# *Groups ask Supreme Court to legalize dirty words on TV*

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An ideologically diverse coalition of public interest groups has submitted an amicus brief urging the United States Supreme Court to extend full First Amendment protection to broadcast media. The Federal Communications Commission has traditionally regulated the transmission of "indecent" speech and images on radio and television broadcasts. But several liberal and libertarian groups are urging the Supreme Court to strike down these regulations, arguing that technological changes have made the original constitutional justification for these regulations obsolete.

The FCC's power to regulate the content of radio and television broadcasts rests on a 1978 Supreme Court decision. Comedian George Carlin had a famous monologue about the "seven words you can never say on television." When a radio station owned by the Pacifica Foundation broadcast the program, it was fined. And in a 1978 decision, the Supreme Court upheld the fine.

The high court offered two reasons for curtailing the First Amendment protections afforded to broadcast media. First, they were "uniquely pervasive." In the 1970s, broadcast television was the only source of video content for most families. Second, broadcast media were "uniquely accessible to children," available at the flip of a switch. Hence, the government was allowed to impose regulations on broadcast media that would never have withstood constitutional scrutiny if applied to other media such as newspapers or books.

**Unconstitutionally vague**

The *Pacifica* court encouraged the FCC to use restraint in enforcing its rules against indecency. At first, the FCC limited its enforcement efforts to the seven words in the Carlin monologue. Later, the agency broadened its enforcement efforts beyond those seven words, but they continued to look the other way when stations broadcast the occasional "fleeting" expletive.

In 2004, however, the FCC adopted a more hard-line posture, holding that even a single, unscripted instance of profanity (such as Bono's use of the F-word during a 2003 broadcast of the Golden Globes) could be a punishable offense. The major television networks challenged the new rules in court, arguing that they were so vague that it was impossible to tell what was allowed.

After a detour to the Supreme Court in 2009, the United States Court of Appeals for the Second Circuit declared the FCC's policy unconstitutionally vague last year. It pointed out that uncertainty about the FCC's rules were chilling speech that clearly merited protection under the First Amendment:

Several CBS affiliates declined to air the Peabody Award-winning “9/11” documentary, which contains real audio footage - including occasional expletives—of firefighters in the World Trade Center on September 11th. Although the documentary had previously aired twice without complaint, following the Golden Globes Order affiliates could no longer be sure whether the expletives contained in the documentary could be found indecent. In yet another example, a radio station cancelled a planned reading

of Tom Wolfe's novel I Am Charlotte Simmons, based on a single complaint it received about the "adult" language in the book, because the station feared FCC action.

**The end of broadcast censorship**

The Second Circuit's decision would allow the FCC to revise its rules (perhaps returning to only regulating the "seven dirty words") and resume broadcast censorship. But a coalition of public interest groups last week filed an amicus brief urging the Supreme Court to go beyond the Second Circuit's position and declare broadcast censorship unconstitutional altogether.

The groups point out that the high court's 1978 reasoning no longer applies to modern television. Whereas broadcast television was once the only source of video content in most households, families now have a wide variety of alternatives, including cable and satellite television, DVD players, and online streaming options. Today, only a small fraction of households—between 8 and 15 percent, according to studies cited in the brief—rely exclusively on broadcast television for home entertainment. Broadcast television is no longer "pervasive."

Nor is it "uniquely accessible to children." The introduction of the V-chip in the 1990s increased parents' control over the television content their children watch. And as Adam Thierer has demonstrated, that was just the beginning. The proliferation of alternative sources of content has made it feasible for parents to eschew broadcast television altogether in favor of DVD players, cable television, online games and videos, and the like. And many of these media offer robust parental controls of their own.

Since neither of the traditional rationales for broadcast censorship apply in the modern world, the groups argue that the courts should reconsider their original justification for allowing the FCC to regulate broadcasting content. Indeed, the Second Circuit itself hinted that it would have liked to reach that result, but didn't do so because it was bound by the Supreme Court's *Pacifica* decision. The Supreme Court itself, of course, has the option to overturn that decision and give broadcasting the same robust First Amendment protections that the courts have given to most other media.

The brief was signed by the Cato Institute, the Center for Democracy and Technology, Public Knowledge, the Electronic Frontier Foundation, and TechFreedom