

ALERT

Obama Administration Seeks Supreme Court Review of Broadcast Indecency Regulations

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The Obama Administration has asked the U.S. Supreme Court to reverse two federal court of appeals decisions that it says "preclude the [Federal Communications] Commission from effectively implementing statutory restrictions on broadcast indecency that the agency has enforced since its creation in 1934." On April 21, the Administration filed a petition for a writ of certiorari with the high court, seeking review of the decisions by the United States Court of Appeals for the Second Circuit in *Fox Television Stations, Inc. v. FCC* and *ABC, Inc. v. FCC*. In those cases, the Second Circuit struck down the Federal Communications Commission's (FCC) broadcast indecency regulations as impermissibly vague and vacated agency orders that found broadcasts including so-called "fleeting expletives" during Fox awards shows and seven seconds of nudity contained in an episode of ABC's *NYPD Blue* to be indecent.

At issue is whether the Commission can apply a contextual approach to indecency without violating First Amendment vagueness standards. Under its existing analysis, in order to determine whether broadcast content is actionably indecent, the Commission considers: (1) whether the material "describe[s] or depict[s] sexual or excretory organs or activities," and (2) whether the broadcast as a whole is "patently offensive as measured by contemporary community standards." The administration argues that the Second Circuit decisions have stifled the FCC's ability to enforce indecency laws by "overturn[ing] the basic framework under which the Commission implements its longstanding statutory and regulatory prohibitions on indecent broadcasting."

In *Fox*, the FCC concluded that Fox's live broadcasts of the Billboard Music Awards in 2002 and 2003 violated the Commission's indecency regulations. The 2002 incident involved Cher's use of the "f-word"

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during an acceptance speech. On the same awards show the following year, Nicole Richie uttered both the "f-word" and the "s-word" during an exchange with her *Simple Life* co-star Paris Hilton about removing cow manure from a Prada purse. For many years, the FCC had taken a restrained approach toward sanctioning the use of isolated expletives on radio and television; the agency did not, therefore, issue a fine in the *Fox* case, because it concluded that licensees did not have notice at the time of the broadcast of the Commission's new, significantly tougher enforcement approach, which proscribed the broadcast of certain words the FCC determined were inherently profane and indecent.

Nevertheless, *Fox* appealed, and the Second Circuit concluded that the Commission "failed to articulate a reasoned basis" for changing its enforcement policy. The Supreme Court reversed, finding that the Commission's context-based approach was rational given the agency's Congressional mandate to protect children from indecent material and in light of "the pervasiveness of foul language" in entertainment programming. On remand, the Second Circuit issued a sweeping decision striking down the entire indecency policy on the grounds that it is "impermissibly vague."

Meanwhile, in *ABC*, the FCC concluded that an episode of *NYPD Blue* was "patently offensive" for including in its opening scene several shots of a woman's buttocks and the sides of her breasts. *ABC* argued the scene was intended to portray the awkwardness between a child and his parent's new romantic partner, and the difficulty of adjusting to the situation. The Commission, however, concluded the scene was "titillating and shocking," and imposed forfeitures of \$27,500 each on several *ABC* affiliates in the Central and Mountain time zones, which aired the network program at 9 p.m. (before the start of the "safe harbor" for indecent programming that begins at 10 p.m.). On appeal, the Second Circuit vacated the FCC's order, ruling that the case was controlled by its holding in *Fox* that the indecency policy is facially unconstitutional.

In asking the Supreme Court to review the Second Circuit's decisions in *Fox* and *ABC*, the administration makes three primary arguments. First, it says, the Second Circuit's rulings conflict with decisions of the Supreme Court and the D.C. Circuit. The lower court, the administration claims, ignored the teaching of Supreme Court in the infamous *Pacifica* case (involving George Carlin's seven dirty words monologue), that analysis of context is a "virtue" of the Commission's indecency approach. Further, the government claims, the decisions conflict with the *Action for Children's Television* cases decided in the 1990s, where the D.C. Circuit twice rejected arguments that the Commission's indecency regulations were vague. In addition, the administration argues, consistent with the Supreme Court's recent decision in *Humanitarian Law Project v. Holder*, the Second Circuit should have addressed the facts before it in the *Fox* and *ABC* cases rather than eviscerating the policy so that a "broadcaster can evade liability for its indecent broadcasts even when the material at issue is 'plainly prohibited.'"

Second, the government contends that the FCC's indecency policy is not unconstitutionally vague. Here, the petition suggests that indecency cannot be defined with precision and that the Commission is not required to do so. Instead, the government says the FCC's regulations clarify standards proposed by Congress. The petition emphasizes that the Commission provided protection to broadcasters by not imposing sanctions where the rules were not clear at the time of the violation, and by creating a safe harbor for the broadcast of indecent content after 10 p.m.

Finally, the administration claims that the decisions undermine the FCC's enforcement policy, leading broadcasters to believe "that they have been freed of the public-interest obligation not to air indecent programming" that they accepted as a condition of obtaining a license. The government underscores the importance of context in evaluating arguably indecent material, as well as the difficulties associated with designing a more tailored approach to indecency enforcement, noting that a ban on specific words would almost certainly be unconstitutional, and would prevent the broadcast of valuable content like "Saving Private Ryan" and "Schindler's List."

We anticipate that the Supreme Court will hear these cases, although it is difficult to predict how the high court ultimately would rule on the First Amendment issues involved. That said, when the Court addressed the Fox case in the first instance, several justices hinted at how they might approach the constitutional question. For example, while Justice Thomas agreed to uphold the "fleeting expletive" policy as valid under the Administrative Procedure Act, he devoted his concurring opinion to "the questionable viability" of *Red Lion* and *Pacifica*—the two precedents that establish the lower level of First Amendment scrutiny that applies to the FCC's authority to regulate broadcast indecency (and, more broadly, broadcast content in general). In her separate dissent, Justice Ginsburg also gave some indication that she doubts the constitutionality of the Commission's "fleeting expletive" policy. After observing the "long shadow the First Amendment casts over what the Commission has done," she expressed reservations regarding whether the agency's current policy fits within the Court's "tightly cabined" ruling in *Pacifica*. Justice Stevens, on the other hand, included a footnote in his dissent disagreeing with Justice Thomas's views on the viability of *Pacifica*. Justice Stevens has now been replaced by Justice Kagan, whose views on these issues are largely unknown.