



Written by [Dave Bohon](#) on January 9, 2012

Supreme Court to Weigh FCC's Authority to Regulate Broadcast Indecency

In what pro-family groups are calling the most important broadcast indecency case in over three decades, the U.S. Supreme Court will hear oral arguments January 10 on the extent to which the Federal Communications Commission (FCC) has the authority to implement rules concerning what is permissible on television, and to fine networks which push the boundaries. If the High Court rules against the tighter controls, as networks hope, nudity, immoral sexual content, and profanity will overwhelm the airwaves, the conservative watchdog groups warn.



At issue in the case, reported [CNN](#), is whether or not the FCC “may constitutionally enforce its policies on ‘fleeting expletives’ and scenes of nudity on television programs, both live and scripted.” In the past the FCC has handed out hefty penalties to broadcasters for decency infractions.

Among the more notorious examples of on-air indecency which the federal agency has targeted is the now-legendary incident during the 2004 Super Bowl half-time show in which Janet Jackson “accidentally” exposed herself. Also cited are a 2003 episode of the police drama *NYPD Blue* which included a scene with a naked woman; a pair of Fox-network-sponsored [Billboard Music Awards](#) shows in 2002 and 2003 during which producers failed to censor profanity uttered by singers Cher and Nicole Richie; and the 2003 televised [Golden Globes](#) awards show during which singer Bono dropped the “F-bomb” while giving an acceptance speech.

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As reported by [NBC News](#), testing of the FCC’s power to regulate broadcast indecency goes back to a 1978 case in which the Supreme Court ruled that the agency acted within its authority in reprimanding an FM public radio network for broadcasting comedian George Carlin’s infamous “Filthy Words” routine.

Networks in the most recent case argue that the FCC’s policy should be struck down on grounds that it is “unconstitutionally vague and for violating free-speech rights under the Constitution’s First Amendment,” reported NBC. “Central to the case is the FCC’s right to regulate broadcast speech differently and more restrictively than other media in an effort to protect children from indecent content, even brief nudity or a single expletive blurted out on a live show.”

Carter Phillips, an attorney for the Fox network, argued in a written brief that media accessibility has broadened dramatically in the past 30 years, so that television networks are now being punished for incidents and content that have become accepted for other mediums, particularly cable and satellite channels, and the Internet. “For more than 30 years, broadcasting alone among all mass media has been a second-class citizen,” wrote Phillips. “Only broadcasting is subject to content-based censorship



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by the federal government.”

But the Obama administration has come down on the side of the FCC, insisting that the agency’s policy’s are constitutional and reasonable with regard to enforcing decency over the airwaves. “The founding era for broadcast communication was the 1920s,” noted the administration’s Solicitor General, Donald Verrilli, in a brief to the High Court. “Since that time, Congress and the Commission have made indecency regulation one of broadcasting’s defining features. That longstanding judgment is entitled to this court’s respect.”

Mark Rienzi, a constitutional law professor at Catholic University of America, told NBC News that the FCC may have difficulty in “explaining to the court why they should be allowed to subject one group of speakers — broadcasters — to an unpredictable set of speech regulations that are not imposed on speakers who convey their messages over cable, satellite, the Internet or print media.”

In 2010 the Supreme Court ruled that the FCC has the authority to penalize networks in cases of isolated indecency. At the same time, reported CNN, the Court refused “to decide whether the commission’s policy violates the First Amendment guarantee of free speech, ruling only on the agency’s enforcement power. The justices ordered the free-speech aspect to be reviewed again by a New York-based federal appeals court, which subsequently ruled in favor of the broadcasters.” It is this ruling that the Justice Department is appealing to the Supreme Court on behalf of the FCC.

“We are hopeful that the court will affirm the commission’s exercise of its statutory responsibility to protect children and families from indecent broadcast programming,” said FCC spokesman Neil Grace of the High Court’s decision to hear the appeal.

By contrast, Fox television spokesman Scott Grogin said his network was “hopeful that the court will ultimately agree that the FCC’s indecency enforcement practices trample on the First Amendment rights of broadcasters.”

Pro-family and decency watchdog groups were vocal in their support of the FCC’s continued oversight. Tim Winter, president of the [Parents Television Council](#) (PTC), said that the exchange of decency protections for the networks’ use of public broadcast airwaves “is a no-brainer. The networks make our case for us every time they tell advertisers the medium remains uniquely pervasive and highly accessible to children.”

The PTC announced that it has filed an [amicus brief](#) in the case, urging the Supreme Court “to affirm the FCC’s authority to fine broadcasters for airing indecent material between the hours of 6 a.m. and 10 p.m. when children are likely to be in the audience.”

Winter said that “if broadcasters want to air F-bombs or depictions of titillating bathroom scenes involving children and nude women, they can wait until 10:00 p.m. when children aren’t likely to be in the audience. That is all the current law requires of broadcasters.”

In its brief the PTC noted that in spite of the rise in popularity of cable and satellite television over the past decade, over-the-air TV has maintained a healthy market share, and still claims 90 percent of the most popular primetime shows. In fact, since 2003 the percentage of Americans who rely solely on broadcast television has tripled to around 15 percent of the viewing public.

“Simply put,” said PTC in its court brief, “broadcast programming saturates the nation’s airwaves and dominates what is seen and heard in the nation’s homes, particularly by children. That is why, despite their claims that they are besieged on all sides by viewing and listening alternatives on cable, the



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Internet and elsewhere, none of the broadcasters has chosen to abandon the free public airwaves.”

In their own friend-of-the-court brief in support of the FCC, [Focus on the Family](#) and the [Family Research Council](#) warned that if the Supreme Court “opens the floodgates to so-called ‘adult material’ at all hours on broadcast TV and radio in the name of the First Amendment, then TV and radio will be open only to adults, not children, and, at that, adults who desire only more indecent material. Television viewers will be forced to listen to indecent material. Profanity and sex will dominate daytime radio. Nothing in the First Amendment requires this result.”

Winter noted that the White House, Congress, and the High Court “have all recognized that protecting children is of paramount importance, especially considering the pervasiveness of foul language and the coarsening of entertainment in general.”

He predicted that the case would determine whether or not the long-time commitment to broadcast decency “will be reduced to a polite fiction that can be safely ignored at the expense of American children and families.”



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