



IN THE SUPREME COURT OF THE UNITED STATES

No. 07A155

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, APPLICANTS

v.

FOX TELEVISION STATIONS, INC., ET AL.

APPLICATION FOR A FURTHER EXTENSION OF TIME WITHIN
WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Federal Communications Commission and the United States, respectfully requests a further extension of time, to and including November 1, 2007, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. The court of appeals entered its judgment on June 4, 2007. No party filed a petition for rehearing or rehearing en banc. By order dated August 23, 2007, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to October 4, 2007. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). The opinion of the court of appeals, which is reported at 489 F.3d 444, is attached.

1. Under 18 U.S.C. 1464, it is unlawful to "utte[r] any obscene, indecent, or profane language by means of radio communication." As directed by Congress, the Federal Communications Commission (FCC) enforces the prohibition against broadcast indecency and profanity between the hours of 6 a.m. and 10 p.m., when children are most likely to be in the audience. See 47 C.F.R. § 73.3999(b); Public Telecommunications Act of 1992, § 16(a), Pub. L. No. 102-356, 106 Stat. 954. In FCC v. Pacifica Foundation, 438 U.S. 725 (1978), this Court upheld the FCC's authority to regulate indecent broadcasts.

This case involves an FCC order determining that the Fox Television Network violated 18 U.S.C. 1464 and 47 C.F.R. § 73.3999(b) by broadcasting expletives uttered by entertainers on two different television awards shows. In reaching that conclusion, the FCC disavowed earlier orders that had indicated that "isolated or fleeting" expletives were not indecent. Because Fox did not have notice that its broadcasts would be considered indecent, the FCC imposed no sanction.

2. A divided panel of the Second Circuit vacated the FCC's order. The court held that the Commission had violated the Administrative Procedure Act by failing to supply a reasoned explanation for its tightened policy regarding the broadcast of fleeting expletives. 489 F.3d at 454-462. Emphasizing that "the Commission does not take the position that any occurrence of an

expletive is indecent or profane," the court was unable to see how the Commission's new policy could be based on concern with the public's "mere exposure" to indecent language. Id. at 458-459.

Although the majority purported to refrain from deciding various constitutional challenges that Fox had raised, it made a number of "observations" concerning those arguments. 489 F.3d at 462-466. In particular, it questioned "whether the FCC's indecency test can survive First Amendment scrutiny" and expressed its sympathy for the contention that the FCC's test is "undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague." Id. at 463.

Judge Leval dissented. 489 F.3d at 467-474. In his view, the FCC gave a reasoned explanation for its change in indecency enforcement policies. Among other things, he found that the Commission's contextual enforcement policy as applied to fleeting expletives did not evidence inconsistency, but instead was a rational attempt to reconcile the potential harm to children from indecent programming with the need to avoid suppression of material of value.

3. The Solicitor General has decided to authorize the filing of a petition for a writ of certiorari in this case. The additional time sought in this application is necessary to permit the preparation and printing of the petition, and because the attorneys with principal responsibility for drafting the petition

have been heavily engaged with the press of other matters before this Court, including drafting two merits briefs and preparing for an oral argument at the session beginning October 1.

Respectfully submitted.

Handwritten signature of Paul D. Clement in cursive script.

PAUL D. CLEMENT

Solicitor General

Counsel of Record

SEPTEMBER 2007