

# Casenote

## ***FCC v. Fox: Has the Supreme Court Sanctioned Political Influence in Agency Decision-making?***

### I. INTRODUCTION

Can agencies radically change policy simply because of a change in the White House? The United States Supreme Court's latest decision in *FCC v. Fox Television Stations, Inc.*<sup>1</sup> suggests that agencies can do exactly that. The Federal Communications Commission (FCC), an independent United States agency, regulates the content of U.S. broadcasting stations.<sup>2</sup> In 2002 and 2003, the FCC and Fox clashed when Fox aired two separate Billboard Music Awards (BMA) shows during which BMA guests uttered isolated expletives.<sup>3</sup> Prior to these incidents, the FCC had never issued an indecency violation to a

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1. 129 S. Ct. 1800 (2009).

2. *See id.* at 1806. *See generally* Josh Martin, Comment, *The Fairness Doctrine: The BCS of American Politics, Annual Eleventh Circuit Survey*, 60 MERCER L. REV. 1393 (2009) (discussing the FCC's use of the fairness doctrine).

3. *Fox*, 129 S. Ct. at 1808.

broadcaster for airing only isolated expletives.<sup>4</sup> Nevertheless, the FCC issued a disciplinary order to Fox, finding such a violation.<sup>5</sup> Fox petitioned for review by the United States Court of Appeals for the Second Circuit, which vacated and remanded the order because the FCC did not provide the fact-based “reasoned explanation” necessary for the policy change to meet the applicable arbitrary and capricious standard of review.<sup>6</sup> After granting a writ of certiorari, the Supreme Court refined the reasoned-explanation requirement, holding that the FCC must only provide a subjective, reasoned explanation for its decision to meet the arbitrary and capricious standard of review.<sup>7</sup> Pursuant to this refined reasoned-explanation test, the Court reversed the Second Circuit’s decision.<sup>8</sup> In doing so, the Supreme Court relaxed the requirement for when an agency changes policy, allowing increased executive influence in agency policy choices. Consequently, an agency’s overall objective of serving the public interest may be hindered due to increased political influence in agency decision-making.

## II. LEGAL BACKGROUND

### A. *Judicial Authority to Review Agency Actions: The Administrative Procedure Act*

Congress passed the Administrative Procedure Act (APA)<sup>9</sup> in 1946, granting courts the authority to review agency action.<sup>10</sup> Specifically, the APA grants courts authority to “compel agency action”<sup>11</sup> when agencies fail to act and to “hold unlawful and set aside agency action”<sup>12</sup> when the reviewing court finds the agency’s action to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>13</sup> However, the APA does not expressly address how courts

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4. See *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 F.C.C.R. 4975, 4980 (2004) (opinion and order).

5. *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 F.C.C.R. 2664, 2691, 2694 (2006) (notices of apparent liability).

6. See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 446–47, 462 (2d Cir. 2007).

7. See *Fox*, 129 S. Ct. at 1810–11.

8. *Id.* at 1812, 1819.

9. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2006)). The APA was later recodified by Pub. L. No. 89-554, 80 Stat. 378 (1966).

10. 5 U.S.C. § 704 (2006).

11. 5 U.S.C. § 706(1) (2006).

12. *Id.* § 706(2).

13. *Id.* § 706(2)(A).

should review agency actions that reverse prior policy choices.<sup>14</sup> Hence, in 1983 the Supreme Court addressed this issue.<sup>15</sup>

*B. Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*

The Supreme Court faced the issue of the appropriate judicial standard of review for an agency's change in policy in the 1983 decision of *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*<sup>16</sup> In that case, the Court reviewed the National Highway Traffic Safety Administration's (NHTSA) radical policy change for passive restraint systems.<sup>17</sup> In 1977, during the Carter Administration, Secretary of Transportation Brock Adams implemented a regulation requiring automobile manufacturers to satisfy a passive restraint requirement by installing either automatic seatbelts or airbags into cars, and to complete the process by 1984. However, in 1981, shortly after President Reagan's inauguration, Secretary of Transportation Andrew Lewis rescinded the passive restraint requirement. Consequently, State Farm filed a petition requesting the United States Court of Appeals for the District of Columbia Circuit to review NHTSA's decision to rescind the passive restraint requirement. The court of appeals rendered a judgment for State Farm, holding that the NHTSA's change in policy was an arbitrary and capricious decision.<sup>18</sup>

In response, the Motor Vehicle Manufacturers Association petitioned for and was granted certiorari from the Supreme Court, which applied the arbitrary and capricious standard.<sup>19</sup> In doing so, the Court held that to meet the arbitrary and capricious standard, the NHTSA had to provide a "reasoned analysis" for its change in policy.<sup>20</sup> The Court defined *reasoned analysis* as requiring the agency to show "a 'rational connection between the facts found and the choice made.'"<sup>21</sup> In reviewing the NHTSA's reasons for changing its policy, the Court held that the NHTSA had not provided a reasoned analysis to meet the

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14. See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

15. See *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40–41 (1983).

16. See 463 U.S. 29, 40–41 (1983).

17. See *id.* at 34.

18. *Id.* at 37–39.

19. *Id.* at 40–41.

20. *Id.* at 42.

21. *Id.* at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

arbitrary and capricious standard of review, largely because the NHTSA failed to address its own prior factual findings.<sup>22</sup>

Pursuant to the holding in *State Farm*, when an agency reverses a policy choice, the agency has to provide a reasoned analysis to survive arbitrary and capricious review.<sup>23</sup> The Court's decision in *State Farm* was also significant for another reason: the legal community largely understood *State Farm* as holding that agencies should derive their decisions based on their expertise and factual findings and *not* on political reasons.<sup>24</sup>

### C. *The FCC's Regulation of Broadcasting Stations*

Against this backdrop, the circumstances for *FCC v. Fox Television Stations, Inc.*<sup>25</sup> began to emerge. Prior to 1960, the FCC's authority to regulate broadcasting stations was limited because the Communications Act of 1934<sup>26</sup> expressly forbade the FCC from engaging in censorship.<sup>27</sup> In 1948 Congress enacted 18 U.S.C. § 1464,<sup>28</sup> popularly known as the "indecent ban."<sup>29</sup> Entitled *Broadcasting Obscene Language*, the ban states in part: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title . . . ."<sup>30</sup> However, the FCC was not authorized to penalize broadcasters under the indecency ban until Congress passed the Communications Act Amendments of 1960.<sup>31</sup> Now, "[a]ny person who is determined by the Commission . . . to have . . . violated any provision of section . . . 1464 of title 18 . . . shall be liable to the United States for a forfeiture penalty."<sup>32</sup> With this amendment, Congress delegated the FCC authority to sanction broadcasting stations for airing obscene, indecent, or profane language on the radio or TV.<sup>33</sup>

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22. *See id.* at 46–48.

23. *See id.* at 43.

24. *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 6 (2009).

25. 129 S. Ct. 1800 (2009).

26. 47 U.S.C. §§ 151–614 (2006).

27. *Id.* § 326.

28. Pub. L. No. 80-772, § 1464, 62 Stat. 683, 769 (1948) (codified as amended at 18 U.S.C. § 1464 (2006)).

29. *See Fox*, 129 S. Ct. at 1806.

30. 18 U.S.C. § 1464.

31. *See* Pub. L. No. 86-752, § 7(a), 74 Stat. 889, 894 (codified as amended at 47 U.S.C. § 503).

32. 47 U.S.C. § 503(b)(1)(D).

33. *See id.*

In 1975 the FCC first exercised its authority granted in the Communications Act Amendments to sanction broadcasters for airing indecent speech.<sup>34</sup> The FCC's order in *In re Citizen's Complaint Against Pacific Foundation Station WBAI (FM), New York, N.Y. (Pacifica Order)*<sup>35</sup> arose from the broadcaster, Pacifica Foundation, airing George Carlin's "Filthy Words" monologue on a radio broadcast.<sup>36</sup> In "Filthy Words," Carlin intentionally repeated seven expletives as part of a satirical comedy routine.<sup>37</sup> This seminal *Pacifica Order* interpreted "indecent" content as that which:

is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.<sup>38</sup>

Using this definition, the FCC found that Pacifica's broadcast of "Filthy Words" was actionably indecent.<sup>39</sup> The FCC had not included repetition in its indecency definition<sup>40</sup> but noted that the monologue's use of "language with the words repeated over and over" supported its indecency finding.<sup>41</sup> Pacifica appealed the FCC's order to the United States Court of Appeals for the District of Columbia Circuit, and the court of appeals overturned the order.<sup>42</sup>

After the court of appeals reversed the FCC's indecency ruling, the FCC petitioned for certiorari from the Supreme Court.<sup>43</sup> In reviewing the FCC's interpretation of *indecent*, as the term appeared in the statutory indecency ban, the Court upheld the FCC's definition.<sup>44</sup> However, in upholding the FCC's definition, the Court refined the definition to require the *repetitive* use of words.<sup>45</sup> While repetition was a factor that the FCC had considered in the *Pacifica Order*,<sup>46</sup> the FCC

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34. See *In re Citizen's Complaint Against Pac. Found. Station WBAI (FM), New York, N.Y. (Pacifica Order)*, 56 F.C.C.2d 94, 99 (1975) (declaratory order).

35. 56 F.C.C.2d 94 (1975) (declaratory order).

36. *Id.* at 95.

37. See *id.* at 100.

38. *Id.* at 98.

39. *Id.* at 99.

40. See *id.* at 98.

41. *Id.* at 99.

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

43. *FCC v. Pacifica Found.*, 438 U.S. 726, 733–34 (1978).

44. *Id.* at 739, 741.

45. *Id.* at 739.

46. See 56 F.C.C.2d at 99.

had not included repetition in its indecency definition.<sup>47</sup> Yet the Supreme Court found the repetition factor important enough to be included in the indecency definition partly because repetition indicates that the speaker deliberately intended the language to be offensive.<sup>48</sup> In his concurring opinion, Justice Powell clarified that the Court's holding did "not speak to cases involving the *isolated use* of a potentially offensive word."<sup>49</sup> Thus, the Court refined the definition of *indecency* in the indecency ban statute to require the repetition of expletives.<sup>50</sup>

In 2001, after receiving numerous requests from broadcasters for clarification of their restrictions under the indecency ban, the FCC issued *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broadcast Indecency (Industry Guidance Statement)*.<sup>51</sup> This statement included "whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities"<sup>52</sup> as one of three principle factors that the FCC balances in determining whether language is patently offensive and, therefore, indecent.<sup>53</sup> Expanding on the repetition factor, the FCC identified numerous prior FCC decisions in which "[r]epetition of and persistent focus on sexual or excretory material [had] *consistently* [been] factors that exacerbate[d] the potential offensiveness of broadcasts."<sup>54</sup> Further, the FCC stated that "[i]n contrast, where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency."<sup>55</sup> The FCC also provided past instances when this fleeting nature weighed against a finding of indecency. For example, in *L.M. Communications of South Carolina, Inc.*,<sup>56</sup> the FCC found that the language "[t]he hell I did, I drove mother-fucker" was not indecent because "the broadcast contained only a fleeting and isolated utterance

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47. See *id.* at 98.

48. See *Pacifica Found.*, 438 U.S. at 757 (Powell, J., concurring).

49. *Id.* at 760–61 (emphasis added).

50. See *In re Pacifica Foundation, Inc.*, 2 F.C.C.R. 2698, 2699 (1987) (opinion and order) ("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.").

51. 16 F.C.C.R. 7999 (2001) (policy statement).

52. *Id.* at 8003.

53. *Id.*

54. *Id.* at 8008 (emphasis added).

55. *Id.*

56. 7 F.C.C.R. 1595 (1992) (letter).

which, within the context of live and spontaneous programming, [did] not warrant a Commission sanction.”<sup>57</sup>

The *Industry Guidance Statement* also included some examples of when fleeting expletives were actionably indecent because their patent offensiveness outweighed their fleeting nature.<sup>58</sup> These examples included “broadcasting references to sexual activities with children and airing material that, although fleeting, is graphic or explicit.”<sup>59</sup> Thus, in the *Industry Guidance Statement*, the FCC proclaimed that the non-repetitive use of language, absent an overwhelming, patently offensive quality, weighs heavily *against* an indecency finding under the indecency ban.<sup>60</sup>

#### D. Change in Policy: The Golden Globes Order

While clear and helpful in theory, the FCC’s indecency clarification was not in effect for long. In 2004 the FCC issued an order that drastically changed FCC precedent and served as the basis for the dispute in *Fox*.<sup>61</sup> In *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program (Golden Globes Order)*,<sup>62</sup> the FCC brought a disciplinary action against various broadcasters that aired a segment of the Golden Globe Awards show during which U2 lead singer, Bono, exclaimed “either ‘this is really, really fucking brilliant,’ or ‘this is fucking great.’”<sup>63</sup>

In the *Golden Globes Order*, the FCC found for the first time that a non-repetitive expletive was indecent.<sup>64</sup> The FCC began its order by setting forth the indecency definition “as language 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>65</sup> While the FCC mentioned that repetition

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57. *Industry Guidance Statement*, 16 F.C.C.R. at 8008 (quoting *L.M. Commc’ns of S.C., Inc.*, 7 F.C.C.R. at 1595); see also *In re Applications of Lincoln Dellar for Renewal of the Licenses of Stations KPRL(AM) & KDDB(FM) Paso Robles, Cal.*, 8 F.C.C.R. 2582, 2585 (1993) (opinion and order) (deciding that “the news announcer’s use of a single expletive [did not] . . . warrant further Commission consideration in light of the isolated and accidental nature of the broadcast”).

58. See *Industry Guidance Statement*, 16 F.C.C.R. at 8009.

59. *Id.*

60. See *id.* at 8008–09.

61. *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program (Golden Globes Order)*, 19 F.C.C.R. 4975 (2004) (opinion and order).

62. 19 F.C.C.R. 4975 (2004) (opinion and order).

63. *Id.* at 4975–76, 4983 n.4.

64. *Id.* at 4980.

65. *Id.* at 4977.

was a factor considered in determining whether material was indecent, the FCC failed to thoroughly analyze this factor.<sup>66</sup> Rather, ignoring the balancing test set out in the *Industry Guidance Statement*, the FCC explained that it could find indecency from non-repetitive words that are patently offensive.<sup>67</sup> The FCC applied the new standard and found Bono's use of the "F-Word" to be patently offensive,<sup>68</sup> partly because the word was inherently sexual in nature.<sup>69</sup> Thus, the FCC found Bono's language indecent in accordance with the indecency ban despite its fleeting use.<sup>70</sup>

The FCC noted that it had changed policy: "While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law."<sup>71</sup> Finally, the FCC concluded by stating that broadcasters were on "clear notice" that fleeting expletives could be actionably indecent.<sup>72</sup>

### III. FACTUAL BACKGROUND FOR *FCC v. FOX*

Unfortunately, Fox did not receive the notice because the "clear notice" the FCC intended in the 2004 *Golden Globes Order* was issued after Fox aired the broadcasts at issue in *FCC v. Fox Television Stations, Inc.*<sup>73</sup> The case arose out of Fox's airing of two BMA live broadcasts. The first broadcast occurred in 2002 when famed musician, Cher, upon winning the Artist Achievement Award, proclaimed, "I've also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck 'em." In like fashion and only one year later, stars of MTV's reality show *The Simple Life*, Paris Hilton and Nicole Richie, presented an award at the 2003 BMA. Hilton began the speech by telling Nicole to "watch the bad language." In response, Richie said, "Why do they even call it *The Simple Life*? Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."<sup>74</sup>

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66. See *id.* at 4978–80.

67. *Id.* at 4980.

68. *Id.* at 4982.

69. See *id.* at 4978.

70. See *id.* at 4982.

71. *Id.* at 4980.

72. *Id.* at 4982.

73. See 129 S. Ct. 1800 (2009); *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program (Golden Globes Order)*, 19 F.C.C.R. 4975 (2004) (opinion and order).

74. *Fox*, 129 S. Ct. at 1808 (internal quotation marks omitted).

Because of these two incidents, the FCC received complaints from the public concerning Fox's airing of the 2002 and 2003 BMA broadcasts. In 2006, after reviewing these complaints, the FCC issued an order to Fox, informing the broadcaster that its airing of both Cher's expletive in 2002 and Nicole Richie's expletives in 2003 was actionably indecent.<sup>75</sup> In that order, entitled *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 & March 8, 2005 (Initial Order)*,<sup>76</sup> the FCC did not sanction Fox because Fox had insufficient notice that isolated expletives could be indecent.<sup>77</sup> In response, several broadcasters sent complaints to the FCC because they were not afforded an opportunity to be heard before the FCC made its decision.<sup>78</sup>

Subsequent to the FCC's review of the broadcasters' complaints, the FCC vacated the *Initial Order* in its entirety and replaced it with a new order, *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 & March 8, 2005 (Remand Order)*.<sup>79</sup> In the *Remand Order*, the FCC analyzed Cher's and Richie's vulgar language at the respective BMA shows.<sup>80</sup> In doing so, the FCC used the same indecency definition that it had used in the *Golden Globes Order*,<sup>81</sup> the order in which the FCC found Bono's isolated expletive indecent.<sup>82</sup> Thus, the FCC had to determine whether Cher's and Richie's isolated expletives were "material that, in context, depict[] or describe[] sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium."<sup>83</sup> In addressing the nonrepetitive nature of both the statements, the FCC referenced the *Golden Globes Order* as precedent, explaining that the nonrepetitive use of language that is patently offensive may be indecent.<sup>84</sup> Applying this standard, the FCC found that both Cher and Richie's language was patently offensive and, thus, indecent.<sup>85</sup>

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75. *Id.*

76. 21 F.C.C.R. 2664 (2006) (notices of apparent liability).

77. *Id.* at 2692, 2695. Despite the "clear notice" in the *Golden Globes Order*, 19 F.C.C.R. at 4982, the FCC decided that the notice was insufficient to sanction Fox. *Initial Order*, 21 F.C.C.R. at 2692, 2695.

78. *In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005 (Remand Order)*, 21 F.C.C.R. 13299, 13302 (2006) (order).

79. 21 F.C.C.R. 13299 (2006) (order).

80. *See id.* at 13299–300.

81. *Compare id.* at 13303 (defining indecency), with *Golden Globes Order*, 19 F.C.C.R. at 4977 (same).

82. *See supra* text accompanying notes 61–69.

83. *Remand Order*, 21 F.C.C.R. at 13303.

84. *Id.* at 13308, 13325.

85. *Id.*

Significantly, the *Remand Order* changed yet another aspect of the FCC's indecency policy. Prior to the *Remand Order*, the FCC distinguished between expletives that were "descriptions or depictions of sexual or excretory functions" and other expletives.<sup>86</sup> Isolated expletives that described sexual or excretory functions were generally considered patently offensive, weighing toward an indecency finding.<sup>87</sup> In contrast, other types of expletives were never considered to be patently offensive, so the FCC never found the isolated use of these plain expletives to be indecent.<sup>88</sup> Noting that this "strict dichotomy" was artificial and made no sense because "an expletive's power to offend derives from its sexual or excretory meaning,"<sup>89</sup> the FCC demolished this distinction with respect to the "F-Word" and the "S-Word."<sup>90</sup> Because the FCC had previously held that a word's sexual or excretory depictions weighed heavily toward a finding of patent offensiveness,<sup>91</sup> the FCC defining the "F-Word" and "S-Word" as *always* depictions of sexual or excretory functions meant that these words *always* weighed toward finding patent offensiveness.<sup>92</sup> In essence, the FCC had completely reversed course by directing that the majority of isolated usages of these words were actionably indecent.<sup>93</sup>

After the *Remand Order*, Fox petitioned for and received review of the FCC's decision from the United States Court of Appeals for the Second Circuit.<sup>94</sup> Relying on the Supreme Court's decision in *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*,<sup>95</sup> the court of appeals required the FCC to provide a fact-based, reasoned explanation for the change in policy to meet the arbitrary and capricious standard.<sup>96</sup> Specifically, the court of appeals held that agencies must clarify "why the original reasons for adopting the [displaced] rule or policy are no longer dispositive" and "why the new rule effectuates the statute as well as or better than the old rule."<sup>97</sup> Under these requirements, the court of appeals held that

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86. *Id.* at 13308 (internal quotation marks omitted).

87. *Id.*

88. *Id.*

89. *Id.* (internal quotation marks omitted).

90. *See id.*

91. *See Golden Globes Order*, 19 F.C.C.R. at 4978.

92. *Remand Order*, 21 F.C.C.R. at 13308.

93. *See id.*

94. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 446 (2d Cir. 2007).

95. 463 U.S. 29 (1983).

96. *See Fox*, 489 F.3d at 456–57.

97. *Id.* (emphasis and internal quotation marks omitted) (quoting *N.Y. Council, Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir. 1985)).

the FCC failed to provide a reasoned explanation to justify changing policy from consistently viewing isolated fleeting expletives as outside the indecency scope to finding such isolated usages indecent.<sup>98</sup> Thus, the FCC's change was found to be arbitrary and capricious.<sup>99</sup>

Subsequently, the Supreme Court granted certiorari to decide the appropriate meaning of arbitrary and capricious when an agency changes policy. Specifically, the Court had to determine whether the FCC properly justified its policy change to hold isolated expletives indecent.<sup>100</sup>

#### IV. COURT'S REASONING

##### A. *The Majority*

The majority opinion, written by Justice Scalia and joined by Justices Roberts, Kennedy, Thomas, and Alito, held that the FCC was justified in changing its policy.<sup>101</sup> First, the majority examined whether the Second Circuit properly articulated an agency's requirement to meet the arbitrary and capricious standard when an agency changes course.<sup>102</sup> The Court held that the Second Circuit wrongly heightened this requirement, finding no basis for courts to utilize a more searching requirement when an agency changes policy than when an agency initially acts.<sup>103</sup> The Court clarified that the APA "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action."<sup>104</sup> The Court also examined the Second Circuit's interpretation of *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*,<sup>105</sup> the primary Supreme Court decision that the Second Circuit determined required a heightened requirement for when an agency changes course.<sup>106</sup>

In reviewing the lower court's interpretation of *State Farm*, the Court concluded that the court of appeals wrongly interpreted the language in *State Farm* that the standard invoked when an agency changes course is "a reasoned analysis for the [agency's] change beyond that which may

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98. *Id.* at 462.

99. *Id.* at 447.

100. *See Fox*, 129 S. Ct. at 1805.

101. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1812 (2009).

102. *Id.* at 1810.

103. *Id.*

104. *Id.* at 1811.

105. 463 U.S. 29 (1983).

106. *See Fox*, 129 S. Ct. at 1810–11.

be required when an agency *does not act* in the first instance.”<sup>107</sup> The court of appeals interpreted that language to mean that the agency’s burden should be greater than that required to meet the arbitrary and capricious standard when the agency initially acts.<sup>108</sup> The Court noted that compelling agency action because of an agency’s failure to act is not as high of a standard as “hold[ing] unlawful and set[ting] aside agency action, findings, and conclusions found to be . . . arbitrary [or] capricious.”<sup>109</sup> Thus, the Court in *State Farm* was, in actuality, pronouncing that an agency’s burden for explaining changes in course to meet the arbitrary and capricious standard was the same as that for initial agency action.<sup>110</sup> Finally, the Court pronounced that an agency’s requirement to explain a change in course was no stricter than the requirement for explaining initial decisions.<sup>111</sup>

Next, the majority explained that for an agency to meet the arbitrary and capricious standard when an agency changes policy, the agency must only provide a “reasoned explanation” for its action.<sup>112</sup> This reasoned explanation requires the agency to display awareness that it is changing its position and “show that there are good reasons for the new policy.”<sup>113</sup> However, the agency “need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one.”<sup>114</sup> Rather, “it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.”<sup>115</sup> Essentially, the court had changed the requirement for when an agency changes course from an objective, fact-based explanation to a subjective, less stringent showing.

The Court continued, explaining that this standard does not mean that an agency must “always provide a more detailed justification than what would suffice for a new policy created on a blank slate.”<sup>116</sup> However, sometimes the agency must provide a more detailed justification, for example, if “its new policy rests upon factual findings that contradict those which underlay its prior policy,” or if the agency’s “prior policy has

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107. *Id.* at 1810 (quoting *State Farm*, 463 U.S. at 42).

108. *Id.* at 1810–11.

109. *Id.* at 1811 (fourth alteration in original) (quoting 5 U.S.C. § 706(2)(A) (2006)).

110. *Id.* at 1810–11.

111. *Id.* at 1811.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

engendered serious reliance interests that must be taken into account.<sup>117</sup> Thus, a detailed justification would only be required when the agency acted in a way that disregarded facts or circumstances that were the basis for the prior policy.<sup>118</sup>

Finally, applying the new requirement to the indecency findings at issue, the majority held that the FCC provided a sufficient reasonable explanation for its change in policy.<sup>119</sup> Specifically, the majority held that the FCC provided sufficient awareness of its change in policy, explaining that “[t]here is no doubt that the Commission knew it was making a change. That is why it declined to assess penalties . . . .”<sup>120</sup> Further, the majority held that the FCC’s decision to no longer distinguish between literal and nonliteral meanings of offensive expletives and instead to find all uses of certain offensive words indecent was “entirely rational.”<sup>121</sup> Likewise, the Court held that the FCC’s change to finding nonrepetitive uses of expletives actionably indecent was reasonable.<sup>122</sup> Thus, under the Court’s new subjective, reasonable explanation-standard, the FCC’s change in policy was acceptable regardless of whether the change was based on political reasons.

#### B. *The Concurrences*

Justices Thomas and Kennedy concurred separately.<sup>123</sup> Justice Kennedy agreed with the majority that the Second Circuit’s standard was inappropriate for judicial review of the FCC’s change in course at issue.<sup>124</sup> Justice Kennedy explained, “The question whether a change in policy requires an agency to provide a more-reasoned explanation than when the original policy was first announced is not susceptible . . . to an answer that applies in all cases.”<sup>125</sup> However, Justice Kennedy emphasized that while the standard used in the present case was appropriate, future courts need to keep in mind that “an agency’s decision to change course may be arbitrary and capricious if the agency sets a new course that reverses an earlier determination but does not

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117. *Id.*

118. *Id.*

119. *Id.* at 1812.

120. *Id.*

121. *Id.*

122. *See id.* at 1813.

123. Justice Thomas’s concurrence is excluded from this Note because the concurrence addresses First Amendment concerns irrelevant to this Note. *See id.* at 1819–22 (Thomas, J., concurring).

124. *See id.* at 1822–24 (Kennedy, J., concurring).

125. *Id.* at 1822–23.

provide a reasoned explanation for doing so.”<sup>126</sup> In other words, when applicable, an agency must articulate why “it now reject[s] the considerations that led it to adopt that initial policy.”<sup>127</sup> While Justice Kennedy conceded that the facts of the specific case were appropriate for the standard Justice Scalia presented, Justice Kennedy believed that the standard would produce an unjust result if implemented in cases in which the facts necessitated a more specific standard of review.<sup>128</sup> Further, Justice Kennedy noted that “[i]f agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances.”<sup>129</sup>

### C. *The Dissents*

There were three separate dissents by Justices Stevens, Ginsburg, and Breyer.<sup>130</sup> Justice Stevens stated that a sufficient explanation for an administration’s policy change is essential to ensure that the agency is following legislative intent rather than political will.<sup>131</sup> Justice Stevens explained that while agencies are traditionally thought to be controlled by both the executive and the legislative branches, in order to protect agencies from political partisan influence, Congress has substantially more control.<sup>132</sup> Hence, Congress, rather than the executive branch, is the body that delegates authority to agencies through statutes.<sup>133</sup> Justice Stevens explained, “[W]hen Congress grants rulemaking and adjudicative authority to an expert agency composed of commissioners selected through a bipartisan procedure and appointed for fixed terms, it substantially insulates the agency from executive control.”<sup>134</sup> However, Justice Stevens explained that agencies must follow the intent of the legislature to *remain* constitutionally legitimate and free from partisan political influence.<sup>135</sup> Thus, courts should require a substantial justification for agencies changing policy to ensure that agencies follow legislative intent.<sup>136</sup>

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126. *Id.* at 1822.

127. *Id.* (alteration in original) (quoting *Fox*, 129 S. Ct. at 1831 (Breyer, J., dissenting)).

128. *Id.* at 1824.

129. *Id.* at 1823.

130. Justice Ginsburg’s dissent is excluded from this Note because the dissent discusses First Amendment concerns irrelevant to this Note. *See id.* at 1828–29 (Ginsburg, J., dissenting).

131. *See id.* at 1825–26 (Stevens, J., dissenting).

132. *See id.* at 1825.

133. *See id.* at 1825–26.

134. *Id.* at 1825.

135. *See id.* at 1825–26.

136. *See id.* at 1826.

Justice Breyer's dissent, joined by Justices Stevens, Souter, and Ginsburg, was the only dissent joined by other Justices.<sup>137</sup> To begin, Justice Breyer emphasized the broad authority granted to independent agencies.<sup>138</sup> Independent agencies are part of the executive branch but, unlike executive agencies, are not part of the federal executive departments.<sup>139</sup> Justice Breyer explained that agency law "does not permit [independent agencies] to make policy choices for purely political reasons nor to rest them primarily upon unexplained policy preferences."<sup>140</sup> Justice Breyer continued, stating that independent agencies like the FCC are purposefully designed to be free from political oversight.<sup>141</sup> This design "helps to secure important governmental objectives, such as . . . maintaining broadcast regulation that does not bend too readily before the political winds."<sup>142</sup> However, Justice Breyer explained that the commissioners of independent agencies are not voted into office,<sup>143</sup> and this unaccountability to the people "makes it all the more important that courts review [agency] decisionmaking to assure compliance with applicable provisions of the law—including law requiring that major policy decisions be based upon articulable reasons."<sup>144</sup>

Justice Breyer believed that an agency's explanation for its change should be much more detailed than the majority had required.<sup>145</sup> However, Justice Breyer clarified that this detailed analysis would not be a heightened standard of review.<sup>146</sup> The same arbitrary and capricious standard of review would be used, but the Court would focus on the change at issue.<sup>147</sup> Justice Breyer explained his standard:

[T]he agency must explain *why* it has come to the conclusion that it should now change direction. Why does it now reject the considerations that led it to adopt that initial policy? What has changed in the world that offers justification for the change? What other good reasons are there for departing from the earlier policy?<sup>148</sup>

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137. See *id.* at 1824; *id.* at 1828 (Ginsburg, J., dissenting); *id.* at 1829 (Breyer, J., dissenting).

138. *Id.* at 1829 (Breyer, J., dissenting).

139. See BLACK'S LAW DICTIONARY 71–72 (9th ed. 2009).

140. *Fox*, 129 S. Ct. at 1829.

141. *Id.*

142. *Id.* at 1829–30.

143. *Id.* at 1829.

144. *Id.* at 1830.

145. See *id.* at 1831.

146. *Id.*

147. *Id.*

148. *Id.*

Justice Breyer then explained the negative implications of the majority's less detailed, less change-focused holding.<sup>149</sup> Specifically, he asserted that the majority's holding will allow agencies to change policies based on "nothing more than political considerations or . . . personal whim."<sup>150</sup> Thus, the political influence that agencies are designed to avoid will nevertheless become a pertinent part of the agency decision-making process.<sup>151</sup>

#### V. IMPLICATIONS OF *FCC v. FOX*

The FCC was established because Congress was concerned that broadcast regulation "should be as free from political influence or arbitrary control as possible."<sup>152</sup> Yet the Supreme Court's new relaxed standard for reviewing agency changes may serve to hinder this overall congressional objective.<sup>153</sup> Scholars have already expressed concern that *FCC v. Fox*<sup>154</sup> "seems to make it easier for agencies to change their policies due to changes in the political landscape."<sup>155</sup> This concern is easy to understand, especially because the Court's new requirement includes, as a factor weighing toward an acceptable explanation, an agency's belief that a change was better.<sup>156</sup> As Justice Breyer explained, an agency's belief can be based on raw political ideology.<sup>157</sup> Thus, judicial review based on the subjective beliefs of agencies will allow political-based agency decisions to stand. Granted, an agency's belief that its change is better is not the only requirement for an agency policy change to pass arbitrary and capricious review.<sup>158</sup> However, at best, including the "belief" requirement does little to help courts make a decision. At worst, the belief requirement may sway courts to allow arbitrary political change.

The Court's decision in *Fox*, by allowing more political influence in agencies, is potentially detrimental because politically influenced agency

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149. *Id.* at 1832.

150. *Id.*

151. *See id.*

152. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1825 (2009) (Stevens, J., dissenting) (quoting S. Rep. No. 69-772, at 2 (1926)).

153. *See id.* at 1825-26.

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

155. Watts, *supra* note 24, at 22; *see also* Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. (forthcoming 2010) (manuscript at 13), available at <http://ssrn.com/abstract=1470850>.

156. *See Fox*, 129 S. Ct. at 1811.

157. *Id.* at 1832 (Breyer, J., dissenting).

158. *See id.* at 1811 (majority opinion) (noting that a court must also decide that there are good reasons for the policy and that the policy is permissible under the statute).

decisions may be harmful to the public interest. Currently, legal scholars have articulated two opposing theories concerning the appropriate level of political influence on agencies. Those in favor of the president-centered theory argue that presidential influence “is *necessary* to the legitimacy of executive branch agencies because it represents a mechanism of electoral accountability.”<sup>159</sup> The opposing view—namely, that agency decisions are best made through careful considerations of agency expertise and that political influence interferes with an agency’s ability to advance the public interest<sup>160</sup>—is the better position for several reasons.

First, the Federal government created each agency to address specific public interest concerns that affect the everyday population. For example, the Environmental Protection Agency (EPA) was created “to protect human health and to safeguard the natural environment . . . upon which life depends.”<sup>161</sup> Agencies employ a specialized staff that is exclusively trained with expertise in its respective area, and agency employees make decisions in the public interest based on their expertise. Conversely, the President might not have the time or energy to resolve agency issues with the care needed to advance the public interest. Because an agency is the governmental entity with the resources and responsibility to discover publicly beneficial information, the agency—not the President—should be the ultimate decision maker. If the President directs an agency based on his or her political will, and this will is contrary to the agency’s findings, the agency’s ultimate decision may not be in the public interest. Before the Supreme Court’s decision in *Fox*, the public at least had some judicial recourse for this kind of agency decision-making. However, the Court’s decision in *Fox* has made it acceptable for agencies to disregard their expert factual findings and change their policies based on pure political reasons. Thus, the public interest is no longer adequately protected from agencies’ arbitrary political decision-making.

Second, while the concern that agencies need some kind of presidential involvement to be electorally accountable is valid, this electoral accountability may be achieved without presidential politics infiltrating agency decision-making. Several scholars agree that presidential interference with agency decision-making does not legitimize agency

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159. Mendelson, *supra* note 155 (manuscript at 3).

160. *See id.*; Peter L. Strauss, *Overseer or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 756–57 (2007).

161. Environmental Protection Agency, *Our Mission and What We Do*, <http://www.epa.gov/epahome/whatwedo.htm> (last visited Mar. 5, 2010).

action.<sup>162</sup> One scholar distinguishes presidential oversight of agencies from presidential decision-making, arguing that the former is a less intrusive way to secure electoral accountability.<sup>163</sup> Further, Congress delegated power to agencies, not the President; when the President acts as the decision maker in agencies, he or she undermines Congress's delegation of agency power, and in turn, intrudes on the separation of powers.<sup>164</sup> Arguing that presidential decision-making in agencies is necessary to hold agencies electorally accountable should not distract from the potential harm that a president's political influence on agencies may have on the public interest. Therefore, the Court's decision in *Fox* remains potentially harmful to the public interest even when considering the electoral accountability argument for accepting executive influence in agencies.

Third, relying on agency expertise, as opposed to political direction, is the best approach for both independent and executive agencies. One pertinent consideration the Court failed to take into account in *Fox* is the difference between independent and executive agencies. Executive agencies, or federal agencies, are part of federal executive departments headed by Cabinet secretaries.<sup>165</sup> Independent agencies, while still part of the executive branch, are not part of an executive department under the direct control of the President.<sup>166</sup> Justice Scalia explained, "The Administrative Procedure Act . . . makes no distinction between independent and other agencies . . . in the standards for reviewing agency action."<sup>167</sup> Thus, the Court's relaxed standard in *Fox* for reviewing agency policy changes will apply to executive and independent agencies alike.<sup>168</sup> Although independent agencies are "sheltered . . . from the President, [as] it has often been observed [from] their freedom from presidential oversight,"<sup>169</sup> executive agencies are wholly controlled by the President. Thus, these executive agencies are more likely

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162. See Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 1009–10 (2001) (arguing that presidents deciding agency policy actually hinders the accountability of both the agency and the executive); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2081–83 (2005); see also Strauss, *supra* note 160, at 704–05 (distinguishing presidential oversight of agencies from presidential decision-making and proposing that the former is all that is needed for electoral accountability).

163. Strauss, *supra* note 160, at 704–05.

164. See *id.* at 697–98.

165. See BLACK'S LAW DICTIONARY, *supra* note 139, at 71.

166. *Id.* at 71–72.

167. *Fox*, 129 S. Ct. at 1817.

168. See *id.*

169. *Id.* at 1815.

to alternate their policies with each change in administration, and under the Court's new standard, these politically based changes will likely be permitted. Moreover, even though independent agencies have some safeguards, they too are subject to presidential influence. For example, in the recent Supreme Court decision, *Massachusetts v. EPA*,<sup>170</sup> the Court held that the EPA, an independent agency, did not provide a reasoned explanation for its decision to not establish greenhouse gas standards for motor vehicles, which was based on avoiding interference with President Bush's foreign policy initiatives.<sup>171</sup> Thus, the Court's new standard affects both types of agencies, even if the standard may affect executive agencies more than independent agencies.

Finally, relying on agency expertise provides a reliable safeguard against political influence compared to the faulty "detailed justification" solution the court articulated. While Justice Scalia announced a "detailed justification" requirement for when agency policy contradicts prior factual findings,<sup>172</sup> this detailed justification is insufficient to prevent *all* harmful political decision-making. The requirement is insufficient because, for a court to be able to apply a "detailed justification" standard of review, the new policy must contradict prior factual findings—a strict test that will rarely be met. For instance, many times the President's political influence on agencies will go against *some* factual findings but not *all* factual findings.<sup>173</sup> Also, the President's influence may be consistent with an agency's factual findings but against the public interest. In situations such as these, political influence will pass muster because the influence does not contradict the agency's prior factual findings. Moreover, even if an agency's decision is found to completely contradict prior factual findings and to warrant a detailed justification, Justice Scalia failed to articulate what a detailed justification entails.<sup>174</sup> Without specific guidelines, an agency may have a better chance of a court upholding its decisions. Thus, even if a detailed justification is required, it does not necessarily follow that courts will set aside an agency's politically influenced decision.

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170. 549 U.S. 497 (2007).

171. *See id.* at 533–34.

172. *Fox*, 129 S. Ct. at 1811.

173. *See, e.g.*, *Huntington Hosp. v. Thompson*, 319 F.3d 74, 79–80 (2d Cir. 2003) (holding that the agency did not provide a reasoned justification for altering its regulations when only one of numerous prior factual findings was contradicted).

174. *See Fox*, 129 S. Ct. at 1811.

## VI. CONCLUSION

In conclusion, the Court's decision in *FCC v. Fox*<sup>175</sup> will likely have public interest consequences. When a court reviews an agency's policy change, the subjective "reasoned explanation" requirement to meet arbitrary and capricious review—an abrupt downgrade from *State Farm's* fact-based "reasoned explanation" requirement—allows the agency to retreat from expert factual findings and make decisions based on political pressure. Thus, partisan presidential politics may now determine the public interest instead of expert research. An agency's unique position and power allow it to practically and beneficially serve the public. Yet when agencies abuse this power, they may compromise the public interest. Courts have the responsibility to ensure that the latter does not occur, and thus, courts should cautiously review an agency decision. In setting a standard that hinders courts from taking a cautious approach when reviewing agency policy changes, the Court has failed to meet this responsibility. The Court will, hopefully, receive an opportunity to correct this shortcoming in the near future.

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