FCC v. *Fox Television Stations*: Supreme Court Upholds an Agency's Right to Change Course

On April 28, 2009, the U.S. Supreme Court issued a 5-4 decision in *FCC* v. *Fox Television Stations, Inc.*, holding that the Federal Communications Commission's (FCC) policy shift banning "fleeting" expletives in broadcasts was not arbitrary or capricious, and was thus acceptable under the Administrative Procedure Act ("APA").[1] In doing so, the Supreme Court declined to address the underlying First Amendment issue, citing the absence of a lower court opinion. The case was remanded to the Second Circuit for further proceedings.[2]

I. FACTS AND PROCEDURAL HISTORY

Congress authorized the FCC to impose sanctions for the broadcast of "any obscene, indecent, or profane language by means of radio communications" between the hours of 6:00 a.m. and 10:00 p.m.[3] This was later extended to television broadcasts. Section 326 of the Communications Act of 1934, as amended, limits this authority by prohibiting the FCC from engaging in censorship.[4]

Thirty years ago, in *FCC* v. *Pacifica Foundation, Inc.*, the Supreme Court upheld the FCC's right to impose limited civil sanctions against a radio broadcast of patently offensive words.[5] The case stemmed from a daytime radio broadcast of George Carlin's monologue, "Filthy Words." The FCC sanctioned Pacifica Radio for violating FCC regulations which prohibited broadcasting "indecent" material. The Court in *Pacifica* accepted as compelling the government's interests in: (i) shielding children from patently offensive material; and (ii) ensuring that unwanted speech does not enter one's home. Focusing on the repetition of the expletives, the Court stated that the FCC had the authority to prohibit such broadcasts during hours when children were likely to be among the audience, and gave the FCC leeway to determine what constituted indecency.[6]

Following *Pacifica*, the FCC exercised some restraint in applying the Court's ruling and refrained from sanctioning isolated, fleeting expletives. The FCC recently shifted this practice, leading to the dispute underlying *Fox Television*. In 2003, during NBC's Golden Globe Awards broadcast, the musician Bono used an expletive in his acceptance speech. The FCC's Enforcement Bureau refused to impose sanctions, finding that because the expletive was "fleeting and isolated," the broadcast did not fall within the scope of the FCC's indecency definition.[7] The full Commission later reversed the Bureau's decision and overruled several earlier decisions

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1 *FCC* v. *Fox Television Stations, Inc*., No. 07-582, 2009 WL 1118715 (U.S. Apr. 28, 2009), referred to in this memorandum as "Fox Television."

2 In light of its decision in Fox Television, the Court vacated and remanded *FCC* v. *CBS Corp*., 08-653, a case involving Janet Jackson's infamous 2004 "wardrobe malfunction" during the Super Bowl's halftime show. *FCC* v. *CBS Corp.*, No. 08-653, 2009 WL 1174862 (U.S. May 4, 2009). Citing the Second Circuit's decision in *Fox Television Stations, Inc.* v. *FCC*, 489 F.3d 444, 451 (2d Cir. 2007), and the cases cited therein, the Third Circuit had overturned the fine imposed on CBS and rejected the FCC's change in policy regarding "fleeting images" as arbitrary and capricious. *CBS Corp.* v. *FCC*, 535 F.3d 167, 181-83 (3d Cir. 2008).

3 18 U.S.C. § 1464.

4 47 U.S.C. § 326.

5 438 U.S. 726 (1978).

6 Justice Powell, in his concurring opinion, explicitly focused on the repetition, reasoning: the language had been "repeated over and over as a sort of verbal shock treatment." 438 U.S. 726 at 757.

7 *See Fox Television Stations Inc.* v. *FCC*, 489 F.3d 444, 451 (2d Cir. 2007).

which had also found the isolated expletive not to be indecent. Recognizing that this was a reversal of its previous policy, the FCC did not sanction the networks for the broadcasts in question.

The broadcast networks filed a petition to review the FCC's order. Rejecting the FCC's determination, the Court of Appeals for the Second Circuit ruled that a change in policy requires a "reasoned analysis for departing from prior precedent."[8] The Second Circuit ruled, in a 2-1 decision, that the FCC's new indecency findings were "arbitrary and capricious," and ordered the FCC to provide a better justification for its new policy.[9] Relying on *Motor Vehicle Manufacturers Association of United States, Inc*. v. *State Farm Mutual Automobile Insurance Co*.,[10] the Second Circuit stated: "Although there is not a 'heightened standard of scrutiny . . . the agency must explain why the original reasons for adopting the rule or policy are no longer dispositive.'"[11] The Court of Appeals did not rule on the broadcasters' First Amendment challenge. The appellate court commented, however, that it doubted the FCC's policy could survive constitutional scrutiny.

II. SUPREME COURT'S DECISION

A. Opinion of the Court

Justice Scalia wrote the opinion of the Court, joined in relevant parts by Justices Roberts, Thomas, Alito and Kennedy. The Court, relying on its decision in *State Farm*, found no distinction between an "initial agency action and subsequent agency action undoing or revising that action."[12] Concluding that the FCC had provided a reasoned explanation for the new policy, the Court held that the change was neither arbitrary nor capricious.[13]

The Court explained that the Commission had acknowledged the change in its policy, and had provided rational reasons for expanding its enforcement. First, the agency explained that not sanctioning single occurrences would likely lead to more frequent incidents.[14] The Court further reasoned that since the agency has generally declined to create *per se* safe harbors in its broadcasting rules, such a practice with regard to isolated expletives was inconsistent with the general practice; the new policy eliminated any *per se* safe harbors for isolated expletives.[15] The agency's enforcement policy shift was further supported by technological advances that make it easier to delete offending words. Moreover, by not imposing sanctions or forfeiture on the networks for the broadcasts in question, the agency ensured that the shift was not arbitrarily applied without providing the parties adequate notice.[16]

The Court rejected the Second Circuit's analysis on a number of grounds. First, the Court opined that while *State Farm* advocates agency action based on empirical data, there are times, such as the present case,

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8 *Id.* at 456.

9 The Administrative Procedure Act prohibits an agency from taking action that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. §706(2)(A).

10 463 U.S. 29 (1983) referred to in the memorandum as "*State Farm.*"

11 *See Fox Television Stations*, 489 F.3d at 456 (internal citation omitted).

12 *Fox Television,* WL 1118715, at *9.

13 *Id*. at *10.

14 *Id*.

15 *Id*. at *7.

16 *Id*. at *11.

where scientific data is "unobtainable."[17] Second, the Court applauded the agency's evaluation of broadcasts on a case-by-case basis. Third, the Court supported the agency's concerns over increasing usage as entirely rational and deserving of deference.

The Court rejected the broadcasters contention that *Pacifica* "represented the outer limits of permissible regulation," and that the discretion that the FCC asserted it retained would lead to a "standardless regime of unbridled discretion."[18]

B. Concurring Opinions

Justice Thomas wrote a concurring opinion stating his view that *Pacifica* and *Red Lion Broadcasting Co.* v. *FCC*[19] (upholding the "fairness doctrine" for broadcast stations), two cases that the FCC used to support its actions in Fox Television, were of "questionable viability." [20] Justice Thomas expressed his willingness to reconsider these decisions in the proper case. He further noted that the current practice of dividing media into different categories for purposes of constitutional scrutiny — internet, broadcast, media, print — made little sense.

Justice Kennedy wrote a separate concurrence expanding his views on when agency action that departs from a prior policy can be deemed "arbitrary and capricious." In his view, the current case did not raise the concerns addressed by the Court in *State Farm*. While the FCC's policy change was "not a model for agency explanation," Justice Kennedy agreed that its reasons were adequate here.[21]

C. Dissent

The dissent, authored by Justice Breyer, and joined by Justices Ginsburg, Souter and Stevens, reasoned that it is "arbitrary, capricious, [and] an abuse of discretion" for an agency to reverse course without adequately explaining why the change in policy is warranted, particularly when the agency relies on "factors well known to it the first time around."[22] According to the dissent, the FCC failed to clarify *why* it changed its indecency policy. When an agency intends to act inconsistently, it must explain the reasons for that change. If the agency must thoroughly explain its reasons when revoking a prior action — as articulated in Court's decision in *State Farm* — a change in policy necessarily must also be explained more thoroughly than the initial decision. In the dissent's view, it is not enough for the agency to explain "why the new policy is a good one;" rather, the agency must also explain why the *change* in policy is appropriate.[23] This requires "a more complete explanation than would prove satisfactory were change itself not an issue."[24] The dissenters also believed the FCC's reading of *Pacifica* was flawed. Furthermore, the dissent noted that the FCC failed to address the potential impact of the new policy on small, local broadcasting networks that may not be able to afford the delay technology that would enable them to "clean" the broadcast. Justices Stevens and Ginsburg also added separate dissenting opinions.

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17 *Id*.

18 *Id*. at *13.

19 395 U.S. 369 (1969).

20 *Id*. at *17 (Thomas, J. concurring).

21 *Id*. at *21 (Kennedy, J. concurring).

22 *Id*. at *26 (Breyer, J. dissenting).

23 *Id*. at *27.

24 *Id*.

III. SIGNIFICANCE OF THE DECISION

In *Fox Television*, the Court clarified the standard for reviewing an agency's change in policy. In upholding the FCC's decision, the Court rejected the principle that the burden on a federal agency to justify its policy choice is greater when the agency is altering a prior policy. It declined, however, to reach the underlying First Amendment issue that Justice Ginsburg noted casts a "long shadow" over the case.[25]

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Landis Best at 212.701.3694 lbest@cahill.com; or Jon Mark at 212.701.3100 or jmark@cahill.com.

[25] *Id*. at *25 (Ginsburg, J. dissenting).