

[FCC Decides to Appeal Indecency Cases to Supreme Court](#)

by [David Oxenford](#)

April 21, 2011

The FCC's **indecenty rules** have, in recent months, twice been declared unconstitutional by the US Court of Appeals for the Second Circuit - essentially finding that the FCC's policies imposed unconstitutional restrictions on speech as they did not give broadcasters any way of determining what was permitted and what was prohibited. After seeking several extensions of time to determine whether to seek Supreme Court review of the Court of Appeals decisions, the FCC today released its Petition for Certiorari to the high court. The Supreme Court need not hear this request for review though, given its previous decision on these rules (which we wrote about [here](#)), and the high publicity and public interest in this subject, the case could quite well end up on the schedule.

This appeal deals with two cases. First, it seeks review of the decision of the Court of Appeals [throwing out the fleeting expletive admonitions](#) given to Fox network stations for the broadcast of two Billboard Music Award shows that contained expletives, one by Cher and one by Nicole Richie. Following the precedent set by the Golden Globes case (where Bono used the "F word"), the Commission held that the use of one of these single words, even if not used in a sexual context, were inherently indecent. The second case covered by the Supreme Court petition was for the depiction of bare female buttocks in the program ***NYPD Blue*** - resulting in \$27,500 fines on a number of ABC stations. This [decision was also overturned by the Court of Appeals](#).

In the last go-round at the Supreme Court, the Court of Appeals had not reached the constitutional issue. Instead, the Court of Appeals threw out the FCC rules simply because the recent decisions were not consistent with precedent (though the Court had suggested that the rules were unconstitutional, but that suggestion was not essential to the decision). The FCC had abandoned their policy of needing repeated use of dirty words (like in the George Carlin routine - ***Seven Words You Can Never Say TV*** - which resulted in a fine not because you can't say these words on TV, but because the use of these words were repeated - see our post [here](#)) before they took action. Thus, the majority of the Supreme Court justices addressed only the issue of whether the FCC was justified in changing its policies to sanction stations for a single isolated use of an expletive and to otherwise tighten its enforcement policies on indecency. While the various concurring and dissenting opinions written by the Justices suggested that there might well be 5 Justices who felt that the FCC's rules and policies were unconstitutional,

the Court did not finally address that issue, but instead sent the cases back to the Court of Appeals to address issues including the constitutional question. When, after consideration following the remand from the Supreme Court, the Court of Appeals did find these rules and policies unconstitutional, it set the stage for the current request for review.

The Supreme Court does not move fast - this is not a case that we will see briefed and argued and decided before the 11 o'clock news. The Court must first act on the Petition, and if it accepts review, schedule briefs and hold an oral argument. So it may well be more than a year before we see a decision, which may bring some clarity as to what kind of indecency enforcement the FCC is able to do.

This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.