

Supreme Court Hears Oral Argument in Broadcast Indecency Case

January 10, 2012 by [Ronald London](#)

The Supreme Court heard oral argument today (Jan. 10, 2012) in *FCC v. Fox Television Stations*, which put squarely before the Court the constitutionality of the FCC's current indecency enforcement regime. The case came to the Court from decisions by the Second Circuit, involving broadcasts of the *Billboard Music Awards* and *NYPD Blue*, which held that the enforcement regime at the center of the FCC's "crackdown" on broadcast indecency over the last several years had become unconstitutionally vague.

The FCC argued that, whatever inherent judgment calls its "contextual" approach to indecency may present in close cases, the broadcasts at issue were clearly indecent under the current test, which it urged is not unconstitutionally vague. Broadcast television networks argued the Second Circuit correctly held the enforcement regime gives the FCC too much discretion to intrude on editorial judgments by broadcasters and to enforce the indecency prohibition arbitrarily. The current regime, it was argued, allows Commissioners to apply their subjective views of a program's merit, and to unconstitutionally assess whether it was "essential" for a show to include its potentially indecent elements. They further urged the time has come for the Supreme Court to revisit its landmark *Pacifica* case, which gives the government greater leeway to regulate indecency in broadcasting in ways that it generally cannot for other media.

The Justices asked both the Solicitor General, who argued for the FCC, and the broadcasters' counsel a number of probing questions. They explored both the FCC's track record in enforcing indecency rules, especially its decisions that the Second Circuit and broadcasters cite as creating unpredictable standards for whether programs can be found indecent and punished with fines, as well as the implications of invalidating the current standard as vague. They also examined whether technological evolution renders *Pacifica* an anachronism.

The members of the Court appeared to come at the case from very different angles. Some sought to explore whether the case could be decided on very narrow grounds, while others were willing to probe the ultimate constitutionality of the indecency regime, while still others suggested the evolution of media technology might ultimately overtake the constitutional dispute, rendering it self-resolving. Some Justices seemed more than willing to allow the FCC to try to preserve broadcasting as a "safe haven" for non-indecent programming, even suggesting that doing so could be allowed for its

“symbolic” value, if for no other reason. There were also questions about whether TV, which allows individualized blocking of programs and channels by viewers who wish to do so by using the V-Chip, could be treated differently for constitutional purposes vis-à-vis indecency, from broadcast radio, where such user-empowering tools do not yet exist.

Justice Sotomayor recused herself from this case, so a 4-4 split on the Court is theoretically possible, which would uphold the decision of the Second Circuit. But ultimately, the argument is one that is particularly difficult to handicap, except to say it is likely the decision will be deeply divided and announced in June as the current Supreme Court Term draws to a close.

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