

Can you say that on TV? The Supreme Court debates

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In this Dec. 9, 2002, file photo, Cher accepts a lifetime achievement award at the MGM Grand Hotel and Casino in Las Vegas during the Billboard Music Awards show. During the show Cher used the F-word. The Supreme Court will hear arguments Tuesday, Jan. 10, 2012, in a First Amendment case that pits the Obama administration against the nation's television networks. The Supreme Court is considering whether government regulators may still police the airwaves for curse words and other coarse content at a time when so many Americans have unregulated cable television, and the Internet is awash in easily accessible adult material. (AP Photo/Joe Cavaretta, file)

(AP) -- In colorful give and take, the Supreme Court debated whether policing curse words and nudity on broadcast television makes sense in

the cable era, one justice suggesting the policy is fast becoming moot as broadcast TV heads the way of "vinyl records and 8-track tapes."

The case involves programing that is available to all viewers free over the air - even though many now receive it through paid cable connections - during hours when children are likely to be watching.

Some justices said they were troubled by inconsistent standards that allowed certain words and displays in some contexts but not in others.

One example frequently cited by the networks was the Federal Communications Commission's decision not to punish ABC for airing "Saving Private Ryan," with its strong language, while objecting to the same words when uttered by celebrities on live awards shows.

Justice Elena Kagan said the FCC policy was, "Nobody can use dirty words or nudity except Steven Spielberg," director of the World War II movie. Other justices seemed more open to maintaining the current rules because they allow parents to put their children in front of the television without having to worry they will be bombarded by vulgarity.

Chief Justice John Roberts, the only member of the court with young children, hammered away at that point. Robert wondered why broadcasters would oppose FCC regulation, especially when cable and [satellite service](#) can offer hundreds of channels with few restrictions.

"All we are asking for, what the government is asking for, is a few channels where ... they are not going to hear the S-word, the F-word, they are not going to see nudity."

Justice Antonin Scalia placed himself on the side of the government. "These are public airwaves. The government is entitled to insist upon a certain modicum of decency. I'm not sure it even has to relate to

juveniles, to tell you the truth."

But at least one justice, Samuel Alito, talked about how rapidly technological change has effectively consigned vinyl records and 8-tracks to the scrap heap, suggesting that in a rapidly changing universe, time will take care of the dispute. Already nearly nine of 10 households subscribe to cable or satellite television and viewers can switch among broadcast and other channels with a button on their remote controls.

"I'm sure your clients will continue to make billions of dollars on their programs which are transmitted by cable and by satellite and by Internet. But to the extent they are making money from people who are using rabbit ears, that is disappearing," Alito said.

The First Amendment case involves programing received by antennas on top of a television set, a house or building. Much of that programing now also is available through cable and satellite connections, but only the over-the-air transmissions are at issue.

The case pits the Obama administration against the nation's television networks. The material at issue includes the isolated use of expletives as well as fines against broadcasters who showed a woman's nude buttocks on a 2003 episode of ABC's "NYPD Blue."

The broadcasters want the court to overturn a 1978 decision that upheld the FCC's authority to regulate radio and television content, at least during the hours when children are likely to be watching or listening. That includes the prime-time hours before 10 p.m.

At the very least, the networks say the FCC's current policy is too hard to figure out and penalizes the use of particular words in some instances but not in others.

The administration said that even with the explosion of entertainment options, broadcast programming remains dominant. It also needs to be kept as a dependable "safe haven" of milder programming, the administration said.

Solicitor General Donald Verrilli Jr. said that if the court were to overrule its 33-year-old decision, "the risk of a race to the bottom is real."

But Carter Phillips, representing the networks in connection with the awards shows, said that little would change because broadcasters would remain sensitive to advertisers and viewers who don't want the airwaves filled with dirty words and nudity.

Phillips and former Solicitor General Seth Waxman, arguing on behalf of ABC, noted that broadcasters could face fines from thousands of pending complaints, including some relating to the broadcast of the 2008 Summer Olympics in Beijing. The opening ceremonies "included a statue very much like some of the statues that are here in this courtroom, that had bare breasts and buttocks," Waxman said.

As some justices turned their gaze toward the sculpted marble panels at the top of the courtroom, Waxman pointed to the one above the bench and said, "Right over here, Justice Scalia."

No one mentioned that those sculptures don't appear on television, because the high court does not allow cameras.

The FCC policy under attack flowed from the court's 1978 Pacifica decision, which upheld the FCC's reprimand of a New York radio station for its mid-afternoon airing of a George Carlin monologue containing a 12-minute string of expletives.

For many years, the FCC did not take action against broadcasters for one-time uses of curse words. But, following several awards shows with cursing celebrities in 2002 and 2003, the FCC toughened its policy. It concluded that a one-free-expletive rule did not make sense as a way of keeping the airwaves free of indecency when children are likely to be watching television.

The 2nd U.S. Circuit Court of Appeals in New York declared the FCC policy unconstitutionally vague.

The Billboard Music Awards aired on Fox in both 2002 and 2003. Cher used the F-word the first year, and reality TV personality Nicole Richie uttered the F-word and S-word a year later. The FCC did not issue a fine in either case but said the broadcasts violated its policy.

The "NYPD Blue" episode led to fines only for stations in the Central and Mountain time zones, where the show aired at 9 p.m., a more child-friendly hour than the show's 10 p.m. time slot in the East.

Justice Sonia Sotomayor is not taking part in the case because she served on the appeals court during its consideration of some of the issues involved.

A decision is expected by late June.

The case is FCC v. Fox Television Stations, 10-1293.

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