

# “Fleeting Expletives” Are the Tip of the Iceberg: Fallout from Exposing the Arbitrary and Capricious Nature of Indecency Regulation

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## I. INTRODUCTION

Challenging the regulation of indecent speech makes for a sexy First Amendment case. Concerns with chilling or censoring speech draw immediate attention, overshadowing the issue of how the Federal Communications Commission (FCC) exercises its discretion when it finds certain language “indecent.” In 1978, the Supreme Court in *FCC v. Pacifica Foundation, Inc.* held that the FCC’s regulation of indecent speech did not violate the First Amendment.<sup>1</sup> Having the constitutional authority to regulate indecent speech, however, is distinct from identifying which actions are appropriate in the exercise of that authority. Until recently, too little attention has been given to the latter query: whether the FCC’s indecency regulation is arbitrary and capricious.

Regulating indecent speech requires sensitivity and discretion in evaluating the contemporary offensiveness of language; concepts of offensiveness change over time. The FCC’s authority to regulate indecent speech primarily originates in 18 U.S.C. § 1464.<sup>2</sup> The FCC defines indecent speech under § 1464 as “material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.”<sup>3</sup> This standard explicitly recognizes a focal point in the history of profanity and foul language (including indecent speech) by

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1. *FCC v. Pacifica Found., Inc.*, 438 U.S. 726, 748-50 (1978) (holding that broadcasting indecent speech has more limited First Amendment protection due to its uniquely pervasive presence in society and because it is uniquely accessible to children). Without making light of their significance, the constitutionality of the FCC’s indecency regime, and related arguments concerning the strength and validity of *Pacifica’s* holding, are beyond the scope of this analysis.

2. § 1464 provides that “[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.” 18 U.S.C. § 1464 (2000). *See also* 47 U.S.C. § 312(a)(6) (2000) (authorizing the revocation of station license or building permit for violation of § 1464); 47 U.S.C. § 503(b)(1)(D) (2000) (authorizing the “imposition of forfeiture[s]” for violating § 1464).

3. Complaints Regarding Various TV Brdcsts. Between Feb. 2, 2002 and Mar. 8, 2005, *Order*, 21 F.C.C.R. 13299, para. 15 (2006) [hereinafter *Order on Remand*].

Geoffrey Hughes, a professor of the history of the English language.<sup>4</sup> Hughes identifies the weakening or loss of intensity of the force and impact of swear words over time as the dominant trend in the history of swearing.<sup>5</sup> A corollary to weakening is the shift in meaning from one that is sexually-charged and/or offensive to one that reflects general use. For example, about three decades after the emergence of the term “jerk” as a verb meaning “to masturbate” in the late nineteenth century, it developed into a common noun meaning “an offensive or worthless person.”<sup>6</sup> The linguistic development of “jerk” demonstrates that over a relatively short period of time, the sexual activity described by a term can dissipate into a widely-used term with no inherent coarse, sexual meaning.

The Supreme Court’s review of the Second Circuit’s decision in *Fox v. FCC*<sup>7</sup> presents an important issue addressing the administrative discretion exercised in the indecency regime. In 2004, the FCC announced the “fleeting expletives” policy—that the isolated use of an offensive expletive could be actionable.<sup>8</sup> After *Fox Television Stations, Inc., CBS Broadcasting, Inc., and NBC Universal, Inc.* (collectively, the Networks) challenged the fleeting expletives policy, the Second Circuit held the policy change invalid as an arbitrary and capricious abuse of agency discretion.<sup>9</sup> In the wake of the Supreme Court grant of certiorari in *Fox v. FCC*, the Third Circuit, in *CBS v. FCC*, found arbitrary and capricious the “fleeting images” policy the FCC articulated to sanction the February 1, 2004 exposure of Janet Jackson’s breast during the Super Bowl.<sup>10</sup>

An undercurrent in the Second and Third Circuit cases is that the FCC’s freewheeling indecency regulation fails scrutiny under the Administrative Procedure Act (APA), 5 U.S.C. § 706.<sup>11</sup> The abuse of discretion found by the Second and Third Circuit Courts of Appeals is ostensibly limited to the policy changes involving fleeting expletives and fleeting images. The FCC’s implementation of those policies, however, appears to fall prey to the same factors that support the arbitrary and

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4. GEOFFREY HUGHES, AN ENCYCLOPEDIA OF SWEARING: THE SOCIAL HISTORY OF OATHS, PROFANITY, FOUL LANGUAGE, AND ETHNIC SLURS IN THE ENGLISH SPEAKING WORLD (2006).

5. *Id.* at 300, 302.

6. *Id.* at 310-11.

7. *Fox TV Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008).

8. *Order on Remand*, *supra* note 3, at para. 7.

9. *Fox v. FCC*, 489 F.3d at 447.

10. *CBS Corp. v. FCC*, No. 06-3575, 2008 U.S. App. LEXIS 16692, at \*3-4, \*32-34 (3d Cir. July 21, 2008).

11. 5 U.S.C. § 706(2)(A) (2006) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . .”).

capricious finding in *Fox v. FCC*. In other words, *Fox v. FCC* and *CBS v. FCC* begin to suggest that neither the recent indecency policies nor the findings may survive APA review. In that light, the administrative law question the Court faces regarding fleeting expletives represents the tip of the iceberg: upholding the court of appeals' decision in *Fox v. FCC* would have the effect of bringing the entire indecency regime under fire, while reversing the court of appeals bolsters the FCC's ability to restrict speech in broadcasting and also would cause greater unpredictability in speech regulation.

This Note thus examines the FCC's indecency regime through the lens of the scope of judicial review for arbitrary and capricious administrative actions. Part II provides a brief overview of the issue presented to the Supreme Court by the Second Circuit's recent decision in *Fox v. FCC*. Part III looks at the standard applied by the FCC to determine if certain language is indecent. Part IV examines the standard for judicial review in finding whether or not an administrative action is arbitrary and capricious. Part V compares the arguments raised by *Fox v. FCC* for and against finding the FCC's indecency regime arbitrary and capricious. Finally, Part VI suggests that the optimal conclusion is to uphold the court of appeals' decision, and proposes an alternative indecency policy that scales back discretion and incorporates a factual foundation to ease administration and to provide clearer guidance to broadcasters.

## II. OVERVIEW

For many years after *Pacifica* was decided, the FCC consistently did not find isolated, non-literal expletives actionably indecent.<sup>12</sup> That changed in 2004, when the FCC abandoned that position and adopted the standard that certain "fleeting expletives"—the broadcast of an isolated expletive which is not repeated—are indecent under § 1464.<sup>13</sup> In regulating fleeting expletives, the FCC determined that certain words, namely "fuck" and "shit," cannot be divorced from their sexual or excretory meanings, and may be regulated even in isolated use.<sup>14</sup> In June 2007, the Second Circuit's

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12. See, e.g., *Pacifica Found. Inc., Memorandum Opinion and Order*, 2 F.C.C.R. 2698, para. 13 (1987) ("If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency.").

13. *Order on Remand, supra* note 3, at paras. 21-23. See also *Complaints Against Various Brdcast. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, Memorandum Opinion and Order*, 19 F.C.C.R. 4975, para. 12 (2004) [hereinafter *Golden Globes Order*].

14. *Order on Remand, supra* note 3, at para. 20.

decision in *Fox v. FCC* invalidated the FCC's fleeting expletives standard, holding that it is arbitrary and capricious under the APA.<sup>15</sup>

Judge Leval's dissent in the court of appeals shrewdly noted that, "if . . . the Commission's actions are arbitrary and capricious because of irrationality in its standards for determining when expletives are permitted and when forbidden, that argument must be directed against the entire censorship structure."<sup>16</sup> Determining whether or not language is "patently offensive" by "contemporary community standards" is the essence of indecency regulation.<sup>17</sup> In finding the fleeting expletives standard arbitrary and capricious, the Second Circuit did not reach the Networks' challenge that the FCC's "community standards" analysis is also arbitrary.<sup>18</sup> Since *FCC v. Pacifica*, in 1978, which represented the first instance where the Supreme Court upheld the FCC's regulation of indecent content in the broadcast medium,<sup>19</sup> the FCC has looked to *Pacifica* as support for finding certain words patently offensive.<sup>20</sup> Thus, despite the recognition that standards of indecency change over time, the FCC's indecency analysis gives short shrift to the problem of evaluating what language meets that standard now, compared to when *Pacifica* was decided 30 years ago.

In November 2007, the Solicitor General filed a petition for a writ of certiorari (Petition) to the Supreme Court on the FCC's behalf, asking the Court to review the Second Circuit's decision in *Fox v. FCC*.<sup>21</sup> The Petition criticizes the court of appeals for placing the FCC in a position in which it will have difficulty regulating isolated expletives based on the contextual analysis, which will leave it ill-equipped to prevent "coarsening of the airwaves."<sup>22</sup> However, this position begs the question by assuming that the FCC will be unable to regulate indecent language. The real issue is whether certain words are indecent, not based on context, but based on serious consideration of contemporary community standards.

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15. *Fox TV Stations, Inc. v. FCC*, 489 F.3d 444, 447 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008).

16. *Id.* at 471 (Leval, J., dissenting).

17. *Order on Remand*, *supra* note 3, at para. 15.

18. *Fox v. FCC*, 489 F.3d at 454.

19. Indus. Guidance on the Comm.'s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Brdcast. Indecency, *Policy Statement*, 16 F.C.C.R. 7999, para. 4 (2001) [hereinafter *Industry Guidance*].

20. *See, e.g.* Complaints Regarding Various TV Brdcasts. Between Feb. 2, 2002 and Mar. 8, 2005, *Notice of Apparent Liability and Memorandum Opinion and Order*, 21 F.C.C.R. 2664, para. 74 (2006) [hereinafter *Omnibus Order*] (citing Citizen's Complaint Against Pacifica Found., *Memorandum Opinion and Order*, 56 F.C.C.2d 94 (1975), for the proposition that any use of the "F-Word" and "S-Word" falls within the first prong of the FCC's indecency definition), *vacated in part*, 21 F.C.C. 13,299 (Nov. 06, 2006).

21. Petition for a Writ of Certiorari, *FCC v. Fox TV Stations, Inc.*, 128 S.Ct. 1647 (2008) (No. 07-582), 2007 WL 3231567.

22. *Id.* at 30.

The question presented to the Supreme Court in *Fox v. FCC* requires a hard look at the “fleeting expletives” standard, but the standard of review for abuse of discretion has clear implications for the entire FCC indecency regime.<sup>23</sup> At the outset, it should be noted that the FCC’s rationale for its policy on fleeting expletives echoes its rationale for regulating indecency, as articulated in *Pacifica*.<sup>24</sup> Indeed, the Solicitor General likely conflates the two for two reasons: to prompt the Court to adhere to the *Pacifica* holding and to acknowledge that the decision implicates the entire indecency regime.<sup>25</sup> The FCC’s Supreme Court brief highlights the reasoned basis the APA requires for an administrative agency’s actions, as articulated by the Supreme Court’s decision in *Motor Vehicle Manufacturers Ass’n of the United States v. State Farm Mutual Automobile Insurance Co.*<sup>26</sup> In its brief, however, the FCC misconstrues the judicial gloss on arbitrary and capricious review—likening it more to a rational basis review than to the hard look *State Farm* established.<sup>27</sup> The Court may utilize a variety of factors in a *State Farm* review to support or negate a reasoned basis for administrative action during judicial review for arbitrary and capricious actions.<sup>28</sup> How the Court applies those factors, and the kind of deference it gives to the FCC, may determine not only the legitimacy of the fleeting expletives policy, but of indecency determinations generally.

Therefore, the Supreme Court’s guidance on whether the FCC’s fleeting expletives policy is arbitrary and capricious is needed because it is a bellwether for the FCC’s alignment with the APA for indecency determinations. Resolving this question of administrative law should brighten the line between indecent and permissible language, the implications of which will provide guidance for broadcasters concerned with chilled and censored content.

### III. FINDING INDECENT SPEECH

The FCC’s analytical approach to an “indecency finding[] involve[s] at least two . . . determinations.”<sup>29</sup> First, the speech must fall within the FCC’s definition of indecent speech by depicting or describing sexual or

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23. *See id.* at 29 (noting that the court of appeals’ decision “effectively nullifies the prohibition on indecent language found in Section 1464”).

24. *See* Brief for the Petitioners at 3-4, *FCC v. Fox TV Stations, Inc.*, No. 07-582 (June 2, 2008), 2008 WL 2308909.

25. *See id.* at 17-18 (“The criticisms by the court of appeals . . . have less to do with the Commission’s revised policy on isolated expletives than they do with the enterprise of broadcast-indecency enforcement in general.”).

26. *See id.* at 21 (referencing *Motor Vehicle Mfr. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).

27. *See id.* at 21-22.

28. *See Motor Vehicle Mfr. Ass’n*, 463 U.S. at 42-43.

29. *Industry Guidance*, *supra* note 19, at para. 7.

excretory organs or activities.<sup>30</sup> Second, and more importantly for purposes of this review, the speech must be “*patently offensive* as measured by contemporary community standards for the broadcast medium.”<sup>31</sup>

The FCC’s *Industry Guidance* policy statement describes several principal factors for measuring patent offensiveness. Considering the context of the work as a whole is critical to the patent offensiveness analysis.<sup>32</sup> The principal factors in the FCC’s decisions are:

(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*.<sup>33</sup>

Despite folding contemporary community standards into these factors for patent offensiveness, the consideration of the former receives some discrete attention from the FCC.

It is difficult to divine what constitutes a satisfactory analysis of contemporary community standards. In recent years, the FCC has stated and reiterated that the “‘community standards for the broadcast medium’ criterion . . . is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant.”<sup>34</sup> On the one hand, the FCC recognizes the Supreme Court’s guidance that the contemporary community standards prong ensures that “material is judged neither on the basis of a decisionmaker’s personal opinion, nor by its effect on a particularly sensitive or insensitive person or group.”<sup>35</sup> On the other hand, the FCC’s determination of contemporary community standards is left open by statements that “decisionmakers need not use any precise geographic area in evaluating material,” and “its evaluation of allegedly indecent material is ‘not one based on a local standard, but one based on a broader standard for broadcasting generally.’”<sup>36</sup> Therefore, the FCC’s standard moves away from particulars and approaches an abstract rather than a factual determination, which provides tremendous discretion in determining an artificial average community standard.

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30. *Id.*

31. *Id.* at para. 8.

32. *See id.* at para. 9.

33. *Id.* at para. 10.

34. *Id.* at para. 8 (quoting WPBN/WTOM License Subsidiary, Inc., *Memorandum and Order*, 15 F.C.C.R. 1838, para. 10 (2000)).

35. Infinity Brdcst. Corp. of Pa., *Memorandum Opinion and Order*, 3 F.C.C.R. 930, para. 24 (1987) [hereinafter *Infinity Broadcasting*] (citing *Hamling v. United States*, 418 U.S. 87, 107 (1974)).

36. *Industry Guidance*, *supra* note 19, at para. 8, n.15 (quoting *Infinity Broadcasting*, *supra* note 35, at para. 24).

The FCC's interpretation of the Supreme Court's guidance from *Hamling v. United States*<sup>37</sup> recognizes the importance of contemporary community standards in evaluating allegedly indecent material, but the determination of that criterion is hedged by statements that the issue will be considered broadly. The FCC couched the issue of evaluating contemporary community standards in a way that does not suggest, much less require, precision in their evaluation. Accordingly, the contemporary community standards criterion guards against subjective, arbitrary findings of indecent material, but does not compel the FCC to engage in clear factual evaluations of indecent material.

By framing the contemporary community standards evaluation with such sweeping language, the FCC opens itself up to arbitrary exercises of its regulatory power. Indeed, broadcast networks have criticized the FCC for determining contemporary community standards based on the Commissioners' subjective opinions.<sup>38</sup> To respond to that criticism, the FCC repeated its most definitive statement of how it determines contemporary community standards.<sup>39</sup> The November 2006 *Order on Remand* cites a 2004 opinion and order which stated that the community standard for the "average broadcast viewer or listener" is determined by relying on the FCC's "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens."<sup>40</sup> The adequacy of that method of determination certainly depends on which side of the equation the affected party stands—for the FCC, it suggests that a wide range of sources is considered, but for broadcasters, it is a rather 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.

#### IV. JUDICIAL REVIEW OF ARBITRARY AND CAPRICIOUS ADMINISTRATIVE AGENCY ACTIONS

Originating in the APA, a reviewing court may set aside an agency action, finding, or conclusion found to be arbitrary and capricious.<sup>41</sup> The judicial gloss on the APA's scope of review for arbitrariness is known as

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37. *Hamling*, 418 U.S. at 107.

38. Joint Comments of Fox TV Stations, Inc., CBS Brcdst., Inc., NBC Universal, Inc. and NBC Telemundo License Co. at 10-11, Remand of Section III.B of the Comm'n's *Omnibus Order*, FCC DA 06-1739 (rel. Sept. 21, 2006).

39. *Order on Remand*, *supra* note 3, at para. 28.

40. *Id.*; see also Infinity Radio License, Inc., *Memorandum Opinion and Order*, 19 F.C.C.R. 5022, para. 12 (2004).

41. 5 U.S.C. § 706(2)(A) (2000).



the hard look doctrine.<sup>42</sup> Generally, the reviewing court looks to see if the agency took a hard look at the question to determine if the agency's decision making was adequate or inadequate, i.e., arbitrary and capricious.<sup>43</sup> The Solicitor General seems to agree with the finding of the court of appeals that the standard for judging fleeting expletives policy is arbitrary and capricious.<sup>44</sup> But considering the foundation for the fleeting expletives policy discussed below, this analysis suggests further that the current standard for the FCC's indecency determinations is arbitrary and capricious under the hard look doctrine.

#### A. *Development of the Judicial Gloss on Arbitrary and Capricious Review*

Absent the judicial gloss, the language of the APA does not provide much guidance for a court reviewing an alleged abuse of administrative discretion. The APA states that “[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .”<sup>45</sup> In 1983, the Supreme Court implicitly adopted the hard look approach to arbitrary and capricious review in *State Farm*.<sup>46</sup> Prior to *State Farm*, arbitrary and capricious review was relatively narrow, and courts essentially reviewed agency actions under a reasonableness standard.<sup>47</sup> During the 1970s, the Court began to move toward the hard look doctrine, notably in *Citizens to Preserve Overton Park v. Volpe*,<sup>48</sup> where the Court stated that the administrative agency “must consider whether the decision was based on a consideration of relevant factors and whether there had been a clear error of judgment.”<sup>49</sup>

#### B. *The State Farm Hard Look Standard*

In *State Farm*, the Court held that the Secretary of Transportation's rescission of Modified Standard 208 was arbitrary and capricious under the

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42. CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE § 8335 (2006).

43. *Id.*

44. See Petition for Writ of Certiorari, *supra* note 21, at 10; see also Brief for the Petitioners, *supra* note 24, at 20 (describing the FCC's policy change as reasonable explained so that it survives the arbitrary and capricious standard).

45. 5 U.S.C. § 706 (2006).

46. See WRIGHT & KOCH, *supra* note 42, § 8335 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)).

47. See ALFRED C. AMAN, JR., ADMINISTRATIVE LAW AND PROCESS: CASES AND MATERIALS 803 (2d ed. 2006).

48. 401 U.S. 402 (1971), *abrogated by* 430 U.S. 99 (1977).

49. AMAN, *supra* note 47, at 804 (quoting *Overton Park*, 401 U.S. at 416).

APA.<sup>50</sup> By the end of the 1970s, Standard 208 required the phasing in of passive restraint systems in automobiles.<sup>51</sup> In 1977, the Secretary of Transportation issued Modified Standard 208, which required passive restraints—namely automatic seatbelts or airbags—in large cars beginning in 1982 and all cars by 1984.<sup>52</sup> Four years later, however, difficulties in the automobile industry led the Secretary to reconsider, and the passive restraint requirement was rescinded.<sup>53</sup> The agency's reasons for the rescission included no longer being able to find that the requirement would produce significant safety benefits, and the costs of implementing would not clearly justify the safety benefits—because most manufacturers opted for automatic seatbelts which could be easily detached.<sup>54</sup> The Court agreed with the Department of Transportation that “a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors,” but nonetheless found that the agency failed to do so in its decision to rescind Modified Standard 208.<sup>55</sup>

Justice White wrote for the five Justice majority on the arbitrary and capricious finding, stating, “the agency has failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary-and-capricious standard.”<sup>56</sup> The Court noted “[t]he scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.”<sup>57</sup> However, the opinion qualified the scope of review, stating that, “[n]evertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>58</sup>

The narrow arbitrary and capricious review requires looking at a variety of factors to determine the adequacy of an agency's action. The factors mentioned in *State Farm* include whether: (1) the agency articulated a rational connection between the facts found and the choice made, (2) the agency has relied on factors which Congress has not intended it to consider, (3) there is a clear error of judgment, (4) the agency entirely failed to consider an important aspect of the problem, (5) the agency offered an

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50. *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46 (1983).

51. *See id.* at 34-36.

52. *See id.* at 37.

53. *See id.* at 38.

54. *See id.* at 38-39.

55. *Id.* at 42-43, 46.

56. *Id.* at 56.

57. *Id.* at 43.

58. *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

explanation for its decision that runs counter to the evidence before the agency, or (6) the agency's conclusion is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>59</sup> In light of these factors, the Court further qualified this standard, stating that it will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."<sup>60</sup>

Further complicating matters, however, the Supreme Court, in *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*,<sup>61</sup> suggested the agency must take a hard look at the relevant facts and data when making its initial decision.<sup>62</sup> In *State Farm*, the Court took a hard look at the relevant facts in the decision made by the agency. *Baltimore Gas* thus provides a hard look that is more deferential to the agency decision making by limiting review to whether relevant facts and data were at play in the agency's decision, and if so, the court defers to the agency's decision.

Overall, then, the language framing the arbitrary and capricious standard allows the reviewing court to lean towards a reasonable, more deferential standard or a more rigorous standard highlighting the hard look factors enumerated in *State Farm*. Of course, the manner in which the arbitrary and capricious review is employed depends not only on the composition of the Court, but also on the facts of the particular case. As Justice O'Connor noted in *Baltimore Gas*, "[w]hen examining . . . [a] scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."<sup>63</sup> It is not clear whether the Court would characterize the nature of certain speech as more of a scientific determination or as a simple finding of fact. For these reasons, it is difficult to anticipate how the Court would apply the arbitrary and capricious standard; however, it also reinforces the need for the Court's guidance in the FCC's determination of the fleeting expletives standard and the contemporary community standards.

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59. *See id.* at 42-43.

60. *Id.* at 43 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

61. 462 U.S. 87 (1983).

62. *Id.* at 97-98 (requiring "only that the agency take a 'hard look' at the environmental consequences before taking a major action . . . The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.").

63. *Id.* at 103.

*C. The Scope of Arbitrary and Capricious Review Is Confused By Many Because It May Take Several Shapes*

Before considering how the Supreme Court may apply the hard look doctrine in *Fox v. FCC*, an apparent confusion regarding the scope and standard of arbitrary and capricious review must be flagged. Discussing the standard of review in *Fox v. FCC*, the Second Circuit,<sup>64</sup> the Solicitor General,<sup>65</sup> and commentators<sup>66</sup> all suggest that the review looks for a “reasoned basis.” While *State Farm* mentions the need for a reasoned basis for an agency’s action,<sup>67</sup> however, focusing on that phrasing out of the full context of the opinion reads the scope of review too narrowly. The facts in *State Farm*, discussed above, demonstrate that the Secretary of Transportation rescinded Modified Standard 208 for practical and economic reasons, but the Court’s examination of the factual underpinnings of the agency’s action, in light of the statutory mandate, did not meet the reasoned analysis standard required to survive arbitrary and capricious review.<sup>68</sup> Interpreting the reasoned basis language in *State Farm* by its plain meaning, thus, misconstrues the arbitrary and capricious standard.

The Supreme Court’s current hard look at the indecency regime—as a whole or limited to fleeting expletives—thus may take several shapes. Applying the approach from the *Overton Park/State Farm* line of cases, the Court may find the indecency determinations arbitrary and capricious for several reasons, either independently or taken together. In the absence of hard data for the FCC’s determination of contemporary community standards, the general question for the Court since *Overton Park* is whether the FCC’s cursory explanation of that determination is a consideration of relevant factors or a clear error of judgment. Under *State Farm*, it is possible for that to lead the Court to conclude that a lack of facts renders community standards decisions arbitrary and capricious because there are no facts found that can be rationally connected to the choice made.<sup>69</sup>

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64. See *Fox TV Stations, Inc. v. FCC*, 489 F.3d 444, 455, 458 (2d Cir. 2007), cert. granted, 128 S. Ct. 1647 (2008).

65. See Petition for Writ of Certiorari, *supra* note 21, at 19; see also Brief for the Petitioners, *supra* note 24, at 20 (arguing that the FCC should survive arbitrary and capricious review because the FCC gave a reasonable explanation for its policy change).

66. See, e.g., Julie Hilden, *The Fight Over “Fleeting Expletives”: How A Grant of Supreme Court Review May Lead to Expanded FCC Power and Reduced First Amendment Rights for Broadcasters*, FINDLAW, Mar. 31, 2008, <http://writ.lp.findlaw.com/hilden/20080331.html> (stating that the reviewing court has to hold that the FCC failed to articulate a reasoned basis for the policy in order to find it arbitrary and capricious under the APA— “[n]ot ‘reasonable’ – simply ‘reasoned’”).

67. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Sec. & Exch. Comm’n v. Chenery Corp.*, 332 U.S. 194 (1947)).

68. See *id.* at 46-57.

69. See *id.* at 56.

Likewise, the absence of hard facts from the method of determining community standards may suffice for the Court to find the standard arbitrary and capricious due to clear error of judgment.<sup>70</sup> Overall, the lack of discrete facts makes it difficult to square the FCC's rather opaque method of determining contemporary community standards into the reasoned analysis required by *State Farm*, discussed above.

Alternatively, the Court may find that the indecency standard is not arbitrary and capricious under either the *State Farm* or the *Baltimore Gas* constructions of the hard look doctrine. In the simplest (and least helpful) decision, the Court, under *State Farm*, will not substitute its judgment for that of the agency.<sup>71</sup> The Court could punt on the issue by giving such bald deference to the FCC, but it does not provide clarity or guidance for indecency determinations. A less feeble decision would require the Court to uphold the indecency regime by chalking up the determinations as an acceptable product of agency expertise. The last point may be bolstered by the *Baltimore Gas* approach, applying greater deference to the agency.<sup>72</sup> Overall, though, an opinion deferring to the FCC's decision-making process, however, would not provide guidance to the broadcast industry on the contours of the current, rather haphazard approach to indecency determinations.

#### V. *FOX v. FCC*: ARGUMENTS FOR AND AGAINST AN ARBITRARY AND CAPRICIOUS INDECENCY DETERMINATION

In *Fox v. FCC*, the Second Circuit did not decide on the arbitrariness of the FCC's contemporary community standards, despite the fact that it is a critical factor to indecency findings. But the court's discussion of fleeting expletives implicates the arbitrary and capricious nature of the current indecency regime. The Networks successfully argued to the Second Circuit that the FCC's November 2006 Remand Order is arbitrary and capricious under the APA "because the FCC has made a 180-degree turn regarding its treatment of 'fleeting expletives' without providing a reasoned explanation justifying the about-face."<sup>73</sup> To reach its conclusion, the Second Circuit addressed the FCC's basis for indecency determinations and its reasons for the change in policy.

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70. *See id.*

71. *See id.* at 43.

72. *See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97-98 (1983).

73. *Fox TV Stations, Inc. v. FCC*, 489 F.3d 444, 455 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008).

A. *The FCC's Reasons for Moving To Regulate Fleeting Expletives*

To explain its change in policy to regulate fleeting expletives, the FCC supplied the same reasons it has given for regulating indecent language since *Pacifica*. According to the Second Circuit, “[t]he primary reason for the crackdown on fleeting expletives advanced by the FCC is the so-called ‘first blow’ theory described in the Supreme Court’s *Pacifica* decision.”<sup>74</sup> In *Pacifica*, the Court rejected an “avert your eyes” rationale,<sup>75</sup> and analogized the first hearing of indecent language to the first blow of an assault—turning off the broadcast after the first hearing is as ineffective a remedy as running away from an assault after the first blow.<sup>76</sup> Based on that statement by the Court in *Pacifica*, the FCC’s November 2006 order stated that isolated or fleeting expletives unfairly force viewers to take the first blow.<sup>77</sup>

A second reason for regulating fleeting expletives concerns the difficulty of determining what the word(s) mean in context. The FCC suggests that an expletive’s power derives from its sexual or excretory meaning.<sup>78</sup> Therefore, the argument follows that literal and non-literal use of a word, e.g., “fuck,” falls within the indecency regime because “it is difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions.”<sup>79</sup> A third reason offered by the FCC to support regulating fleeting expletives is the concern that an exemption for fleeting expletives would “permit broadcasters to air expletives at all hours of a day so long as they did so one at a time.”<sup>80</sup> The FCC also reasoned that “categorically requiring repeated use of expletives in order to find material indecent is inconsistent with [their] *general approach to indecency enforcement, which stresses the critical nature of context.*”<sup>81</sup> In sum, the force of these reasons derives from the meaning that the reasonable broadcast viewer would ascribe to an expletive in context in order to find it indecent.

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74. *Id.* at 457.

75. The Supreme Court, in *Cohen v. California*, 403 U.S. 15, 21 (1971), found that those in a Los Angeles courthouse who did not care to be bombarded with the “Fuck the Draft” message on Cohen’s jacket should simply avert their eyes.

76. *See* FCC v. *Pacifica Found., Inc.*, 438 U.S. 726, 748-49 (1978).

77. *See Order on Remand*, *supra* note 3, at para. 25.

78. *See id.* at para. 23.

79. *Id.* at paras. 23, 58.

80. *Id.* at para. 25.

81. *Id.* at para. 23 (emphasis added).

### B. Case Studies and the Second Circuit's Rejection of the FCC Rationales

Even though the FCC has hung its hat on the first blow theory since *Pacifica*, the Second Circuit found it unpersuasive and incoherent when considered along with their standard for finding indecency. The court of appeals highlighted the inconsistency between the first blow theory and the contextual analysis at the heart of the indecency policy.<sup>82</sup> During oral argument, the FCC further undercut the first blow theory by stressing that it does not take the position that any occurrence of an expletive is indecent.<sup>83</sup> The tension between the first blow theory and the indecency policy is demonstrated in the December 13, 2004 episode of “The Early Show” on CBS, one of the four television shows at issue in *Fox v. FCC*.<sup>84</sup>

The FCC struggled with how to evaluate “The Early Show” from December 13, 2004. During a live interview, at approximately 8:10 a.m. (EST), a cast member from “Survivor: Vanuatu” described a fellow cast member as a “bullshitter.”<sup>85</sup> Based on the principal factors mentioned in the *Industry Guidance* policy statement, the FCC’s 2006 *Omnibus Order* determined that the language was indecent because, in this circumstance, the “S-Word” was vulgar, graphic and explicit, and it was shocking and gratuitous.<sup>86</sup> After the *Omnibus Order*, Fox and CBS petitioned for review by the Second Circuit, and the FCC moved for a voluntary remand which resulted in the *Order on Remand*.<sup>87</sup> The *Order on Remand* doubled back on the *Omnibus Order*, deferring to the network’s characterization of the interview as a “news interview,” not an entertainment program, and thus it was not actionably indecent.<sup>88</sup> The Second Circuit viewed the decision in the *Order on Remand*, and the news exception, which the FCC emphasized as broad at oral argument, as a flat contradiction to the first blow rationale.<sup>89</sup>

#### 1. Issues with Demonstrative Indecency: Literal and Non-literal Uses

Like “jerk” a century ago, implicit in the Second Circuit’s rejection of the FCC’s second argument is the idea that the expletives “shit” and “fuck”

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82. See *id.* at para. 15; *Industry Guidance*, *supra* note 19, at para. 9 (noting that full context is critical to an indecency determination).

83. See *Fox TV Stations, Inc. v. FCC*, 489 F.3d 444, 458 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008).

84. *Id.* at 452.

85. See *Omnibus Order*, *supra* note 20, at para. 137; *Order on Remand*, *supra* note 3.

86. *Omnibus Order*, *supra* note 20, at para. 139, para. 141.

87. *Fox v. FCC*, 489 F.3d at 453.

88. *Order on Remand*, *supra* note 3, at paras. 72-73.

89. See *Fox v. FCC*, 489 F.3d at 458.

are not demonstratively indecent under the current community standard. This second argument stressed that a fleeting expletive may be regulated because, despite the fact that “shit” and “fuck” have non-literal usages, it is difficult or impossible to tell whether the usage is literal, and they are, after all, expletives because of their literal meaning.<sup>90</sup> Rejecting this argument, the court of appeals found the rationale unsupported by record evidence and contradicted by evidence from the Networks, and not simply the result of a difference in opinion from the FCC’s judgment.<sup>91</sup> The court stated that the FCC’s rationale “defies any commonsense understanding of these words, which, as the general public well knows, are often used in everyday conversation without any ‘sexual or excretory’ meaning.”<sup>92</sup>

To support its conclusion, the court of appeals provided several illustrations of expletives used in a way that could not reasonably be construed as referencing sexual or excretory organs or activities.<sup>93</sup> A prime example cited by the court is from the 2003 Golden Globe Awards, where Bono, lead singer of the band U2, said, “this is really, really, fucking brilliant,”<sup>94</sup> during his acceptance of the award for best song in a movie.<sup>95</sup> The court of appeals also included analogous colorful examples from President George W. Bush and Vice President Dick Cheney.<sup>96</sup> President Bush, during the 2006 G8 summit in Russia, remarked to British Prime Minister Tony Blair that the UN needed “to get Syria to stop doing this shit . . . .”<sup>97</sup> The example from Vice President Cheney recounted the June 2004 exchange with Senator Patrick Leahy on the Senate floor where the former told the latter, go “[f]uck yourself.”<sup>98</sup>

## 2. From the Golden Globes to the Supreme Court

The fallout from the Golden Globes incident gave rise to *FCC v. Fox* in the Supreme Court, and it also put a spotlight on the problem with the discretion in the indecency policy. When the FCC’s Enforcement Bureau

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90. See *id.* at 459 (citing *Order on Remand*, *supra* note 3, at para. 23).

91. *Fox v. FCC*, 489 F.3d at 460 n.10.

92. *Id.* at 459.

93. See *id.*

94. Complaints Against Various Brdcast. Licensees Regarding Their Airing of the “Golden Globe Awards” Program, *Memorandum Opinion and Order*, 18 F.C.C.R. 19859, para. 2 (2003) [hereinafter *Golden Globes Bureau Decision*], *rev’d by Golden Globes Order*, *supra* note 13.

95. See Phil Rosenthal, *The Gold Rush Is On*, CHICAGO SUN-TIMES, Jan. 20, 2003, at 32 (the song was “The Hands That Built America” from *Gangs of New York*).

96. See *Fox v. FCC*, 489 F.3d at 459.

97. See Paul Kent, *Waging War for Lost Sons*, DAILY TELEGRAPH (Australia), July 22, 2006, Features, Inside Edition, at 64.

98. See *Fox v. FCC*, 489 F.3d at 459-60; see also Sheryl Gay Stolberg, *Salty Language as Cheney and Senator Clash*, N.Y. TIMES, June 25, 2004, at A18.



reviewed Bono's incident at the Golden Globes, it found that "[t]he word 'fucking' may be crude and offensive, but, in the context presented here, did not describe sexual or excretory organs or activities."<sup>99</sup> Moreover, the Enforcement Bureau made clear that when offensive language is used as an adjective to emphasize an exclamation (as Bono did) or it is used as an insult (as President Bush and Vice President Cheney did), then it falls beyond the scope of the indecency regime.<sup>100</sup>

Following the 2003 Golden Globes, the Parents Television Council filed numerous complaints with the FCC, and as a result, in March 2004, the FCC flipped, announcing the fleeting expletives policy that essentially held any utterance of "fuck" indecent.<sup>101</sup> The Golden Globes decisions demonstrate a troubling breadth of discretion and obscurity in the FCC's determinations that speech is patently offensive by contemporary community standards. The FCC's indecency analysis stresses the critical importance of the "full context,"<sup>102</sup> and acknowledges the use of "fuck" as an intensifier, but nevertheless concludes that, in any context, "fuck" carries a sexual connotation bringing it within the scope of the indecency regime.<sup>103</sup>

The court of appeals made quick work of the FCC's floodgates and contextual arguments, instead moving forward to the conclusion that the lack of evidence supporting the mercurial fleeting expletives policy renders it arbitrary and capricious. The FCC's floodgates argument was determined to be "divorced from reality" because the FCC itself recognized in the *Order on Remand* that fleeting expletives were rare even before *Golden Globes*.<sup>104</sup> Likewise, the FCC's argument that requiring repeated use of expletives undercuts its contextual approach is dismissed for their own paradoxical position that in a contextual analysis "fuck" and "shit" are per se indecent.<sup>105</sup> In sum, the Second Circuit found these rationales for the amplification of the indecency policy an unreasonable departure from the prior regime.<sup>106</sup> Moreover, the court found the FCC's policy "devoid of any evidence that suggests a fleeting expletive is harmful," which it suggested is particularly important today because there are so many more media

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99. *Golden Globes Bureau Decision*, *supra* note 94, at para. 5.

100. *See id.*

101. *See Golden Globes Order*, *supra* note 13.

102. *Id.* at para. 7.

103. *See id.* at para. 8.

104. *Fox TV Stations, Inc. v. FCC*, 489 F.3d 444, 460 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008); *see also Order on Remand*, *supra* note 3, at para. 29 (noting that television networks' own policies do not allow any expletives at any time of day, and which supports why even fleeting expletives are a rare occurrence).

105. *Fox v. FCC*, 489 F.3d at 460.

106. *Id.* at 461.

outlets that may expose children to expletives than when the FCC began sanctioning indecent speech.<sup>107</sup> The unreasonable rationales combined with the lack of evidence led the court to decide that the FCC failed to meet the reasoned basis required by *State Farm*.<sup>108</sup>

C. *The FCC's Appeal Hinges on Reasonableness, Not a Hard Look*

In the Solicitor General's Petition and Brief for the Petitioners, the court of appeals is rebutted with heavy reliance on *Pacifica*, and only sparse reference to the APA and *State Farm*.<sup>109</sup> The Petition presented colorful support for the first blow theory, suggesting that it does not require the FCC to treat any first blow as a knockout punch in order to be relevant in contextual analysis.<sup>110</sup> Citing *Pacifica*, the FCC's Supreme Court Brief highlighted the Court's characterization of the first blow theory and *Pacifica*'s suggestion that context could effect the weight of the first blow.<sup>111</sup> Reference to the APA in the Petition, however, is limited to a suggestion that the Act does not require consistent prohibition in all contexts, and the absence of the same cannot be reconciled with *Pacifica*, and is not necessarily unreasonable.<sup>112</sup>

The FCC's Supreme Court Brief actually states that contextual distinctions justify the implementation of the fleeting expletives policy, but the FCC did not offer any evidence of offensiveness or harm.<sup>113</sup> Citing Judge Leval's dissent as support, the FCC's Supreme Court Brief urges that the FCC's general observation that expletives cannot be divorced from their sexual or excretory meaning is not irrational.<sup>114</sup> Rather than provide any evidentiary support for that proposition, the Petition cites a D.C. Circuit case and a Supreme Court case, which suggest that such evidence is not required to establish indecency or obscenity.<sup>115</sup> In this context, the Petition frames the *State Farm* issue as a change in policy to better implement § 1464, rather than an unreasonable departure from the prior indecency policy.<sup>116</sup>

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107. *Id.*

108. *Id.*

109. See Petition for Writ of Certiorari, *supra* note 21; see also Brief for the Petitioners, *supra* note 24, at 21-27.

110. Petition for Writ of Certiorari, *supra* note 21, at 16.

111. See Brief for the Petitioners, *supra* note 24, at 32.

112. Petition for Writ of Certiorari, *supra* note 21, at 19.

113. Brief for the Petitioners, *supra* note 24, at 28-29.

114. See *id.* at 34-35.

115. *Id.* at 39-41 (citing *Action for Children's Television v. FCC*, 58 F.3d 654 (1995), *cert. denied*, 516 U.S. 1043 (1996); *Ginsberg v. New York*, 390 U.S. 629, 641 (1968)).

116. See Petition for Writ of Certiorari, *supra* note 21.

Unfortunately, the FCC failed to consider the heart of the arguments that cut against its position. While *State Farm* review for arbitrary and capricious action is narrow, dismissing the relevance of evidentiary support in the agency's decisions loses sight of the thrust of *State Farm*, which requires a rational connection between the facts and the agency's decision.<sup>117</sup> Also, while *Pacifica* and the First Amendment are certainly relevant to the issue at hand, the extensive reliance on its arguments and holding is misplaced given that the present question concerns administrative law. In fact, the FCC's request that the Supreme Court remand the case to consider the First Amendment issue along with the APA issue<sup>118</sup> suggests awareness that the FCC's APA argument is thin. The FCC gave little attention to the scope of arbitrary and capricious review, which further highlights the need for Supreme Court guidance in the convoluted indecency policy, and for evaluating arbitrary and capricious administrative decisions more generally.

## VI. CONCLUSION: THE FUTURE OF A POLICY AT RISK

After recognizing that the fleeting expletives policy represents an amplification rather than a subset of the FCC's indecency regime, it is clear that judicial review of fleeting expletives carries broad implications for the entire indecency policy. The arguments provided by the FCC in *Fox v. FCC* highlight that fact, and also demonstrate rampant discretion buttressed by general observations rather than facts. Those two considerations are troubling both as an abuse of administrative power, and consequently, as murky waters that stifle speech rather than provide meaningful guidance to broadcasters. The Supreme Court's decision in *FCC v. Fox* should clarify the contours of administrative discretion in regulating indecency. Confining the FCC to the limits of administrative discretion set forth in *State Farm* will ease administration by the agency and will provide clearer notice to broadcasters.

The FCC's argument fails to recognize that the Supreme Court's arbitrary and capricious standard looks to reasons in relation to facts, and in fleeting expletives regulation—and in indecency determinations generally—facts are needed more than layers of rationales. In light of the scope of the arbitrary and capricious review for a reasoned basis for an agency's action outlined in *State Farm*, review of fleeting expletives, and the Court's treatment of the FCC's reasons and methods for indecency determinations, implicates the entire indecency regime directly or indirectly. If the Court determines that methods and reasons for finding

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117. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56 (1983).

118. Brief for the Petitioners, *supra* note 24, at 42.

fleeting expletives indecent represent a tinkering of the entire indecency regime, then the decision should cause immediate ramifications to indecency determinations generally. However, it is possible that the Court will cordon off fleeting expletives from the larger indecency policy. But, even if the Court adopts the latter approach, it should only delay a related challenge to the indecency regime—either way, *Fox v. FCC* has exposed the FCC's reasons and methods in enforcing § 1464 as thin in concrete bases and thick with meandering discretion.

Of course, invalidating any portion of the indecency regime would present a significant development—after all, this is the first case the Court has heard on broadcast indecency since *Pacifica*.<sup>119</sup> That creates a predicament considering Chief Justice John Roberts's approach to creating consensus with narrow decisions on hot issues.<sup>120</sup> Deciding on the lack of factual basis for indecency determinations should strike that balance by providing clearer guidance to broadcasters without gutting the FCC's ability to regulate indecent speech. Incorporating a factual component into the determination of contemporary community standards should provide clarity to what constitutes indecent speech under § 1464, and should also allow the policy to comport better with contemporary society. As noted above, the determinations of speech as patently offensive by contemporary community standards are reduced to general observations or nebulous interactions between the FCC and different sectors of society. There are a variety of ways for the FCC to cull facts regarding what is considered indecent.<sup>121</sup>

The nature of arbitrary and capricious review under *State Farm* and *Baltimore Gas* may result in a more or less deferential view, which should probably correlate to the rigor of the corrective measures directed to the FCC. In other words, if the Court upholds the Second Circuit by applying a hard look at the FCC's actions using the factors enumerated by the Court in *State Farm*,<sup>122</sup> then, that less deferential approach suggests more rigorous adjustment in the FCC's policy. On the other hand, if the Court finds the policy arbitrary and capricious under the more deferential approach from *Baltimore Gas* discussed above, then perhaps a less rigorous fact finding

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119. Robert Barnes and Frank Ahrens, *Supreme Court to Review FCC Ban on Profanity*, WASH. POST, Mar. 18, 2008, at A01.

120. Hope Yen, *Roberts Seeks Greater Consensus on Court*, WASH. POST, May 21, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/21/AR2006052100678.html>.

121. See, e.g., TIMOTHY JAY, CURSING IN AMERICA: A PSYCHOLINGUISTIC STUDY OF DIRTY LANGUAGE IN THE COURTS, IN THE MOVIES, IN THE SCHOOLYARDS AND ON THE STREETS 141-47 (1992) (discussing studies where a sample set of people were asked to rate the offensiveness of scores of words).

122. *State Farm*, 463 U.S. at 42-43.

would be required in indecency analysis. Whichever method the Court applies, this case presents an opportunity for the Court to cut through the Gordian knot of indecency rhetoric, which has led to the present swell of cases and abuse of discretion elucidated by *Fox v. FCC*'s treatment of fleeting expletives.

