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DOCKET FILE COPY ORIGINAL JAN 21 1993

Dear Sirs,

FCC MAIL ROOM

I am writing concerning the regrettable decision to prevent Daniel Becker from airing his anti-abortion ads.

Mr. Becker is endeavoring to awaken us to the evil horror of pre-natal infanticide. Because of the nature of abortion where the pre-born are cut to pieces or burned alive in a saline solution, it is impossible to find a pleasant, palatable method to present the seldom seen side of abortion.

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The objections raised against the ads included an accusation that they were too graphic and too disturbing to be viewed by the general public. It is my understanding that this was a leading reason when the censoring of his ads was decided upon.

I also understand that there are laws and policies that lay guidelines for what can and cannot be aired. If they do exist, they are being applied selectively. I recall scenes from Dracula during the World Series that showed vampires with bloody faces rising from their graves. Of course, the news has shown actual footage of Somalians dead from starvation lying in their own excrement and shattered and torn bodies from the fighting in Bosnia-Herzegovina.

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If such segments can be shown to evoke sympathy for the suffering in other parts of the world, why can't a man speak up for the systematically slaughtered and helpless here in our own country?

Sincerely,
Edward P. Gleason

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JAN 21 1993 FEDERAL COMMUNICATIONS COMMISSION OFFICE OF THE SECRETARY

FCC - MAIL ROOM

02-254

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From: Mark Johansen
506 N West St
Xenia OH 45385
To: Office of the Secretary
Federal Communications Commission
1919 M Street NW
Washington DC 20554
Date: Jan 15, 1993
RE: "Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act", regarding FCC Ref 8210-AJZ/MJM

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There are three questions at issue here. First is the narrow question of whether the specific advertisements under discussion are or are not "indecent" and thus subject to restricted airing. Decisions on this question affect the particular candidates involved, and perhaps future candidates who might wish to produce commercials including similar images. Second is the more general question of the standard by which "indecent" is determined, i.e. the definition of indecency. Decisions on this question could affect all future political candidates. Finally there is the issue of the procedures actually used to determine indecency. I would like to address each question in turn.

Gillett asserted that pictures of dead fetuses constitute depiction of "excretory activity". It is not clear (to me at least) whether Gillett meant that the fetus himself was excrement, or that the accompanying blood and menstrual material are excrement. In either case, the FCC's Mr Stewart wisely rejected this argument, quoting a dictionary definition of "excrement" that clearly could not be construed to include either. Not everything that is expelled or exuded from the body is excrement.

Defining excrement in a way that would include these pictures not only violates any reasonable use of the term, but it would have far-ranging implications. If they meant that the "blood and gore" are excrement and therefore subject to legal restrictions on airing, it would surely follow that any depiction of blood and gore, not just those that happen to accompany an abortion, would necessarily have to be similarly restricted. Such a ruling would surely decimate the ranks of prime-time police dramas, not to mention news reports on war and crime.

If they meant that the fetus himself is excrement, it is difficult to see how this term can be defined so as to include an aborted fetus, but not include a fetus/baby born alive by the normal means. Are all human beings to be defined as "excrement" because they were at one time exuded from the bodies of their mothers? (If it is ruled illegal to depict human beings on television this would rather limit broadcast fare.)

Clearly, for an aborted fetus or the accompanying blood and gore to be considered excrement would require a definition so absurdly broad that it would make a wide range of images currently depicted in the media indecent. Any attempt to single out aborted fetuses as subject to special restrictions not applied to any other images a political candidate might choose to use would surely invite a court challenge on free speech and

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equal protection grounds, and the courts have routinely struck down laws and regulations with such content-specific restrictions on speech.

Thus, in regard to the question of whether the particular material in question was legally "indecent", the reasoning and conclusions contained in the letter by Mr Stewart are completely correct.

This brings us to the more general question of the definition of "indecent". For the real objection to these images was surely not that they were "indecent" as the word is commonly understood or as defined by law and regulations, i.e. explicit depiction of sexual or excretory activity, but rather that they were unpleasant or offensive.

The issue at hand posits a conflict between regulations that require broadcasters to provide access to political candidates with regulations restricting the airing of indecent material. If a proposed political advertisement is not legally indecent, no conflict exists and there is no reason to exempt the broadcaster from §315. The broadcaster cannot simply decide to ignore the law because he considers its consequences undesirable. He must show that the material is specifically banned or restricted under some other law, presumably §303(m)(1)(D). The fact that some people may be offended by particular material does not make it indecent or obscene, and therefore subject to governmental restrictions. As the Supreme Court ruled in *Hustler v Falwell* (108 Sct 876), "The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." Similarly, in *Texas v Johnson* (109 Sct 2533) the Court said, "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

To allow broadcasters to negate §315 whenever they believe the material to be "offensive" would deprive the law of its force. Consider various current issues: Suppose a candidate who is concerned about AIDS produces a commercial in which he states support for a condom distribution program. Surely such a commercial could be offensive in a way much more closely related to a common definition of "indecent" than the issue at hand. Or a candidate campaigns on a platform that includes aiding Somalia or Ethiopia, and includes scenes in his campaign commercials showing starving children. Or a candidate urges intervention in Bosnia, and produces commercials showing streets littered with dead bodies, or victims of torture in prison camps. Surely such scenes would be offensive in exactly the same sense as images of aborted fetuses may be offensive: they are bloody, gruesome, and/or generally unpleasant.

Indeed, almost any political commercial could be offensive to someone. You may recall that during the recent presidential debates Mr Clinton criticized certain aspects of Mr Bush's foreign policy, prompting Mr Bush to interrupt to "defend the honor of the United States". Later Mr Bush made some depreciating comments about the economy of Arkansas under Mr Clinton's administration, to which Mr Clinton replied that he

felt similarly obliged to "defend the honor of the State of Arkansas". Either candidate could reasonably have argued that he found the other's remarks "offensive" because they were unpleasant, derogatory, or some such.

To say that the "reasonable access" regulations do not apply when the advertisement could be "offensive" to someone, indeed that the advertisement is then limited to the "safe harbor" hours, would purge our airwaves of almost all political advertising. (Of course some might say that that would be a good thing, but that was surely not the intended purpose of the laws and regulations.)

None of the documents that I have seen from the FCC specifically address this aspect.

Finally, regarding the procedural question of how indecency is determined, there is an important flaw in the FCC's positions.

In point 2 of the Request for Comment, which you acknowledge was made under "severe time constraints", you state that a station is not required to air a political commercial outside the "safe harbor" hours that "it reasonably and in good faith believes is indecent". This appears to put the evaluation of indecency entirely at the discretion of the station. Absent some provision for timely recourse by the candidate, this could gut the regulations of all meaning. The situation is ripe for abuse. If a broadcaster does not agree with a candidate's positions, they can simply declare that they believe his commercials to be indecent and relegate them to the middle of the night when few are watching.

The advantage of the regulations as they were originally written and enforced was that they allowed individual media outlets no such discretion. All bona fide candidates were legally entitled to media access. Presumably before this law was passed some media outlets gave such equal access, either out of a desire to be evenhanded, or to encourage open debate, or simply because they wanted the advertising revenue. Other media outlets aired commercials for candidates they liked and refused to give their opponents an opportunity to respond. The law guaranteed all candidates a chance to get their message across.

But this new interpretation allows media outlets to once again pick and choose who they will permit to be heard. All they need do to censor someone is to state that they believed his commercials to be indecent.

Surely at a minimum, a procedure would have to be laid out whereby the candidates could appeal such a decision by the broadcaster.

The courts have routinely ruled that obscenity is not protected by the First Amendment. Thus, the next logical step is for a broadcaster to be given (or decide they already have been given) the discretion to decide that a given commercial is legally and constitutionally obscene. They could then refuse to air it at all. Combined with the FCC's policy of refusing to judge any given piece of material before it has aired in order to avoid any question of prior restraint, the candidate would then appear to have absolutely no recourse. The station can refuse to air a commercial, claiming it is obscene. The FCC will not rule on whether or not it is obscene until after it has been

aired. Thus, §315 has been completely circumvented. In such a scenario, it does not matter whether the station has any plausible grounds whatsoever for declaring the proposed commercial to be obscene. It could consist solely of the words "Vote for Jane Smith for U.S. Senate" in white letters on a black background. The candidate could show the ad to the FCC, and everyone there who sees it could agree that there is absolutely no reasonable basis for saying that it is obscene. But because it has not yet been aired, the FCC will not officially evaluate it, and therefore will not reject the station's claim that it is obscene. The very fact that the station has chosen to censor it invokes FCC policies which prevent the FCC from declaring that the act of censorship was unreasonable and illegal.

(This is, perhaps, not the appropriate place to discuss the policy of no-prior-restraint in general. But as an aside, it seems to me that it creates a situation tantamount to ex post facto law: You refuse to tell someone whether a certain action which he is contemplating is legal or not until after he has done it. It is difficult to see what is gained by such unpredictability in the law.)

This dilemma might be an unfortunate necessity if the FCC was under some compulsion to avoid any possibility of engaging in prior restraint. But to the best of my knowledge, there is no such compulsion. I am not aware of any statutory provision. (Unless §326 is so construed. Though I would think this would have to be interpreted not to apply to obscenity to avoid a contradiction with §303(m)(1)(D) and title 18, §1464. But the U.S. Code is rather voluminous, and I freely admit I have not studied it page by page.) Neither is there a constitutional limitation. The Supreme Court ruled in *Freedman v Maryland* (85 Sct 734, 380 US 51) that prior restraint is constitutional, provided that it meets certain conditions. Namely, the burden of proof for any permanent restraint must lie with the government agency and not the broadcaster; there must be a reasonable time limit within which any evaluation must take place or exhibition/broadcasting is permitted by default; and the broadcaster must have recourse to a judicial override of the agency ruling. The relevant portions of this decision have been reaffirmed several times, as recently as 1990 in *FW/PBS Inc v Dallas* (110 Sct 596).

You seem to be creating a situation where each broadcaster is authorized to deputize himself as an agent of the government, with powers to censor any material he finds obscene or indecent by any definition he chooses to devise, and with no appeal from his decisions permitted. Not only does this defy common sense, but it violates §315, which specifically says that the broadcaster "shall have no power of censorship over the material broadcast under the provisions of this section".

I propose a simple alternative. If a station believes that it is faced with a conflict between §303(m)(1)(D) and §315, it should be required to submit the suspect material to the FCC for evaluation, whereupon the FCC would determine which law applies. As required by the Supreme Court's *Freedman* test, before any political commercial could be censored the burden of proof must lie with those seeking to censor it, there must be a reasonable

time limit for holding up airing pending such a decision (which in this context would have to be such that, if approved, the commercial could be aired in time to be effective in the current campaign), and the candidate must have recourse to the courts to overrule an unfavorable decision. (Perhaps the broadcaster should also have the option of going to court to overrule a decision in favor of airing, though it is not clear what standing they would have to bring such a suit, as once it has been determined that they will not be violating the law by airing the material they do not seem to have anything at stake.) Such a procedure would protect the interests of all concerned.

Mark Johansen