CASE 18–2 Fox Television Stations, Inc. v. Federal Communications Commission United States Court of Appeals 489 F.3d 444 (2d Cir. 2007) The Federal Communication Commission’s (FCC’s) policing of “indecent” speech stems from 18 U.S.C. Section 1464, which 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.” The FCC first exercised its statutory authority to sanction indecent (but nonobscene) speech in 1975, when it found Pacifica Foundation’s radio broadcast of comedian George Carlin’s “Filthy Words” monologue indecent. Under the FCC’s definition, indecent speech is language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. During [a] January 19, 2003, live broadcast of the Golden Globe Awards, musician Bono stated in his acceptance speech: “[T]his is really, really, brilliant. Really, really, great \*\*\*\*” (expletive included in the original broadcast). On a complaint about the broadcast by individuals associated with the Parents Television Council, the FCC held that any use of any variant of “the F-Word” inherently has sexual connotation and therefore falls within the scope of the indecency definition. The Commission found the fact that use of the word was fleeting and isolated irrelevant and overruled all prior decisions in which fleeting use of an expletive was held not indecent. On February 21, 2006, the Commission found Fox Television Stations, Inc.’s broadcast of the 2002 Billboard Music Awards and Fox’s broadcast of the 2003 Billboard Music Awards indecent and profane. During the 2002 broadcast, Cher stated: “People have been telling me I’m on the way out every year, right? So f\*\*\* ‘em.” Fox filed a petition for review of the FCC’s order in the U.S. Court of Appeals for the Second Circuit. Justice Pooler Agencies are of course free to revise their rules and policies. Such a change, however, must provide a reasoned analysis for departing from prior precedent. When an agency reverses its course, a court must satisfy itself that the agency knows it is changing course, has given sound reasons for the change, and has shown that the rule is consistent with the law that gives the agency its authority to act. In addition, the agency must consider reasonably obvious alternatives and, if it rejects those alternatives, it must give reasons for the rejection. The agency must explain why the original reasons for adopting the rule or policy are no longer dispositive [a deciding factor]. The primary reason for the crackdown on fleeting expletives advanced by the FCC is the so-called “first blow” theory. Indecent material on the airwaves enters into the privacy of the home uninvited and without warning. To say that one may avoid further offense by turning off the [television or] radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. We cannot accept this argument as a reasoned basis justifying the Commission’s new rule. First, the Commission provides no reasonable explanation for why it has changed its perception that a fleeting expletive was not a harmful “first blow” for the nearly thirty years between [the decisions in Pacifica’s case] and Golden Globes. More problematic, however, is that the “first blow” theory bears no rational connection to the Commission’s actual policy regarding fleeting expletives. A re-broadcast of precisely the same offending clips from the two Billboard Music Award programs for the purpose of providing background information on this case would not result in any action by the FCC. The Order makes passing reference to other reasons that purportedly support its change in policy, none of which we find sufficient. For instance, the Commission states that even non-literal uses of expletives fall within its indecency definition because it is “difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions.” This defies any commonsense understanding of these words, which, as the general public well knows are often used in everyday conversation without any “sexual or excretory” meaning. Even the top leaders of our government have used variants of these expletives in a manner that no reasonable person would believe referenced “sexual or excretory organs or activities.” [The court proceeded to recount examples of when President Bush and Vice President Cheney used the questionable words in public.] Accordingly, we find that the FCC’s new policy regarding “fleeting expletives” fails to provide a reasoned analysis justifying its departure from the agency’s established practice. For this reasons, Fox’s petition for review is granted. Affirmed for Fox Television