

18. *See infra* Part I.

19. *See infra* Part I.

20. *See infra* Part II.

21. *See infra* Part II.

22. *See infra* Part III.

23. U.S. CONST. amend. I. This right is not absolute and has been restricted in several carefully defined areas. *See, e.g.*, *Miller v. California*, 413 U.S. 15, 24–26 (1973) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (fighting words); *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562–66 (1980) (commercial speech);

under the First Amendment, but may be restricted at certain times for the protection of children.<sup>24</sup> This authority comes from 18 U.S.C. § 1464 (“Section 1464”).<sup>25</sup> In 1960, Congress authorized the FCC to impose civil forfeitures for violating Section 1464.<sup>26</sup> Fifteen years later, the FCC first exercised its authority to regulate indecent speech.<sup>27</sup> In 1978, the Supreme Court in *Pacifica* held that the FCC could regulate content that is indecent but does not meet the legal definition of obscene.<sup>28</sup> The content found indecent in *Pacifica* came

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Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (imminent lawless action); Schenck v. United States, 249 U.S. 47, 52 (1919) (clear and present danger); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (content-neutral time, place, or manner restrictions); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (libel).

24. “It is well-established that indecent speech is fully protected by the First Amendment.” *Fox III*, 613 F.3d 317, 325 (2d Cir. 2010). However, indecent material may “be restricted in order to avoid its broadcast during times of the day when there is a reasonable risk that children may be in the audience.” *Obscene, Indecent, and Profane Broadcasts, FCC Consumer Facts, Consumer & Governmental Affairs Bureau, FEDERAL COMMUNICATIONS COMMISSION*, <http://www.fcc.gov/cgb/consumerfacts/obscene.html> (last visited Oct. 31, 2011). As such, the FCC has implemented rules for broadcast television and radio whereby material that falls under the Commission’s definition of “indecent” may not be aired between the hours of 6:00 AM and 10:00 PM. *Id.* The remaining time period (between 10:00 PM and 6:00 AM) is called the “safe harbor” period, during which a station may air indecent material. *See Obscenity, Indecency & Profanity—FAQ, FEDERAL COMMUNICATIONS COMMISSION*, [www.fcc.gov/guides/obscenity-indecency-profanity-faq](http://www.fcc.gov/guides/obscenity-indecency-profanity-faq) (last visited Oct. 31, 2011).

Congress has legislated to protect children against *obscene*, as opposed to indecent, material available via other mediums. For example, The Child Online Protection Act (COPA) was enacted in 1998. 47 U.S.C. § 231 (2010). COPA purports to prohibit websites from making sexually explicit material available to minors. *See FAQ on the COPA Commission, COPA COMMISSION*, <http://www.copacommission.org/commission/faq.shtml> (last visited Nov. 9, 2011). The obscenity analysis of COPA was upheld in *Ashcroft v. ACLU*, 535 U.S. 564, 585 (2002) (remanding the issue of constitutionality to the Third Circuit).

25. 18 U.S.C. § 1464 (2010) (“Whoever utters any . . . indecent . . . language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”).

26. Communications Act Amendments, 1960, Pub. L. No. 86-752, 74 Stat. 894 (codified as amended at 47 U.S.C. § 503(b)(2)(C)) (2010). The maximum fine is \$325,000 for each violation or each day of a continuing violation. *Id.* The cap for a continuing violation is \$3,000,000. *Id. But see* WGBH Educ. Found., 69 F.C.C.2d 1250, 1254 (1978) (explaining that “the First Amendment and the ‘no censorship’ provision of Section 326 of the Communications Act severely limit any role by the Commission and the courts in enforcing the proscription contained in Section 1464”).

27. *See Fox III*, 613 F.3d at 320 (explaining the delay whereby “[i]t was not until 1975,” fifteen years after “Congress authorized the FCC to impose civil forfeitures for violations of Section 1464 . . . that the FCC first exercised its authority to regulate speech it deemed indecent but not obscene”).

28. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). The Court’s rationale was predicated on a nuisance theory, due to broadcasting’s “uniquely pervasive presence in the lives of all

out of a twelve minute monologue entitled “Filthy Words” delivered by comedian George Carlin.<sup>29</sup> The broadcast was recorded before a live audience and aired at 2:00 PM on a New York radio station.<sup>30</sup> Carlin repeatedly used seven words that he believed could not be aired on television: shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.<sup>31</sup> The Court emphasized that *Pacifica’s* holding was deliberately narrow.<sup>32</sup> The FCC subsequently took heed of the Court’s warning and limited regulations to *Pacifica’s* specific words.<sup>33</sup>

The next indecent-broadcast enforcement proceeding brought by the FCC came nearly ten years after *Pacifica*.<sup>34</sup> In the *Infinity Order*, the Commission broadened its indecency standard.<sup>35</sup> Rather than focusing on *Pacifica’s* seven words, the Commission adopted a contextual approach to indecency analysis.<sup>36</sup>

In 2001, the FCC issued a Policy Guideline explaining its indecency standard.<sup>37</sup> A two-prong analysis was introduced. First, “the material must describe or depict sexual or excretory organs or activities.”<sup>38</sup> Second, “the broadcast must be *patently offensive* as

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Americans” and the fact that television is “uniquely accessible to children.” *Fox III*, 613 F.3d at 320 (quoting *Pacifica*, 438 U.S. at 748–49). These two reasons have been called the “twin pillars” of *Pacifica* by the Second Circuit. Hudson, *supra* note 15. In his concurring opinion in *Pacifica*, Justice Powell noted that the holding was not meant to apply to “cases involving the isolated use of a potentially offensive word,” like fleeting expletives. *Fox III*, 613 F.3d at 321 (quoting *Pacifica*, 438 U.S. at 760–61 (Powell, J., concurring)).

29. *Pacifica*, 438 U.S. at 729.

30. *Id.*

31. *Id.* at app. 751.

32. *Id.* at 750.

33. *Fox III*, 613 F.3d at 321.

34. See *Infinity Broad. Corp. of Penn.*, 3 F.C.C. Rcd. 930 (1987) (Order) [hereinafter *Infinity Order*] (involving indecent speech aired on three separate radio broadcasts).

35. *Id.* The *Infinity Order* ended the “[u]nstated, but widely assumed, and implemented . . . belief that only material that closely resembled the George Carlin monologue would satisfy the indecency test articulated by the FCC in 1975.” *Id.* The Commission found the implementation of *Pacifica’s* ruling to be “unduly narrow as a matter of law and inconsistent with [the Commission’s] enforcement responsibilities.” *Id.* The main problem with the earlier standard was that it “ignored an entire category of speech by focusing exclusively on specific words rather than the generic definition of indecency.” *Id.* The Commission declared that “[t]his made neither legal nor policy sense.” *Id.*

36. The contextual framework adopted would use the “generic definition of indecency” to analyze contested speech. *Id.*

37. See *2001 Policy Statement*, *supra* note 5.

38. *Id.* at 8002.

measured by contemporary community standards for the broadcast medium.”<sup>39</sup> For prong two, “the overall context of the broadcast . . . is critical.”<sup>40</sup>

The Commission’s policy changed in 2004 after performance artist Bono used the “F-word” during his acceptance speech at the Golden Globes.<sup>41</sup> The order condemning this speech as indecent allowed a nonliteral, fleeting use of an expletive to be actionable for the first time in Commission history.<sup>42</sup> In fact, the Commission put broadcasters on “clear notice that, in the future, they will be subject to potential enforcement action for any broadcast of the ‘F-Word’ or a variation thereof” in similar situations, effectively making any use of the word “fuck” presumptively indecent.<sup>43</sup> Finally, in addition to expanding its indecency policy, the Commission encouraged

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39. *Id.* For the second prong of the analysis, several factors are to be considered, including: “(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.*” *Id.* at 8003.

40. *Id.*

41. See Complaints against Various Broadcast Licenses Regarding the Airing of the “Golden Globe Awards” Program, 19 F.C.C. Rcd. 4975 (2004) (Memorandum Opinion and Order) [hereinafter *Golden Globes*]. After winning the award for “Best Original Song,” Bono said, “This is really, really, fucking brilliant.” *Id.* at 4976; *FCC Flip-Flops on Bono F-Word*, CBSNEWS.COM (Mar. 12, 2004), <http://www.cbsnews.com/stories/2004/02/25/entertainment/main602251.shtml>. After the show aired, the FCC received over 18,500 complaints in response to Bono’s fleeting use of the word “fucking,” notwithstanding its use as an adjective, rather than a verb. See *Derelection of Duty: How the Federal Communications Commission Has Failed the Public*, PARENTS TELEVISION COUNCIL, <http://www.parentstv.org/ptc/publications/reports/fccwhitepaper/main.asp> (last visited Nov. 2, 2011).

42. See *Golden Globes*, 19 F.C.C. Rcd. at 4975. Here, the Commission essentially carved out an exception to the second factor enunciated in the 2001 *Policy Statement* which looks at whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities. See 2001 *Policy Statement*, *supra* note 5. The Commission’s decision in *Golden Globes* addressed the question specifically left open in *Pacifica*, “whether an occasional expletive could be considered indecent.” *Golden Globes*, 19 F.C.C. Rcd. at 4982. One commentator described this new “Bono Rule” as “absolute rubbish.” Jess Bravin & Amy Schatz, *Don’t Read His Lips—You Might Be Offended: The Supreme Court Hears a Challenge to the FCC’s Crackdown on ‘Fleeting Expletives,’* WALL ST. J., Nov. 4, 2008, at A14, available at <http://online.wsj.com/article/SB122575539538895001.html> (quoting Jesse Sheidlower, linguist and editor at large for the Oxford Dictionary, who explained, “[y]ou can ask people if they think Bono is talking about sex, and I will guarantee they will say no”).

43. *Golden Globes*, 19 F.C.C. Rcd. at 4982; *Fox III*, 613 F.3d at 323 (explaining *Golden Globes*).



broadcasters to use available modern technology to avoid airing fleeting expletives.<sup>44</sup>

The Commission has applied and extended the standard set forth in *Golden Globes* to subsequent enforcement proceedings.<sup>45</sup> The 2006 *Omnibus Order* added “shit,” and variations thereof, to the FCC’s list of presumptively indecent words.<sup>46</sup> In this era of heightened regulation, the FCC also increased the maximum allowable fine for an indecent broadcast to \$325,000 for each violation or each day of a continuing violation.<sup>47</sup> This was a tenfold

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44. *Golden Globes*, 19 F.C.C. Rcd. at 4980. The Commission suggested that broadcasters implement a delay or bleeping system to avoid fines and enforcement, reasoning that:

technological advances have made it possible as a general matter to prevent the broadcast of a single offending word or action without blocking or disproportionately disrupting the message of the speaker or performer. NBC and other licensees could have easily avoided the indecency violation here delaying the broadcast for a period of time sufficient for them to effectively bleep the offending word. Indeed, we encourage networks and broadcasters to undertake such technological measures.

*Id.* at 4980.

45. See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C. Rcd. 2664 (2006) [hereinafter *Omnibus Order*]. The Commission applied the *Golden Globes* standard to four programs involving fleeting expletives and found them indecent. *Id.* First, reiterating the policy set forth in *Golden Globes*, the FCC found Cher’s statement at the 2002 Billboard Music Awards in regards to critics’ statements, “So fuck ‘em,” to be indecent. *Id.* at 2690–91. Second, at the 2003 Billboard Music Awards, instead of using the scripted euphemisms, Nicole Richie said, “Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.” *Omnibus Order*, 21 F.C.C. Rcd. at 2692–93; *Fox Television Stations, Inc. v. FCC (Fox I)*, 489 F.3d 444, 452 (2d Cir. 2007).

Like “fuck” (“the F-word”), “shit” (“the S-word”), used here by Richie, was considered equally vulgar, graphic, and explicitly depicting excretory activity. *Omnibus Order* at 2693. Similarly, the FCC found the use of “bullshit” in various episodes of *NYPD Blue*, as a derivative of the S-word, to be indecent, despite the fact that the broadcasts did not dwell on the word. *Id.* at 2697. Finally, during a live interview on *The Early Show*, a contestant on the television show, *Survivor*, called another contestant a “bullshitter.” *Id.* at 2698–99. Like in *NYPD Blue*, the FCC found that a derivative use of the S-word “invariably invokes a coarse excretory image, even when its meaning is not the literal one.” *Id.* at 2699. After going through the contextual analysis, the Commission found the use of the fleeting expletive indecent. *Id.* Despite findings of indecency, no sanctions were imposed because the four broadcasts aired before *Golden Globes*, when precedent would have allowed the broadcasters to believe that the Commission would not have taken enforcement action against isolated uses of expletives. *Id.* at 2692. In contrast, the same order found that Chris Rock, telling the audience to “sit their asses down,” making reference to “the buttocks, which are sexual and excretory organs” was “not sufficiently vulgar, explicit, or graphic to support a patent offensiveness finding.” *Id.* at 2714–15.

46. See *Omnibus Order*, 21 F.C.C. Rcd. 2664 (2006).

47. See 47 U.S.C.A. § 503 (West 2011).

increase from the previous maximum fine.<sup>48</sup> One consequence of such large fines is that broadcasters are forced to engage in prophylactic self-censorship in fear of being heavily fined for questionably “unprotected” indecent speech.<sup>49</sup> The resulting proliferation of airing live television programs on a delay has had the consequence of making “live” broadcasts a fiction.<sup>50</sup>

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48. Associated Press, *House OKs New FCC Indecency Fines: President Expected to Sign Law to Increase Penalties Tenfold*, TODAYSHOW.COM (June 7, 2006 3:20 PM), <http://today.msnbc.msn.com/id/13166836/ns/today-entertainment/> [hereinafter Associated Press 2006].

49. See Opinion, *The Court and 'Fleeting Expletives'*, N.Y. TIMES, Nov. 4, 2008, at A34 (“This regime is a serious threat to free expression and constitutionally protected speech. Just as troubling, broadcasters are engaging in self-censorship—refraining from airing speech that should be protected out of fear of facing FCC fines based on vague rules.”); John Eggerton, *Leahy Lays into FCC Over Indecency Enforcement: Senator Slams Commission Over 'Rigid and Unyielding' Indecency Enforcement*, BROADCASTING & CABLE, THE BUSINESS OF TELEVISION (Oct. 21, 2008, 5:57 PM), [http://www.broadcastingcable.com/article/115982-Leahy\\_Lays\\_Into\\_FCC\\_Over\\_Indecency\\_Enforcement.php](http://www.broadcastingcable.com/article/115982-Leahy_Lays_Into_FCC_Over_Indecency_Enforcement.php) (quoting Democratic Vermont Senator Patrick Leahy as saying, “The media should be . . . bringing vibrant and interesting voices and views into our homes,” not worrying that “an inadvertent slip is going to land them in trouble with regulators”). But see Associated Press 2006, *supra* note 48 (quoting Republican Representative Fred Upton of Michigan as saying the increase was appropriate to get “the filth and triple-x smut of the public airwaves”).

Self-censorship is further induced by the related fear of having to pay for any consequential legal fees needed to respond to FCC investigations. See Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Respondents at 28, *FCC v. Fox, Inc.*, 129 S. Ct. 1800 (2009), available at [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-582\\_RespondentAmCu12MediaArtsAdvocacyOrgs.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-582_RespondentAmCu12MediaArtsAdvocacyOrgs.pdf) [hereinafter ACLU Brief]. When facing the choice of possibly being put out of business as a result of FCC fines and legal fees or proactively censoring questionable indecent programming, stations will choose the latter. See *id.*

One example of such self-censorship was PBS’s airing of Ken Burns’s documentary “The War” in two different versions. See Casey Rae-Hunter, *Holy F\*ck! Court Junks FCC Indecency Policy*, FUTURE OF MUSIC COALITION (July 13, 2010, 6:43 PM), <http://futureofmusic.org/blog/2010/07/13/holy-fck-court-junks-fcc-indecency-policy>. Another example of self-censorship occurred in 2004, when stations fearful of FCC violations aired a “clean” version of a song from the Broadway Show, *A Chorus Line*, which uses the words “tits” and “ass” in a comedic song about the use of plastic surgery among Broadway dancers. See ACLU Brief, *supra*, at 28.

50. For example, after Bono’s acceptance speech, NBC aired the Golden Globes on a 10-second delay. See *FCC Flip-Flops on Bono F-Word*, *supra* note 41. ABC did the same with its broadcast of the Academy Awards. *Id.* Moreover, while the *Omnibus Order* was pending, Fox “pledged, whenever possible, to air future live entertainment programming with a five-minute delay.” *Omnibus Order*, 21 F.C.C. Rcd. 2664, 2691 n.156 (2006). Supporters of the policy argue that implementing the FCC’s suggested delays for live broadcasts “will not be the death of live television.” Brief for Parents Television Council as Amici Curiae Supporting Petitioner at 13, *FCC v. Fox, Inc.*, 129 S. Ct. 1800 (2009) [hereinafter Parents Television Council Brief]. Instead, “[i]f broadcasters took Section 1464 seriously” then they would at least already implement delays for award shows since those have already been shown to be problematic. *Id.*

The current FCC indecency policy first reached the Second Circuit in 2007 (*Fox I*).<sup>51</sup> The Second Circuit held that the FCC's new policy on fleeting expletives "fails to provide a reasoned analysis justifying its departure from the agency's established practice."<sup>52</sup> As such, the court announced that the FCC's indecency regime as announced in *Golden Globes* and applied in the *Omnibus Order* was invalid under the Administrative Procedure Act (APA).<sup>53</sup>

The Supreme Court granted certiorari and heard the appeal (*Fox II*).<sup>54</sup> The Court reversed the Second Circuit's finding that the FCC's orders were arbitrary and capricious within the meaning of the APA.<sup>55</sup> Since the case was not appealed on the grounds of constitutionality, the Court remanded the case to the Second Circuit for consideration of that issue.<sup>56</sup> On remand, the Second Circuit

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51. *Fox Television Stations, Inc. v. FCC (Fox I)*, 489 F.3d 444 (2d Cir. 2007). The case arose out of petitions filed by Fox and CBS for review of the *Omnibus Order*. *Id.* at 453. Before the parties briefed *Fox I*, the FCC moved for voluntary remand of the *Omnibus Order*, which was granted. *Id.* On remand, the FCC issued a new order. *Id.* The order affirmed its finding of indecency in the 2002 and 2003 Billboard Music Awards. *Id.* The FCC reversed its finding against the *Early Show*, distinguishing it due to its use within the context of a news interview, where First Amendment concerns require "utmost constraint" concerning such broadcasts. *Id.* at 454. The order also dismissed the complaint against *NYPD Blue* on procedural grounds. *Id.* at 453. The *NYPD Blue* dismissal caused ABC to end its participation in the appeal. *Id.* at n.5. The appeal to the Second Circuit concerned the affirmed broadcasts. *Id.* at 454.

52. *Id.* at 462.

53. "The Administrative Procedure Act . . . sets forth the full extent of judicial authority to review executive agency action for procedural correctness." *FCC v. Fox Television Stations, Inc. (Fox II)*, 129 S. Ct. 1800, 1810 (2009); see also *The Administrative Procedure Act*, 5 U.S.C. § 551 *et seq.* (2011). The APA "permits (insofar as relevant here) the setting aside of agency action that is 'arbitrary' or 'capricious.'" *Fox II*, 129 S. Ct. at 1810 (citing 5 U.S.C. § 706(2)(A)). *Fox I*, 489 F.3d at 462. In dicta, the court noted its "skept[ic]ism" that the Commission [could] provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster." *Id.* Because the court could decide on APA grounds, it declined to rule on constitutional grounds. *Id.* at 467.

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

55. *Id.* at 1812. "Acting FCC Chairman Michael Copps applauded the . . . decision in a statement, saying [it] 'should reassure parents that their children can still be protected from indecent material on the nation's airwaves.'" Jess Bravin & Amy Schatz, *Court Backs Fines for On-Air Expletives*, WALL ST. J., Apr. 29, 2009, at A2.

56. *Fox II*, 129 S. Ct. at 1819. The Supreme Court still heard constitutional arguments, including those made by "Solicitor General Gregory Garre, arguing for the FCC, warn[ing] that the agency had an obligation to guard against the possibility of 'Big Bird dropping the F-bomb on *Sesame Street*.'" See Dahlia Lithwick, *Shit Doesn't Happen: The Supreme Court's 100 Percent Dirt-Free Exploration of Potty Words*, Supreme Court Dispatches, SLATE.COM (Nov. 4, 2008, 6:51 PM), <http://www.slate.com/id/2203758> (discussing oral argument before the Supreme Court). The Court expressed a similar concern during *Fox IV*'s oral argument. See

struck down the FCC's indecency policy as impermissibly vague in violation of the First Amendment's guarantee of free speech.<sup>57</sup> The FCC petitioned the Second Circuit for rehearing or rehearing *en banc*, which was ultimately denied.<sup>58</sup> On June 27, 2011, the Supreme Court granted certiorari to decide whether the FCC's current indecency policy violates the First Amendment.<sup>59</sup>

The FCC interprets the Second Circuit's decision as "effectively . . . preclud[ing] the Commission from enforcing federal broadcast indecency restrictions unless it can develop a new policy that deemphasizes context (in order to survive the panel's vagueness analysis), and yet simultaneously respects the Supreme Court's endorsement of a contextual analysis."<sup>60</sup> In addition to legal ramifications, the FCC is concerned with the decision's impact on American families.<sup>61</sup>

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Transcript of Oral Argument, *supra* note 2, at 29 ("Well, if we rule in your favor on the First Amendment grounds, what will people who watch Fox be seeing between 6:00 a.m. and 10:00 p.m.? Are they going to be seeing a lot of people parading around in the nude and a stream of expletives?") (question posed by Justice Alito). Fox responded by arguing that "as long as you have advertising revenue that drives a significant amount of the decisionmaking here, you're going to have the kind of self-restraint that frankly ought to cause the Court to say we . . . no longer need to treat the broadcast medium as the weak sister . . . of the media." *Id.* at 37. Following this logic, the FCC and the Court should rest assured that Sesame Street will never end with Big Bird saying, "Today's show is brought to you by the letter F, for fuck." However, because of *Reno*, the government cannot protect children from seeing their favorite childhood characters curse in the form of Internet spoofs and memes. *See Reno v. ACLU*, 521 U.S. 844 (1997); *infra* notes 65–67 and accompanying text. For an example, see YOUTSFU, <http://youstfu.com/wp-content/uploads/2012/01/3.jpg> (last visited Feb. 1, 2012) (parody Internet meme of Sesame Street's Cookie Monster and Bert).

57. *Fox III*, 613 F.3d 317 (2d Cir. 2010).

58. *See* Petition for Rehearing, *supra* note 3.

59. *FCC v. Fox Television Stations, Inc.*, 613 F.3d 317, *cert. granted*, 131 S. Ct. 3065 (June 27, 2011).

60. Petition for Rehearing, *supra* note 3, at 10; *see also* Press Release, Michael J. Copps, Commissioner, FCC, Statement of Commissioner Michael J. Copps on the Second Circuit Decision in *Fox V. FCC* (July 13, 2010), [http://www.fcc.gov/Daily\\_Releases/Daily\\_Business/2010/db0713/DOC-299761A1.pdf](http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0713/DOC-299761A1.pdf) [hereinafter Commissioner Copps's Statement] (criticizing Second Circuit for creating "confusion"). Essentially, as the Commission "reads the panel decision, the Commission can't win because any changes to make its contextual analysis more predictable would raise further First Amendment concerns, subjecting the FCC to a Catch-22." Dan Kirkpatrick, *Fox v. FCC: FCC Concentrates And Asks Again*, COMMLAWBLOG (Aug. 29, 2010), <http://www.commlawblog.com/2010/08/articles/broadcast/fox-v-fcc-fcc-concentrates-and-asks-again/>.

61. *See* Edward Wyatt, *FCC Indecency Policy Rejected On Appeal*, N.Y. TIMES, July 14, 2010, at B1 (quoting FCC Chairman Julius Genachowski as saying that "the commission was

The Commission is not alone in its concern for family values. Conservative groups believe that the practical effect of the decision will leave children unprotected by opening the door for broadcasters to air indecent content.<sup>62</sup> On the other hand, the media industry sees the decision as protecting First Amendment rights.<sup>63</sup>

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‘reviewing the court’s decision in light of our commitment to protect children, empower parents, and uphold the First Amendment’”). In a separate statement, FCC Commissioner Copps expressed his view that the decision was anti-family. *See* Commissioner Copps’s Statement, *supra* note 60. In the press release, Copps stated that he was “shocked by such an anti-family decision” and criticized the Second Circuit for allowing a decision which will have a “chilling effect . . . on the ability of American parents to safeguard the interests of their children.” *Id.* Copps would like to see the decision reversed. *Id.*

62. *See* Lawrence D. Jones, *Gov’t Appeals Ruling on FCC Indecency Policy*, THE CHRISTIAN POST (Aug. 30, 2010, 11:48 PM), <http://www.christianpost.com/news/govt-appeals-ruling-on-fcc-indecency-rule-46549/>. Additionally, Tim Winter, President of the Parents Television Council, said that “the Second Circuit ruling w[ill] kick down the door for indecent content to be aired at any time of day over the public airwaves—even in front of children.” Gautham Nagesh, *FCC Appeals Ruling on Indecency Restriction, Hillicon Valley*, THE HILL (Aug. 26, 2010, 12:48 PM), <http://thehill.com/blogs/hillicon-valley/technology/115947-fcc-appeals-court-ruling-on-indecency-policy?page=1>. A study by the Kaiser Foundation found that 75 percent of children between the ages of six months and six years watch television on a daily basis. VICTORIA RIDEOUT, ELIZABETH HAMEL, & KAISER FAMILY FOUNDATION, THE MEDIA FAMILY: ELECTRONIC MEDIA IN THE LIVES OF INFANTS, TODDLERS, PRESCHOOLERS AND THEIR PARENTS 7 (2006), available at <http://www.kff.org/entmedia/upload/7500.pdf>. Of those children who watch television regularly, each watch approximately one hour and twenty minutes each day. *Id.* These statistics are used to support the argument that broadcast television is still “uniquely pervasive” in the lives of Americans and “uniquely accessible to children,” and that it has not been replaced in favor of cable and other television mediums. *See* Parents Television Council Brief, *supra* note 50, at 10–11. This view is supported by statistics showing that in 2006, each of the top ten broadcast programs had more than fifteen million viewers while only one cable program had just five million viewers. *Id.* at 10. Additionally, during the 2004–2005 television season, 485 of the 495 most-watched television programs were on broadcast television. *Id.* at 11. Because of the demonstrated pervasiveness of television in children’s lives, conservative groups exclaimed that the mere thought of eliminating the FCC indecency policy “shows a callous disregard for the powerful influence, for good or for evil, of the medium of television on the hearts and minds of America’s children.” Brief for National Religious Broadcasters as Amici Curiae Supporting Petitioners at 25, *FCC v. Fox, Inc.*, 129 S. Ct. 1800 (2009) [hereinafter National Religious Broadcasters Brief]. However, it may not be long before these statistics become irrelevant and the indecency regulations become inoperable due to Americans increasingly receiving television in their homes via mediums other than the public airwaves. *See* Transcript of Oral Argument *supra* note 2, at 21. Justice Alito noted that “broadcast TV is . . . living on borrowed time. It’s not going to be long before it goes the way of vinyl records and eight-track tapes” and asks Carter G. Phillips, counsel for Fox, “so, why not just let this [indecency regulation] die a natural death?” *Id.* at 33–34.

63. *See, e.g.*, Associated Press, *FCC’s Fleeting-Expletive Policy Struck Down*, FIRST AMENDMENT CENTER (July 13, 2010), <http://www.firstamendmentcenter.org/fccs-fleeting-expletives-policy-struck-down> (noting the reaction of the media industry by quoting Andrew Jay Schwartzman, Policy Director of Media Access Project, which joined as a party in *Fox III*

### B. A Trend of First Amendment Victories

Notwithstanding the FCC's interpretation, *Fox III* is consistent with the Supreme Court's refusal to apply an indecency standard to other mediums.<sup>64</sup> Importantly, in *Reno v. American Civil Liberties Union*,<sup>65</sup> the Court struck down the Communications Decency Act (CDA),<sup>66</sup> which "prohibits the knowing transmissions of obscene or indecent messages to any recipient under 18 years of age," because it was too burdensome on adult speech.<sup>67</sup>

In addition, the Supreme Court has recently indicated its unwillingness to carve out more exceptions to constitutionally protected speech.<sup>68</sup> First, in *United States v. Stevens*, the Court held

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on behalf of musicians, producers, writers, and directors, as saying, "The score for today's game is First Amendment one, censorship zero"; Press Release, Nat'l Ass'n of Broadcasters, NAB Statement on Today's Indecency Ruling (July 13, 2010), available at <http://www.nab.org/documents/newsRoom/pressRelease.asp?id=2326> (quoting Dennis Wharton, Executive Vice President of Communications at the National Association of Broadcasters as saying, "NAB supports today's appellate court decision. As broadcasters, we will continue to offer programming that is reflective of the diverse communities we serve. We believe that responsible decision making by network and local station executives, coupled with program blocking technologies like the V-chip, is far preferable to government regulation of program content."); Nellie Andreeva, *FCC's Indecency Policy Struck Down*, DEADLINE.COM (July 13, 2010, 11:50 AM), <http://www.deadline.com/2010/07/fccs-indecency-policy-struck-down/> ("I know what Bono and the broadcast networks will call today's ruling on FCC's policy on fleeting expletives by a federal appeals court—'f\*\*king brilliant.'").

64. See ACLU Brief, *supra* note 49, at 36 ("This . . . government censorship system . . . is constitutionally off-limits for every other medium."). These other mediums include the Internet, see *Reno v. ACLU*, 521 U.S. 844 (2010), and public and leased access cable, see *Denver Area Ed. Telecomm. Consortium v. FCC*, 518 U.S. 727 (1996).

65. 521 U.S. 844 (1997).

66. 47 U.S.C. § 223 (2010). CDA is the popular name of Title V of the Communications Act of 1996.

67. *Reno*, 521 U.S. at 859. The Court held that "the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech." *Id.* at 874. The government argued that the CDA is constitutional because it serves as a means of "cyberzoning" on the Internet. *Id.* at 867–68. This argument was rejected by the Court because "the CDA applies broadly to the entire universe of cyberspace." *Id.* at 868. Consequently,

[i]n order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

*Id.* at 874.

68. See, e.g., *United States v. Stevens*, 130 S. Ct. 1577 (2010); *Brown v. Entm't Ass'n*, 131 S. Ct. 2729 (2011).

that depictions of animal cruelty are not categorically unprotected by the First Amendment.<sup>69</sup> Then, relying on *Stevens*, the Court invalidated a California law which restricted the sale of violent videogames to minors.<sup>70</sup> Significantly, the Court stressed that “[m]inors are entitled to a significant measure of First Amendment protection.”<sup>71</sup> The unwillingness to restrict speech in these recent decisions may foretell a similar unwillingness to support the FCC’s current indecency-enforcement regime after *Fox IV* is heard.<sup>72</sup>

### C. Technology

Modern technological advances play a highly valuable role in parents’ ability to regulate the television content viewed by children. One means of parental control is the V-Chip.<sup>73</sup> As of January 1, 2000, the FCC requires all television sets with a picture screen of thirty-three centimeters or larger to be equipped with V-Chip technology.<sup>74</sup>

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69. *Stevens*, 130 S. Ct. at 1580 (2010). The Court ultimately held that a federal statute criminalizing the creation, sale, or possession of certain visual or auditory depictions of animal cruelty, but not the underlying conduct, was overbroad and invalid under the First Amendment. *Id.* at 1592; see also *Brown*, 131 S. Ct. at 2734 (“Last Term, in *Stevens*, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated.”).

70. *Brown*, 131 S. Ct. at 2734.

71. *Id.* at 2735 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212–13 (1975)).

72. See Kevin Goldberg, *The Swami: Looking at Violent Video Games Now, Seeing Indecency in the Future*, COMMLAWBLOG (June 29, 2011), <http://www.commlawblog.com/articles/first-amendment> (predicting that the Court’s refusal in *Brown v. Entertainment Merchants Ass’n* to uphold a California law that restricted sales of violent video games to minors because it impeded First Amendment rights is indicative of the Court ruling in favor of the FCC).

73. See *V-Chip: Putting Restrictions on What Your Children Watch*, FEDERAL COMMUNICATIONS COMMISSION, <http://www.fcc.gov/guides/v-chip-putting-restrictions-what-your-children-watch> (last visited Dec. 26, 2011). (“The V-chip allows parents or other caregivers to block programming on their televisions that they don’t want children to watch.”).

74. See *id.* The FCC’s endorsement of the V-chip is consistent with the Supreme Court’s ruling that “governmental action to promote voluntary efforts by parents to protect their children from sexual content is a less restrictive alternative to blocking mandated by statute.” Brief for Center for Democracy & Technology and Adam Thierer as Amici Curiae Supporting Respondents at 9, *FCC v. Fox, Inc.*, 129 S. Ct. 1800 (2009), available at [http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\\_preview\\_briefs\\_pdfs\\_07\\_08\\_07\\_582\\_ResponseAmCuCtrforDem\\_TechThiererrevised.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_07_582_ResponseAmCuCtrforDem_TechThiererrevised.authcheckdam.pdf) [hereinafter Center for Democracy & Technology Brief]. In *U.S. v. Playboy Entertainment Group*, the Supreme Court noted that parents’ “targeted blocking enables the government to support parental authority

Moreover, the nationwide transition to digital television (DTV) has had the effect of allowing households lacking a television with a built-in V-Chip to gain one through the DTV converter box.<sup>75</sup>

V-Chip technology blocks programming based on ratings selected by the parent.<sup>76</sup> The V-Chip is used in conjunction with the TV rating system.<sup>77</sup> The ratings are conveniently displayed and easily understood by parents.<sup>78</sup> Despite the available technology, most parents do not avail themselves of such protection.<sup>79</sup> In order to help parents take advantage of the television control technology, the media

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without affecting the First Amendment interests of speakers and willing listeners . . . .” *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 815 (2000).

75. See IMPLEMENTATION OF THE CHILD SAFE VIEWING ACT; EXAMINATION OF PARENTAL CONTROL TECHNOLOGIES FOR VIDEO OR AUDIO PROGRAMMING, 24 F.C.C. Rcd. 11413, 11418 (Aug. 27, 2009) (report) [hereinafter PARENTAL CONTROL TECHNOLOGIES Report]. By June 12, 2009, federal law required that all broadcasting in analog format cease in lieu of digital format. See *Frequently Asked Questions*, DTV.GOV, <http://www.dtv.gov/consumercorner.html> (last visited Nov. 3, 2011). After the transition, households with analog televisions would only be able to view over-the-air digital programming by purchasing a digital-to-analog set-top converter box. *Id.*

76. See *V-Chip: Putting Restrictions on What Your Children Watch*, *supra* note 73.

77. See *id.* The TV Parental Guidelines were established by the National Association of Broadcasters (NAB), the National Cable Television Association (NCTA), and the Motion Picture Association of America. See *V-Chip: Putting Restrictions on What Your Children Watch*, *supra* note 73. For a complete list and description of industry’s rating system, see *Obscenity, Indecency & Profanity—FAQ*, *supra* note 24.

78. The ratings are easily understood by parents since they are modeled after movie ratings which have been part of the public knowledge and understanding for decades. *About the TV Ratings and V-Chip*, THE TV PARENTAL GUIDELINES, <http://www.tvguidelines.org/> (last visited Nov. 9, 2011). The ratings can easily be viewed by parents as they appear in the upper left corner of the screen when the program first begins and sometimes again after commercial breaks. *Id.* But see Parents Television Council Brief, *supra* note 50, at 13 (arguing that regardless of parents’ ability to understand the actual ratings system, the V-chip “is only as good as the rating system it is based on, and that system is bad”).

79. See News Release, Federal Communications Commission, FCC Commissioner Gloria Tristani Urges TV Networks to Recommit to V-Chip Education Efforts (Apr. 4, 2000), [http://www.fcc.gov/Bureaus/Miscellaneous/News\\_Releases/2000/nrmc0016.html](http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/2000/nrmc0016.html) (noting that recent survey data indicated that 39 percent of parents had “never even heard of” a V-Chip). FCC Commissioner Tristani urged the television industry to educate the public about both V-Chip technology and the TV ratings system. *Id.* This statistic has varied over the years. A survey in November 2005, found that 49 percent of parents with children ages 2–17 were aware of the V-Chip. See PARENTAL CONTROL TECHNOLOGIES Report, *supra* note 75, at 11421 (citing a study conducted by Russell Research, commissioned by TV Watch). Another survey in June 2007, of parents with children aged 18 and younger found that 69 percent of those parents were aware of the V-Chip. *Id.* (citing a survey conducted by Luntz Maslansky Research/Hart Research, Commissioned by TV Watch).



industry implemented the “Take Control. It’s Easy” initiative in 2005.<sup>80</sup>

As pointed out by the FCC, the “V-Chip is the only advanced blocking technology available to the 11 percent of TV households that exclusively rely on over-the-air television that does not require purchasing an additional piece of equipment.”<sup>81</sup> However, there are many other technologies available to the remaining 89 percent of households. Other viewer empowerment technologies include VCRs, DVD players, digital video recorders (DVRs), and Video on Demand (VOD) services.<sup>82</sup> The FCC announced its formal review of V-Chip technology and other available parental control technology in March 2009.<sup>83</sup>

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80. Media Release, National Cable and Telecommunications Association, New “Take Control. It’s Easy” Public Service Announcements Alert Consumers to Parental Controls (May 17, 2005), <http://www.ncta.com/ReleaseType/MediaRelease/370.aspx> (explaining the \$250 million educational campaign in which more than 100 cable networks serving more than 90 percent of cable households will participate). Kyle McSparrow, President and CEO of the National Cable and Television Association, explained that “[t]he goal . . . is to alert parents that easy-to-use tools already exist for them to manage their family’s TV viewing[.]” *Id.*

81. PARENTAL CONTROL TECHNOLOGIES Report, *supra* note 75, at 11418.

82. See Center for Democracy & Technology Brief, *supra* note 74, at 11. More and more households are taking advantage of these technologies as their costs decrease, making the argument that the FCC’s indecency policy is needed to protect against “invasiveness” of broadcast television even less credible. *Id.* at 11–12. A new filtering technology seeking commercial development is CC+. See First Principals, Inc., *Selective Filtering of Video Content According to Rating*, CAPTION TV INC, <http://www.firstprincipals.com/CTV-One-Pager-01.pdf>. This technology would give parents increased flexibility in determining the control settings. See *CC+ Parental Control Technology*, CAPTION TV, <http://www.captiontv.com/> (last visited Dec. 26, 2011). Instead of tying the control settings to the Parental Guidelines, CC+ is an interactive technology that allows parents to choose what they find to be “offensive and objectionable.” *Id.* Parents can create customized lists of words to be muted or crossed out in captions. See *CC+ Technology*, CAPTION TV, <http://www.captiontv.com/Technology.html> (last visited Nov. 3, 2011). Another advantage of CC+ is that it can be applied to live television broadcasts. *Id.* This feature is extremely important in the context of the FCC’s concern for fleeting expletives balanced against the media’s concern for prophylactic self-censorship.

83. See Ira Teinowitz, *FCC to Re-Examine V-Chip, Other TV Tech*, TVWEEK (Mar. 3, 2009, 2:30 PM), [http://www.tvweek.com/news/2009/03/fcc\\_to\\_reexamine\\_vchip\\_other\\_t.php](http://www.tvweek.com/news/2009/03/fcc_to_reexamine_vchip_other_t.php). The FCC is conducting this formal review in response to the mandate given by the Child Safe Viewing Act passed by Congress in 2007. See Child Safe Viewing Act of 2007, Pub. L. No. 110-452, 122 Stat. 5025. The Child Safe Viewing Act requires the FCC to examine:

- (1) the existence and availability of advanced blocking technologies that are compatible with various communications devices or platforms; (2) methods of encouraging the development, deployment, and use of such technology by parents that do not affect the packaging or pricing of a content provider’s offering; and (3) the

Technology is important in assisting parents in regulating what their children may view on television. Even FCC Commissioner Michael Copps has noted that “[p]arents are the first line of defense against these barrages of violent and indecent images. But parents must be armed with information about programming content and the tools to prevent their children’s exposure to the content the parents find objectionable.”<sup>84</sup> Once informed, parents can easily execute this defense playbook.<sup>85</sup>

### III. ANALYSIS

The first indecency case, *Pacifica*, was decided in a dramatically different era.<sup>86</sup> Technology allowing parents to screen and control

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existence, availability, and use of parental empowerment tools and initiatives already in the market.

*Id.*

84. Teinowitz, *supra* note 83. It is argued that it is not the viewers’ responsibility to affirmatively avoid indecent programming through the use of technology filters. *See* Parents Television Council Brief, *supra* note 50, at 11–12. Rather, it is the government’s responsibility because Section 1464 is about what is broadcasted, not what is received. *Id.* at 11. Even if a technological filter would solve the problem, it still merely “shifts the problem of broadcast indecency from the broadcasters to the public, and effectively reverses the power flow of Section 1464 from a restriction on broadcasters to a burden on viewers and listeners.” *Id.* *But see* *Reno v. ACLU*, 521 U.S. 844, 877 (1997) (suggesting the opposite conclusion concerning the capability and responsibility of parents in filtering indecent content on the Internet). In *Reno*, the Supreme Court adopted the district court’s findings that “currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which *parents* may believe is inappropriate for their children will soon be widely available.” *Reno*, 521 U.S. at 877; *see also* Center for Democracy & Technology Brief, *supra* note 74, at 9 (arguing that “the legal significance of user empowerment technologies as less restrictive alternatives to government regulation is not diminished because they must be applied by parents (as with the V-Chip), or some parents choose not to use them, or they are not perfect at all times”). The Center for Democracy Brief relied on *Playboy Entertainment*, in which the Court observed that “[i]t is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.” *Id.* at 10 (quoting *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 824 (2000)).

85. *See supra* notes 76–80, 82 and accompanying text.

86. *See* *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). This decision came down over thirty years prior to *Fox III* in 2010.

what their children watch on television simply was not available.<sup>87</sup> Ironically, in the era without user empowerment technology, the restrictions were less slanted toward regulation, and case law explicitly endorsed limited regulation of indecent material.<sup>88</sup> But in the twenty-first century, where broadcast viewers have numerous user empowerment technologies from which to choose, conservative groups espousing family values endorse and applaud the current restrictive FCC policies.<sup>89</sup> *Fox III* raises a compelling question: whether it is more desirable to chill parents' ability to safeguard their children or to chill free speech.<sup>90</sup>

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87. Since *Pacifica*,

[O]ur televisions and radios have grown up, and they have gotten married to all sorts of other electronic devices and technologies. These marriages are producing multimedia offspring that bear little or no resemblance to the bulky boxes of yesterday. This 'convergence' of various technologies . . . renders obsolete many of the rules that have governed broadcasting for decades.

Drew Clark, *TV Has Grown Up. Shouldn't FCC Rules?*, THE WASH. POST, May 16, 2004, at B02.

88. See *Pacifica*, 438 U.S. at 750 ("It is appropriate . . . to emphasize the narrowness of our holding."); WGBH Educ. Found., 69 F.C.C.2d 1250, 1254 (explaining the tension between the no censorship provision of the Communications Act and enforcing Section 1464). Broadcasting restrictions still remained minimal even with the *Infinity Order*'s introduction of a broader, contextual analysis of indecent material. See *Infinity Order*, *supra* note 34 and accompanying text.

89. See Nagesh, *supra* note 62; Jones, *supra* note 62 (quoting the statement released by Concerned Women for America after *Fox III* was released, which stated that the group "was 'pleased to see the FCC is standing up for families and the agency's power to regulate indecency granted by 'We the People'"); see also Parents Television Council Brief, *supra* note 50, at 11–13 (discounting the usefulness of user empowerment technology as a remedy). However, conservative organizations have been criticized for the significant influence they have had on the FCC's indecency decisions. See Jennifer E. Jones, *The Discriminatory Effects of Protecting America's Children*, 3 THE MODERN AMERICAN 3, 5 (2007) ("Using the FCC as a puppet, political watchdog groups have enabled FCC Commissioners to become . . . 'culture czars.'").

90. See Commissioner Copps Statement, *supra* note 60; *Fox III*, 613 F.3d 317, 320 (2d Cir. 2010) (noting that this concern for free speech impingements results from indecent speech restrictions and dates back to the *Pacifica* opinion). There is simply no reason to think that *Fox III* will have a chilling effect on parents' ability to safeguard their children against what they do not want their children to see on television. Parents, by taking some initiative, can learn to effectively use the V-Chip and other more advanced technologies in order to monitor the programming that can be viewed by their children. See *V-Chip: Putting Restrictions on What Your Children Watch*, *supra* note 74; Center for Democracy & Technology Brief, *supra* note 75, at 11. These technologies are not hard to master and are based on ratings systems that have been in use for a substantial period of time. See *supra* notes 77–78. Further, there are even technologies available that allow parents to create their own preferences for content blocking

The long-held rationale justifying regulation of indecent speech is that broadcast television is a uniquely pervasive force in American life and is uniquely available to children.<sup>91</sup> Modern technology weakens this argument, yet the government and conservative groups cling to arguments that such technology is misunderstood, underused, and ineffective.<sup>92</sup> The argument continues that even if this technology is effective, that does not relieve the government of its “burden” to regulate such conduct under Section 1464.<sup>93</sup> However, *Golden Globes* suggested that the burden *could* be shifted to broadcasting companies in light of modern technology.<sup>94</sup> If the burden can be shifted to private corporations, then there is no reason why it cannot be shifted to private homes where user empowerment technology is available to adults in the household. It would then be unnecessary for broadcasters to run live shows on a delay.<sup>95</sup> Thus, if the burden is placed on families, rather than on the broadcasters, First Amendment and censorship issues could be avoided.<sup>96</sup>

Further, *Fox III* is consistent with case law regulating indecent material in other mediums.<sup>97</sup> Consequently, the Second Circuit’s decision should not have triggered the shocking reaction displayed by the FCC and conservative organizations who objected to the decision.<sup>98</sup> The issue in *Fox III* is analogous to *Reno*.<sup>99</sup> *Reno*

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which would allow parents to specifically tailor their media filter. See *CC+ Parental Control Technology*, *supra* note 82.

91. See *supra* note 28.

92. See Parents Television Council Brief, *supra* note 56, at 11–13; Transcript of Oral Argument *supra* note 2, at 19–21 (arguing that despite the availability of the V-chip, the public has generally not taken advantage of it, and even if they did, it would not be an effective blocking tool) (argument of Solicitor General Donald B. Verrilli).

93. See Parents Television Council Brief, *supra* note 50, at 11–14. Beyond a “burden” to regulate indecent material, Justices Scalia and Kennedy suggest that there is a “symbolic value” in these regulations, such that if “these are public airwaves, the government is entitled to insist upon a certain modicum of decency.” See Transcript of Oral Argument *supra* note 2, at 22.

94. See *Golden Globes*, 19 F.C.C. Rcd. 4975, 4980 (2004); *Omnibus Order*, 21 F.C.C. Rcd. 2664, 2664, 2691, 2694 (2006).

95. For example, user-empowerment technology could be employed by parents to prescreen live shows by watching it first while recording it, then allowing their children to view the recorded show and fast-forwarding through any parts parents deem inappropriate.

96. The FCC’s indecency policy could be reconciled with the First Amendment issues raised in *Fox I* and *Fox II*, and specifically addressed in *Fox III*, if the test in the *2001 Policy Statement* was simply no longer used.

97. See ACLU Brief, *supra* note 49, at 36.

98. See Commissioner Cops’s Statement, *supra* note 60; Wyatt, *supra* note 61; Jones,

overtaken a statute on First Amendment grounds because it effectively restricted content on the “entire universe of cyberspace.”<sup>100</sup> Such burden on adult speech is unacceptable “if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.”<sup>101</sup>

In the context of broadcasting, as in *Reno*, the FCC’s indecency policy effectively restricts content for the entire universe of noncable broadcasters subject to FCC regulation. This is achieved in two ways: first, by the safe-harbor period;<sup>102</sup> second, through network self-censorship.<sup>103</sup> Concerning the former, the safe-harbor period between 10 PM and 6 AM is really a two-hour window, rather than the eight-hour window it purports to be on its face.<sup>104</sup> After midnight, viewers drop dramatically.<sup>105</sup> Thus, in practice, the indecency policy essentially eliminates all times to air such material where people will actually watch it.<sup>106</sup> This creates a tremendous burden on adult speech since adults are only free to view such content without restrictions for such a short window of time. The latter restriction is a reprehensible consequence of today’s era of heightened regulation. In light of modern technology, the FCC’s legitimate purpose of regulating speech for the protection of children could certainly be served by less restrictive means.

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*supra* note 62; Nagesh, *supra* note 62; *see also* National Religious Broadcasters Brief, *supra* note 62, at 25 (expressing similar reactions to the original decision, *Fox I*, when it was appealed to the Supreme Court).

99. *Reno v. ACLU*, 521 U.S. 844 (1997).

100. *Id.* at 868.

101. *Id.* at 874.

102. *See* ACLU Brief, *supra* note 49, at 29–32.

103. *See supra* note 49; *see also Omnibus Order*, 21 F.C.C. Rcd. 2664, 2691 n.156 (2006).

104. The safe-harbor period is controversial. In 1988, the FCC instituted a 24-hour, seven-day a week ban for indecent broadcasting, arising out of a directive from Congress as part of an appropriations bill. *See* Levi, *supra* note 4, at 7. In 1991, the D.C. Circuit ruled that the 24-hour ban was unconstitutional. *Id.* In 1993, in compliance with the Public Telecommunications Act of 1992, a safe-harbor period was created from midnight through 6 AM. *Id.* The D.C. Circuit found this time period to be an unconstitutional restriction. *Id.* Finally, in 1995, the FCC instituted today’s safe harbor period, from 10 PM through 6 AM. *Id.*

105. *See* ACLU Brief, *supra* note 49, at 29.

106. *See id.* at 29–31.

#### IV. PROPOSAL

The battle over the remote control is a common theme in American life. That fight, however, has always been a private household affair—between siblings, spouses, parent and child, and so on. Since the 1970s, the FCC has been slowly creeping its way into the battle.<sup>107</sup> The height of FCC interference came with its regulation of fleeting expletives and fines for violations.<sup>108</sup> In *Fox III*, the Second Circuit issued a harsh blow to the FCC's era of heightened regulation.<sup>109</sup> Courts should use this momentum to end the battle for the remote control and put an end to governmental regulation of indecent content once and for all.

##### *A. Restructuring the Current FCC Indecency Policy*

At a minimum, the Court should hold that the FCC's current indecency policy is invalid and require the FCC to restructure its policy to comply with the First Amendment. Only once the FCC deregulates indecent content will it be relieved from the Catch-22 in which it has found itself.<sup>110</sup>

There are many alternative measures that the FCC could take to minimize censorship and First Amendment concerns while still having an indecency-enforcement regime. The FCC could return to its pre-2004 regulations and stop fining broadcasters for fleeting expletives or reduce the fine for violating the regulations.<sup>111</sup> If the fines are reduced, then stations would feel less pressure to air live

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107. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *WBGH Educ. Found.*, 69 F.C.C.2d 1250 (1978); *Infinity Order*, 3 F.C.C. Rcd. 930 (1987); *Golden Globes*, 19 F.C.C. Rcd. 4975 (2004); *Omnibus Order*, 21 F.C.C. Rcd. 2664 (2006).

108. See *Golden Globes*, 19 F.C.C. Rcd. 4975 (2004); Associated Press 2006, *supra* note 48.

109. See *Fox III*, 613 F.3d 317 (2d Cir. 2010).

110. See Kirkpatrick, *supra* note 60.

111. At oral argument, Carter G. Phillips, attorney for Fox, conceded that the FCC's indecency-enforcement regime "worked perfectly fine from all the way up to 2001, even I would say until 2004, when the commission wildly changed its approach." See Transcript of Oral Argument, *supra* note 2, at 26.

programming on a delay.<sup>112</sup> This would minimize media self-censorship.<sup>113</sup>

### *B. Compromise: Public and Private Cooperation*

For the 89 percent of American households that *do* have technology available to them in addition to the V-Chip, more protective measures are available.<sup>114</sup> Instead of airing all live shows on a delay, broadcasters could air one version live for adult viewers and a second version on a short delay that viewers could access through the “On Demand”<sup>115</sup> feature of their cable box.<sup>116</sup> This option

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112. A relaxed policy will “not only be a boon to awards shows, which will now be less fearful of the late-bleeped curse word, but also scripted series like *Family Guy*, which can now make horse-semen jokes with no fear of retribution.” Willa Paskin, *Court Rules the FCC Indecency Policy is Itself Indecent*, VULTURE (July 13, 2010, 3:00 PM), [http://nymag.com/daily/entertainment/2010/07/court\\_rules\\_heralds\\_in\\_tempora.html](http://nymag.com/daily/entertainment/2010/07/court_rules_heralds_in_tempora.html).

113. Self-censorship is strongly discouraged by the First Amendment and FCC policy should be consistent with that overall constitutional policy. See Jones, *supra* note 89, at 5 (“The public, as well as broadcasters, have First Amendment rights to free speech guaranteed by the Constitution” which have been “fundamentally quashed” by the FCC’s current indecency policy). Notwithstanding the Constitution’s commitment to free speech, the result of the FCC’s recent stringent enforcement policies, including legislation which significantly increased penalties for each “indecent” utterance, is to chill speech. See Katherine A. Fallow, *The Big Chill? Congress and the FCC Crack Down on Indecency*, 22 COMM. LAWYER 1, 25 (2004). It is likely that those that object to *Fox III* for striking down the FCC indecency policy, fearing that vulgarity will take over the airwaves, will probably object to returning to the pre-2004 status quo as well. See Jones, *supra* note 89, at 3–4 (commenting on the socio-political agendas of media watchdog groups). However, lowering fines will only serve the purpose of reducing self-censorship and will not encourage broadcasters to discard their judgment entirely. See *supra* note 56. Lower fines will only punish the broadcasters less for accidentally airing unintended language or language that they could not anticipate would be deemed “indecent” by the Commission.

114. See Center for Democracy & Technology Brief, *supra* note 74, at 11418. The biggest obstacle in a complete deregulation of indecent television programming is the 11 percent of households that do not have more than V-Chip technologies. See PARENTAL CONTROL TECHNOLOGIES Report, *supra* note 75, at 11418. Such households cannot watch shows on a delay and cannot screen the content for their children immediately. Such households must record the show in its entirety on tape recorders or DVDs, while screening it live, and then after the entire show has aired, the show can be re-watched in its entirety. This “burden” is light in comparison to the First Amendment burdens placed on the remaining 89 percent of the American populace.

115. Most cable subscribers have an “On Demand” feature that is easy to use. See, e.g., *How to Watch On-Demand with Charter Cable*, EHOW, [http://www.ehow.com/how\\_2066780\\_watch-demand-charter-cable.html](http://www.ehow.com/how_2066780_watch-demand-charter-cable.html) (last visited Nov. 3, 2011).

116. This would relieve broadcasters from having to make the choice between self-censorship and the possibility of being subject to extreme fines. See 47 U.S.C.

would also be consistent with the Court's recommendation in *Golden Globes* for stations to use available technology to delay and bleep offensive language. But, rather than forcing all adults to view the delayed version, adults could still have the option of seeing the authentic live version.<sup>117</sup> This compromise between the broadcasting industry and the government would relieve the burden on adult speech, while providing desirable safeguards for children.

The FCC and the media industry could also work collaboratively to inform the public about the available options for monitoring the television content that airs in their living room. Earlier ineffective educational campaigns solely directed by the media industry could be improved if the government participated.<sup>118</sup> Any campaign implemented by the media would be more effective if it were based upon the information gathered and assessed by the government's formal review of available blocking technologies and effective methods for increasing the use of such technologies by the public.<sup>119</sup> The majority of households are already familiar with the V-Chip, so the next steps would be to reach out to those who are still unaware of that technology, educate the public about additional existing technologies, and then teach the public how to use such technologies.<sup>120</sup> Such a collaborative campaign would better enable parents to use available technology to screen television programming. Empowering parents with such knowledge would rid television of its "unique pervasiveness" and "unique availability to children."<sup>121</sup>

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§ 503(b)(2)(C)(ii) (2010); *see also* Associated Press 2006, *supra* note 48. If cable companies would allow these delayed broadcasts to be viewed for free "On Demand," then parents who wish to take advantage of the option would not be penalized for monitoring their children's television programming.

117. This would alleviate concerns that the FCC indecency policy has served to be the death of live television. *See supra* note 50 and accompanying text.

118. *See supra* note 80 and accompanying text.

119. *See supra* note 83 and accompanying text.

120. *See supra* note 79 and accompanying text.

121. *See* FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978); *see also supra* note 28 and accompanying text.



### *C. Regulating from the Living Room, not Washington*

Considering that the FCC has yet to create a viable indecency policy in the fifty years since Congress granted it the authority to regulate indecent speech, it may be wise for the FCC to simply end its effort towards regulating indecent speech on broadcast television. The FCC's indecency policy has been declared unconstitutionally vague because of its inconsistent application. That is because it is so difficult to define *what* is "indecent" by contemporary community standards.<sup>122</sup> This determination differs by who reviews a case brought to the FCC and who the acting FCC Commissioners are at the time.

What is "indecent" also differs by household: what one set of parents consider indecent, others may not. "Community" should be replaced with "household" and parents ought to take over this responsibility entirely. It is far more efficient for parents to decide what is "indecent," rather than expending large amounts of time and money litigating over what is "indecent" for the purposes of FCC regulations. The number of inconsistent judgments and appeals from broadcasters alone shows the inefficiency of having a government-defined standard.<sup>123</sup>

Parents have a right to monitor their children's exposure to broadcast television. User-empowerment technology gives parents ample opportunity to exercise this right by allowing them to hand

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122. Even the standard "contemporary community standards" itself is hard to define, let alone "indecency" according to that standard. The FCC claims that "indecency will be judged by the average broadcast viewer or listener." *Infinity Order*, 3 F.C.C. Rcd. at 933. However, the FCC has been criticized for determining contemporary community standards based on the subjective opinions of the sitting commissioners. *See* Complaints Regarding Various Television Broad. Between Feb. 2, 2002 and Mar. 8, 2005, 21 F.C.C. Rcd. 13299, 13309 (2006) (order). The FCC rebuts such attacks by explaining that it evaluates indecency by "relying on the FCC's 'collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens.'" *Id.* at 13309-10. In practice, broadcasters have found the FCC standard to be an "opaque statement that provides little guidance, and worse, it could reasonably be perceived to be dressed-up language that boils down to the subjective predilections of those in the FCC." Hutchinson, *supra* note 6, at 236. Even Justice Kagan acknowledges that "there's a lot of room here for FCC enforcement on the basis of what speech they think is kind of nice and proper and good. And . . . that's a serious First Amendment issue." Transcript of Oral Argument, *supra* note 2, at 54.

123. *See id.*

pick what their children can and cannot see.<sup>124</sup> The V-Chip may not be perfect, but it is available to everyone.<sup>125</sup> Parents would be free to choose what *they* find to be indecent and actively prevent their children from being exposed to such material. It is not the government's responsibility to act as parents and decide what is and is not appropriate for children to view. Parents are perfectly capable of playing such a role and if they choose not to, the government need not step in and fill their shoes.

#### V. CONCLUSION

There is no supportable reason for a government-issued indecency policy in the twenty-first century. Regardless of whether the Supreme Court upholds or invalidates the FCC's current indecency regime, the FCC ought to eliminate this regulation from its repertoire. If, however, the FCC does not want to completely abolish its policy, then the FCC should at least reduce the maximum allowable fine for a violation and return to its pre-2004 policy that was favorable with regards to fleeting expletives.

If the FCC does not restructure its contextual indecency analysis, the FCC has a plethora of technologies available to assist in combating what it finds to be indecent. Implementing such user-empowerment technologies would decrease the burden on broadcasters to self-censor while keeping broadcasters' and viewers' First Amendment rights intact.

With the First Amendment hanging in the balance, the Supreme Court should invalidate the FCC's current indecency regime.

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124. Journalist and parent, Drew Clark, commented:

I don't want my 4-year-old son to see crude or provocative shows when he turns on our television. I also don't want him to see such material when he turns on our Internet-connected computer. Yet it would be impractical, as well as unconstitutional, for the government to set itself as the censor of cable, satellite and Internet content. It makes more much [sic] sense for consumers to determine what comes into their homes.

Clark, *supra* note 87.

125. See Center for Democracy & Technology Brief, *supra* note 74, at 9–10, 9 n.3; see also *supra* notes 74–75 and accompanying text.

Broadcasters' and viewers' First Amendment rights are simply too important for the Court to rule any other way.