The previews are contributed by the Legal Information Institute, a non-profit activity of Cornell Law School. This department includes an indepth look at two cases plus executive summaries of other cases before the Supreme Court. The executive summaries include a link to the full text of the preview.

FCC v. Fox Television Stations (10-1293)

Appealed from the U.S. Court of Appeals for the Second Circuit (July 13, 2010)
Oral argument: Jan. 10, 2012

In 2002 and 2003, the Federal Communications Commission (FCC) reprimanded the Fox television network for fleeting profanities that appeared during Fox's broadcast of the Billboard Music Awards. In 2003, the FCC also censured ABC Inc. for a scripted television scene featuring brief nudity. Fox appealed, and the Second Circuit vacated the FCC's decision, ruling that the FCC's indecency policy was arbitrary and capricious. After the U.S. Supreme Court reversed the holding and remanded the case for reconsideration, the Second Circuit again rejected the FCC's policy, this time citing impermissible vagueness and significant First Amendment concerns. The Supreme Court must now determine the scope of the FCC's authority to regulate passing instances of nudity and expletive use on television broadcasts.

Background

Federal law empowers the FCC to regulate the broadcasting of indecent or profane language and to fine any broadcasting network that violates those regulations. In 1975, following the broadcast of George Carlin's "Filthy Words" monologue, a 12-minute segment laden with expletives, the FCC brought a civil forfeiture proceeding against the Pacifica Foundation, the organization that aired the monologue. The case reached the Supreme Court, which, in a narrow decision, found that the FCC could constitutionally restrict indecent speech.

In 2001, the FCC issued a policy statement to clarify the industry standard for regulation of indecent speech. The FCC emphasized that the use of fleeting and isolated expletives was not sufficiently indecent to warrant an enforcement action. However, in 2003, after the singer Bono used an expletive during a televised award ceremony, the FCC declared that a single fleeting expletive could be actionably indecent. This ruling was confirmed in subsequent FCC enforcement actions. Two noteworthy incidents involved Fox's broadcast of the Billboard Music Awards in 2002 and 2003, which contained fleeting expletives spoken by the singer Cher and the actress Nicole Richie. The FCC also targeted a 2003 episode of the ABC series "NYPD Blue," which featured a nude scene that lasted seven seconds.

Following these enforcement actions, the respondents, a collection of television and radio broadcasting networks, petitioned the Second Circuit for a review of the FCC's orders. The Second Circuit remanded the petition to allow the FCC to reconsider the networks' challenges to its orders, but the FCC reaffirmed that the language was indecent.

The Second Circuit then vacated the FCC's conclusion, finding that the change in the commission's policy was arbitrary and capricious and therefore in violation of the Administrative Procedure Act. The Second Circuit found that the FCC failed to justify the apparent abandonment of its previous policy permitting fleeting expletives. The Supreme Court reversed the Second Circuit's decision, determining that the FCC could regulate broadcast programming in order to provide viewers with profanity-free content. The Court declined to address the networks' constitutional arguments and remanded the case to the Second Circuit for consideration of the constitutional issues. On remand, the Second Circuit found the FCC's indecency policy to be impermissibly vague and thus unconstitutional in its entirety. The FCC is now appealing the ruling to the Supreme Court.

Implications

In support of the respondents, the Cato Institute argues that *FCC v. Pacifica Foundation*, which established the FCC's current authority to regulate indecent material on television and radio, is outdated. The *Pacifica* decision, according to Cato Institute, rested largely on the finding that broadcast media played a broad and pervasive role in the lives of many Americans; however, the media landscape has changed, and broadcast television no longer occupies the same dominant position in society, thus undercutting *Pacifica*'s driving rationale. The Cato Institute also notes that modern technology enables the delivery of news and entertainment via means that did not exist at the time the *Pacifica* decision was handed down—a time when broadcasting airwaves and paper publications were the sole means of delivering content to private homes.

The Cato Institute also contends that parents today have sufficient tools to control the availability of broadcasting content in the home. Specifically, Cato notes that the "V-chip"—installed in the majority of televisions made since 2000—enables parents to block particular programming, thereby preventing childrens' access to potentially offensive content. Parents, the Cato Institute points out, may also use DVRs other recording technologies to create libraries of parent-approved content effectively.

In opposition, the Parents Television Council (PTC) asserts that broadcasting still remains a uniquely popular and pervasive medium; therefore, broadcasters that use the public airwaves have a special public duty. The PTC notes, for instance, that, in 2003, more than 15 million American households relied exclusively on broadcast programming for their news and entertainment content. Furthermore, the PTC points out that, despite competition from alternative media sources, few large broadcasters, if any, have deserted the public airwaves but continue to produce significant content for public consumption.

In addition, Focus on the Family and Family Research Council argue that the ban on broadcasting indecency must be upheld because children retain unique

access to broadcasting content. Focus on the Family notes that, as was true in *Pacifica*'s time, children today need only turn on the television to have access to potentially offensive or indecent broadcasting content. The PTC, moreover, contends that screening technology such as the V-chip cannot justify overturning *Pacifica*, given that these technologies are often restricted to television broadcasts, and that the technology solution places the burden to ensure the propriety of the content on viewers rather than on broadcasters.

Legal Arguments

Contrasting Characterizations of the FCC's Indecency Policy

ABC argues that the FCC's policy on expletive use is unconstitutionally vague because the policy does not adequately notify broadcasters about when they might be subject to reprimand. ABC acknowledges that the Supreme Court's holding in *FCC v. Pacifica Foundation* gave the FCC some latitude in regulating potentially indecent material; however, ABC asserts that *Pacifica*'s context-based approach did not grant the FCC unfettered authority. According to ABC, because the FCC's context-based approach does not consider objective criteria, its indecency policy, which was clear in the past, is now arbitrary and opaque. Moreover, in ABC's view, the FCC has misconstrued the *Pacifica* Court's explanation of the relation between context and expletive use: even though the Court instructed the FCC to make indecency determinations according to the time, nature, and audience of particular broadcasts, the FCC gives significant weight to whether the artistic or social merit of a program justifies its profane nature.

Fox also decries the arbitrary and variable nature of the FCC's approach to indecency in broadcasts. Fox notes that the FCC defines the "offensiveness" of broadcasted material in accordance with the FCC's own experience and knowledge, allowing the FCC to justify almost any outcome under the malleable indecency framework. Deciding whether a certain program features "offensive" or "profane" content, Fox contends, is an inherently subjective determination that is difficult to predict. Furthermore, according to Fox, the FCC's vague approach to indecency is already discouraging certain forms of speech on television.

The FCC, however, argues that the Second Circuit's ruling was too broad, as the court should have evaluated the policy as applied to the particular Fox and ABC broadcasts before the court. The FCC contends that its policy does comport with Fifth Amendment due process, both facially and as applied to the facts in this case. The FCC concedes that it could replace the context-based approach with a comprehensive list of banned words and images but cautions that such a rigid approach may permit the broadcast of highly offensive content that simply omits the prohibited words and images. The FCC also argues that, given the sophisticated nature of broadcast companies—which have long maintained robust internal procedures to ensure compliance with community standards—the context-based approach to indecency does not deprive broadcasters of notice as to what content will be considered indecent. According to the FCC, concerns about inadequate notice are mitigated by the FCC's "safe harbor" period, which, between 10 p.m. and 6 a.m., allows broadcasters to air any material without fear of reprimand.

Indecent Language and the First Amendment

Both Fox and ABC argue that the FCC's indecency policy violates the First Amendment. Fox points out that content-based restrictions on speech are considered presumptively unconstitutional, even when the restricted material enters private homes. Furthermore, according to Fox, the justifications underlying the FCC's modern indecency policy are now outdated and cannot square with current realities in the media market. For one, departing from a key *Pacifica* rationale, Fox notes that broadcasting no longer possesses the uniquely ubiquitous presence that it enjoyed in the 1970s. In another significant departure from *Pacifica*, Fox asserts that children no longer enjoy unobstructed access to media content. With the advent of blocking technologies such as the V-chip, parents can exercise control over the programming to which their children are exposed. Historically, Fox points out, the Court has invalidated indecency prohibitions when such blocking technologies were available.

Even if *Pacifica* is not overturned, Fox and ABC contend that the FCC's indecency policy fails traditional constitutional scrutiny. The *Pacifica* Court worried that sustained profanity might harm the psychological well-being of young audience members, but Fox argues that the same concern does not apply to fleeting expletives or momentary vulgarity. Furthermore, in Fox's view, the FCC's indecency policy is not properly tailored to achieve the goal of shielding children from offensive content. On the one hand, the policy is under-inclusive because it does not insulate children against offensive content found on alternative media sources, including the Internet. On the other hand, the policy is over-inclusive because many households do not contain minors, and many parents do not oppose their children's exposure to fleeting profanities.

The FCC, however, avers that its indecency policy comports with the First Amendment. The FCC notes that the *Pacifica* Court did not characterize its decision as touching the outer limits of acceptable indecency regulation; hence, the FCC argues that its own decision to expand the *Pacifica* approach does not conflict with the First Amendment analysis used in the case. The FCC further asserts that the broadcast medium still occupies a leading position among all media sources. The FCC notes, for instance, that 485 of the 495 most watched television programs in 2004 and 2005 appeared on broadcast television. The FCC also argues that broadcast programming remains uniquely accessible to children. The FCC notes that, unlike cable or the Internet, where viewers have to seek out offensive material affirmatively, with broadcasting, parents can expose children to potentially profane content through the simple act of purchasing a television set. Finally, the FCC contends that the broadcast medium requires special First Amendment consideration because broadcasters serve only by dint of a government license to broadcast. As broadcast licensees have received special government permission to use a valuable public resource—the

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public airwaves—the FCC argues that broadcasters have implicitly agreed to be subject to certain heightened regulation.

Conclusion

In *Pacifica*, the Supreme Court endorsed the FCC's regulation of indecent material in the broadcast medium. Since that time, the FCC has adopted a context-based approach to the regulation of indecent material. Fox and ABC now contend that the FCC's approach has gone too far, arguing that the FCC's current indecency policy is impermissibly vague and runs afoul of the First and Fifth Amendments. **TFL**

Prepared by Alison Carrizales and Tom Schultz. Edited by Edan Shertzer.

Filarsky v. Delia (10-1018)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (Sept. 9, 2010)
Oral argument: Jan. 17, 2012

Operating at the behest of Steve Filarsky, a private attorney retained by the city of Rialto, Rialto officials ordered Nicholas Delia, a local firefighter, to consent to a warrantless search of his home. After the incident, Delia brought a civil rights claim against both Filarsky and the city, alleging a violation of Delia's Fourth Amendment right to be free from unreasonable search and seizure. Filarsky and Rialto's officials moved to dismiss the case. The district court extended qualified immunity to all defendants, but the Ninth Circuit reversed in part, ruling that Filarsky could not enjoy immunity. Other circuit courts, however, have granted qualified immunity to private lawyers retained by the government. The U.S. Supreme Court must resolve the circuit split and decide whether qualified immunity should be extended to private attorneys working for the government.

Background

In 2000, the city of Rialto's Fire Department hired Nicholas Delia as a firefighter. In 2006, after helping to clean up a toxic spill, Delia claimed to feel sick, and his doctor issued the first of several letters excusing Delia from work. The Fire Department was suspicious of Delia's illness, especially because Delia had recently been faced with disciplinary action. The department hired a private investigator, who filmed Delia buying building insulation. Based on those photos, the department commenced a formal internal investigation to determine whether Delia was missing work on false pretenses. Filarsky, a private attorney who had previously worked for the city of Rialto, was asked to lead the investigation.

Filarsky conducted an internal affairs interview of Delia, who admitted that he had purchased the insulation to repair his house; however, Delia claimed that he had not yet installed the insulation. Filarsky asked Delia to allow department officials to inspect the insulation in his home, but Delia refused and questioned Filarsky's authority to order the warrantless search. Unable to get Delia to consent, Filarsky procured a written order from the fire chief, which directed Delia to produce the insulation material for inspection. Delia acquiesced—albeit reluctantly—and allowed department officials to follow him home, where he produced several rolls of insulation for their inspection.

In 2008, Delia filed a civil rights claim under 42 U.S.C. § 1983 against both Filarsky and the city of Rialto. Delia alleged that the warrantless inspection of his house constituted an unreasonable search and seizure in violation of the Fourth Amendment as well as an invasion of privacy in violation of the Fourteenth Amendment. The district court, however, dismissed the claim, ruling that all defendants were entitled to qualified immunity.

Delia appealed to the Ninth Circuit, which affirmed the grant of qualified immunity to the city officials but reversed the grant of immunity to Filarsky. The Ninth Circuit refused to follow Sixth Circuit precedent, which held that private attorneys retained by the government are entitled to qualified immunity against a plaintiff's claim under 42 U.S.C. § 1983. Instead, the Ninth Circuit conformed to its own case law, which declined to extend qualified immunity to private attorneys in civil rights suits, even when those attorneys were hired by the government.

Implications

Filarsky argues that, without immunity, private attorneys will be deterred from representing the government, fearing that they may bear plaintiffs' full damage awards. Filarsky contends that the loss of immunity may significantly raise private attorneys' professional insurance premiums, thus driving many attorneys back into the private sector. Filarsky contends that the fact that many insurance policies do not cover constitutional torts intensifies the problem and argues that, even when such claims are covered, attorneys may still be held liable for damages that exceed the coverage amount. In addition, Filarsky points out that some states prohibit insurance companies from covering punitive damages, which are often sought in § 1983 actions.

Delia, however, asserts that private attorneys are unlikely to abandon the public sector just because they are denied qualified immunity. For example, Delia points out that all private attorneys—whether serving private or public clients—are faced with the potential risk of malpractice suits. Moreover, Delia argues that, even if they are denied qualified immunity, private attorneys such as Filarsky may have alternative means of shielding themselves from liability. For example, Delia notes that private attorneys may still be able to assert a good faith defense against § 1983 actions, a possibility expressly contemplated in several Supreme Court cases.

Filarsky contends that denying qualified immunity to private attorneys would raise the cost and lower the quality of legal services provided to the government, thus preventing the government from functioning efficiently. Amici point out that budget constraints cause various government bodies to rely heavily on private attorneys for cost-effective legal services. However, when faced with higher insurance premiums, private attorneys may either pass on the costs of liability to the government or refuse to represent it altogether. In addition, Filarsky avers that

denial of immunity would encourage private attorneys to offer more liability-conscious legal advice instead of full and candid opinions, thus forcing the government to make decisions on a less informed basis.

Delia argues that normal market pressures would ensure that private attorneys provide their clients with efficient and vigorous representation. When private attorneys are more concerned with protecting themselves than with providing appropriate legal advice, Delia contends that market competition would replace these attorneys with those who can provide high-quality services at affordable prices. Delia asserts that immunity-related liability concerns are unlikely to distract private attorneys from their professional obligations, given that the risk of such liability is lower than the malpractice risk to which all attorneys are exposed. Finally, Delia cautions that granting immunity to private attorneys may affect other government employment contracts, such as requiring courts to extend immunity to workplace investigators who are not attorneys.

Legal Arguments

Historical Role of Private Attorneys in Government Settings

Ultimately, to determine whether private parties are entitled to qualified immunity, courts must perform a two-part test, asking whether both history and the purposes of government employee immunity support a finding of immunity. Focusing on the first prong, Filarsky contends that publicly employed attorneys traditionally benefited from immunity and the Ninth Circuit's holding undermines the historical role of private counsel who are hired to advise and represent the government. Filarsky argues that it has long been understood that publicly employed attorneys are not mere advisers but public fiduciaries; therefore, these attorneys must enjoy qualified immunity in the course of serving the public interest. Furthermore, Filarsky asserts that the Ninth Circuit has established a rigid categorical rule that finds no support in Supreme Court precedent.

Delia asserts that Filarsky's immunity argument fails to account for the context of the case at hand: even though, in the past, courts did extend qualified immunity to some publicly employed attorneys, Filarsky was hired to conduct an internal workplace investigation—a function that does not require a legal degree. Furthermore, Delia contends that personnel investigations probably did not exist when 42 U.S.C. § 1983 was enacted; indeed, the Court would not recognize due process protections for dismissed government employees until 100 years later. Delia concludes that there is no historically rooted tradition of affording immunity to private individuals who are conducting personnel investigations.

The Purposes of ∫ 1983 and the Qualified Immunity Doctrine

With reference to the second prong of the immunity test, Filarsky asserts that extending qualified immunity in this case would further the purposes underlying both § 1983 and the qualified immunity doctrine. Extending immunity, in Filarsky's view, would ensure that state and local governments maintain critical access to legal counsel, which promotes government compliance with the law and leads to more effective public action. Just as the major purpose behind qualified immunity is to prevent unwarranted timidity in government officials performing their duties, Filarsky argues that extending qualified immunity to private attorneys retained by the government will ensure that these attorneys provide candid advice in the public's interest, unaffected by fear of personal liability.

Delia counters that the main rationale for granting qualified immunity—the desire to avoid unwarranted timidity—is addressed by the normal forces of marketplace competition. Delia argues, for example, that profit-seeking motivations will encourage private attorneys to serve actively and assertively in the best interest of the public, minimizing the risk of timid decision-making. Furthermore, Delia maintains that the other policy concern associated with immunity—preventing suits that may distract public employees from performing their duties—is not seriously implicated in this case. Delia asserts that Filarsky's "doomsday" scenario of private attorneys fleeing the private sector is fanciful and notes that Filarsky's prediction has not materialized in the period since the Ninth Circuit handed down its decision denying immunity.

A New Test for Qualified Immunity

Filarsky proposes that a functional inquiry test be used in determining whether a private attorney is entitled to qualified immunity. Under this test, courts would evaluate whether the private attorney is functionally equivalent to a government employee. The test would look to the nature of the private attorney's duties, the amount of supervision and control to which the attorney is subject, the attorney's role in the government's exercise of essential duties, and the immunity afforded to government officials in that same role. Citing previous Supreme Court cases, Filarsky maintains that the functional inquiry test comports with Court precedent and accords with the Court's substantive approach to immunity. Filarsky contends that this test would lead to immunity determinations that are based on an individual's role and duties rather than on the individual's formal title.

Delia attacks Filarsky's test as arbitrary and unsupported by precedent. Delia notes that determining whether a private attorney is under "close" government supervision is a fact-sensitive question that may circumvent immunity by dragging public employees into court. Delia points out the functional inquiry test may sweep too broadly and require courts to extend immunity to non-attorneys who perform investigations of government employees. Delia suggests that Filarsky himself would fail the proposed functional test, because Filarsky was merely investigating Delia's use of sick leave, was subject to little supervision by city officials, and enjoys no clear precedent of immunity granted to private parties who conduct workplace investigations. Delia proposes that courts perform an inquiry based on reasonableness, asking whether a reasonable attorney trained in conducting government personnel investigations would know that the action ordered in this case—a warrantless search of Delia's home—was illegal.

Conclusion

The Supreme Court's decision in this case will address the contours of the qualified immunity doctrine, resolving whether private attorneys who conduct investigations of government employees

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in the workplace are entitled to qualified immunity in federal civil rights claims. Filarsky argues that affording qualified immunity comports with the historical role of private attorneys engaged in government work. Delia maintains that policy reasons, and the realities of the professional marketplace, overcome the need for immunity. The Court's decision will stoke the ongoing debate about the increasing use of private contractors for governmental functions. **TFL**

Prepared by Angela Chang and Tian Wang. Edited by Edan Shertzer. The authors would like to thank former Supreme Court Reporter of Decisions Frank Wagner for his assistance in editing this preview.

Coleman v. Court of Appeals of Maryland (10-1016)

Appealed from the U.S. Court of Appeals for the Fourth Circuit (Nov. 10, 2010)
Oral argument: Jan. 11, 2012

Daniel Coleman was denied medical leave by his employer, the Maryland Court of Appeals. Soon after the denial, he was terminated from his job, and he sued the state of Maryland under the Family and Medical Leave Act (FMLA). Coleman argues that the FMLA provisions for medical leave should be considered together as a unified effort against gender discrimination that permits state employees to sue state employers under the self-care provision. In addition, Coleman argues that the FMLA's purpose of preventing gender discrimination abrogates state immunity. Maryland argues that the FMLA's provisions address different forms of discrimination and should be examined individually. Maryland contends that state immunity under the Eleventh Amendment bars lawsuits against a state employer under the self-care provision of the FMLA. This case will clarify the scope of state exposure to employment lawsuits seeking money damages under the FMLA. Full text is available at www.law.cornell.edu/supct/cert/10-1016. **TFL**

Prepared by Meredith Carpenter and Charlotte Davis. Edited by Natanya DeWeese.

Holder v. Gutierrez (10-1542) and Holder v. Sawyers (10-1543)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (Jan. 24, 2011)
Oral argument: Jan. 18, 2012

In these two cases, the Supreme Court will determine whether aliens may impute their parents' time spent lawfully residing in the United States to satisfy residency requirements for cancellation of removal under § 1229b. In both cases, the aliens entered the United States as children; lived with their parents who were legal permanent residents; and later became inadmissible because of violations of the law. Holder argues that the plain language of § 1229b does not allow imputation and that allowing imputation would be contrary to congressional intent. On the other hand, Gutierrez and Sawyers contend that Congress passed the Immigration and Nationality Act to preserve family unity. They argue that interpreting the statute to disallow imputation would be unreasonable and contrary to congressional intent. If the Supreme Court upholds the imputation rule, aliens who resided with their parents who are legal permanent residents would be able to impute their parents' residency period to satisfy the requirements for cancellation of removal under § 1229(b). Full text is available at www.law.cornell.edu/supct/cert/10-1542. **TFL**

Prepared by Amy Hsu and Alison Skaife. Edited by Natanya DeWeese.

Kappos v. Hyatt (10-1219)

Appealed from the U.S. Court of Appeals for the Federal Circuit (Nov. 8, 2010)
Oral argument: Jan. 9, 2012

Gilbert Hyatt initiated a civil action under 35 U.S.C. § 145 against David Kappos, the director of the U.S. Patent and Trademark Office, after the Patent and Trademark Office's Board of Patent Appeals and Interferences sustained rejections for 79 of Hyatt's claims. The district court disregarded new evidence presented by Hyatt, because he failed to present such evidence before the Patent and Trademark Office when it was available, and granted Kappos summary judgment. The Federal Circuit initially affirmed the district court's ruling but later reversed it. Kappos argues that § 145 affords Hyatt only a deferential review, and new evidence can be introduced only if such evidence becomes available after Patent and Trademark Office proceedings. Hyatt counters that § 145 authorizes the district court to decide patent application de novo and generally allows introduction of new evidence. The Supreme Court's decision will clarify the procedure for judicial review of the patent application process. Full text is available at www.law.cornell.edu/supct/cert/10-1219. **TFL**

Prepared by Amanda Hellenthal and Chuan Liu. Edited by Eric Schulman.

Knox v. Service Employees International Union, Local 1000 (10-1121)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (Dec. 10, 2010)
Oral argument: Jan. 10, 2012

California's nonunion state employees sued their collective bargaining agent, alleging that the imposition of an additional agency fee assessment used to fund political actions without notice or an opportunity to object violated their rights under the First, Fifth, and Fourteenth Amendments. The district court granted summary judgment in favor of the nonunion employees. On appeal, the Ninth Circuit reversed. The nonunion employees now appeal. The Supreme Court will determine what disclosures unions must provide when imposing additional agency fees on nonmembers and to what extent unions can use nonmembers' wages to fund expenditures without first obtaining consent. Full text is available at www.law.cornell.edu/supct/cert/10-1121. **TFL**

Prepared by Heather Byrne and Judah Druck. Edited by Jacqueline Bendert.