

Analysis of U.S. Supreme Court Decision Upholding

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Posted in Indecency

In a 5-4 decision released April 28, 2009, the United States Supreme Court has upheld the FCC's decision to find "fleeting expletives" actionably indecent in certain circumstances. The immediate import of the decision is that even a single occurrence of the F-word or S-word outside of the safe harbor (10:00 pm to 6:00 am) may subject a television or radio station to fines up to \$325,000. We previously reported on the oral argument in this case when it occurred back in November.

The case, *FCC v. Fox Television Stations, Inc.*, involved the single use of the F-word by Cher during the 2002 Billboard Music Awards show and the use of the F-word and S-word by Nicole Richie during the 2003 Billboard Music Awards show broadcast by the Fox Network and its affiliates. The FCC found these uses to be actionably indecent because, following its decision in the Golden Globes decision (the Bono case), the 2003 broadcast involved a literal description of excrement and both broadcasts involved the F-word which inherently has a sexual connotation. The FCC did not fine the Fox stations, however, because the broadcast occurred before the FCC announced its new policy regarding fleeting expletives in the Golden Globes case.

Upon review, the Second Circuit Court of Appeals held that the FCC had failed to offer a "reasoned basis" for its change in its new indecency policy. The Second Circuit, accordingly, struck down the new policy as a violation of the Administrative Procedure Act (the "APA") and noted that it was not necessary to reach the question whether the policy violated the First Amendment. Nonetheless, the Second Circuit observed that it was skeptical that the FCC could articulate a rationale for the policy that would survive a First Amendment challenge.

The FCC, however, sought review of the Second Circuit's decision by the Supreme Court, and the Court, in a very splintered decision, reversed the Second Circuit and held that the FCC's "fleeting expletives" policy did satisfy narrow APA review.

Writing for a narrow five-justice majority, Justice Scalia stated that when an agency changes course, the course change is not subjected to a more searching review or any more heightened standard than when the agency had adopted its initial policy. Only good reasons for the new policy need be articulated, not more substantial reasons than those required in the first instance. Even a policy change tinged with constitutional overtones, like the fleeting expletives policy at issue here, is not to be subjected to a more stringent arbitrary-and-capricious standard of review. In those cases, the lawfulness of the policy change under the Constitution must be addressed in a separate

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constitutional challenge.

Applying this narrow scope of review to the FCC's decision, Justice Scalia found that the FCC's decision to find these two broadcasts actionably indecent was not arbitrary or capricious. The FCC signaled it was making a change in the Golden Globes order, and its reasons for expanding the scope of its enforcement activity were deemed rational. According to the majority, it makes sense not to distinguish between literal and nonliteral uses of offensive words, it is rational to believe that the former exception for fleeting expletives would likely lead to more widespread use of offensive language, the fact that it is now easier to bleep out offending words supports the stepped-up enforcement policy, and the FCC's decision not to impose a forfeiture shows that the agency was not arbitrarily punishing parties without notice.

The Scalia majority rejected both the Second Circuit's reasoning and the arguments of Fox and the other networks. With respect to the FCC's reliance on the harm to children, criticized by the Second Circuit, the majority stated that empirical evidence of any such harm is not necessary; all one needs to know is that "children mimic the behavior they observe." The Court also rejected the network's contention that the FCC had effectively adopted a presumption of indecency, stating merely that the FCC's "repeated reliance on context refutes this claim." The Court likewise did not accept the broadcasters' characterization that the FCC's appeal to "context" is a "smokescreen for a standardless regime of unbridled discretion." Instead, the Court noted that its prior decision in *FCC v. Pacifica Foundation* approved FCC regulation based on a nuisance rationale under which context is all-important, and the APA does not mandate anything different.

Perhaps most importantly, the Scalia majority rejected the broadcasters' argument that the FCC had gone beyond the scope of its authority as articulated in *Pacifica*:

[W]e have never held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expletives may not be forbidden. To the contrary, we explicitly left for another day whether "an occasional expletive" in "a telecast of an Elizabethan comedy" would be prohibited. By using the narrowness of *Pacifica*'s holding to require empirical evidence of harm before the Commission regulates more broadly, the broadcasters attempt to turn the sword of *Pacifica*, which allowed some regulation of broadcast indecency, into an administrative-law shield preventing any regulation beyond what *Pacifica* sanctioned. Nothing prohibits federal agencies from moving in an incremental manner.

(Emphases in original.) Justice Scalia's language suggests that he views *Pacifica* as only the opening wedge of the FCC's authority to regulate indecency consistent with the First Amendment and not, as most observers, including the FCC itself for the first 25 years of indecency enforcement, as the

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confining enclosure limiting the constitutional scope of enforcement.

The majority, like the Second Circuit below, refused to reach the First Amendment implications of the fleeting expletives policy. Justice Scalia observed that its constitutionality “will be determined soon enough, perhaps in this very case.” In the meantime, Justice Scalia concluded, “any chilled references to excretory and sexual material surely lie at the periphery of First Amendment concern.”

Justice Scalia was joined in the majority opinion by Chief Justice Roberts and by Justices Kennedy, Thomas, and Alito, although Justice Kennedy did not join in the section of the opinion criticizing the dissenting opinions. Both Justice Thomas and Kennedy wrote concurring opinions.