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OFFICE OF GENERAL COUNSEL

M E M O R A N D U M

TO: Chief, PIRS

FROM: Associate General Counsel, Litigation Division

SUBJECT: Daniel Becker v. FCC & USA, No. 95-1048 and Washington Area Citizens Coalition Interested in Viewer's Constitutional Rights v. FCC & USA, No. 95-1056. Filing of two new Petition for Review filed in the United States Court of Appeals for the District of Columbia Circuit.

DATE: February 27, 1995

Docket No(s). MM Docket No. 92-254

File No (s).

This is to advise you that Daniel Becker, on January 19, 1995, and Washington Area Citizens Coalition Interested in Viewer's Constitutional Rights, on January 23, 1995, filed Section 402(a) Petitions for Review of: In the Matter of Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, 9 FCC Rcd 7638 (1994).

Petitioner challenges the Mass Media Bureau's ruling (7 FCC Rcd 5599) that political advertisement containing graphic abortion imagery (1) was not indecent under 18 U.S.C. 1464 and (2) could be channelled to times when unsupervised children are less likely to be in the audience without violating requirements of 47 U.S.C. 312(a)(7) or 315(a).

Due to a change in the Communications Act, it will not be necessary to notify the parties of this filing.

The Court has docketed these cases as Nos. 95-1048 and 95-1056 and these cases have been assigned to C. Grey Pash, Jr.

Daniel M. Armstrong

cc: General Counsel
Office of Public Affairs
Shepard's Citations

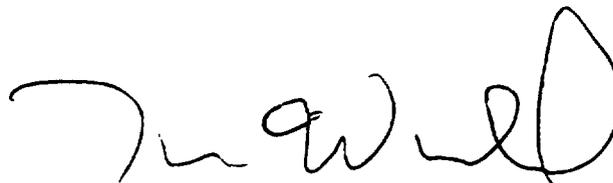
CERTIFICATE OF SERVICE

I, Tim Wineland, in the law offices of Gammon & Grange, P.C., hereby certify that I have sent this 19th day of January 1995, by first-class, postage prepaid, U.S. Mail, copies of the foregoing PETITION FOR REVIEW to the following:

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Tim Wineland

In the
**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Washington Area Citizens Coalition)
Interested in Viewer's Constitutional Rights,)
)
Petitioner,)
)
v.)
)
Federal Communications Commission and)
United States of America,)
)
Respondents.)

United States Court of Appeals
For the District of Columbia Circuit

FILED JAN 23 1995

RON GARVIN
CLERK

95-1056

PETITION FOR REVIEW

Pursuant to 47 U.S.C. Section 402(a), 28 U.S.C. Section 2342(1) and 28 U.S.C. Section 2344, the Washington Area Citizens Coalition Interested in Viewers Constitutional Rights ("Petitioner" or "WACCI-VCR") hereby petitions this court for review of the Federal Communications Commission's ("FCC" or "Commission") *Memorandum Opinion and Order* ("MO&O"), FCC No. 94-249 (released November 22, 1994) in MM Docket No. 92-254.

Venue in this court is proper under 28 U.S.C. Section 2343. This petition is timely filed under 28 U.S.C. Section 2344.

A copy of the Commission's *MO&O* is provided and attached to this Petition.

Petitioner

Petitioner WACCI-VCR is a non-profit membership organization. Its members are listeners and viewers of the electronic media. The organization seeks to represent its members' interests in protecting their right to be informed on issues of importance, and to hear the views of all legally qualified candidates for public office. Members of WACCI-VCR have been legally qualified candidates for public office in the past, and may in the future run for political office.

The Commission's *MO&O*

Petitioner seeks review of that portion of the Commission's *MO&O*, FCC No. 94-249 (released November 22, 1994) which holds that broadcast licensees may decline to broadcast commercials for legally qualified candidates for federal office at times specified by the candidates where the broadcaster determines that the commercials, while not indecent, "may otherwise be harmful to children." *MO&O* at ¶¶13, *et seq.* The Commission found such "channeling" of political advertisements to later hours to be consistent with the licensee's duty under 47 U.S.C. Section 312(a)(7) to provide reasonable access to federal candidates for public office. *MO&O* at ¶¶13-23. The Commission also found that permitting broadcasters to exercise discretion in this manner did not transgress the prohibition against censorship of political advertisements found in 47 U.S.C. Section 315(a). *MO&O* at ¶24.

The Commission's *MO&O* granted an application for review filed by Kaye, Scholer, Fierman, Hays & Handler ("Kaye Scholer") which sought reversal of the FCC Mass Media Bureau's decision to deny Kaye Scholer's July 29, 1992 petition for declaratory ruling. The petition sought a declaratory ruling that a

broadcaster may, consistent with the reasonable access provision 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.

MO&O at ¶1 n.2. The *MO&O* also denied the December 3, 1992 application for review of Daniel Becker, a candidate for federal office in Georgia. Mr. Becker sought review of an October 30, 1992 Mass Media Bureau decision which declined to rule on whether a political advertisement

placed by Mr. Becker on WAGA-TV, Atlanta, Georgia, was indecent under 18 U.S.C. §1464.¹

In its *MO&O*, the Commission ruled that these political advertisements, which portrayed abortions and fetal tissue, did not depict or describe sexual or excretory activities or organs and therefore did not meet the Commission's definition of indecency or the definition of 18 U.S.C. §1464. *MO&O* at ¶¶10-12.² The Commission went on to rule that for material ~~which~~ the broadcast licensee, using its "reasonable, good faith judgment," feels is harmful to children, it may, consistent with its "reasonable access" and "non-censorship" duties, "channel" these advertisements so they will not be shown at times when there is a high likelihood that children will be in the audience. *MO&O* at ¶13.

Petitioner respectfully seeks review of the *MO&O*. To the extent indicated, this action is arbitrary and capricious and in excess of statutory authority in that it contradicts the plain language and legislative history of Sections 312 and 315 of the Communications Act. In addition, the Commission's action violates the First Amendment of the United States Constitution.

WHEREFORE, Petitioner respectfully requests that this Court:

1. Reverse that part of the Commission's *MO&O* which holds that broadcast licensees may, consistent with Sections 312(a)(7) and 315 of the Communications Act, channel political advertisements which they in good faith believe may be harmful to child viewers to hours when these children are less likely to be in the viewing audience;
2. Remand this matter to the Commission with instructions to issue a revised decision

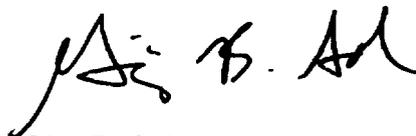
¹The Commission sought public comment on the various issues raised in the applications for review. *See Request for Comments*, 7 FCC Rcd 7297 (1992). WACCI-VCR filed comments and reply comments pursuant to the Commission's request.

²Petitioner does not seek review of this portion of the Commission's *MO&O*.

stating that such channeling is contrary to the "reasonable access" requirement of Section 312(a)(7) and the "no censorship" provision of Section 315; and

3. Grant all such other relief which may be just and proper.

Respectfully Submitted,



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Counsel for Petitioner

January 23, 1995