

"A broadcaster would be justified in refusing access to a candidate who intended to utter obscene or indecent language, because Section 312(a)(6) [of the Communications Act], which provides that the Commission may revoke a license for, *inter alia*, a violation of [18 U.S.C.] §1464 must be read to carve an exception to Section 312(a)(7). . . . The application of both traditional norms of statutory construction as well as an analysis of the legislative evolution of Section 315 [of the Communications Act] militate in favor of reading [18 U.S.C.] Section 1464 as an exception to Section 315. [Emphasis added.]"

Letter from Chairman Mark S. Fowler to Hon. Thomas A. Luken (January 19, 1984).<sup>3</sup>

In its August 21, 1992 Letter Ruling, the Mass Media Bureau denied Kaye, Scholer's Petition For Declaratory Ruling. The Bureau rejected Kaye, Scholer's suggestion that broadcasters be permitted to classify candidate "uses" as "indecent", under the circumstances described above, or to "channel" candidate "uses" containing graphic depictions of aborted fetuses to hours when there is no reasonable risk that children may be in the audience, unless the Commission has held that the material is indecent, within the meaning of 18 U.S.C. §1464. Yet, the Bureau also held, in its Letter Ruling, that it would refuse to rule, in advance of any broadcast, as to whether any particular programming is indecent, on the ground that any such ruling could be viewed as imposing an impermissible prior restraint in protected speech. Letter Ruling at 2.

Nonetheless, the Bureau held, in its Letter Ruling, that one specific political advertisement, broadcast by Television Station WAGA-TV, Atlanta, Georgia, which contained the types of graphic depictions of bloodied, aborted fetuses described above, was not indecent, within the meaning of 18 U.S.C. §1464. Although the Letter Ruling reaffirmed the Commission's existing standard for measuring broadcast indecency, and although the Letter Ruling reaffirmed that that standard focuses on patently offensive depictions or descriptions of, *inter alia*, "excretory" activities or organs, the Bureau

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<sup>3</sup> A copy of that document was set forth as Exhibit 1 to Kaye, Scholer's Petition For Declaratory Ruling herein.

held that the type of graphic depictions of bloodied, aborted fetuses or fetal tissue here at issue is not the result of an "excretory" activity, under the Commission's indecency definition. Letter Ruling at 4.

Finally, the Letter Ruling reaffirmed the continuing validity of the Mass Media Bureau's prior ruling in Southern Arkansas Radio Company, 5 FCC Rcd 4643 (Mass Media Bureau 1990), in which the Bureau held that a broadcaster may air only "content-neutral disclaimers" in connection with a particular candidate's broadcast "uses", as long as such a disclaimer is broadcast by a station with all subsequent advertising broadcast on behalf of every candidate for the same office. See Letter Ruling at 5 n. 4. Nonetheless, the Bureau held, in its Letter Ruling, that, where a broadcast licensee determines, in good faith, that the material presented in a "use" by a candidate "could be disturbing to child viewers", the broadcaster would be allowed to air a viewer "advisory". Letter Ruling at 4-5. The Mass Media Bureau prescribed the following as an example of an acceptable viewer advisory:

"The following political advertisement contains scenes which may be disturbing to children. Viewer discretion is advised."

Letter Ruling at 5.

For the reasons set forth below, the Mass Media Bureau's Letter Ruling is in conflict with established Commission precedent and policy governing the "reasonable access" provisions of Section 312(a)(7) of the Communications Act, the "no censorship" clause of Section 315(a) of the Communications Act, and governing the prohibition against the broadcast of "indecency" under 18 U.S.C. §1464. Furthermore, the Bureau's interpretation and application of Section 312(a)(7) of the Communications Act violates the First Amendment rights of broadcasters by unduly circumscribing their editorial discretion. In addition, in light of the Letter Ruling and other past precedent, the Commission's standard for assessing whether broadcast matter is "indecent", within the meaning of 18 U.S.C. §1464, is unconstitutionally vague and unclear. The Bureau's ruling that the types of graphic depictions here at issue are not "indecent", within the meaning of 18 U.S.C. §1464, involves a question of law or policy which has not previously been resolved by the Commission. The Bureau's

determinations as to the issues posed in this proceeding are arbitrary, capricious and constitute an abuse of discretion. For all these reasons, expedited Commission review and reversal of the Bureau's determinations, as described more fully below, is warranted in the public interest.

## II. Argument

### A. The Bureau's Action In Its Letter Ruling Is In Conflict With Applicable Commission Precedent Under Section 312(a)(7) of The Communications Act And Violates The First Amendment Rights of Broadcasters

The central issue posed by Kaye, Scholer's Petition For Declaratory Ruling is whether a broadcaster may, consistent with the "reasonable access" provisions of Section 312(a)(7) of the Communications Act and the "no censorship" provision of Section 315(a) of the Communications Act, "channel" into those hours when there is no reasonable risk of children being in the audience, candidate "uses" that present graphic depictions of dead or aborted and bloodied fetuses or fetal tissue. The Petition emphasized that we were not urging that the Commission allow broadcasters the unbridled discretion to censor candidate "uses" or to completely ban from the airwaves those candidate "uses" that contain the types of graphic and shocking depictions of fetal tissue described above. Rather, we merely urged that the Commission uphold as reasonable any determination by a broadcast licensee that programming or announcements of the sort here at issue is "indecent", within the meaning of 18 U.S.C. §1464, even if the Commission itself might otherwise have adopted a contrary view in the first instance. Petition For Declaratory Ruling at 2.

In denying Kaye, Scholer's Petition, the Bureau flatly refused to defer to the reasonable, good-faith judgments of broadcasters who decide to "channel" the types of candidate spot announcements here at issue into hours when children are not likely to be in the audience. The Bureau ruled as follows:

"[W]e cannot accept petitioners' suggestion that broadcasters be permitted to classify political use material as indecent so that they may restrict the time at which it airs even where it does not meet the Commission's indecency definition. Nor can we permit a broadcaster to alter the scheduling of such material because the broadcaster finds it otherwise 'unsuitable' for children. Such channelling would violate a federal candidate's reasonable access rights under Section 312(a)(7) of the Act, which requires broadcasters to permit legally qualified candidates 'reasonable access' to their facilities. As a general matter, broadcasters may not direct candidates to unwanted times of the day or evening."

Letter Ruling at 2-3.

The Bureau's refusal to defer to reasonable, good-faith judgments by broadcasters concerning unsuitability for children of the political spots here at issue flatly contradicts prior Commission precedent in the area of "reasonable access". The Commission has held that, in evaluating broadcaster compliance with the "reasonable access" provisions of Section 312(a)(7) of the Communications Act, the applicable scope of Commission review will be limited solely to determining whether the broadcaster has taken the appropriate factors into account and whether the broadcaster has acted reasonably and in good faith:

"In evaluating any 'reasonable access' complaint ... we apply a mode of analysis analogous to that which the courts use in reviewing discretionary decisions by an agency. In determining whether the agency violated the Administrative Procedure Act by acting in a manner that was 'arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law' (5 U.S.C. §706(2)(A)), the reviewing tribunal must take a hard look to see whether the decision 'was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). In the instant context, we may not simply substitute our de novo judgment regarding the access request and the networks' responses, but must 'judg[e] the objective reasonableness' of the networks' explanation of their actions. Straus Communications, Inc. v. FCC, 530 F.2d 1001, 1011 (D.C. Cir. 1976)."

Carter-Mondale Presidential Committee, 74 FCC 2d 631, 642 n. 16 (1979), reconsideration denied, 74 FCC 2d 657 (1979), aff'd sub nom., CBS, Inc. v. FCC, 629 F.2d 1 (D.C. Cir. 1980) D.C. Cir. 1980, aff'd, 453 U.S. 367 (1981).

In its reconsideration order in Carter-Mondale Presidential Committee, supra, the Commission emphasized that:

"... in carrying out our responsibilities under Section 312(a)(7) we will provide leeway to broadcasters and not merely attempt de novo to determine the reasonableness of their judgments under Section 312(a)(7)."

Carter-Mondale Presidential Committee, 74 FCC 2d 657, 672 (1979).

In affirming the Court of Appeals' decision affirming the Commission's Carter-Mondale decisions, the Supreme Court stated:

"If broadcasters take appropriate factors into account and act reasonably and in good faith, their decisions will be entitled to deference even if the Commission's analysis would have differed in the first instance. [Emphasis added.]"

CBS, Inc. v. FCC, 453 U.S. 367, 387 (1981).

In CBS, Inc. v. FCC, the Supreme Court rejected the claim that Section 312(a)(7) of the Communications Act, as implemented by the Commission, violates the First Amendment rights of broadcasters by unduly circumscribing their editorial discretion. 453 U.S. at 394-397. However, the Supreme Court's determination to uphold the constitutional validity of Section 312(a)(7), as applied, rested, in large measure, specifically on the narrow scope of Commission review of broadcaster judgments under Section 312(a)(7). See 453 U.S. at 396.

The Commission's narrow scope of review over broadcaster judgments in relation to "reasonable access" was recently reaffirmed by the Commission:

"As we concluded in 1978: '[A]lthough a candidate for Federal office is entitled under Section 312(a)(7) to varied broadcast times, such candidate is not entitled to a particular placement of his or her political announcement on a station's broadcast schedule. ... Additionally, there may be circumstances where a licensee might reasonably refuse broadcast time to political candidates during certain parts of the broadcast day. It is best left to the discretion of a licensee when and on what date a candidate's spot announcement or program should be aired.' Report and Order [Concerning Commission Policy In Enforcing Section 312(a)(7) of the Communications Act, 68 FCC 2d 1079,] 1091 [(1978)]. We reaffirm our longstanding policy ...."

Codification of the Commission's Political Programming Policies, 7 FCC Rcd 678, 682 (1991), on reconsideration, \_\_ FCC Rcd \_\_, FCC 92-210 (released June 11, 1992).

Thus, the Bureau's determination, in its Letter Ruling, to apply a radically expansive scope of review over broadcaster judgments, pursuant to Section 312(a)(7) of the Communications Act, not only is at odds with consistent Commission and judicial precedent under Section 312(a)(7)<sup>4</sup>, but also undermines the constitutional validity of Section 312(a)(7), as applied. In Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973), the Supreme Court stated:

"Th[e] role of the Government as an 'overseer' and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic 'free agent' call for a delicate balancing of competing interests. The maintenance of this balance for more than 40 years has called on both the regulators and the licensees to walk a 'tightrope' to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act."

Id., 412 U.S. at 117.

The Bureau's unwarranted and unreasoned usurpation of licensee discretion through the Bureau's overly expansive scope of Commission review thus upsets this "delicate balance" and thereby erodes the constitutional validity, under the First Amendment, of Section 312(a)(7) of the Communications Act, as applied in this case. Simply stated, Section 312(a)(7), as interpreted by the Bureau in the Letter Ruling, violates the First Amendment rights of broadcasters by unduly circumscribing their editorial discretion.

The constitutional infirmity inherent in the Bureau's Letter Ruling is underscored by reference to certain Commission pronouncements and rulings in which the willingness by the Commission to defer to reasonable, good-faith broadcaster judgments appears to be based solely on the particular content of a broadcast. For example, as noted in our Petition For Declaratory Ruling, in Letter From

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<sup>4</sup> In this regard, it is well-established that, if the Commission chooses to alter its regulatory course, it "must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971); accord Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983); Action For Children's Television v. FCC, 821 F.2d 741, 745 (D.C. Cir. 1987).

Chairman Mark S. Fowler to Hon. Thomas A. Luken (January 19, 1984), supra, the Commission's staff suggested that neither Section 312(a)(7) of the Communications Act nor Section 315(a) of the Communications Act require broadcast licensees to accept candidate "use" advertisements "... if the broadcaster reasonably believes the advertisement contains obscene or indecent material." Id., Staff Memorandum, at 1.<sup>5</sup> The Letter From Chairman Mark S. Fowler to Hon. Thomas A. Luken and its accompanying Staff Memorandum were issued in response to the announced plan by a former federal

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<sup>5</sup> Similarly, the Staff Memorandum expressed the following view:

"[W]e believe that a broadcaster would be justified in refusing access to a candidate who intended to utter obscene or indecent language, because Section 312(a)(6) [of the Communications Act], which provides that the Commission may revoke a license for, inter alia, a violation of [18 U.S.C.] §1464, must be read to carve an exception to Section 312(a)(7) [of the Communications Act]. [Emphasis added.]"

Id. at 7, n. 17.

Thus, the Staff Memorandum specifically approved of a broadcaster's refusal to air a federal candidate's advertisement, based simply on the broadcaster's determination that a federal candidate prospectively "intended" to place material in his advertisements that might be obscene or indecent.

It should be noted, in passing, that the Mass Media Bureau's Letter Ruling in this case appears to have gone to great lengths to mask the fact that the Letter from Chairman Mark S. Fowler to Hon. Thomas A. Luken and its accompanying Staff Memorandum involved precisely the very same issues as are presented in this case -- i.e., the impact of 18 U.S.C. §1464 on a broadcaster's obligations under the "reasonable access" provisions of Section 312(a)(7) of the Communications Act and under the "no censorship" provision of Section 315(a) of the Communications Act. Rather than expressly acknowledging that the Luken letter and its accompanying Staff Memorandum dealt with allegedly indecent or obscene material contained in a federal candidate's broadcast "uses", the Bureau's Letter Ruling merely cited the Luken letter as a

"... staff advisory opinion indicating that certain types of speech may not be subject to the Section 315 no-censorship provision ...."

Id. at 4 n. 3.

The foregoing description of the Luken letter by the Bureau conveniently neglects to note that the Luken letter and its accompanying Staff Memorandum dealt with both the "reasonable access" provisions of Section 312(a)(7) of the Communications Act and the "no censorship" provision of Section 315(a) of the Act.

candidate to demand "reasonable access" on television stations for the purpose of broadcasting "uses" that would contain excerpts from sexually explicit films.

More recently, in Letter to William T. Carroll, Esq. (Christian Action Network), FCC Ref. No. S210-AJZ, 92050480 (Mass Media Bureau June 12, 1992), the Mass Media Bureau reaffirmed the Commission's adherence to the principle that, in determining whether particular broadcast matter constitutes obscene or indecent material, in violation of 18 U.S.C. §1464,

"[t]he broadcaster must exercise his/her independent editorial judgment in determining whether the particular material meets this definition, or, for example, contains such 'value' as to deem it non-obscene."

Id., slip op. at 2.

The Christian Action Network ruling -- which was cited approvingly in the Mass Media Bureau's Letter Ruling herein (Id. at 2) -- arose in the context of a request by an organization to have the Commission overturn a determination by broadcast licensees that certain spot announcements containing depictions of artwork funded by the National Endowment For The Arts were obscene or indecent. Based on this concern, the broadcasters in question refused to air the spot announcements containing these depictions.

Thus, the Commission has demonstrated a willingness to defer to reasonable, good-faith licensee discretion in rendering judgments as to whether particular broadcast matter is obscene or indecent where the content of the material in question consists of excerpts from sexually explicit films or depictions of provocative artwork. However, the impact of the Letter Ruling is to single out graphic depictions of aborted fetuses as the one type of broadcast over which broadcasters will not be given editorial discretion to make reasonable, good-faith judgments to which the Commission will give deference. It is significant to note, in this regard, that the impact of Letter from Chairman Mark S. Fowler to Hon. Thomas A. Luken was, effectively, to keep off the air those federal candidate spots

that might have contained excerpts from sexually explicit films, while the impact of the Bureau's Letter Ruling in this case was, effectively, to mandate that a federal candidate's spots containing graphic and shocking depictions of aborted fetuses would have to be broadcast, even during hours when children are likely to be in the audience.

These distinctions, which appear to be content-based, serve to highlight the constitutional infirmity of the Bureau's action in its Letter Ruling. The Supreme Court has recently held that the First Amendment imposes a "content discrimination" limitation upon the government's ability to prohibit even that speech which is unprotected by the First Amendment. See R.A.V. v. City of St. Paul, Minnesota, \_\_ U.S. \_\_, 112 S.Ct. 2538, 2545 (1992). The Supreme Court emphasized, in this regard, as follows:

"The rationale of the general prohibition [against content discrimination], after all, is that content discrimination 'rais[es] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace ...'. [Citations omitted.]"

Id., 112 S.Ct. at 2545.

For all these reasons, the Bureau's action in its Letter Ruling contravenes the First Amendment to the United States Constitution.

**B. The Bureau's Action In Its Letter Ruling Is In Conflict With Applicable Commission Precedent under 18 U.S.C. §1464, Thereby Rendering The Commission's Standard For Assessing Indecency Unconstitutionally Vague**

In its Letter Ruling, the Mass Media Bureau reaffirmed the Commission's existing standard for gauging whether broadcast matter is "indecent", within the meaning of 18 U.S.C. §1464, and specifically reaffirmed that that standard focuses on whether the material depicts or describes, in a patently offensive manner, inter alia, "excretory" activities or organs. Letter Ruling at 4. Nonetheless, the Bureau held that the type of graphic depictions of bloodied, aborted fetuses or fetal tissue here at

issue is not the result of an "excretory" activity, under the Commission's indecency definition. Id. The Bureau's stated rationale for this conclusion was as follows:

"Neither the expulsion of fetal tissue nor fetuses themselves constitutes 'excrement'. [Emphasis added, footnote omitted.]"

Id. at 4.

In this connection, the Bureau noted, in its Letter Ruling, as follows:

"Webster's Dictionary defines 'excrement' as 'waste material, especially fecal matter, expelled from the body after digestion.' Webster's II New Riverside University Dictionary, p. 451 (1984). Federal case law has been similarly restricted in scope. See, e.g., L.M. Communications, 7 FCC Rcd 1595 (MMB 1992); FCC v. Pacifica Foundation, 438 U.S. 726 (1978)."

Letter Ruling at 4 n.2.

Thus, the Bureau simply set up a "strawman" -- i.e., the word "excrement" -- and, not surprisingly, was able to knock it over quite easily by finding that aborted fetuses do not come within the ambit of the dictionary definition of "excrement". Unfortunately, however, while "excrement" may be one form of an excretory by-product, it is by no means the only such by-product. It is significant to note that the Bureau's Letter Ruling discretely avoided any effort to cite the dictionary meanings of the terms "excretory", "excretion" or "excrete"; these words, rather than the term "excrement", are the only relevant terms for purposes of Commission indecency analysis, under the Commission's existing standard of indecency.

Webster's Ninth New Collegiate Dictionary (1985) defines "excretory" as follows:

"Of, relating to, or functioning in excretion."

Id. at 433.

The same dictionary defines the term "excretion" as follows:

"The act or process of excreting; something excreted; especially useless, superfluous, or harmful material ... that is eliminated from the body and that differs from a secretion in not being produced to perform a useful function."

Id. at 433.

The same dictionary defines the term "excrete" as follows:

"To sift out, discharge, from ex- + cernere to sift ... ; to separate and eliminate or discharge ... from the blood or tissues or from the active protoplasm."

Id. at 433.

Based on these definitions, aborted fetuses or fetal tissue are clearly excretory by-products. That is, an aborted fetus is one which has been "sifted out", separated, eliminated and discharged from the uterus of a woman. The Mass Media Bureau's unreasoned and novel determination to equate the term "excretory" with "excrement" was arbitrary, capricious and an abuse of discretion.<sup>6</sup>

In short, the Mass Media Bureau has engaged in semantic word games in its Letter Ruling to justify its conclusion that the type of broadcast material here at issue -- i.e., graphic and shocking depictions of dead, aborted and bloodied fetuses -- is not "indecent", within the meaning of 18 U.S.C. §1464. Unfortunately, however, it is impossible to reconcile this holding with other recent Commission decisions in which particular programming has been ruled to be "indecent", within the meaning of 18 U.S.C. §1464. For example, in Infinity Broadcasting Corp. of Pennsylvania, 2 FCC Rcd 2705 (1987), the Commission announced that its indecency standard would be extended to cover the broadcast of not only explicit sexual or excretory references, but also of more subtle

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<sup>6</sup> It should be noted that the Mass Media Bureau was plainly in error in its suggestion, in footnote 2 of its Letter Ruling, that federal case law has restricted the definition of "excretory" to the term "excrement". In this regard, it should be emphasized that nowhere in either of the two cases cited by the Bureau (L.M. Communications, 7 FCC Rcd 1595 (Mass Media Bureau 1992); and FCC v. Pacifica Foundation, 438 U.S. 726 (1978)) is there a single reference to the term "excrement". While both of these cases may have involved the broadcast of scatological material, neither of those two decisions sets forth an "indecency" standard which is based on the term "excrement" rather than on the broader term "excretory".

expressions, such as sexually-oriented innuendo or double entendre. 2 FCC Rcd at 2706. Accord, Letter To Capitol Broadcasting Company, FCC Ref. No. 8210-AJZ, 91110835 (Mass Media Bureau July 28, 1992).

If mere innuendo or double entendre may suffice to render broadcast material "indecent" within the meaning of 18 U.S. §1464, the Commission would be hard-pressed to justify why graphic and shocking depictions of bloodied aborted fetuses are not "indecent", particularly where the broadcaster reasonably concludes that such depictions are patently offensive, as measured by contemporary community standards for the broadcast medium.<sup>7</sup>

Based on the foregoing, it is manifest that the Commission's ever-changing standard for assessing whether broadcast matter is "indecent" is inherently vague and unclear and provides broadcasters no meaningful guide identifying the category of material that falls within the ambit of 18 U.S.C. §1464. Indeed, the Mass Media Bureau's Letter Ruling in this case marks such a radical shift in the Commission's indecency standard as to render the Commission's indecency calculus virtually standardless.<sup>8</sup> Accordingly, we respectfully submit that, in light of the Bureau's Letter Ruling, the Commission's definition of the term "indecent" within the meaning of 18 U.S.C. §1464, is

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<sup>7</sup> In this regard, the broadcaster is in the best position to assess whether a particular depiction is "patently offensive", as measured by contemporary community standards for the broadcast medium in the particular community in which the broadcast station is located. This is particularly true, where, as here, the broadcaster makes a determination that particular depictions are, indeed, "patently offensive", as measured by contemporary standards for the broadcast medium in his community. Although the Commission has announced that it will henceforth judge alleged indecency, not on the basis of a local community standard, but rather "one based on a broader standard for broadcasting generally", Reconsideration Order, 3 FCC Rcd 930, 933 (1987), this broader standard has not previously been applied by the Commission so as to reverse a broadcaster determination that particular broadcast material is patently offensive in his community. The Mass Media Bureau's Letter Ruling in this case represents the first such Commission holding, to our knowledge.

<sup>8</sup> Cf. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-151 (1969) (a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license without narrow, objective and definite standards to guide the licensing authority is unconstitutional).

unconstitutionally vague, since persons "... of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391 (1926), cited approvingly in Action For Children's Television v. FCC, 852 F.2d 1332, 1339 (D.C. Cir. 1988).<sup>9</sup>

**C. The Mass Media Bureau's  
Determination To Allow Broadcasters To Air  
"Viewer Advisories" In Connection With  
Graphic Depictions of Aborted Fetuses  
Will Not Suffice To Protect Impressionable Children**

Having ruled that candidate "uses" containing graphic depictions of dead or aborted and bloodied fetuses are not "indecent" within the meaning of 18 U.S.C. §1464, the Bureau implicitly concluded that the candidate "uses" in question were protected against broadcaster censorship under the "no censorship" provision of Section 315 of the Communications Act. The Bureau reaffirmed, in its Letter Ruling, the validity of the precedent in Southern Arkansas Radio Company, 5 FCC Rcd 4643 (Mass Media Bureau 1990), in which it was held that, where a spot announcement is protected against broadcaster censorship under Section 315(a) of the Communications Act, the broadcaster is prohibited, under Section 315(a), from broadcasting any viewer advisories or warnings as to the nature of the content of the broadcasts. Southern Arkansas Radio Company, supra, held that a broadcaster may air

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In Action For Children's Television v. FCC, supra, the Court of Appeals noted that, in FCC v. Pacifica Foundation, 438 U.S. 726 (1978), the Supreme Court did not address specifically whether the Commission's definition of the term "indecent" was on its face unconstitutionally vague. 852 F.2d at 1338. The Court of Appeals further noted that the Supreme Court did hold that the George Carlin "Seven Dirty Words" monologue was "indecent", within the meaning of 18 U.S.C. §1464, and the Court of Appeals inferred from that holding

"... that the [Supreme] Court did not regard the term 'indecent' as so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.' [Citation omitted.]"

852 F.2d at 1339.

Even if the Commission's articulated standard of 'indecentcy' must be deemed to have survived a challenge that it was, on its face, unconstitutionally vague, nonetheless, the Bureau's Letter Ruling mandates the conclusion that the Commission's ever-shifting "standard" of indecentcy, as applied, is unconstitutionally vague.

only "content-neutral disclaimers" in connection with a particular candidate's "uses", as long as such a disclaimer is broadcast by a station in connection with all subsequent advertising broadcast on behalf of every candidate for the same office, regardless of content differences. See Southern Arkansas Radio Company, supra, 5 FCC Rcd at 4644.

Although the Mass Media Bureau cited Southern Arkansas Radio Company approvingly in its Letter Ruling (Id. at 5 n. 4), the Bureau nonetheless held that broadcasters were allowed to air a content-oriented parental advisory in connection with candidate "uses" that contain graphic depictions of aborted fetuses. Letter Ruling at 4-5. Indeed, the Bureau went so far as to specify the following as an example of an acceptable viewer advisory:

"The following political advertisement contains scenes which may be disturbing to children. Viewer discretion is advised."

Id. at 5.

While we applaud the Bureau's apparent recognition that some means must be given to broadcasters to protect impressionable children from the inevitable psychological damage that would be inflicted on them by exposure to graphic and shocking depictions of aborted fetuses, we respectfully submit that the Mass Media Bureau may have placed undue reliance on the benefits of viewer advisories. It is simply not reasonable to expect that children of tender years would react in any meaningful fashion to the type of viewer advisory fashioned by the Mass Media Bureau in its Letter Ruling, nor is it reasonable to believe that a youngster watching a cartoon program or other children's program would run to switch channels, turn off the television set or call a parent into the room if the type of viewer advisory envisioned by the Mass Media Bureau were to interrupt the program. Thus, the use of the viewer advisory, standing alone, would not suffice to avoid exposure of impressionable children to the types of graphic depictions of aborted fetuses which are at issue in this proceeding.

Nonetheless, the Commission should not deprive broadcasters of the opportunity to utilize such content-oriented viewer advisories in the event that the Commission affirms the Bureau's holding that candidate "uses" containing graphic depictions of aborted fetuses must be broadcast during times of the day when there is a reasonable risk that children may be in the audience. Rather, if the Commission affirms this latter holding by the Mass Media Bureau, the Commission should expressly overrule the suggestion in Southern Arkansas Radio Company, 5 FCC Rcd 4643 (Mass Media Bureau 1990), that the broadcast of content-oriented viewer advisories violates the "no censorship" provision of Section 315(a) of the Communications Act. The Bureau's holding in Southern Arkansas Radio Company was based, in part, on the mandate of the "no censorship" provision of Section 315(a). See 5 FCC Rcd at 4644. The Commission should expressly reject such an interpretation of Section 315(a), so that a broadcaster's ability to utilize appropriate viewer advisories in the circumstances presented in this case will be clear.

### III. Conclusion

This case presents the fundamental question of whether the Commission will acknowledge that broadcasters are afforded the discretion, under the "reasonable access" provisions of Section 312(a)(7) of the Communications Act, to serve as conscientious public trustees by "channelling" graphic and shocking images of aborted fetuses into those periods of the day when there is no reasonable risk that children may be in the audience. Stated otherwise, the issue presented is whether the Commission will recognize that broadcasters have the right (if not the duty), as public trustees, to attempt to protect impressionable children from exposure to shocking images and depictions that are likely to be psychologically disturbing and harmful to them.<sup>10</sup>

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<sup>10</sup> In his concurring opinion in Federal Communications Commission v. Pacifica Foundation, *supra*, Justice Powell emphasized:

"[C]hildren may not be able to protect themselves from speech, which, although shocking to most adults, generally may be avoided by the unwilling through the exercise of choice. At the same time, such speech may have a deeper and more lasting  
(continued...)"

For the reasons set forth above, the Mass Media Bureau's Letter Ruling in this case, which essentially forces broadcasters to air these types of images during hours when impressionable children are likely to be in the audience, is arbitrary, capricious, contrary to precedent, and violative of the First Amendment. This determination by the Mass Media Bureau in its Letter Ruling should be reversed on an expedited basis<sup>11</sup>, as more particularly set forth above. Nonetheless, the Commission should affirm the viewer advisory portion of the Letter Ruling in the event that the Commission affirms the Bureau's holding that candidate "uses" containing graphic depictions of aborted fetuses must be broadcast during

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<sup>10</sup>(...continued)

negative effect on a child than on an adult."

438 U.S. at 757 – 758.

Congress has recognized the need to protect children in connection with television programming in its enactment of the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, codified at 47 U.S.C. §§303a, 303b and 394. The Commission has also been solicitous to the viewing needs of children by adopting rules to implement the Children's Television Act of 1990. See Policies and Rules Concerning Children's Television Programming, 6 FCC Rcd 2111 (1991).

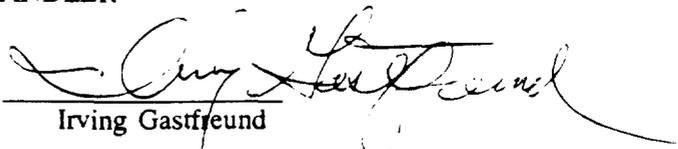
<sup>11</sup> Expedited action by the full Commission on the instant Application For Review is hereby respectfully requested, in order to secure a resolution by the full Commission of the issues presented in this case at the earliest possible moment, and, in any event, as early as possible prior to the November 3, 1992 general election. Such an expeditious ruling by the Commission will not only provide needed clarification and guidance on the issues for broadcasters, but will also facilitate expeditious judicial review, should such review become necessary.

times of the day when there is a reasonable risk that children may be in the audience.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS &  
HANDLER

By:

  
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September 1, 1992

**CERTIFICATE OF SERVICE**

I, Mary Odder, a secretary in the law firm of Kaye, Scholer, Fierman, Hays & Handler, hereby certify that on this 22nd day of January, 1993, I have caused a copy of the foregoing "Comments" to be hand-delivered to the following:

Honorable James H. Quello  
Commissioner  
Federal Communications Commission  
1919 M Street, N.W.  
Room 802  
Washington, D.C. 20554

Honorable Sherrie P. Marshall  
Commissioner  
Federal Communications Commission  
1919 M Street, N.W.  
Room 826  
Washington, D.C. 20554

Honorable Andrew C. Barrett  
Commissioner  
Federal Communications Commission  
1919 M Street, N.W.  
Room 844  
Washington, D.C. 20554

Honorable Ervin S. Duggan  
Commissioner  
Federal Communications Commission  
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Mary Odder