

Supreme Court Issues Narrow Decision in Favor of Broadcasters on Broadcast Indecency

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On June 21, 2012, the U.S. Supreme Court issued its ruling in *FCC v. Fox Television Stations, Inc. (Fox II)*. In a decision written by Justice Kennedy, the Court without dissent (Justice Ginsburg concurred in the judgment and Justice Sotomayor did not participate) set aside the Federal Communications Commission's (FCC) orders citing Fox and ABC for indecency violations, finding that the agency failed to give the networks prior, fair notice that fleeting expletives and momentary nudity could be found actionably indecent.

The protracted legal wrangling over the FCC's modification of its broadcast indecency policy originated in 2006, when the FCC found that isolated utterances of the "F-" and "S-" words by Cher and Nicole Richie during live broadcasts by Fox of the 2002 and 2003 Billboard Music Awards were actionably indecent. In 2008, the FCC issued a substantial fine against ABC and certain of its affiliates for broadcasting an episode of *NYPD Blue* in 2003 that displayed an adult female's nude buttocks for seven seconds and momentarily showed the side of her breast. But prior to a 2004 shift in policy, which occurred after all three of these broadcasts, the FCC had refrained from issuing sanctions for broadcasts that included the isolated use of expletives and momentary indecency.

When the matter first came before the Supreme Court in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (*Fox I*), the Court held that the FCC's departure from its prior policy of non-enforcement against fleeting expletives did not violate the Administrative Procedure Act (APA), as it was neither arbitrary nor capricious. The Court found that the agency had acknowledged its change in policy and had offered

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a reasonable explanation for doing so. However, the Court declined to address the constitutionality of the FCC's indecency policy at that time, instead remanding the matter to the U.S. Court of Appeals for the Second Circuit to assess whether the policy violates the First Amendment. On remand, the Second Circuit found that the agency's indecency policy was unconstitutionally vague.

In the case decided today, the Supreme Court again punted on the First Amendment implications of the FCC's indecency policy, instead narrowly deciding the case on Fifth Amendment due process grounds. Specifically, the Court found that Fox and ABC lacked fair notice at the time of their pre-2004 broadcasts that the material they aired could be found actionably indecent. Clarity of regulation is essential, the Court explained, so that "regulated parties. . . know what is required of them so they may act accordingly" and "so that those enforcing the law do not act in an arbitrary or discriminatory way." Rigorous adherence to these principles is even more critical when speech is involved as vagueness may chill protected speech. Given the convoluted regulatory history in the indecency arena, broadcasters did not have sufficient notice that a fleeting expletive or momentary nudity was proscribed under the FCC's indecency policy during the times of the broadcasts at issue, and thus, could not be found to be in violation of that policy for airing such material.

The Court rejected the FCC's argument that Fox could not establish unconstitutional vagueness because the agency declined to impose a monetary forfeiture on Fox. In an important ruling, the Court held that the FCC's mere assurance that it would not consider the challenged indecency findings when setting future forfeiture penalties, as it is statutorily permitted to do, is insufficient to remedy the constitutional violation. The Court further concluded that the challenged indecency findings could have an adverse impact on the network's reputation with both audiences and advertisers.

The Court also rejected the FCC's contention that an isolated, ambiguous statement on televised nudity in a 1960 agency decision gave sufficient notice to ABC that its 2003 *NYPD Blue* broadcast would be considered indecent, particularly given the substantial amount of the fine imposed on ABC.

While the decision is a win for broadcasters, it is a narrow victory, as the Supreme Court did not address whether the FCC's current indecency policy is consistent with the First Amendment. The Court expressly noted the narrow scope of the decision and also observed that its decision leaves the FCC "free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements" and leaves the courts free to review the current policy or any modifications thereto. Further, the Supreme Court noted that it was unnecessary for the Court to reconsider its decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), thus sidestepping the broader issue of whether the government has the authority to regulate broadcast indecency. Justice Ginsburg expressed her view on the questionable viability of *Pacifica* in a brief concurrence in the judgment, opining that the Court's decision in *Pacifica* "was wrong when it issued" and that "[t]ime, technological advances, and the Commission's untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration."