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INTRODUCTION

Daniel Becker ("Becker") and the Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights ("WACCI") filed suit against the Federal Communications Commission ("FCC") involving two sections of the Communications Act of 1934 (the "Act")[1] and challenged the FCC's interpretation of its powers under the Act in denying Becker's access to prime time broadcasting slots for his political commercials.[2] Under § 312(a)(7) (1994), the Act requires broadcasters to provide candidates for federal office with "reasonable access" to the broadcast media.[3] Section 315(a) of the Act guarantees all candidates for elective office equal opportunities in the use of the broadcast media, and deprives licensees of the power to censor the material a candidate may wish to broadcast.[4]

The United States Court of Appeals for the District of Columbia held that the initial Declaratory Ruling ("Ruling") of the FCC violated the "reasonable access" requirement of § 312(a)(7) by permitting content-based channeling of non-indecent political advertisements.[5] In addition, the court of appeals found the FCC Ruling to be violative of the "no censorship" and "equal opportunities" provisions of § 315(a), because it permitted licensees to discriminate against candidates based on the content of the message of the advertisement.[6]

FACTS

Becker, a candidate for election to the United States House of Representatives in Georgia's Ninth Congressional District, requested the airing of a campaign advertisement which included photographs of aborted fetuses.[7] WAGA-TV, which aired the commercial, received numerous complaints from viewers who saw the advertisement.[8]

Anticipating that Becker would request the commercial to be aired again, Gillett Communications of Atlanta, the licensee of WAGA-TV, filed a petition with the FCC requesting a declaratory ruling on the following question:

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1. 47 U.S.C. §§ 151 et. seq. The Communications Act of 1934 established the Federal Communications Commission and its regulatory powers and responsibilities.
2. Becker v. Federal Communications Commission, 95 F.3d 75, 76 (D.C. Cir. 1996).
3. 47 U.S.C. § 312(a)(7) (1994).
4. 47 U.S.C. § 315(a) (1994).
5. *Becker*, 95 F.3d at 75.
6. *Id.*
7. *Id.* at 76-77.
8. *Id.* at 77.

whether a licensee may channel a use by a legally-qualified federal candidate to a safe harbor[9] when children are not generally present in the audience if the licensee determines in good faith that the proposed use is indecent or otherwise unsuitable for children.[10]

A petition followed from a number of unnamed broadcast licensees requesting a declaratory ruling that broadcast licensees may decline to air political advertisements that "present graphic depictions or descriptions of aborted fetuses or any other similar graphic depictions of excised or bloody fetal tissue, where there is, in the good-faith judgment of the licensee, a reasonable risk that children may be in the audience."[11]

The FCC's Mass Media Bureau ("Bureau") found that the advertisement was not indecent.[12] In addition, the Bureau stated that "such channeling would violate . . . § 312(a)(7) of the Act," because "channeling material that is not indecent . . . would deprive federal candidates of their rights to determine how best to conduct their campaigns."[13] The petitioners filed an Application for Review.[14]

In October 1992, Becker again sought to purchase air time from WAGA-TV.[15] He desired to broadcast a 30-minute program entitled "Abortion in America: The Real Story" on November 1 following an afternoon televised football game.[16] WAGA-TV refused to air the program at the time requested, claiming that the advertisement would violate the indecency provision of 18 U.S.C. § 1464.[17] The station was willing to broadcast the program only during the safe harbor hours of midnight to 6 a.m.[18] Becker filed a complaint with the FCC.[19]

The FCC responded to Becker's request with a letter ruling.[20] Noting that until the FCC had solicited comments on the interplay of §§ 312(a)(7) and 315(a) and the indecency provision of the criminal code, the letter stated that it would not be unreasonable for the licensee to require the program to air during the safe harbor time period as long as the licensee, in good faith, found the program to be indecent.[21] Becker then filed an Application for Review with the FCC.[22]

The FCC issued its Memorandum Opinion and Order on November 22, 1994, denying Becker's Application for Review and granting the FCC's in part. The FCC

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9. In other words, a time generally considered to have significantly fewer children viewers (12 a.m. to 6 a.m.). *Id.* at 80. (citing Action for Children's Television v. FCC, 58 F.3d 654, 665 (D.C. Cir. 1995)).

10. *Id.* at 77. (citing Gillett Communications, Petition for Declaratory Ruling at 1 (July 28, 1992)).

11. Kaye Scholer, Petition for Declaratory Ruling at 1 (July 29, 1992).

12. *Letter Ruling*, 7 F.C.C.R. 5599, 5600 (Aug. 21, 1992).

13. *Id.*

14. *Becker*, 95 F.3d at 77.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Letter Ruling*, 7 F.C.C.R. 7297 (Oct. 30, 1992).

22. *Becker*, 95 F.3d at 78.

concluded that Becker's initial advertisement was not indecent.[23] There was also evidence in the record that the graphic political advertisements at issue can be psychologically damaging to children.[24] Furthermore, the FCC held that nothing in § 312(a)(7) precluded a broadcaster's exercise of some discretion with respect to placement of political advertisements so as to protect children, and that channeling would not violate the no-censorship provision of § 315(a).[25] As a result, WACCI and Becker petitioned the District of Columbia Court of Appeals for review.[26]

LEGAL ANALYSIS

The court's analysis focused on the statutory analysis and interpretation of §§ 312(a)(7) and 315(a). Because Congress had not directly addressed the issue of channeling by licensees of the broadcast media, the court sought to determine whether the FCC's construction of the statute, in its guidelines, was rational and consistent with the statute.[27] If the guidelines met this requirement, the court must, according to the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[28] defer to the guidelines.

I. SECTION 312(A)(7)

Section 312(a)(7) states that the FCC may revoke any station license for "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy."[29] The appellate court noted, however, that the Act did not define "reasonable access."[30]

The court referred to the FCC's policy guidelines to determine the meaning of the phrase. In relevant part, "§ 312(a)(7) impose[s] upon licensees . . . the specific responsibility to afford . . . the opportunity to purchase reasonable amounts of time to legally qualified candidates for Federal elective office; . . . the test of whether a licensee has fulfilled its obligations under § 312(a)(7) is one of reasonableness."[31] In addition, the guidelines state that "it is unreasonable and not in compliance with the

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23. In re Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, 9 F.C.C.R. 7638, 7649 (1994) ("Declaratory Ruling").

24. *Id.*

25. *Id.*

26. *Becker*, 95 F.3d at 78.

27. *Id.*

28. 467 U.S. 837, 842-43 (1984). The Supreme Court held that unless Congress has addressed a particular issue of the Act on point, a court must defer to the FCC's own construction of the statute, provided it is "permissible," i.e., "rational and consistent with the statute."

29. 47 U.S.C. § 312(a)(7) (1994).

30. *Becker*, 95 F.3d at 78.

31. Licensee Responsibility under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971, 47 F.C.C. 2d 516, 516-517 (1974) (Licensee Responsibility).

statute for a licensee to adopt a rigid policy of refusing to sell or give prime-time programming to legally qualified candidates."[32] The guidelines further state that such a rigid policy would deny candidates access to time periods with the largest audiences and would be inconsistent with congressional intent to give "candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters."[33]

The appellate court found the language in the guidelines to support the contention that permitting a licensee to channel a political advertisement, which it believes may be harmful to children, frustrates Congress' primary purpose in enacting § 312(a)(7).[34] The court acknowledged, in passing, that there are competing interests between the licensee's desire to protect children from offensive and harmful images and the interest of a political candidate in having his statutory right of access to the largest audiences on the airwaves.[35] However, the court supported the notion that § 312(a)(7) was designed to allow candidates the ability to gain access to the largest audiences, and that giving licensees the power to make a subjective judgment in channeling programming, albeit in good faith, would be akin to giving them free reign to make their determinations.[36]

The court supported its reasoning by citing *CBS, Inc. v. FCC*, [37] which stated that "endowing licensees with a 'blank check' to determine what constitutes 'reasonable access' would eviscerate § 312(a)(7)."[38] In further support of its position, the court noted that the FCC never has sufficiently outlined the circumstances under which a licensee can reasonably refuse broadcast time to political candidates during certain parts of the broadcast day.[39] Although the FCC has stated that denial of access may occur when there is a realistic danger of substantial program disruption,[40] the factors which the FCC advises the licensee to consider in protecting himself or herself bear no connection to making a decision to channel political advertisements based on their content.[41]

An additional concern of the court was that a subjective standard for the licensees would render it impossible to determine whether it was the advertisement's message rather than its images that the licensee found "too shocking for tender minds."[42] The court shared the petitioners' concern that it was impossible to separate certain messages from graphic images, especially where a political candidate may wish to call attention to an issue precisely because of the images involved.[43] The court noted that

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32. *Id.*
33. *Id.*
34. *Becker*, 95 F.3d at 79-80.
35. *Id.* at 80.
36. *Id.* at 79-81.
37. 453 U.S. 367 (1981).
38. *Becker*, 95 F.3d at 81.
39. *Id.* at 80.
40. *Id.*
41. *Id.* at 81.
42. *Id.*
43. *Id.*

other volatile topics such as the death penalty, rape, gun control, euthanasia and animal rights could evoke a similar shock effect.[44]

The court also found that certain provisions of the Act cited by the respondents did not provide evidence of congressional concern for the quality of content of advertisements during children's programs, but rather were concerned with regulating the quantity and duration of advertisements.[45] In addition, the court could not find any sort of regulation for advertisements on broadcasting materials that are not indecent.[46] Because of the lack of evidence that Congress intended the good faith determinations of licensees to supersede a political candidate's right to reasonable access to the airwaves, the court held that §§ 312(a)(7) and 315(a) provided no right to licensee discretion outside that specified as causing "a realistic danger of program disruption."[47]

II. SECTION 315(A)

Section 315(a) provides that:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section .[48]

The Supreme Court found that § 315(a) permits the "full and unrestricted discussion of political issues by legally qualified candidates" and reflects Congress' "deep hostility to censorship either by the Commission or by a licensee."[49]

In rejecting the respondents' alleged right to channel the content of certain political advertisements, the appellate court stated that case law uniformly opposes allowing licensees any power of censorship over the content of political broadcasts whether they are "first" uses or responses to first uses.[50] The court further found that the FCC's guidelines provided no definition of "censorship" as it is applied in the statute.[51]

Relying on *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*,[52] the court adopted the rationale that "censorship" encompasses more than the refusal to run a candidate's advertisement or the deletion of material contained in it.[53] Reasoning that channeling could supply leverage to licensees in the heat of a political election, and

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44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 80-82.
48. 47 U.S.C. § 315(a) (1994).
49. Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 525, 528 (1959).
50. *See, e.g., Hammond for Governor Committee*, 69 F.C.C. 2d 946, 947 (Broadcast. Bur. 1978).
51. *Becker*, 95 F.3d at 82.
52. 360 U.S. 525 (1959).
53. *Becker*, 95 F.3d at 83.

because erroneous decisions could not be corrected swiftly enough by the courts to avoid injury to candidates during campaigns, the court concluded that censorship would force a candidate to avoid controversial issues during a campaign and restrict the coverage of consideration relevant to intelligent political decision.[54] Problems of self-censorship and discrimination between candidates, the court observed, frustrated the full discussion of political issues that Congress intended.[55]

The appellate court supported its view by citing case law which denied stations the ability to require candidates to indemnify stations from liability due to a candidate's advertisement, because such an agreement would limit the candidate's ability to express his political ideas.[56] Thus, it appears that "*any* attempts by a licensee to coerce a candidate to revise his political announcement, albeit by threat of litigation or otherwise, will be considered censorship."[57]

The court further concluded that § 315(a) requires equal opportunities to broadcasters' facilities.[58] The court reasoned that if a station channels one candidate's message but allows his opponent to broadcast his messages in prime time, the first candidate will have been denied equal opportunity guaranteed by § 315(a), and subjected to "broadcasting Siberia."[59]

CONCLUSION

The court's interpretation of §§ 312(a)(7) and 315(a) is a clear and well-reasoned argument against allowing licensees any power in making content-based decisions on whether and whom to allow to make political advertisements.[60] Although the court declined to discuss the influence of the First Amendment on this case directly, it is clear that the court tacitly assumed congressional intent for the statutes to be consistent with the notion of the First Amendment's protective stance against a "chilling effect" on unpopular voices in the political arena.[61]

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54. *Id.* at 84.
55. *Id.*
56. *Id.* at 83-84. (citing Radio Station WPAM, 81 F.C.C. 2d 492 (1980) and D.J. Leary, 37 F.C.C. 2d 576 (1972)).
57. *Becker*, 95 F.3d at 83. (citing Radio Station WPAM, 81 F.C.C. 2d 492, 495 (1980) (emphasis added)).
58. *Becker*, 95 F.3d at 84.
59. *Id.*
60. *Id.* at 82.
61. *Id.* at 83-85.