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## Supreme Court Narrowly Rules in Favor of FCC's "Fleeting Expletives" Ban; Court Ordered Remand May Force the Supreme Court to deal with the First Amendment Issue

by Richard R. Zaragoza and Paul A. Cicelski

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*In a 5-4 decision released today, the Supreme Court upheld the FCC's so-called "fleeting expletives" policy which bans the radio and television broadcast of single so-called four-letter words that are considered indecent.*

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However, the narrow ruling of the Court stopped short of deciding whether the FCC's change in policy violates the First Amendment. Justice Scalia's majority opinion emphasized that it was dealing only with the question of whether the FCC's new fleeting expletives policy was "arbitrary and capricious" as a matter of law. The majority determined that the FCC's change in policy was "entirely rational" under the Administrative Procedure Act. In doing so, the Court reversed the decision of the Second Circuit Court of Appeals that had found the FCC's new policy to be arbitrary and capricious and remanded the case to the Second Circuit for further review.

The incidents under review by the Supreme Court occurred during the 2002 and 2003 "Billboard Music Awards" on Fox when Cher and Nicole Richie used the "F-word" and Richie also used the "S-word." The FCC found the incidents to be actionably indecent but decided not to impose fines because its decision marked a change from prior precedent that single, isolated use of these words were not actionable. The Second Circuit held that in finding the broadcasts to be actionable, the FCC had acted arbitrarily and capriciously in not adequately justifying its departure from decades of previous FCC decisions. The Second Circuit remanded the case to the FCC to provide a rational explanation for its departure from precedent. The FCC appealed the Second Circuit's decision to the Supreme Court which reversed the Second Circuit's holding.

The Supreme Court decided not to address whether the FCC's policy change violates the First Amendment and instead remanded the case to the Second Circuit to decide the constitutional issue. The decision by the Supreme Court to return that issue to the Second Circuit carries with it the likelihood that the Supreme Court will not be able to avoid the First Amendment issue the next time. The reason is the Second Circuit was highly skeptical that the FCC's new fleeting expletives policy could pass constitutional muster. According to Justice Scalia, "whether it is unconstitutional, will be determined soon enough, perhaps in this very case" once the Second Circuit has had the opportunity to rule on whether the FCC's policy shift violates free speech protections.

The dissenting Justices argued that the FCC's change in policy was arbitrary and capricious because the FCC failed to adequately explain why it changed its indecency policy. In her dissent, Justice Ginsburg also stated that "there is no way to hide the long shadow the First Amendment casts over what the Commission has done. Today's decision does nothing to diminish that shadow." Although Justice Thomas concurred with the majority holding that the FCC's actions were not arbitrary and capricious, he appeared to want to help the Second Circuit on remand by spelling out his reasons why broadcasters should no longer be treated as second-class citizens under the First Amendment. Citing the Court's "scarcity rationale," Justice Thomas stated that the First Amendment arguments in favor of continued FCC regulation in this area "were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity."

In light of the Court's narrow procedural ruling in the case, it remains unclear how the case will finally be decided either at the Second Circuit or when the First Amendment question is likely heard by the Supreme Court. We will keep you apprised of the further proceedings in the case as they occur. In the interim, broadcasters must keep in mind that even inadvertent expletives broadcast over the air can result in significant FCC fines, so broadcasters should remain diligent in their efforts to educate their programmers about the critical need to avoid the broadcast of obscene material at all times, and the broadcast of indecent and profane material outside the safe harbor times of 10:00 P.M. and 6:00 A.M., as well as to insure that the station has sufficient devices in place and personnel trained and ready to eliminate any such material before it goes out over the airwaves.

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