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November 10, 2011

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## **SPLC, CBI Ask Supreme Court to Void “Vague” FCC Broadcast Indecency Regulations**

The Student Press Law Center, a nonprofit advocate for the First Amendment rights of the student media, joined College Broadcasters, Inc., in urging the U.S. Supreme Court Thursday to strike down the Federal Communications Commission’s policy of fining broadcasters for “fleeting expletives,” saying that the policy is forcing student broadcasters to censor themselves unnecessarily.

In a friend-of-the-court brief filed Thursday, the SPLC and CBI ask the Court to declare that the FCC’s post-2001 crackdown on swear-words in over-the-air broadcasting violates the First Amendment. The brief argues that the FCC has failed to give broadcasters clear guidance on what uses of profanity or nudity will lead to fines – which can range up to \$500,000 – and when “indecent” content will be deemed justified by the artistic or news value of the broadcast.

“The Commission’s current approach chills college broadcasters into self-censoring their speech so as to leave a broad buffer before reaching the indistinct boundary where indecency may (or may not) lie. This is the hallmark of an unconstitutionally vague regulatory regime,” said the brief, filed in support of Fox Broadcasting in its long-running dispute with the FCC over “fleeting expletives” in live broadcasts of celebrity award shows. The brief points out that highly newsworthy content – such as Richard Nixon’s Oval Office tapes – may contain strong profanity of the kind that the Commission has recently decided is punishable if broadcast over public airwaves outside the “safe harbor” hours between 10 p.m. and 6 a.m.

“College broadcasting is supposed to be a laboratory for experimentation, and is supposed to be a forum for presenting live talk, news and sporting events. But the risk of a five-figure or six-figure fine that could put a station out of business really discourages students from airing the very type of broadcasts that their audiences most want and that offer the most diversity in programming,” said attorney Frank D. LoMonte, executive director of the SPLC.

LoMonte said the SPLC felt it was essential for the student media to be represented in the case because the FCC has argued that broadcasters are well-funded, sophisticated entities with ample financial resources to purchase and operate “delay” technology to catch stray profanities – ignoring the reality at small campus stations.

The brief was prepared by SPLC Legal Fellow Robert Arcamona with the assistance of Washington, D.C., attorney volunteer Greg Smith of the Law Offices of Gregory S. Smith, a veteran federal litigator who has worked in the White House Counsel's Office and for the Senate Judiciary Committee.

"College Broadcasters, Inc. believes that the FCC's inconsistent enforcement of indecency standards disproportionately impacts student broadcasters, almost all of whom lack the resources both to ensure that no fleeting expletives slip out over our airways and to absorb a massive fine for such an accident. Furthermore, college broadcasters – by design – often serve underrepresented populations whose idea of 'community standards' may not entirely overlap with that of the general public, or the FCC," said Gregory Weston, president of CBI.

"As an organization charged with educating the next generation of broadcasters, CBI finds that the FCC's inconsistent standards hinder our ability to teach well-meaning students what is and is not considered indecent, leading them to either unknowingly violate the FCC's standards or to engage in self-censorship to avoid any chance of doing so," Weston said.

The case, *FCC v. Fox Television Stations, Inc.*, originated with the FCC's imposition of fines against television networks for blurted curse-words heard on the Billboard Music Awards during 2002 and 2003. Since the Supreme Court recognized the FCC's authority to penalize "indecent" speech in the landmark 1978 case of *FCC v. Pacifica Foundation* – involving George Carlin's "filthy words" monologue – the Commission has expanded its view of what is punishable. The Commission decided in 2001 that even a single swear-word or reference to sexual acts could be punished as indecent.

In 2010, the Second Circuit U.S. Court of Appeals in New York agreed with Fox that the Commission's broadcast indecency regulations had become unconstitutionally vague, giving no fair warning to anticipate when a fine might be imposed. In an opinion issued last week, the Third Circuit U.S. Court of Appeals in Philadelphia agreed that – as applied to the infamous Janet Jackson "wardrobe malfunction" during the 2004 Super Bowl halftime broadcast – the FCC overstepped the Constitution in imposing fines for the "fleeting" broadcast of nudity or profanity.

The Supreme Court is expected to hear the *Fox* case during early 2012 and issue a decision by the end of June 2012.

More information about the work of the Student Press Law Center is available on its website at [www.splc.org](http://www.splc.org).