1977 WL 189559 (U.S.) (Appellate Brief)
Supreme Court of the United States.

FEDERAL COMMUNICATIONS COMMISSION, Petitioner,
v.
PACIFICA FOUNDATION, Respondent.

No. 77-528.
1977.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brief of Motion Picture Association of America, Inc. As Amicus Curiae

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***1 INTRODUCTORY STATEMENT**

The facts of record in this case, the pertinent statutory provisions, the provisions of the United States Constitution involved, and the opinions of the court below are set out in the briefs and appendices filed by the appellants. This amicus accepts them for purposes of its own brief. Both parties have consented in writing to the filing of this brief amicus curiae by the United States Catholic Conference.

***2 IDENTIFICATION AND INTEREST OF THE AMICUS CURIAE**

A.

IDENTIFICATION OF THE AMICUS

The United States Catholic Conference is a nonprofit corporation and an agency through which the Catholic Bishops of the United States collaborate with other members of the Church--priests, religious and laity--in areas where voluntary collective action on an interdiocesan and national basis can benefit the Church and society.

USCC is an agency of the Catholic Bishops of the United States. Its predecessor, established in 1919, was known as the National Catholic Welfare Conference. The prime purpose of USCC is to unify and coordinate activities of the Catholic people of the United States in programs and works of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, civic education, youth activities, communications and public affairs, with emphasis on the preservation of religious liberty in America.

B.

INTEREST OF AMICUS IN THIS CASE.

Communication as a fundamental human activity touches upon all aspects of human life. The church recognized the import of modern communication. The ***3** Pontifical Commission for the Means of Social Communication has stated:
1. The Unity and Advancement of men living in society: these are the chief aims of social communication and of all the means it uses. These means include the press, the cinema, radio and television. The constant improvement in the media puts them at the disposal of more and more people who in their daily lives make increasing use of them. More than ever before, the way men live and think is profoundly affected by the means of communication.

2. The Church sees these media as "gifts of God" [1] which, in accordance with his providential design, unite men in brotherhood and so help them to cooperate with his plan for their salvation.

13. All men of good will, then, are impelled to work together to ensure that the media of communication do in fact contribute to the pursuit of truth and the speeding up of progress. The Christian will find in his faith an added incentive to do this. And the message of the Gospel thus spread will promote this idea -- which is the brotherhood of man under the fatherhood of God. [2]

It is the conviction of the amicus that matters of such fundamental import require consideration from all quarters. A spirit of service to the Court prompts this amicus to submit the arguments contained herein for the Court's consideration.

***4** SUMMARY OF ARGUMENT

I.

FIRST AMENDMENT DOES NOT REQUIRE GOVERNMENT TO
PARTICIPATE IN USE OF INDECENT, PROFANE OR OBSCENE LANGUAGE.

Government is an active participant in the broadcast media. The statutory limitation upon the use of indecent, profane or obscene language which is found in 18 U.S.C. § 1464 is, *inter alia*, a limitation upon government activity. The First Amendment is not a limitation on government to control its own activities.

II.

PROPER ADJUDICATION OF THE INSTANT CASE TURNS ON PUBLIC-INTEREST.

First Amendment rights of broadcast licensee are, we submit, circumscribed by the rights of the public which he serves. There can be no effective resolution of the basic problem confronting the court without a recognition of the pivotal role which the licensee's public must play.

***5** III.

LEGITIMATE PUBLIC INTEREST FURTHERED by 18 U.S.C., SECTION 1464.

Vulgarism, racial and religious slurs are disruptive of the civility which is necessary to the order of society. This kind of offensiveness alienates members of society from each other while adding nothing to the quality of discourse. The public interest manifested by 18 U.S.C. 1464 is an interest in its own order.

IV.

RATIONAL BASIS TEST, RATHER THAN THE TRADITIONAL FIRST AMENDMENT ANALYSIS, IS THE PROPER FRAMEWORK FOR ADJUDICATION.

The proper basis for adjudication of the instant case is whether or not the statute and the action of the regulatory body are reasonably linked for a legitimate public interest.

***6 ARGUMENT**

I.

FIRST AMENDMENT DOES NOT REQUIRE GOVERNMENT TO PARTICIPATE IN USE OF INDECENT, PROFANE OR OBSCENE LANGUAGE

Analysis of the instant case in the framework of *Roth*[1] *Miller*[2] and *Paris Adult*[3] is wholly inappropriate. In *Roth*, *Miller* and *Paris Adult* the court had before it the question of government's authority to restrict “speech” of others. With respect to the broadcast media, however, inquiry shifts from First Amendment limitations on government to the question of whether or not government must accommodate indecent or profane language. Government is an active participant in the broadcast media. It is for this reason, as noted in *Red Lion*[4] that traditional First Amendment analysis does not apply to the broadcast media. It is the position of this amicus that there is nothing in the First Amendment's restrictions upon government which requires that government itself participate in the activity complained of here. It is one thing to say the government must refrain from prohibiting certain kinds of speech. It is another to say that government must itself participate in such speech.

It is the contention of this amicus that the First Amendment would not be a bar to a federal statute which prohibited ***7** the government making soft-core pornographic films acceptable to local community standards. The First Amendment is a limitation on government's power to control citizens. It is not a limitation on government's right to control its own activities. Statutory limitations on indecent, profane and obscene language in the broadcast media are, inter alia, a limitation upon government. It forbids the government to lend its support to such activity. The constitutional touchstone here is, we submit, found in the resolution of the question of whether or not there is a legitimate public interest which is reasonably served by such a statute.

II.

PROPER ADJUDICATION OF THE INSTANT CASE TURNS ON PUBLIC INTEREST

Thee is an unfortunate likelihood that the instant action may be perceived to involve only two parties, namely, the FCC and the licensee, Pacifica Foundation. There is, of course, a third party whose interest, as we shall discuss below, conditions the rights

and responsibilities of both the named parties in the instant action. We speak, of course, of the public, in whose interest licensee is to carry forward his use of the media and for whose benefit the government is to carry forward its regulation.

There is a tendency to assume that "government" is coterminus with the public. Both the commercial licensee and the government are very often found to speak of the "public interest". Nevertheless, it is clear that neither of these two can claim the right to speak for the public.

***8** We are of the opinion that the decision below is fundamentally flawed because the court below failed to recognize that the dispute involves not merely the two named defendants but a third party whose rights are, in the last analysis, more significant than either of the two named parties. The conflict which bottoms this dispute is in reality a conflict about the nature of a tripartite relationship between the public, government and the licensee. The previous decisions of this court relating to the broadcast media have clearly recognized the importance of this tripartite relationship.

The nature of the broadcast media and the history of their growth, which were carefully examined in *Red Lion, Inc., et al v. Federal Communications Commission, et al*[5] (395 U.S. 367) have given rise to a complex set of questions which must inevitably be resolved. Some of the principal questions are: (1) whether or not there should be standards relating to program content, (2) who should establish such standards, and (3) how such standards should be implemented. The factual pattern of the instant case is, we submit, a product of the various tensions surrounding these questions.

It is the unique quality of the broadcast media to operate on two opposing concepts: the principle of public trusteeship and the principle of journalistic discretion. It is no accident that the two principal Supreme Court decisions in this area -- *Red Lion*[6] and *CBS*[7] -- spring from the tensions created by this antinomy. The history of litigation in this area is a ***9** record of attempts by the various parties to denigrate one or the other of these principles.

Licensees have argued that their discretion is absolute under the First Amendment and have chafed under trusteeship-rooted fairness regulations. Were broadcasters to succeed in winning full acceptance of their point of view, the antinomy would be broken since the trusteeship concept would hold no meaning in law.[8]

Those asserting the trusteeship principle have argued that they are entitled to access to the media. If they were to succeed, the antinomy would similarly be broken, since the "public" would have supplanted the licensee.[9]

In the instant case we are faced with such tensions. On the one hand, the FCC acting under statutory recognition of the trusteeship principle has sought to enforce standards of content. On the other hand, the licensee seeks to expand his role to the complete exclusion of both other parties -- government and public.

The trusteeship concept has not yet been thoroughly developed, and it is the position of this amicus that many fundamental difficulties in this area flow from an incomplete analysis of this concept. Historically, there is the common notion that trusteeship merely means access, the history of the ascertainment policy which originated in 1960 indicates that a large percentage of content-related complaints seek redress by access.[10]

Another facet of the trusteeship concept which has received attention is the notion that government regulation of ***10** media be socially responsive in calculating public needs. One need only look to the ascertainment policy to certify acceptance of the concept that government is the medium for expression of public will.[11]

The First Amendment rights of the broadcast licensee are, we submit, circumscribed by the rights of the public which he serves. There can be no effective resolution of the basic problem confronting the Court without a recognition of the pivotal role which the licensee's public must play.

Mr. Justice White, writing in *Red Lion Broadcasting, supra,* [12] said the media system must ultimately serve the viewers and listeners, whose rights were deemed to be paramount. [13] The Court characterized licensees as "given the privilege of using scarce radio frequencies as proxies for the entire community." [14]

"It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of press."

Chief Justice Burger, writing for the Supreme Court in ***11** *Columbia Broadcasting System, Inc. v. Democratic National Committee,* states:

> "A licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a 'public trustee'." [15]

Thus, it is a well-established principle that broadcast licenses serve as "proxies" for the community. The relationship of the broadcast licensee to the public which he serves is, we believe, the proper focal point for resolving the complex and vexatious questions noted above regarding program content.

Moreover, the court has recognized that the existence of this tripartite relationship removed the broadcast media from the traditional First Amendment analysis. The broadcast media is uniquely a creature of this tripartite relationship and as a practical matter can have no existence outside this relationship. In recognition of this fact this court has repeatedly held that whatever First Amendment rights a licensee may possess are circumscribed by the public interest. *Red Lion v. FCC,* 395 U.S. 367 (1968).

It is the position of this amicus that the rights of broadcast licensees with respect to program content are at some point circumscribed by rights which the public retains. In our view, a proper development of the trusteeship concept would include, inter alia, *direct public involvement in broadcaster practice.* Such involvement could be implemented through means not yet fully explored; for instance, establishment of regional and/or local broadcasting councils or even through referendum or election of licensees. We do not advance any of these alternatives as necessarily the proper method to ***12** implement the public's role in broadcasting; however, we do respectfully urge the Court to take care to avoid an adjudication of the present dispute which might foreclose development of substantive aspects of the trusteeship concept.

Admittedly, there has been little substantive development of the trusteeship concept. Nevertheless, it is our view that the doctrine of public trusteeship, unless this concept is merely a useful fiction, inevitably implicates a penumbral right of the licensee's public to circumscribe the broadcaster's discretion regarding program content.

Thus, the questions before this Court are (1) whether the public has a legitimate interest which needs to be protected in the repression of "indecent, profane or obscene language" and (2) whether the government's actions are reasonably calculated to protect those interests.

One must not forget that the First Amendment is a limitation upon government. We recognize that there is a tendency for government to take upon itself the mantle of the public and this must be resisted. This very reason is why the court has seen fit to recognize that a licensee of the broadcast media does have certain First Amendment rights. But the controlling factor here is not the rights of licensee nor the rights of the government, but rather public interest. This litigation and litigation involving similar matters, *Writers Guild of America v. FCC,* 423 F. Supp. 1064 (1976), can only be properly understood in terms of a process to resolve the nature of this tripartite relationship.

***13 III.**

LEGITIMATE PUBLIC INTEREST FURTHERED BY 18 USC, SECTION 1464

Just as it is a misperception to view the instant dispute as involving only the government and licensee, it is also a misperception to view the instant controversy as between the public and "seven words". The disassociation of the words from their societal context puts before the Court a conflict which does not, in fact, exist. Language is never disassociated from human conduct for language is uniquely a human attribute. While it is possible to disassociate language from human affairs in an abstract sense it is not possible to do so in a legal context. This is particularly so in the framework of our constitutional system.

Article III requires that federal jurisdiction can only be invoked when there is a "case or controversy". The myriad of court decisions which have dealt with the standing issue reflect a genuine concern that adjudication take place only in a "concrete context". *Warth v. Seldin,* 422 U.S. 490, 498-502; *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 37-39 (1976).

It is for this reason that we call the Court's attention to the fact that the instant dispute does not involve the public interest in the seven words. Rather, the case deals with the public's right to repress vulgarity. Mr. Carlin suggests that one is not permitted to say these seven words on the air and the implication of his remarks is that this is so because of statutory restrictions. This amicus submits that there are other reasons involved and that those lie in the public's right to protect itself.

***14** The relationship of law to both public and private activity is twofold -- it regulates and it teaches. It has a coercive and a didactic function. In truth, the didactic element is probably the more important even in the regulatory process. Law always does more than simply regulate activity; law does more than described herein. Law articulates the values to which we, as a society, subscribe. In the area of public activity, it is widely recognized that the notion of appropriateness comes into play. The word "indecent" means "inappropriate". Most vulgarity falls into this category. When we speak of inappropriate public conduct or speech we look not only to the speaker or to the text but to the listener as well.

This Court has repeatedly recognized that words can and do have an assaultive impact. *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942). As the late Alexander M. Bickel stated:

> "Even speech which advocates no idea can have its consequences. It may inflict injury by its very utterance, as the Court said a generation ago, in the Chaplinsky case, of lewd or profane or fighting words. There is such a thing as verbal violence, a kind of cursing, assaultive speech that amounts to almost physical aggression, bullying that is no less punishing because it is simulated." [16]

The monologue at issue in the instant case is not only vulgar but is calculatedly so. Mr. Carlin started out with the premise of choosing language for its offensiveness. We choose not to use certain words in public out of consideration for the impact that they have on other members of society who find these words offensive.

***15** Contrary to what Mr. Carlin suggests, it is not the words which are of concern, but the societal context in which the "speech" takes place. Vulgarisms, racial epithets and religious slurs are destructive of the civility which is necessary to the order of society. This kind of offensiveness alienates members of society from each other while adding nothing to the quality of discourse. The public interest manifested by 18 USC § 1464 is, then, an interest in its own order. The legitimacy of legislative action to protect this interest has long been recognized.

"In deciding Roth, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect '*the social interest in order and morality.*' *Roth v. United States,* 354 U.S. at 485, 77 S. Ct., at 1309, quoting *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, 62 S. Ct. 766, 769, 86 L. Ed. 1031 (1952) (emphasis added in Roth). [17]

In short, society pays a very real price for such vulgarisms and gains nothing in return. Moreover, as this Court has noted: "There are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights and interests 'other than those of the advocates are involved.' *Breard v. Alexandria*, 341 U.S. 622, 642, 71 S. Ct. 920, 932, 95 L. Ed. 1233 (1951). These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and possibly, the public safety itself." [18]

***16**

"... The question is, should there be a right to obtain obscene books and pictures in the market, or to foregather in public places -- discreet but accessible to all -- with others who share a taste for the obscene? To grant this right is to affect the world about the rest of us, and to impinge on other privacies and other interests, as those concerned with the theater in New York have found, apparently to their surprise. Perhaps each of us can, if he wishes, effectively avert the eye and stop the ear. Still, what is commonly read and seen and heard and done intrudes upon us all, wanted or not, for it constitutes our environment." [18]

The value manifested by 18 U.S. Code, Section 1464 is, at bottom, that of commitment to civility. It is the contention of this amicus that the statutory prohibition contained in this section reflects a legitimate public interest in the limitation of the government's participation in such activity.

IV.

RATIONAL BASIS TEST, RATHER THAN THE TRADITIONAL FIRST AMENDMENT ANALYSIS, IS THE PROPER FRAMEWORK FOR ADJUDICATION.

It is the view of this amicus that with respect to the statutory regulation of the broadcast media, the proper standard of review is a rational basis test. It is clear from the Court's previous ruling with respect to the broadcast media that traditional First Amendment analysis is not applicable ***17** to the broadcast media. *Red Lion v. FCC, supra,* and *CBS v. Democratic National Committee, supra.* Further, we submit that the proper basis for adjudication in the instant case is whether or not the statute *and* the action of the regulatory body are reasonably linked to a legitimate public interest.

The prohibitions contained in 18 USC § 1464 are, as we have noted above, closely related to legitimate public interest. This Court's rulings in *Roth,* [19] *Miller* [20] and *Paris Adult* [21] have in fact found legitimate public interest in order and morality. Moreover, we would submit than the statutory language in question is sufficiently drawn to provide adequate notice to those who might be prosecuted under it. No more lucid demonstration of this fact is needed that the fact that Mr. Carlin himself recognized that broadcast was not permissible. In plain fact, the entire monologue was designed to be calculatedly offensive and to do the very thing which he recognized to be improper.

V.

CONCLUSION

The broadcast media are by their nature a unique creature of a tripartite relationship involving the public, government and the licensee. The tensions which surround the media flow from a failure to fully develop a trusteeship concept in its substantive dimensions. Nevertheless, it is clear that government itself is an active participant in the broadcast media ***18** and a statutory rather than constitutional framework is the proper basis for adjudication of the relationship between these parties. It is clear that

the public interest is paramount. Proper adjudication of the dispute must be grounded in a determination of whether or not the government's action furthers a legitimate public interest.

This Court has long recognized a legitimate public interest in the integrity of the social order. In light of this interest, we submit that the statute in question and the regulatory activity undertaken in compliance with that statute are reasonably calculated to advance this public interest. For that reason the amicus respectfully urges the Court to reverse the lower court decision and to reaffirm the validity of the statutory prohibition against the use of indecent, profane or obscene language in the broadcast media.

Footnotes

1 Encyclical of Pius XII Miranda Prorsus, A.A.S., XXIV (1957), p. 765.

2 Communications: A Pastoral on the Media, Public Opinion and Human Progress, USCC, 1971. p. xv and p.4.

1 *Board of Regents v. Roth*, 408 U.S. 564 (1972).

2 *Miller v. California*, 4133 U.S. 15 (1973).

3 *Paris Adult Theater v. Slaton*, 413 U.S. 49 (1973).

4 *Red Lion, Inc. et al v. FCC, et al.*, 395 U.S. 367 (1968).

5 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1968).

6 See Note 5.

7 CBS v. Democratic National Committee, 412 U.S. 94 (1972), p. 118.

8 Red Lion Broadcasting, Co., *supra.*

9 Columbia Broadcasting System, *supra.*

10 Canby, 55 Texas Law Review 67 (1976).

11 *Ibid.*

12 Red Lion, *supra.*

13 *Ibid*, page 390.

14 *Ibid*, page 394.

15 CBS v. Democratic National Committee, *supra.*

16 Bickel, the Morality of Consent, (1975) p. 72.

17 Paris Adult v. Slaton, *supra.*

18 Bickel, *supra*, p. 74.

18 Bickel, *supra*, p. 74.

19 Board of Regents v. Roth, *supra.*

20 Miller v. California, *supra* 18.

21 Paris Adult v. Slaton, *supra.*

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