margin of the screen, it was not the focus of the presentation, and the licensee did nothing to draw attention to it. The Commission's conclusion that WDBJ's news story met the first element of the "patently offensive" test cannot be reconciled with the Commission's prior application of that test. *Cf. Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 21 FCC Rcd 2760, 2765-66 ¶ 11 (2006) ("*Super Bowl*"), *rev'd sub nom. CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008), *vacated*, 556 U.S. 1218 (2009), *reinstated*, 663 F.3d 122 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2677 (2012) (Commission's analysis of whether image is "graphic and explicit" based on placement "in the center of the screen").

B. The Broadcast Did Not Dwell on or Repeat Sexual Material

With respect to the second factor – "whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities"[13] – the NAL concedes that the "box" was visible for "approximately three seconds." NAL ¶ 15. It then goes on to note that some viewers apparently were able to see the material, although whether they did so during the actual broadcast or by looking at a recording later is not stated in any of the complaints, and therefore, was not known to the Commission. The NAL then states that "even relatively brief material can be indecent" if other factors are present, without reaching any clear determination on the second factor.

This analysis is flawed for two reasons. *First*, under well-established Commission precedent, appearances of three seconds or less, such as WDBJ's broadcast, are conclusively deemed to be fleeting. A "fleeting" appearance by a political candidate – generally deemed to be an appearance of less than four seconds – is not deemed to be a use of a station under Section

[13] *Indecency Policy Statement*, 16 FCC Rcd at 8003 ¶ 10.

315(a) of the Communications Act.[14] The Commission has never even attempted to explain why its consistent understanding that "fleeting" appearances will not be considered under the political broadcasting rules does not control its application of the same term in applying its indecency policy.[15]

Second, the Commission ignores its actual standard, which asks whether the broadcast "dwells on or repeats at length" depictions of sexual or excretory organs or activities. It does not attempt to explain in plain English how an incidental shot seen for only 2.7 seconds at the margin of the screen and never repeated could have "dwelled" on its subject. And there is no dispute that the subject was not repeated. *See also infra* n.34 (only basis for forfeiture under 47 U.S.C. § 503(b)(1) was alleged willfulness, not repetition). Therefore, the Commission must find that the WDBJ broadcast did not violate the second element of the "patently offensive" standard.

C. The Broadcast Did Not Seek to Pander or Titillate

The NAL fares no better with respect to the third element of the "patently offensive" test – whether the material "appears to pander or is used to titillate or whether the material

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[14] *See, e.g.*, *Allen H. Bondy*, 14 R.R. 1199 (1957); *National Urban Coalition*, 23 F.C.C.2d 123 (Broad. Bur. 1970); *Law of Political Broadcasting*, 100 F.C.C.2d 1476, 1492 ¶ 35 (1984); *Oliver Productions*, 4 FCC Rcd 5953, 5954 ¶ 7 (1989).

[15] To support the claim that fleeting images can be held to violate the indecency policy, the NAL cites Chief Justice Roberts' opinion concurring in the denial of certiorari in *FCC v. CBS Corp.*, 132 S. Ct. 2677, which states that licensees in the future would be on notice concerning brief images. First, that opinion was handed down on June 29, 2012, less than two weeks prior to the WDBJ broadcast, and the Chief Justice's comments were not widely noted beyond the Commission and lawyers who regularly handle indecency matters. Second, denials of *certiorari* are not holdings on the merits. *See United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.). "Concomitantly, opinions accompanying the denial of certiorari cannot have the same effect as decisions on the merits." *Teague v. Lane*, 489 U.S. 288, 296 (1988). Third, the Commission ignored Justice Ginsburg's concurring opinion in the same case, which pointed to the need for the Commission "to reconsider its indecency policy in light of technological advances and the Commission's uncertain course." 132 S. Ct. at 2678 (Ginsburg, J., concurring). If the Commission seeks to rely on the Chief Justice's opinion, it must also implement Justice Ginsburg's opinion directing it to reconsider its entire approach to indecency enforcement.

appears to have been presented for its shock value." *Indecency Policy Statement*, 16 FCC Rcd at 8003 ¶ 10. By its terms, this standard includes consideration of a broadcaster's intent in presenting the material. The natural meaning of the words "is *used* to titillate" and "have been *presented* for its shock value" refers to the purpose for which the material was included in the broadcast. In the *Indecency Policy Statement*, the Commission said exactly that: the "apparent *purpose* for which material is presented can substantially affect whether it is deemed to be patently offensive as aired."[16]

The examples the Commission cites also confirm that the third standard rests on a broadcaster's intent. For example, in issuing an NAL in *Citicasters Co. (KSJO(FM))*, 15 FCC Rcd 19095, 19096 ¶ 6 (Enf. Bur. 2000), the Commission cited statements by the station's disk jockeys as demonstrating that "the material was *intended to be pandering and titillating*" (emphasis added). More recently, in *Young Broadcasting*, the Commission "weigh[ed] heavily ... off-camera employees' comments urging the performers to conduct a nude presentation" as demonstrating the broadcaster's *intent* to pander, shock or titillate.[17] The Commission tries to rely on *Young Broadcasting* for the separate proposition that a brief glimpse of a penis may be considered indecent, even in the context of a newscast. But *Young Broadcasting* is not binding

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[16] *Id.* at 8010 ¶ 20 (emphasis added). The Commission cited as authority Justice Powell's characterization of the material found indecent in *FCC v. Pacifica Foundation*, 438 U.S. 726, 757 (Powell, J., concurring in part): "[t]he language employed is, to most people, vulgar and offensive. It was *chosen* specifically for this quality, and it was repeated over and over as a sort of verbal shock treatment" (emphasis added). Therefore, the Commission clearly understood that the third factor rested on a broadcaster's affirmative choice of material and its intent to shock the audience.

[17] *Young*, 19 FCC Rcd at 1755-57; *see WQAM License Ltd. Partnership*, 19 FCC Rcd 22997, 22003 (2004) (pandering demonstrated by the "brutal" and "depraved" *intent* of the radio show host). The NAL in note 47 cites in support language in the *Omnibus Indecency Remand Order*, 21 FCC Rcd 13299, which in turn relied on statements in *Super Bowl*, 21 FCC Rcd at 6657-58. Since both of those decisions were subsequently reversed, the Commission cannot view either decision as controlling.

on this point because the FCC never issued a final order in that case.[18] And even if it had issued an order, it does not apply to the circumstances presented here, where there was no intent to pander or shock the audience. By definition, a broadcaster cannot "pander" inadvertently.

The NAL attempts to rewrite the third factor by denying the relevance of "the subjective state of mind of the broadcaster."[19] Instead of looking at whether there is any reason to believe that WDBJ intentionally broadcast the offending material, the Commission looks only at whether the material is "shocking." Once again, the Commission conflates separate factors in its analysis. According to the analysis in the NAL, any broadcast found to be "explicit and graphic" necessarily must be considered "pandering or titillating."

Instead, in applying the third factor, the Commission must examine evidence of intent. Here, the undisputed evidence is that WDBJ was unaware of the presence of the "boxes" at the edge of the broadcast picture. Because it did not know that the "boxes" were there, and certainly not that they would be seen by viewers, it could not have intended to "pander or titillate" nor could it present for shock material that it did not know existed.

The NAL suggests that WDBJ can be sanctioned because, in the Commission's view, it failed to take "adequate precautions" to avoid showing explicit material. NAL ¶ 17. But the

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[18] The FCC decision in *Young Broadcasting* is not binding precedent. As the Commission has explained, "NALs [are] the equivalent of complaints beginning adjudicatory proceedings[,] are not final decisions and are not judicially reviewable." *See* Reply of Federal Communications Commission *et al.* in Support of Joint Motion for Voluntary Remand, *Fox Television Stations, Inc. v. FCC*, No. 06-1760-AG (2d Cir., filed July 10, 2006), at 11-12. *See generally* 47 U.S.C. § 504(c). Although the licensee in *Young Broadcasting* filed a comprehensive opposition to the NAL in February 2004, the FCC never responded, and the FCC's complaint against the station lapsed. *Cf. CBS Corp.*, 663 F.3d at 130.

[19] NAL ¶ 16. Despite the NAL's focus on "subjective" intent, a proper application of the third factor does not mean that the Commission must somehow peer into a broadcaster's mind. The Commission can divine intentions from a broadcaster's actions. *See also infra* 50 (discussing import of subjective intent in constitutional scienter requirement).

evidence is otherwise – the news story was carefully and thoroughly reviewed by two senior personnel in the Station's news department, and the fact that the Station blurred out any website addresses in the program shows that, when it was aware of unrelated and inappropriate content, it took steps to ensure that viewers could not see it.[20] Thus, the Commission cannot – consistent with either the text of the third standard or its decisions applying it – conclude that the inadvertent and unrelated inclusion of a brief depiction of a sexual organ at the edge of the screen during a news program was "pandering or titillating" or "presented for shock value."[21] Any doubts about the application of these standards must, under the Commission's self-established "utmost restraint" policy, be resolved in favor of WDBJ. Therefore, the Commission should withdraw the NAL.

V. THE FCC LACKS A CONSTITUTIONALLY-SOUND TEST FOR INDECENCY

The Commission devotes a single paragraph of the NAL to its conclusion that imposing the maximum fine on WDBJ's newscast is consistent with the First Amendment. NAL ¶ 22. It states incorrectly that WDBJ's argument merely "incorporates arguments of ABC, Inc. and others in litigation unrelated to the broadcast at issue here" and assumes that WDBJ is asking the Commission to overturn *Pacifica*. *Id.* To avoid any further misunderstanding, WDBJ accordingly sets forth its constitutional analysis in greater detail below. As made abundantly clear in

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[20] Indeed, it would be particularly odd for the Station to blur website *addresses*, which by definition consist solely of text, because they referred to pornographic material, yet allow a pornographic image to make it to air.

[21] The Commission attempts to defend its analysis by claiming that, "[a]ny other application of the three principal factors of our contextual analysis in this case would permit a broadcaster to air graphic and explicit sexual material ... as long as such material was displayed for three seconds or less." NAL ¶ 17. But that suggestion misses the point; the record shows that the inclusion of the sexual material in WDBJ's broadcast was unintentional and inadvertent. A broadcaster which affirmatively chose such material would present a different case that would fall under the long line of precedents that viewed broadcaster intent as an influential factor.

recent cases involving the FCC's indecency rules, the Commission has both a constitutional and statutory responsibility to ensure that any actions taken under this policy comport with the First Amendment. But the Commission's actions thus far in this case fall far short of that obligation.

A. The Supreme Court Neither Upheld Nor Ratified the FCC's Indecency Policy

The NAL rejected WDBJ's constitutional arguments in this case by claiming its actions are "[c]onsistent with almost forty years of precedent and the Supreme Court's recent review of our indecency authority." *Id.* This facile conclusion misreads both *Pacifica* as well as the Supreme Court's more recent decision in *Fox II*, 132 S. Ct. 2307. The Supreme Court neither reaffirmed *Pacifica* nor ratified the FCC's current policies for enforcing its indecency standard. Rather, the Court held unanimously that the FCC's approach to enforcement had been so inconsistent with basic due process principles that it did not need to reach the First Amendment questions.[22]

1. The Constitutional Questions the Supreme Court Left Open in *Fox* Must be Addressed

To be sure, the Supreme Court in *Fox II* did not invalidate the Commission's current approach to enforcement – but the Court did not approve it, either. It left the Commission "free to modify its current indecency policy," but stressed that any enforcement is subject to "applicable legal requirements" and that courts will be "free to review the current policy or any modified policy in light of its content and application." *Id.* In this regard, a majority of the

[22] *Fox II*, 132 S. Ct. at 2320. In its reference to this case, the FCC overlooks the Court's holding, and cites only part of the background section describing how the FCC's policies evolved. NAL ¶ 22 n.68 (citing *Fox II*, 132 S. Ct. at 2312-14).

Court left no doubt that the "applicable legal requirements" governing the FCC's rules require strict adherence to First Amendment commands.[23]

This means that in any enforcement action – like this one – the FCC must explain how its proposed sanction is consistent with the First Amendment. It is insufficient for the Commission merely to state, as it does in the NAL, that "*Pacifica* remains valid and supporting authority for the Commission's indecency enforcement." NAL ¶ 22. Such a statement begs the question of what types of enforcement actions are permissible under *Pacifica*. The fact that the Supreme Court held in *Pacifica* that enforcing an indecency standard does not violate the First Amendment or Section 326 based on the facts of that case says nothing about the FCC's authority to apply a different test *in this case*.

To pretend otherwise is to ignore the litigation both at the agency and in the courts between 2004 and 2012 that explored the constitutional limits of indecency enforcement under *Pacifica*. In every case that reached the First Amendment question, the FCC's authority was curtailed. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 335 (2d Cir. 2010); *ABC, Inc. v. FCC*, 404 F. App'x 530 (2d Cir. 2011). *See also CBS Corp.*, 663 F.3d at 151 ("Our reluctant conclusion that the FCC has advanced strained arguments to avoid the implications of its own fleeting indecency policy was echoed by our sister circuit in *Fox*.").

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[23] *See, e.g.*, *Fox II*, 132 S. Ct. at 2321 (Ginsburg, J., concurring) ("Time, technological advances, and the Commission's untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration."); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 530-35 (2009) ("*Fox I*") (Thomas, J., concurring) (questioning the constitutional validity of FCC regulation of programming content); *id.* at 539 (Kennedy, J., concurring) (reserving judgment on whether the FCC's policies are constitutional); *id.* at 539 (Stevens, J., dissenting) ("the Commission's changed view of its statutory mandate certainly would have been rejected if presented to the Court at the time [of *Pacifica*]"); *id.* at 545-46 (Ginsburg, J., dissenting) ("there is no way to hide the long shadow the First Amendment casts over what the Commission has done"); *id.* at 556, 565-67 (Breyer, J., dissenting) ("the FCC works in the shadow of the First Amendment and its view of the application of that Amendment to 'fleeting expletives' directly informed its initial policy choice").

Specifically, the Second Circuit held that the FCC's "contextual" approach to indecency enforcement is impermissibly vague, that there has been little rhyme or reason to its decisions, and that its enforcement actions have substantially chilled protected speech. *Fox Television Stations, Inc.*, 613 F.3d at 330-35. The court was particularly skeptical about the FCC's inconsistent explanations for how it treats indecency allegations against news programming. *Id.* at 332 ("The policy may maximize the amount of speech that the FCC can prohibit, but it results in a standard that even the FCC cannot articulate or apply consistently.").

The Commission's dismissive reference to the Second Circuit cases as "litigation unrelated to the broadcast at issue here," NAL ¶ 22, misconstrues their import; the court made clear that its analysis was not tied to the facts of any particular case, but was based on a history of standardless and arbitrary decisionmaking. *ABC, Inc.*, 404 F. App'x at 535. Also, the court did not say that it would be impossible for the Commission to craft a constitutional policy – only that "the FCC's current policy fails constitutional scrutiny."[24] The "current policy" the court found so deficient was the same "industry guidance" *on which the Commission relies in this case*. *See* NAL ¶¶ 12-17 (applying *Indecency Policy Statement*).

To be clear: WDBJ is not arguing that the Second Circuit decision currently is binding on the Commission. But the FCC cannot act as if the test it purports to apply in this case is free from constitutional doubt where it has been found to be seriously deficient by the only courts ever to review it in operation. The Commission must address the constitutional issues that arise

[24] The Second Circuit did not purport to decide whether *Pacifica* remains good law. Although that court took note of seismic changes in media and technology since 1978, it observed that it is for the Supreme Court to decide whether *Pacifica* is still valid, while the circuit court "must evaluate the FCC's indecency policy under the framework established by the Supreme Court in *Pacifica*." *Fox Television Stations, Inc.*, 613 F.3d at 327.

from the application of its indecency test in *this* case, and it is no answer to state only that *Pacifica* is still good law.

The fact that the Supreme Court left open the question of the test's constitutional validity does not entitle the FCC to brush off the issue when raised by a licensee facing a Notice of Apparent Liability. *Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987) (The Commission "may not simply ignore a constitutional challenge in an enforcement proceeding."). The D.C. Circuit has stressed that "no precedent ... permits a federal agency to ignore a constitutional challenge to the application of its own policy merely because the resolution would be politically awkward." *Id.* at 874.

2. The Commission Has Not Met its Constitutional and Statutory Obligations

Five years have elapsed since the Second Circuit detailed the constitutional deficiencies of the FCC's indecency test, and three years have passed since the Supreme Court affirmed the result (if not the reasoning) of that decision. As explained in greater detail below, no court has ever upheld the FCC's test for indecency set forth in the 2001 *Indecency Policy Statement*. More to the point, *that test has been found to be constitutionally deficient by every court that has ruled on its merits*, which may help explain why the FCC has sought to avoid judicial review whenever it could.

In April 2013, following *Fox II*, the FCC issued a Public Notice and sought public comment to review its broadcast indecency policies and enforcement "to ensure they are fully consistent with vital First Amendment principles,"[25] but it has yet to come up with any answers. The Commission acknowledged the constitutional tensions at issue when it dismissed over one

[25] *See* Public Notice, *FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy*, 28 FCC Rcd 4082 (2013) ("*2013 Public Notice*").

million complaints as being beyond the statute of limitations, otherwise deficient, or "foreclosed by settled precedent." *2013 Public Notice*, 28 FCC Rcd at 4082. To date, the Commission has received nearly 103,000 comments in this docket, yet has taken no action to clarify its policies. Even if the FCC decides to leave its policies unchanged at the conclusion of its review, the *2013 Public Notice* is an acknowledgement that it owes licensees and the public a better explanation of its constitutional reasoning. *E.g.*, *Fox Television Stations, Inc.*, 613 F.3d at 327-28 ("The First Amendment places a special burden on government to ensure that restrictions on speech are not impermissibly vague," both to provide fair notice to those who must obey the law, and to prevent "subjectivity and discriminatory enforcement" by those who must enforce it.).

Two years is too long to wait for a constitutionally-sound standard to govern program content regulation for an agency constrained by the First Amendment. Before the Commission may impose an NAL in this case it must complete the review of its indecency standard it initiated with the *2013 Public Notice*. It is not sufficient for the Commission to enforce its current policies given their constitutional history and to say that it will focus only on "egregious cases." *Id.* at 4083. The *2013 Public Notice* failed to define what constitutes an "egregious case." The NAL simply ignores the question and says that the Commission will continue to apply its preexisting policies.[26]

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[26] NAL ¶ 21. Some insight may be gained from earlier actions of the Commission, but not in a way that clarifies the issues presented here. After *Fox II*, the FCC and Department of Justice voluntarily dismissed a pending collection action against Fox and certain of its affiliates for a program entitled *Married by America*. At the time, Chairman Genachowski explained that in the wake of the Supreme Court's decision, "the Commission is reviewing its indecency enforcement policy to ensure that the agency carries out Congress's directive in a manner consistent with vital First Amendment principles," and that "in the interim, I have directed the enforcement Bureau to focus its resources on the strongest cases that involve egregious indecency violations." John Eggerton, *DOJ, FCC Drop Pursuit of Fox 'Married by America' Indecency Fine*, Broadcasting & Cable, Sept. 21, 2012. Between then and now, the Commission

Administrative agencies are not free to announce one policy and then, without discussion or analysis, follow a different one. *See, e.g., Committee for Community Access v. FCC*, 737 F.2d 74, 77 (D.C. 1984) ("[T]he agency cannot silently depart from previous policies"); *accord CBS Corp. v. FCC*, 663 F.3d at 144-46. The Commission did not even attempt to explain how a miniature and inadvertent 2.7-second shot of a sexual organ could be deemed "egregious," and its failure to do so is fatal. Likewise, the Commission has yet to answer its own questions for how its policies might be changed to be consistent with "vital First Amendment principles." *2013 Public Notice*, 28 FCC Rcd at 4082. To enforce its policies without alteration or explanation in this NAL begs these important questions.

B. Devising a Constitutional Policy to Regulate Broadcast Indecency Requires Great Restraint

1. The FCC Must Adhere to the First Amendment

a. The Commission Has Very Limited Constitutional Authority to Prohibit Broadcast Programming

Broadcasters "are engaged in a vital and independent form of communicative activity," *League of Women Voters of Cal. v. FCC*, 468 U.S. 364, 378 (1984), and the Communications Act confers upon licensees "the widest journalistic freedom consistent with their public [duties]." *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (quoting *CBS, Inc. v. DNC*, 412 U.S. 94, 110 (1973)). Section 326 of the Act prohibits censorship and expressly withholds from government the power to "interfere with the right of free speech by means of radio communication." This denies to the FCC "the power of censorship" as well as the ability to promulgate any "regulation or condition" that interferes with freedom of speech. 47 U.S.C. § 326. These policies "were drawn from the First Amendment itself [and] the 'public interest' standard necessarily invites

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has not explained what it means by "egregious," or how that concept as applied in cases like *Married by America* can be distinguished from the present case.

reference to First-Amendment principles." *CBS, Inc. v. DNC*, 412 U.S. at 121. Consequently, "the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area." *League of Women Voters*, 468 U.S. at 378.

Any regulation of broadcast programming content requires the Commission to "walk a 'tightrope'" to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act." *CBS, Inc. v. DNC*, 412 U.S. at 117; *Banzhaf v. FCC*, 405 F.2d 1082, 1095 (D.C. Cir. 1968). Although the Supreme Court historically has allowed the FCC some latitude to impose some public interest requirements on broadcast licensees, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), this applies only to general programming guidelines and not to programming mandates or prohibitions. Licensees may be held "only broadly accountable to public interest standards." *CBS, Inc. v. DNC*, 412 U.S. at 120. While the Commission may "inquire of licensees what they have done to determine the needs of a community they propose to serve, it may not impose upon them its private notions of what the public ought to hear." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 650 (1994) (quoting *Report and Statement of Policy re: Commission En Banc Programming Inquiry*, 44 F.C.C. 2303, 2308 (1960)).

The Commission's indecency policy presents a more significant constitutional problem than does a general public interest requirement. Indecency enforcement actions prohibit and/or punish specific programs, and any such power to specify what material may or may not be broadcast "carries the seeds of the general authority to censor denied by the Communications Act and the First Amendment alike," and creates a "high-risk that such rulings will reflect the Commission's selection among tastes, opinions, and value judgments, rather than a recognizable public interest." *Banzhaf*, 405 F.2d at 1095. Although an indecency restriction had been part of the law since the Radio Act of 1927, the FCC did not attempt to define the concept as separate

from obscenity until 1975 in *A Citizen's Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y.*, 56 F.C.C.2d 94, 97-98 (1975) ("*FCC Pacifica Order*"). And the Supreme Court narrowly upheld the Commission's approach in *Pacifica*. These decisions define the constitutional limit of the FCC's authority in this area.

Any broadcast indecency regulations must be finely calibrated because indecent, but not obscene, speech is protected by the First Amendment. *Reno v. ACLU*, 521 U.S. 844, 874-75 (1997); *Fox Television Stations, Inc.*, 613 F.3d at 325 ("It is well-established that indecent speech is fully protected by the First Amendment."). Yet the standard for regulating broadcast indecency, at least on its face, is less rigorous than the one used to regulate obscenity,[27] a category of speech which is *not* protected by the First Amendment. *See Reno*, 521 U.S. at 872-75 (contrasting concepts of obscenity and indecency). Unlike the test for obscenity, the indecency definition does not require examination of the work "as a whole," and does not ask whether the material appeals primarily to the prurient interest. Indecency is not limited to patently offensive depictions of sex acts that are "specifically defined by law," and it is not a complete defense that the material has serious value. And the FCC's regulatory concern focuses on the impact of expression on children, not on the "average person" in a community.[28] Lacking

[27] *Miller v. California*, 413 U.S. 15, 24 (1973) (to establish obscenity government must prove (1) that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals primarily to the prurient interest; (2) that it depicts or describes, in a patently offensive way, hard core sexual conduct specifically defined by the applicable state law; *and* (3) that it lacks serious literary, artistic, political, or scientific value).

[28] The indecency standard the FCC now uses is analytically indistinct from the Nineteenth Century obscenity test set forth in such cases as *United States v. Bennett*, 24 F. Cas. 1093, 1102 (CCNY 1879). The Supreme Court expressly overturned that test as a violation of the First Amendment in *Roth v. United States*, 354 U.S. 476, 489 (1957) ("judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press").

these more rigorous doctrinal limits, the Commission must find other effective ways to stay within constitutional bounds when it defines indecency.

b. The Commission Historically Followed a Restrained Indecency Enforcement Policy

The FCC historically has dealt with this constitutional paradox by following a tightly restrained enforcement policy. That is, because the indecency test was less demanding than the one for obscenity, the Commission sought to stay within First Amendment limits by adopting bright line restrictions on its own authority to provide greater certainty for broadcasters where it could. Such limits beyond which indecency complaints were not considered "actionable" include "time channeling," whereby the FCC will not apply the rules to broadcasts after 10 p.m., and refusal to consider complaints for fleeting, inadvertent, or isolated transmissions. Thus, under *Pacifica*, the FCC sought to satisfy its statutory and constitutional obligations through practical application of policies that limited significantly its enforcement flexibility and the chilling effects on broadcasters. *See, e.g., Action for Children's Television v. FCC*, 932 F.2d 1504, 1509-10 (D.C. Cir. 1991) ("*ACT II*") (First Amendment requires FCC indecency policy to have a "safe harbor").

One way or the other – by using a more doctrinally rigorous test or by adopting self-imposed limits on its enforcement authority – the Commission must meet its constitutional and statutory obligations. This is true regardless of the level of constitutional scrutiny that applies to the broadcast medium. As the Second Circuit explained, "[b]roadcasters are entitled to the same degree of clarity as other speakers, even if restrictions on their speech are subject to a lower level of scrutiny. It is the language of the rule, not the medium in which it is applied, that determines whether a law or regulation is impermissibly vague." *Fox Television Stations*, 613 F.3d at 329.

2. *Pacifica's* Restrained Enforcement Approach is Constitutionally Required

From the beginning, the FCC recognized the inherent imprecision of its "indecency" test (particularly when compared to that for obscenity), and sought to avoid First Amendment problems by construing the term "indecent" narrowly and exercising its authority cautiously. *See FCC Pacifica Order*, 56 F.C.C.2d at 103-04 (concurring statement of Commissioners Robinson and Hooks) ("the statute ... on its face expresses no limit on our power to forbid 'indecent' language over the air, [but] the First Amendment does not permit us to read the statute broadly"). The *FCC Pacifica Order* emphasized the need to "avoid the error of overbreadth" so that the indecency definition would not "force upon the general listening public debates and ideas which are 'only fit for children.'" *Id.* at 98-100.

The Commission decided that an indecency complaint would not be "actionable" for purposes of Section 1464 unless the licensee intentionally engaged in repeated or extended presentations of indecent material. *See Petition for Reconsideration of a Citizen's Complaint Against Pacifica Foundation Station WBAI (FM)*, 59 F.C.C.2d 892, 893 n.1 (1976) ("*Pacifica Recon. Order*") (emphasis added). It explained that inadvertent, isolated or fleeting transmissions of "indecent" material do not violate the law. *Id.*

This was consistent with the FCC's historic treatment of allegedly indecent broadcasts. *E.g.*, *Jack Straw Memorial Found.*, 21 F.C.C.2d 833, 842 (1971) ("[t]he standard of public interest is not so rigid that an honest mistake or error on the part of a licensee results in drastic action against him"). *See also CBS, Inc.*, 21 R.R.2d (P&F) 497, 498 (1971) (isolated use of "damn" did not violate Section 1464); *Pacifica Found.*, 36 F.C.C. 147, 150 (1964) (rejecting license challenge based on complaints that station aired five programs that contained profanity and discussions of homosexuality). The Commission has stressed that, "in sensitive areas like

this," the Commission can act "only in clear-cut, flagrant cases," and that "doubtful or close cases are clearly to be resolved in the licensee's favor." *Eastern Educ. Radio*, 24 F.C.C.2d 404, 414 (1970) (too close supervision of programming "would be flagrant censorship").

The approach also was the centerpiece of the Commission's defense of its *Pacifica* standard in the courts. The D.C. Circuit had invalidated the FCC's indecency standard as overly broad and vague, *Pacifica Found. v. FCC*, 556 F.2d 9, 17-18 (D.C. Cir. 1977), so in its briefing to the Supreme Court, the FCC stressed that its authority to penalize indecent broadcasts "must be read narrowly." Brief for the Federal Communications Commission, *FCC v. Pacifica Found.*, No. 77-528 (Mar. 3, 1978), 1978 WL 206838 at 26-27 (citation omitted). It emphasized "the *deliberate repetition* of these words" in the Carlin monologue, noting that the case involved "prerecorded language with the words repeated over and over [and] *deliberately broadcast*." *Id.* at 26 (emphasis added).

The Supreme Court took the Commission at its word and reversed the court of appeals on a very limited basis, characterizing its 5-4 decision as an emphatically narrow holding. *See Pacifica*, 438 U.S. at 750 ("It is appropriate ... to emphasize the narrowness of our holding."). Justices Powell and Blackmun, who supplied the crucial votes for *Pacifica's* slim majority, noted "[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word." *Id.* at 760-61 (Powell, J., concurring). They stressed that the FCC does not have "unrestrained license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes." *Id.* at 760-61. Critical to the Court's holding was the level of restraint the FCC historically had exercised in construing and enforcing Section

1464. *See id.* at 761 n.4 (Powell, J., concurring) ("the Commission may be expected to proceed cautiously, as it has in the past").

Following *Pacifica*, the FCC interpreted the decision as requiring that it enforce Section 1464 with great restraint. For example, in its first opportunity to construe the Court's decision, the agency rejected a broadcast station license challenge on indecency grounds. *See WGBH Educ. Found.*, 69 F.C.C.2d 1250 (1978). It explained:

> We intend strictly to observe the narrowness of the *Pacifica* holding. In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the "indecent" words in question. The opinion of the Court specifically stated that it was not ruling that "an occasional expletive ... would justify any sanction ...." Further, Justice Powell's concurring opinion emphasized the fact that the language there in issue had been "repeated over and over as a sort of verbal shock treatment." He specifically distinguished "the verbal shock treatment [in *Pacifica*]" from "the isolated use of a potentially offensive word in the course of a radio broadcast."

Id. at 1254 (citations omitted). For almost a decade after *Pacifica*, the FCC strictly limited its enforcement of Section 1464 to the "seven dirty words" in Carlin's monologue.

Gradually, however, the Commission began to relax some of these self-imposed restrictions. In 1987, the Commission concluded that the "generic definition" articulated in its original *Pacifica Order* could properly be applied to broadcast expression beyond the seven specific words made famous by George Carlin.[29] Yet in all other respects, the Commission reaffirmed that "Section 326 and the First Amendment dictate a careful and restrained approach with regard to review of matters involving broadcast programming," and that "[s]peech that is

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[29] *See Pacifica Radio*, 2 FCC Rcd 2698, 2699 (1987), *aff'd on recons.*, *Infinity Broad. Corp. of Pa.*, 3 FCC Rcd 930 (1987), *aff'd in part, rev'd in part*, *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*"). *See also Regents of the Univ. of Cal.*, 2 FCC Rcd 2703 (1987) (same subsequent history); *Infinity Broad. of Pa.*, 2 FCC Rcd 2705 (1987) (same subsequent history).

indecent must involve more than the isolated use of an offensive word." *Infinity Broad. Corp.*, 2 FCC Rcd at 2705.

On review, the D.C. Circuit affirmed the "generic definition" for construing Section 1464, but in doing so expressly reinforced the First Amendment principles that limit the statute's scope. Writing for the court, then-Judge Ginsburg emphasized that "the FCC may regulate [indecent] material only with due respect for the high value our Constitution places on ... what the people say and hear." *ACT I*, 852 F.2d at 1344. Quoting Justice Powell's "'expectation that [the] Commission will continue to proceed cautiously," Judge Ginsburg similarly anticipated that "the potential chilling effect of the FCC's generic definition ... will be tempered by the Commission's restrained enforcement policy." *Id.* at 1340 n.14.

3. The FCC's Current Multi-Factor Test for Indecency Has Never Been Upheld by Any Court

The Commission's movement to a "generic" indecency definition created pressure on the agency to more precisely define indecency. The FCC issued its 2001 *Indecency Policy Statement* to settle a 1994 enforcement action after the district court in that case denied the Commission's motion to dismiss all of the licensee's constitutional counterclaims. *See United States v. Evergreen Media Corp. of Chicago*, 832 F. Supp. 1183, 1187 (N.D. Ill. 1993). Rather than risk having a court rule on the constitutional validity of its more generalized approach to enforcement, the Commission dismissed the case and pledged to provide "industry guidance" on its broadcast indecency policies speech within nine months of the settlement. *Evergreen Media, Inc. v. FCC*, Civil No. 92 C 5600 (N.D. Ill. Feb. 22, 1994). Seven years later, the Commission issued its 2001 *Indecency Policy Statement*.

From the beginning, even the Commission had difficulty understanding or applying its own test under the *Indecency Policy Statement*. For example, in *KBOO Foundation*, 16 FCC

Rcd 10731, 10733 (Enf. Bur. 2001), issued just weeks after the *Indecency Policy Statement*, the Enforcement Bureau concluded that the rap poem *Your Revolution* was indecent because it contained "unmistakably patently offensive sexual references," but later reversed its evaluation of the same material, finding that, "on balance and in context, the sexual descriptions in the song are not sufficiently graphic to warrant sanction." *KBOO Found.*, 18 FCC Rcd 2472, 2474 (Enf. Bur. 2003). Likewise, the Bureau deemed the "radio edit" of the Eminem song *The Real Slim Shady* to contain "unmistakable offensive sexual references." *Citadel Broad. Co.*, 16 FCC Rcd 11839, 11839, 11840 (Enf. Bur. 2001). But it later characterized the exact same sexual references as "oblique," and not "expressed in terms sufficiently explicit or graphic enough to be found patently offensive." *Citadel Broad. Co.*, 17 FCC Rcd 483, 486 (Enf. Bur. 2002).

These reversals occurred not because new facts came to light or because the Commission refined its standard, but because the Bureau simply changed its "impressions" about the "patent offensiveness" of the material. "Your Revolution" initially was considered indecent despite the fact it had been performed for junior high and high school students in programs coordinated through the New York City Board of Education, *KBOO Foundation*, 16 FCC Rcd at 10733, but was later cleared, in part *because* the performer, Sarah Jones, had been asked to perform "Your Revolution" at high school assemblies. *KBOO Found.*, 18 FCC Rcd at 2474. The Second Circuit would later reject such reasoning in *Fox* because the standard allowed the FCC to reach "diametrically opposite conclusions at different stages of the same proceeding for precisely the same reason," *Fox Television Stations, Inc.*, 613 F.3d at 332-333, but for years the Commission was able to avoid judicial review of its indecency rulings.

The *Evergreen Media* case, now more than two decades old, was the last time a licensee contested a Section 1464 forfeiture order in court before the more recent litigation that

culminated in *Fox*.[30] As a consequence, *no court has ever upheld the multi-factor test for indecency that the FCC first articulated in 2001*. Since then, the Commission has done nothing to support or clarify the indecency test it announced in 2001, and instead has asserted authority to penalize a broader range of speech and to impose more draconian penalties. *See infra* § V.B.4.a. It was only after all this that the 2001 *Indecency Policy Statement* had its first court test – which it failed. *Fox Television Stations, Inc.*, 613 F.3d at 330.

4. The FCC Abandoned its Restrained Enforcement Policy

a. The Commission's Change in Policy Prompted Judicial Review of the Commission's Overall Test for Indecency

Beginning in 2004, the Commission changed its construction of Section 1464 in dramatic and far-reaching ways, including: (1) greatly expanding the scope of the potentially "indecent" images and utterances it prohibits; (2) overruling past precedent to sanction fleeting, isolated, or unintended utterances; (3) punishing licensees for indecent material broadcast during news programs; and (4) imposing separate penalties on "profane" speech.[31] Taken together, these changes created a fundamentally different regulatory regime than the one that was before the Supreme Court in *Pacifica*. This triggered an overall review of the Commission's standard for

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[30] *See also supra* note 19 & accompanying text (discussing Commission's failure to issue final order in *Young Broadcasting* after opposition to NAL); *supra* note 27 (discussing government's voluntary dismissal of *Married by America* collection action after Fox refused to pay forfeiture). *Cf. Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace,"* 21 FCC Rcd 2732 (2006) (NAL allowed to lapse after opposition by broadcaster).

[31] *E.g.*, *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975 (2004); *2006 Omnibus Indecency Order*, 21 FCC Rcd at 2668-703 ¶¶ 16-145. It reversed earlier decisions finding that news programs had violated the indecency rules, *Omnibus Indecency Remand Order*, 21 FCC Rcd at 13327-28 ¶¶ 71-72, and it decided not to pursue separate penalties for profanity. In all other respects, however, the FCC endeavored to defend its new approach to enforcement as constitutional.