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## Political Advertisements in the Era of Fleeting Indecent Images and Utterances

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*Political Advertisements in the Era of Fleeting Indecent Images and Utterances*

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## *Political Advertisements in the Era of Fleeting Indecent Images and Utterances*

By LaVonda N. Reed-Huff\*

### **Introduction**

Television and radio advertisements for years have been effective and popular campaign tools used by political candidates seeking to gain votes. In an era of increasingly negative political campaign advertisements, some political figures and candidates have found themselves the target of negative broadcast advertisements suggesting that an opponent has engaged in some form of sexually immoral or somehow unacceptable conduct. Election seasons in recent years have ushered in a new breed of increasingly vulgar and sexually charged political broadcast advertisements.<sup>1</sup> So extreme are some advertisements in this new genre of political speech, they are dangerously close to violating federal law prohibiting the broadcast via television and radio of indecent materials.

Scholars, the FCC, and the courts have pondered how regulators would deal with the issue of indecency in political broadcasting for years, focusing to date primarily on the body of cases dealing with political advertisements depicting abortions, aborted fetuses, and racial hate speech.<sup>2</sup> Existing cases have turned on the statutory and

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<sup>1</sup> See "Too Hot for Corker", available at <http://www.youtube.com/watch?v=cWkrwENN5CQ>; and see "Bad Call" available at [http://www.youtube.com/watch?v=DDZ\\_bPYWjd8](http://www.youtube.com/watch?v=DDZ_bPYWjd8).

<sup>2</sup> See, e.g., In re Complaint by Atlanta NAACP, Atlanta, Ga. Concerning Section 315 Political Broadcast by J.B. Stoner, 36 F.C.C.2d 635 (1972) (use of the term "nigger") [hereinafter *Stoner I*]; In re Complaint by Julian Bond Atlanta NAACP Atlanta, Georgia Concerning Political Broadcasting, 69 F.C.C.2d 943 (July 28, 1978) (use of the term "nigger") [hereinafter *Stoner II*]; Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Vincent A. Pepper, Esq., Counsel, Gillette Communications of Atlanta, Inc., Irving Gastfreund, Esq., 7 F.C.C.R. 5599 (Aug. 21, 1992) (regarding broadcast of political campaign advertisement containing abortion-related material) [hereinafter *Mass Media Bureau Letter to Kaye Scholer*]. See also Samantha Mortlock, Comment, *What the [Expletive Deleted] is a Broadcaster to Do? The Conflict Between Political Access Rules and the Broadcast Indecency Prohibition*, 14 GEO. MASON L. REV. 193 (2006). Mortlock correctly characterizes the "dilemma" facing broadcast licensees.

See also In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664, ¶ 187, n. 234 (Mar. 15, 2006) [hereinafter *Omnibus Order*]. A complaint was filed against a broadcast licensee for the broadcast outside the safe harbor of a political advertisement that mentioned rape, sodomy, and molestation. The advertisement did not feature any nude images or depictions of any of the described acts. The narrator of the advertisement states:

He used candy to lure the children into the house. Once inside, the three children were sexually molested. A four-year old girl raped. Her brothers- sodomized. A Belleville man was arrested and convicted for the crime after trying to develop pictures of the abuse. Despite prosecutor's objections, Judge Lloyd Karmeier gave him probation, saying "The court should grant leniency..." Another case where Karmeier let a violent criminal out into the community. Lloyd Karmeier -- the wrong choice for Supreme Court. Paid for by the Democratic Party of Illinois.

regulatory definitions of “indecent” and “obscenity” and suggest that broadcasters might have certain immunities and programming rights with respect to their decision to air political advertisements containing material they deem offensive, inappropriate, and harmful to children.<sup>3</sup>

The newer, more sexually suggestive political advertisements present the dilemma at which lawmakers, courts, and scholars have hinted for years—how to reconcile three seemingly conflicting federal statutes which, on the one hand, seek to give political candidates greater access to the television and radio media and consequently to the eyes and ears of the electorate, yet, on the other, seek to remove indecent material from the broadcast airwaves during hours of the day when children are likely to be in the audience.<sup>4</sup> These statutes obligate broadcast licensees to provide non-discriminatory and uncensored access to candidates for political office, yet fail to state an exception to broadcast indecency rules or to grant immunity to broadcasters forced to air political advertisements which contain at best sexually suggestive, and in the worst case, indecent, profane, or obscene material.<sup>5</sup> While no broadcast licensee has been sanctioned by the government for the broadcast of an indecent political advertisement, the Federal Communications Commission (the “FCC” or the “Commission”) has never had to answer that specific question, and moreover, the law is not clear that broadcasters are immune from such sanction were it to broadcast such an advertisement.

Interestingly, Larry Flynt, creator of Hustler magazine, launched a campaign for president in the 1980s.<sup>6</sup> Flynt promised that his campaign advertisements would contain hard core pornography.<sup>7</sup> The Commission was prepared at the time to issue a ruling permitting broadcasters to reject the advertisements.<sup>8</sup> Flynt never requested airtime for the advertisements, and the FCC’s ruling never was issued.<sup>9</sup>

This new breed of political advertisements, Flynt’s proposed advertisements not included, while not indecent under the FCC’s current definition, is closer to crossing the lines of indecency than were offensive racist advertisements and gruesome anti-abortion advertisements of years past. The once hypothetical sexually suggestive political

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*Available at*

[http://www.brennancenter.org/programs/downloads/buyingtime\\_2004/STSUPCT\\_IL\\_DPIL\\_KARMEIER\\_CHILDREN.pdf](http://www.brennancenter.org/programs/downloads/buyingtime_2004/STSUPCT_IL_DPIL_KARMEIER_CHILDREN.pdf). The Commission stated “[b]ecause we find that the advertisement is not indecent, we need not decide whether the Commission may propose forfeitures against licensees that broadcast indecent political advertisements outside of the safe harbor.”

<sup>3</sup> See, e.g., *Stoner I*, 36 F.C.C.2d at 636-38; *Stoner II*, 69 F.C.C.2d at 944; *Mass Media Bureau Letter to Kaye Scholer*, 7 F.C.C.R. at 5599-600; *Becker v. FCC*, 95 F.3d 75 (D.C. Cir. 1996).

<sup>4</sup> 18 U.S.C. § 1464 (2006) (prohibiting broadcast indecency); 47 U.S.C. § 312 (2006) (affording reasonable access to broadcast facilities for candidates for federal office); 47 U.S.C. § 315 (2006) (providing equal opportunities for use of broadcast facilities by candidates for the same office and prohibiting censorship).

<sup>5</sup> *Id.*

<sup>6</sup> Interview of Bobby Baker, FCC Enforcement Bureau.

<sup>7</sup> See *id.*

<sup>8</sup> See *id.*

<sup>9</sup> In June 2007, Flynt placed an advertisement in the Washington Post offering \$1 million for stories involving the sex lives of government officials.

advertisement is now a reality, and the truly indecent political advertisement might be on the near horizon. One such sexually suggestive television advertisement appeared in 2006 in Tennessee endorsing Republican Bob Corker in his race against Democrat Harold Ford, Jr. for a U.S. Senate seat.<sup>10</sup> The Corker advertisement used sexually suggestive visual images to suggest that Ford frequented wild sex parties and had sexual liaisons with white women.<sup>11</sup> Ford is black. In the advertisement, the bare shoulders and face of an otherwise seemingly unclothed young blonde woman appeared on the screen as the young blonde winked and purred into the camera that she had previously met Ford at a Playboy party.<sup>12</sup> The advertisement closed with another shot of the still questionably clothed young blonde teasing Ford to call her.<sup>13</sup> Ford lost the election.

Another television advertisement broadcast in New York in the same year endorsed Republican Raymond Meier in his U.S. congressional campaign against Democrat Michael Arcuri.<sup>14</sup> The advertisement opened with superimposed images of a woman who appeared to be an exotic dancer straddling a chair and seductively dancing while purring “Hi, sexy...”<sup>15</sup> Meanwhile, the target of the advertisement, Arcuri stared in the dancer’s direction while lasciviously and seductively licking his lips.<sup>16</sup> The advertisement accused Arcuri of using Oneida County, New York taxpayer dollars to satisfy his sexual desires while on official business by calling an adult fantasy telephone hotline and then charging the call to his hotel room.<sup>17</sup> Despite this advertisement, which ran in the days leading up to the election, Arcuri defeated his opponent to win the congressional seat.

Industry insiders and regulators point to the remote possibility of a political candidate seeking airtime to broadcast a political advertisement containing indecent material.<sup>18</sup> In an era where the media appears to take great fascination in the sex lives of elected officials and greater satisfaction in actually catching and embarrassing them for these exploits, we are certain to see more of this type of material emerge in political

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<sup>10</sup> The advertisement, titled “Too Hot for Corker”, sponsored by the Republican National Committee, opens with an African-American woman posing the question “Harold Ford looks good. Isn’t that enough?” Then camera captures short sound bites from a series of people who appear to be citizens on a city street making comments about how Ford wants to protect the privacy of terrorists, will increase taxes, favors gun control, is not worried about the threat of North Korea, and has taken money from producers of pornographic movies—“Don’t we all?” the citizen chuckles. *Available at* <http://www.youtube.com/watch?v=cWkrwENN5CQ>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> The advertisement titled “Bad Call” was paid for by the National Republican Congressional Committee. It also features fleeting images of a clothed male lower body. *See supra* at note 1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> One easily can imagine an advertisement featuring protesters uttering expletives or wearing clothing containing indecent material, whereas an undeniably indecent political advertisement seems unimaginable to most.

campaign advertisements.<sup>19</sup> In early 2009, Stormy Daniels, a pornographic movie star, announced her preliminary plans to run for the U.S. Senate from Louisiana against incumbent David Vitter who was involved in a notorious call-girl scandal that rocked Washington, DC in 2007.<sup>20</sup> The possibility of one or both of the candidates incorporating indecent material in their campaign advertisements is not so far-fetched.

This article does not assert that either the aforementioned anti-Ford or anti-Arcuri political advertisements squarely falls within the subject matter scope of the FCC's definition of indecency, but that they do signal a gradual yet significant shift toward the willingness of political candidates and their supporters to pay for campaign advertisements with a sexual tinge. This article asks a question that has been asked by other scholars—what is a broadcaster to do in the event it is presented with political material that might fall within the subject matter scope of the FCC's definition of indecency. It offers some resolutions to this conflict taking into consideration recent court cases dealing with the issue of broadcast indecency.

This article addresses the recent struggle of the FCC and the courts to define indecency and to defend the continued relevance of current indecency rules in light of a converging and ever-changing technological environment. The FCC has on more than one occasion sidestepped ruling on the issue where the material was determined not to have passed the threshold satisfying the definition of indecency.<sup>21</sup> Moreover, none of these prior cases clearly answers the question of a broadcaster's liability in the event a broadcaster airs or chooses not to air a political advertisement that actually is determined to be indecent, profane, or obscene as those terms have come to be defined.

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<sup>19</sup> Each the anti-Ford and the anti-Arcuri advertisements were broadcast in a news cycle when the public also was bombarded by unrelated broadcast news stories of a congressman engaging in inappropriate sexual e-mail exchanges, and perhaps worse, with underage boys and of an evangelical Christian minister using drugs and having sex with male prostitutes. Michael Wolff, *It's The Adultery, Stupid*, VANITY FAIR, June 2008, at 94 (stating that “[p]olitics is now about sex . . . Sex (sex, not gender) in politics is as significant a subtext as race. It has the power to alter elections, undermine parties, and, possibly, change history. . . We want to know. . . Sex completes the picture—it explains so much. . . It's a point of identification and differentiation.” See Bill Cotterell and Jim Ash, *Foley resigns from Congress*, TALLAHASSEE DEMOCRAT, Sept. 30, 2006, at 1A (discussing the resignation of Rep. Mark Foley (R-Fla.) amid allegations of substance abuse and inappropriate sexual conduct with underage congressional pages). See Alan Cooperman, *Minister Admits to Buying Drugs and Massage*, WASH. POST, Nov. 4, 2006, at A02 (reporting on the activities of evangelical minister Ted Haggard). Since that time, the sordid details of the private lives of countless other politicians have flooded the broadcast and cable airwaves. See, e.g., *Senator Pleads Guilty in Sex-Sting Case*, VIRGINIAN-PILOT, Aug. 28, 2007, at A14 (reporting on the guilty plea of Senator Larry Craig (R-ID) stemming from his arrest for allegedly inappropriate behavior in an airport men's restroom); see also Mark Mueller, *Call Girl Scandal Engulfs Spitzer N.Y Governor Issues Apology*, TIMES OF TRENTON (New Jersey), Mar. 11, 2008, at A01 (reporting on the admission of New York governor Eliot Spitzer of association with high priced escort service; and see David Zucchini and Elizabeth Mehren, *McGreevy's Double Life Changed in a Single Day*, L.A. TIMES, Aug. 15, 2004, at A26 (reporting on the revelation by the married New Jersey governor James E. McGreevy that he was gay and had an affair with a male staffer).

<sup>20</sup> See, e.g., Jonathan Tilove, *Adult Film Actress Contemplates Run to Unseat Vitter; She Asks Flynt to be Campaign Manager*, TIMES-PICAYUNE (New Orleans), Feb. 13, 2009, at 4.

<sup>21</sup> See e.g., *Omnibus Order*, 21 F.C.C.R. at ¶¶ 180-87; *Stoner II*, 69 F.C.C.2d at 944.

Scholars have proposed resolutions to this dilemma, including among others, granting immunity from indecency sanctions and repealing some or all of the rules forming the dilemma.<sup>22</sup> The recent racy political advertisements go to the heart of the question of how broadcasters, without clear statutory language, may handle requests by political candidates and their supporters to air campaign advertisements that more closely fit the Commission's definition of indecency, and perhaps even the definitions of obscenity or profanity as well.

Part I of the article describes the statutory conflict. Part II addresses recent broadcast indecency actions including the indecency cases recently decided by the Second and Third Circuits and one currently pending before the U.S. Supreme Court. Part III specifically evaluates recent political advertisements containing sexually suggestive material. Part IV addresses how courts have handled earlier claims of offensive political speech offering insight and how they might handle future claims. Part V of this article revisits some of the earlier proposals for resolution of the dilemma facing broadcast licensees and will suggest others.

This article reiterates the call for immunity for broadcasters that air political advertisements containing indecent material. In addition to evaluating these proposals, this article, in Part V, offers alternative resolutions of the issue including the suggestion that Congress could extend all three of the laws making up the statutory conflict beyond broadcast licensees to include all cable and satellite channels. Additionally, the article suggests that Congress could repeal the broadcast indecency prohibition entirely taking into consideration the decreasing relevance of the rule in the context of the prevalence of cable and satellite video services and the emergence of the Internet. The Commission also could carve out an express exception to indecency enforcement. The worst resolution would be for the Congress to do nothing.

In the absence of congressional action, courts could carve out a judicially created exception to the indecency statute as it has done in other contexts. The answers to this problem will depend significantly on how the U.S. Supreme Court rules in *FCC v. Fox Television Stations, Inc.* regarding fleeting expletives. This article suggests that courts should uphold existing case law regarding the treatment of fleeting and isolated expletives and remand any FCC order imposing forfeiture based on any utterances of fleeting expletives or fleeting depictions of indecent images in the political context and otherwise. In so doing, the courts would continue to force the FCC to refine its indecency definition to address constitutional vagueness issues and to offer a more reasoned explanation for the need to change its longstanding policy of not acting on isolated or fleeting indecent material as required by the Administrative Procedures Act.<sup>23</sup>

## **I. The Statutory Conflict**

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<sup>22</sup> See Mortlock, *supra* note 2, at 223-26.

<sup>23</sup> 5 U.S.C. § 706(2)(A)(2006).

All FCC broadcast licensees must serve the “public interest, convenience and necessity.”<sup>24</sup> That obligation has applied to the daily operations and overall mission of broadcasters since the earliest days of regulation of the industry. Congress and the FCC have enacted statutes, rules, and regulations that balance the interests of the various entities that make up this public the FCC and its licensees are charged to serve. Among these statutes are those prohibiting indecency and prohibiting censorship, and those making the broadcast airwaves available to political candidates.<sup>25</sup>

The first statute in the trio is 18 U.S.C. § 1464 which prohibits the broadcast of indecent, obscene, or profane material over the broadcast airwaves. The second statute is 47 U.S.C. § 312 which requires licensees of broadcast stations to afford reasonable access to its facilities for all candidates for federal elective office. Finally, 47 U.S.C. § 315 requires broadcasters to afford equal opportunities to use broadcast facilities to all legally qualified candidates for the same political office and prohibits broadcasters from censoring political speech.<sup>26</sup> Broadcasters have found themselves in a predicament when a candidate has sought to use a broadcast station to air an advertisement that contains material that could be characterized as indecent, obscene, or profane as these terms have been defined by federal case law and by the Federal Communications Commission (the “FCC” or the “Commission”).<sup>27</sup>

In the context of indecency, obscenity, and profanity in the broadcast media, the FCC achieves this goal through a combination of governmental and citizen action. The FCC does not monitor the programming of its licensees for the purpose of levying forfeitures for rule violations, but rather regulates in large part by acting upon complaints about media content that are filed with the agency by broadcast viewers and listeners

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<sup>24</sup> Radio Act of 1927, 44 Stat. 1162 (1927), Communications Act of 1934, 47 U.S.C. § 151, et seq., Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

<sup>25</sup> See 47 U.S.C. §§ 312, 315, 326; 18 U.S.C. § 1464.

<sup>26</sup> 47 U.S.C. § 315 (2006). 47 C.F.R. § 73.1940. A legally qualified candidate of public office is defined as any person who has publicly announced that he or she is a candidate for public office, meets the qualifications for serving in that office, is eligible to be elected to that office, and makes a substantial showing that he or she is a bona fide candidate for the office or for nomination to the office. 47 U.S.C. § 326 also prohibits the FCC from engaging in censorship of broadcast material. See also In re Complaint Under Section 315 of the Communications Act of 1934 as amended, Letter to Metromedia, Inc. Regarding Socialist Labor Party of California, 40 F.C.C. 423 (1964); and see Public Notice, Use of Broadcast Facilities by Candidates for Public Office, 24 F.C.C.2d 832, 860 (1970).

<sup>27</sup> While § 312 and § 315 do apply to cable and satellite systems, they have only limited applicability in these contexts. The obligations in those sections extend to cable and direct broadcast satellite service (“DBS”) channels only to the extent that the relevant programming is carried on a cable television or DBS system channel “subject to the *exclusive control*” of the cable or DBS provider. 47 C.F.R. § 76.205 (2006) (emphasis added) (cable); 47 C.F.R. § 25.701 (2006) (“DBS origination programming is defined as programming (exclusive of broadcast signals) carried on a DBS facility over one or more channels and subject to the exclusive control of the DBS provider.”) A cable system is defined as any facility designed to provide video programming to multiple subscribers through “closed transmission paths.” It does not include, *inter alia*, “a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities us[e] any public right of way.” 47 U.S.C. § 522(7)(B)(2006). FCC v. Beach Communications, Inc., 508 U.S. 307, 309-10 (1993). These rules do not apply to the Internet.

after the material has been broadcast.<sup>28</sup> At the root of indecency, obscenity, and profanity determinations is the contemporary community standard and the context in which the material is presented.<sup>29</sup> Deputizing the entire public as the watchdogs or monitors of broadcast material, in theory, results in agency decisions more closely reflecting these community standards than would be possible were those determinations made solely by a small number of commissioners or FCC staffers. Moreover, this public watchdog function is essential because, as discussed herein, the FCC is prohibited from engaging in censorship of all broadcast material, not just that of a political nature.<sup>30</sup>

Taking into consideration contemporary community standards and the context of political speech, an argument could be made that political advertisements should be a safe haven from presentation of gratuitous, confusing, and often untrue private, intimate, and sexually suggestive matters. The political broadcast advertisement, it could be argued, simply is an inappropriate venue for the racy content commonplace in other genres of television and radio broadcast programming. With the amount of information Americans process daily from multiple media sources, it has become more difficult to sift through it all and to find the real truth particularly when convoluted by irrelevant, misleading, and gratuitous sexual or sexually suggestive content. Political broadcast material should be free from this type of often misleading content. The political process ideally would seek to highlight truths and inform the electorate, but not pander, titillate, or seduce with misleading and gratuitous sexually suggestive content.

As currently written, the statutes and regulations enacted to serve the public interest in protecting children from the potential harms of exposure to indecent, obscene, and profane material broadcast via the public airwaves are in conflict with the laws that have been enacted to enhance and protect the political process by protecting the rights of candidates for political office to use the public airwaves for purposes of furthering their political campaigns.<sup>31</sup> This conflict lies in the inability of a broadcaster to reject candidate-sponsored political advertisements that contains indecent, obscene, or profane material. By leaving this issue unresolved, the federal government has hogtied broadcasters when it comes to their discretion to pick and choose which political advertisements they will air and when during the broadcast day they will air them.

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<sup>28</sup> See, e.g., Letter to Mr. Daniel Becker, Becker for Congress, 7 F.C.C.R. 7282 (Oct. 30, 1992) *citing* Letter to Christian Action Network released June 12, 1992 (stating that the FCC “does not render indecency rulings in advance of a broadcast.”)

<sup>29</sup> See In the Matter of Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999, 8002, ¶ 9 (Apr. 6, 2001) hereinafter *Indecency Policy Statement*]; and see FCC v. Pacifica Foundation, 438 U.S. 726, 750 (1978) (placing significance on the context in which the material is presented and stating that the Court was not ruling that “an occasional expletive . . . would justify any sanction . . .”).

<sup>30</sup> See 47 U.S.C. §§ 315, 326 (2006).

<sup>31</sup> 18 U.S.C. § 1464 (2006) (prohibition against the broadcast of indecent, profane, or obscene material). See also 47 C.F.R. § 73.670 (2006) (limiting the number of minutes that may be devoted to commercials during children’s television programming); 47 U.S.C. §§ 312 (2006) (reasonable access for federal candidates), § 315 (equal opportunities for all candidates and censorship prohibition). See also 47 C.F.R. § 4165 (2006) (indecent broadcasts); and see 47 C.F.R. § 4170 (2006) (obscene broadcasts).

**A. 18 U.S.C. § 1464: Prohibition Against Broadcast Indecency, Obscenity, and Profanity**

Section 1464 of title 18 of the United States Code provides that “[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined . . . or imprisoned not more than two years, or both.”<sup>32</sup> The purpose of this law is to protect children from harmful material broadcast over the public airwaves.<sup>33</sup> In addition to the two-year prison term, violation of this section also subjects a broadcast licensee to license revocation and a fine of up to \$325,000 per violation.<sup>34</sup> The Commission has clearly stated that it does not regulate indecency on cable or satellite subscription services.<sup>35</sup>

**1. Indecent Material**

Indecent programming is “language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities.”<sup>36</sup> It is material intended to pander or titillate, or that is vulgar or lewd.<sup>37</sup> Although indecent speech receives First Amendment protection, courts

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<sup>32</sup> 18 U.S.C. § 1464 (2006). This provision was moved from the Communications Act to the Criminal Code in 1948.

<sup>33</sup> See *Pacifica*, 438 U.S. at 749-51.

<sup>34</sup> 47 C.F.R. § 1.80(a)(4), (b)(1)(2006); 47 U.S.C. § 503(b)(2)(C)(2006). “If the violator is . . . a broadcast station licensee or permittee; . . . and, is determined . . . to have broadcast obscene, indecent, or profane language, the amount of any forfeiture penalty . . . shall not exceed \$325,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$3,000,000 for any single act or failure to act.” In 2006, Congress raised the maximum fine to \$325,000 per violation following several years of highly publicized indecent broadcast incidents. 47 U.S.C. 503(b)(2)(C). Previously, the base monetary sanction for violation of the FCC’s indecency, profanity, and/or obscenity restrictions had been \$7,000 per violation with a maximum fine of \$32,500 per violation. The fine may be adjusted based on such factors as the nature, circumstances, extent and gravity of the violation, the degree of culpability of the violator, the violator’s history of prior offenses, the violator’s ability to pay, and such other factors as justice may require. See also Enforcement Policies Regarding Broadcast Indecency, 66 Fed. Reg. 21984, 21986 (May 2, 2001); and Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, § 2, 120 Stat. 491 (2006) *codified at* 47 U.S.C. § 503(b)(2)(C)(2006).

<sup>35</sup> See In the Matter of Various Complaints Against the Cable/Satellite Television Program “Nip/Tuck”, Mar. 4, 2005. While all services are subject to the reasonable access, equal opportunity, and censorship rules, *albeit* to differing degrees, cable and satellite service providers are not subject to the same rules governing indecency and profanity as are traditional over-the-air television and radio broadcast licensees. Obscenity, however, is prohibited on all services at all times. 47 C.F.R. § 73.3999 (2006).

<sup>36</sup> See Citizen’s Complaint Against Pacifica Foundation Station WBAI (FM), New York, New York, 56 F.C.C.2d 94, 98 (1975); see also *Pacifica*, 438 U.S. at 738-41. Because the FCC is expressly prohibited from censoring broadcast material, and because it does not regulate by monitoring broadcast material, the FCC relies almost exclusively on the viewing and listening public to register complaints regarding offensive and inappropriate broadcast programming. It is this larger community standard by which the FCC regulates and reacts to programming alleged by listeners and viewers to be indecent, obscene, or profane.

<sup>37</sup> *Pacifica*, 438 U.S. at 747.

have upheld the FCC's authority to prohibit television and radio broadcasts of indecent material during times of the day when there is a reasonable risk that children will be in the viewing or listening audience.<sup>38</sup> Broadcasters may broadcast indecent and profane material to the safe harbor viewing period of 10:00 p.m. to 6:00 a.m.—those hours of the day when children are less likely to be in the viewing and listening audience.<sup>39</sup> This is called channeling.

In determining liability for the broadcast of indecent material, the FCC applies a two-prong test.<sup>40</sup> First, the Commission will determine whether the speech indeed is indecent under the Commission's definition of the term.<sup>41</sup> Second, it will consider the context in which the speech arises, taking into consideration whether it is "patently offensive as measured by contemporary community standards for the broadcast medium."<sup>42</sup> To determine whether the material broadcast is indecent, the FCC looks at three primary factors: (1) whether the description or depiction is explicit or graphic; (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs; and (3) whether the material appears to pander or is used to titillate or shock.<sup>43</sup> Neither of these three factors alone is determinative, but must be balanced to determine whether the material, taking into consideration its context, is indecent.<sup>44</sup>

The prohibition against indecent material, to date, has turned on the U.S. Supreme Court's holding in *FCC v. Pacifica Foundation*.<sup>45</sup> In that case, the Court was asked to resolve the question of whether the FCC could fine a broadcaster for airing during the afternoon daylight hours, the 12-minute "Filthy Words" monologue by George Carlin in which he identified seven words "you couldn't say on the public . . . airwaves" and then

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<sup>38</sup> See, e.g., *id.* at 749; *Action for Children's Television v. FCC*, 58 F.3d 654, 669-70 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996) [hereinafter *ACT III*]; see also *United States v. Playboy Entm't Group*, 529 U.S. 803, 811 (2000) ("when we consider the further circumstance that the material comes unwanted into homes where children might see or hear it against parental wishes or consent, there are legitimate reasons for regulating it."); *Reno v. ACLU*, 521 U.S. 844, 874 (1997) ("It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials.

<sup>39</sup> See *Action for Children's Television v. FCC*, 58 F.3d 654, 669-670 (D.C. Cir. 1995) (en banc), *c45ert. denied, ACT III*.

<sup>40</sup> See *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 13299, ¶ 15, FCC 06-166 (Nov. 6, 2006) [hereinafter *Omnibus Remand Order*].

<sup>41</sup> See *Pacifica*, 438 U.S. at 742 ("Context is all important" in indecency determinations). *Indecency Policy Statement*, 16 F.C.C.R. at 8002, ¶ 8; *Omnibus Order*, 21 F.C.C.R. at 2667, ¶ 12.

<sup>42</sup> See *Pacifica*, 438 U.S. at 742 ("Context is all important" in indecency determinations.). *Indecency Policy Statement*, 16 F.C.C.R. at 8002, ¶ 8; *Omnibus Order*, 21 F.C.C.R. at 2667, ¶ 12.

<sup>43</sup> *Omnibus Order*, 21 F.C.C.R. at 2668, ¶ 14; *Indecency Policy Statement*, 16 F.C.C.R. at 8002-15, ¶¶ 8-23. See also *Application of Pacifica Foundation; For Renewal of License for Noncommercial Station WPFW(FM)*, Washington, D.C., 95 F.C.C.2d 750, ¶¶ 16-18 (1983) (defining indecency and finding that isolated use of expletives during the license term "fail[ed] to raise a substantial and material question of fact as to whether renewal of WPFW's license would serve the public interest, convenience and necessity.")

<sup>44</sup> *Indecency Policy Statement*, 16 F.C.C.R. at 8010, ¶¶ 9, 20 *citing* *Tempe Radio, Inc. (KUPD-FM)*, Notice of Apparent Liability for Forfeiture, 12 F.C.C.R. 21828 (Mass Media Bur. 1997); *EZ New Orleans, Inc. (WEZB(FM))*, Notice of Apparent Liability for Forfeiture, 12 F.C.C.R. 4147 (Mass Media Bur. 1997).

<sup>45</sup> See generally *Pacifica*, 438 U.S. at 726.

proceeded to repeat them over and over in various forms.<sup>46</sup> The Court upheld the FCC's authority to regulate broadcast indecency.<sup>47</sup>

The Court in *Pacifica* acknowledged that the media “have established a uniquely pervasive presence in the lives of all Americans.”<sup>48</sup> Furthermore, it agreed that “because broadcasting is uniquely accessible to children, even those too young to read” it has the potential to affect them particularly in a negative way.<sup>49</sup> It can “enlarge[] a child’s vocabulary in an instant.”<sup>50</sup> Therefore, “the government’s interest in the well-being of its youth and supporting parents claim to authority in their own household justified the regulation of otherwise protected expression.”<sup>51</sup> The holding in *Pacifica*, however, is not limited to use of the seven words used by George Carlin in “Filthy Words.”<sup>52</sup> Depending on the context in which the speech is uttered, innuendo and double entendre may be considered indecent when coupled with other explicit references.<sup>53</sup> *Pacifica* suggests that channeling indecent broadcasts to the wee hours of the morning, avoids exposing children to material that might be inappropriate for them.<sup>54</sup>

Pursuant to *Pacifica*, indecent speech must involve more than an isolated or fleeting use of an offensive word.<sup>55</sup> Until recently, the Court and the FCC have reasoned that they will focus on deliberate and repetitive use of expletives and other such language used in a patently offensive manner.<sup>56</sup> After 30 years of adherence to this policy the FCC changed its policy significantly and has put broadcast licensees on notice that it no longer will permit the broadcast of even fleeting and isolated use of profanity.<sup>57</sup> As discussed below, the Court has agreed to hear the appeal of a case involving the use of fleeting words that in their common usage describe sexual or excretory organs or activities.<sup>58</sup>

## 2. Profane Material

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<sup>46</sup> *Id.* at 729-30.

<sup>47</sup> *Id.* at 735-38.

<sup>48</sup> *Id.* at 748.

<sup>49</sup> *Id.* at 749.

<sup>50</sup> *Id.* at 749.

<sup>51</sup> *Id.* at 749.

<sup>52</sup> See In the Matter of Pacifica Foundation, Inc., Memorandum Opinion and Order (1987), 2 F.C.C.R. 2698 (1987) [hereinafter *Pacifica M&O*].

<sup>53</sup> See, e.g., In the Matter of Infinity Broadcasting Corp. of Penn., Memorandum Opinion and Order, 2 F.C.C.R. 2705 (1987); *Pacifica*, 438 U.S. at 750.

<sup>54</sup> *Pacifica*, 438 U.S. at 749-51; *Pacifica Foundation*, 56 F.C.C.2d at 98.

<sup>55</sup> *Pacifica*, 438 U.S. at 750.

<sup>56</sup> *Pacifica M&O*, 2 F.C.C.R. at 2699, ¶ 13; *Pacifica*, 438 U.S. at 750 (“We have not decided that an occasional expletive . . . would justify any sanction or . . . would justify a criminal prosecution.”).

<sup>57</sup> Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globes Awards” Program, 19 F.C.C.R. 4975 (2004) [hereinafter *Golden Globes Order*]; see generally *Omnibus Order*, 21 F.C.C.R. 2664; see generally *Omnibus Remand Order*, 21 F.C.C.R. at 13299.

<sup>58</sup> See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2<sup>nd</sup> Cir. 2007), cert. granted *FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647, 170 L. Ed. 2d 352 (2008), 07-582 (2007) (addressing the isolated and fleeting use of various forms of the words “shit” and “fuck” and other profane material).

Traditionally, the Courts and the FCC defined profanity as blasphemy.<sup>59</sup> The Commission adopted a new definition in 2004 in its *Golden Globes Order*, which broadened the definition of profanity to include speech beyond that which might be considered blasphemous.<sup>60</sup> The definition adopted in 2004 defined profane as “those personally reviling epithets naturally tending to provoke violent resentment or denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance.”<sup>61</sup> This new definition was overturned by the Second Circuit in *Fox Television Stations, Inc. v. FCC* where the Second Circuit vacated and remanded the Commission’s *Omnibus Remand Order*.<sup>62</sup> The Second Circuit found that the FCC’s new definition of “profane” “substantially overlap[s] the statutory term ‘indecent’ . . . render[ing] the statutory term ‘indecent’ superfluous.”<sup>63</sup> No new definition has been adopted, nor was the issue raised in the Commission’s *Petition for Certiorari* in the U.S. Supreme Court.<sup>64</sup>

### 3. Obscene Material

While indecent and profane material receive some First Amendment protection, obscene material does not, and, therefore, may not be broadcast at any time on broadcast stations nor on cable or satellite channels.<sup>65</sup> The Supreme Court has opined that to be

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<sup>59</sup> *Fox v. FCC*, 489 F.3d 444; *Duncan v. United States*, 48 F.2d 128, 134 (9<sup>th</sup> Cir. 1931); *Gagliardo v. United States*, 366 F.2d 720, 725 (9<sup>th</sup> Cir. 1966); *In re Complaint by Warren B. Appleton, Brockton, Mass.* 28 F.C.C. 2d 36 (1971).

<sup>60</sup> *Golden Globes Order*, 19 F.C.C.R. 4975, at ¶ 14.

We recognize that the Commission's limited case law on profane speech has focused on what is profane in the context of blasphemy . . . but nothing in those cases suggests either that the statutory definition of profane is limited to blasphemy . . . Broadcasters are on notice that the Commission in the future will not limit its definition of profane speech to only those words and phrases that contain an element of blasphemy or divine imprecation, but, depending on the context, will also consider under the definition of "profanity" the "F-Word" and those words (or variants thereof) that are as highly offensive as the "F-Word," to the extent such language is broadcast between 6 a.m. and 10 p.m. . . We will analyze other potentially profane words or phrases on a case-by-case basis.

<sup>61</sup> *Golden Globes Order*, 19 F.C.C.R. 4975 at ¶ 13 (quoting *Tallman v. United States*, 465 F.2d 282, 286 (7<sup>th</sup> Cir. 1972); and see *Pacifica*, 438 U.S. at 735-38, 750. The Court, in *Pacifica*, decided the case based on principles similar to the law of public nuisance which favors channeling behavior over outright prohibitions. The Court favored channeling material that depicts or describes sexual or excretory activity in a patently offensive way to times of the day when children are less likely to be in the audience. While 47 U.S.C. § 326 prohibits government censorship of broadcast material prior to its broadcast, it does not prohibit the FCC from reviewing the content of broadcast material after the fact and sanctioning licensees who broadcast indecent, obscene, or profane material.

<sup>62</sup> *Fox v. FCC*, 489 F.3d at 467.

<sup>63</sup> *Id.* at 467) (“our canons of statutory construction do not permit such an interpretation”).

<sup>64</sup> *FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647, 170 L. Ed. 2d 352 (2008), 07-582 (2007).

<sup>65</sup> See, e.g., *Roth v. U.S.* 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15, 23 (1973). Separate statutes prohibit the distribution and transmission of obscene material on cable and satellite television services. See 18 U.S.C. § 1468 (prohibiting distribution of obscene material on cable and satellite television); 47 U.S.C. § 559 (prohibiting transmission of obscene material on cable services. See also 47 U.S.C. §§ 532(h), 544(d), 558. 18 U.S.C. § 1468(a) reads:

found obscene, material must meet a three-prong test: (1) an average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest (i.e., material having a tendency to excite lustful thoughts);<sup>66</sup> (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political, or scientific value.<sup>67</sup> The Supreme Court has indicated that this test is designed to cover hard-core pornography and not other forms of indecent or offensive speech.<sup>68</sup>

In response to the racist tirades of U.S. senatorial candidate J.B. Stoner in the 1970s, the NAACP asked the FCC to ban the word “nigger” as obscene or indecent in accordance with the U.S. Supreme Court’s holding in *Pacifica*.<sup>69</sup> The NAACP misunderstood the Court’s holding in *Pacifica* to apply to racist hate speech. In response, the FCC concluded that use of the racial epithet “nigger” is neither indecent nor obscene under its rules.<sup>70</sup> No matter how offensive the term, it describes neither sexual organs, sexual or excretory activity, nor sexual conduct in a patently offensive manner as is required pursuant to the agency’s rules.

#### **B. 47 U.S.C. § 312: Sanctions for Failure to Provide Reasonable Access and for Broadcast of Indecent Material**

In recognition of the extraordinarily influential role played by the broadcast media in shaping the public’s views and opinions on political matters, Congress enacted 47 U.S.C. § 312(a) seeking to give political candidates for federal office greater access to this influential medium of public communication with potential voters.<sup>71</sup> Congress also sought to contain the cost of this access.<sup>72</sup> Section 312(a) of the Communications Act

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Whoever knowingly utters any obscene language or distributes any obscene matter by means of cable television or subscription services on television, shall be punished by imprisonment for not more than 2 years or by a fine in accordance with this title, or both.

47 U.S.C. § 559 reads:

Whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined under title 18, United States Code, or imprisoned not more than 2 years, or both.

<sup>66</sup> *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (citing *Roth v. U.S.*, 354 U.S. 476, 487-489 (1957)).

<sup>67</sup> *See Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>68</sup> *See, e.g., Miller v. California*, 413 U.S. 15, 23-25 (1973); *Jacobellis v. Ohio*, 378 U.S. 184, (1964) (C.J. Harlan and J. Clark, dissenting); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54 (1973) (“This Court has consistently held that obscene material is not protected by the First Amendment as a limitation on the state police power by virtue of the Fourteenth Amendment.”).

<sup>69</sup> *Stoner II*, 69 F.C.C.2d at 943-44; 46 U.S.L.W. 5018 (1987); *Pacifica*, 438 U.S. at 738-51.

<sup>70</sup> *Stoner II*, 69 F.C.C.2d at 944-45.

<sup>71</sup> Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 312(a).

<sup>72</sup> *See CBS, Inc. v. FCC*, 453 U.S. 367, 379 (1981), *citing* Federal Campaign Act of 1971: Hearings on S.1, S. 382, and S. 956 before the Subcommittee on Communications of the Senate Committee on Commerce,

provides for administrative sanctions for, among other things, the broadcast of indecent material<sup>73</sup> and the failure to allow candidates for *federal* elective office reasonable access to broadcast stations.<sup>74</sup>

Paragraph (7) of § 312(a) affords legally qualified candidates for federal office an affirmative right of reasonable access to a licensee's station and allows for license revocation in the event of a broadcaster's

willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.<sup>75</sup>

The statute does not define reasonable access, nor do FCC regulations offer any one particular definition. The FCC, however, has developed an individualized, case-by-case set of interpretative factors to be considered to effectuate the reasonable access requirements of § 312(a)(7) including the following: (i) a candidate's stated purpose in seeking air time; (ii) the amount of time previously sold to the candidate; (iii) the disruptive impact on the broadcaster's regular program schedule; and (iv) the likelihood of requests for time by rival candidates under federal broadcast equal opportunity requirements.<sup>76</sup> The Supreme Court upheld the FCC's standard and practice of case-by-case determinations of reasonableness in *CBS v. FCC*.<sup>77</sup> The Court also opined that this

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92<sup>nd</sup> Cong., 1<sup>st</sup> Sess. 2 (1971) (remarks of Sen. Pastore); and S. Rep. No. 92-96, 20 (1971) U.S. Code Cong. & Admin. News 1972, 1773-1774.

<sup>73</sup> 47 U.S.C. § 312 (a)(7)(2006).

<sup>74</sup> 47 U.S.C. § 312(a)(6) (providing for administrative sanctions for violation of 18 U.S.C. § 1464—broadcast of indecent material); 47 U.S.C. § 312(a)(7). The FCC has further regulated these requirements in 47 C.F.R. § 73.1944 (2006). Paragraph (a)(6) provides that the Federal Communications Commission may revoke any station license or construction permit for violation of 18 U.S.C. § 1464. 18 U.S.C. § 1464 also provides for imprisonment of not more than two years. Section 312 also provides for license revocation in the event a licensee broadcasts a lottery or engages in mail fraud. The Court of Appeals deferred to the FCC on the determination of when a campaign actually has begun. *See CBS, Inc. v. FCC*, 629 F.2d 1, 18 (D.C. Cir. 1980).

<sup>75</sup> 47 U.S.C. § 312 (a)(7)(2007). Added to the Communications Act by the Federal Election Campaign Act of 1971, Pub. L. No. 92-225.

<sup>76</sup> *See CBS, Inc. v. FCC*, 453 U.S. 367, 375, 387 (1981); *In the Matter of Codification of the Commission's Political Programming Policies*, 7 F.C.C.R. 678, 681 (1991); 47 F.C.C.2d 516, 516-17 (1974); *and see* 68 F.C.C.2d 1079, 1089, 1091, n. 14 (1978) ("there may be circumstances when a licensee might reasonably refuse broadcast time to political candidates during certain parts of the broadcast day.") *See Becker*, 95 F.3d at 80. These circumstances are not defined. The Commission has indicated that in weighing these factors, it will focus on two issues: "(1) has the broadcaster adverted to the proper standards in deciding whether to grant a request for access, and (2) is the broadcaster's explanation for his decision reasonable in terms of those standards?" *CBS, Inc. v. FCC*, 629 F.2d 1, 18 (D.C. Cir. 1980).

<sup>77</sup> *CBS, Inc. v. FCC*, 453 U.S. 367, 386-91 (1981).

practice did not “improperly involve the FCC in the electoral process or significantly impair broadcasters’ editorial discretion.”<sup>78</sup>

Broadcasters must justify denials of access and may not use any of these considerations as a pretext for denial of access.<sup>79</sup> Additionally, broadcasters must cite “a realistic danger of substantial program disruption” to justify denial of reasonable access.<sup>80</sup> Generally, broadcasters are accorded deference provided they demonstrate that they have acted reasonably and in good faith.<sup>81</sup> Blanket, across-the-board types of policies denying access to the station will not be accorded such deference upon agency review of a denial and very likely will be found unreasonable.<sup>82</sup>

The affirmative right conferred upon federal candidates by the section is limited. This statutory provision does not confer upon political candidates any affirmative right of access to a broadcast station during any *particular time* of the broadcast day, but candidates may not be excluded from certain parts of the broadcast day including prime time.<sup>83</sup> Similarly, there is no right to time during any particular program.<sup>84</sup> Nor is there any promise of free air time.<sup>85</sup> Candidates must be willing to pay for the air time.<sup>86</sup>

## **C. 47 U.S.C. §§ 315 and 326: Equal Opportunities and Prohibition Against Censorship**

### **1. Equal Opportunities for Competing Candidates**

While § 312(a)(7) provides candidates for federal office affirmative, *albeit*, reasonable access to use broadcast stations, § 315 of the Communications Act merely provides candidates for any public office equal opportunities of access to a licensee’s

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<sup>78</sup> *Id.*

<sup>79</sup> *See id.* at, 387.

<sup>80</sup> *See CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

<sup>81</sup> *See, e.g.*, In re Complaint of Carter-Mondale Presidential Committee, Inc. Against The ABC, CBS & NBC Television Networks, 74 F.C.C.2d 657, 665, 674 (Nov. 28, 1979); *See, e.g.*, In re Complaint of Carter-Mondale Presidential Committee, Inc. Against The ABC, CBS and NBC Television Networks, 74 F.C.C.2d 631, 642-51 (Nov. 21, 1979); and *see FCC 1978 Report and Order*, 68 F.C.C.2d at 1089-1092, 1094.

<sup>82</sup> *See CBS, Inc. v. FCC*, 453 U.S. 367 (1981) *citing* 302 U.S. App. D.C. 369, 386-387, 629 F.2d 1, 18-19 (1980).

<sup>83</sup> *See FCC 1978 Report and Order*, 68 F.C.C.2d at 1090, ¶ 40; In Re Public Notice Concerning Licensee Responsibility Under Amendments to The Communications Act Made By The Federal Election Campaign Act of 1971, 47 F.C.C. 2d 516 (1974) [hereinafter *Licensee Responsibility*].

<sup>84</sup> In the Matter of Codification of the Commission’s Political Programming Policies, 7 F.C.C.R. 678, 682 (1991).

<sup>85</sup> *FCC 1978 Report and Order*, 68 F.C.C.2d at 1088, ¶ 35; In the Matter of Codification of the Commission’s Political Programming Policies, 7 F.C.C.R. at 687, ¶ 49.

<sup>86</sup> *See Kennedy for Preside Comm. v. FCC*, 204 U.S. App. D.C. 160, 174-178, 636 F.2d 432, 446-450 (1980); Public Notice, The Law of Political Broadcasting and Cablecasting, 69 F.C.C.2d 2209, 2288-2290 (Aug. 16, 1978).

station as are afforded other candidates.<sup>87</sup> The intent of this section is to afford rival candidates a comparable audience reach. Specifically, § 315 provides

[i]f any licensee shall permit any person who is a legally qualified candidate for *any* public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.<sup>88</sup> (Emphasis added).

Section 315 does not grant candidates an affirmative right of reasonable access to a broadcast station in the way § 312(a)(7) does to federal candidates, but merely provides that once a broadcaster has provided access to its station to one candidate for any political office, it must provide the same access to its station to other candidates for that same political office.<sup>89</sup> Section 315 also contains four exceptions.<sup>90</sup> The section provides that

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<sup>87</sup> 47 U.S.C. § 315(a) (2006).

<sup>88</sup> *Id.*

<sup>89</sup> This includes the same amount of airtime the same time slots, and the same prices. *See, e.g.*, In re E.A. Stephens, 11 F.C.C. 61 (1945) (not only must candidates be offered the same amount of airtime, but the desirability of the time slots offered competing candidates also must be comparable); *see also* In re D.L. Grace, Esq., 40 F.C.C. 297 (1958); Public Notice, Use of Broadcast Facilities by Candidates for Public Office, 24 F.C.C.2d at 838, 869, 877 (1970); In re Television Co. of America, 40 F.C.C. 319 (1961); *and see* In re Political Broadcast Rates, 40 F.C.C. 265 (1955) (FCC does not mandate particular rates, but requires equal treatment of candidates in rates charged). The rule confers a legal right to a candidate only when an opposing candidate, not someone speaking on behalf of the opposing candidate, has used the station to advance his or her candidacy. *See Felix v. Westinghouse Radio Stations, Inc.* 186 F.2d 1 (3d Cir. 1950), *cert. denied* 341 U.S. 909 (1951). While Section 315 does not specifically address the rights of groups supporting or opposing candidates to access the broadcast station, pursuant to FCC policy, third parties might have a right of equal opportunity in certain circumstances. Though considered to be related to the now-defunct Fairness Doctrine, the Zapple Doctrine, which seems to have survived, is viewed as a quasi-equal opportunity principle that entitles supporters of a candidate with substantial support—generally nominees of major political parties—time comparable to that offered supporters of another candidate. The Zapple Doctrine does not entitle supporters to the same degree of time, but rather a roughly comparable opportunity to buy comparable time. This doctrine was created to deal with potential political imbalances that could be brought about by the influence of third-party supporters of candidates to avoid triggering equal opportunities for competing candidates. *In Re Request by Nicholas Zapple, Communications Counsel, Committee on Commerce for Interpretive Ruling Concerning Section 315 Fairness Doctrine* (“Nicholas Zapple”), 23 F.C.C. 2d 707, 707–09 (1970). Section 312 and Section 315 were invoked in an interesting way during the 2004 presidential campaign. In Fall, 2004, the Sinclair Broadcast Group (“Sinclair”) ordered all of its 60 plus broadcast stations to show the film “Stolen Honor: Wounds That Never Heal” (“Stolen Honor”), a film featuring Vietnam veterans criticizing Democratic candidate John Kerry’s anti-war activities upon returning to the U.S. following his wartime service. Airing the film would have preempted regularly scheduled primetime television programming. Democrats claimed that Sinclair violated the equal time provision by not giving Kerry an opportunity to respond. The party also claimed that the film amounted to a prolonged free political advertisement for George W. Bush that violated the campaign finance rules by not also airing a pro-Kerry advertisement of equal length. It was characterized as an “illegal campaign contribution.” Sinclair eventually decided not to air the entire “Stolen Honor” film choosing instead to show “A POW Story: Politics, Pressure and the Media” which included portions of “Stolen Honor” and segments of another film “Going Upriver: The Long War of John Kerry” that Sinclair claimed contained segments more flattering to John Kerry. In an interesting twist of application of the reasonable access and equal time statutes, the equal time provision and reasonable access provisions would have given more access to George W. Bush because it was John Kerry whose image appeared on screen..

there has been no use of the station by a legally qualified candidate when the candidate appears in:

(1) a bona fide newscast; (2) a bona fide news interview<sup>91</sup>; (3) a bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary)<sup>92</sup>; or (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).<sup>93</sup>

## **2. Censorship Prohibition and Channeling**

In addition to equal opportunity protection, § 315 also prohibits broadcasters from censoring broadcast material.<sup>94</sup> It provides in relevant part

such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate.<sup>95</sup>

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<sup>90</sup> 47 U.S.C. § 315(a) (2006).

<sup>91</sup> *See also* In re Station KFDX-TV, 40 FCC 374 (1962) (Bona fide news interviews must be regularly scheduled for the purposes of § 315). *See also* In re Capitol Radio Networks, FCC DA96-573, Apr. 11, 1996; In re Arthur R. Block, FCC DA 92-1458, Letter dated Oct. 21, 1992 (The FCC also will consider whether the licensee has independent control over the program and whether the broadcaster has control over format, content, and selection of interview participants are based on the licensee's good faith judgment as to the participant's newsworthiness, rather than for the purpose of furthering the participant's political candidacy.).

<sup>92</sup> 47 U.S.C. § 315(a). *See, e.g.,* In re Victor E. Ferrall, Jr., 46 F.C.C. 2d 1113 (1974) (The candidate's appearance must be incidental to the presentation of the subject matter and not simply to advance the candidate's candidacy.).

<sup>93</sup> 47 U.S.C. § 315(a). *See also* Kennedy for President Committee v. FCC, 636 F.2d 417 (1980) (three factors will be considered to determine whether coverage of a candidate's press conference is exempt as on-the-spot coverage of a news event: (i) whether the conference is live; (ii) whether the broadcaster makes a good faith determination that the conference is a bona fide news event; and (iii) whether the broadcaster demonstrates any favoritism toward the candidate.). *See also* In re Wade H. Hargove, 66 F.C.C. 2d 1055 (1976) (an appearance by a candidate on a newscast, bona fide news interview, bona fide news documentary or on-the-spot coverage of a bona fide news event "is not use of the a broadcasting station for the purposes of § 315(a)(4)."). *See also* NOW, New York City Chapter v. FCC, 555 F.2d 1002 (1977) (The Commission will not question a broadcast licensee's judgment as to what constitutes news "unless there is extrinsic evidence of deliberate distortion or news staging or unless licensee consistently fails to report news events of public importance that cannot in good faith be ignored.").

<sup>94</sup> 47 U.S.C. § 315; 7 F.C.C.R. 678 (1991). *See also* 47 U.S.C. § 326 (prohibiting the Federal Communications Commission from engaging in censorship of broadcast content).

<sup>95</sup> 47 U.S.C. § 315(a) (2007).

Nowhere does § 315 expressly state that § 1464 does not apply to political broadcast material. Additionally, nowhere does § 1464 state that political advertisements are excepted from the indecency, obscenity, and profanity prohibition. In other words, although neither a licensee nor the government may not censor political broadcast material under § 315 and § 326, respectively, neither section expressly excepts political broadcast material from what may be considered actionably indecent.

Section 326 prohibits the government from censoring or prohibiting speech up front, but does not prohibit the government from punishing, after the fact, speech that violates § 1464.<sup>96</sup> This loophole and that in § 312 are what potentially could find broadcasters in a quandary unable to prohibit the speech themselves, unable to request that the Commission prohibit the speech, yet not insulated from liability should indecent political speech be broadcast over the public airwaves.

In the 1970s, broadcasters were faced with the dilemma of what to do when a political candidate requested broadcast time to air a political advertisement in which the candidate spewed white supremacist hate speech and boldly referred to blacks as “niggers.”<sup>97</sup> By the early 1990s, broadcasters were faced with the dilemma of how to handle requests for airtime by candidates for political office to broadcast advertisements depicting aborted fetuses.<sup>98</sup> At the time, it was argued by broadcasters and some in the public that the advertisements either were indecent, obscene, profane, or all of the above, and therefore should be barred from broadcast television altogether.<sup>99</sup> In the alternative, it was suggested that the advertisements be relegated to hours of the viewing day when

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<sup>96</sup> See *FCC v. Pacifica*, 438 U.S. 726, 737-38 (1978) (“We conclude, therefore, that § 326 does not limit the commission’s authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting.”). In 1927 and 1934, the anticensorship provision of § 326 and the indecency prohibition of § 1464 were enacted in the same section. A 1948 revision of the Criminal Code to include U.S. statutory provisions located in other titles, the prohibition against the broadcast of obscene, indecent, and profane material was removed from the Communications Act and reenacted as part of the Criminal Code. Courts have concluded that this change in the U.S. Code was not intended to change the applicability of the anticensorship provision of § 326.

<sup>97</sup> See generally *Stoner II*, 69 F.C.C.2d 943; *Stoner I*, 36 F.C.C.2d 635. During his U.S. senatorial campaign in Georgia, J. B. Stoner made a political announcement stating:

I am J. B. Stoner. I am the only candidate for U.S. Senator who is for the white people. I am the only candidate who is against integration. All of the other candidates are race mixers to one degree or another. I say we must repeal Gambrell’s civil rights law. Gambrell’s law takes jobs from us whites and gives those jobs to the niggers. The main reason why niggers want integration is because the niggers want our white women. I am for law and order with the knowledge that you cannot have law and order and niggers too. Vote white. This time vote your convictions by voting white racist J. B. Stoner into the run-off election for U.S. Senator. Thank you. *Stoner I*, 36 F.C.C.2d at 636.

<sup>98</sup> See generally *Mass Media Bureau Letter to Kaye Scholer*, 7 F.C.C.R. 5599 (regarding broadcast of political campaign advertisement containing abortion-related material).

<sup>99</sup> See, e.g., *Stoner II*, 69 F.C.C.2d at 944-45; *Stoner I*, 36 F.C.C.2d at 635 (where NAACP argued that use of the word “nigger” posed an imminent and immediate threat to the public); see also, *Mass Media Bureau Letter to Kaye Scholer*, 7 F.C.C.R. at 5599-600.

children were less likely to be in the viewing audience and when the chance of potential harm to them would be reduced.<sup>100</sup>

## II. Immunity and Possible Exceptions to the Political Broadcast Rules

### A. Broadcaster Immunity for Political Speech Where Censoring is Prohibited

In *Farmers Educational and Cooperative Union of America, North Dakota Division v. WDAY, Inc.*, a broadcast licensee sought to remove defamatory material from speeches made by legally qualified candidates for political office.<sup>101</sup> Presuming that § 315 was interpreted to ban such censorship of political speeches, the broadcaster sought legal immunity from suit for broadcast of the libelous statements.<sup>102</sup> In *WDAY*, the Supreme Court affirmed the equal opportunity mandate of § 315 opining that the basic purpose of § 315 is “full and unrestricted discussion of political issues of legally qualified candidates.”<sup>103</sup> Additionally, in holding that § 315 prohibits censorship, the Court in *WDAY* aptly recognized that the broadcaster is faced with a difficult decision in deciding whether to censor political material in violation of § 315 or to risk being found guilty of libel or defamation.<sup>104</sup>

The lack of certainty as to the possible success of defenses to libel and the natural inclination to err on the side of caution, the Court opined, thereby either intentionally or unintentionally chills speech.<sup>105</sup> Because time often is of the essence, thereby heightening the angst of broadcasters faced with this choice, and because of the nature of political campaigns and the limited time period of election seasons, a candidate and a broadcaster may not resolve the issue before voters take to the polls.<sup>106</sup> Therefore, the holding in *WDAY* provides a reasonable and workable resolution of the broadcasters’ dilemma when presented with political speech containing defamatory material.

The Court in *WDAY* relied on legislative history and what it concluded was Congress’s intended purpose of fostering public discussion of political issues and of not placing unreasonable burdens on broadcasters which play such an important role in the

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<sup>100</sup> *Id.*; and see *Farmers v. WDAY*, 360 U.S. 525.

<sup>101</sup> *Id.* at 529.

<sup>102</sup> *Id.* See also *Sorensen v. Wood*, 243 N.W. 82 (1932). *Sorensen v. Wood*, the first judicial decision to address the issue of immunity from a libel suit, said that a broadcaster could delete defamatory statements from political speech. Cases since *Sorensen* uniformly have reversed course, instead, recognizing broadcaster immunity from libel suits relating to the broadcast of political advertisements.

<sup>103</sup> *Farmers v. WDAY*, 360 U.S. at 529.

<sup>104</sup> *Id.* at 529-30.

<sup>105</sup> *Id.*

<sup>106</sup> See, e.g., *id.* at 530.

political process.<sup>107</sup> The Court in *WDAY*, therefore, recognized immunity from defamation suits where a broadcaster airs a political advertisement that defames an opposing candidate.<sup>108</sup> No such immunity has been recognized for the broadcast of indecent material contained in political advertisements.

## B. Possible Exceptions to the Political Broadcast Rules

In 1992, the FCC and the U.S. District Court for the Northern District of Georgia interpreted the indecency provisions of § 1464 to be exceptions to the reasonable access, censorship, and equal opportunities provisions of § 312 and § 315.<sup>109</sup> This conclusion ultimately was overturned by the D.C. Circuit in *Becker v. FCC*.<sup>110</sup> In the earlier cases, the FCC and the U.S. District Court concluded that licensees were not obligated to broadcast indecent political speech outside the safe harbor.<sup>111</sup> They concluded that § 312(a)(7) and § 315 actually override programming discretion ordinarily allowed licensees by the Communications Act.<sup>112</sup> In other words, pursuant to § 312(a)(7) and § 315, broadcasters must provide reasonable access on equal terms without censorship to political candidates for federal office despite the fact that the broadcaster might find the material in the political advertisement indecent, obscene, or profane. Unfortunately, the law does not expressly provide that broadcasters may not be found liable for violation of

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<sup>107</sup> *Id.* at 528, 530, n.5, n.6. The FCC has agreed, and legislative history supports this conclusion.

<sup>108</sup> *Id.* at 529. The Court affirmed the conclusion of the North Dakota Supreme Court which said that “since power of censorship of political broadcasts is prohibited it must follow as a corollary that the mandate prohibiting censorship includes the privilege of immunity from liability for defamatory statements made by the speakers.”

<sup>109</sup> *See, e.g.,* Gillett Communications of Atlanta, Inc. v. Becker, 807 F. Supp. 757, 762 (1992) *citing* Memorandum by FCC Staff, Jan. 6, 1984.

<sup>110</sup> 95 F.3d at 84-85 (vacating FCC ruling in *In the Matter of Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act*, 9 F.C.C.R. 7638 (1994)).

<sup>111</sup> *See* Mass Media Bureau Letter to Kaye Scholer, 7 F.C.C.R. 5599, Aug. 21, 1992 (ruling on a Petition for Declaratory Ruling regarding anti-abortion political advertisement, the Mass Media Bureau declines to rule that abortion advertisements as a class are indecent, declines to foreclose warnings to viewers regarding contents of political advertisements that might be harmful to children, but finds channeling of political advertisements that are not indecent to be in violation of reasonable access requirements); *See* Public Notice Request for Comments, *In the Matter of Petition for Declaratory Ruling concerning Section 312(a)(7) of the Communications Act*, 7 F.C.C.R. 7297, Oct. 30, 1992, MM Docket No. 92-254, FCC 92-486 (the Commission determined that further and comprehensive review of the issue was necessary. “Specifically, we seek comment on all issues concerning what, if any, right or obligation a broadcast licensee has to channel political advertisements that it reasonably and in good faith believes are indecent. We also seek comment as to whether broadcasters have any right to channel material that, while not indecent, may be otherwise harmful to children. In this latter respect, we specifically invite commenters to address the proper scope of any such right and the standard by which the Commission should evaluate the reasonableness of broadcasters’ judgments rendered in exercising that right.”). The FCC later affirmed the Mass Media Bureau’s decision that (i) the abortion imagery was not indecent under § 1464; (ii) the material could be psychologically damaging to children; (iii) that § 312(a)(7) does not preclude channeling; and (iv) that § 312(a)(7) does not violate the no censorship mandate of § 315. *See also* *In the Matter of Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act*, 9 F.C.C.R. 7638.

<sup>112</sup> *See* *Becker*, 95 F.3d at 82.

§ 1464 for the broadcast of such political advertisement featuring material ultimately found indecent, obscene, or profane. This unfortunate loophole presents the dilemma facing broadcasters.

The most important conclusion the FCC reached in rejecting the NAACP's claim in response to the racist speech of J.B. Stoner was that "even if the Commission were to find the word 'nigger' to be 'obscene' or 'indecent,' in light of Section 315 we may not prevent a candidate from utilizing that word during his 'use' of a licensee's broadcast facilities."<sup>113</sup> The Commission has not as forcefully stated this conclusion since *Stoner II*. This single sentence highlights the broadcaster's dilemma. Use of certain language is certain to be offensive to many of a broadcaster's audience, and indeed to the broadcaster also; however, because of the right of equal opportunity to all candidates for the same public office and the prohibition against censorship of political advertisements by a broadcaster, the broadcaster, must for the sake of the political process and the rights of the candidate allow even the most offensive racist to use the public airwaves broadcast facilities to spew hate, spread discontent, and generally offend the public. The issue of indecent political speech nor the conclusion suggested by the *dicta* in the case of J.B. Stoner's advertisement, however, have ever been addressed by the courts. The Commission seems to have an implicit exception to the indecency prohibition for political advertisements. Such an exception, however, never has been expressly stated.

Courts and the FCC have addressed claims that certain political material is indecent and potentially harmful to children.<sup>114</sup> In two 1992 U.S. Congressional races, Daniel Becker of Georgia and Michael Bailey of Indiana, attempting to convey their anti-abortion stances, broadcast television campaign advertisements depicting aborted fetuses. The advertisements seemed specifically designed to repulse viewers and voters and to sink the campaigns of their pro-choice opponents. The broadcast stations in both cases received numerous complaints about the gruesome images depicted over the broadcast airwaves. At least one broadcaster asked the FCC to declare the advertisements indecent and to permit broadcasters to channel those advertisements to hours when children were less likely to be in the viewing audience. The D.C. Circuit in *Becker*, on review of an FCC ruling, grappled with the question of whether the portrayals of aborted fetal tissue—material that was not considered indecent—could be channeled to the safe harbor hours when children are less likely to be in the viewing audience.<sup>115</sup> The court struggled with the tension between the competing interests of children, broadcast licensees, the voting public, and those of political candidates exercising their right of "access to time periods with the greatest audience potential."<sup>116</sup> The FCC had concluded earlier that the abortion depictions were not indecent, but that because of the potential psychological harm to children, § 312(a)(7) did not preclude a broadcaster from exercising its discretion to channel the advertisement or airing it at a time that would be less detrimental to

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<sup>113</sup> *Stoner II*, 69 F.C.C.2d at 944.

<sup>114</sup> *See, e.g., Stoner II*, 69 F.C.C.2d at 944-45; *Mass Media Bureau Letter to Kaye Scholer*, 7 F.C.C.R. at 5599-600.

<sup>115</sup> 95 F.3d at 77-78, 80.

<sup>116</sup> *Becker*, 95 F.3d at 80 (citing *Licensee Responsibility*, 47 F.C.C.2d at 517).

children.<sup>117</sup> Additionally, the FCC concluded that channeling the potentially psychologically harmful advertisement did not violate the prohibition against censorship in § 315.<sup>118</sup>

The D.C. Circuit stated in *Becker* “[w]e are faced, then, with competing interests—the licensee’s desire to spare children the sight of images that are not indecent but may nevertheless prove harmful, and the interest of a political candidate in exercising his statutory right of ‘access to the time periods with the greatest audience potential.’”<sup>119</sup> The D.C. Circuit observed that in light of this statutory conflict, the FCC has afforded licensees the final say in deciding in favor of children.<sup>120</sup> The D.C. Circuit, however, took a different approach than did the FCC. The D.C. Circuit found that the FCC’s approach “frustrated what the FCC itself had identified as Congress’s primary purpose in enacting section 312(a)(7); namely to ensure ‘candidates access to the time periods with the greatest audience potential . . . .’”<sup>121</sup>

As a threshold matter, the D.C. Circuit concluded that the advertisement was not indecent because it did not fit the FCC’s definition.<sup>122</sup> Additionally, the D.C. Circuit held in *Becker* that channeling of political advertisements, even those containing abortion-related content, to the safe harbor is not permitted as such action would offend political broadcasting rules providing political candidates reasonable and equal access to broadcast outlets as well as violate laws prohibiting censorship of political speech.<sup>123</sup> The court

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<sup>117</sup> See In the Matter of Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, 9 F.C.C.R. at 7649 (finding that the depictions of aborted fetuses did not depict sexual or excretory organs or activities); see also 7 Letter Opinion to Mr. Daniel Becker, Becker for Congress, 1992, F.C.C.R. 7282, Oct. 30 (“Abortion in America: The Real Story” (case “presents . . . question of whether a licensee in the absence of a Commission ruling as to whether a given political commercial is or is not indecent, may nonetheless channel the advertisement to the indecency safe harbor where it reasonably and in good faith determines that the ad is indecent. . . Under these circumstances, and until the Commission provides definitive guidance, the staff believes it would not be unreasonable for the licensee to rely on the informal staff opinion referred to above and conclude that Section 312(a)(7) does not require it to air, outside the ‘safe harbor’, material that it reasonably and in good faith believes is indecent.”).

<sup>118</sup> In the Matter of Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, 9 F.C.C.R. at 7649.

<sup>119</sup> 95 F.3d at 80, (citing *Licensee Responsibility*, 47 F.C.C.2d at 517). The gruesome images poses potentially greater psychological harm to children than would exposure to the naked body parts of living people.

<sup>120</sup> *Becker*, 95 F.3d at 80; In the Matter of Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, 9 F.C.C.R. at 7646.

<sup>121</sup> *Becker*, 95 F.3d at 79-80 (citing *Licensee Responsibility*, 47 F.C.C.2d at 517); *FCC 1978 Report and Order*, 68 F.C.C.2d at 1090.

<sup>122</sup> *Becker*, 95 F.3d at 80.

<sup>123</sup> 95 F.3d at 80. *But see* Gillett Communication of Atlanta, Inc. v. Becker, 807 F. Supp. 757 (N.D. Ga. 1992), *reversed and vacated by* Gillett Communications of Atlanta, Inc. v. Becker, 5 F.3d 1500 (11<sup>th</sup> Cir. 1993). The U.S. District Court for the Northern District of Georgia granted a broadcaster injunctive and declaratory relief regarding the broadcast of a potentially indecent political advertisement, finding that the material was indecent as it described excretory activity and material. The U.S. Court of Appeals vacated and remanded without opinion, letting the District Court’s decision stand. *Becker*, 95 F.3d at 84-85. *But see* Gillett Communications of Atlanta, Inc. v. Becker, 807 F. Supp. 757 (N.D. Ga. 1992) (granting

concluded that channeling the abortion advertisements to the safe harbor violated both § 312(a)(7) and § 315 by “permitting content-based channeling of non-indecent political advertisements, thus denying qualified candidates the access to the broadcast media envisioned by Congress.”<sup>124</sup> Broadcasters could not deny a candidate access to adult audiences just because children might be in the audience.<sup>125</sup> In this case, the D.C. Circuit seems to have recognized an exception to the indecency rules for political advertisements.

### III. Recent Indecency Actions

A number of complicated and highly politically charged issues remained unresolved in the indecency arena. For example, it is unclear to what extent the FCC may prohibit fleeting images of nudity, fleeting sexually related or sexually suggestive references, and fleeting and isolated utterances of profanity. The likelihood of such content appearing in a political campaign advertisement, while once unimaginable, or at least considered outside the bounds of public decency, clearly now has become quite possible.

The FCC is caught in a tough position. On the one hand, are the political pressures from certain constituents and concerned parents to preserve some safe radio spectrum for programming suitable for a young audience. On the other hand, are those asserting the First Amendment who cite to the Supreme Court’s holding in *Pacifica* and the FCC’s longstanding policy against sanctioning fleeting expletives.<sup>126</sup> Also complicating the issue is the disparate regulation of broadcast and subscription services and the resulting economic implications of that regulatory disparity. Some argue that the omnipresence of these services to dispute the continued strict regulation of broadcast services. They would argue that it seems on its face no longer to be warranted and indeed unfair regulation from an economic perspective.

#### A. **Janet Jackson and the Bare Breast: *CBS Corp. v. FCC***

The number of indecency complaints filed with the FCC increased exponentially from 1993 when there were no complaints at all to 2006 when there were 327,198, peaking in 2004 with a record 1,405,419 indecency complaints.<sup>127</sup> The year 2004 marked

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declaratory and injunctive relief and holding (i) that the prohibition against the broadcast of indecent material was an exception to the reasonable access, equal opportunities, and anti-censorship provisions; (ii) that the abortion advertisement was indecent; and (iii) that a broadcaster could channel the abortion advertisement to the safe harbor).

<sup>124</sup> *Becker*, 95 F.3d at 84-85.

<sup>125</sup> *Id.* at 79-80.

<sup>126</sup> See *Pacifica*, 438 U.S. at 750; *Pacifica M&O*, 2 F.C.C.R. at 2699, ¶ 13; see also *Petition for a Writ of Certiorari, FCC v. Fox Television Stations*, 07-582 (2007).

<sup>127</sup> These filings represented complaints about programming on television, radio, and cable; however, according to FCC records no Notices of Apparent Liability (“NALs”) have been issued against cable

the now infamous CBS live television broadcast of Super Bowl XXXVIII when during the halftime show featuring musical performers Janet Jackson and Justin Timberlake, an apparent “wardrobe malfunction” resulted in Jackson’s bare breast being exposed for a fraction of a second.<sup>128</sup> That fraction of a second of exposure of Jackson’s bare breast resulted in an “unprecedented number of complaints” to the FCC.<sup>129</sup>

Upon review, the FCC found the performance indecent and issued a forfeiture in the amount of \$550,000 against all of CBS’s twenty locally owned affiliates.<sup>130</sup> First, the Commission determined that the Super Bowl XXXVIII broadcast fell within the subject matter scope of the FCC’s definition of indecency.<sup>131</sup> The broadcast, which was aired outside the safe harbor, was found to depict “sexual or excretory organs or activities”—the bare breast.<sup>132</sup> On the determination of patent offensiveness, the FCC considered the Janet Jackson breast reveal in the context of the entire halftime show and concluded that the entire halftime show was patently offensive as measured by contemporary community standards for the broadcast medium.<sup>133</sup> Besides the duo performance by Jackson and Timberlake, the halftime show included performances by other artists who sang songs with sexual innuendo and who danced suggestively.<sup>134</sup> The depiction of the nude breast

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programmers. See Table of Indecency Complaints and NALs: 1993-2006, available at <http://www.fcc.gov/eb/oip/Stats.html>; and see Table of All Broadcast Indecency-Related Notices of Apparent Liability Issued by the FCC and/or the Enforcement Bureau since November 8, 1999, available at <http://www.fcc.gov/eb/broadcast/NAL.html>.

<sup>128</sup> See e.g., Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, Notice of Apparent Liability for Forfeiture, 19 F.C.C.R. 19230 (2004) [hereinafter *Super Bowl NAL*], affirmed, Forfeiture Order, 21 F.C.C.R. 2760 (2006) [hereinafter *Super Bowl Forfeiture Order*], affirmed, Order on Reconsideration, 21 F.C.C.R. 6653 (2006), [hereinafter *Super Bowl Order on Reconsideration*], on appeal sub nom. CBS Corp. v. FCC, No. 06-3575 (3d Cir. 2006). Jackson’s bare breast was on the screen for a mere nine-sixteenths of a second. See Brief for Petitioners CBS Corporation, et al., CBS Corporation v. FCC, 06-3575 (3<sup>rd</sup> Cir. 2006). CBS v. FCC, 535 F.3d 167 (3<sup>rd</sup> Cir. 2008). In 2009, yet another Super Bowl-related incident raised eyebrows and could result in FCC enforcement action. Somewhere between ten to thirty seconds of a male pornographic video program interrupted the live feed of the Super Bowl to Comcast cable customers in Tucson, Arizona. The broadcaster confirmed the incident, but contended that the pornography was not included in the feed when it dispensed the signal to cable operators. See Brian J. Pedersen, *Super Bowl Clip ‘A Malicious Act’: Both Comcast, U.S. Probing How Major Broadcast Interrupted*, ARIZ. DAILY STAR (Tucson), Feb. 3, 2009..

<sup>129</sup> *Super Bowl NAL*, 19 F.C.C.R. at 19231. The actual number of complaints received by the Commission is in dispute, as a significant percentage of the complaints received where either duplicates or form complaints generated by a small number of special interest groups.

<sup>130</sup> At the time, the maximum indecency fine was \$27,500. The 20 CBS-owned affiliates were fined the maximum \$27,500 for the broadcast. The FCC reaffirmed the \$550,000 forfeiture on remand. See Reconsideration Order (May 31, 2006). *Super Bowl NAL*, 19 F.C.C.R. at 19230, 19240, 19242 ¶¶ 1, 24, 30; *Super Bowl Forfeiture Order*, 21 F.C.C.R. at 2775, 78, ¶¶ 28, 37. Later in 2006, the FCC denied a petition for reconsideration of the case. In the Matter of Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, Order on Reconsideration (May 31, 2006). CBS v. FCC, 535 F.3d 167 (3<sup>rd</sup> Cir. 2008).

<sup>131</sup> See *Super Bowl Forfeiture Order*, 21 F.C.C.R. at 2771-72, ¶ 22.

<sup>132</sup> *Id.* at 2764-65, ¶ 9.

<sup>133</sup> *Id.* at 2765 ¶ 10.

<sup>134</sup> *Id.* at ¶ 13. During the performance Timberlake danced and teased one another. Timberlake grabbed Jackson, rubbed against her body, and slapped her buttocks. All the while, he pleaded with Jackson to let him “rock your body . . . just let me rock you ’til the break of day.” Then as he peeled off her brassiere I

was found to be graphic and explicit.<sup>135</sup> While the agency determined that the material did not dwell or repeat at length on the exposure of the nude breast and was merely a fleeting image, the FCC concluded that “even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness.”<sup>136</sup>

As for the third factor in the test for patent offensiveness determinations, the FCC concluded that the skillfully choreographed routine of Jackson and Timberlake in the context of the entire halftime show did have the effect of titillating, pandering to, and shocking the viewing audience viewers who had no prior warning of what was to come during this performance.<sup>137</sup> So, even though the depiction of the nude female breast was found to be fleeting in nature, the Commission found the other two factors used to determine whether broadcast material is patently offensive outweighed the lack of dwelling and repetition of the depiction of the nude breast.<sup>138</sup> It was graphic, explicit, tending to titillate, pander, and shock.<sup>139</sup> Thus, the material, which was aired outside the safe harbor, fell within the FCC’s definition of indecency and was patently offensive as measured by contemporary community standards for the broadcast medium.<sup>140</sup>

Additionally, the FCC found that the performance aired by CBS and its affiliates was “willful.”<sup>141</sup> The Commission made such a determination not because CBS consciously broadcast the nude breast “but because the network ‘consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast.’”<sup>142</sup> CBS was found by the FCC to have failed to take precautions to prevent the indecent broadcast despite knowledge prior to the broadcast that the halftime show would include “some shocking moments.”<sup>143</sup> CBS was found fully responsible, under the doctrine of *respondeat superior*, for the actions of the performers and the choreographer of the performance.<sup>144</sup>

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sang “gonna have you naked by the end of this song.” See Brief of FCC and U.S., *CBS Corp. v. FCC*, 06-3575, at 10-11 (3<sup>rd</sup> Cir. 2006).

<sup>135</sup> *Super Bowl Forfeiture Order*, 21 F.C.C.R. at 2765-66 ¶11.

<sup>136</sup> *Id.* at 2766 ¶12 (quoting *Indecency Policy Statement*, 16 F.C.C.R. at 8009, ¶19). See also Young Broadcasting; Tempe Radio, Notice of Apparent Liability, 12 F.C.C.R. 21828 (Mass Media Bur. 1997) (forfeiture paid); LBJB Broadcasting, Notice of Apparent Liability, 13 F.C.C.R. 20956 (Mass Media Bur. 1998) (forfeiture paid). But see *Pacifica*, 438 U.S. 726; and see generally *Indecency Policy Statement*, 16 F.C.C.R. 7999..

<sup>137</sup> *Super Bowl Forfeiture Order*, 21 F.C.C.R., at 2766-67, ¶¶ 13-14.

<sup>138</sup> *Id.*, ¶12; *Super Bowl NAL*, 19 F.C.C.R. at 19236, ¶ 14.

<sup>139</sup> *Super Bowl Forfeiture Order*, 21 F.C.C.R. at 2767, ¶14.

<sup>140</sup> *Id.*

<sup>141</sup> See *id.* at 2767-68, ¶ 15; *CBS Corporation v. FCC*, Brief for the Federal Communications Commission and the United States in the United States Court of Appeals for the Third Circuit, 06-3575, 15, 38-51 (2006).

<sup>142</sup> See *Super Bowl Forfeiture Order*, 21 F.C.C.R. at 2767-68, ¶ 15; *CBS Corporation v. FCC*, Brief for the Federal Communications Commission and the United States in the United States Court of Appeals for the Third Circuit, 06-3575, 15, 38-51 (2006).

<sup>143</sup> *Id.*

<sup>144</sup> See *Super Bowl Forfeiture Order*, 21 F.C.C.R. at 2771-72, ¶ 22. The Halftime Show was produced by MTV and was choreographed by a Jackson choreographer.

CBS appealed the FCC's decision to the Third Circuit, which vacated the Commission's orders and remanded for further proceedings.<sup>145</sup> On appeal, there were two significant issues. The first issue was whether the FCC acted arbitrarily and capriciously in applying a new policy which permitted a finding that the fleeting image of Jackson's nude breast was indecent and thus actionable.<sup>146</sup> CBS argued that the Commission violated the Administrative Procedure Act by not providing a reasoned explanation for its deviation from a longstanding policy not to act on isolated or fleeting material.<sup>147</sup>

The second issue was whether the Commission, applying theories of *respondeat superior*, vicarious liability, and the willfulness standard in the indecency statute, properly found CBS had violated the indecency prohibition.<sup>148</sup> At issue was whether CBS intended to broadcast indecent material and whether it knew that Jackson and Timberlake were planning a wardrobe reveal.<sup>149</sup>

Specifically, on appeal, CBS argued that: (i) the FCC's forfeiture order violated the First Amendment under *Pacifica*; (ii) the FCC violated its only policy of only fining repeated or extended presentations of indecent material; (iii) the FCC's action violated due process and was arbitrary and capricious, specifically, the new standard the FCC currently asserts was not in place at the time of the Super Bowl, thus failing to give notice and thus the FCC should have vacated the forfeiture for the same reasons as it did in the subsequent fleeting expletive cases pursuant to its decision in the *Omnibus Order*;<sup>150</sup> and (iv) the FCC did not measure contemporary community standards.<sup>151</sup>

In response, the FCC argued that its indecency orders and rules are constitutional. The agency attempted to draw a distinction between the fleeting images in this case and its prior decisions regarding fleeting expletives.<sup>152</sup> The Commission argued that its longstanding policy of restraint in acting on isolated and fleeting material was limited to fleeting expletives, and did not extend to the fleeting images in question during the Super Bowl XXXIII Halftime Show.<sup>153</sup> Broadcasting, the Commission asserted, has only limited First Amendment protection and that the government's interests are substantial, and the indecency rules are narrowly tailored to those interests.<sup>154</sup> It offered concern

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<sup>145</sup> See Brief for Petitioners CBS Corporation, et al., *CBS v. FCC*, 06-3575 (3<sup>rd</sup> Cir. 2006); *CBS v. FCC*, 535 F.3d 167 (3<sup>rd</sup> Cir. 2008).

<sup>146</sup> *CBS v. FCC*, 535 F.3d at 171.

<sup>147</sup> *Id.* at 171; 5 U.S.C. § 706 (2006).

<sup>148</sup> *CBS v. FCC*, 535 F.3d at 171.

<sup>149</sup> Brief for Petitioners CBS Corporation, et al., *CBS v. FCC*, 06-3575 (3<sup>rd</sup> Cir. 2006). Jackson and Timberlake both admitted that CBS and MTV knew nothing about their planned performance and that the stunt unfortunately just went terribly wrong from what they had planned.

<sup>150</sup> See generally *Omnibus Order*, 21 F.C.C.R. 2664; and see Brief for Petitioners CBS Corporation, et al., *CBS v. FCC*, 06-3575 (3<sup>rd</sup> Cir. 2006).

<sup>151</sup> Brief for Petitioners CBS Corporation, et al., *CBS v. FCC*, 06-3575 (3<sup>rd</sup> Cir. 2006).

<sup>152</sup> *CBS v. FCC*, 535 F.3d at 183-84.

<sup>153</sup> Brief for Federal Communications Commission and United States, *CBS v. FCC*, 06-3575 (3<sup>rd</sup> Cir. 2006).

<sup>154</sup> *Id.*

about subjecting viewers to the “first blow” of indecent material as an explanation for its change of policy regarding fleeting material.<sup>155</sup>

The Third Circuit ruled against the FCC. The Third Circuit found that the FCC’s departure from its policy excepting fleeting material from the scope of its indecency action, acted arbitrarily and capriciously.<sup>156</sup> While not foreclosing declaratory action, the court made clear that the FCC may not penalize CBS retroactively under this new rule which it had adopted in the later decided *Golden Globes* case.<sup>157</sup> Such loss by the FCC in the Third Circuit was not unexpected particularly in light of what appears to be a growing body of law seriously questioning the FCC’s policies regarding incidences of isolated and fleeting indecency.<sup>158</sup> The FCC has petitioned the U.S. Supreme court for certiorari but has asked the Court to hold the petition in abeyance pending the Court’s decision in *FCC v. Fox Television Stations, Inc.*<sup>159</sup>

## **B. Fleeting Expletives**

### **1. 2003 “Golden Globe Awards”**

In 2003, musician Bono, upon learning that he had been awarded a Golden Globe, exclaimed on a live National Broadcasting Company, Inc. (“NBC”) broadcast that his recognition was “really, really fucking brilliant. Really, really, great.”<sup>160</sup> The FCC’s Enforcement Bureau denied the numerous complaints received in response to the broadcast on the grounds that Bono’s utterance of the word “fucking” was isolated and fleeting.<sup>161</sup> The Enforcement Bureau concluded that in this case use of the word “fucking” did not refer to a sexual act, but was used more as a modifier similar to using a term like “extremely” or “really.”<sup>162</sup> The Enforcement Bureau concluded, therefore, that

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<sup>155</sup> See FCC Petition for Certiorari, *FCC v. Fox Television Stations, Inc.*, at 10 (2007).

<sup>156</sup> *CBS v. FCC*, 535 F.3d at 171. Additionally, the Third Circuit found that the FCC could not impose liability on CBS for the acts of Jackson and Timberlake “under the proper application of vicarious liability and in light of the First Amendment requirement that the content of speech or expression not be penalized absent a showing of scienter.”

<sup>157</sup> *CBS v. FCC*, 535 F.3d at 178-81.

<sup>158</sup> See generally *CBS v. FCC*, 535 F.3d 167 (3<sup>rd</sup> Cir. 2008); see also *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, cert. granted *FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647, 170 L. Ed. 2d 352 (2008).

<sup>159</sup> See John Eggerton, *FCC, DOJ Appeal Janet Jackson to Supreme Court*, BROADCASTING & CABLE, Nov. 21, 2008.

<sup>160</sup> Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 18 F.C.C.R. 19859 (2003) [hereinafter *Enforcement Bureau Golden Globes Decision*]. In 2009, the FCC received a new round of indecency complaints about NBC’s live broadcast of the 2009 Golden Globes during which a movie director gave the finger to actor Mickey Rourke who was on stage accepting an award. See BROADCAST COMMUNICATIONS DAILY, Jan. 21, 2009; BROADCAST COMMUNICATIONS DAILY, Jan. 14, 2009. The Commission now must grapple with the question of whether the gesture could be considered indecent. *Id.*

<sup>161</sup> *Enforcement Bureau Golden Globes Decision*, 18 F.C.C.R. at 19860-61, ¶¶ 5-6.

<sup>162</sup> *Id.*

the speech was not indecent as defined by the Commission and as supported by a long line of FCC policy regarding fleeting uses of such language.<sup>163</sup>

Despite the action by the Enforcement Bureau and the agency's own long established policy reaffirming that fleeting expletives uttered on broadcast stations would not be actionable, the full Commission overturned the ruling of the bureau, concluding that the utterance, while admittedly fleeting was now considered profane and indecent and patently offensive under contemporary community standards.<sup>164</sup> The Commission explained that the word "fuck" and all variations of it, however they are used, have a sexual connotation.<sup>165</sup> It stated further that "the 'F-Word' is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language" insinuating that all uses of it describes sexual activity even if not used literally so.<sup>166</sup> Declining to sanction NBC in this particular instance because utterances of fleeting expletives were not actionable at the time Bono uttered them on live television, the Commission, nevertheless, warned all broadcast licensees that the Commission would consider any future use of the "F-word" and all variations of it, even as an "intensifier" or modifier, to be indecent and profane and thus actionable.<sup>167</sup>

NBC and other broadcasters filed petitions for reconsideration and a petition to stay the FCC's order.<sup>168</sup> To date, the FCC has not acted on these petitions, but has applied the policy adopted in the *Golden Globes Order* to subsequent cases.<sup>169</sup>

## **2. Other Broadcasts of Fleeting Expletives**

In 2006, the FCC consolidated into one order a response to four other complaints against various licensees for the following broadcasts: (i) Fox's "2002 Billboard Music Awards" in which entertainer Cher stated "I've also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck 'em. I still have a job and they don't."; (ii) Fox's "2003 Billboard Music Awards" during which presenter, Nicole Richie, stated "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."; (iii) several episodes of the ABC network's weekly hour-long police drama "NYPD Blue" which contained the words "bullshit," "dick," and "dickhead"; and (iv) the CBS network's "The Early Show" where a guest during a live morning interview used the word "bullshitter."<sup>170</sup>

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<sup>163</sup> *Id.*

<sup>164</sup> *Golden Globes Order*, 19 F.C.C.R. at 4979-81, ¶¶ 9, 13 ("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>165</sup> *Id.*

<sup>166</sup> *Id.* at ¶ 9.

<sup>167</sup> *Id.* at ¶¶ 15-17.

<sup>168</sup> Brief in Opposition of NBC Universal, Inc., FCC v. Fox Televisions, Inc., 07-582, at 7 (Feb. 1, 2008).

<sup>169</sup> *Id.*; *Golden Globes Order*, 19 F.C.C.R. 4975; and see *Omnibus Order*, 21 F.C.C.R. at 2667, ¶ 12;

*Omnibus Remand Order*, 21 F.C.C.R. at 133301,13304-05, ¶¶ 7, 16.

<sup>170</sup> *Omnibus Order*, 21 F.C.C.R. at 2690-93, 2696, 2698-99 ¶¶ 101, 112 n. 164, 125, 137.

The FCC found each of these broadcasts indecent and profane under the new policy it adopted in the *Golden Globes Order*.<sup>171</sup> Using the same analysis it used in the *Golden Globes Order*, the Commission stated again that any use of any variation of the word “fuck” is presumed indecent and profane.<sup>172</sup> Similarly, any use of “shit” also is presumptively indecent and profane.<sup>173</sup> Additionally, the broadcasts were found explicit, shocking, and gratuitous, and thus, patently offensive.<sup>174</sup> Again, the Commission declined to issue a forfeiture because the utterances were made when the old policy that isolated fleeting expletives were not indecent or profane was applicable.<sup>175</sup> Because of this, the FCC concluded that the broadcasters did not have adequate notice of the new policy regarding the broadcast of fleeting or isolated expletives.<sup>176</sup>

Fox, CBS, and ABC filed petitions for review of the order.<sup>177</sup> On voluntary 60-day remand, the FCC issued a new order, the *Omnibus Remand Order*, addressing these four incidents.<sup>178</sup> Rejecting arguments opposing sanctioning isolated and fleeting utterances, the *Omnibus Remand Order* vacated in substantial part the *Omnibus Order*.<sup>179</sup> The FCC reaffirmed its holding that both the 2002 and 2003 Fox Billboard Music Awards shows contained indecent and profane material.<sup>180</sup> The “NYPD Blue” forfeiture was vacated on procedural grounds and the complaint against ABC was dismissed.<sup>181</sup>

The Commission reversed its decision regarding “The Early Show” broadcast.<sup>182</sup> The Commission concluded that because the use of the word “bullshitter” on “The Early Show” occurred during a “bona fide news interview,” it was not subject to forfeiture.<sup>183</sup>

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<sup>171</sup> *Id.* at 2698-99, ¶ 137, § III.B; *Golden Globes Order*, 19 F.C.C.R. 4975.

<sup>172</sup> *Omnibus Order*, 21 F.C.C.R. at \_\_\_\_\_, ¶¶ 81, 102, 107; *Golden Globes Order*, 19 F.C.C.R. 4975.

<sup>173</sup> *Omnibus Order*, 21 F.C.C.R. at \_\_\_\_\_, ¶¶ 81, 125-127, 138, 143. The Commission did not consider utterances of the word “dick” and its derivative “dickhead” in the context they were presented to be patently offensive. The terms were not used to describe a sexual organ but rather to denigrate another person. Therefore, the use of “dick” and “dickhead” were not found to be indecent. The Commission, however, found use of the word “shit” to be patently offensive as measured by community standards, and thus indecent.

<sup>174</sup> *Omnibus Order*, 21 F.C.C.R. at 2691, 2694, 2697, 2699, ¶¶ 106, 120, 131, 141.

<sup>175</sup> *Id.* at 2692, 2695, 2698, 2700, ¶¶ 111, 124, 136, 145.

<sup>176</sup> *Id.* at 2700 ¶ 145.

<sup>177</sup> Fox and CBS filed a petition in the Second Circuit. ABC Television Network (“ABC”) and Hearst-Argyle Television, Inc. (“Hearst”) filed a joint petition for review in the D.C. Circuit. The Second Circuit which granted Fox’s motion to consolidate these cases.

<sup>178</sup> *See generally Omnibus Remand Order*, 21 F.C.C.R. at \_13299.

<sup>179</sup> *Id.* at 13302, ¶ 11.

<sup>180</sup> *Id.* at 13325, ¶ 63.

<sup>181</sup> *Id.* at 13328, ¶ 74.

<sup>182</sup> *Id.* at 13328, ¶ 73.

<sup>183</sup> *Id.* at 13327, ¶ 71 (“There is no outright news exemption from our indecency rules.”); *Indecency Policy Statement*, 16 F.C.C.R. at 8002-03. It relied on its *Indecency Statement* which suggests that context is important and that “[e]xplicit language in the context of a bona fide newscast might not be patently offensive.” Although the FCC has never recognized a formal exception in the indecency rules for “bona fide news interviews”, the Commission seemed to excuse the use of the term in that instance. The Commission, however, has never said, nor did it say in the case of “The Early Show” that it would never act on indecent material presented in a bona fide news context.

Although the FCC has never recognized a formal exception in the indecency rules for “bona fide news interviews,” the Commission seemed to excuse the use of the term “bullshitter” in that instance.<sup>184</sup> The Commission, however, has never said, nor did it say in the case of “The Early Show” that it would never act on indecent material presented in a bona fide news context. Along the same vein, the FCC has never said that it would never act in the political advertisement context either.

The *Omnibus Remand Order* was appealed to the Second Circuit.<sup>185</sup> On appeal, the Second Circuit vacated and remanded the FCC’s decision to the Commission for further proceedings.<sup>186</sup> The Second Circuit found that the agency’s new policy on fleeting expletives “represents a significant departure from positions previously taken by the agency and relied on by the broadcast industry.”<sup>187</sup> The court also found that the FCC’s new policy was arbitrary and capricious, the agency having failed to provide a reasoned basis for the policy change.<sup>188</sup>

The Second Circuit recognized that federal agencies may revise their rules and policies as they find appropriate, but that such agency rule and policy changes must be supported by a “reasoned explanation” of why the new rule or policy is better than the old rule or policy.<sup>189</sup> The court concluded that the Commission failed to offer such a reasoned explanation for its new policies on either fleeting expletives or profanity.<sup>190</sup> Moreover, the Second Circuit rejected the FCC’s argument that fleeting expletives must not be exempted from a finding of indecency because to do so would “unfairly force[] viewers (including children) to take ‘the first blow’” referred to by the Court in *Pacifica*.<sup>191</sup> The Court in *Pacifica* made it clear that it was not offering an opinion on fleeting utterances of profanity.<sup>192</sup>

The Second Circuit struggled to reconcile the Commission’s nearly thirty years of acquiescence to the problem of the proverbial “first blow” with its newfound concern about fleeting expletives.<sup>193</sup> Specifically, the Second Circuit found that the FCC did not provide a “reasonable explanation for why it has changed its perception that a fleeting

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<sup>184</sup> *Omnibus Remand Order*, 21 F.C.C.R. at ¶ 71.

<sup>185</sup> *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 447. In 2001, the Commission attempted to provide broadcasters with guidance on its indecency enforcement policy. The Commission excepted fleeting and fleeting expletives and sexual references from indecency enforcement action. The agency also stressed the importance of taking potentially indecent material in proper context. *Indecency Policy Statement*, 16 F.C.C.R. at 8016-17, ¶ 30.

<sup>188</sup> *Fox v. FCC*, 489 F.3d at 447.

<sup>189</sup> *Fox v. FCC*, 489 F.3d at 456-57.

<sup>190</sup> *Id.* at 460-62.

<sup>191</sup> *Pacifica*, 438 U.S. at 748; *Omnibus Remand Order*, 21 F.C.C.R. at 13309, ¶ 25. The first blow analogy suggests that while a listener or viewer may elect to turn off the television or radio or switch the channel after hearing offensive language, listeners and viewers should not have to be subjected to this proverbial “first blow,” but that FCC rules may prohibit the utterance or depiction of indecent, profane, or obscene material altogether. In doing so, viewers and listeners are spared suffering the needless first blow.

<sup>192</sup> *Pacifica*, 438 U.S. at 750.

<sup>193</sup> *Fox v. FCC*, 489 F.3d at 457-58. The Court in *Pacifica* rejected the argument that “one may avoid further offense by turning off the radio when he hears indecent language.” 438 U.S. at 748-49.

expletive was not a harmful ‘first blow’ for the nearly thirty years between *Pacifica* and *Golden Globes*.<sup>194</sup> The court found that the FCC failed to produce any evidence that a fleeting expletive is harmful. Additionally, the exceptions the Commission seemed to carve out appear to undercut its concerns about the “first blow.” The Commission’s treatment of the material presented in “The Early Show” as excusable because it appeared in a bona fide news interview, as well as its excuse of the expletives that were considered “integral” to a work, such as those that appeared in the movies “Saving Private” and “Schindler’s List”, indeed forced viewers to take the first blow.<sup>195</sup> The Second Circuit found that the FCC failed to support its “first blow” theory in light of these gaping holes.<sup>196</sup> Because the FCC did not prohibit the broadcast of all expletives, the court could not find support for this new policy.<sup>197</sup> The court also disagreed with the FCC’s conclusion that the “F-word” has an inescapable sexual connotation, pointing out that the word often is used in casual daily conversation without a sexual meaning.<sup>198</sup> This case has been appealed to the United States Supreme Court, and the Supreme Court has granted the FCC’s and U.S. government’s *Petition for Certiorari*.<sup>199</sup>

### 3. Supreme Court Appeal

The issue on appeal to the U.S. Supreme Court is “[w]hether the court of appeals erred in striking down the FCC’s determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of ‘any obscene, indecent, or profane language,’ even when the uttered expletives are not repeated.”<sup>200</sup>

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<sup>194</sup> Fox v. FCC, 489 F.3d at 457-58; *Pacifica* 438 U.S. 726; *Golden Globes Order*, 19 F.C.C.R. 4975.

<sup>195</sup> Fox v. FCC, 489 F.3d at 458-59. *In re Complaints Against Various Television Licensees Regarding Their Broadcast of "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4512-13 ¶¶ 13, 14 (Feb. 3, 2005). “Saving Private Ryan” is a dramatic movie about combat soldiers in World War II. “Schindler’s List” is a drama based on the real life experiences of a German businessman and Jews enslaved by Nazis during World War II.

<sup>196</sup> Fox v. FCC, 489 F.3d at 458-59.

<sup>197</sup> *Id.* at 456-57. The Second Circuit did acknowledge the warning in *Pacifica* that a total ban on expletives would raise significant constitutional questions.

<sup>198</sup> Fox v. FCC, 489 F.3d at 456-57.

<sup>199</sup> FCC v. Fox Television Stations, Inc., 128 S. Ct. 1647, 170 L. Ed. 2d 352 (2008).

<sup>200</sup> See *Petition for a Writ of Certiorari, FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647, 170 L. Ed. 2d 352, 07-582 (2008); and see 18 U.S.C. 1464 (2006); see 47 C.F.R. 73.3999 (2006). Respondents Fox Television Stations, Inc. have framed the issue as “[w]hether the court of appeals correctly held as a matter of administrative law that the FCC failed to provide a reasoned basis for reversing its longstanding indecency enforcement policy with respect to isolated and fleeting expletives.” Brief in Opposition of Respondents Fox Television Stations, Inc., CBS Broadcasting, Inc, and ABC, Inc., FCC v. Fox Television Stations, Inc., 128 S. Ct. 1647, 170 L. Ed. 2d 352, 07-582 (2008). Respondent NBC Universal, Inc. and NBC Telemundo License Company frame the issue as “[w]hether the court of appeals erred in holding that the Commission had failed to explain adequately the abrupt reversal of its longstanding determination that fleeting and isolated utterances of expletives generally fall outside the Commission’s definition of broadcast indecency.” Brief in Opposition of NBC Universal, Inc. and NBC Telemundo License Company, FCC v. Fox Television Stations, Inc., 128 S. Ct. 1647, 170 L. Ed. 2d 352, 07-582 (2008).

Petitioners, FCC and the U.S. government, have argued that the Second Circuit's opinion conflicts with the Court's holding in *Pacifica*.<sup>201</sup> Petitioners seem to concede that pursuant to *Pacifica* and Commission decisions, when "a complaint focuses solely on the use of expletives, . . . repetitive use in a patently offensive manner is a requisite to a finding of indecency."<sup>202</sup> But, they contend, when offensive language involves not just expletives, but describes sexual or excretory functions "repetition of specific words or phrases is not necessarily an element critical to a determination of indecency."<sup>203</sup> The Commission, it argues, has established that determinations of patent offensiveness are fact-specific.<sup>204</sup> In determining whether material is patently offensive, it will consider the "full context" of the broadcast.<sup>205</sup> The Commission claims in its *Petition for Certiorari*, therefore, that even fleeting references may be found indecent if other factors such as graphic language or explicit language "contributing to a finding of patent offensiveness" are present.<sup>206</sup>

Petitioners argue that the Second Circuit imposed "hurdles" in supporting its changed policy that "find no support in the Administrative Procedure Act."<sup>207</sup> Petitioners argue that the agency must continually review its policies and that it may make policy changes where "prior polic[ies] failed to implement properly the statute."<sup>208</sup> The failure the agency alleges is the drawing of an "artificial distinction" between expletives and descriptions or depictions of sexual or excretory activity despite the fact that "an expletive's power to offend derives from its sexual or excretory meaning."<sup>209</sup>

At the heart of Respondents' argument is that the Administrative Procedure Act requires that the FCC justify, by a more reasoned explanation, the decision to change a 30-year old policy not to consider fleeting expletives to fall within the definition of indecency.<sup>210</sup> Respondents, seeking to uphold the Second Circuit's decision, have argued, first, that there is no conflict between the Second Circuit's decision and

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<sup>201</sup> *Petition for a Writ of Certiorari, FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647, 170 L. Ed. 2d 352, 07-582 (2008).

<sup>202</sup> 2. F.C.C.R. 2698, 2699 ¶ 13 (Apr. 16, 1987).

<sup>203</sup> *Pacifica M&O*, 2 F.C.C.R. at 2699 ¶ 13.

<sup>204</sup> *Petition for a Writ of Certiorari, FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647, 170 L. Ed. 2d 352, 07-582 (2008).

<sup>205</sup> *Indecency Policy Statement*, 16 F.C.C.R. at 8002-03, ¶ 19.

<sup>206</sup> *Id.* at 8008-09, ¶¶ 17, 19; *Petition for a Writ of Certiorari, FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647, 170 L. Ed. 2d 352, 07-582, at 5 (2008).

<sup>207</sup> *Petition for a Writ of Certiorari, FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647, 170 L. Ed. 2d 352, 07-582, at 21 (2008); Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

<sup>208</sup> *FCC Petition for a Writ of Certiorari, FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647, 170 L. Ed. 2d 352, 07-582, at 22 (2008) *citing* *Rust v. Sullivan*, 500 U.S. 173, 187 (1991).

<sup>209</sup> *Omnibus Remand Order*, 21 F.C.C.R. at ¶ 23.

<sup>210</sup> Brief in Opposition of Respondents Fox Television Stations, Inc., CBS Broadcasting, Inc, and ABC, Inc., 07-582 (2008); Brief in Opposition of NBC Universal, Inc. and NBC Telemundo License Company, *FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647, 170 L. Ed. 2d 352, 07-582 (2008), *citing* *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 981. (2005).

*Pacifica*.<sup>211</sup> Second, respondents argue that the Second Circuit's decision is consistent with administrative law principles and other precedent including *ACT III*.<sup>212</sup> Finally, they argue that the Second Circuit's remand to the FCC does not warrant the Court's review.<sup>213</sup>

Even the U.S. Supreme Court saw the possibility of such a dilemma in *FCC v. Fox*.<sup>214</sup> The Court's decision in the fleeting expletives case may better define what constitutes indecent material and the extent to which fleeting images or other isolated sexual content in political campaign advertisements like those in the recent political advertisements actually triggers the statutory conflict in question here.

How the Supreme Court rules in *FCC v. Fox* this summer could alter, in part, this analysis.

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<sup>211</sup> Brief in Opposition of Respondents Fox Television Stations, Inc., CBS Broadcasting, Inc, and ABC, Inc., *FCC v. Fox Television Stations, Inc*, 128 S. Ct. 1647, 170 L. Ed. 2d 352, 07-582 (2008); Brief in Opposition of NBC Universal, Inc. and NBC Telemundo License Company, *FCC v. Fox Television Stations, Inc*, 128 S. Ct. 1647, 170 L. Ed. 2d 352, 07-582 (2008).

<sup>212</sup> Brief in Opposition of Respondents Fox Television Stations, Inc., CBS Broadcasting, Inc, and ABC, Inc., 07-582 (2008); Brief in Opposition of NBC Universal, Inc. and NBC Telemundo License Company, *FCC v. Fox Television Stations, Inc*, 128 S. Ct. 1647, 170 L. Ed. 2d 352, 07-582 (2008); *ACT III*, 58 F.3d 654. In *ACT III*, the D.C. Circuit rejected arguments that the FCC's indecency definition was vague and overbroad. 58 F.3d 654 (1995). Additionally, the D.C. Circuit upheld the FCC's policy of channeling indecent material to the safe harbor, but disagreed with the disparate application of the safe harbor to stations that signed off at or before midnight and all other broadcast stations. The court, therefore, directed the FCC's to enlarge the safe harbor hours to include the hours from 10:00 p.m. to 6:00 a.m. instead of midnight to 6:00 a.m. The D.C. Circuit in earlier cases *ACT I*, 852 F.2d 1332 (D.C. Cir. 1988) (breadth, vagueness, delineation of safe harbor hours; sides with FCC), and *ACT II*, 932 F.2d 1504 (D.C. Cir. 1991), *cert denied* 112 S. Ct. 1281 (1992) (requests review of FCC order issued in compliance with law prohibiting indecent material 24 hours per day. Court says indecent material afforded First Amendment protection as long as channeled but obscene material is not protected), had also upheld the indecency definition. *ACT II* vacated a complete ban on indecent material. The D.C. Circuit in *ACT III*, held that scientific evidence of harm to children was not necessary to show a compelling governmental interest. *ACT III* dealt with pornographic material, not fleeting expletives.

<sup>213</sup> Respondents also argue that the Commission's definition of indecency is unconstitutionally vague tending to chill large amounts of speech, citing the lenient standard applied in the *Saving Private Ryan* case in which the Commission was deferential to the artistic freedom of the filmmaker and the subject matter which was war and contrasting that with the lack of deference shown the filmmaker in a documentary about blues music. In re Complaints Against Various Television Licensees Regarding Their Broadcast of "Saving Private Ryan," 20 F.C.C.R. 4507, 4512-13, ¶¶ 12-14 (Feb. 28, 2005). Brief in Opposition of Respondents Fox Television Stations, Inc., CBS Broadcasting, Inc, and ABC, Inc., *FCC v. Fox Television Stations, Inc*, 128 S. Ct. 1647, 170 L. Ed. 2d 352, 07-582 (2008); *and see* Brief in Opposition of NBC Universal, Inc. and NBC Telemundo License Company, *FCC v. Fox Television Stations, Inc*, 128 S. Ct. 1647, 170 L. Ed. 2d 352, 07-582 (2008). In 1997, the Court struck down a similar indecency standard in the Communications Decency Act. The Court found the standard unconstitutionally vague. *See Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>214</sup> *See* Transcript of U.S. Supreme Court Oral Argument in *FCC v. Fox* (Nov. 4, 2008).

C. **Nudity and Other Crass Behavior on Television’s “NYPD Blue”,  
“Married By America”, and “Without A Trace”**

1. **“NYPD Blue”**

On February 19, 2008, the Federal Communications Commission issued a *Forfeiture Order* against the ABC Television Network and certain affiliated stations issuing a fine in the amount of \$27,500.<sup>215</sup> The *NYPD Blue Forfeiture Order* sanctioned ABC’s 9:00 p.m. broadcast of an episode of the police drama which depicted a woman’s naked buttocks and a portion of her naked breast. In the scene, the woman’s naked body was shown while she was taking a shower and as an eight-year old boy looked on. The female’s naked body parts were not obscured, blurred, or pixulated.<sup>216</sup> The FCC cited the repeated shots of the woman’s naked buttocks and the deliberate panning of the camera down her back “to reveal another full view of her buttocks before panning up again” to create a “voyeuristic” vantage point.<sup>217</sup> The FCC also cited another camera shot in which the young boy’s shocked face is depicted from between the naked woman’s legs.<sup>218</sup>

In its *NYPD Blue Forfeiture Order* the Commission affirmed its earlier decisions and concluded that the depiction of the naked female buttocks in the “NYPD Blue” episode squarely came within the subject matter scope of its indecency definition in that it described or depicted sexual or excretory organs or activities.<sup>219</sup> Despite the fact that the buttocks is not necessarily biologically an excretory organ, the FCC has consistently concluded that it is an excretory organ for the purposes of satisfying its indecency definition.<sup>220</sup> The FCC stated in the *NYPD Blue Forfeiture Order* that “the buttocks, which, though not physiologically necessary to procreation or excretion, are widely associated with sexual arousal and closely associated by most people with excretory activities.”<sup>221</sup>

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<sup>215</sup> In the Matter of Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program “NYPD Blue”, 23 F.C.C.R. 3147 (Feb. 19, 2008) [hereinafter *NYPD Blue Forfeiture Order*], ¶¶ 52-53. The FCC imposed the fine only on those ABC affiliates about which the agency had received complaints resulting from the broadcast of the material outside the safe harbor. The FCC previously had issued a Notice of Apparent Liability for Forfeiture in the case. In the Matter of Complaints Against Various Television, Licensees Concerning Their February 25, 2003 Broadcast of the Program “NYPD Blue”, 23 F.C.C.R. 1596 (Jan. 25, 2008) [hereinafter *NYPD Blue NAL*].

<sup>216</sup> *NYPD Blue Forfeiture Order*, 23 F.C.C.R. at 3152, ¶ 13. Pixulation is a popular method used to distort the resolution of an image in order to obscure it.

<sup>217</sup> *Id.* at 3153-54, ¶ 16.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 3149-50, ¶ 7.

<sup>220</sup> *Id.* at 3150, ¶ 8. n. 28 citing *Omnibus Order*, 21 F.C.C.R. at 2681 ¶ 62, 2718 ¶ 225 (finding buttocks are sexual and excretory organs within the definition of indecency); Entercom Kansas City License, LLC, Notice of Apparent Liability for Forfeiture, 19 F.C.C.R. 25011 ¶ 7 (2004) (comments about genitals, buttocks, and breasts); Rubber City Radio Group, Notice of Apparent Liability for Forfeiture, 17 F.C.C.R. 14745, 14747 ¶ 6 (Enf. Bur. 2002) (comments about a “baby’s ass”).

<sup>221</sup> *NYPD Blue Forfeiture Order*, 23 F.C.C.R. at 3150, ¶ 8. n. 28 citing *Omnibus Order*, 21 F.C.C.R. at 2681 ¶ 62, 2718 ¶ 225 (finding buttocks are sexual and excretory organs within the definition of indecency); Entercom Kansas City License, LLC, Notice of Apparent Liability for Forfeiture, 19 F.C.C.R.

Reviewing the context of the material in the episode and whether the material was patently offensive as measured by contemporary community standards, the FCC concluded that “notwithstanding any artistic or social merit and the presence of a parental advisory and ration, the material was patently offensive under the community standards for the broadcast medium.”<sup>222</sup> In reaching this conclusion, the FCC first determined that the depiction of the naked buttocks in this case was sufficiently graphic and explicit to support a finding of indecency.<sup>223</sup>

Next, the FCC also found that the repeated camera shots of the woman’s naked buttocks, while not as egregious as some cases the agency had reviewed, certainly rendered the episode more offensive than many cases the Commission had previously found not of patently offensive.<sup>224</sup> The FCC acknowledged that the depiction in the “NYPD Blue” episode was not as lengthy or as repetitive as some indecency cases where there had been a finding of patent offensiveness, but that it did contain “lengthier depictions of nudity, or more focus on nudity, than other cases involving nudity where the Commission has found that this factor did not weigh in favor of a finding of patent offensiveness.”<sup>225</sup> Finally, in applying the third factor in determining whether material is patently offensive, the FCC concluded that the scene was pandering, titillating and shocking because of the voyeuristic camera shots that panned up and down the back of the woman’s naked body.<sup>226</sup> This case has been appealed to the Second Circuit.<sup>227</sup>

## **2. “Married By America”**

On February 22, 2008, the Federal Communications Commission issued a *Forfeiture Order* against a number of Fox Television Network affiliated stations for the broadcast of the reality show “Married By America.”<sup>228</sup> The forfeiture, in the amount of \$7,000 per station, sanctioned Fox’s broadcast prior to 10:00 p.m. of the reality show featuring bachelor and bachelorette parties for two couples all of whom prior to the show

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25011 ¶ 7 (2004) (comments about genitals, buttocks, and breasts); Rubber City Radio Group, Notice of Apparent Liability for Forfeiture, 17 F.C.C.R. 14745, 14747 ¶ 6 (Enf. Bur. 2002) (comments about a “baby’s ass”).

<sup>222</sup> *NYPD Blue Forfeiture Order*, 23 F.C.C.R. at 3155, ¶ 18.

<sup>223</sup> *Id.* at 3152, ¶ 13.

<sup>224</sup> *Id.* at 3153, ¶ 15.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *ABC v. FCC*, \_\_\_\_\_ (2<sup>nd</sup> Cir.2008).

<sup>228</sup> In the Matter of Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program “Married By America” on April 7, 2003, 23 F.C.C.R. 3222 (Feb. 22, 2008) [hereinafter *Married By America Forfeiture Order*]. A Notice of Apparent Liability for Forfeiture had been issued previously on October 12, 2004. In the Matter of Complaints Against Various Licensees Regarding Their Broadcast Of The Fox Television Network Program “Married By America” On April 7, 2003, 19 F.C.C.R. 20191 [hereinafter *Married By America NAL*]. The Enforcement Bureau denied a petition for reconsideration. In the Matter of Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program “Married By America” on April 7, 2003, 23 F.C.C.R. 5699 (Apr. 4, 2008).

were strangers, but whom America by vote paired to be married on the show. The bachelor and bachelorette parties for the couples featured “sexually oriented” and suggestive performances by male and female strippers.<sup>229</sup>

The various scenes cited by the FCC in its *Married By America Forfeiture Order* included depictions of nude and semi-nude female and male adult entertainers grinding their crotches with partygoers, smearing and licking whipped cream from various body parts, seductively kissing breasts and other body parts, spanking partygoers with whips and belts, providing suggestive and seductive lap dances, and engaging in other sexually suggestive behavior.<sup>230</sup> The FCC concluded that the depictions, many of which were pixilated to obscure naked body parts such as buttocks, breasts, and genitals, were designed “to stimulate sexual arousal.”<sup>231</sup> The Commission found the material “sufficiently graphic and explicit to support an indecency finding.”<sup>232</sup> In the *Forfeiture Order*, the FCC stated that the fact that naked body parts were pixilated “did not obscure the overall graphic character of the depiction” and determined that the material should be assessed “in its full context.”<sup>233</sup>

Fox refused to pay the \$91,000 forfeiture, which has been reduced from the nearly \$1.2 million originally imposed, and asked the Commission for reconsideration.<sup>234</sup> Borrowing language from the court of appeals, Fox called the fine “arbitrary and capricious, inconsistent with precedent, and patently unconstitutional.”<sup>235</sup> The FCC refused to reconsider on procedural grounds.<sup>236</sup> The U.S. Department of Justice has weighed in, filing suit in the D.C. Circuit, the Southern District of Iowa, the Southern District of West Virginia, and the Middle District of Tennessee against eight Fox affiliates to recover the \$7,000 forfeiture against each.<sup>237</sup> The resolution of these cases likely will be influenced at least in part by the Supreme Court’s decision in *FCC v. Fox Television Stations, Inc.*<sup>238</sup>

### **3. “Without A Trace”**

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<sup>229</sup> *Married By America Forfeiture Order*, 23 F.C.C.R. at 3223, ¶ 2.

<sup>230</sup> *Id.* at 3324,27, ¶¶ 7-14.

<sup>231</sup> *Id.* at 3326, ¶ 12.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> Fox press release 3/24/08. See also Frank Ahrens, *Fox Refuses to Pay FCC Indecency Fine*, WASH. POST, Mar. 25, 2008, at D01 The \$91,000 forfeiture was to be paid by March 22, 2008. Upon receipt of a forfeiture, licensees generally have two options available: (i) pay and appeal the fine or (ii) do not pay the fine and later mount a defense in a trial de novo should the government seek to collect the amount of the forfeiture.

<sup>235</sup> See *id.*

<sup>236</sup> See In the Matter of Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program “Married By America” on April 7, 2003, 23 F.C.C.R. 5699 (Apr. 4, 2008) (FCC Enforcement Bureau).

<sup>237</sup> See John Eggerton, *FCC Kicks Back Fox's Married by America Appeal*, BROADCASTING & CABLE, Apr. 4, 2008.

<sup>238</sup> *FCC. v. Fox Television Stations, Inc.*, 128 S. Ct. 1647, 170 L. Ed. 2d 352 (Apr. 4, 2008).

In 2006, the FCC issued a Notice of Apparent Liability for Forfeiture against numerous CBS network affiliates for the December 31, 2004 broadcast of an episode of “Without A Trace” which depicted teenagers engaged in sex acts.<sup>239</sup> The episode involved an FBI investigation into the disappearance and rape of a high school student.<sup>240</sup> In a flashback scene, viewers were taken back to the scene of a teenage sex party that included depictions of couples and groups of teenagers engaged in various sex acts.<sup>241</sup> There was no actual nudity, but teenagers were depicted partially unclothed. The scene depicted intercourse between the teenagers.<sup>242</sup> The final scene in the flashback depicted the victim in a bra and panties straddling a male.<sup>243</sup> Two other males were kissing her breast and the victim was moving up and down on the male who was shown thrusting his hips into the victim’s crotch.<sup>244</sup>

Even though there was no actual nudity, the FCC concluded that the depiction of sexual activity was shocking, intended to titillate, and patently offensive under contemporary community standards.<sup>245</sup> The FCC proposed a fine totaling \$3,607,500 against the CBS affiliates.<sup>246</sup> This case has been appealed to the Second Circuit.<sup>247</sup>

#### **IV. The Anti-Ford and Anti-Arcuri Advertisements Probably Are Fleeting and Not Indecent**

##### **A. The Advertisements While Offensive Do Not Meet the Definition of Indecency**

While the anti-Ford and the anti-Arcuri advertisements are offensive, racist, and/or sexually suggestive, neither advertisements is indecent, obscene or profane as defined by statutory and regulatory law. Neither the anti-Ford nor the anti-Arcuri advertisements describes or depicts sexual or excretory organs or activities. The depiction in the anti-Ford advertisement presents a suggestion of nudity but no actual depiction of sexual or excretory organs. Only the bare shoulders of the young blonde woman are shown on camera. While the anti-Arcuri advertisement shows a stripper appearing to give a suggestive dance performance, only the woman’s silhouette is depicted on camera, and she is not engaged in any actual sex act.

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<sup>239</sup> Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program “Without A Trace”, 21 F.C.C.R. 2732 (Mar. 15, 2006) [hereinafter *Without A Trace NAL*].

<sup>240</sup> *Id.* at 2735, ¶ 11.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 2736, ¶ 16.

<sup>246</sup> *Id.* at 2759 (Attachment A). The Notice of Apparent Liability for Forfeiture later was cancelled against eight licensees. See *In the Matter of Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program “Without A Trace”*, 21 F.C.C.R. 3110 (FCC Enforcement Bureau) (2006).

<sup>247</sup> See *CBS v. FCC*, \_\_\_\_\_ (2<sup>nd</sup> Cir. 2008).

Consequently, they do not fall neatly within the context of the FCC's indecency definition. Additionally, even were they found to be indecent, they very well could be found to be fleeting and isolated indecent material, the actionability of which will turn on the Supreme Court's decision in the fleeting expletive cases. These advertisements, however, are precursors to future political speech that might fall within that definition. Not satisfying the definition of indecency, the FCC could not sanction a licensee who decided to broadcast either of these advertisements. The advertisements admittedly do not present broadcasters the exact legal dilemma contemplated by scholars and courts, but they definitely signal a shift in that direction. It likely is only a matter of time before broadcasters face the situation that will force them to make this tough choice between competing statutory obligations.

## **B. Patent Offensiveness in Context and as Measured by the Community Standard**

Assuming for a moment that the advertisements were deemed indecent and for the sake of argument, however, the second part of an indecency analysis should be considered. As discussed above, determinations of whether broadcast material is indecent "[are] largely a function of context."<sup>248</sup> Context was taken into consideration when Bono used the expletive to describe just how happy he was to receive a Golden Globe award. Context was considered in the Janet Jackson, Justin Timberlake Super Bowl XXXVIII performance. Therefore, the context in which the anti-Ford and anti-Arcuri advertisements arose also must be considered.

In this case, the context obviously is the political process and specifically a political campaign for a United States political office. While public opinion of politicians often is less than laudatory, the public's disappointment with the conduct of politicians is grounded in the notion that on a certain level we hold them to a higher standard as administrators of the public trust. While we understand that politics can be dirty business, the mudslinging in political advertisements historically has been contained to casting aspersions on an opponent's character in the form of attacks on their political, social, and economic policies. Because of technological advances—namely the popularity of 24-hour news programming and the public's greater access to information provided by citizen journalists on Internet websites—what used to be behind-closed-door, private, and personal matters have now become much more public and widely available for considerable public consumption.<sup>249</sup> No matter how inappropriate a forum the political campaign arena for gratuitous, titillating, and suggestive sexual speech, candidates and politicians do continually seem to be caught up in scandal involving sexual misconduct that in some cases does have some bearing on their suitability for public office.

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<sup>248</sup> See *Pacifica*, 438 U.S. at 742.

<sup>249</sup> Michael Wolff, *supra* at note 19.

**1. The Material is Not Explicit or Graphic**

The material in the anti-Ford and anti-Arcuri advertisements is not explicit or graphic. As discussed above, there is no actual nudity or any depiction of explicit or graphic sexual activity.

**2. The Images Are Fleeting and Do Not Dwell or Repeat at Length**

The material in the anti-Ford advertisement does not dwell or repeat at length descriptions of sexual organs or activities. The image, although repeated once, does not do so at length. The image of the woman with bare shoulders appears on the screen only for a few seconds. An argument could be made that the material in the anti-Arcuri advertisement does dwell at length on the image of the woman appearing to perform an erotic dance. However, the woman is not naked, and there is no actual depiction of sexual activity.

**3. The Material is Not Intended to Pander, Titillate, or Shock**

The anti-Ford and anti-Arcuri advertisements do pander, titillate, and arouse viewers. They are intended to and do arouse our racial prejudices, fears, and willingness to stereotype. In that way they are just as, if not more, harmful to children, the political process, and society at large as any sexual content currently being broadcast because they and advertisements like them are presented in a serious context with the intent of confusing an already media-overwhelmed and saturated electorate. While the depictions in both the anti-Ford and anti-Arcuri advertisements are offensive and gratuitous, they, however, probably were not intended to pander, titillate, or arouse the viewers in a sexual manner. Instead, they were intended to taint the image both of Ford and Arcuri as well as their chances of victory respectively, and in the case of the anti-Ford advertisement, to evoke racial images and prejudicial thoughts against Ford.

Television content in general has become much racier. Additionally, sexually suggestive material is commonplace on broadcast, cable, and satellite television as well as on the Internet, particularly when websites such as YouTube<sup>250</sup>, MySpace, and Facebook<sup>251</sup> are factored into the analysis.<sup>252</sup> The bar has been set very low. Compared to regularly scheduled primetime programming, today's political advertisements still probably would be considered appropriate for general audiences including children, from an indecency perspective. The regular prime time line up on the big four broadcast

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<sup>250</sup> Available at <http://youtube.com>.

<sup>251</sup> MySpace and Facebook are social networking websites that allow users to post photographs, videos, and various personal information. These websites are available at <http://myspace.com> and <http://facebook.com>, respectively.

<sup>252</sup> The CBS network will air a racy program titled "Swingtown" during Summer, 2008. The show will feature the lives of adults who engage in the "swinger" lifestyle which involves having sex with multiple partners. Groups like the Parents Television Council already are voicing opposition to the program.

networks, on the other hand, provides a steady diet of sex, violence, and generally base programming. Programming on cable generally is even more permissive particularly when the excessive drinking and sexually suggestive material commonplace in many reality shows is factored in.<sup>253</sup>

The race to the bottom with respect to the quality of television programming also might reflect a growing tolerance in American society for the crass, suggestive, and base material streamed into our households every minute of every day. There is, after all, no huge ground swell of public outrage. The majority of indecency complaints received by the FCC in recent years have originated from one watchdog organization, the Parents Television Council.<sup>254</sup>

Americans, in large part, seem to have become desensitized to sexualized material on television. Advertisements for condoms, breast enlargement, erectile dysfunction medications, other products touting the ability to enhance intimate satisfaction can be seen on television all day long, even during times of the day when children are very likely to be in the viewing audience. The number of sex scandals involving public figures and the 24-hour news coverage of them has brought the language of sex to a prominent place in contemporary news coverage. This material routinely crawls across the bottom of the television screen on morning news television programs. The details of the alleged sex acts are openly discussed at all times of the day by television newscasters. Due to our exposure to crass and coarse television programming, the American public in many ways has developed immunity to this type of material that has invaded the homes and the minds of all viewers, not just children. FCC policy, however, historically has been highly protective of children seeking to shield them from the potentially harmful effects of excessive sexual content in broadcast radio and television programming. When the broader availability of and subscription to cable, satellite, and high-speed Internet services is factored in, our collective resistance to indecent material becomes even more evident.

On the other hand, with this desensitization comes the fear that the American public has lost the ability to be discerning regarding indecent material. Additionally, the fact that the political advertisements in question are aired by an increasingly consolidated and corporate-controlled media must factor into this analysis. Consolidation in the news industry has resulted in fewer traditional sources and outlets distributing what historically have been viewed as reliable information based on sound journalistic principles. So, a possibly less discerning electorate is being fed news and information from a small subset of sources and outlets. While there are no separate standards for entertainment programming and advertising, as it relates to a matter as socially important as voting and

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<sup>253</sup> Cable and satellite enjoy greater freedom to broadcast indecent material that would be banned on broadcast stations. The Internet is largely unregulated in almost all respects.

<sup>254</sup> The Parents Television Council is an “advocacy organization protecting children against sex, violence, and profanity in entertainment.” See mission statement of organization, *available at* <http://www.parentstv.org>. The Parents Television Council makes it incredibly easy for visitors to its website to file indecency complaints with the FCC. The website provides multiple links directly to the FCC.

the civic function it should serve to all of American society, negative advertisements featuring indecent or sexually suggestive material should arguably be held to a higher standard. Free over-the-air broadcasting has a uniquely special place in the American marketplace of ideas.<sup>255</sup> It is available to everyone regardless of economic status and ideology. Many households have abandoned subscription services altogether due to the questionable content and otherwise prohibitive costs associated with those subscription services. Preserving at least one venue—over-the-air broadcasting—for balanced, relatively innocuous programming is important to the democracy and its inhabitants.

Moreover, although there are no outright bona fide news exemptions to the indecency prohibition, if the FCC begins to recognize exceptions to the indecency rule, the exceptions could threaten to swallow the rule prohibiting the broadcast of indecent material.<sup>256</sup> Its handling of “The Early Show” shows a willingness to extend these exemptions. Recognition of formal exceptions to the indecency prohibition would extend the obscenity exceptions for artistic expression, bona fide news coverage, documentaries, news interviews, and of course political speech to indecency and profanity.<sup>257</sup> Should this happen, an argument could be made that there is no compelling reason for maintaining the indecency rule.

## V. Resolution of the Statutory Conflict is Possible

Congress and the FCC have left unresolved the question of whether a broadcaster will be subject to criminal prosecution in “future election-related conflicts” where the political speech is indeed indecent under the FCC’s and court’s definition of the term.<sup>258</sup> In light of the possibility of a questionably indecent political advertisement, however remote or how far in the distant future, a legally sound solution is warranted. The Court’s decision in *FCC v. Fox Television Stations, Inc.* is unlikely to resolve this conflict, but might provide guidance as to how the dilemma could be resolved. That being the case, either the FCC, Congress, or lower courts will have to revisit this issue seeking to resolve the statutory dilemma. Congress could resolve this dilemma in one of a number of different ways.<sup>259</sup>

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<sup>255</sup> *Pacifica*, 438 U.S. at 742.

<sup>256</sup> *Omnibus Remand Order*, 21 F.C.C.R. at ¶ 71.

<sup>257</sup> *See, e.g.*, *Miller v. California*, 413 U.S. 15, 24 (1973); 47 U.S.C. § 315 does include exceptions for bona fide news cast, bona fide news interview, bona fide documentary, and on the spot coverage of bona fide news events.

<sup>258</sup> Mortlock, *supra* note 2, at 210-12.

<sup>259</sup> *See id.*, at 219-27; Hille von Rosenvinge Sheppard, *The Federal Communications Act and the Broadcast of Aborted Fetus Advertisements*, 1993 U. CHI. LEGAL F. 393 (1993); Lisa Suzanne Mangan, *Aborting the Indecency Standard in Political Programming*, 1 COMM.LAW CONSPECTUS 73 (1993); Milagros Rivera-Sanchez and Paul H. Gates, Jr., *Abortion on the Air: Broadcasters and Indecent Political Advertising*, 46 FED. COMM. L.J. 267 (1994); Helene T. Schrier, Comment, *A Solution to Indecency on the Airwaves*, 41 FED. COMM. L.J. 69 (1988); Kristine A. Oswald, *Mass Media and the Transformation of American Politics*, 77 MARQ. L. REV. 385 (1994); Lili Levi, *The FCC, Indecency, and Anti-Abortion Political Advertising*, 3 VILL. SPORTS & ENT. L. J. 85 (1996).

In her comment, Samantha Mortlock correctly characterizes the broadcasters' dilemma and proposes reasonable resolutions of the conflict.<sup>260</sup> It has been suggested by other scholars that this statutory conflict may be resolved by either by amending, clarifying, or repealing the political broadcast rules. It has been suggested that Congress could amend the reasonable access and equal opportunity statutes to expressly exclude political advertisements that include indecent, obscene, or profane material, effectively banning all broadcast indecency including that in political advertisements. Second, Congress could expressly create an exception to the anti-censorship provisions of § 326 and § 315 of the Communications Act, thus permitting broadcasters to channel indecent political advertisements to the safe harbor. Third, Congress could completely repeal the reasonable access and equal opportunities provisions.

Alternatively, Congress could permit all broadcast advertisements to be channeled to the safe harbor, thereby removing the discretion of broadcasters in deciding which advertisements are indecent and which ones are not. An alternative and perhaps overall better solution would be to grant broadcasters immunity from violation and sanction under the indecency provisions in § 1464 by granting the same type of immunity currently granted broadcasters who broadcast political advertisements that defame an individual. Also, Congress, the FCC, or the courts could clarify the definition of indecency.

The earlier proposals include the suggestions (i) that Congress could amend and/or clarify the reasonable access and equal opportunity statutes to prohibit indecent material in political advertisements; (ii) that Congress repeal the reasonable access, equal opportunities, and anti-censorship provisions; (iii) that Congress expressly create an exception to the anti-censorship provisions of § 326 and § 315 of the Communications Act to permit broadcasters to channel indecent political advertisements to hours of the day when children are less likely to be in the viewing audience; (iv) that Congress require all broadcast advertisements to be channeled to the safe harbor, thereby removing the discretion of broadcasters in deciding which advertisements are indecent and which ones are not; and (v) that Congress grant broadcasters immunity from suit if they choose to air these advertisements.

In addition to those proposals already offered, there are some other possible resolutions to this statutory conflict. First, Congress could prohibit indecent material in political advertisements. Second, Congress could take a more revolutionary approach and repeal the indecency rules altogether. The Supreme Court's decision in the fleeting expletives case has some bearing on the resolution of this statutory conflict to the extent that the Supreme Court could clarify or alter what constitutes indecent material and what degree of repetition is required for the FCC to impose sanctions. Third, Congress could expand all of the rules in this tripartite to include all cable and satellite channels. Finally, do nothing at all. Each of these proposals has its strengths and infirmities and are discussed below.

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<sup>260</sup> See Mortlock, *supra* note 2, at 210-12, 220-26.

In light of the uncertainty surrounding the viability of the current indecency rules, any resolution that depends on a broadcaster's actually assessing the content of an advertisement for indecency is bound to be problematic creating more problems than are solved. The definition of indecency has proven difficult to apply particularly as it relates to fleeting images and utterances. The standards from one station to the other and one community to another could be applied differently, making it nearly impossible for candidates to predict which advertisements will be accepted, and at which time of the broadcast day their advertisements might be aired. This is an inefficient resolution that also could drive up costs to political candidates and broadcasters who engage in litigation over the issue of whether an advertisement was properly accepted, rejected, or channeled.

In the absence of congressional action, this article suggests that courts should uphold existing case law regarding the treatment of fleeting and isolated expletives and remand any FCC order imposing forfeiture or finding indecent any utterances of fleeting expletives or fleeting depictions of indecent images. In so doing, the courts continue to force the FCC to refine its indecency definition to address constitutional vagueness issues and to offer a more reasoned explanation for the need to change its longstanding policy of not acting on isolated or fleeting indecent material as required by the Administrative Procedures Act.<sup>261</sup>

What follows is a discussion, in order of preference beginning with the grant of immunity to broadcasters in this situation, of some plausible resolutions to this matter.

**A. Amend § 1464 to Expressly Except Political Advertisements**

Congress could amend the indecency statute to expressly except political advertisements from the scope of the statute. Such a resolution would continue to enforce the indecency prohibition against broadcasters in all other contexts, but would close the current loophole and provide clarity to broadcasters in situations in which they are presented with requests to air political advertisements containing indecent material. This alternative will not serve the larger issue of protecting children from harmful material that might be presented in a political advertisement, but it will preserve the right of a political candidate to present himself or herself to the electorate in the way he or she chooses. It also preserves the right of the electorate to see the candidate as he or she really is and to make an informed decision as to whether to cast a vote for that candidate.

Such a resolution to the dilemma, however, could be viewed as an endorsement of certain indecent speech and could undercut the government's concern about subjecting viewers to the first blow inflicted by exposure to indecent material. Critics might argue that the first blow is no less painful in this situation than it would be in other forms of broadcast material.

**B. Grant Immunity to Broadcasters**

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<sup>261</sup> 5 U.S.C. § 706 (2006).

Congress could grant broadcasters immunity from suit if they choose to air these advertisements. This is a good short- and long-term solution. As others have suggested, this would be the better solution of all of the options as far as solving the statutory conflict. Currently, there is no statute or case law providing immunity from liability in the event of indecent political speech, but such immunity has been recognized and upheld in the context of defamatory political speech.<sup>262</sup> The effect of this option would be to grant broadcasters immunity from liability under the indecency provisions in Section 1464 by granting the same type of immunity currently granted broadcasters who broadcast defamatory political advertisements.<sup>263</sup>

This proposal, however, does nothing to solve the complimentary problem of the public airwaves being used as a vehicle for the distribution of indecent material. The argument against a grant of immunity for broadcasters is that a vote for immunity likely would be interpreted by vocal opponents of broadcast indecency as a vote in favor of more broadcast indecency. Additionally, while this proposal also solves the problem of disparate treatment of services—broadcasting, cable, and satellite—opponents of broadcast indecency could frame this as a repeal of an indecency regulation and therefore a step in the wrong moral direction. They might prefer to see a prohibition of indecency not only on broadcast, but also on subscription services as well. In other words, opponents of a grant of immunity in the context of indecent political advertisements probably would prefer, instead, broad prohibitions against indecency on all services and a express prohibition of indecency in political advertisements.

This immunity could extend to indecent and profane material as well as racial hate speech and obscene speech in the spirit of revealing the true character of a candidate, but any such immunity clearly must be limited to the speech of qualified candidates for public office and should not grant any additional protection to broadcasters who use the public airwaves themselves to slander individuals or groups such as racial minorities. Nor should any such grant of immunity open the door for broadcasters to air any more indecent, profane, or obscene speech than is already permitted under § 1464 and the FCC's current regulations.

Scholars have suggested that perhaps it is nonsensical for Congress to grant broadcasters immunity from one of Congress' own most controversial prohibitions.<sup>264</sup> Congress, however, creates exceptions to its statutes all the time. Case in point is one of the very statutes creating this statutory dilemma. Section 315 includes significant exceptions to the equal opportunities requirement.<sup>265</sup>

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<sup>262</sup> *Farmers v. WDAY*, 360 U.S. at 529-35.

<sup>263</sup> *Id.*

<sup>264</sup> See Mortlock, *supra* note 2, at 223-24 (asserting that because the conflict is between three federal statutes, it cannot be resolved by invoking the Supremacy Clause argument used in *Farmers v. WDAY* to find immunity for broadcasters of defamatory political speech).

<sup>265</sup> 47 U.S.C. § 315 (exceptions where the appearance of a legally qualified candidate appears in “(1) a bona fide newscast; (2) a bona fide news interview; (3) a bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary)); or

**C. Repeal the Indecency Rules Altogether or Offer a Reasoned Explanation for Acting on Fleeting Indecency**

This proposal solves the statutory conflict, but it also arguably is the most controversial. From a purely legal perspective, this seems to be a reasonable option to resolving many of the problems at hand—the unclear definition of indecency, the difficult application of the standards, and the disparate treatment of competing services. From a moral standpoint, however, this seems to be the wrong approach. To allow opportunities for more sexually oriented material over the broadcast airwaves would seem to be a step in the wrong direction.

The hurdles to be crossed to effectuate this proposal are quite high. On the one hand, the continued wisdom of the indecency prohibition has been called into question as evidenced in no small part by the Supreme Court’s decision to hear the appeals of the fleeting expletive cases. Moreover, as discussed, herein, the distinction between cable and satellite service on the one hand and traditional broadcast service on the other hand, regarding how the services are regulated by the FCC does not make much sense.<sup>266</sup> A majority of Americans receive television service via a subscription service provided either by a cable company or a satellite service provider. Most consumers of television programming make very little practical distinction between the services when channel surfing or program selection. Consequently, it makes very little sense that the broadcaster occupying channel 9 on the channel line up is subject to one set of rules when the cable channel on channel 19 abides by a different set of rules. In the context of political broadcast advertisements, it is nonsensical to impose upon political candidates one set of rules when broadcasting on cable or satellite but another set when broadcasting on traditional broadcast stations. Perhaps the broadcast indecency rules have seen better days.

This alternative gets right at the issues before the U.S. Court of Appeals and the U.S. Supreme Court relating to the Commission’s departure from 30 years of policy of not acting on fleeting expletives and images. The FCC has had a difficult time articulating a reasoned explanation for changing the longstanding policy. As it currently stands, the FCC really may not sanction fleeting images and expletives under current

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(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto)”).

<sup>266</sup> See Clay Calvert, *The Two-Step Evidentiary and Causation Quandary for Medium-Specific Laws Targeting Sexual and Violent Content: First Proving Harm and Injury to Silence Speech, then Proving Redress and Rehabilitation Through Censorship*, 60 FED. COMM. L.J. 157 (2008). Calvert criticizes the “underinclusiveness” of the FCC’s medium-specific regulation of minors’ access to indecent, profane, and violent material where broadcasters and providers of subscription services are regulated differently. Calvert explores the legislative dilemma presented by the Second Circuit’s decision on Fox relating to fleeting expletives. He suggests that “two knotty questions” now face legislators: (1) proving harm and (2) proving redress by providing sufficient evidence that the regulatory scheme actually remedies the problem of exposure of children to harmful material.

rules, as the Second and Third Circuit Courts of Appeals have found the rules arbitrary and capricious.<sup>267</sup> In light of these rulings, the FCC has to retool these prohibitions. Courts could continue to vacate and remand the FCC's orders until the agency finally gets it right. Courts have said that the FCC must offer a reasoned explanation for its recent policy shifts on fleeting indecency. The only other alternative would be to adhere to longstanding policy or to repeal the rules. While this might ultimately be the long-term best solution it does little to address the short-term issues of broadcasters, political candidates, or the principles of democracy.

Broadcasters argue that the current indecency rules put them at an economic disadvantage compared to cable and satellite services particularly in this era of communications convergence and due to the widespread availability of more advanced communications services.<sup>268</sup> Under the current rules, television and radio broadcasters are prohibited from airing the type of racy programming that has been popular of recent on the subscription channels. Cable and satellite television and radio channels are not subject to these indecency prohibitions and, therefore, may air more harsh language and more crude sexual content any time of the day, not just during the safe harbor.

The FCC could expand each of the rules to include all cable and satellite channels. This proposal would require all cable, satellite, and broadcast stations to provide reasonable access and equal opportunities to political candidates and would prohibit indecent material on all services equally. The benefit, of course, is that it could potentially benefit the political process by securing access to more outlets for political candidates. This benefits the electorate and arguably society as a whole. Such a resolution might be favored by proponents of rules that remove indecency from all of television. Groups like the Parents Television Council are concerned about the prevalence of profanity and sexual content on all services, not just broadcast television.<sup>269</sup>

The problem, however, is that the terrible confusion surrounding broadcast indecency would then be introduced to the subscription services arena as well.<sup>270</sup> While one problem would be solved, a larger one would be created. Disallowing all indecency

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<sup>267</sup> Fox v. FCC, 489 F.3d 444 (2<sup>nd</sup> Cir. 2007); CBS v. FCC, 535 F.3d 167 (3<sup>rd</sup> Cir. 2008).

<sup>268</sup> See Lili Levi, *Chairman Kevin Martin on Indecency: Enhancing Agency Power, A Response to Kevin Martin et al., Expansion of Indecency Regulation*, 60 FED. COMM. L.J. 1, 32 (2007) ("In a world in which distinctions between cable and broadcast are in many ways chimerical and in which cable has experimented with edgier programming, continuing stringent enforcement of indecency rules against broadcast stations would simply disadvantage broadcasters vis-à-vis their regulatory exempt competitors without significantly reducing the availability of sexual content on television. This Response does not claim that à la carte will necessarily lead to the consequences detailed above. It simply argues that the Chairman's failure to address the possibility that à la carte distribution could lead to either overbroad or underinclusive speech regulation is a significant omission.").

<sup>269</sup> See Ted Hearn, *Stevens Adds Cable to Indecency Jihad*, Multichannel News, Mar. 7, 2005, at 1, 21. FCC Chairman Kevin Martin and Senator Ted Stevens have called for regulating indecency on cable and satellite services. See Open Forum on Decency: Hearing Before the Committee on Commerce, Science and Transportation, 109<sup>th</sup> Cong. 9-12 (Nov. 29, 2005). Transcript available at <http://www.commerce.senate.gov/pdf/decency2.pdf>.

<sup>270</sup> See Clay Calvert, *supra* at note 266.

even on cable and satellite potentially raises more significant constitutional issues including First Amendment challenges than even those raised by application of the rules to broadcasters.<sup>271</sup> While this proposal would put all services on equal footing, the unfortunate result, of course, is to extend the dilemma to more services than it already is, thus exacerbating the statutory dilemma at issue in this article.

Any such economic-disadvantage type argument made by broadcasters, however, must be informed by the fact that broadcasters operate in a highly regulated industry and pursuant to a license which does not confer on them an absolute fee simple ownership right.<sup>272</sup> Because of this limitation, broadcasters are not entitled to any expectation of treatment on parity with that of subscription services. While it is true that subscription services do use the public airwaves, and that satellite service providers are subject to licensing of their satellites and earth stations, they simply are not regulated in the same way as are broadcast licensees. This quasi-private property nature of subscription services is in part why the FCC has not to date extended the broadcast rules to satellite and cable services.<sup>273</sup>

Additionally, the overwhelming majority of indecency complaints in recent years have been generated by a small group of individuals and organizations, namely the Parents Television Council. With ratings for cable television programs rising, arguably, American viewers and listeners are not as offended by the state of broadcast programming as the increased number of indecency complaints would suggest.<sup>274</sup> Therefore, perhaps the indecency rules no longer are necessary or desirable by the contemporary viewing community.

On the other hand, while most indecency complaints in recent years are the result of a very active watchdog group, many Americans if pressed on the issue might reveal a strong distaste for the crass material on broadcast as well as cable and satellite channels.<sup>275</sup> While not compelled to complain to the FCC about this content, they might indeed desire greater federal control and regulation of the indecent television and radio programming on all services, particularly due to the lack of distinction in their consumption of the services. In sum, they might favor increased regulation of cable and satellite services as well. The public's response to such a proposal turns at least in part

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<sup>271</sup> See Clay Calvert, *Bono, the Culture Wars, and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and Its New Path on Profanity*, 28 SEATTLE UNIV. L. R. 61 (2004).

<sup>272</sup> See Radio Act of 1927, 44 Sta. 1162 (no private ownership of airwaves—permission to use airwaves conferred by government in form of a license). A license is a non-possessory right to use or go over the property of another for a specific purpose. See, e.g., *Seaboard A. L. R. Co. v. Dorsey*, 111 Fla. 22, 27; 149 So. 759, 761 (1933) (“A license is a mere permit to use the property of another.”), *Tatum v. Dance*, 605 So. 2d 110(1992) (“a license is merely a personal right to use the property of another for a specific purpose.”).

<sup>273</sup> The FCC has long resisted calls to extend its indecency regulations to subscription services. See John C. Quale and Malcolm J. Tuesley, *Space, the Final Frontier—Expanding FCC Regulation of Indecent Content onto Direct Broadcast Satellite*, 60 FED. COMM. L. J. 37 (2007).

<sup>274</sup> See Nielsen Ratings.

<sup>275</sup> The Parents Television Council is a media watchdog group that seeks to address the prevalence of sex, violence, and profanity on television and radio via enforcement of existing rules and influencing ongoing communications policy. See <http://www.parentstv.org/PTC/aboutus/main.asp>.

on whether the Parents Television Council and groups like it are speaking on behalf of a silent majority or a vocal minority. Perhaps the general viewing and listening public simply have become particularly desensitized to broadcast content, or perhaps they are not offended, or perhaps they are offended but just not to the point of filing a formal complaint. It is difficult to tell which is the case.

Regarding fleeting expletives, a compelling argument could be made that children are harmed just as much by the cumulative effects of repeated exposure to isolated and fleeting expletives over time as they are by exposure to material in a single broadcast that dwells on or repeats sexual or excretory material or activity. The bottom line is that once a child is exposed to this content, it is forever emblazoned in the child's psyche. Therefore, it could be argued that isolated expletives are just as harmful as material that dwells or repeats the material. This essentially is the FCC's argument supporting its policy change. It should be of no or little consequence that the FCC is slow in coming to this conclusion—nearly 30 years to be exact. Federal agencies must be allowed to revise its policies after careful consideration of the past and anticipated future effectiveness of those policies. Perhaps the FCC just needs to articulate this more clearly in order to justify not only its policy change, but also to justify retention of the indecency and profanity restrictions altogether.

#### **D. Change the Definition of Indecent Material**

The definition of indecent material could be changed to include not just patently offensive material that describes sexual or excretory activities or organs, but also to include any material that could be harmful to children. The FCC could refine the definition of indecency to include sexually suggestive as well as racially offensive speech such as that of J.B. Stoner.<sup>276</sup> Under current application of indecency principles, the word "shit" would be indecent, whereas "nigger" is not. Both are equally offensive. Also, it could include depiction of gruesome images such as aborted fetuses as well as all fleeting images and utterances of indecent and/or offensive speech.

Such a vague and broad definition, however, is sure to be found to run afoul of the First Amendment.<sup>277</sup> Despite the likely constitutional hurdle, this solution could resolve the statutory conflict while simultaneously protecting children from various forms of harmful speech. Additionally, hate speech also enjoys significant First Amendment protection despite the psychological harm caused by the speech to the individuals and groups it targets and despite the overall harm to society caused by the speech.<sup>278</sup> Generally, racist speech is protected except in the workplace where it creates a hostile work environment, or it constitutes fighting words creating a true threat of violence.<sup>279</sup>

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<sup>276</sup> See *Stoner II*, 69 F.C.C.2d at 944-45; *Stoner I*, 36 F.C.C.2d at 636.

<sup>277</sup> U.S. Const. amend. I.

<sup>278</sup> See *e.g.*, *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

<sup>279</sup> See, *e.g.*, *Virginia v. Black*, 538 U.S. 343 (2003); see also *R.A.V. v. St. Paul*, 505 U.S. 377 (1992)

(striking a city ordinance banning bias-motivated crimes such as cross burnings because the statute prohibited otherwise permitted speech and stating that the First Amendment does not permit the government to impose special prohibitions on speakers who express views on disfavored subjects); and see

The anti-censorship provisions in § 326 and § 315 are further evidence of the freedoms afforded political candidates wishing to use the public broadcast airwaves in furtherance of their campaigns.<sup>280</sup> In the political broadcast context, the FCC acquiesced to this general rule in the case of J.B. Stoner in upholding the right of access afforded candidates for federal elective office by 47 U.S.C. § 312 and rejecting efforts to characterize racist speech as indecent or obscene.<sup>281</sup>

This resolution would require the Commission to offer a reasoned explanation for changing its longstanding policy of not punishing the broadcast of fleeting expletives, fleeting images, or various forms of hate speech.<sup>282</sup>

**E. Amend and/or Clarify the Reasonable Access and Equal Opportunity Statutes to Prohibit Indecent Material in Broadcast Political Advertisements**

Congress could clarify or amend the reasonable access and equal opportunity statutes to expressly exclude indecent political advertisements. To do so, would close the loophole in the three conflicting statutes and effectively ban all indecent broadcast material from the airwaves during the hours of 6:00 a.m. to 10:00 p.m.—the non-safe harbor hours. This proposal hurts broadcasters more so than candidates or the election process. Candidates would be free to put their advertisements on cable and satellite channels and on the Internet bypassing broadcasters altogether. Voters likewise could receive the candidate’s message simply by switching to the Internet or to a cable or satellite channel. The public still, however, might be subjected to indecent material which might be harmful to children.

The wisdom of this solution is highly questionable, as currently it is not even clear that Congress and the FCC should ban any indecent material on broadcast stations at all. Currently, the overwhelming majority of television viewers have abandoned reliance on traditional over the air broadcast choosing instead to subscribe to either cable or satellite service. That being the case, most consumers today draw little distinction

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In re: KGEZ(AM), Kalispell, MT, Facility ID No. 60575, Skyline Broadcasters, Inc., 22 F.C.C.R. 8395 (2007) (denying petitions to deny license renewal and reiterating that “if there is to be free speech, it must be free speech that we abhor and hate as well as for speech that we find tolerable and congenial”). Zapis Communications Corp., Memorandum Opinion and Order, 7 F.C.C.R. 3888 (MB 1992) (citing Anti-Defamation League of B’nai B’rith, Memorandum Opinion, 4 F.C.C. 2d 190, 192 (1966), *aff’d*, Memorandum Opinion and Order, 6 F.C.C. 2d 385 (1967), *aff’d sub nom.* Anti-Defamation League of B’nai B’rith v. FCC, 403 F. 2d 169 (1968), *cert. denied*, 394 U.S. 930 (1969).

<sup>280</sup> 47 U.S.C. §§ 315, 326.

<sup>281</sup> See *Stoner II*, 69 F.C.C.2d at 944-45. See also Clay Calvert, *Imus, Indecency, Violence & Vulgarity: Why the FCC Must Not Expand Its Authority Over Content*, 30 HASTINGS COMM. & ENT. L.J. 1, 4, 10-16 (2007) (suggesting that any attempts to expand the definition of broadcast indecency to include racist and sexist speech will be void for vagueness).

<sup>282</sup> See *Fox v. FCC*, 489 F.3d 444, *cert. granted* *Fox v. FCC*, 128 S. Ct. 1647, 170 L. Ed. 2d 352 (2008), 07-582 (2007) (addressing the isolated and fleeting use of various forms of the words “shit” and “fuck” and other profane material); and see *CBS v. FCC*, 535 F.3d 167 (3<sup>rd</sup> Cir. 2008).

between broadcast and cable television stations as they are consumed via cable and satellite services nearly indistinguishably. As such, the relevance of the different treatment of broadcast services and subscription services, which are not subject to the same prohibitions against airing indecent material, for the purpose of the public interest in protecting children from indecent material has little continued value or relevance since indecent material is not prohibited on cable and satellite channels or on the Internet. Perhaps statutory law and agency regulations should reflect this market change.

Additionally, the difficulty in determining what is indecent opens the door to greater confusion. This alternative leaves too much discretion in the hands of broadcasters and the opportunity for misuse or misapplication of the rules and the indecency standard. Until the definition of indecency and its application are clarified, this solution is unacceptable.

#### **F. Permit Channeling of Indecent Political Advertisements to the Safe Harbor**

Congress could expressly create an exception to the anti-censorship provisions of § 326 and § 315 of the Communications Act to permit broadcasters to channel indecent political advertisements to the safe harbor hours of 10:00 p.m. to 6:00 a.m. when children are less likely to be in the viewing audience. Without this exception, such attempts to channel political advertisements to particular hours of the broadcast day would violate the express prohibitions against censorship and contradict the D.C. Circuit's holding in *Becker*.<sup>283</sup>

If broadcasters are given the authority to so channel indecent political advertisements, the potential harm to children would be diminished *albeit* only to the extent that the underlying assumption that children are less likely to be in the viewing audience actually holds true. Permitting channeling of select advertisements, however, has some other more identifiable problems.

The most obvious problem is associated with the difficulty in actually defining what constitutes indecent material. Again, there is too much discretion left to the broadcasters to apply a confusing and unclear set of rules. Because neither the courts, Congress, nor the FCC have been able to provide broadcasters clear guidance as to what material it will sanction, broadcasters might err on the side of caution and channel more material than is necessary.<sup>284</sup> While the definition of what constitutes indecency becomes somewhat clearer with each court decision, and hopefully will become clearer when the court rules on the fleeting expletives cases, few broadcasters necessarily want to put their licenses in jeopardy and incur the huge costs of litigation to defend a decision to air a political broadcast ad in order for a case to work its way through the judicial system.

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<sup>283</sup> *Becker*, 95 F.3d at 84-85.

<sup>284</sup> B. Chad Bungard, *Indecent Exposure: An Economic Approach to Removing the Boob from the Tube*, 13 UCLA ENT. L. REV. 195 (2006) (highlighting the FCC's inconsistent and ineffective application of the indecency definition and advocating for the creation of an Indecency Review Board to rectify the situation).

Conversely, broadcasters could find themselves liable for having channeled an advertisement that the courts ultimately find was not indecent and should not have been relegated to the safe harbor. Either way, the broadcaster loses.

The media should simply be the forum for discussion and distribution of ideas, not the censor of the message. In light of the FCC's current activity in the indecency arena, and the lack of clarity as to what actually constitutes indecent material, broadcasters should not be pushed into a corner. To do so would potentially quell speech as broadcasters, fearful of indecency forfeitures, would become overly cautious and might reject too many requests for political air time.

A related problem is that of discriminatory treatment of indecent advertisements and those that are not. A large segment of the viewing audience might be deprived of the opportunity to view advertisements that might be aired only in the wee hours of the morning. Not only is the candidate harmed in that he or she is not given access to the same audience as might be his or her competitors, but so is the entire electorate. This solution would undoubtedly trigger litigation claiming discriminatory treatment of political speech and harm to the electorate.

The government may impose reasonable time, place, and manner restrictions on speech so long as the restrictions are narrowly tailored to achieve a significant government interest.<sup>285</sup> Channeling is more like permissible time, place, and manner restrictions and should be permitted. This is separation of indecent material suitable for adults, but not children, generally is accomplished in broadcasting by channeling indecent programming to the safe harbor. The Commission has held that requiring indecent broadcast material to be channeled in this way is a reasonable and narrow time, place, and manner restriction consistent with the First Amendment protections afforded other media.<sup>286</sup>

One may argue, however, that granting broadcasters the authority to channel certain advertisements to the safe harbor while permitting others to be broadcast during the hours of 6:00 a.m. to 10:00 p.m. is discriminatory because the time of day the advertisements would be broadcast would be channeled based solely on the content of the message.

Neither Congress nor the FCC should push any policies permitting broadcasters to refuse to air these advertisements. Fostering a free marketplace of ideas political arena free from censorship requires that neither broadcasters nor the government quell political speech. While it is quite another story were the broadcaster itself make hateful, obscene, indecent, or profane comments in other contexts, it could be said convincingly that allowing political candidates to reveal their true selves through their political advertisements, no matter how distasteful, is actually in the public's best interest.

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<sup>285</sup> *Renton v. Playtime Theatres*, 106 S. Ct. 925 (1986); *Young v. American Mini-Theatres*, 427 U.S. 50 (1976).

<sup>286</sup> *Pacifica M&O*, 2 F.C.C.R. at 2699, ¶ 15.

A collateral benefit of airing even negative material is that the advertisements say as much about the sponsor of the advertisement as they do about the person being attacked. It takes a truly unique political candidate to use the word “nigger” or any other racially offensive term on television or the radio or to use the public airwaves during prime time to air indecent, obscene, or profane material wholly inappropriate for children. Perhaps the public is better off having had this information available to it. The electorate in many ways is made better off by insight into the character of a sponsor of such advertisement which goes directly to the public’s determination as to whether a candidate who sponsors such a negative advertisement is ripe to be entrusted with the public trust that is commensurate with holding public office. The public is better served by having had access to this information prior to the election than to find out after a candidate wins the office and then begins to carry out his or her governmental authority in a manner offensive, oppressive, or discriminatory to the general public he or she has been elected to serve.

Allowing the advertisements to show the true fiber and character of a candidate is better for society in the long run to the extent that the electorate can see past the hype and hysteria to the true message and messenger. Politically correct speech may conceal the true character of a candidate, which is not always in society’s overall best interest. On the other hand, this type of speech by a candidate may stoke negative stereotypes or may be unnecessarily divisive. Nevertheless, it is better that the public know this about a candidate prior to the election.

**F. Require or Permit Channeling of all Political Advertisements to the Safe Harbor**

Congress could require all broadcast advertisements to be channeled to the safe harbor, thereby removing the discretion of broadcasters in deciding which advertisements are indecent and which ones are not. Such a requirement might be found to be an unconstitutionally overbroad attempt to regulate a very small subset of otherwise permissible speech. Additionally, to do so would potentially harm the entire political process, the political advertisement would take on the same status as late night infomercials. They would be rendered ineffective as the potential audience reach would be significantly reduced. Any such regulation that allowed for broadcaster discretion to channel or not to channel would suffer from the same problems as that of permitting broadcasters to refuse to air indecent advertisements as broadcasters still would have to make the initial determination of indecency which in and of itself if wrought with problems. This proposal does not necessarily help the overall political process.

Overall, this is a more equitable resolution than those options depending on licensees’ determinations of indecency. Nevertheless, this resolution severely undermines concerns about protecting political candidates’ access to a broad audience and about not shutting candidates out from certain hours of the day when that audience might be largest.

### **G. Wait and See/Do Nothing At All**

Courts and Congress could simply wait and see what the FCC does when a licensee actually does broadcast an indecent political advertisement. Because some feel the possibility of an indecent political advertisement is remote, regulators might prefer this alternative. They would be waiting particularly to see whether the Commission receives any complaints about the broadcast and whether it issues a Notice of Apparent Liability and forfeiture against the broadcaster for the indecent broadcast. The FCC could set forth a policy of not acting on such complaints in the context of political advertisements or could issue a forfeiture which it would have to substantiate particularly if the material is fleeting in nature. Pursuing this course, however, fails to provide broadcasters with sufficient notice of what broadcast material the Commission will or will not sanction.

Doing nothing at all does not seem particularly troublesome if you take past inaction as an indicator of the possibility of a legal issue. However, it is only a matter of time before this rationale collapses. Just because the FCC has had no problem resolving the issue in the past, this is so simply because the FCC has not yet been presented with a case involving a political advertisement containing material that falls within the FCC's definition of indecency.

The FCC very well might sanction a broadcaster under pressure from groups like the Parents Television Council or political rivals of the candidate supporting the advertisement. Until the Commission has a real case before it, which route it will take remains a mystery.

### **H. Repeal the Reasonable Access, Equal Opportunities, and Anti-Censorship Provisions Altogether**

Repeal of the reasonable access, equal opportunities, and anti-censorship provisions could eliminate the conflict. Were these provisions to be repealed, a licensee would be free to reject a candidate seeking to broadcast a message to which the licensee objected or found otherwise undesirable. If a licensee voluntarily were to permit candidates access to its station for the purpose of political speech, then the licensee could be subject to the indecency provisions of § 1464.

The problem with this proposal is obvious. Licensees would be free to discriminate against one candidate in favor of another or others. Licensees would be given too much power over candidates' access to the electorate via the public airwaves. Not only would candidates be harmed by such a policy, but so would the general public and the political process itself.

## **Conclusion**

Even if the advertisements in the new genre of racy political advertisements do not meet the definition of indecency, they are dangerously close to the tipping point that the courts and the FCC have danced around for many years. They are closer to the realm of broadcast indecency than are the abortion advertisements of the 1990s and the racially offensive advertisements of the 1970s, yet not quite as egregious as the wardrobe malfunction of Superbowl XXXVIII, nudity of “NYPD Blue” or the expletives of the various awards shows that have suffered the wrath of the FCC in recent years. Nevertheless, in the context of promoting a democratic society in which voters are adequately informed about candidates’ stance on substantive issues, these advertisements lack any serious political merit and add little to nothing of value to the political process.

The appropriate solution to this dilemma, however, is not to revoke reasonable access and equal opportunities for political candidates, for to do so would frustrate the public interest obligations of broadcasters. Nor is the answer to prohibit indecent material from political advertisements because of the risk of censorship and the possibility of undue influence of the media on the political process. Absent a complete repeal of the indecency ban altogether, which could be on the horizon and legally justifiable, the more appropriate solution to this dilemma is to close the current loophole left open by the three existing statutes and afford broadcasters the same type of immunity from liability that currently is afforded them in the context of defamation suits.<sup>287</sup>

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<sup>287</sup> See *Farmers v. WDAY*, 360 U.S. at 530-35.