No. ___

IN THE

Supreme Court of the United States

MINORITY TELEVISION PROJECT, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents,

and

LINCOLN BROADCASTING CO.,
Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Walter E. Diercks
RUBIN, WINSTON, DIERCKS, HARRIS & COOKE, LLP
1201 Connecticut Avenue
Suite 200
Washington, DC 20036

E. Joshua Rosenkranz
Counsel of Record
Robert M. Loeb
Brian D. Ginsberg
Nicholas F. Lenning
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioner

QUESTIONS PRESENTED

1. In 1969, this Court held in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), that the First Amendment permits the government to restrict the speech of broadcasters in ways that this Court would never tolerate in other media. This Court based the distinction on the view that at the time, only broadcasters—and only a handful of broadcasters, at that—could reach American families in their living rooms. Now millions of speakers can reach American families in their living rooms, and just about everywhere else, with almost unlimited audio-visual content. Should this Court overrule *Red Lion*'s outdated rationale for diminishing the First Amendment protection of broadcasters?

2. At a minimum, in light of this Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), applying strict scrutiny to bans on paid political messages that are "broadcast," does strict scrutiny apply to laws prohibiting broadcasters from transmitting paid political messages?

3. Consistent with the prevailing approach in the courts of appeals, does a ban on speech fail intermediate scrutiny if the only evidence before Congress supposedly linking the ban to the interest that the government seeks to advance consists of guesswork lacking any concrete factual support?

CORPORATE DISCLOSURE STATEMENT

Minority Television Project, Inc. does not have a parent corporation. No publicly held corporation owns 10 percent or more of Minority Television Project's stock.

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The Ninth Circuit's panel opinion, published at 676 F.3d 869, is reprinted at Pet. App. 83a-144a. The order granting en banc rehearing, published at 704 F.3d 1009, is reprinted at Pet. App. 81a-82a. The court's en banc opinion, published at 736 F.3d 1192, is reprinted at Pet. App. 1a -80a.

JURISDICTION

The Ninth Circuit issued its en banc opinion on December 2, 2013. Pet. App. 2a. On February 24, 2014, Justice Kennedy extended the time for filing a petition for a writ of certiorari to March 17, 2014. Accordingly, this Court has jurisdiction. 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution is reprinted at Pet. App. 266a. Section 399b of title 47 of the U.S. Code, which codifies § 1231 of the Omni-

[1] We use "Pet. App." for the Petition Appendix and "E.R." for the Excerpts of Record in the court of appeals.

bus Budget Reconciliation Act of 1981, is reprinted at Pet. App. 264a-65a.

STATEMENT OF THE CASE

The world has changed dramatically since 1969. In the Vietnam era, top television ratings went to *Doris Day*, not *Duck Dynasty*. Back then, the color television was a novelty and high-powered computers, using tape reels and punch cards, filled up an entire room. Today, people carry the same computing power, and color video screens, in their pockets and manipulate inputs with their fingertips. Back then, conventional over-the-air broadcasting was the only way to reach the American family in their living room with audiovisual content on news or public affairs. And technology at the time permitted only a limited number of stations to harness the airwaves effectively. Now, innumerable speakers can reach American families in their living rooms, and just about everywhere else, with almost unlimited audiovisual content on public affairs, news, and everything else imaginable.

That dramatic change is central here. In 1969, in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), this Court invoked the "scarcity" of conventional over-the-air broadcasting opportunities to hold that the First Amendment permits the government to regulate broadcasters more intrusively than all other speakers. But *Red Lion*'s premise is now profoundly wrong. Conventional over-the-air broadcasters no longer control access to Americans' eyes and ears. And in any event, there are exponentially more broadcasters now than ever before. The need

for intrusive government regulation, if it ever existed, has long expired. This Court should update broadcasters' First Amendment rights to reflect this current—and vastly different—reality, and hold that strict scrutiny applies to restrictions on broadcast speech.

Stating that it was bound by this Court's precedent, the Ninth Circuit below applied *Red Lion*'s intermediate scrutiny to a congressional ban on certain types of paid messages. It did so despite the fact that the restraint at issue banned core political speech. Moreover, the court below blessed the ban even though the record before Congress contained nothing more than speculation as to whether the restraint would advance the government's asserted interest.

Red Lion *And The "Scarcity" Of Available Mass Communication Opportunities*

The First Amendment provides that "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I. Accordingly, this Court has "appl[ied] the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

"The text of the First Amendment makes no distinctions among print, broadcast, and cable media." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 812 (1996) (Thomas, J., concurring in the judgment in part). Yet, in 1969, the

Court in *Red Lion* decided that a substantially lower level of scrutiny applied to the medium of conventional over-the-air television and radio broadcasting. 395 U.S. at 388-89.

In *Red Lion*, the Court confronted the FCC's "fairness doctrine." *Id.* at 369. The fairness doctrine required broadcasters, if they aired one side of a newsworthy, controversial issue, to cover all sides. *Id.* A broadcaster challenged this requirement under the First Amendment. *Id.* at 370-71. The Court rejected the challenge because of the unique role that conventional over-the-air broadcasting played at the time, and the technological shortcomings that encumbered it. *Id.* at 400-01.

In 1969, when it came to mass audiovisual communications, broadcasting was essentially the only option, and it was fraught with practical difficulties. Broadcasting involves the transmission of electromagnetic waves through the air at certain frequencies. *See id.* at 387-88. The electromagnetic spectrum, as its name suggests, is a continuum. *See* Uday A. Bakshi & Atul P. Godse, *Analog Communication* § 1.3 (2d ed. 2009). And as such, strictly speaking, just like a piece of string can be forever chopped into smaller and smaller pieces, the spectrum can be subdivided into an infinite number of frequencies. *Id.* But the Court observed that, as a practical matter, "the state of commercially acceptable technology" at the time created a "scarcity of radio frequencies" that broadcasters could use at any one time. 395 U.S. at 388, 390. One significant limitation was that broadcasters could not at the same time use frequencies that were very close together,

because "the problem of interference [wa]s a massive reality." *Id.* at 388; *id.* ("[O]nly a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had.").

Against this backdrop, the Court in *Red Lion* thought it "idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.* The Court found "nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and … to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." *Id.* at 389.

Subsequently, the Court elaborated that *Red Lion* had established an intermediate level of scrutiny for content-based regulation of broadcast speech. The government need only show that the restraint is "narrowly tailored to further a substantial governmental interest." *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 380 (1984) (citing *Red Lion*, 395 U.S. at 377).

Today's Unlimited Opportunities For Transmitting Audiovisual Content

Today's media landscape would be unrecognizable to an observer in 1969. The American family is inundated with audiovisual content. Anyone with an internet connection can reach them at little cost, for example by launching a podcast or starting a

YouTube channel. Few, if any, are truly "barred from the airwaves." *Red Lion*, 395 U.S. at 389. Moreover, conventional over-the-air broadcasting is not even the most common means of transmitting traditional broadcast programming. Conventional over-the-air broadcast television has largely been overtaken by pay-television distributors. Cable companies, like Comcast, distribute hundreds of stations by cable. Telephone companies, like Verizon, do the same on fiber optic lines. Companies like DIRECTV do it by satellite. All these businesses face increasing competition from online video distributors, like Netflix, Amazon, and Hulu, delivering traditional television programming through the internet.

Also, conventional over-the-air broadcasting itself has become much more spectrum-efficient, making broadcast opportunities much less scarce. Digital data compression techniques now allow television broadcasters to transmit multiple different programs simultaneously using the same slice of bandwidth that could have accommodated only one channel in the *Red Lion* days. The Vietnam War era "problem of interference," 395 U.S. at 389, is a thing of the past.

But even though mass communication outlets are abundant in today's world, this Court has yet to extend broadcasters full First Amendment protection. Instead, it continues to permit Congress and the FCC to restrain broadcasters' speech on the same old rationale. *See, e.g.*, *Prometheus Radio Project v. FCC*, 652 F.3d 431, 464 (3d Cir. 2011), *cert. denied sub nom.*, *Tribune Co. v. FCC*, 133 S. Ct. 64, 64 (2012); *CBS, Inc. v. FCC*, 453 U.S. 367, 395-96

(1981); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 794-95 (1978).

Congress Limits The Speech Rights Of Public Broadcasters

This case involves speech restrictions imposed by Congress on public broadcasters. These restrictions apply to television stations affiliated with the Public Broadcasting System. But they also apply to independent stations like Petitioner Minority Television Project's licensee KMTP. KMTP is a San Francisco television station dedicated to multicultural community programming. It is the nation's second African-American-owned public television station, and the only such station that is community controlled.

Since its inception, public broadcasting has faced financial hardships. To cover their costs, public broadcasters have occasionally accepted paid advertising. And organizational and structural constraints that tie public stations to their educational missions have helped prevent such broadcasters from revising their programming to cater to potential advertisers rather than the communities the broadcasters serve. For example, the FCC found that, from 2000 to 2002, KMTP aired almost 2,000 commercials advertising the goods and services of for-profit companies. Pet. App. 252a-53a. Yet no one has ever suggested that KMTP has deviated from its mission of "multicultural diversity": "through information, education and the arts[,] bringing significant programming to underrepresented groups in addition to broader audience in the San Francisco Bay Area." KMTP, *Connecting People, Cultures, and the*

World in the Digital Landscape, http://www.kmtp.tv/about.html (last visited Mar. 17, 2014). Accordingly, the notion of selling limited advertising time to keep public broadcast stations afloat has garnered support not only from broadcasters themselves but from members of Congress (including a former chairman of the House Subcommittee on Communications), the National Education Association, and other educational groups. *The Communications Act of 1979: Hearings on H.R. 3333 before the Subcomm. on Commc'ns of the Comm. on Interstate and Foreign Commerce*, Vol. I, pt. 1, 96th Cong. 2, 136-37 (1979); 78 Cong. Rec. 8828-32 (May 15, 1934).

Yet, in 1981, Congress passed a law prohibiting public broadcasters from airing certain kinds of paid messages. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1231, 95 Stat. 483, 731 (1981). That provision, which became § 399b of the Public Broadcasting Act, prohibits paid "message[s] or other programming material" that "promote any service, facility, or product offered by any person who is engaged in such offering for profit"—but permits identical such messages paid for by non-profits. *Id.* Section 399b also prohibits core political speech—messages that "express the views of any person with respect to any matter of public importance or interest" or that "support or oppose any candidate for political office"—if the broadcaster accepts consideration in return. *Id.*

By its terms, as to all of the speech it prohibits, § 399b extends well beyond the 30-second advertisements that are familiar to us all. It prohibits

substantive, paid political messages by any political candidate or advocacy group. Such paid political messages are barred whether they are 30-second spots or half-hour air-time purchases. It also means that a station like KMTP cannot run a debate between two political candidates (like it wanted to do during the 2008 presidential primaries) if their campaigns defray any part of the station's costs.

While § 399b bars paid political messages, it allows non-profits to purchase time to tout their goods or services, even where doing so delivers a political message. For example, a public station cannot air a non-profit abortion clinic's paid issue message on abortion rights, but it can air the same clinic's paid advertisement for abortion services. *See, e.g.*, E.R. 98-99. The station cannot air National Rifle Association ("NRA") advertisements urging viewers that "A Free People Ought To Be Armed," but it can air spots selling NRA bumper stickers displaying precisely that message.

Along with § 399b, Congress launched a pilot program authorizing certain public broadcasters to engage in limited paid advertising and creating the Temporary Commission on Alternative Financing for Public Telecommunications ("Temporary Commission") to study the results. Pub. L. No. 97-35 § 1233, 95 Stat. at 733-34. The broadcasters were permitted to air any sort of product advertisements they wanted so long as they did not interrupt programming and obeyed other temporal restrictions. *Id.* The Temporary Commission confirmed what prior experience had demonstrated, reporting that "[t]he participating stations appear to have made

programming decision independent of advertiser interest." Temporary Commission, *Final Report* 20 (Oct. 1, 1983). "[C]arriage of limited advertising … did not influence the program selection process." *Id.* Nevertheless, Congress never relaxed the restrictions in any way.

The Ninth Circuit Sustains The Speech Restrictions

After finding that Minority Television Project had aired programming material that § 399b's ban prohibited, the FCC imposed a forfeiture order, which Minority Television Project paid. Pet. App. 214a-30a. Challenging that order, and seeking to enjoin the FCC from prohibiting Minority Television Project from airing similar such programming material in the future, the station filed a complaint against the government raising a First Amendment challenge to § 399b. E.R. 176-77. The district court rejected the challenge. Pet. App. 146a-98a. In sustaining § 399b, the court relied in part on a report by an economics professor and a declaration by the manager of a public television station, "neither of which was considered by Congress." *Id.* at 158a.

Ninth Circuit Panel. A Ninth Circuit panel reversed in part, upholding § 399b's ban on paid messages, except to the extent that it covered paid political messages about candidates and issues. Pet. App. 83a-144a. As to paid messages generally, the panel, bound by *Red Lion*, explained that it was constrained to apply intermediate scrutiny, under which the government must prove that the "statute is 'narrowly tailored to further a substantial governmental

interest.'" *Id.* at 94a (quoting *League of Women Voters*, 468 U.S. at 380). The panel recognized that "much has changed in the media landscape since the Supreme Court … first adopted a standard that treats broadcasters differently under the First Amendment." *Id.* at 95a. But "just as golfers must play the ball as it lies, so too we must apply the law of broadcast regulation as it stands today." *Id.* On that basis, it upheld the restrictions on commercial advertising. *Id.* at 106a.

The panel started by observing that "the government has a substantial interest in ensuring high-quality educational programming on public broadcast stations," a point Minority Television Project did not dispute. *Id.* at 108a. But, as to political messages (about both candidates and issues), the panel found "no *evidence* in the record—much less evidence which was in the record *before Congress*—to support Congress's specific determination that public issue and political advertisements impact the programming decisions of public broadcast stations to a degree that justifies the comprehensive advertising restriction at issue here." *Id.* at 117a.

The panel also held that "[t]he fact that Congress chose not to ban *all* advertisements, but left a gap for certain non-profit advertisements, is also fatal to its case." *Id.* at 121a. This was because "there is no reason to think that public issue and political advertisers have any *greater* propensity to seek large audiences [and thus potentially pollute the character of public broadcasting] than do non-profit advertisers." *Id.* at 123a.

Judge Noonan wrote a concurring opinion further highlighting the government's evidentiary deficiencies. *Id.* at 126a-30a. He observed that "[w]hat Congress had before it were educated guesses by persons familiar with the media," "not … evidence but predictions." *Id.* at 127a. And it was inappropriate to fill that gap with "evidence [that] has not been provided to Congress," such as the economics professor's report and the station manager's declaration. *Id.* Judge Paez dissented, because he would have upheld § 399b in its entirety. *Id*. at 130a-45a.

En Banc Review. Characterizing this as a case "of exceptional importance," the government petitioned for en banc review. En Banc Pet. at 1. The Ninth Circuit granted rehearing en banc and issued a decision upholding § 399b in its entirety. Pet. App. 1a-48a. The en banc majority credited the government's post-enactment evidence and found that § 399b's speech ban was narrowly tailored to the goal of preserving the character of public broadcasting. *Id.* at 31a-46a.

Judge Callahan dissented from the majority's decision to uphold the ban on paid political messages. *Id.* at 48a-49a.

Chief Judge Kozinski, joined by Judge Noonan, dissented from the majority opinion in its entirety. *Id.* at 49a-82a. They believed that § 399b should be reviewed under strict scrutiny. *Id.* at 79a. Given "the state of technology today," *Red Lion*'s "rationale has been hollowed out as if by termites," they observed. *Id.* at 79a-80a. "The only way to reach mass audiences in those days was through the broadcast

spectrum." *Id.* at 52a. That is no longer true in today's world of abundant "viable alternative means of communication." *Id.* Moreover, since 1969, "the broadcast spectrum has vastly expanded." *Id.* at 77a. Spectrum scarcity "no longer exist[s]." *Id.* at 79a.

Chief Judge Kozinski's dissent observed, however, that § 399b "doesn't pass muster under any kind of serious scrutiny," including intermediate scrutiny. *Id.* at 4a. The government's evidence, he found, was nothing more than "a bunch of talking heads bloviating about their angst" concerning the theoretically possible effects that advertising could have on public broadcasting. *Id.* at 60a. "[N]o one paid any attention to the obvious differences between non-profit and commercial entities, and how they respond to market incentives …." *Id.* at 65a-66a. Public broadcasters "have charters and other organizational constraints that tie them to their mission," yet "[n]one of those who presented 'evidence'—better characterized as Chicken Littleisms—about the calamitous effects of allowing commercial (and political and issue) advertising on public broadcasting took the slightest account of these structural constraints." *Id.* at 62a, 65a. And the dissent observed that the Temporary Commission's advertising program affirmatively demonstrated that the object of the "angst" expressed by the "talking heads" likely would never materialize. *Id.* at 67a-70a.

The dissent also found no evidence to support the "curious line" Congress drew between prohibited and protected speech. *Id.* at 53a. "No one explains why political and issue ads are dangerous, if adver-

tising for non-commercial entities (including product ads) isn't." *Id.* at 55a. "The legislation forbids non-profit organizations from advertising about matters of public concern or candidates for public office," but not "from advertising themselves and the services they offer." *Id.* at 56a.

REASONS FOR GRANTING THE PETITION

This Court should grant review for three reasons. *First*, 45 years of profound technological advancements have eviscerated the core scarcity rationale this Court adopted in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1965) to justify using only intermediate scrutiny to review restraints on broadcast speech. *Second*, the bar on paid political messages cannot be reconciled with this Court's holdings that mandate application of strict scrutiny to restrictions on political speech on conventional over-the-air broadcast. *Third*, this Court should resolve the conflict among the circuits as to whether evidence beyond speculative prognostications is required in order to pass intermediate scrutiny, and as to whether such evidence must come from the record before Congress rather than post-hoc.

I. THIS COURT SHOULD RECONSIDER *RED LION* IN LIGHT OF TECHNOLOGICAL CHANGE THAT HAS UNDERMINED ITS SCARCITY RATIONALE.

The government has relied on *Red Lion* to regulate broadcasters' speech in ways (like § 399b's restriction) that would never pass muster in any other context. Whatever merit *Red Lion* had in 1969, the

"quaintly archaic" scarcity rationale cannot be sustained today. Pet. App. 77a (Kozinski, C.J., dissenting). Judges and scholars have been urging this Court to overrule the rationale for decades. The time has long since come for this Court to restore the full measure of First Amendment protection to broadcasters, like Minority Television Project.

A. The Scarcity Rationale Is No Longer Valid.

When this Court "plucked broadcast stations out of the mainstream of First Amendment jurisprudence in 1969," *id.* at 52a (Kozinski, C.J., dissenting), it recognized from the start that its rationale had a limited shelf life. It premised its holding on "the present state of commercially acceptable technology" as of 1969. *Red Lion*, 395 U.S. at 388; *see Meredith Corp. v. FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987). The Court obviously understood that innovations could make spectrum scarcity irrelevant, by developing means of communication that do not use the spectrum, or could alleviate scarcity by using the spectrum more efficiently. It was evident from the start that if these innovations materialized, the applicable level of constitutional scrutiny would have to be re-examined. In 1973, less than five years after *Red Lion*, Justice Douglas—who was recused in *Red Lion*—made the point, observing that "[s]carcity may soon be a constraint of the past." *CBS, Inc. v. DNC*, 412 U.S. 94, 158 n.8 (1973) (Douglas, J., concurring).

Now, 45 years after *Red Lion*, scarcity is a relic. "[T]he state of commercially acceptable technology" for transmitting messages to the masses has ad-

vanced light-years, such that "the world of communications look[s] vastly different." Pet. App. 52a (Kozinski, C.J., dissenting). Broadcasters simply do not have the same unique access to American living rooms that they once had. In today's world, unlike in 1969, few people, if any, are "barred from the airwaves." *Red Lion*, 395 U.S. at 389.

To start, conventional over-the-air broadcasting is no longer the only, or even the most popular, way to transmit audiovisual content to the masses. The internet has revolutionized communications. The U.S. population of about 315 million has about 400 million high-speed broadband internet subscriptions. Organization for Economic Cooperation and Development, *Broadband Statistics* (Jan. 9, 2014), http://www.oecd.org/sti/broadband/1c-TotalBBSubsbars-2013-06.xls (last visited Mar. 17, 2014). Anyone using those subscriptions—100 million of which are for wired connections that do not even implicate the spectrum, *id.*—can tap into the internet's "relatively unlimited, low-cost capacity for communication of all kinds." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). They can transmit audiovisual content to the masses with just a few clicks. They can launch podcasts. Dean Johnson, *Do-It-Yourself Broadcasting Comes to iPod*, Boston Herald, Dec. 23, 2004, at 49. They can create YouTube channels—of which there are currently over 500 million. Mat Honan. *YouTube Re-Imagined: 505,347,842 Channels on Every Single Screen*, Wired, Aug. 15, 2012, http://www.wired.com/gadgetlab/2012/08/500-million-youtube-channels/all/ (last visited Mar. 17, 2014). In the internet age, "any person with a [connection] can become a town crier with a voice that resonates

farther than it could from any soapbox." *Reno*, 521 U.S. at 871.

Moreover, "traditional broadcast television and radio are no longer the 'uniquely pervasive' media forms they once were" even for "traditional broadcast media programming." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 533 (2009) (Thomas, J., concurring). Satellite television multichannel video programming distributors ("MVPDs") like DIRECTV deliver hundreds of national channels of content to homes across the country. *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 28 F.C.C.R. 10,496, 10,503, 10,507, ¶¶ 18, 27 (2013) ("*Report on Video Competition*"). Cable MVPDs like Comcast do, too. *Id.* at 10,503, 10,505-07, ¶¶ 18, 23-26. So do high-speed fiber-optic services like Verizon FiOS. *Id.* at 10,503, 10,507-08, ¶¶ 18, 28. And MVPDs also deliver over 5,000 public-access channels nationwide that focus exclusively on issues related to local communities. *Id.* at 10,525, ¶ 59. Pay television itself has created an abundance of content-transmission opportunities. There is "overwhelming evidence concerning … the entry of new competitors at both the programming and the distribution levels" of the pay-television marketplace. *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009); *id.* ("[T]here has been a dramatic increase both in the number of cable networks and in the programming available to subscribers.").

Television is now on the internet, too. Broadcast networks like CBS and Fox use their own websites to make their shows available online. *Report on Video*

Competition, 28 F.C.C.R. at 10,608, ¶ 225. Local stations do so and cable networks do too. *Id.* at 10,608, ¶ 226. About 86% of all full-power commercial television stations operate a website on which they stream video content. *Id.* at 10,589, ¶ 191.

Networks also partner with online video distributors ("OVDs") like Netflix, Amazon, and Hulu to distribute their programs. *Id.* at 10,500, ¶¶ 9-11. Many OVDs create and distribute their own original dramas and comedies, too, like Netflix's wildly popular *House of Cards*. *Id.* at 10,610-11, ¶ 231.

In light of all these new outlets, under 10% of American television households rely solely on over-the-air broadcasting to receive television programming. *Id.* at 10,592-93, ¶ 198. MVPDs, which boast 100 million subscriptions, *id.* at 10,556, ¶ 30, and OVDs, which rack up over 180 million unique viewers per year, *id.* at 10,640, ¶ 293, have taken over.

Even apart from all these additional outlets, the capacity of over-the-air broadcasting "has vastly expanded." Pet. App. 77a (Kozinski, C.J., dissenting). As the inventor of the cell phone has observed, "[t]echnological progress has doubled the amount of available radio spectrum for telecommunications every 30 months since 1897." Martin Cooper, *The Myth of Spectrum Scarcity* 2 (2010), http://dynallc.com/wpcontent/uploads/2012/12/themy thofspectrumscarcity.pdf (last visited Mar. 17, 2014). Back in 1969, conventional over-the-air broadcasting used analog transmission technology. *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 293 (D.C. Cir. 2003) (Roberts, J.). Now, by congressional command, it is

entirely digital. DTV Delay Act, Pub. L. No. 111-4, § 2, 123 Stat. 112, 112 (2009). Digital television facilitates "more efficient use of … electromagnetic spectrum," permitting broadcasters to transmit as much as four times "more information over a channel of electromagnetic spectrum than is possible through analog broadcasting." *Consumer Elecs. Ass'n*, 347 F.3d at 293. Nationwide, there are now more than 10 times as many over-the-air television broadcast stations as there were when this Court decided *Red Lion*. *Compare* FCC, *Broadcast Station Totals as of December 31, 2013*, http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0108/DOC-325039A1.pdf (last visited Mar. 17, 2014), *with* FCC, *Broadcast Station Totals for December 1968*, http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-302125A1.pdf (last visited Mar. 17, 2014). That tight-packing also has diminished the interference problem that concerned the Court in *Red Lion*. The "switch from analog to digital transmission … allow[s] the FCC to 'stack broadcast channels right beside one another along the spectrum'" such that they all come in loud and clear. *Fox Television Stations*, 556 U.S. at 533 (Thomas, J., concurring) (quoting *Consumer Elecs. Ass'n*, 347 F.3d at 294).

There is now a surplus of over-the-air television broadcast spectrum. A former FCC Chief Economist has concluded that now only 17% of available over-the-air television broadcast spectrum is being used. Thomas W. Hazlett, *Unleashing the DTV Band: A Proposal for an Overlay Auction* 6 (Dec. 18, 2009), http://apps.fcc.gov/ecfs/document/view?id=7020353683 (last visited Mar. 17, 2014). So much has been ly-

ing fallow that Congress ordered the FCC to auction off chunks of that bandwidth, Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3003, 111 Stat. 251, 265-66 (1997), and the FCC has done so repeatedly, *see, e.g.*, *Auction of 700 MHz Band Licenses Closes*, 23 F.C.C.R. 4572 (2008); *Auction of Lower 700 MHz Band Licenses Closes*, 20 F.C.C.R. 13,424 (2005); *Lower 700 MHz Band Auction Closes*, 18 F.C.C.R. 11,873 (2003); *Lower 700 MHz Band Auction Closes*, 17 F.C.C.R. 17,272 (2002); *700 MHz Guard Bands Auction Closes*, 16 F.C.C.R. 4590 (2001); *700 MHz Guard Bands Auction Closes*, 15 F.C.C.R. 18,026 (2000). And Congress very recently ordered the FCC to do so once again. Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6403(a)-(c), 126 Stat. 156, 225 (2012).

The President's Council of Advisors on Science and Technology summed it up succinctly: Any claimed "shortage of spectrum is in fact an illusion." President's Council of Advisors on Science and Technology, *Report to the President: Realizing the Full Potential of Government-Held Spectrum to Spur Economic Growth* vi (2012). Chief Judge Kozinski was exactly right when he concluded below that *Red Lion*'s "rationale—whatever its merits at the time—no longer carries any force." Pet. App. 52a. It is "not justified by the state of technology today," and the core of its reasoning has "been hollowed out as if by termites." *Id.* at 79a-80a.

B. *Red Lion* Has Received Withering Criticism From Every Corner.

Chief Judge Kozinski is hardly alone in criticizing *Red Lion* and its progeny. Several Justices of this Court have expressed doubt over the continuing validity of *Red Lion*'s scarcity rationale. *See, e.g.*, *Fox Television Stations*, 556 U.S. at 534 (Thomas, J., concurring) (stating that the "dramatic changes in factual circumstances might well support a departure from precedent under the prevailing approach to *stare decisis*" and welcoming "reconsideration of *Red Lion*"); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 813 (1996) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring and dissenting in part) (explaining that the scarcity doctrine was "dubious from [its] infancy"); Elena Kagan, *Remarks at the 1995 Libel Conference of the Newspaper Association of America, National Association of Broadcasters, and Libel Defense Resource Center* (Sept. 21, 1995) ("[D]id the scarcity rationale ever make sense with respect to broadcasting?"); *see also FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2321 (2012) (Ginsburg, J., concurring in the judgment) ("In my view, the Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) [in which the Court permitted the government to regulate broadcasters more intrusively than other media because it found that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans"] was wrong when it issued. Time[] [and] technological advances … show why *Pacifica* bears reconsideration.").

The D.C. Circuit has been urging this Court for three decades to reconsider the scarcity rationale for diluting broadcasters' First Amendment rights. *See, e.g., Telecomms. Research & Action Ctr. v. FCC*, 801 F.2d 501, 507-09 (D.C. Cir. 1986). The court has subjected the scarcity doctrine to "intense criticism." *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 877 n.3 (D.C. Cir. 1999) (internal quotation marks omitted); *see, e.g., Time Warner Entm't Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (per curiam) (Williams, J., joined by Edwards, C.J., Silberman, D. Ginsburg, and Sentelle, JJ., dissenting from denial of rehearing en banc); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) (en banc) (Edwards, C.J., dissenting) ("[I]t is no longer responsible for courts to apply a reduced level of First Amendment protection ... on the indefensible notion of spectrum scarcity."); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 682-83 (D.C. Cir. 1989) (Starr, J., concurring). Other appellate judges have joined the chorus. *See, e.g., Ark. AFL-CIO v. FCC*, 11 F.3d 1430, 1443 (8th Cir. 1993) (en banc) (R. Arnold, C.J., concurring in judgment) ("[T]he legal landscape has changed enough since that time to produce a different result.").

In the scholarly community, "[d]issatisfaction with *Red Lion* has spawned an academic cottage industry." Jim Chen, *Conduit-Based Regulation of Speech*, 54 Duke L.J. 1359, 1403 & n.310 (2005) (citing more than a dozen articles criticizing *Red Lion*).

There is scarcely a more thoroughly discredited decision currently on the Court's books.

C. Congress And The FCC Have Repeatedly Signaled Their Abandonment Of The Scarcity Rationale.

In *League of Women Voters*, this Court acknowledged that "[t]he prevailing rationale for broadcast regulation based on spectrum scarcity ha[d] come under increasing criticism." 468 U.S. at 376 n.11. But rather than restore the rights it had taken away in *Red Lion*, this Court encouraged Congress or the FCC to give the Court "some signal … that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *Id.* Their signals against the scarcity rationale are unmistakable.

The FCC has confirmed that it has "provide[d] the Supreme Court with the signal referred to in *League of Women Voters*." *In re Syracuse Peace Council*, 2 F.C.C.R. 5043, 5053, ¶ 65; *id.* at 5051, ¶ 55 n.151 (1987) (finding that "the increase in the number of media outlets available to the public … discredits the claim of numerical scarcity in the electronic media"); *id*. at 5053, ¶ 65 (concluding that "the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press"). It "has unequivocally repudiated spectrum scarcity as a factual matter." *In re the Personal Attack and Political Editorial Rules*, 13 F.C.C.R. 21,901, 21,940 (1998) (separate statement of Commissioners Powell & Furchtgott-Roth); John W. Berresford, FCC Media Bureau Staff Research Paper, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has*

Passed 18 (2005) ("By no rational, objective standard can it still be said that, today in the United States, channels for broadcasting are scarce.").

Congress, too, has clearly signaled that it no longer subscribes to the scarcity rationale. In the Telecommunications Act of 1996, for example, it ordered the FCC to relax and repeal certain of its media-ownership rules—rules created before and during the 1970s that were designed to prohibit consolidation and promote diversity in ownership and grounded on the theory that broadcast opportunities were in short supply. Pub. L. No. 104-104, § 202(a)-(g), 110 Stat. 56, 112 (1996). And it directed the FCC to conduct periodic aggressively deregulatory reviews of whatever media-ownership restrictions remained, "determin[ing] whether any of such rules are necessary in the public interest as the result of competition" and "repeal[ing] or modify[ing]" them accordingly. *Id.* § 202(h), 110 Stat. at 112. The D.C. Circuit has said that this mandate can be "likened to Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.')." *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1044 (D.C. Cir. 2002).

Congress sent yet another signal in 1993, when it authorized the FCC to allocate new licenses for particularly valuable spectrum uses by competitive auction, as opposed to by engaging in the content-based applicant-by-applicant comparisons thought necessary in the spectrum-scarce days of *Red Lion*. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 312, 387-88 (1993). And since 1997, it has outright ordered the FCC to

do so. *See, e.g.*, 47 U.S.C. § 309(j)(1); Pub. L. No. 112-96, § 6405, 126 Stat. at 230; DTV Delay Act, Pub. L. No. 111-4, § 5, 123 Stat. 112, 114 (2009); Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 3003(b), 120 Stat. 4, 22 (2006); Pub. L. No. 105-33, § 3002(a)(1)(A), (E), 111 Stat. at 258. Moreover, Congress plainly does not believe that there is a scarcity of conventional over-the-air broadcast opportunities today, because, as explained above (at 19-20), it has ordered the FCC to auction off precisely that spectrum for other uses (which the FCC has done and continues to do).

Congress and the FCC could scarcely have been clearer in rejecting the need to guard against scarcity of broadcast spectrum. Thus, there is no valid excuse or reason to allow *Red Lion* to persist. And, this case, where *Red Lion* is being used to justify a ban on paid political messages and rules that favor the speech of non-profits over for-profit entities, provides the perfect vehicle for re-examining the ongoing vitality of *Red Lion*.

D. The Scarcity Doctrine Reduces Speech, As This Case Demonstrates.

This Court in *Red Lion* made assurances that "if experience … indicates that" the rules sustained by the scarcity rationale "have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." 395 U.S. at 393. Experience has shown precisely that as to the fairness doctrine. As the FCC later observed, the fairness doctrine actually "chill[ed]" speech, "operate[d] as a

pervasive and significant impediment to the broadcasting of controversial issues of public importance," and, in particular, inhibited the expression of unpopular opinion. *In re Inquiry into Section 73.190 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 145, 169, 188-90, ¶¶ 42, 69-71 (1985).

Experience revealed the speech-reducing effect of the scarcity doctrine once again with respect to Congress's ban on editorialization by public broadcasters that this Court considered in *League of Women Voters*. In that case, the Court held that "the public's 'paramount right' to be fully and broadly informed on matters of public importance through the medium of noncommercial educational broadcasting is not well served by the restriction, for its effect is plainly to diminish rather than augment 'the volume and quality of coverage' of controversial issues." 468 U.S. at 399 (quoting *Red Lion*, 395 U.S. at 393).

The same is true of § 399b. Obviously, the ban reduces speech—including paid political candidate and issue messages. Even in the commercial context, § 399b restricts speech in a blatant content- and speaker-based manner. For example, a public broadcaster cannot air a paid advertisement touting the state-of-the-art medical care available at a for-profit hospital, but the public broadcaster can take the same money to air that same commercial so long as the hospital is a not-for-profit.

Moreover, it does not just reduce what might be thought of as "advertising speech." It harms sub-

stantive programming in a tangible way. For example, a public broadcaster, such as KMTP, could not air a political debate if the participating candidates defrayed any portion of the cost. *See also* Temporary Commission, *supra*, at 20-21 ("In several cases, advertising revenues permitted stations to acquire specific programs that they otherwise could not have afforded to purchase.").

In addition to that direct and immediate reduction in speech, § 399b's advertising ban will have the effect of reducing speech in the longer term. This is because it deprives public broadcasters of a critical potential source of basic operating revenue. And while most public broadcasters are affiliated with the government-created and -funded Corporation for Public Broadcasting, and as such can count on the federal government year after year to supply as much as a third of their operating budget, U.S. Gov't Accountability Office, GAO-07-150, *Structure and Funding of Public Television* 31 (2007), independents like KMTP cannot. Small, minority-focused public broadcasters like KMTP, which receive no federal funds, will be the ones that suffer most and the ones that are most likely to have to shutter their doors.

That presents a particularly acute irony here. KMTP prides itself on broadcasting an array of diverse, multicultural programming, the kind that would not get produced if stations like KMTP did not produce it. And that type of broadcasting diversity is exactly what this Court in *Red Lion* hoped that the scarcity rationale would *promote*. The Court's avowed goal was to have a communications marketplace in which broadcasters "present those views and

voices which are representative of [the] community." 395 U.S. at 389. Here, though, by impeding KMTP from covering its operating costs, the scarcity doctrine will have succeeded in undermining that diversity. It will operate to increase the likelihood that those views are "barred from the airwaves." *Id.*

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S CASES PRESCRIBING STRICT SCRUTINY FOR ALL BANS ON POLITICAL SPEECH, INCLUDING IN THE BROADCAST CONTEXT.

There is an urgent need to have this Court repudiate the court of appeals' application of *Red Lion* to political speech. Under this Court's more recent precedent, it is clear that political speech, even in the realm of broadcast media, cannot be banned by a government agency or Congress without meeting the highest levels of constitutional scrutiny. Absent this Court's intervention, governmental restraints banning paid political messages will continue to persist. Such rules run contrary to the very purposes of the First Amendment and cannot be allowed to stand.

In *McConnell v. FCC*, 540 U.S. 93 (2003), a challenge to a provision of the Bipartisan Campaign Reform Act ("BCRA") that prohibited corporations and unions from using their general treasury funds to finance "electioneering communications." 2 U.S.C. § 441b(b)(2), (3)(A). The statute defined "electioneering communications" to include "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and meets other, technical criteria. *Id.* § 434(f)(3)(A)(i).

The challengers argued that this ban violated the First Amendment. *McConnell*, 540 U.S. at 204.

Recognizing that the provision burdened political speech, the Court applied strict scrutiny to all the communications in question. *See id.* at 205-07. It did not distinguish "broadcast … communications" from "cable[] or satellite communications." As to all political communications, it "examine[d] the degree to which BCRA burdens First Amendment expression and evaluate[d] whether a compelling governmental interest justifies that burden." *Id.* at 205. The Court "ruled that BCRA survives strict scrutiny to the extent it regulates express advocacy"—language explicitly calling for the election or defeat of a particular candidate—"or its functional equivalent." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 465 (2007) ("*WRTL*") (controlling opinion of Roberts, C.J.) (citing *McConnell*, 540 U.S. at 206).

The Court applied strict scrutiny to the same provision once again in *WRTL*. The plaintiff there was a corporation that "began broadcasting .. radio advertisement[s]" that, while mentioning members of Congress who were up for election, were not (at least not clearly) directed at influencing the election. *Id.* at 458-59, 470. The plaintiff argued that the statutory prohibition could not constitutionally be applied to its ads. Even though the ads were *broadcast over the air*, *id.* at 458-89, this Court held that because the prohibition "burdens political speech, it is subject to strict scrutiny," *id.* at 464 (citing *McConnell*, 540 U.S. at 205). The Court held that the provision could not satisfy strict scrutiny and "is

unconstitutional as applied to WRTL's … ads." *Id.* at 481.

Particularly relevant here is the final link in the chain: *Citizens United v. FEC*, 558 U.S. 310 (2010), where the Court applied strict scrutiny to the same provision once more—this time striking the provision down entirely. The Court started with the proposition that "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" 558 U.S. at 340 (quoting *WRTL*, 551 U.S. at 464). Finding that "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations," the Court held the provision invalid. *Id.* at 365.

The Court went out of its way to note that there was no constitutional difference between "movies shown through video-on-demand"—which were at issue there—and "television ads" on "conventional television." *Id.* at 326. The Court found it improper "to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech." *Id.*

In all three of these cases, the Court applied strict scrutiny to the statute's restraint on political speech—including its coverage of "broadcast" and "satellite" speech, both of which make use of the electromagnetic spectrum. This Court did not for a moment consider *Red Lion* a valid basis to water down the First Amendment protection of core politi-

cal speech, even though that broadcasting spectrum was implicated in each case. As the Court summed up in *Citizens United*, "[l]aws that burden political speech are 'subject to strict scrutiny.'" 558 U.S. at 340 (quoting *WRTL*, 551 U.S. at 464). Period.

The court of appeals violated this central tenet in refusing to apply strict scrutiny to § 399b's ban on paid political messages that "express the views of any person with respect to any matter of public importance or interest," as well as those that "support or oppose any candidate for political office." Such political messages are core First Amendment speech. *Buckley v. Valeo*, 464 U.S. 1, 14 (1978). After all, "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the systems of government established by our Constitution." *Id.*

The Ninth Circuit's deviation from this Court's precedents is even starker because § 399b not only burdens political speech, but disfavors particular speakers in the process. It discriminates between broadcasters and speakers that use other media: Public broadcast stations may not air paid political messages, but cable stations, internet sites, and newspapers all may—even if they have a public-service mission. Section 399b also discriminates among broadcasters: While public broadcasters cannot air those political messages, private commercial broadcasters can. This all flouts *Citizens United*'s holding that, when it comes to political speech, "restrictions distinguishing among different speakers, allowing speech by some but not others" not only im-

plicate strict scrutiny, but are "[p]rohibited." 558 U.S. at 340.

As discussed above, not only does the decision prevent public broadcasters from tapping into a potentially critical source of revenue to help keep the lights on, but it directly prohibits them from airing programming that falls within the heartland of their community-education mission. Political debates, deep issue investigations, and more are off limits simply if any of the program participants help offset the cost. This Court's immediate intervention is needed to allow public broadcasters to zealously and completely fulfill their educational goals.

Thus, this Court should grant review and hold that *Citizens United* applies with full force to regulations of political speech in the broadcast context. Only by making this seemingly ineluctable conclusion explicit can this Court allow public broadcasters to fully serve the public.

III. THE DECISION BELOW DEEPENS MULTIPLE CIRCUIT CONFLICTS CONCERNING THE APPLICATION OF INTERMEDIATE SCRUTINY.

The proper course is for this Court to grant this petition and overrule *Red Lion* in full. But if *Red Lion* is to persist, there is a vital need for this Court to resolve the circuit conflict regarding how intermediate scrutiny applies in the realm of First Amendment speech rights. As the Ninth Circuit's decision demonstrates, the courts of appeals are all over the map and are in urgent need of this Court's guidance.

This Court has set the ground rules. When intermediate scrutiny applies to a speech restriction, the government must prove "that the restriction is narrowly tailored to further a substantial governmental interest." *League of Women Voters*, 468 U.S. at 380. In a case like this, where the ban "appears to restrict precisely that form of speech which the Framers of the Bill of Rights were most anxious to protect—speech that is 'indispensable to the discovery and spread of political truth'—[courts] must be especially careful in weighing the interests that are asserted in support of th[e] restriction and in assessing the precision with which the ban is crafted." *Id.* at 383 (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). At the end of the day, "the question is whether the legislative conclusion was reasonable and *supported by substantial evidence*." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 211 (1997) ("*Turner II*") (emphasis added).

This Court emphasized that not just any evidence will do, and that such evidence cannot be post hoc. It must have actually been considered by Congress. The support must include "substantial evidence *in the record before Congress*." *Id.* (emphasis added); *see also id.* at 208 ("The issue before us is whether … Congress had substantial evidence for making the judgment that it did.").

A. The Circuits Disagree Over What Quantum Of Evidence Is Required.

This Court has instructed that "a governmental body seeking to sustain a restriction [even] on com-

mercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). That burden "is not satisfied by mere speculation and conjecture," *id.* at 770, or by "anecdotal evidence and educated guesses," *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995). In a case like this one, the rule restricting speech must be based upon "specific support," such as "contemporaneous stud[ies]" and "[e]mpirical research." *Turner II*, 520 U.S. at 197, 202-03, 208; *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001) (invalidating restriction on commercial speech where the government "did not 'carefully calculat[e] the costs and benefits associated with the burden on speech imposed' by the regulations," even though the government adduced numerous empirical studies and extensive market data to support its judgment (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993))).

There is, however, a conflict among the circuits as to how to carry out this Court's intermediate scrutiny mandate. At least three circuits properly require the government to point to concrete facts in the record before Congress or the agency restricting speech, and not simply instinct, to demonstrate both the governmental interest and that the restrictions on speech are narrowly tailored. The Second Circuit recognizes that "[w]here the predictions of harm [sought to be remedied by the regulation] are proscriptive, the government cannot rely on assertions, but must show a basis in fact for its concerns." *Harman v. City of N.Y.*, 140 F.3d 111, 122 (2d Cir. 1998). The Fifth Circuit has struck down speech

regulations grounded in "'common sense,' not data or empirical evidence." *Bailey v. Morales*, 190 F.3d 320, 324 (5th Cir. 1999). The Sixth Circuit finds insufficient mere "common sense," even when it "clearly indicates that a particular speech regulation will directly advance the government's asserted interest." *Pagan v. Fruchey*, 492 F.3d 766, 774 (6th Cir. 2007) (en banc). The Seventh Circuit does, too, insisting on "evidence" justifying legislative line-drawing. *Pearson v. Edgar*, 153 F.3d 397, 404 (7th Cir. 1998) (striking down a ban on real estate solicitation as "[s]evere[ly] underinclusive[]" where there was no "evidence that real estate solicitation poses a particular threat to residential privacy" above and beyond "other types of solicitation" which the ban did not cover); *see also R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1219 (D.C. Cir. 2012) (invalidating the FDA's graphic labeling warning requirement for tobacco products because, despite mountains of scientific and economic evidence and years of government and international wisdom regulating tobacco products, the record lacked "evidence showing that such warnings have *directly caused* a material decrease in smoking rates").

Had the Ninth Circuit applied the approach embraced by those circuits, the outcome here would have been different, both as to the ban on paid goods-and-services advertisements and the ban on paid political messages. The government pointed only to "general concerns"—"[s]tray comments, unsupported by facts"—"about insulating public television from a variety of influences." Pet. App. 55a. None of the government's evidence "took the slightest ac-

count of … structural constraints" that "tie [public broadcasters] to their mission." *Id.* at 62a, 65a.

Nor did the government point to any evidence supporting the "curious line" between what § 399b prohibits and what it allows. *Id.* at 53a. No evidence justifies the line that "forbids non-profit organizations from advertising about matters of public concern or candidates for public office" but permits them to "advertis[e] themselves and the services they offer." *Id.* at 56a. The law impermissibly "distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 195 (1999). And, as the Ninth Circuit en banc majority candidly admitted, it "'clearly inverts the hierarchy of constitutional protections of speech'" by elevating commercial speech (specifically that by non-profits) above core political speech. Pet. App. 39a (quoting Brief for Minority Television Project at 38).

The Ninth Circuit is not alone, in allowing the government to satisfy intermediate scrutiny via little more than such hand-waving. The Fourth Circuit, for example, has held that under intermediate scrutiny, whenever a government recites a rationale for regulation that is "well-accepted" as a general matter, "its evidentiary burden falls at the bottom of th[e] spectrum." *Ctr. for Ind. Freedom v. Tennant*, 706 F.3d 270, 283 (4th Cir. 2013).

B. The Circuits Disagree On Where The Government Must Draw Its Supporting Evidence From.

This Court could not have been clearer. When it comes to intermediate scrutiny, "the question is whether the legislative conclusion was … supported by substantial evidence in the record before Congress." *Turner II*, 520 U.S. at 211. Even the government has agreed. Brief for Respondents FCC and United States of America at 23, *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010).

The Sixth, Tenth, and D.C. Circuits properly recognize that the government's proof must include "'substantial evidence in the record before Congress.'" *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 521 (6th Cir. 2012) (quoting *Turner II*, 520 U.S. at 211); *Golan v. Holder*, 609 F.3d 1076, 1090 (10th Cir. 2010) (same), *aff'd* 132 S. Ct. 873 (2012); *Time Warner Entm't Co., L.P. v. United States*, 211 F.3d 1313, 1322 (D.C. Cir. 2000) (same).

The Ninth Circuit below, however, placed near-dispositive reliance upon a report by an economics professor and a declaration by the manager of a public television station, neither of which was in the record before Congress. Indeed, the en banc majority relied almost exclusively on these documents for its conclusion that "[t]he goals of § 399b cannot 'be fully satisfied by less restrictive means that are readily available.'" Pet. App. 43a-45a (quoting *League of Women Voters*, 468 U.S. at 395).

This Court should grant review here to resolve these circuit conflicts and hold that intermediate scrutiny has real teeth and requires real substantial evidence in the record before Congress, and adequate consideration of that evidence, before the government can compromise free speech rights.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Walter E. Diercks
RUBIN, WINSTON, DIERCKS, HARRIS & COOKE, LLP
1201 Connecticut Avenue
Suite 200
Washington, DC 20036

E. Joshua Rosenkranz
Counsel of Record
Robert M. Loeb
Brian D. Ginsberg
Nicholas F. Lenning
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

March 17, 2014

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MINORITY TELEVISION PROJECT, INC., *Plaintiff-Appellant*, v. FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA, *Defendants-Appellees*, and LINCOLN BROADCASTING COMPANY, *Intervenor*.	No. 09-17311 D.C. No. 3:06-cv-02699-EDL OPINION

Appeal from the United States District Court for the Northern District of California
Elizabeth D. Laporte, Magistrate Judge, Presiding

Argued and Submitted En Banc
March 19, 2013 – San Francisco, California

Filed December 2, 2013

Before: Alex Kozinski, Chief Judge, and John T. Noonan, Barry G. Silverman, M. Margaret McKeown, Kim McLane Wardlaw, William A. Fletcher, Ronald M. Gould, Marsha S. Berzon, Johnnie B. Rawlinson, Consuelo M. Callahan and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge McKeown; Partial Concurrence and Partial Dissent by Judge Callahan; Dissent by Chief Judge Kozinski

SUMMARY*

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Public Television

The en banc court affirmed the district court's summary judgment in favor of the government in an action brought by a public television broadcaster challenging, on First Amendment grounds, 47 U.S.C. § 399b, which prohibits public radio and television stations from transmitting paid advertisements for for-profit entities, issues of public importance or interest, and political candidates.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Applying intermediate scrutiny, the court upheld the advertising ban as constitutional. The panel concluded that substantial evidence before Congress supported the conclusion that the advertising prohibited by § 399b posed a threat to the noncommercial, educational nature of noncommercial educational programming and that additional evidence bore out Congress's predictive judgment in enacting § 399b. The court held that the government has substantial interest in imposing advertising restrictions in order to preserve the essence of public broadcast programming. The court further held that § 399b's restrictions were narrowly tailored to the harms Congress sought to prevent and that the restrictions left untouched speech that did not undermine the goals of the statute.

The court rejected the assertion that the § 399b was overinclusive because it prohibited political and issue advertising and underinclusive because it permitted advertising by non-profit entities. Finally, the court affirmed the district court's dismissal of the as-applied challenges to § 399b and its challenges to the related regulation, 47 C.F.R. § 73.621(e), on the grounds that jurisdiction over challenges to Federal Communication Commission orders lies exclusively in the court of appeals; as such, federal district courts lack jurisdiction over appeals of such orders.

Concurring and dissenting, Judge Callahan stated that she concurred in the

majority's opinion only insofar as it upholds 47 U.S.C. § 399(b)'s prohibition against paid advertisements by for-profit entities. She dissented from the majority's acceptance of § 399(b)'s prohibition of advertisements on issues of public importance or interest and for political candidates.

Dissenting, Chief Judge Kozinski, with whom Judge Noonan joined, stated that would strike down as unconstitutional the statute and corresponding regulations that prohibit public broadcast stations from carrying commercial, political or issue advertisements. Chief Judge Kozinski stated that the evidence presented by the government in support of these speech restrictions doesn't pass muster under any kind of serious scrutiny, and that even if intermediate scrutiny applies there is simply not enough there to satisfy a skeptical mind that the reasons advanced are rational, let alone substantial.

COUNSEL

Walter Elmer Diercks (argued), Rubin Winston, Diercks, Harris & Cooke, LLP, Washington, D.C.; John L. Fitzgerald, Pinnacle Law Group, San Francisco, California, for Plaintiff-Appellant.

Mark B. Stern (argued) and Samantha L. Chaifetz, Attorneys, Appellate Staff, United States Department of Justice, Civil Division,

Washington, D.C.; Joseph P. Russoniello, United States Attorney; Tony West, Assistant Attorney General; Austin C. Schlick, General Counsel, Jacob M. Lewis, Acting Deputy General Counsel, Joel Marcus, Attorney, and Maureen K. Flood, Attorney, Federal Communications Commission, Washington, D.C., for Defendants-Appellees.

Joyce Slocum and Gregory Allan Lewis, National Public Radio, Inc., Washington, D.C.; Katherine Lauderdale and Thomas Rosen, Public Broadcasting Service, Arlington, Virgina, for Amici Curiae National Public Radio, Inc., and Public Broadcasting Service.

OPINION

McKEOWN, Circuit Judge:

Public television—a fixture of American life for decades—has showcased Masterpiece Theater, PBS NewsHour, children's programs such as Sesame Street and Curious George, and many more audience favorites. The hallmark of public broadcasting has been a long-standing restriction on paid advertising to minimize commercialization. In a classic case of "follow the money," Congress recognized that advertising would change the character of public broadcast programming and undermine the intended distinction between commercial and noncommercial broadcasting.

Public broadcast radio and television stations are regulated by federal statute. Under 47 U.S.C. § 399b, public stations are prohibited from transmitting paid advertisements for for-profit entities, issues of public importance or interest, and political candidates. These restrictions were adopted to minimize commercialization of public broadcast stations, also known as noncommercial educational ("NCE") stations because they are "used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service." 47 C.F.R. § 73.621.

Minority Television Project ("Minority TV"), a public television broadcaster, challenges the advertising restrictions as facially unconstitutional under the First Amendment. Applying intermediate scrutiny, as counseled by the Supreme Court in FCC v. *League of Women Voters*, 468 U.S. 364 (1984), we uphold the advertising ban as constitutional. We also affirm the district court's dismissal of Minority TV's as-applied challenges to § 399b and its challenge to the related regulation, 47 C.F.R. § 73.621(e).

BACKGROUND

I. NONCOMMERCIAL EDUCATIONAL STATIONS

For three-quarters of a century, the Federal Communications Commission ("FCC") has set aside broadcasting channels for noncommercial educational stations. *See* 3 Fed. Reg. 364 (Feb. 9, 1938) (reserving channels for NCE FM radio stations); *Sixth Report & Order*, 41 F.C.C. 148, 158-59 (1952) (reserving channels for NCE television stations); *see also* 47 U.S.C. § 303 (a)-(b) (authorizing the FCC to classify radio stations and "[p]rescribe the nature of the service to be rendered by each class of licensed stations"). The FCC explained that it was reserving a portion of the broadcast spectrum for NCE television stations because of "the important contributions which noncommercial educational television stations can make in educating the people both in school—at all levels—and also the adult public," and the "high quality type of programming" available on NCE stations—"programming of an entirely different character from that available on most commercial stations." *Third Notice of Further Proposed Rulemaking*, 16 Fed. Reg. 3072, 3079 (1951).

From the start, the FCC recognized that allowing NCE stations to "operate in substantially the same manner as commercial applicants" would not further its goal of ensuring high quality educational programming. 41 F.C.C. at 166 (1952). Initially, NCE stations were prohibited from airing any promotional content—even if it was unpaid—and were only permitted to identify program underwriters by

name. *See* 17 Fed. Reg. 4062 (1952); *Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, 86 F.C.C. 2d 141, 142, 154 (1981).

In response to concerns that this restriction was broader than necessary to achieve its purpose, the FCC embarked on an extensive notice and comment proceeding between 1978 and 1981. *See* 86 F.C.C. 2d at 141; *Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations,* 90 F.C.C. 2d 895, 909 (1982). The FCC undertook this effort "with an eye toward striking a reasonable balance between the financial needs of such stations and their obligation to provide an essentially noncommercial broadcast service." 86 F.C.C. 2d at 141. In crafting new rules, the FCC noted that its "interest in creating a 'noncommercial' service has been to remove the programming decisions of public broadcasters from the normal kinds of commercial market pressures under which broadcasters in the unreserved spectrum usually operate." *Id.* at 142. Cognizant of First Amendment concerns, the FCC stated that it was adopting "the minimum regulatory structure that preserves a reasonable distinction between commercial and noncommercial broadcasting." *Id.* at 144. At the end of lengthy deliberation, the FCC in 1981 set out a new, liberalized broadcast advertising framework.

Id. Later that year, after two days of hearings,[1] Congress essentially codified the FCC's new framework in 47 U.S.C. §§ 399a and 399b.[2]

Section 399b—the heart of this case—prohibits paid advertising, except for advertising for goods and services offered by non-profit organizations. An "advertisement" is defined as material transmitted in exchange for remuneration that is intended:

> (1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit;
>
> (2) to express the views of any person with respect to any matter of public importance or interest; or

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[1] *Hearings before the Subcomm. on Telecomms, Consumer Protection, and Finance of the H. Comm. on Energy and Commerce on H.R. 3238 and H.R. 2774*, 97th Cong. (hereinafter "H. Hgs."). H.R. 3238 ("The Public Broadcasting Amendments Act of 1981") was passed by the House, but § 399a and § 399b, along with the rest of the Public Broadcasting Amendments Act of 1981, were enacted as part of the Omnibus Budget Reconciliation Act of 1981. Pub. L. No. 97-35, 95 Stat. 357 (1981). We look to the legislative history of H.R. 3238 for the record before Congress when it entered § 399b.

[2] There were two minor differences between the FCC's framework and the enacted statutes. The FCC prohibited all goods and services advertising for which consideration was received, but § 399b prohibits such advertising by for-profit entities only. Section 399a also differs somewhat from the FCC's treatment of donor acknowledgments. 90 F.C.C. 2d at 901-02.

> (3) to support or opposed any candidate for political office.

§ 399b(a). Section 399b allows the airing of promotional content for which consideration is not received. Section 399a, which is not at issue here, permits the use of non-promotional identifying information in donor acknowledgments (for example, logograms and location information). This scheme has been the law for more than 30 years.

II. MINORITY TV PROCEEDINGS

Minority TV is the licensee of a noncommercial educational television station in San Francisco subject to the advertising restrictions in 47 U.S.C. § 399b and 47 C.F.R. § 73.621(e). After another broadcaster complained to the FCC about Minority TV's underwriting announcements, the FCC commenced a proceeding against Minority TV. The FCC's Enforcement Bureau found the Minority TV had broadcast announcements that violated § 399b and § 73.621(e) more that 1,911 times, and issued a Notice of Apparent Liability for Forfeiture in the amount of $10,000. 17 FCC Rcd. 15646 ¶¶ 30, 33 (2002). Minority TV's announcements were in exchange for consideration and on behalf of for-profit corporations such as Chevrolet, Ford, and Korean Airlines. *Id.* ¶ 14. The FCC found that the advertisements included improper

promotional language. *Id.* ¶¶ 9, 15. The FCC rejected nearly all of Minority TV's challenges and issued a forfeiture order for $10,000. 18 FCC Rcd. 26611 (2003). The FCC denied Minority TV's application for review and petition for reconsideration. 20 FCC Rcd. 16923 (2005); 19 FCC Rcd 25116 (2004).

Minority TV then filed in this court a petition for review of the FCC orders. After filing the petition, Minority TV paid the $10,000 forfeiture to the FCC in full. We transferred the case to district court.[3]

The district court dismissed Minority TV's challenges to the notice and the forfeiture order, its as-applied challenges to § 399b, and its facial and as-applied challenges to § 73.621(e) for lack of jurisdiction because the courts of appeals have exclusive jurisdiction to review FCC regulations and orders. 47 U.S.C. § 402(a). The court explained that § 504(a), the carve-out allowing district courts to review forfeiture orders, applied only to unpaid forfeiture actions. 47 U.S.C. § 504(a).

On cross-motions for summary judgment, the district court granted summary judgment

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[3] In transferring the case, we cited 47 U.S.C. § 504(a) and *Dougan v. FCC*, 21 F.3d 1488, 1490-91 (9th Cir. 1994), in which we held that "§ 504(a) vests exclusive jurisdiction in the district courts to hear enforcement suits by the government *and* suits by private individuals seeking to avoid enforcement." *Id.* (emphasis added).

for the FCC on Minority TV's facial challenges to § 399b. *Minority Television Project, Inc. v. FCC*, 649 F. Supp. 2d 1025, 1048 (N.D. Cal. 2009). Invoking the intermediate scrutiny test from *League of Women Voters*, the court held that the statute was "narrowly tailored to further a substantial government interest." *Id.* at 1042. The court pointed to the ample evidence before the Congress showing that "the advertising prohibitions were necessary to preserve the unique programming presented by public stations," *id.* at 1037, and to "additional material before the Court demonstrate[ing] that the legislative conclusions are supported by substantial evidence," *id.* at 1039. In addition, the court held that the statute was not unconstitutionally vague. *Id.* at 1048.

Minority TV appealed. The panel upheld the ban on for-profit goods and services advertising. Two members of the divided panel issued separate opinions striking down the statute's ban on issue and political advertising. *Minority Television Project, Inc. v. FCC*, 676 F.3d 869 (9th Cir. 2012). In dissent, Judge Paez determined that §§ 399b(a)(2) and (3) were neither "patently overinclusive [nor] underinclusive," and that there were no "'less restrictive means' to § 399b that [were] readily available.'" *Id.* at 893-95. (Paez, J., dissenting) (citation omitted). Unlike the panel majority, Judge Paez found substantial record evidence to support § 399b's narrow tailoring. *Id.* at 896-97. In an unpublished memorandum disposition,

the panel unanimously held that the district court correctly dismissed Minority TV's as-applied challenges to § 399b and its challenges to 47 C.F.R. § 73.621(e), and that § 399b was not unconstitutionally vague.[4] A majority of nonrecused active judges voted in favor of rehearing en banc. 704 F.3d 1009 (9th Cir. 2012).

ANALYSIS

I. FACIAL INTERMEDIATE SCRUTINY CHALLENGE TO § 399b

A. FRAMEWORK FOR ANALYSIS

1. Intermediate Scrutiny Test for Broadcast Regulation

The Supreme Court laid down the standard for evaluating the constitutionality of § 399b—intermediate scrutiny—in *League of Women Voters*. 468 U.S. at 380. That case involved a First Amendment challenge to a statutory provision forbidding all NCA stations that received grants from the Corporation for Public Broadcasting from "engag[ing] in editorializing." *Id.* at 366 (citing 47 U.S.C. § 399 (1980)). The Court declined to apply strict scrutiny even though the statute was content-based and "plainly operate[d] to restrict the expression of editorial opinion on matters of

[4] Minority TV did not appeal the district court's dismissal of its claims regarding the notice and the forfeiture order.

public importance"—a form of speech "entitled to the most exacting degree of First Amendment protection." *Id.* at 375-76. It explained that, "because broadcast regulation involves unique considerations, our cases have not followed precisely the same approach that we have applied to other media and have never gone so far as to demand that such regulations serve 'compelling' governmental interests." *Id.* at 376.

The Court struck down the ban on editorialization because it was not "sufficiently tailored to the harms it s[ought] to prevent to justify its substantial interference with broadcasters' speech." *Id.* at 392. In particular, the ban was "manifest[ly] imprecis[e]"—both "patent[ly] overinclusive[] and underinclusive[]." *Id.* at 392, 396. The government's substantial interest in ensuring that viewers did not think broadcasters' editorials reflected the views of the government could "be fully satisfied by less restrictive means that [were] readily available." *Id.* at 395.

Like the statute at issue in *League of Women Voters*, § 399b is a content-based broadcast regulation, and we may uphold the statute's restrictions on advertising only if we are satisfied that they are "narrowly tailored to further a substantial governmental interest." *Id.* at 380. In addition, because subsections (a)(2) and (a)(3) burden public issue and political speech, we must be "particularly wary in assessing [the statute] to determine whether it

reflects an impermissible attempt 'to allow a government [to] control . . . the search for political truth.'" *Id.* at 384 (quoting *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 538 (1980) (alteration in original)).

Minority TV urges us to adopt a strict scrutiny standard. We do not credit Minority TV's argument that *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010), overruled decades of precedent sub silentio—especially given that the Court there expressly overruled two other cases with no mention of *League of Women Voters* or an intent to change the level of scrutiny for broadcasting. *Citizens United* was not about broadcast regulation; it was about the validity of a statute banning political speech by corporations. Had *Citizens United* changed the standard for broadcast regulation, presumably the Supreme Court would have recognized as much two years later in *FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2320 (2012), rather than declining to address the broadcasters' claim that precedent providing for less rigorous scrutiny of broadcast regulation "should be overruled because the rationale of that case has been overtaken by technological change." The Supreme Court has not gone there and neither should we, absent a complete record on the subject and a change of direction by the Supreme Court. This case is not a suitable one

for such fundamental reconsideration of longstanding precedent.[5]

2. Scope of the Record

We are presented with an ample record to support § 399b, consisting both of evidence that was before Congress in 1981 and evidence before the district court that covered the period after enactment. Following the Supreme Court's lead, we look to "the evidence before Congress and then the further evidence presented to the District Court." *Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 196 (1996) (*"Turner II"*). As a matter of course, in multiple First Amendment cases, the Court has looked beyond the record before Congress at the time of enactment. *See*, *e.g.*, *League of Women Voters*, 468 U.S. at 387 & n.18, 390 & n.19, 392 n.21, 393 n.22 (looking to testimony before Congress as well as reports and other evidence following the statute's enactment), and *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 821–22 (2000) (faulting the government for failing to produce additional "probative evidence" to supplement the "near

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[5] We acknowledge that there has been considerable technological change in broadcasting, including the ubiquity of the Internet. However, a thoughtful examination of the impact of those changes on the use of broadcast spectrum, market segmentation, and the like can hardly occur on a record bare of evidence of the impact of technological change. Minority TV has offered nothing other than sound bite platitudes, and the dissent has offered nothing other than a series of newspaper articles, with the weight of such publications as ESPN Playbook and Variety.

barren legislative record" in applying strict scrutiny).

Congress enacted §§ 399a and 399b after a two-year FCC notice and comment proceeding, days of hearings, and a thoughtful committee report. Indeed, the record before Congress provides a sufficient basis to uphold the statute even without the supplemental evidence offered in the district court. This case "does not present a close call" requiring us to elaborate on what evidentiary burden Congress bears in enacting a law that implicates First Amendment rights. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 393 (2000); *see also Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 133 (1989) (Scalia, J., concurring) ("Neither due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote.").

It is clear, however, that Congress is "not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 666 (1994) ("*Turner I*"). We reject Minority TV's suggestions to the contrary. The dissent's insistence on "evidence" in the technical sense is misplaced. We are not abdicating to a congressional whim or succumbing to some notion that "judges like public radio and television," Dissent at 41, simply because we give credence to congressional findings. Pure

and simple, the dissent doesn't like what Congress found after considering extensive FCC administrative proceedings, holding its own hearings, and preparing a committee report. Congress is a political body that operates through hearings, findings, and legislation; it is not a court of law bound by federal rules of evidence. Ignoring fundamental principles of separation of powers, the dissent would rewrite the legislation, ignore the congressional evidence, and substitute pop culture and its own policy judgment for that of Congress.

In enacting §§ 399a and 399b, Congress made a prediction about the effects of underwriting announcements, logograms, and advertising on public broadcast programming. We must accord deference "to [Congress's] findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." *Turner II*, 520 U.S. at 196. Congressional concern and prognostication was well informed, but the information before Congress was necessarily limited because advertising had never been allowed on NCE stations. The First Amendment does not require Congress to wait for a feared harm to take place before it can act. Such a high bar would make little practical sense—it would tie Congress in knots and strip it of its ability to adopt forward thinking public policy. "Sound policymaking often requires

legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner I*, 512 U.S. at 665.

Apart from the evidence that was before Congress in 1981, the government presented significant additional evidence, including a 2007 report by the Government Accountability Office ("GAO") on public television; the report of the Temporary Commission on Alternative Financing for Public Telecommunications, which oversaw an experiment with limited advertising on public television; information about political advertising; an expert report from a Stanford University professor emeritus with over 40 years of experience in studying the economics of broadcasting and public television; and a declaration from a vice president of a foundation that operates numerous noncommercial educational radio and television stations.

We conclude that substantial evidence before Congress supported the conclusion that the advertising prohibited by § 399b posed a threat to the noncommercial, educational nature of NCE programming and that the additional evidence bears out Congress's predictive judgment in enacting § 399b. Minority TV's scant evidentiary showing reinforces this conclusion. *See Nixon*, 528 U.S. at 394 (noting that more extensive evidence might be required if the parties challenging the statute "had made

any showing of their own to cast doubt" on the evidence supporting it). Similarly, the dissent offers only speculation not substance for its view that permitting unfettered advertising wouldn't lead to distortion and perverse incentives. Poking holes in the congressional evidence is hardly a substitute for the scrutiny required of this court.

B. INTERMEDIATE SCRUTINY ANALYSIS OF SECTION 399B

We now turn to a more detailed analysis of whether § 399b is "narrowly tailored to further a substantial governmental interest." *League of Women Voters*, 468 U.S. at 380. Section 399b was enacted in 1981 against the backdrop of declining federal support for public broadcasting. Congress was acutely aware that public broadcasting needed new sources of revenue to survive, but it was also worried about undermining the essential nature of public broadcast programming. The FCC had just promulgated new, liberalized regulations that were "designed to further the important governmental interest in preserving the essentially noncommercial nature of public broadcasting *within a minimal regulatory framework* by insulating public broadcasters from commercial marketplace pressures and decisions." 90 F.C.C. 2d 895, 896 (1982) (statement by FCC Commissioner Washburn clarifying the impact of the Public Broadcasting Amendments Act on the recently issued

regulations) (emphasis in original). The FCC believed the liberalized advertising restrictions "satisf[ied] constitutional objections." *Id.* Congress agreed, and so do we.

1. Substantial Governmental Interest

Federal regulation of the broadcast spectrum, a scarce public resource, is entitled to more deferential First Amendment review than regulation of other types of media. *See Reno v. ACLU*, 521 U.S. 844, 868 (1997) (highlighting the "special justifications for regulation of the broadcast media that are not applicable to other speakers," including the "history of extensive Government regulation of the broadcast medium," "the scarcity of available frequencies at its inception," and "its 'invasive' nature") (citations omitted); *Turner I*, 512 U.S. at 637 (noting that the "justification for [the Court's] distinct approach to broadcast regulation rests on the unique physical limitations of the broadcast medium"). This deferential review is not strict scrutiny light, but instead requires us to benchmark the statute against the requirements of *League of Women Voters*, including the government's substantial interest. Section 399b's advertising restrictions speak directly to the government's substantial interest in maintaining the unique, free programming niche filled by public television and radio. That Minority TV does not contest the government's substantial interest in ensuring the diversity

and quality of public broadcast programming is no surprise. Nonetheless, it is useful to detail the nature and scope of the government's interest both as a prelude to and a basis for informing our narrow tailoring analysis.

The First Amendment rights of Minority TV and potential advertisers do not exist in a vacuum. The Supreme Court has recognized the public's right "to receive suitable access [through broadcast media] to social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broad*. Co. *v. FCC,* 395 U.S. 367, 390 (1969). "Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty," and "we must afford great weight to the decisions of Congress and the experience of the [FCC]." *Columbia Broad. Sys. v. Democratic Nat'l Comm*., 412 U.S. 94, 102 (1973).

In pursuit of its goal, the government set aside specific channels for noncommercial use, provided funding through the Corporation for Public Broadcasting and other means, and created special requirements and restrictions for NCE stations. *See, e.g.,* 47 U.S.C. §§ 303 (a)-(b), 394, 396, 399a, 399b; 47 C.F.R. § 73.503. However, the dissent fails to appreciate that section 399(b) is a central prong of these structural constraints and that they operate as a package to effectuate congressional intent.

The dissent's selective excision of a foundational principle of public television undermines the integrated legislative package and ignores the FCC's experience with public television. Section 399b does not stand alone; it is an important piece of a comprehensive scheme to promote programming that is differentiated from the typical commercial fare.

Numerous statutes and reports recognize the unique nature of NCE programming. For example, when the FCC first set aside television channels for noncommercial use, it pointed to "the important contributions which noncommercial educational television stations can make" and the "high quality type of programming" available on NCE stations—"programming of an entirely different character from that available on most commercial stations." *Third Notice of Further Proposed Rulemaking*, 16 Fed. Reg. 3072, 3079 (1951). In the Public Broadcasting Act of 1967, which, among other things, established the Corporation for Public Broadcasting, Congress found that "[i]t furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence, and which will constitute a source of alternative telecommunications services for all the citizens of the Nation." 47 U.S.C. § 396(a)(5). And in passing the Children's Television Act of 1990,

the Senate explained that "public television is the primary source of educational children's programming in the United States."[6] S. Rep. 101-66, at 7 (1989).

The unrebutted evidence before us documents that programming on public broadcast stations is markedly different from that on commercial stations. That was true in 1981 when Congress enacted § 399b, and it is true now. As the district court noted, "Congress did not write on a blank slate when it enacted Section 399b; rather, after a half-century of experience with public broadcasting, the record before Congress showed that public television and radio stations carry very different programming than do commercial stations." 649 F. Supp. 2d at 1036. For example, there was testimony before Congress that public radio allows "7 or 15 minutes to explore an issue, rather than being confined to the 30-60- and 90-second snatches common to commercial stations," provides "the only network for the blind," "gives you jazz live," and provides four hours of daily news of a different nature than that provided by commercial stations. H. Hgs.

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[6] Speaking before the Senate on this Act, Senator Wirth stated that "[t]he marketplace has simply failed to produce [educational children's programming] on its own, in large part because the advertiser-driven television industry does not find children's programming to be a particularly lucrative venture" and that "educational [children's] programs have literally disappeared from the airwaves on all but PBS stations." 136 Cong. Rec. 18241–18242 (daily ed. July 19, 1990).

at 323 (Walda W. Roseman, Senior Vice President, National Public Radio ("NPR")).

Stanford University Professor Emeritus Roger Noll, a government expert who has spent over forty years studying the economics of broadcasting and public television, presented evidence that "non-commercial stations offer statistically significantly more public affairs, children's and family programming, and statistically significantly less violent programming, than both affiliates of commercial networks and all other commercial stations." According to the Government Accountability Office, public broadcasters devote 16 percent of all program hours to educational children's programming,[7] compared to the 3.32 hours per week the average commercial broadcaster gives to such programming. Many NCE stations also broadcast instructional programming for adults, including GED preparation, community college telecourses, and professional growth programming for teachers and administrators. In addition, some public broadcast stations are the only source of local programming that is not related to news or sports.

The primary harm § 399b sought to prevent was the loss of the distinctive content of public broadcast programming. Congress heard from dozens of witnesses who testified, among other things, that "[c]ommercialization will

[7] Some NCE stations devote more than 40 percent of their weekday program hours to children's programming.

make public television indistinguishable from the new commercial or pay culture cable services," H. Hgs. at 149 (Larry Sapadin, Executive Director, Association of Independent Video & Filmmakers, Inc.), and that NCE-type programming "is just not possible with the commercial constraints of providing a commercial service," H. Hgs. at 323 (Walda W. Roseman, NPR). "All consumer and public interest group representatives" who testified "were concerned about what they viewed as a trend towards the commercialism of public broadcasting." H. R. Rep. No. 97-82, at 9 (1981).

One of the major themes in the evidence before Congress was that advertising distorts programming decisions because advertisers have something to sell—be it a product, message, or candidate—and they want to sell it to the largest audience possible. Representative Robert Matsui, a former member of the Communications Subcommittee, explained that the "principal thrust of commercial broadcasting . . . is controlled by its need to reach mass audiences in order to sell products. While this mass approach is definitely a valid purpose, commercial broadcasting is unable thereby to respond to the myriad of individual needs of any community. . . . It simply does not possess the programming flexibility to tailor shows to serve the numerous characteristics of each community." H. Hgs 30–31. Similarly, an article submitted to the House by the National Association of Educational Broadcasters

explained that public broadcasters "don't aim to amuse the lowest common denominator of the audience because we're not seeking the highest ratings possible. Because we don't carry ads. Because the law won't let us." H. Hgs. 226–27; *see also* H. Hgs. 129-30 (John C. DeWitt, American Found. for the Blind) (testifying that "commercialization of public broadcasting . . . run[s] the danger that [broadcasters] will focus on the lowest common denominator of programming" rather than on serving "diverse audiences" like minorities, women, and the print handicapped). One member of the House of Representatives summed up this concern: "Will the search for dollars compromise [public broadcasting's] creative genius? Will there be strings attached to the money that is given to public broadcasting so that the most courageous and needed programs are not funded for fear of controversy—or simply fear itself?" 127 Cong. Rec. 13148 (June 22, 1981) (Rep. Waxman).

The commercialization Congress feared was not restricted to typical commercial business advertising. Rather, Congress was worried about the commercialization of public broadcasting itself: the selling of airtime. *See, e.g.*, H. Hgs. 71 (Senator Wirth describing how the "selling of time" would transform public broadcasting by leading stations to make programming decisions based on their calculations of the advertising value of shows); *see also* H. Hgs. 149 (the Executive Director of the Association of Independent Video &

Filmmakers, Inc., emphasizing that "[s]elling makes its own demands").

Congress heard testimony about the need to protect public broadcasting from all special interests whose advertising dollars could affect programming decisions. *See* H. Hgs. 112 (Jack Golodner, Director, Department for Professional Employees, AFL-CIO) ("[I]f public broadcasting is to perform its role . . . , then sufficient public funding must be made available so that to the furthest extent humanly possible, it is insulated from political, corporate, and, for that matter, labor influence."). The record shows that Congress was concerned with "insulat[ing] public broadcasting from special interest influences—political, commercial, or any other kind." 127 Cong. Rec. 13145 (1981) (Rep. Gonzales); *see also* H.R. Rep. No. 97-82, at 16 (1981) (listing as a criterion for alternative financing mechanisms the "insulation of program control and content from the influence of special interests—be they commercial, political or religious").

Evidence before the district court reinforces the congressional view that if advertising were allowed, programming would "follow the money," changing the nature of public broadcast programming. The research cited by Noll is consistent with much of the testimony before Congress, and it bears out Congress's predictive judgment that advertising would change the face of public broadcasting.

Noll explained that commercial broadcasting suffers from a "market failure" in that a "competitive, advertiser-supported television system leads to an emphasis on mass entertainment programming with insufficient attention to programs that serve a small audience, even if that audience has an intense desire to watch programs that differ from standard mass entertainment programs." According to Noll, in order to attract advertising dollars, NCE stations would have to change their programming to be more like that on commercial stations—programming that advertisers prefer because it attracts large audiences.

The diversity and quality of programming on public broadcast stations stems both from the restrictions on advertising and from the incentives created by the existing funding structure. Funding for NCE stations comes from federal, state, and local subsidies; donations from viewers; and program underwriters including corporations, foundations, and other entities. Noll explained that, "[b]ecause the viability of public television stations depends on attracting donations, stations are motivated to offer programs that encourage voluntary contributions from the communities that they serve."

Lance Ozier, the Vice-President for Planning and Policy of the WGBH Educational Foundation, detailed that funding from federal

and state government sources as well as foundations and other not-for-profit underwriters would be jeopardized if NCE stations were permitted to air paid advertisements. Ozier stated that the loss of funding would not be restricted to those stations who chose to air advertisements: "Every public station would face the consequences generally of a perceived deviation from the public education mission."

In 2007, the GAO reported that many of the public television licensees with whom it spoke opposed greater underwriting flexibility. The large majority that opposed greater underwriting flexibility said that it "would not generate increased underwriting revenues, since corporations and advertisers desire programming with high ratings and a targeted demographic," "would upset viewers and contribute to a decline in membership support," "could threaten a licensee's ability to receive financial support from a state government," and "would be inconsistent with the mission of public television and could alter programming decisions."

The upshot of the evidence—starting with the FCC study, buttressed during congressional hearings, and reinforced by additional evidence before the district court—is that the government has a substantial interest in imposing advertising restrictions in order to preserve the essence of public broadcast programming.

2. Narrow Tailoring

With this substantial interest in mind, the next question in our intermediate scrutiny analysis is whether the law is "narrowly tailored to further [that] substantial government interest." *League of Women Voters*, 468 U.S. at 380. Unlike strict scrutiny, intermediate scrutiny does not require that the means chosen by Congress be the least restrictive. *See Turner I*, 512 U.S. at 662; *United Brotherhood of Carpenters & Joiners of Am. Local 586 v. NLRB*, 540 F.3d 957, 968 (9th Cir. 2008). As the Supreme Court succinctly noted in a commercial speech case, narrow tailoring requires "a 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Bd. of Tr. of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) (citation omitted).

Understanding the contrast between this case and the ban on editorialization in *League of Women Voters* is a useful starting point in the narrow tailoring analysis. *See* 468 U.S. at 393. That ban was patently overinclusive because it "include[d] within its grip a potentially infinite variety of speech" that was not related to the government's interests in protecting NCE stations from "being coerced . . . into becoming vehicles for government propagandizing or the objects of governmental influence." *Id.* at 393, 396. The restriction was also patently underinclusive. *Id.* at 396. Because the stations

remained "fully able to broadcast controversial views so long as such views [were] not labeled as [their] own," the ban did not effectively "reduce the risk of government retaliation and interference." *Id.* at 384–85. There was also evidence that some supporters of the bill were less concerned with the risk of government control of NCE stations than they were with protecting themselves from critical speech. *Id.* at 387 n.18 (quoting the provision's chief sponsor, who explained that some representatives "have very strong feelings because they have been editorialized against"). Finally, the government's interest in ensuring that audiences would not presume that broadcasters' editorials reflected official government views could have been easily satisfied by a less restrictive regulation requiring NCE stations to broadcast a disclaimer when they editorialized. *Id.* at 395. In short, there was very little fit between the ban and its stated purposes.

In contrast, § 399b's restrictions are narrowly tailored to the harms Congress sought to prevent. Having documented the link between advertising and programming, Congress reaffirmed the long-standing ban on advertising on NCE stations, but in a more targeted manner. In place of the prior absolute ban on promotional content, which swept within its reach a wide range of speech that did not pose a significant risk to public programming, Congress enacted targeted restrictions that

leave untouched speech that does not undermine the goals of the statute. The restrictions leave broadcasters free to air enhanced underwriting, which both the FCC and Congress determined did not pose the same risk to programming as advertisements. Broadcasters may air any promotional content for which consideration was not received. Finally, the statute permits non-profit advertisements. As to this latter category, the government offered evidence that non-profit advertisements, which are few in number and perceived by the public as consistent with the mission of public broadcasting, do not pose the same threat as other forms of advertising.

Section 399b's prohibitions are specifically targeted at the real threat—the influence of paid advertising dollars. Congress identified significant special interests that pump money into advertising, setting out three subsets of advertisers—typical for-profit businesses, political candidates, and advocacy groups. The term "advertisement" is defined by reference to these three subsets, which taken together have a single effect: to prevent the commercialization of public broadcasting by prohibiting nearly all advertising. Although the dissent proffers unsupported distinctions between political or issue advertisements and commercial advertisements they are not germane to the overall threat that Congress targeted: commercialization through advertising.

Unlike the ban on editorialization, which was underinclusive to the point of ineffectiveness, § 399b effectively "insulate[s] public broadcasting from special interest influences—political, commercial, or any other kind." 127 Cong. Rec. 13145 (1981). More than thirty years since § 399b was enacted, the continuing differences between public broadcasting and commercial broadcasting are a testament to the statute's success in promoting Congress's purpose. The government provided expert evidence that the "present system of financing public television is effective"—that it "improves diversity of programming" while "avoiding problems associated with advertisements." Minority TV's unsupported assertion that "399b's attempt to prevent the 'buying' of influence cannot possibly be effective" because "groups, entities, and individuals" can still "attempt to 'buy' influence" by making donations is not persuasive. Not only is there no evidence that donations affect programming; there is a huge difference between a donation and targeted advertising.

The dissent acknowledges the evidence before Congress and the district court, but offers its own theories of how to protect public broadcasting. Contrasting the actual evidence and the dissent's proposals illustrates the difference between the strict scrutiny standard that the dissent hoped we would apply and the intermediate scrutiny standard that we are bound to apply. We do not demand

mathematical precision from Congress; rather, we demand a "fit" between the ends and the chosen means. *Fox*, 492 U.S. at 480. The evidence in this case easily demonstrates a fit between section 399(b) and the substantial interest in protecting the essence of public broadcasting. Therefore, section 399(b) survives intermediate scrutiny on this prong of the analysis under *League of Women Voters*.

a. Overinclusiveness: Challenge to Issue and Political Advertising Restrictions

Minority TV essentially lets pass § 399b's restriction on for-profit goods and service advertising and focuses its attack on the political and issue advertising restrictions. This attack rests on a distinction without a difference. Congress was trying to prevent the commercialization of public broadcasting itself, not simply advertisements by commercial businesses.

Minority TV mistakenly attempts to equate congressional focus on commercialization with for-profit businesses; but this reading is at odds with congressional intent. Congress determined that the "insulation of program control and content from the influence of special interests—be they commercial, political or religious"—was necessary. *See* H.R. Rep.

No. 97-82, at 16 (1981). The government's evidence regarding the enormous sums spent on political advertising confirms Congress's prediction that, like advertising by for-profit entities, political advertising dollars have the power to distort programming decisions. In 2008 alone, political advertisers spent $2.2 billion. As the campaign season gets longer and longer, commercial television viewers are bombarded with political and issue advertising. Prohibiting only goods and services advertising and allowing issue and political advertising would have shifted incentives and left a gaping hole in § 399b's protections.

We recognize the special place political speech has in our First Amendment jurisprudence. *Morse v. Frederick*, 551 U.S. 393, 403 (2007) ("Political speech, of course, is 'at the core of what the First Amendment is designed to protect.'") (citation omitted). But there is no evidence that Congress was targeting political speech, critical speech or particular viewpoints as opposed to the programming influence exerted by advertising dollars. *Cf. League of Women Voters*, 468 U.S. at 387 n.18 (noting that some supporters of the ban on editorialization "appear to have been more concerned with preventing the possibility that these stations would criticize Government officials" than with the risk of undue government influence).

Each form of prohibited advertising poses a similar threat. Whether selling financial

services, a state senator, or a voter initiative, advertisers seek the largest possible audience. *See* H. Hgs. 149 ("The purpose of advertising is simply to sell—a product or an image. Selling makes its own demands.") (Larry Sapadin, Executive Director, Association of Independent Video & Filmmakers, Inc.). Advertisers also seek programming that is consistent—or at least not contrary to—their messages and values, or the values of their customers or constituencies. *See* Yoo, Christopher S., *Architectural Censorship and the FCC*, Regulation, vol. 28, issue 1 (2005), at 24 ("Anecdotal evidence suggests that some advertisers have discouraged networks from offering programming that addresses controversial issues or that casts their products in an unflattering light. In addition, reliance on advertising support leaves programmers vulnerable to the political biases of advertisers and special interest groups."). Finally, selling programs would essentially convert public broadcasting into commercial broadcasting. *See*, *e.g.*, H. Hgs. 71 ("If we get public broadcasting into the selling of time, how do we avoid then getting public broadcasting . . . into a very large commitment of their own to figure out what demographics they are touching or what the measurement is going to be able to be of that particular population, and how much X program sells for and how much Y program sells for?") (Sen. Wirth). It strains logic to suggest that advertisers would compete intensely to run ads for a state senator or a voter initiative on guns

or taxes during Sesame Street or Mister Rogers. Children are hardly the appropriate target audience.

Minority TV argues that more was needed before Congress could prohibit issue and political advertising. We disagree. Substantial evidence before Congress supported its determination that the selling of airtime to political and issue advertisers, as with for-profit advertisers, would distort programming decisions. As the Court observed in *Turner II* in rejecting the dissent's insistence that Congress was required to have more information before it could enact the cable must-carry legislation, that level of factfinding "would be an improper burden for courts to impose on the Legislative Branch." 520 U.S. at 213. "That amount of detail is as unreasonable in the legislative context as it is constitutionally unwarranted." *Id.* Congress's prophylactic action, based on common sense, congressional understanding of how political advertising works, and record evidence, did not need to await an empirical study to support its predictions. *See Turner I*, 512 U.S. at 665 ("Sound policymaking often requires legislatures to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable.").

Congress's determination that all three kinds of advertising posed a significant threat to

public programming is supported by substantial evidence, and Minority TV does not point to any evidence indicating that issue and political advertising are less likely to result in commercialization than corporate goods and services advertising. Its argument as to overinclusiveness doesn't pan out.

b. Underinclusiveness: Challenge to Permitting Advertising by Non-Profit Entities

Minority TV makes much of the fact that § 399b does not prohibit advertising by non-profit entities. It frames this as an argument that § 399b favors commercial speech—advertising by non-profits—over non-commercial speech—political and issue advertisements. Minority TV claims that the statute "clearly inverts the hierarchy of constitutional protections of speech." There is, however, a documented reason for exempting this tiny slice of advertising from the overall restrictions—non-profit advertising is a drop in the bucket money wise and this limited advertising has no programmatic impact.

Although the cases that Minority TV relies on for this argument concern newspaper racks and portable signs, the argument itself appears to come straight from the law of billboards. It is true that, with respect to

billboards, "an ordinance is invalid if it imposes greater restrictions on noncommercial than on commercial billboards." *Nat'l Adver. Co. v. Orange,* 861 F.2d 246 (9th Cir. 1988). But public broadcasting stations are not billboards, and broadcast regulations are not subject to the formulation for billboards, newspaper racks, or signs. "Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)).

Even if this longstanding distinction were cast aside, Minority TV's reliance on cases such as *Ballen v. Redmond*, 466 F.3d 736 (9th Cir. 2006), and *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), is misplaced. In *Ballen*, for example, the sign ordinance was ostensibly intended to promote safety and community aesthetics. Instead, the ordinance discriminated on the basis of content and the permitted signs created the same harms as the prohibited ones. This was a classic mismatch between the restriction and its stated purpose. Unlike the statute here, the ordinance in *Ballen* was not "a reasonable fit between the restriction and the goal[.]" 466 F.3d at 744. *Discovery Network* also underscored the same absence of "reasonable fit" because the ordinance was directed to such a "paltry" aspect of the purported problems posed by newspaper racks. 507 U.S. at 417–18.

To the extent that Minority TV is making an underinclusiveness argument—that § 399b is underinclusive because it does not prohibit goods and services advertising by non-profits—that attack also fails. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2668 (2011) (explaining that "[r]ules that burden protected expression may not be sustained when the options provided by the State are too narrow to advance legitimate government interests"); *see also Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1238–39 (10th Cir. 2004) ("The underinclusiveness of a commercial speech regulation is relevant only if it renders the regulatory framework so irrational that it fails materially to advance the aims that it was purportedly designed to further."). The statute in *League of Women Voters* was "patent[ly] . . . underinclusive[]" and "'provide[d] only ineffective or remote support for the government's purpose,'" whereas § 399b has been effective in meeting the government's asserted interest. 468 U.S. at 396 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980)). Allowing non-profit advertising has not thwarted § 399b's goals.

In promulgating its newly liberalized 1981 regulations, the FCC noted that "[m]any commenting parties were concerned with the proscription" on promoting the sale of products or services as applied to announcements made

on behalf of non-profit entities or the station itself. 86 F.C.C. 2d. at 144. The FCC addressed this concern by limiting the ban to announcements for which consideration was received. *Id.* at 148–49. Congress went one step further in narrowly tailoring the legislation, by allowing non-profit advertising for goods and services without regard to whether consideration was received.

Congress's prediction that non-profit advertising would not pose the same risk to public broadcasting as the restricted types of advertising is borne out by the record. Lance Ozier from the WGBH Educational Foundation explained that advertising by non-profit entities "do[es] not present the same danger" to public television as prohibited forms of advertising because (1) "viewers generally have seen messages from [non-profit] entities as being consistent with the public education mission of public television," so advertisements by non-profit entities "do not threaten traditional funding sources" like viewer donations and government grants, and (2) "there is a much smaller set of not-for-profit advertisers than there is of for-profit advertisers." Non-profit advertising sales are so small that they did not even register on the breakdown of public television revenue sources presented by the government. Indeed, there is only a single actual non-profit announcement in the record before us, and it is not one that Minority TV sought to broadcast. Non-profit advertising does

not pose the same threat as commercial, political, or issue advertisements in large part because the number of corporate advertisers dwarfs the number of potential non-profit advertisers. In the end, exempting non-profit advertising underscores, rather than undermines, Congress's narrow tailoring.

c. No Sufficient Less Restrictive Means

The goals of § 399b cannot "be fully satisfied by less restrictive means that are readily available." 468 U.S. at 395. Section 399b already is a less restrictive means of ensuring diverse, high quality programming on public broadcast stations than either the previous promotional prohibition or any attempt to directly regulate program content rather than advertising.[8] The latter approach would not only be less effective, it would open a different can of First Amendment worms.

Minority TV insists that time, place, and manner restrictions could achieve the same goals. Without any support as to correlation with Congressional goals, Minority TV blithely

[8] According to Roger Noll, "the regulatory approach—improving the content of programs by writing content rules—is not as effective as simply removing the commercial incentive by eliminating advertising and subsidizing the right kind of programs." For example, the poor outcomes of efforts to mandate educational and informational children's programming on commercial stations evidence the weakness of a content regulation approach.

suggests limiting the number of underwriting announcements or permitting advertising that doesn't interrupt programming and is limited in length. But that argument runs counter to the evidence. Lance Ozier concluded that NCE stations would "be forced to change [their] programming substantially . . . even if advertisements did not interrupt programming or if they were limited in length." Ozier explained that, "should public broadcasting be perceived as being 'commercial,'" NCE stations would have a harder time soliciting donations from viewers and might lose funding from federal and state government sources, foundations, and other not-for-profit underwriters. The stations could also experience increased costs by losing the beneficial treatment they currently receive in negotiating labor contracts and broadcast rights.

Minority TV also ignores the history of the Advertising Demonstration Program, an experiment authorized by the Public Broadcasting Act of 1981 that allowed advertisements on some public broadcast stations subject to the very restrictions Minority TV proffers—that the advertisements not interrupt programming and be limited in length. The Temporary Commission on Alternative Financing for Public Telecommunications ("the Commission"), which was charged with overseeing the experiment, concluded that "the benefit that some public broadcasting stations might gain additional revenues from the

authorization of limited advertising does not balance the potential risks identified in this report." Among the potential risks identified were those noted by Ozier. For example, representatives of the five major unions involved with program production told the Commission that they "may seek 'commercial' rates and rights agreements from public broadcast stations that air limited advertisements," and copyright-owners' representatives similarly indicated that they might seek higher payments from those stations.[9] Based on the results of the experiment, the Commission recommended that Congress leave § 399b's prohibitions in place. It is rare to have the benefit of a comparison when judging less restrictive means. We cannot ignore experience with alternatives that demonstrates that § 399 is narrowly tailored to accomplishing Congress's goals.[10]

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[9] The Commission obtained agreements to freeze labor and copyright costs for the course of the experiment with the express assurance that such freezes would not constitute a precedent if limited advertising were later authorized.

[10] We are surprised by the dissent's effort to undermine the Commission's recommendation with selective excerpts from the Commission's report. For example, the dissent picks up on language suggesting a possible increase in revenues. The Commission, however, specifically discounted reliance on data showing any increased revenue. The dissent also highlights opinion polls that "showed an increase in the number of subscribers who reported that they would continue to contribute;" in fact, the actual data reflected "[a] significant decline in average contribution per subscriber at advertising stations." Moreover, the data showed reduced giving from large

Finally, although Congress may not have considered a pure time, place and manner restriction, as Minority TV claims it should have, it did evaluate less restrictive alternatives. The House considered an alternative to § 399b that would have allowed institutional advertisements that did not interrupt regular programming and did not exceed thirty seconds in duration. H. Hgs. 24 (proposed text of H.R. 2774). While some of those who testified before Congress supported allowing institutional advertisements, many opposed it. *See*, *e.g.*, H. Hgs. 229 (David Ives, president of WGBH TV in Boston) (stating that allowing logograms "liberalizes our rules without compromising our principles," but that permitting even limited institutional advertisements would "blur the distinction between us and commercial stations"); H. Hgs. 149 (Association of Independent Video and Filmmakers, Inc.) ("Even tasteful, institutional advertising will give rise to programming that will conform to the purposes of corporate image-building . . . .").

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contributors. Likewise, the dissent ignores new costs to public broadcast stations that the Commission identified, including tax increases or complete loss of tax-exempt status that could result without section 399(b). The dissent's "evidence" does not withstand basic scrutiny.

II. FACIAL VAGUENESS CHALLENGE TO § 399B

Section 399b's prohibition of paid messages intended to "promote" any service, facility, or product of a for-profit entity is not unconstitutionally vague. A statute need not have "mathematical certainty" to survive a vagueness challenge; instead, it may be marked by "flexibility and reasonable breadth, rather than meticulous specificity." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (citation omitted). Nonetheless, the meaning of the term "promoting" a product or service is fully within "common understanding" and is clear in the vast majority of circumstances. *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001). To the extent it is not, the FCC—to remove uncertainty—provides declaratory rulings to broadcasters who fear they might run afoul of § 399b. 47 C.F.R. § 1.2. This guidance serves to "sufficiently narrow potentially vague or arbitrary interpretations" of the statute. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 504 (1982).

III. AS-APPLIED CHALLENGE TO § 399B AND CHALLENGES TO 47 C.F.R. § 73.621(E)

The district court correctly dismissed Minority TV's as-applied challenges to § 399b and its challenges to 47 C.F.R. § 73.621(e). Section 399b was applied to Minority TV only through FCC orders and regulations, including

47 C.F.R. § 73.621(e). Jurisdiction over challenges to FCC orders lies exclusively in the court of appeals; as such, federal district courts lack jurisdiction over appeals of FCC orders. 28 U.S.C. § 2342(1) ("The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part) or determine the validity of . . . all final orders of the Federal Communications Commission."). *See also United States v. Dunifer*, 219 F.3d 1004, 1007 (9th Cir. 2000) (explaining that district courts lack jurisdiction over any challenge to FCC regulations).

Although the Supreme Court has previously reviewed a First Amendment challenge to an FCC regulation that was initially filed in federal district court, *see Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999), the Court in that case did not address—and was not asked to address—whether jurisdiction in the district court was proper. Courts "are not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio." *United States v. L.A. Trucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

AFFIRMED.

CALLAHAN, Circuit Judge, concurring and dissenting:

I concur in the majority's opinion only insofar as it upholds 47 U.S.C. § 339(b)'s prohibition against paid advertisements by for-profit entities.

I dissent from the majority's acceptance of § 339(b)'s prohibition of advertisements on issues of public importance or interest and for political candidates. As explained by the Chief Judge in his dissent, and by Judge Bea in his opinion for the three-judge panel, *Minority Television Project, Inc. v. F.C.C.*, 676 F.3d 869, 885–89 (9th Cir. 2012), these restrictions implicate the First Amendment's core concerns and are not justified on this record even under the intermediate standard set forth in *FCC v. League of Women Voters*, 468 U.S. 363 (1984). I would hold that these restrictions are unconstitutional.

Chief Judge KOZINSKI, with whom Judge NOONAN joins, dissenting:

The United States stands alone in our commitment to freedom of speech. No other nation—not even freedom-loving countries like Canada, England, Australia, New Zealand and Israel—has protections of free speech and free press like those enshrined in the First Amendment. These aren't dead words on paper written two centuries ago; they live. In many ways, the First Amendment *is* America. We would be a very different nation but for the constant buffeting of our public and private

institutions by a maelstrom of words and ideas, "uninhibited, robust, and wide-open." *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

But the First Amendment isn't self-executing; it depends on the vigilance of judges in scrutinizing the multitude of prohibitions, restrictions, burdens and filters that government—federal, state and local—constantly seeks to impose on speech and the press. The essence of First Amendment vigilance is skepticism, not deference. Governments always have reasons for the things they do and, for the most part, we accept those reasons as valid, even if they're not entirely persuasive. But prohibitions on speech are different. Whether we engage in strict scrutiny, which applies to most forms of speech, or intermediate scrutiny, which my colleagues believe applies here, we don't uphold restrictions on speech if the government's reasons do not, at the very least, make sense.

The majority embraces every justification advanced by the government without the least hesitation or skepticism, and without giving proper weight to the true harms caused by the speech restrictions in question. The opinion is certainly a fine example of rational basis review, but if intermediate scrutiny is to have any bite, we can't just trot out all of the reasons the government advances in support of the regulation and salute.

The Supreme Court showed us how intermediate scrutiny *should* be done in *FCC v. League of Women Voters*, 468 U.S. 363 (1984). There, the Court found restrictions on speech wanting because the government's justifications were speculative and any problems could be remedied by less drastic means. *Id.* at 385–99. The majority here downplays *League of Women Voters* as an obvious case of governmental overreach, but it wasn't so obvious to the four Justices who wrote three separate dissents taking the majority to task for failing to accord the speech restrictions sufficient deference. The majority cites the *League of Women Voters* opinion, but its approach resembles far more the dissents.

That said, it's hard to pinpoint exactly where the majority goes astray. I will note what I consider to be errors, but doubt I can persuade those not already on board. How could I? With a standard as mushy and toothless as intermediate scrutiny, it's hard to *be* clearly wrong. A standard that calls on us to distinguish among shades of gray provides scant protection to speech: The very indeterminacy of the standard enables—nay, encourages—judges to apply their own values. Speech that judges like gets protected, and speech that judges don't like gets the back of the hand. And judges like public radio and television, while pretty much nobody likes commercials. It's hardly a fair fight, which is why I believe it's time to

reconsider the applicability of intermediate scrutiny to broadcast restrictions.

The Court plucked broadcast stations out of the mainstream of First Amendment jurisprudence in 1969, when the world of communications looked vastly different. The only way to reach mass audiences in those days was through the broadcast spectrum. And no medium of communication approached the power of radio and television to reach into people's homes with sounds and images. Given the scarcity of the broadcast spectrum and the absence of viable alternative means of communication, the Court may have justifiably believed that it was confronted with a market failure—a bottleneck in the pathways of communication. It may have served the First Amendment to correct that market failure by keeping those pathways accessible to a multitude of views, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), safe for minors, *FCC v. Pacifica Found*, 438 U.S. 726 (1978), and otherwise regulated.

I'm certainly not the first one to note that that rationale—whatever its merits at the time—no longer carries any force. *See, e.g., FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1819–22 (2009) (Thomas, J., concurring). It's a fine point whether judges of the inferior courts are bound by Supreme Court decisions that the Court itself hasn't yet bothered to overrule, but whose rationale has been decimated by

intervening developments. I was once of the view that only the Supreme Court may perform such operations, and the rest of us must keep applying law we know to be wrong until the Court tells us otherwise. In fact, I once wrote a jeremiad warning my colleagues of the perils of treating a Supreme Court case as overruled, when the Court itself hadn't told us so. In that case, we not only defied a six decades-old Supreme Court precedent, but also dozens of cases in every other regional circuit. *See United States v. Gaudin*, 28 F.3d 943 (9th Cir. 1994) (en banc) (Kozinski, J., dissenting). And, as I predicted, the Court granted cert. and . . . unanimously affirmed us. *United States v. Gaudin*, 515 U.S. 506 (1995). So I guess the lesson is, we must not get ahead of the Supreme Court—unless we're right.

I

The statute here draws a curious line between permissible and impermissible speech: Advertisements for commercial goods and services are prohibited, and so are those for political candidates and issues. 47 U.S.C. § 399b. But logograms and advertisements for goods sold by non-commercial entities are permitted. *Id.* To determine whether speech falls on the permitted or prohibited side of the line, the regulator (here the FCC) must evaluate what the speech says; it must evaluate speech based only on its content. Moreover, as the majority recognizes, some of the prohibited

speech—namely political and issue advertising—implicates the First Amendment's core concern with ensuring an informed electorate. We must therefore be doubly skeptical: first, because the restriction is content-based and, second, because we have traditionally treated some of the prohibited speech with the greatest solicitude.

The majority declares itself satisfied with the evidence supporting these prohibitions and distinctions, but the record is much sparser and far more ambiguous than the majority acknowledges. There is, for starters, almost nothing in the congressional record compiled at the time the legislation was adopted that speaks to the supposed dangers posed by political and issue advertising. Many witnesses testified about their fear that "[c]ommercialization [would] make public television indistinguishable from the new commercial or pay culture cable services." Maj. op. 21 (citing *Hearings before the Subcomm. on Telecomms., Consumer Protection, and Finance of the H. Comm. on Energy and Commerce on H.R. 3238 and H.R. 2774*, 97th Cong. 149 (1981) (Larry Sapadin, Executive Director, Association of Independent Video & Filmmakers, Inc.) [hereinafter H. Hgs.]); *see also* H. Hgs. at 323 (Walda W. Roseman, NPR). But commercialization, as that term is commonly understood, deals with commerce; it says nothing at all about advertising for political candidates or on issues of public interest.

The majority also points to a few comments suggesting that Congress feared the influence of political interests. Jack Golodner, of the AFL-CIO, for example, advocated that public broadcasting be "insulated from political, corporate, and, for that matter, labor influence." *See id.* at 112. Congressman Gonzales similarly emphasized the need to "insulate public broadcasting from special interest influences—political, commercial, or any other kind." 127 Cong. Rec. 13145 (1981). But such general concerns about insulating public television from a variety of influences say nothing about advertising. No one explained, much less provided evidence, how allowing stations to accept paid advertising from politicians would make them subject to influence by those politicians. No one said a word about influence by organizations that sponsor issue ads. Stray comments, unsupported by facts, may be enough to support legislation under the all-forgiving rational basis test, but intermediate scrutiny surely calls for more.

There are other lacunae in the legislative record. No one explains why political and issue ads are dangerous, if advertising for non-commercial entities (including product ads) isn't. If legislators feared influence, why didn't they worry about stations falling under the sway of non-commercial entities? The list of non-commercial entities is vast. Many are poorly funded and non-controversial (such as some museums and theater groups), but others are

quite wealthy and influential, including advocacy groups, churches, foundations, think tanks and fraternal organizations. The legislation forbids non-profit organizations from advertising about matters of public concern or candidates for public office. But nothing prevents them from advertising themselves and the services they offer, and thereby presumably influencing the programming of public broadcast stations. If there are reasons why influence by the Westboro Baptist Church, Heritage Foundation, Planned Parenthood, National Rifle Association, Middle East Research Institute, Family Research Council, Media Matters for America and AARP poses less of a threat than influence by entities commenting on issues of public importance or candidates for public office, they are nowhere to be found in the legislative record.

Even if we look at the evidence developed after the legislation was passed—some of it decades later—there isn't much to support the ban on political and issue ads. The majority cites a magazine article stating that in 2008, $2.2 billion was spent on political advertising. Maj. op. 29. So what? Where's the evidence that public broadcasters would suffer adverse consequences if they were allowed to run such ads? We can't assume that political campaign ads will have the same adverse effects attributed to commercial ads (more on this later). Political ads are inherently more transitory and episodic—centering on a

particular campaign season, ballot issue or candidate—so it's far from clear that they would present the same capture problem attributed to ads for commercial products, whose producers are in the market for the long haul. Nobody bothers to explain the connection, and yet the majority sees no problem. This is hardly rational basis review, much less intermediate scrutiny.

And the new evidence says nothing at all about issue ads. Neither of the expert affidavits (such as they are) even mentions them. There is no magazine article suggesting there are billions of dollars in issue ads gearing up to invade the public airwaves. No one suggests that sponsors of issue ads are waiting voraciously in the wings, yearning to pressure public broadcast stations into changing their programming. Not a word. Nor is there a hint of a suggestion that issue ads are out of keeping with the high-brow character of public television. And, of course there can't be, because issue ads are about ideas. Where's the beef?

Issue ads can be quite important from a First Amendment perspective. Aside from generating revenue, which public television and radio stations can use to produce more and better programming, issue ads can help educate the public about some of the most significant questions of the day: whether to take military action against foreign nations; whether private individuals should have the right to carry

concealed weapons; whether minors are entitled to undergo certain medical procedures without their parents' consent; whether we should have capital punishment, and for what crimes; whether undocumented aliens should be given a path to citizenship; how the tax burden should be allocated; whether same-sex couples should be allowed to marry; whether the government should be reading our e-mails or listening to our phone calls . . . . The list is endless. How exactly would public broadcasting as we know it be harmed by allowing a limited number of paid issue ads that don't interrupt programming? My colleagues give the issue ban a pass, based entirely on the momentum supposedly created by the ban on commercial advertising. This isn't intermediate scrutiny; it's zero scrutiny.

Which brings us to the one debatable issue—the ban on advertisements for commercial products and services, which was at the center of congressional concern when the 1981 Act was passed. There was, indeed, much hand-wringing about the dangers of commercialization, most of which the majority references in its opinion. But there's nothing that one might call *evidence*. The legislation was designed to deal with the problem of drastically diminished federal funding for public broadcast stations, and the need for those stations to raise money from other sources. Congress considered several fund-raising possibilities, among them various flavors of commercial advertising, including logograms,

institutional advertisements (promoting companies rather than specific products) and commercial advertising. It's fair to say that none of the witnesses thought commercial advertising was a good idea, and most thought it would significantly harm public broadcasting.

Their concerns can be divided into roughly 4 categories: (1) that adding commercial advertising would force changes in program format and cause public broadcasting to lose its distinctive character; (2) that broadcasters' ability to raise money commercially would cause subscribers and other non-commercial sources of funding to withdraw support; (3) that the need to raise revenue through commercial advertising would necessitate changes in programming content, so as to attract larger audiences, leaving no airtime to serve audiences with less popular tastes; and (4) that there would be an increase in various costs, ranging from increased labor costs to the payment of additional royalties for copyrighted materials to loss of various statutory benefits. In the aggregate, the witnesses fretted, allowing commercial advertising would dramatically change the character of public broadcasting, defeating its mission of serving audiences not served by commercial stations.

These are certainly weighty concerns, but what's remarkable about the testimony presented to Congress is that they are nothing *but* concerns. The legislative record contains no

documentation or evidence; there are no studies, no surveys, no academic analyses—nothing even as meaty as the rather anemic expert reports introduced by the government in our case. Sure, a lot of people worried that commercial advertising would wreck public broadcasting, but people worry about a lot of things that never come to pass. *See*, *e.g.*, Peter Gwynne, *The Cooling World,* Newsweek, April 28, 1975, at 64. Where's the proof, or even the rigorous analysis, showing that the matters worried about were likely to occur? It's certainly not in the legislative record.

I know it's difficult to prove with certainty what the future will bring. *See*, *e.g.*, *Turner Broad. Sys. v. FCC (Turner I)*, 512 U.S. 622, 665 (1994). Nevertheless, if we're conducting some level of heightened scrutiny, not merely rational basis review, we should insist on something more than a bunch of talking heads bloviating about their angst. We should expect, for example, a study of how public broadcast stations actually operate, how they differ in their governance and structure from commercial stations and whether those differences have any bearing on how they are likely to respond if they were allowed to raise money through commercial advertising. Or, witnesses might have presented historical examples shedding light on the likelihood of future behavior, or the experience of broadcast stations in other countries. But there's nothing like that; we're left to take on faith that the witnesses' fears are

justified. Such faith isn't consistent with the heightened scrutiny courts are supposed to give legislation that abridges the freedom of speech.

In fact, there was a great deal that Congress could have considered before resorting to such strict speech restrictions—things we may not ignore in judging the legislation under heightened scrutiny. We must consider whether the speculation about the dangers of commercial advertising makes sense in light of all the known circumstances, just as the Court did in *League of Women Voters*, 468 U.S. at 385–99. The concerns expressed by the various witnesses about the dangers of commercial advertising boiled down to the fear that it would change public broadcasting into a more commercial enterprise, which would disserve the segment of the public not being adequately served by commercial broadcasting.

Does this make sense? Commercial broadcasters operate the way they do precisely because they're commercial entities, whose purpose is to make profits for their shareholders. Managers of commercial broadcast stations and networks thus generally measure their success based on the broad popularity of their shows and the revenue they generate as a result of commercials and subscriptions. We call this capitalism, and we're perfectly content to have the laws of supply and demand control the behavior of commercial entities.

But we don't observe non-commercial entities operating by the same rules: Museums, charities, churches, universities, hospitals, theater companies, musical ensembles and a large variety of other organizations operate on a non-profit basis, even as similar institutions (e.g., hospitals, museums, universities, theaters) operate side-by-side with them on a commercial basis. The lure of profit doesn't cause charitable institutions to abandon their missions and reinvent themselves as commercial entities: The Red Cross doesn't go into the business of selling blood or charging for rescue missions because there's a quick buck in it; the Met doesn't swap programs with the Grand Ole Opry because it thinks it can make more money playing country music; and food banks don't start charging prices that match those of the supermarket across the street.

We understand perfectly well why this is so. Charitable and civic organizations have charters and other organizational constraints that tie them to their mission; they have a variety of governmental regulations and incentives that keep them from straying into the commercial arena; they have managers and staff who are dedicated to the organization's core purpose; and they have boards of directors who supervise them to ensure they stick to it. Just as important is what they don't have: shareholders who demand a return on their investments. Charitable and civic organizations

intrinsically operate by different rules than commercial entities, and it would never occur to us to pass laws prohibiting the Los Angeles County Museum of Art from selling automobiles and dishwashers, even though the sale of such items might well be profitable and allow the museum to acquire more and better art.

It thus seems wholly irrational to make undocumented claims about the likely behavior of public broadcast stations, were they allowed to air advertisements, without first considering the ways in which they differ from commercial entities. And the differences are huge. To begin with, public broadcasters must, by law, operate as non-profit entities. 47 C.F.R. § 73.621. They must be owned by "a public agency or nonprofit private foundation, corporation, or association," or by a municipality. 47 U.S.C. § 397(6). Any station that *isn't* owned or operated by a state, political subdivision of a state or a public agency must have a community advisory board. 47 U.S.C. § 396(k)(8)(A). In fact, universities operate most public radio stations, while non-profit community organizations and state government agencies operate most public television stations. *See* Corporation for Public Broadcasting, *Who Operates the Stations?*, http://www.cpb.org/aboutpb/faq/operates.html.

Federal funding for public broadcasting stations is also conditioned on their maintaining programming that is consistent with the goals of the statute. Federal funds are distributed by

the Corporation for Public Broadcasting, which may make grants "for production of public television or radio programs by independent producers and production entities and public telecommunications entities, producers of national children's educational programming, and producers of programs addressing the needs and interests of minorities, and for acquisition of such programs by public telecommunications entities." 47 U.S.C. § 396(k)(3)(B)(i).

Finally, licenses for public broadcast stations aren't handed out on a first-come, first-served basis. In deciding whether to grant an application for a license, the FCC favors: (1) "local applicants . . . who have been local continuously for no fewer than two years"; (2) applicants with "no attributable interests .... in any other broadcast station"; (3) public or private entities "with authority over a minimum of 50 accredited full-time elementary and/or secondary schools within a single state"; (4) accredited public or private institutions of higher learning "with a minimum of five full time campuses within a single state"; and (5) organizations that will "regularly provide programming for and in coordination with [statewide educational] entit[ies]" for use in schools' curricula. 47 C.F.R. § 73.7003. Further, to receive a license, the potential station owner must show that the proposed station will "be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to

furnish a nonprofit and noncommercial television broadcast service." 47 C.F.R. § 73.621.

None of those who presented "evidence"—better characterized as Chicken Littleisms—about the calamitous effects of allowing commercial (and political and issue) advertising on public broadcasting took the slightest account of these structural constraints. They all predicted that the lure of advertising dollars would turn public broadcasters into commercial broadcasters. But is it rational to believe that public broadcast stations operated by municipalities, universities and non-profit foundations would risk losing federal funding (and perhaps their FCC licenses) by abandoning their traditional viewership in order to compete with commercial stations for advertising dollars? This strikes me as about as likely as the Smithsonian turning itself into Busch Gardens because it decides that roller coaster rides are more popular than mastodon skeletons.

Still and all, had Congress been presented with evidence that public broadcast stations could be diverted from their mission by the lure of lucre, despite the multitude of structural obstacles—had anyone even mentioned this as a consideration—I might feel constrained to defer to the congressional judgment. But no one paid any attention to the obvious differences between non-profit and commercial entities, and how

they respond to market incentives—even though there is a well-developed branch of economics that deals with precisely this subject. *See, e.g.*, Burton A. Weisbrod, The Nonprofit Economy (1988); Susan Rose-Ackerman, *Altruism, Nonprofits, and Economic Theory*, 34 J. Econ. Lit. 701 (1996); Joseph P. Newhouse, *Toward a Theory of Nonprofit Institutions: An Economic Model of a Hospital*, 60 Am. Econ. Rev. 64 (1970).

What's more, we know for a fact that some of the witnesses who testified before Congress in 1981 were wrong. Three of the witnesses, each of whom was worried sick about the potentially catastrophic effects of commercialization on public broadcast stations, also made dire predictions about the pernicious use of logograms. Oy vey! Congress nevertheless adopted that provision, and logograms have been in use in public broadcasting for over a quarter of a century. And, know what? The Cassandras were wrong; public broadcasting as we know and love it has survived just fine—perhaps a tad better, as underwriting, including logograms, generates much-needed revenue for public broadcasting. *See* NPR, *Public Radio Finances*, http://www.npr.org/about-npr/178660742/public-radio-finances.

Congress knew that predictions about how commercial advertising would affect public broadcast stations were speculative. It therefore sought to develop empirical evidence

by authorizing an experiment that would allow public broadcasters to air commercial advertising and expanded underwriting credits. A temporary commission was established to study the project and report back to Congress. The majority alludes to this study in its opinion, claiming that it supports its position, Maj. op. 35–36, but I read the study very differently.

While written in cautious and somewhat tentative terms, the report contained a number of findings and conclusions that severely undermine the doomsday predictions made by witnesses before Congress and accepted as Gospel Truth by the majority today. Specifically, the Commission found as follows:

- "Limited advertising and expanded underwriting credits both generated revenues in excess of reported expenses." Such revenues "equaled about 8.1 percent of the stations' total net income."

- "In several cases, advertising revenues permitted stations to acquire specific programs that they otherwise could not have afforded to purchase. . . . The demonstration program did . . . suggest that (at least where advertising or expanded underwriting revenue is only one source among many) no movement toward programming changes resulted."

- "[W]hile most subscribers and regular viewers reported initially that they would watch less public television if advertisements were present, the second wave of the survey showed no differences in the amount of time these groups reported watching."

- "Although a first wave response suggested that 20 to 40 percent of public television subscribers might reduce their contributions, the second wave of the opinion poll showed no significant differences in the overall amount of giving reported. Additionally, the poll showed an increase in the number of subscribers who reported that they would continue to contribute to public television."

- "Analysis of subscription revenues at participating stations showed . . . [a]n increase in total number of subscribers and contributors at all stations compared with the previous year; [n]o significant differences in total number of subscribers or total contributions compared to the control group [stations that did not carry advertising]; [a] significant decline in average contribution per subscriber at advertising stations compared to the control group [which] suggests that carriage of limited advertising may have affected giving by large contributors. The decline, however, also could reflect an

> influx of new subscribers contributing smaller amounts to the stations involved."

It is true, as the majority notes, that the Temporary Commission recommended maintaining the advertising ban, despite these positive findings. Instead of raising revenue through advertising, the Commission recommended enhanced federal funding for public broadcasting—at least the majority did. For this, they were taken to task by the Minority Report, authored by the National Telecommunications and Information Administration, an executive agency within the Department of Commerce. The minority decried the fact that "[t]he majority report . . . does not fully and fairly reflect the overwhelmingly positive results of the advertising demonstration experiment itself. . . . The majority, in short, seems to have rejected the Congressional directive that we come up with some new lyrics and appears content instead simply to sing what by now is a very familiar song." It's a song that echoes loud and clear in today's majority opinion, three decades later. Pointing out that "the public's money is the easiest of all money to spend—because it doesn't seem to belong to anyone," the minority chastised the majority for "continuation of the 'cargo cult' approach all have seen before." Ditto.

Here is how the Minority Report summarized the results of the demonstration program: "The evidence produced by the

advertising demonstration program is almost completely positive and affirmative. In no instance did the findings indicate any significant adverse consequences with respect to these matters." The demonstration program "confirmed the view that people watch and support public television because they like and enjoy the programming, not just because it is 'commercial free.'" The Commission's polling data, for example, revealed that "no significant audiences were in fact alienated," and that stations were able to generate significant revenues. Although the minority conceded that there were risks to allowing public broadcasters to air paid advertisements, because of the significance of the potential gains, it concluded that "the sounder course for the Temporary Commission would have been to place maximum reliance on informed licensee discretion, and minimum weight on the utility of Washington-imposed constraints."

The significance of the demonstration program can't be overstated: It is the *only* evidence in the record about the real-life consequences of allowing public broadcast stations to run commercial advertisements. And the experience is overwhelmingly positive. The demonstration program points to yet another gap in the majority's reasoning—the failure to appreciate or accord any weight to the serious adverse free speech consequences of the advertising ban. The record suggests three:

First, as the demonstration program illustrates, stations that receive paid advertising revenue can acquire or produce programs that they could not otherwise afford. Thus, the loss of advertising revenue can't be dismissed as simply a loss of money; it is, in fact, a loss of speech. We know for a fact (from the demonstration program) that there are stations wishing to run content that is consistent with their educational and civic mission but can't afford to do so. Advertising revenue would allow public broadcast stations to acquire content that will serve their audiences. Additional revenue would also enable stations to produce local content, which is one of the identified goals of public broadcasting, rather than relying on content produced nationally or abroad.

Second, an infusion of additional non-governmental revenue would help public broadcast stations gain independence from the federal government. The record before Congress, and the record in our case, makes it clear beyond dispute that public broadcast stations are desperately dependent on federal subsidies. Can broadcasters that are so dependent on one source of revenue be truly free to speak in ways that are critical of that source? Would public broadcasters feel free to run a program exposing corruption by, say, the chairman of the relevant appropriations committee? My guess is that any station wishing to produce such a program would be dissuaded from doing so. Washington is a small

town with a long memory, and no one wants to get into a grudge match with the goose that lays golden eggs. The only *true* independence, the only *truly* free speech, comes from having a multitude of funding sources, so that none is so crucial that it can't be dispensed with. Deriving a portion of revenue from commercial advertising, along with other sources, can help secure that independence.

Third, advertisements are speech. Viewers often see commercials as no more than annoying interruptions, but the Supreme Court has recognized that advertisements often carry important, sometimes vital, information. *See, e.g., Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (lawyer advertising); *Virginia State Bd. of Pharmacy. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (prescription drug prices); *Rubin v. Coors Brewing Co.,* 514 U.S. 476 (1995) (beer labels). Advertisements can be for annoying, useless or decadent products, but they can also encourage people to get breast exams, http://goo.gl/MM6sV9; join the peace corps, http://goo.gl/bfBmiy; get a smoke alarm, http://goo.gl/wChmN0; prevent forest fires, http://goo.gl/HrCxQG; vote, http://goo.gl/do9TCc, etc., etc. Excluding advertising from public broadcasting deprives viewers of the opportunity to obtain such important information.

The statute's ban on issue advertising (for which, remember, no one gives any justification at all, *see* p. 46 *supra*) is particularly troubling, as it deprives public broadcast audiences of precisely the type of information we expect an informed public to have: how to vote on issues of public importance, http://goo.gl/6CRk3J, http://goo.gl/XLrL9A, http://goo.gl/TL6BQU; the state of public health, http://goo.gl/PXI7am; and the performance and funding of our public schools, http://goo.gl/1BRQJu. Campaign ads can make or break presidential elections, *see, e.g.*, http://goo.gl/6oGrfy, http://goo.gl/fnFbkh; http://goo.gl/v0Ju. Can we say that there is really a substantial—or even a rational—justification for precluding public broadcast audiences from being educated on issues of public importance? Is it consistent with the principles of an informed electorate to deprive those who watch public television and listen to public radio of an important source of information?

I understand the concern about turning public broadcasting into something that is quite different from what it is today. But why aren't the structural constraints, discussed above, sufficient to prevent this? And, if we fear they're not, there are many intermediate restraints, far short of a complete prohibition. The Temporary Commission suggested limiting the duration and placement of advertisements, and ensuring diversity of funding (perhaps by placing a limit on the percentage of revenue any

station could derive from any single source). Surely, anything is better from a free speech perspective than an outright and total ban, yet Congress seems to have given this possibility no consideration. Nor does the majority.

I add only a few words about the two expert declarations presented by the defendant in the district court; they deserve no more. Assuming that it's possible to supplement the legislative record decades after the legislation is passed—which to my mind is still an open question, *see Turner I*, 512 U.S. at 671–74 (Stevens, J., concurring)—these experts add nothing to the debate. The Ozier declaration parrots the worries expressed by the witnesses before Congress. He predicts that alternative sources of funding would dry up, that stations would yield to pressure from advertisers to change their programming, that foundations would withdraw their support and that various concessions now enjoyed by public television would be jeopardized. Ozier provides no new facts, just the same lame predictions previously made by others—and largely refuted by the experiment conducted by the Temporary Commission following the passage of the 1981 legislation.

The Noll affidavit does add some new matter, mostly irrelevant. For example, Noll comments adversely on the "advertising of nutritionally undesirable food and . . . the inclusion of violent content" in commercial

stations, and reports that "[r]esearch has shown that violent program content causes antisocial behavior among children and food advertising to children promotes an unhealthy diet that causes obesity." What this has to do with the matter under consideration is unclear; it seems at times like Professor Noll prepared his declaration for another client and then adapted it to this case.

In the parts of the declaration that do bear on our case, he pretty much embraces the cargo cult attitude alluded to by the Minority Report of the Temporary Commission, calling for "replac[ing] advertising with government subsidies as the main source of revenues." For this you need a Ph.D.?

Noll also concludes, without much support or analysis, that public broadcast stations would have to change the nature of their programming to generate significant revenue. This conclusion is flatly contradicted by the experiment conducted by the Temporary Commission, which found that stations could gain substantial revenue without changing their content. *See* p. 54–55 *supra*. Noll doesn't mention the Temporary Commission's Report, preferring to rely on his own intuition rather than inconvenient real-world evidence. Nor does Noll discuss, or even acknowledge, the structural constraints that would likely prevent public broadcast stations from reinventing themselves as commercial stations. I might not go so far as to say the Noll report is irrational, but it

certainly doesn't carry the kind of heft—in light of all the other available evidence—that the Supreme Court's analysis in *League of Women Voters* demands.

In sum, the evidence presented by the government in support of these speech restrictions simply doesn't pass muster under any kind of serious scrutiny—the kind of scrutiny we are required to apply when dealing with restrictions on speech. Even if intermediate scrutiny applies—and I doubt that it does, *see* pp. 61–64 *infra*—there is simply not enough there to satisfy a skeptical mind that the reasons advanced are rational, let alone substantial.

II

Because "[t]he text of the First Amendment makes no distinctions among print, broadcast, and cable media," *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 812 (1996) (Thomas, J., concurring in the judgment in part), *Red Lion* and *Pacifica* represent a jarring departure from our traditional First Amendment jurisprudence. As Justice Thomas explained in his lucid concurrence in *Fox Television*, "*Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity." 129 S. Ct. at 1820. Justice Thomas's words echo the views of Chief Judge Emeritus

Harry Edwards in *Action for Children's Television v. FCC*, 58 F.3d 654, 673 (D.C. Cir. 1995) (en banc) (Edwards, J., dissenting): "There is no justification for this apparent dichotomy in First Amendment jurisprudence. Whatever the merits of *Pacifica* when it was issued[,] . . . it makes no sense now."

Today, *Red Lion* looks even more quaintly archaic than at the time Judge Edwards and Justice Thomas made their observations. To start, the broadcast spectrum has vastly expanded, due in part to advances in technology, including the "switch from analog to digital transmission, which . . . allow[s] the FCC to 'stack broadcast channels right beside one another along the spectrum.'" *Fox Television*, 129 S. Ct. at 1821 (Thomas, J., concurring) (quoting *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 294 (D.C. Cir. 2003)). And "traditional broadcast television and radio are no longer the 'uniquely pervasive' media forms they once were. For most consumers, traditional broadcast media programming is now bundled with cable or satellite services." *Id.* at 1822. This trend has continued and accelerated, with the delivery of much content by way of cellular networks and the internet. *See*, *e.g.*, Jim Edwards, *People Now Spend More Time Watching Their Phones than Watching TV*, Business Insider (Aug. 15, 2012), http://goo.gl/jtrVNk; AJ Marechal, *CW Offers 'Husbands,' More Web Fare from Digital Studio*, Variety.com (Mar. 27, 2013),

http://goo.gl/Cww32h; Maura McGowan, *Original Series Help Netflix Turn a Tidy Profit*, Adweek (Apr. 23, 2013), http://goo.gl/9oy0gb; *Procon.org and Pivot.tv Join Forces on Critical Thinking Campaign,* Procon.org (Sept. 13, 2013), http://goo.gl/ibGN1t; Jon Robinson, *New 'Madden' Includes NFL Sunday Ticket*, ESPN Playbook (May 17, 2013), http://goo.gl/gKJRVZ; Alex Stedman, *Disney Invites Kids To Bring iPads to Theaters for 'The Little Mermaid' Re-Release*, Variety.com (Sept. 11, 2013), http://goo.gl/YjEfUw; Esther Zuckerman, *Netflix Has Done It Again: 'Orange Is the New Black' Has 'Astounded' the Critics*, The Atlantic Wire (July 2, 2013), http://goo.gl/mML64G.

For reasons explained at length above, I don't think the standard of review matters very much to the outcome in this case; the restrictions on advertising by public broadcast stations fail any standard of review more rigorous than a straight-face test. But under an intermediate standard of review, the result is highly unpredictable, as judges of intelligence and good faith can view the situation very differently. This isn't because judges have failed; the standard itself promotes uncertainty. Because there are no absolutes, judges are left to exercise their judgment based on their personal experiences and predilections.

"Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 844 (1992).

Nowhere is this truer than in the case of speech, which is especially vulnerable to uncertainties in the law. This is why we have special doctrines applicable to speech only. For example, we allow those whose rights haven't been violated to bring suit, and we'll strike down a law, even if it has some constitutional application, if it's substantially overbroad. *See*, *e.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *see also N.Y. Times v. Sullivan*, 376 U.S. 254, 272 (1964) (freedom of speech requires "breathing space" (internal quotation marks omitted)). It is our constitutional duty to make the law of free speech clear and predictable.

To the extent *Red Lion* was justified by the state of technology at the time it was written, it's certainly not justified by the state of technology today. The bottlenecks and monopolies that existed in the field of mass communications when *Red Lion* was decided no longer exist. It's one of the oldest maxims of the common law that once the reason for a rule ceases, the rule itself disappears. It's a maxim the Supreme Court recognizes and expects inferior courts to honor. *See Funk v. United States*, 290 U.S. 371, 385–87 (1933). We shouldn't turn a blind eye to the vast technological changes in the field of mass communications that make broadcasting less significant and pervasive every day. We not only have the right, but also the constitutional duty, to brush aside a precedent—venerable

though it may be—when its rationale has been hollowed out as if by termites.

* * *

I would strike down as unconstitutional the statute and corresponding regulations that prohibit public broadcast stations from carrying commercial, political or issue advertisements. I would reverse the district court and remand with instructions that summary judgment be granted in favor of the plaintiffs. And I would set public television and radio free to pursue its public mission to its full potential. We'd all be better off for it.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MINORITY TELEVISION PROJECT, INC., *Plaintiff-Appellant*, v. FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA, *Defendants-Appellees*, and LINCOLN BROADCASTING COMPANY, *Intervenor*.	No. 09-17311 D.C. No. 3:06-cv-02699-EDL OPINION

COUNSEL

John L. Fitzgerald, Pinnacle Law Group, San Francisco, CA; Andrew A. August, Pinnacle Law

Group, San Francisco, CA; Walter Elmer Diercks, Rubin, Winston, Diercks, Harris & Cooke, LLP, Washington, D.C., for the plaintiff-appellant.

KOZINSKI, Chief Judge

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to *Fed. R. App. P. 35(a)* and *Circuit Rule 35-3*. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MINORITY TELEVISION PROJECT, INC., *Plaintiff-Appellant*, v. FEDERAL COMMUNICATIONS COMMISSION; ET AL., *Defendants-Appellees*, and LINCOLN BROADCASTING COMPANY, *Intervenor*.	No. 09-17311 D.C. No. 3:06-cv-02699-EDL OPINION

Appeal from the United States District Court for the Northern District of California
Elizabeth D. Laporte, Magistrate Judge, Presiding.

Argued and Submitted November 1, 2010—San Francisco, California

Filed April 12, 2012

Before: John T. Noonan, Richard A. Paez, and Carlos T. Bea, Circuit Judges.

Opinion by Judge Bea; Concurrence in Judgment by Judge Noonan; Dissent by Judge Paez

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COUNSEL

Walter E. Diercks, Rubin,Winstron, Diercks, Harris & Cooke LLP, Washington, DC, for the plaintiff-appellant.

Mark B. Stern, United States Department of Justice, Civil Division, Appellate Staff, for the defendants-appellees.

OPINION

BEA, Circuit Judge:

A federal statute, 47 U.S.C. § 399b prohibits public broadcast radio and television stations[1] from

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[1] Public broadcast stations—alternatively called "noncommercial educational stations," *compare* 47 U.S.C. § 399b *with* 47 C.F.R. § 73.621—are stations which are "used

transmitting over the public airways: 1) advertisements for goods and services on behalf of for-profit entities, 2) advertisements regarding issues of public importance or interest ("public issues"), and 3) political advertisements. 47 U.S.C. § 399b(a). The statute is therefore a content-based ban on speech: public broadcasters may transmit many types of speech, but unlike most other stations, they may not transmit those three classes of advertising messages. Plaintiff-Appellant Minority Television Project, a public broadcaster, contends that this ban violates the First Amendment. Applying intermediate scrutiny, we uphold the ban on the transmission of advertisements for goods and services by for-profit entities, but we strike down as unconstitutional the ban on public issue and political advertisements.[2]

I. Facts and Prior Proceedings

Appellant Minority Television Project is a nonprofit California corporation which operates the San Francisco television station KMTP-TV. KMTP-TV focuses on what it describes as " multicultural programming," and it airs a wide variety of non-

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primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service." 47 C.F.R. § 73.621.

[2] In a unpublished disposition filed concurrently with this opinion, we address Minority's contentions that §399b is unconstitutionally vague, and its appeal of the district court's dismissal of its as-applied challenges to § 366b and its implementing FCC orders.

English language television shows. KMTP-TV is licensed as a public broadcast station by the FCC, which sets aside certain broadcast frequencies for public radio and television stations which transmit educational programming. Unlike commercial stations, public broadcasts stations are expected not to rely on paid advertising, but on federal and state subsidies, individual donors, special events, foundation grants, and corporate contributions. *See generally* 47 C.F.R. § 73.621. KMTP-TV is one of the few public broadcast stations in the United States which does not receive funding from the Corporation for Public Broadcasting (a private, non-profit corporation created by Congress in 1967 to invest in educational programming on public broadcast stations). *See* 47 U.S.C. § 396(g)(2) (B).

However, because of its status as a public broadcast station, Minority is nonetheless subject to 47 U.S.C. § 399b, which prohibits public broadcast stations from transmitting any "advertisements." Under § 399b, an "advertisement" is defined as (1) a paid promotional message from a for-profit entity, (2) a paid message on any matter of public importance, or (3) a paid message in support of a political candidate. The relevant portion of the statue reads:

> (a) "Advertisement" defined. For purposes of this section, the term "advertisement" means any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended—

> (1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit;
>
> (2) to express the views of any person with respect to any matter of public importance or interest; or
>
> (3) to support or oppose any candidate for political office.

47 U.S.C. § 399b.

On August 9, 2002, pursuant to a complaint filed by another broadcaster, the FCC determined that Minority had violated § 399b approximately 1,900 times between the years 1999 and 2002. 7 FCC Rcd 15646 (2003). The FCC found that Minority had "willfully and repeatedly" violated § 399b when it broadcast paid promotional messages on KMTP-TV from for-profit corporations such as State Farm, Chevrolet, and U-Tron Computers.[3] 7 FCC Rcd

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[3] Minority does not contest that the broadcasts for which it was fined were "advertisements" within the meaning of § 399b. The translated script for a representative advertisement, for Asiana Airlines, read as follows:

Female Character: "Did you get the surprising news Asiana Airlines sent to you? Now you can get American Airline [sic] free tickets using Asiana mileage."

Male Character: "Asiana Air now combines mileage with American Airlines."

15646 (2003). Minority was fined $10,000 by the FCC. 7 FCC Rcd 15646 (2003). Minority paid its $10,000 fine, but also filed a complaint in federal court for the Northern District of California in which it sought both reimbursement of the $10,000 and declaratory relief. In relevant part, Minority alleged that § 399b violates the First Amendment because its restriction on advertising was not narrowly tailored to the government's interest in preserving the educational programs on public broadcast stations. Minority alleges that it has declined to broadcast public issue and political advertisements and would do so but for the fear of FCC fines and forfeitures similar to those previously imposed and paid. Minority contended § 399b is an unconstitutional content-based restriction on speech, because it bans *all* paid public issue and political speech while permitting paid promotional messages by non-profits.

In response, the government contended § 399b's restrictions on advertising are necessary to preserve the educational nature of public broadcast programming. The government contended that because advertisers naturally wish to reach the

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Female Character: "Now you can travel free to America, Central or South America, and even Europe—to 270 cities around world [sic] earning mileage with Asiana Airlines. Although you travel with Asiana Airlines or with American Airlines."

Male Character: "Now you can travel fee to America, Central or South America, and even Europe—to 270 cities around world [sic] earning mileage with Asiana Airlines, Although you travel with Asiana Airlines or with American Airlines."

largest possible audience, advertisers are more likely to buy commercials on television programs with high numbers of viewers. Thus, the government contended, advertiser-supported television and radio stations have an incentive to broadcast programs with mass-market appeal. According to the government, if public television and radio stations became financially dependent on advertising, such stations would replace their niche educational programs with more popular programs which have greater mass-market appeal, thus endangering the broadcast of the educational programs for which public broadcast stations exits. *See supra* p. 3924, n.1.

After discovery, Minority and the FCC filed cross-motions for summary judgment on Minority's facial challenges to § 399b. The district court applied intermediate scrutiny to § 399b, and determined the prohibitions on advertising were narrowly tailored to meet the substantial government interest in maintaining educational programming on public stations.

Minority timely appealed the district court's grant of summary judgment. We have jurisdiction under 28 U.S.C. § 1291. We review *de novo* the district court's grant of summary judgment. *United States v. Alisal Water Corp.*, 431 F.3d 643, 651 (9th Cir. 2005).

II. Determining What Level of Scrutiny Applies

As in all First Amendment cases, we must first determine the correct standard of scrutiny to apply to the challenged statute. Because First Amendment doctrine and the media landscape have changed substantially in recent years, this is no simple matter.

A. The Nature of the Restriction

[1] At the threshold of the inquiry, we must determine whether this restriction is content based or content neutral. We have previously held that "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content, then it is content based." *G.K. Ltd. Travel v. City of Lake Osewego*, 436 F.3d 1064, 1071 (9th Cir. 2006). Here, § 399b imposed clear content-based restrictions on the station's speech.

[2] First, Minority may broadcast a wide variety of content for a wide variety of purposes, but the station may not air the three types of advertisements banned by § 399b. That is a content-based restriction, since it plainly restricts Minority's speech based on the speech's content.

[3] Second, and equally important, § 399b discriminates within the class of speech it defines as "advertisements." Public broadcast stations may not broadcast *most* types of advertising speech, but these

stations may broadcast paid promotional messages for products and services of nonprofit corporations. *See* 47 U.S.C. § 399b(a)(1). For example: the record shows that the FCC allowed a public broadcast station in Indiana to broadcast a paid message which promoted Planned Parenthood's "confidential, affordable reproductive health services" because Planned Parenthood "is a non-profit organization." Nonetheless, a public broadcast station may not broadcast a paid message "to express the views of any person with respect to any matter of public importance" or "to support or oppose any candidate for political office" regardless whether the sponsoring entity is an individual, a nonprofit corporation, or a for-profit corporation. 47 U.S.C. § 399b(a)(2) and (a)(3). Thus, had Planned Parenthood sought to air a paid message in support of Presidential candidates who favored abortion rights, or sought to broadcast an "issue ad" on the importance of sex education in schools, a public broadcast station would have been prohibited from airing it under § 399b(a)(2) and (a)(3). Indeed, in its letter to Planned Parenthood, the FCC specifically stated that its proposed message did not violate § 399b because it did not support any candidate for political office, nor express any views with respect to a matter of public importance. But, as shown, Planned Parenthood could advertise to promote *itself*.

[4] Thus, § 399b prohibits a public broadcast station from broadcasting any advertisement which expresses views on a matter of public importance or on behalf of a political candidate regardless who

sponsored the message—Planned Parenthood (a nonprofit), Apple, Inc. (a for-profit), or a committee to re-elect President Obama (a political group). But it allows a public broadcast station to transmit a paid promotional message from a nonprofit, so long as that message does not express views on public issues or political candidates. That is a further content-based restriction on speech, and this restriction in particular burdens speech on issues of public importance and political speech.

B. Intermediate Scrutiny Applies

[5] Having identified § 399b's speech restrictions as content-based on two levels, we must determine what level of scrutiny to apply in our analysis. Because government regulation of content is one of the primary evils contemplated by the First Amendment, content-based restrictions are strongly disfavored and are often subject to strict scrutiny. Indeed, in the typical case, "[c]ontent-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Further, the bans on public issue and political advertisements appear at first glance to be especially strong candidates for strict judicial scrutiny because political speech is "entitled to the most exacting degree of First Amendment protection." *League of Women Voters,* 468 U.S. 364 at 375. Under strict scrutiny, the government would be required to "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that

interest." *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010).

[6] But this is not the typical case, because these particular content-based restrictions on speech apply to broadcasters. For decades now, the Supreme Court has held that content-based speech restrictions that apply to broadcasters are subject to a less demanding form of judicial scrutiny than similar restrictions that arise in other media contexts. *See FCC v. Pacifica Found.*, 438 U.S. 726 (1978). Indeed, in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Court held that this intermediate level of scrutiny applies to regulations governing public broadcasters in particular. *Id.* at 376—77.

[7] Specifically, in *League of Women Voters*, the Court observed that "because broadcast regulation involves unique considerations, our cases have not followed precisely the same approach that we have applied to other media and have never gone so far as to demand that such regulations serve 'compelling' governmental interests." *League of Women Voters*, 468 U.S. at 376. Pursuant to the Commerce Clause, Congress regulates the broadcast spectrum—which is a "scarce and valuable national resource"—to ensure that stations which broadcast on those frequencies "satisfy the public interest, convenience, and necessity."[4] *Id.* Thus, when Congress acts

[4] Since 1927, the federal government has required radio and television stations which wish to transmit over-the-air signals to obtain a license to broadcast on a particular frequency. *See* Radio Act of 1927, 44 Stat. 1162 (1927). Since 1939, the FCC

pursuant to its regulation of the broadcast spectrum, it does not operate under the same First Amendment standards that apply to regulation of other forms of media. Instead, in light of the history behind Congressional broadcast regulation—even those which, as here, impose a content—based restriction on core political speech—are subject to intermediate scrutiny, the government must prove a challenged statue is "narrowly tailored to further a substantial governmental interest." *Id.* at 380.

Despite the Court's pronouncement in *League of Women Voters*, which was a public broadcasting case, Minority urges us to apply strict scrutiny for two different reasons. First, citing a concurring opinion in *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009), which questioned the continuing

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has reserved certain frequencies for public television and radio broadcasting stations. 47 CFR §§ 4.131—4.133 (1939) (radio); 41 F.C.C. 148 (1952) (television). The FCC justified its reservation of frequencies for public broadcast television stations by noting that broadcast frequencies are a scarce national resource, and public broadcast stations would provide "programming of an entirely different character from that available on most commercial stations." *Id*. at 166, ¶ 57.

When the FCC set aside television frequencies for public broadcast stations, it noted that the "objective for which special educational reservations have been established—i.e., the establishment of a genuinely educational type of service—would not be furthered by permitting educational institutions to operate in substantially the same manner as commercial applicants." *Id*. As a result, the FCC placed strict restrictions on advertising on public broadcast stations. Before the 1981 enaction of § 399b, public broadcast stations were barred from broadcasting *any* advertisement, and could identify program sponsors only by name. *Id*.

validity of the broadcast regulation precedents on which *League of Women Voters* relied, Minority contends that new technologies such as cable and the Internet have undermined the core "spectrum scarcity" rationale of broadcast regulation cases. *Id.* at 1821 (Thomas J., concurring). Under this theory, because "traditional broadcast television and radio are no longer the 'uniquely pervasive' media forms they once were," *id.*, courts should no longer treat broadcast restrictions any differently from other restrictions on speech.

Minority is surely correct that much has changed in the media landscape since the Supreme Court, in the 1970's first adopted a standard that treats broadcasters differently under the First Amendment. Indeed, it is possible that the Supreme Court itself may soon declare that the era of a special broadcast examination for strict scrutiny is over. After briefing and argument in this case, the Supreme Court heard argument in a case in which a coalition of the nation's major broadcasters have asked the Court to overrule *Pacifica* and its progeny and "announce firmly and finally that the time for treating broadcast speech differently than all other communications is over." Br. of Respondents Fox Television Stations et al. in *FCC v. Fox Television Stations*, No. 101293, at 1.

But that case has not yet been decided. Thus, just as golfers must play the ball as it lies, so too we must apply the law of broadcast regulation as it stands today. A majority of the Supreme Court has not overruled *Pacifica, League of Women Voters*, and

related cases. Intermediate broadcast scrutiny remains in vigor, and it governs this case.

Second, pointing to the bans on public issue and political advertising in particular, Minority contends that § 399b should be subject to strict scrutiny in the wake of *Citizens United v. FEC*, 130 S. Ct. 876, 886 (201). *Citizens United* applied strict scrutiny to 2 U.S.C. § 441b, which prohibited corporations from engaging in "electioneering communications"[5] within 30 days of a primary or 60 days of a general election, and held that the statue violated the First Amendment. *Id.* at 890. "The only reasonable conclusion that can be drawn from *Citizens United*," contends Minority, "is that any restrictions or prohibition of political speech on broadcast radio or television is subject to strict scrutiny."

We disagree. *Citizens United* was not a broadcast regulation case, so the Court there had no reason to revisit *League of Women Voters* and related cases, Instead, the Court relied on its previous application of strict scrutiny in cases which challenged the constitutionality of restrictions on campaign expenditures, not broadcast spectrum regulation. *See id.* at 899 (citing *FEC v Wisc. Right to Life, Inc.*, 551 U.S. 449, 464 (2007), a previous case which analyzed § 441b, for the proposition that "laws that burden political speech are subject to strict

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[5] "Electioneering communication" was defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office," or any communication which is "publicly distributed," regardless of the medium. *Citizens United*, 130 S. Ct. 876, 887.

scrutiny"). Thus, in *Citizens United*, the Court applied strict scrutiny to § 441b because that statute dealt with regulations on campaign expenditures *generally*, *See e.g., id.* at 897 (listing, as acts that would be outlawed under § 441b, corporations running advertisements, publishing books, or creating websites). *Citizens United* in no way dealt with the "unique considerations" inherent in Congress's regulation of the broadcast spectrum.

Moreover, *Citizens United* expressly overruled two of the Court's prior decisions: *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which permitted a ban on speech based on corporate identity, and *McConnell v. FEC*, 540 U.S. 93 (2003), which relied on *Austin* to uphold a facial challenge to § 441b. Neither case involved regulation of public broadcasting. Thus, it is not surprising that the Court in *Citizens United* did not once mention *League of Women Voters*; it was neither overruled nor distinguished away. That is fatal to Minority's contention, because in *League of Women Voters*, the Supreme Court specifically rejected the contention that content-based laws which burden political speech *and* are enacted pursuant to the broadcast spectrum require the application of strict judicial scrutiny. *League of Women Voters*, 468 U.S. at 376.

We therefore apply intermediate scrutiny to the restrictions. As explained below, we keep in mind as we apply that standard that public issue and political speech in particular is at the very core of the First Amendment's protection. We also must be

mindful that the narrow tailoring prong of the intermediate scrutiny standard itself has undergone additional elaboration by the Supreme Court since *League of Women Voters* was decided in 1984. It is the details of that standard to which we now turn.

C. The Requirements of Intermediate Scrutiny

1. League of Women Voters

In determining what the application of intermediate scrutiny entails, *League of Women Voters* is our starting point. In that case, the Supreme Court considered a First Amendment challenge to a statute which forbade any public broadcasting station from transmitting editorials on "controversial issues of public importance" if that station had received a grant from the Corporation for Public Broadcasting. The Court in *League of Women Voters* held that the ban on station editorial was "defined solely on the basis of the content of the suppressed speech." *Id.* at 383. "In order to determine whether a particular statement by station management constitutes an 'editorial,'" the Court reasoned, "enforcement authorities must necessarily examine the content of the message that is conveyed to determine whether the views expressed concern 'controversial issues of public importance.'" *Id.* Although the Court held that the statute at issue in *League of Women Voters* was *viewpoint*-neutral—i.e., it prohibited station editorials on *all* sides of an issue—the Court held the "First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also

to prohibition of public discussion on an entire topic"; thus, the Court held the statute was a content-based restriction on speech. *Id.* at 384.

In light of the First Amendment's hostility towards content-based restrictions on speech touching on controversial issues of public importance on the one hand, and deference afforded to Congress's regulation of the broadcast spectrum on the other, the Court in *League of Women Voters* held that a *robust* form of intermediate scrutiny applies to content-based restrictions on broadcast speech which burden political expression. Under the standard applied in *League of Women Voters*, a restriction on speech will be upheld only if the government proves "the restriction is narrowly tailored to further a substantial governmental interest." *Id.* at 380. The Court in *League of Women Voters*—while declining to require the government to prove a "compelling" interest under the more stringent strict scrutiny test—required judicial "wariness" *within* the standard it described. The Court did so because the statute at issue in that case restricted editorials, which are "precisely the form of speech which the Framers of the Bill of Rights were most anxious to protect—speech that is indispensable to the discovery and spread of political truth." *Id.* at 383. The Court said that it "must be *particularly wary* in assessing [the statute] to determine whether it reflects an impermissible attempt to allow the government to control . . . the search for political truth." *Id.* at 384 (emphasis added).

The Court held that the restriction there was not narrowly tailored. *Id.* at 395. Rather, a "broad ban on all editorializing by every station that receives [Corporation for Public Broadcasting] funds far exceeds what is necessary to protect against the risk of governmental interference or to prevent the public from assuming that editorials by public broadcasting stations represent the official view of government." *Id.* Although the Court recognized that "the Government certainly has a substantial interest in ensuring that the audiences of noncommercial stations will not be led to think that the broadcaster's editorials reflect the official view of the Government," the Court said that "this interest can be fully satisfied by less restrictive means that are readily available." *Id.* For example, the Court stated that Congress could "simply require public broadcasting stations to broadcast a disclaimer every time they air editorials which would state that the editorial . . . does not in any way represent the views of the Federal Government or any of the station's other sources of funding." *Id.* Thus, the Court held the ban on station editorials unconstitutional and affirmed the grant of summary judgment to the League of Women Voters. *Id.* at 402.

For the purpose of application of the proper level of scrutiny, the statute at issue in this case is similar to the challenged statute in *League of Women Voters*.[6] Section 399b makes content-based distinctions which, by their terms, burden speech in a similar manner to the provision at issue in *League*

[6] The statute in that case can be found at 47 U.S.C. § 399 (1982) (subsequently amended by Pub. L. 100-626 (1988)).

of Women Voters. Like the statute in *League of Women Voters*, § 399b was enacted pursuant to Congress's regulation of public broadcast stations—stations which were explicitly set aside for educational programming. Moreover, subsections 399b(a)(2) and (a)(3) share the additional similarity with the provision at issue in *League of Women Voters* that the provisions burden public issue and core political speech.

2. Subsequent Elaboration: the Turner Cases and Discovery Network

We are conscious, of course, that First Amendment doctrine has not been stagnant in the nearly thirty years since *League of Women Voters* was decided. We must also consider further elaborations of the narrow tailoring inquiry under intermediate scrutiny. We thus take guidance in particular from two cases together known as "the *Turner* cases," as well from select commercial speech cases that applied intermediate scrutiny, especially *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993).

In the mid-1990s, the Supreme Court had occasion comprehensively to describe intermediate broadcast scrutiny, albeit in a slightly different context from that here, in a pair of cases known as the *Turner* cases. In *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994) *("Turner I"),* the Supreme Court reversed, for further fact finding, the district court's grant of summary judgment to the FCC on a First Amendment challenge to a statute which

compelled cable companies to carry local broadcast stations. 512 U.S. 667. The Court held that there was not enough evidence in the record to determine whether local broadcast stations would go out of business if cable companies were not required by law to carry local broadcast stations. *Id.* at 668. The Court revisited the dispute after additional discovery in district court in *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"). In *Turner II*, the Court upheld the district court's decision on remand in favor of the FCC because the additional record evidence supported Congress's determinations. *Id.* at 224.

[8] As relevant here, the guiding principle of narrow tailoring under intermediate scrutiny is that the government must "demonstrate that the recited harms" to the substantial governmental interest "are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way." *Turner I*, 512 U.S. at 664-65. Furthermore, although a statute is "not invalid simply because there is some *imaginable* alternative that might be less burdensome on speech," *Turner II*, 520 U.S. at 217, the government must prove that the statute does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Turner I*, 512 U.S. at 665 (internal quotations omitted). Importantly, the government must prove both the reality of the recited harms and that the statute does not burden more speech than necessary "by substantial evidence." *Turner II*, U.S. at 211. "Substantial evidence" must include "substantial evidence in the

record before Congress" at the time of the statute's enaction.[7] *Id.*

[9] Additional instruction on what narrow tailoring requires comes from *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993). In *Discovery Network*, the Court was faced with a content-based restriction on speech: a city ordinance banned sidewalk newsracks which distributed "commercial" handbills," but not newsracks which distributed "newspapers." *Id.* at 429. A group of publishers of commercial handbills challenged the statute as an impermissible content-based restriction on speech prohibited by the First Amendment. *Id.* at 412. The city defended the ordinance by contending if furthered its "legitimate interest in ensuring safe streets and regulating visual blight." *Id.* at 415. Cincinnati contended newsracks *in general* undermined safety and esthetics in the public right of way; thus, the ban on newsracks which contained a certain type of *content* was justified because it necessarily reduced the *total* number of newsracks on sidewalks. *Id.* at 415.

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[7] While the Court in *Turner I* held that the regulation there was not content-based, *see* 512 at 652, these cases nonetheless guide the analysis because they are the most comprehensive descriptions of intermediate scrutiny in the First Amendment context. The government's brief draws heavily from these cases. Indeed, the D.C. Circuit recently drew heavily on the *Turner* cases when it applied *Second* Amendment intermediate scrutiny to a series of new gun regulations imposed by the District of Columbia. *See Heller v. District of Columbia*, ___ F.3d ___, 2011 WL 4551558, at *11 (D.C. Cir. Oct. 4, 2011).

The Supreme Court held the statute unconstitutional, because the "selective and categorical" content-based ban on newsracks containing handbills was not narrowly tailored to the city's purported interest. *Id.* at 417. Although the city's "desire to limit the *total* number of newsracks is justified by its interests in safety and esthetics," the statute was "unrelated to any distinction between 'commercial handbills' and "newspapers,'" and thus was not narrowly tailored. *Id.* at 429-30 (emphasis added, some internal quotation marks omitted). The Court said:

> The city has asserted an interest in esthetics, but respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks. Each newsrack, whether containing "newspapers" or "commercial handbills," is equally unattractive . . . . [T]he city's primary concern, as argued to us, is with the aggregate number of newsracks on the streets. On that score, however, all newsracks, regardless whether they contain commercial or noncommercial publications, are equally at fault.

Id. at 425-26.

[10] Thus, the Court held the newsrack ordinance was not narrowly tailored, because there was no proof that newsracks containing *handbills* (banned) threatened the governmental interests in

esthetics and safety to a greater degree than newsracks containing *newspapers* (permitted). Therefore, the Court held the costs and benefits of the statute had not been "carefully calculated" to meet the substantial governmental interest. *See id.* at 416 n.12. Notably, the ordinance did not regulate the number of newsracks permitted on the city's sidewalks, regardless their content.[8]

D. Summary

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[8] The Supreme Court's recent decision in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), reaffirms that § 399b would be subjected to rigorous analysis even if viewed through the lens of commercial speech. In that case, that Court struck down a Vermont law which restricted the sale, disclosure, and use of records created by pharmacies that reveal the prescribing habits of doctors. Such records are useful to drug companies who market their drugs to doctors. That case therefore involved paradigmatic *commercial* speech, but the Court nonetheless noted that "the First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'" *Id*. at 2664 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The Court continued by noting that "[c]ommerical speech is no exception" to this principle in part because a "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Id*. (quotation marks omitted).

However, because "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied," the Court did not formally overrule any cases holding that commercial speech is subject to less protection than core public issue or political speech. *Id.* at 2667. Thus, after *Sorrell*, it is clear that commercial speech is subject to a demanding form of intermediate scrutiny analysis.

[11] Synthesizing three decades of First Amendment cases, then, we take heed of two key principles. First, for us to sustain any content-based restriction the government must prove both the reality of recited harms and that the statute does not burden more speech than necessary "by substantial evidence." *Turner II*, 520 U.S. at 211. "Substantial evidence" must include "substantial evidence in the record before Congress" at the time of the statute's enaction. *Id.* Second, when Congress, enacts a "selective and categorical" ban on speech, as here, the government must prove that the speech *banned* by a statute poses a greater threat to the government's purported interest than the speech *permitted* by the statue. *Discovery Network*, 507 U.S. at 425.

III. Analysis of § 399b

Our final step is to determine whether the government has carried its burden to prove that § 399b passes intermediate First Amendment scrutiny. Intermediate scrutiny requires the government to prove a challenged statute is narrowly tailored to a substantial government interest. *League of Women Voters*, 468 U.S. at 380. We hold that 399b(a)(1), which prohibits advertising by for-profit entities for their goods and services, meets this standard. However, 399b(a)(2) and a(3), which prohibit public issue and political advertising, do not.

A. The Subsections are Severable

We must decide at what level of generality to undertake the analysis. That is: do all provisions of § 399b stand or fall together, or should we analyze separately subsections 399b(a)(1), (a)(2), and (a)(3)? We conclude that it is appropriate to sever the provisions and analyze them separately.

[12] Although neither § 399b nor the Public Broadcasting Amendments Act of 1981 contains an explicit severability clause, we are confident that we nevertheless may hold one section constitutional without so holding as to the others. Statutes are presumptively severable and "a court should refrain from invalidating more of the statute than is necessary." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). We may sever the statute "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *Id.*

[13] Here, we see no reason to think that Congress would not have enacted the ban on promotional advertising by for-profit entities if it could not also have enacted the bans on political or public issue advertising. Moreover, neither party contends the statute is not severable, and the district court analyzed the provisions separately. There is thus no warrant for departing from the general presumption of severability in this case.

Our conclusion is further supported by Congress's decision to ban advertising selectively. Since

Congress determined that these three classes of advertising should be banned, then Congress must demonstrate that the recited harms" to the substantial governmental interest of each class of advertising "are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way." *Turner I*, 512 U.S. at 664-65. It is that inquiry to which we now turn.

B. The Government's Overall Interest

[14] The government asserts the same interest is furthered by all three of § 399b's restrictions on advertising: that Congress may ban advertising on public television stations to ensure that high quality educational and noncommercial programming is broadcast on the public airwaves. The government contends that if public broadcast stations were permitted to transmit paid commercial, public issue, and political advertisements, public broadcast stations would attempt to attract advertising dollars by replacing niche educational programming with programming of greater mass-market appeal. In turn, the distinction between public broadcast and commercial stations would be blurred—and the breadth of quality educational and other noncommercial programming on public broadcast stations would be reduced.

As an initial matter, we hold the government has a substantial interest in ensuring high-quality educational programming on public broadcast stations—a conclusion Minority does not dispute. Even though cable, satellite, and the Internet have changed the nature of television and radio, the

broadcast spectrum remains a finite national resource. Congress set aside broadcast frequencies for public stations to ensure Americans would have access to niche programming such as public affairs shows and educational programs for children. *See* 41 F.C.C. at 166, ¶ 57 (FCC reserves broadcast frequencies for public broadcast stations because they offer "programming of an entirely different character from that available on most commercial stations").

[15] Moreover, the government has submitted unrebutted evidence that public broadcast stations *do* broadcast substantially different types of programs than do commercial stations. For example, the Government Accountability Office has determined that 16 percent of all program hours broadcast by public television stations are devoted to educational children's programming. By contrast, commercial broadcasters devote less than 2 percent of their program hours to educational or informational children's programming. According to a Senate report submitted by the government, public television is "the primary source of educational children's programming in the United States." Children's Television Act of 1990, S. Rep. No. 101-66 at 3, *reprinted in* 1990 U.S.C.C.A.N. 1628, 1633. Public broadcast stations regularly broadcast renowned children's shows such as "Sesame Street," "Mr. Roger's Neighborhood," and "Reading Rainbow," which attempt to teach children to read and to do sums. *Id.* at 23-36, 1990 U.S.C.C.A.N. at 1631-33. Again, Minority does not dispute that the government's interest in maintaining public

broadcast stations' niche programming is "substantial." Instead, Minority contends that § 399b is not narrowly tailored to the asserted government interest.

C. Whether The Restrictions Are Narrowly Tailored

We thus turn to the "narrowly tailored" prong of the intermediate scrutiny test. Under the *Turner* cases, the government must "demonstrate that the recited harms" to the substantial governmental interest "are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way." *Turner I*, 512 U.S. at 664-65. The government must prove both the reality of the recited harms and that the statute does not burden more speech than necessary "by substantial evidence." *Turner II*, 520 U.S. at 211. "Substantial evidence" must include "substantial evidence in the record before Congress" at the time of the statute's enaction. *Id.* Moreover, when Congress enacts a "selective and categorical" ban on speech, as here, the government must prove that the speech *banned* by a statute poses a greater threat to the government's purported interest than the speech *permitted* by the statute. *See Discovery Network*, 507 U.S. at 425, 429.

1. Subsection 399b(a)(1)

We first turn to 399b(a)(1), the restriction on paid advertisements for goods and services on behalf of for-profit corporations. As in the *Turner* cases, we hold that there was "substantial evidence"—

including "substantial evidence in the record before Congress"—to support Congress's conclusions that: a) the harm posed by advertising by for-profit entities on public broadcast stations was "real, not merely conjectural," and b) banning advertising by for-profit entities does not "burden substantially more speech than necessary to further the government's legitimate interest." *Turner I*, 512 U.S. at 664-65.

[16] Prior to the enactment of § 399b in 1981, Congress considered eliminating *all* advertising restrictions on public broadcast stations. Congress's decision to continue regulation of promotional advertising—at least by for-profit entities—on public broadcast stations was supported by substantial evidence presented to Congress that advertising would harm the educational mission of public broadcast stations. Congress heard testimony by a senior vice president from National Public Radio ("NPR"), who testified that an internal study conducted by NPR had shown that "on-air advertising" would hold "little or no promise for public radio," because public radio stations broadcast precisely "what commercial stations choose *not* to broadcast because of insubstantial income potential." (emphasis added). Congress also heard testimony from John C. DeWitt, from the American Foundation for the Blind, who testified that he was concerned a "commercialization of public broadcasting" would focus public broadcast programming towards the "lowest common denominator," rather than "diverse audiences," including minorities, women and the "print handicapped." Finally, Congress had before it written testimony by the Association of Independent

Video and Filmmakers, which stated unequivocally: "commercialization will make public television indistinguishable from the new commercial or pay culture cable services. And public television will fail."

[17] In addition to the evidence which was before Congress in 1981, the government submitted a report from Roger G. Noll, an emeritus professor at Stanford University, who had written several books on the economics of the television industry. Noll's report concluded that because advertisers wish to air commercials on television programs with high numbers of viewers, "[a] competitive, advertiser-supported television system leads to an emphasis on mass entertainment programming." Advertiser-supported television provides few "programs that serve a small audience, even if that audience has an intense desire to watch programs that differ from standard mass entertainment programs." Commercial television stations, for example—which are primarily reliant on advertising—offer "children's programming *only* if it can be used to market products to children," despite parents' desire to have their children watch educational television programming. The government buttressed Noll's report with a declaration from Lance Ozier, the former president of a nonprofit organization which operates a number of public broadcast television stations in Massachusetts. Ozier stated that the educational programs on public broadcast stations "do not attract sufficient viewership to attract substantial advertising revenue." Thus, "subjecting non-commercial stations to the same commercial

pressures faced by commercial stations would make it economically impossible to provide such programming."

Minority urges us to discount the evidence before Congress in 1981 as "the opinions, predictions and wishes of the witness[es] unencumbered by any evidence." Minority is correct that Congress had no *empirical* data—statistics, academic studies, or otherwise—to support its 1981 conclusion that allowing commercial advertising on public broadcast stations would undermine niche programming on those stations. But we are unaware of any authority which requires a particular *type* of evidence in the record before Congress. Indeed, *Turner I* reminds us that "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events," *Turner I*, 512 U.S. at 665. We do not normally "substitute our judgment for the reasonable conclusion of a legislative body." *Turner II*, 520 U.S. at 211. Moreover, "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner I*, 512 U.S. at 666.

[18] We thus decline Minority's invitation to second-guess Congress as to the *quality* of the evidence before it as to the probable effect commercial advertising by for-profit firms would have on program content. In light of the deference we afford to Congress's legislative judgments, we conclude that Congress's conclusion that paid promotional messages by for-profit entities pose a threat to extinguish public broadcast stations' niche

programming was supported by substantial evidence, including "substantial evidence in the record before Congress." *Turner II*, 520 U.S. at 211. Moreover, all of the evidence which was before Congress—and which was submitted by the government to the district court—evinces a strong connection between the harm recited and the prevalence of commercial advertising. Thus, we cannot conclude that § 399b(a)(1) "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Turner I*, 512 U.S. at 665.

2. Subsections 399b(a)(2) and (a)(3)

The outcome is different for subsections 399b(a)(2) and (a)(3), which proscribe public issue and political advertising. As we explain, there is simply no evidence in the record—much less "substantial evidence in the record before Congress" at the time of the statute's enaction, *Turner II*, 520 U.S. at 411—to connect the ban on this speech to the government's interest in maintaining certain types of programming. Moreover, there is no evidence that public issue and political advertisements, which are banned, are more harmful than advertisements for goods and services by non-profits, which are allowed. *Discovery Network*, 507 U.S. at 425.

As previously discussed, we accept Congress's conclusion that commercial advertisers seek the largest audience possible, and that, were public broadcast stations permitted to transmit commercial advertisements without restriction, such stations would seek to make themselves more attractive to

advertisers by broadcasting programs with mass-market appeal. But neither logic nor evidence supports the notion that public issue and political advertisers are likely to encourage public broadcast stations to dilute the kind of noncommercial programming whose maintenance is the substantial interest that would support the advertising bans.

[19] To take two key examples: the government cites ample evidence that public television provides "more public affairs programming and children's and family programming" than advertiser supported stations do. It is easy to see how the ban on commercial advertisements in subsection 399b(a)(1) is narrowly tailored to further the governmental interest in pre-serving such niche programming. But the connection between a ban on public issue and political advertisements and the interest of promoting niche programming is, to put it generously, tenuous—and a tenuous connection is not enough to survive intermediate scrutiny. The restriction must be "narrowly tailored" and there must be "substantial evidence" that supports the restrictions.

[20] Consider first the effect of the ban on public issue and political advertisements on the nature and prevalence of children's educational programming. There is virtually no way that these advertisements, if allowed, would negatively affect the nature of children's programming on public television stations. After all, the large majority of viewers of these programs are legally prohibited from voting, so there is virtually no incentive for a station to alter its children's programming to suit the preferences of a

political candidate or issue group. At the outer reaches of one's imagination, perhaps, lies a potential Saturday morning cartoon featuring an appearance by President Obama or Candidate Romney, Santorum, Paul, or Gingrich, wherein the political personality appears in the episode to fight crime alongside Superman or Batman. It is true that such cartoon would be more likely to exist on a station where the particular candidate is able to run a 30-second political advertisement before and after his world-saving derring-do than on a station where such advertisements are prohibited. But the possibility that such cartoons will replace "Sesame Street" anytime soon seems quite remote. At best, it is pure speculation, which was never mentioned before Congress. Upholding the ban on public issue and political advertising requires more than speculation.

The interest in maintaining public affairs programming of the sort currently seen on public television is a slightly closer case, but the government still fails to carry its burden. There are a few scattered remarks in the record that, with § 399b, Congress wished to "insulate public broadcasting from special interest influences—political, commercial, or any other kind." 127 Cong. Rec. 13145 (June 22, 1981) (remarks of Rep. Gonzalez); *see also* H.R. Rep. No. 97-82, 97th Cong., 1st Sess. 16 (1981) (emphasizing the need for "insulation of program control and content from the influence of special interests—be they commercial, political, or religious"). The temptation of receiving advertising dollars from groups or individuals who wish to air public issue or political advertisements

are indeed the types of special interest influences that could distort the nature of public affairs programming offered on public television. Especially in an election season, we see how a news broadcaster may be tempted to alter the content of its public affairs programming if it thinks it can garner additional advertising dollars from one or another campaign, SuperPAC, or advocacy group by doing so.

[21] But speculation aside, there is no *evidence* in the record—much less evidence which was in the record *before Congress*—to support Congress's specific determination that public issue and political advertisements impact the programming decisions of public broadcast stations to a degree that justifies the comprehensive advertising restriction at issue here. In *Turner II*, the Supreme Court stated that such evidence must at least *include* "substantial evidence in the record before Congress" at the time of the statute's enaction, *Turner II*, 520 U.S. at 211. Here, the government fails to point to evidence to support the needed connection between the means of § 399b(a)(2) and (a)(3) (prohibition of public issue and political issue advertisements) and the ends to be achieved (survival of educational programming). For instance, no witness testified to Congress in 1981 as to the relative motivations of public issue and political advertisers when compared to other advertisers. Instead, the only evidence before Congress dealt with the motivations of commercial advertisers or advertisers *generally*. But the type of advertising proscribed by § 399b(a)(2) and (a)(3) is very different than that proscribed by (a)(1).

Further, the only evidence cited by the government in the district court and in its brief to support § 399b(a)(3)'s content-based restriction on political speech was a 2008 article in AdWeek Magazine which stated that $2.2 billion was spent on political campaign advertisements during 2008. The AdWeek article did not provide any figures for the amount of money spent on non-political advertising, so the significance of the $2.2 billion figure is unclear. Additionally, the fact that a large amount of money was spent on political television advertisements in 2008 is not "substantial evidence" that political advertisers seek a larger audience than do nonprofits advertisers, or that they distort programming decisions by buying advertising time. And a magazine article from *2008* certainly was not "substantial evidence [which was] in the record before Congress" 27 years earlier, in *1981*, when § 399b was enacted. *See Turner II*, 520 U.S. at 211. Moreover, there was no evidence presented by the government to justify § 399b(a)(2)'s restriction on public issue speech.

[22] Indeed, of the Congressional testimony relied on by the district court in its determination that the statute withstood intermediate scrutiny, it is instructive that two of the three representatives referred explicitly to the threat to public broadcasters of "commercialization." John C. DeWitt from the American Foundation for the Blind testified that he was concerned the "commercialization of public broadcasting" threatened to focus its programming towards the "lowest common denominator," rather than "diverse audiences,"

including minorities, women and the "print handicapped." Hearings before the Subcomm. on Telecommns, Consumer Protection, and Finance of the H. Comm. on Energy and Commerce on H.R. 3238 and H.R. 2774, 97th Cong. 1st Sess. (1981) ("1981 House Hearings."). This does nothing to support the bans in subsections (a)(2) and (a)(3), because public issue and political advertisements pose no threat of "commercialization." By definition, such advertisements do not encourage viewers to buy commercial goods and services. A ban on such advertising therefore cannot be narrowly tailored to serve the interest of preventing the "commercialization" of broadcasting.

The district court also cited testimony of the Association of Independent Video and Filmmakers (AIVF). AIVF's testimony stated unequivocally that "commercialization will make public television indistinguishable from the new commercial or pay culture cable services. And public television will fail." But again, this concern simply does not implicate public issue and political advertisements.[9]

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[9] A third piece of testimony before Congress in 1981 was by a representative from National Public Radio (NPR), and that testimony is on the whole unhelpful to the government. The NPR representative in fact suggested that the programs provided by public television stations could survive a statutory scheme which allowed paid advertising generally. The NPR representative testified that, per NPR's internal study, "on-air advertising and pay cable fall into [a] category" which "may attract money for some public television stations, [but] hold little or no promise for public radio." Thus, the NPR testimony cannot be "substantial evidence" that prohibitions on public

Ultimately, the most revealing statement in the government's brief on this point is the following sentence, which contains no citations: "Political advertisers are no less capable of exerting influence on programmers than commercial advertisers, and, accordingly, political advertising has never been permitted in public broadcasting." If that preliminary statement of fact about the ability of political advertisers to exert program influence were supported by some evidence—in particular, some evidence before Congress when it enacted the ban—the government could sustain its burden under intermediate scrutiny. But at such a critical point, the government makes only a bare assertion, unsupported by citation to any evidence. The government cannot simply assert its way out of the "substantial evidence" requirement of the First Amendment.[10]

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issue or political advertisements were "necessary to preserve" public broadcasting stations' programming.

[10] The dissent contends that the Constitution imposes only two "procedural" requirements on a law's passage, bicameralism and presentment, and therefore objects to the conclusion that "the constitutionality of a federal law might turn on the quantity and quality of evidence before Congress at the time of enactment." Dissent at 3968-69. But those are two different questions: one is what the Constitution requires for enactment of a law, and another is what the First Amendment to the Constitution requires for a law abridging speech to be valid. For provisions like subsections 399b(a)(2) and (a)(3), which undeniably restrict speech, the Supreme Court has stated that the law must pass the intermediate scrutiny test: the government must show that the statute "promotes a substantial governmental interest" and "does not burden substantially more speech than necessary to further that interest." *Turner II*, 520 U.S. at 213 (internal quotations

[23] The fact that Congress chose not to ban *all* advertisements, but left a gap for certain non-profit advertisements, is also fatal to its case under the analysis in *Discovery Network*, the commercial handbills case. Here, the banned speech (public issue and political advertisements) is analogous to *Discovery Network's* handbills; the permitted speech (promotional advertisements by nonprofits) is analogous to the *Discovery Network's* newspapers. And just as the city in *Discovery Network* was required to prove that handbill-dispensing news-racks posed a greater threat to public safety and esthetics than newspaper-dispensing newsracks, the government here must prove that public issue and political advertisements pose a greater threat to educational programming on public broadcast stations than promotional advertisements on behalf of non-profits. 507 U.S. at 424. Indeed, the government's burden is even higher here than in *Discovery Network*, because § 399b disadvantages *political* speech—bans on which we must be "particularly wary." *League of Women Voters*, 468

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omitted). In elaborating the intermediate scrutiny inquiry, the Court stated that courts must "assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Id.* at 195. The *Turner* requirement is not a "procedural requirement" to enactment; rather, it is a substantive test for a provision's constitutionality under the First Amendment.

U.S. at 384.[11] Recall that the newsracks banned in *Discovery Network* contained commercial handbills.

[24] Applying the *Discovery Network* standard to § 399b's "selective and categorical" content-based bans on speech, we find no basis for § 399b's content-based discrimination against public issue and political advertisements. In fact, it stands to reason that *both* public issue and political advertisers, on the one hand, and nonprofits seeking to advertise for their goods and services, on the other, would generally seek the largest audience possible. A nonprofit university which seeks to attract students through television advertisements would want its advertisements seen by as many potential applicants as possible; so, too, would a Presidential candidate generally want his advertisement viewed by the largest possible audience of voters.

Of course, this is a generality: we do not doubt that many advertisers—political and nonpolitical—sometimes target niche markets. A nonprofit group seeking to raise funds for wildlife preservation may choose to spend its money to advertise during nature

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[11] Accordingly, even if Judges Noonan and Paez are correct that *Discovery Network* is not directly applicable because it is a commercial speech case, *see* Concurrence at 3956; Dissent at 3965, that would do nothing to change the outcome because "commercial speech [handbills] can be subject to *greater* governmental regulation than noncommercial speech [political advertising]." *Discovery Network*, 507 U.S. at 426. If commercial speech could not be banned in *Discovery Network*, perforce political speech cannot be banned here. Indeed, the fact that we find certain sections of § 399b to be invalid under a standard that would, if anything, be *more* favorable to the government reinforces today's holding.

shows, the better to reach motivated donors. But so might an evangelical Presidential candidate choose to spend his money advertising on religious-themed shows in Iowa in advance of the Iowa caucuses, to increase voter turnout to his advantage. The point is that in general, there is no reason to think that public issue and political advertisers have any *greater* propensity to seek large audiences than do non-profit advertisers. Yet Minority and other public television stations may broadcast one type of advertisement but not the other. That is the kind of picking-and-choosing among different types of speech that Congress may not do, absent evidence to show that Congress's favoritism is necessary to serve its substantial interest.

[25] Thus, because § 399b's content-based ban on public issue and political advertisements bears "no relationship whatsoever to the particular interests that the [government] has asserted," *Discovery Network*, 507 U.S. at 424, the statute is not narrowly tailored. Here, as in *Discovery Network*, there is no basis for the content-based distinction drawn by § 399b. Just as newsracks containing "commercial handbills" and newsracks containing "newspapers" posed an identical threat to safety and esthetics, so too, for aught that appears— especially in the Congressional record—do public issue and political advertisers, on the one hand, and non-political, non-profit advertisers on the other pose identical threats to displace niche programs on public broadcast television.

The dissent relies on the aforementioned Ozier declaration for the proposition that "the content and

quantity of nonprofit advertising do not pose the same sort of threat to public broadcasting's financial model as other sorts of advertising." Dissent at 3967-68. But even if the dissent is correct that non-profit advertising *in general* does not pose the sort of threat that for-profit advertising does, that fact would do nothing to justify 399b's content-based speech restriction *within* the class of nonprofit advertising. The statute gives Minority the ability to broadcast an advertisement for Planned Parenthood's goods and services but does not allow Minority to broadcast an advertisement stating Planned Parenthood's view on a piece of proposed legislation or a political candidate. That is a crucial content-based distinction—and there is no evidence at all to support it.[12]

[26] The government's evidence in this case shows only the size and effect of one class of advertising: traditional commercial advertising. That is the content of speech proscribed in subsection § 399b(a)(1), which proscription we today

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[12] The dissent claims that Congress in fact "intended to shield public programming" from undue "political" influence but not from "advertisements by nonprofit entities." Dissent at 3966-67. In support of this "Congressional intent," the dissent cites to not a word of statutory text but only to a sentence fragment by a single House member contained in the congressional record. *Id*. (citing 127 Cong. Rec. 13145 (June 22, 1981) (remarks of Rep. Gonzalez). But "[r]eliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards," *New England Power Co. v. New Hampshire*, 455 U.S. 331, 342 (1982), and Representative Gonzalez's isolated statement cannot overcome the absence of evidence in the record justifying the content-based restriction.

hold passes "intermediate scrutiny" and which we uphold. But the government cannot point to evidence that its fear of harm to public television that would come from allowing stations to air public issue and political advertisements is "real, not merely conjectural," much less that the portions of the statute which ban such political and public issue advertisements "alleviate those harms in a direct and material way." *Turner I*, 512 U.S. at 664. Thus, we strike down as unconstitutional subsections 399b(a)(2) and (a)(3).

Of course, following today's decision, Congress is free to "try again." If there truly is evidence that broadcast of public issue and political advertisements would cause substantial harm—that their broadcast would change program content as directly and substantially as would for-profits' advertising—Congress could compile a record to show as much, and perhaps pass a law restricting such speech. That record would contain evidence, not mere conjecture and anecdote. It is evidence of harm to a substantial governmental interest—not mere conjecture—which the First Amendment requires. *See Turner II*, 520 U.S. at 211.

The district court's grant of summary judgment to the government is **AFFIRMED** in part, and **REVERSED** in part. We **REMAND** to the district court with instructions to enter an order granting summary judgment to Minority Television Project as

to § 399b(a)(2) and § 399b(a)(3), and for further proceedings consistent with this opinion.[13]

NOONAN, Circuit Judge, concurring in the judgment:

Broadcast speech is protected by the First Amendment, but it has characteristics that distinguish it from most other forms of speech. Intermediate scrutiny must be applied to this modern medium unknown to the framers of the Constitution. *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984). Broadcast speech, as it now exists, came into existence by the allocation by the government of space on the spectrum of frequencies for broadcasting. It is therefore licensed by the government. Of course, the government might have abstained from allocating frequencies, as it did before 1927. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375-76 (1969). That road was not followed. Without effective challenge, the government took charge and rationed the frequencies. Broadcast television, as it exists today, exists as it does because the government has been a shaper of it. Speech by license of the government presents a formidable paradox in application of the First Amendment.

The appellant is licensed by the government as a not-for-profit broadcaster. It is authorized by license pursuant to 47 C.F.R. § 73.621(a), a regulation

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[13] Because Minority was fined $10,000 for violations of § 399b(a)(1)—which survives our decision today—we affirm the district court's denial of reimbursement. Moreover, we express no opinion as to whether subsection 399b(a)(1) would withstand *strict* scrutiny analysis.

specifying that a license may be given to a "nonprofit educational organization upon a showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial broadcast television service." The nature of licensed broadcasting makes it inappropriate to draw guidance from a case such as *City of Cincinnati v. Discovery Network*, 307 U.S. 410 (1993), invalidating a city ordinance governing news racks.

When 47 U.S.C. § 399 was enacted, there was no evidence before Congress as to the impact of political speech on public broadcasting because no such speech had been permitted. What Congress had before it were educated guesses by persons familiar with the media. When this case began in 2006, the government did not produce any more evidence, because no more evidence existed.

Legislatures may often have to act on the basis of prediction rather than on the basis of evidence. The conduct of a war on poverty, or of an actual war, for example, may depend on such legislative guesswork. As I understand the teaching of the Supreme Court, however, a restriction on political speech, the "highest rung of the hierarchy of First Amendment values," *League of Women Voters*, 468 U.S. at 381, must normally be based on evidence of harm to a substantial governmental interest. *Id.* at 391; *Red Lion*, 395 U.S. at 393. Such evidence has not been provided to Congress. Accordingly, the ban on speech is an unconstitutional abridgement of the First Amendment.

This requirement was dropped by the plurality in *Turner II* relying on evidence introduced on remand to the district court—evidence obviously not before Congress when it enacted the statute in question. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 200 (1997) (plurality opinion). It is unclear whether this example justifies other courts in not looking for evidence before Congress or in relying not on evidence but predictions. I believe that we are still bound by *League of Women Voters, supra.*

Citizens United v. FEC, 130 S. Ct. 876 (2010), decided a different question and is therefore not controlling here. It is, however, relevant in affording the view of governmental control of speech now taken by the United States Supreme Court. For example, Justice Kennedy writing for the Court observed:

> While some means of communication may be less effective than others at influencing the public in different contexts, any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux. *Id.* at 890.

> The recognition of the "rapid flux" in the technologies and the recognition that "substantial questions would arise" if the courts favored or disfavored a particular means of speech suggest the sensitivity of the Court to the changing field of communication by television.

Justice Kennedy went on to state:

> Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker. *Id.* at 891.

This passage's negative reference to basing "constitutional lines" on "particular media" could be read as embracing the special constitutional lines now governing broadcast media.

With the rapid flux of technologies transmitting television, there have come new forms of television that do not require use of the narrow spectrum employed by broadcast television. These new forms—cable, satellite, cell phone, the Internet and the iPad—have introduced a variety of ways of communicating on television and call at least for a new look at the government's substantial role in licensing and regulating speech on broadcast television.

In short, in this delicate and difficult field of rapid change, it would be hard to believe that the restrictions on political speech established by the statute over thirty years ago are constitutionally valid even if they had met constitutional criteria when they were published.

Minority TV also challenges as "vague" the prohibition of § 399 of any advertisement intended "to promote any service, facility or product offered by any person who is engaged in offering such offering for profit." The words are clear enough. What Minority TV appears to be objecting to is the application of the statute as confusing or inconsistent.

As a viewer of Jim Lehrer NewsHour and its successor, I have seen announcements that to my mind are ads. For example, I have viewed Charles Schwab's message, "Talk to Chuck"—it is not about Chuck's golf game. I have viewed Chevron's "We have more in common than you think"—it appears to me to promote Chevron's business by asking me to identify with its efforts to improve the environment. I have watched as a pest control company has displayed the power of its techniques to eliminate a bug, a promotion of its services, one would suppose. But all of the above would be relevant on an as-applied challenge. Such a challenge must be brought as original matter in the court of appeals. Consequently, on this point, too, I concur in the result reached by Judge Bea.

PAEZ, Circuit Judge, dissenting:

I agree with Judge Bea's conclusions, contained in Part III of his opinion, that substantial evidence supports Congress's determination that advertising by for-profit entities on public broadcast stations poses a real harm, and that 47 U.S.C. § 399b(a)(1) does not burden substantially more speech than necessary to further the government's legitimate interest. However, as I explain in greater detail below, I agree neither with Judge Bea's analytical approach, nor with his conclusion that §§ 399b(a)(2) and (3) impose an unconstitutional, content-based restriction on speech. Accordingly, I respectfully dissent.[14]

For almost sixty years, noncommercial public broadcasters have been effectively insulated from the lure of paid advertising. The court's judgment will disrupt this policy and could jeopardize the future of public broadcasting. I am not persuaded that the First Amendment mandates such an outcome. In my view, §§ 399(a)(2) and (3) satisfy the scrutiny standard set forth in *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984). I therefore disagree with Judge Bea's heavy reliance on a commercial speech case, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), to impose an unprecedented and unwarranted burden of proof on the government. I also take issue with Judge Bea's contention that *Turner Broad. Sys., Inc. v. F.C.C. ("Turner I"),* 512 U.S. 622 (1994) and *Turner Broad. Sys., Inc. v. F.C.C.* ("*Turner II*"), 520 U.S. 180 (1997) require the government to prove

[14] I concur, however, in the Memorandum disposition filed simultaneously with this opinion.

its case by presenting "'[s]ubstantial evidence[,]' [which] must include 'substantial evidence in the record before Congress' at the time of the statute's enaction." Op. at 3938 (quoting *Turner II*, 520 U.S. at 211) (internal citation omitted). Because §§ 399b(a)(2) and (3) are narrowly tailored provisions that fulfill the government's substantial interest in noncommercial public broadcasting, I would affirm the district court's order granting summary judgment to the FCC.

I.

I agree with both Judge Bea and Judge Noonan that because § 399b regulates broadcast media, the broadcast-specific version of intermediate scrutiny[15]

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[15] It is important to distinguish the broadcast-specific version of intermediate scrutiny from other scrutiny standards that are used in First Amendment cases. Parts of Judge Bea's opinion inappropriately follow the intermediate scrutiny framework that the Supreme Court applied in *Turner I* and *Turner II*. The standard outlined in the Turner cases—which involved First Amendment challenges to content-neutral, non-broadcast regulations—is not relevant here. In light of the unique nature of broadcast speech, for almost eighty years the Supreme Court has refused to apply the same level of First Amendment scrutiny to broadcast regulations that it has applied to regulations governing, for example, newspapers or magazines. *See League of Women Voters*, 468 U.S. at 376-77 ("Were a similar ban . . . applied to newspapers and magazines, we would not hesitate to strike it down as violative of the First Amendment."); *see also National Broad. Co. v. U.S.,* 319 U.S. 190, 226-27 (1943); *Columbia Broad. Sys., Inc. v. Democratic Nat. Comm.,* 412 U.S. 94, 101 (1973); *F.C.C. v. Pacifica Foundation,* 438 U.S. 725, 748 (1978). Because § 399b is a content-based regulation of broadcast media, the intermediate broadcast scrutiny test from *League of Women Voters* provides

should guide our analysis of this case. As Judge Bea's opinion notes, a regulation will survive such scrutiny if it is "narrowly tailored to further a substantial government interest." *League of Women Voters*, 468 U.S. at 380 (cited at Op. 3935).[16] As noted, I also agree with Judge Bea's twin conclusions that the government has a substantial interest in noncommercial public broadcasting and that §399b furthers this interest. I differ from both Judge Bea and Judge Noonan in my conclusion that §§399b(a)(2) and (3) are sufficiently tailored to survive broadcast scrutiny. Judge Bea's analysis draws from cases involving non-broadcast, content-neutral, and commercial speech restrictions. I disagree with this approach, and would decide this case by hewing closely to *League of Women Voters*, which is directly on point.

From *League of Women Voters* we can derive several principles to guide our analysis of whether

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the correct framework for evaluating Minority's First Amendment challenge to §§ 399b(a)(2) and (3). Because *Discovery Network, Turner I,* and *Turner II* involved non-broadcast regulations, I do not share Judge Bea's view that these cases provide "additional elaboration" of the standard outlined in *League of Women Voters*. Op. at 3934; *see also* Op. at 3937-40.

[16] There are two key differences between strict scrutiny and intermediate broadcast scrutiny. First, the government interest need only be "substantial," rather than "compelling," to survive intermediate broadcast scrutiny. Second, the "narrowly tailored" requirement of intermediate broadcast scrutiny is more flexible than the corresponding requirement for strict scrutiny. Determining the exact meaning of "narrowly tailored" is a difficult exercise because the Supreme Court has not explicitly defined this term in its broadcast cases.

§§ 399b(a)(2) and (3) are narrowly tailored. In *League of Women Voters*, the Supreme Court explained that a broadcasting regulation is narrowly tailored when it is not "manifest[ly] imprecis[e]," 468 U.S. at 392, when it is not patently overinclusive or underinclusive, *Id.* at 396, and when "less restrictive means" of furthering the government's interest are not "readily available," *Id.* at 395. Moreover, if a content-based broadcasting regulation "far exceeds" what is necessary to satisfy the government's interest, then it is not narrowly tailored." *Id.* at 395. In my view, §§ 399b(a)(2) and (3) satisfy these requirements.

First, the law is not "patent[ly] overinclusive[ ]." *Id.* at 396. On the contrary, the legislative history of § 399b demonstrates that the law was crafted to restrict the least possible amount of speech. Before the passage of § 399b, public broadcasters were prohibited from airing *all* advertisements. *See, e.g.,* 17 Fed. Reg. 4062 (1952) (47 C.F.R. § 3.621(d), (e)) (later moved to 47 C.F.R. § 73.621(d), (e)); *In the Matter of Comm'n Policy Concerning the Noncommercial Nature of Educ. Broad. Stations ("Comm'n Policy I"),* 86 F.C.C. 2d 141, 142 (1981) (discussing the "existing proscription against all promotion of products and services) (emphasis in original). The Public Broadcast Amendments Act of 1981, codified in 47 U.S.C. §§ 399a and 399b, modified these restrictions to enhance donor acknowledgments, to allow public broadcasters to air any content (including advertisements) for which consideration is not received, and to allow nonprofit organizations to advertise services, products, and facilities. In light of these modifications, § 399b is

less restrictive of public broadcasters' First Amendment rights than the statute at issue in *League of Women Voters*, which broadly prohibited *all* editorial content from being broadcast. In contrast to the statute at issue in *League of Women Voters*, § 399b gives broadcasters programming flexibility while still insulating the stations from the "commercial market pressures" that result from reliance on advertising revenue. *Comm'n Policy I*, 86 F.C.C. 2d at 142. Thus, § 399b is not overinclusive—at least not in my view—nor does it "far exceed[ ]" what is necessary to satisfy the government's interest in promoting non-commercial educational broadcasting. *See League of Women Voters*, 468 U.S. at 395.[17]

Second, § 399b is not underinclusive. In *League of Women Voters*, the Court held that the statute in question was underinclusive because it barred editorializing but did not bar stations from choosing to air partisan content. 468 U.S. at 396-97. Considering that the government's purported interest was to prevent the broadcast of controversial or partisan opinions, the law was

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[17] I understand Judge Bea's argument to be that he defers to Congress's judgment that market pressure poses a danger to public broadcasting, yet he draws a distinction between the type of market pressure which for-profit and political or public issue advertisers will exert. Op. at 3946-47, 3948-49. Such a distinction is untenable in light of the tremendous sums spent on political campaign advertisements—$2.2 billion in 2008—which represent a considerable source of potential revenue by any measure. Judge Bea reaches his conclusion that § 399b is overinclusive only by discounting this evidence. *See* Op. at 3948-49.

minimally effective. *Id.* Thus, the Court held that the underinclusive law, which "provide[d] only ineffective or remote support for the government's purpose," was not valid under the First Amendment. *Id.* (quoting *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.,* 447 U.S. 557, 564 (1980)).

Unlike the underinclusive statute at issue in *League of Women Voters*, Congress's decision to allow non-profit advertising on public broadcasts has not rendered § 399b ineffective. According to Stanford Professor Roger G. Noll, a leading scholar on the economics of television, § 399b's ban on paid commercial advertisements, political advertisements, and issue advertisements has effectively insulated public broadcasting from the market failure problem of commercial broadcasting. Lance Ozier, a senior officer of the WGBH Educational Foundation,[18] similarly explained that advertising by non-profit entities "do[es] not present the same danger" to public television as for-profit advertising. Unlike commercial, political, and issue advertisements, non-profit announcements—according to Ozier—are viewed as "consistent with the public education mission of public television," and therefore do not threaten other funding sources. Particularly, Ozier explains that the presence of just a small number of non-profit advertisers creates only a minimal risk that stations will seek to boost

[18] WGBH is the largest producer of primetime and online programming for the Public Broadcasting Service (PBS) and is also a major producer of national programs for many public radio stations.

viewership in order to increase advertising sales. Non-profit advertising sales, for example, did not even register on Professor Noll's breakdown of public television revenue sources. As an additional anecdote, Minority has produced just one instance in which a non-profit entity purchased an announcement on a public broadcast station. In short, advertisements by non-profit organizations do not appear to foster the market failure problem of public broadcasting that Congress sought to avoid in enacting § 399b.[19] Thus, I would conclude that §§ 399b(a)(2) and (3) are not unconstitutionally underinclusive.

Third, there appear to be no "less restrictive means" that are "readily available" to further the government's interest in promoting public broadcasting. Neither Judge Bea nor Judge Noonan offers any alternative to the current regime, and certainly not one that is "less restrictive" and "readily available." Similarly, Professor Noll's report lays out some plausible alternatives to § 399b, but concludes that these alternatives are not reasonable.

Thus, § 399b is not "manifest[ly] imprecis[e]," *League of Women Voters*, 467 U.S. at 392, nor is it patently overinclusive or underinclusive, *Id.* at 396. Nor are there "less restrictive means" to § 399b that are "readily available." *Id.* at 395. Accordingly, I would hold that § 399b satisfies the scrutiny test laid

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[19] I believe that this evidence belies Judge Bea's glib contention that "there is no reason to think that public issue and political advertisers have any greater propensity to seek large audiences than do nonprofit advertisers." Op. at 3953.

out in *League of Women Voters* and affirm the district court's grant of summary judgment to the FCC.

II.

Judge Bea's opinion heavily relies on an inapposite commercial speech case, *City of Cincinnati v. Discovery Network,* 507 U.S. 410 (1993), to strike down §§ 399b(a)(2) and (3). In my view, Judge Bea's reliance on, and interpretation of, *Discovery Network* are flawed for three reasons.

First, Judge Bea relies on *Discovery Network* for the proposition that *League of Women Voters*' narrow tailoring requirement demands that the government prove that the speech prohibited by §§ 399b(a)(2) and (3) poses a greater threat to the government's interest than the speech allowed. Op. at 3941. Because *Discovery Network* involved non-broadcast commercial speech, it has little relevance to this case. *Discovery Network* neither interpreted nor applied the narrow tailoring requirement of intermediate broadcast scrutiny, so Judge Bea's reliance on *Discovery Network* is unfounded.

Second, Judge Bea's initial mistake of relying on *Discovery Network* is compounded by his misreading of the case. Judge Bea states that under *Discovery Network*, "the government must prove that the speech *banned* . . . poses a greater threat than the speech *permitted*." Op. at 3941 (emphasis in original). This is not a fair reading of *Discovery Network*. The portion of *Discovery Network* cited by Judge Bea contains the Court's observation that all

newsracks, whether containing commercial newspaper or noncommercial handbills, were "equally unattractive." 507 U.S. at 425. Accordingly, the Court in *Discovery Network* found that the law in question was not effective at addressing the government's interest in avoiding visual blight on the streets of Cincinnati. *Id.* at 428. I therefore read *Discovery Network* to support the accepted notion that a regulation burdening speech cannot be underinclusive to the point of inefficacy. *Accord League of Women Voters*, 468 U.S. at 397. I do not believe, however, that *Discovery Network* stands for the broad proposition that the government must prove that all banned speech is more harmful than all allowed speech. This holding imposes a burden on the government that surpasses even the exacting standard of *strict* scrutiny. In order to meet Judge Bea's heavy burden, Congress would have to ban either all advertisements or no advertisements because no regulation that creates categorical distinctions could plausibly encompass only the most harmful content imaginable.[20]

Third, even if *Discovery Network* were applicable to this case, which I believe it is not, I disagree with

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[20] Judge Bea's approach also flatly contradicts later commercial speech cases. *See, e.g., Greater New Orleans Broad. Ass'n, Inc. v. United States,* 527 U.S. 173, 188 (1999) ("The Government is not required to employ the least restrictive means conceivable."); *see also id.* (stating that narrow tailoring requires "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served") (quoting *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

Judge Bea's unsubstantiated conclusion that public issue and political advertisements "pose identical threats" to the unique programming of public broadcasting as non-profit advertisements. Op. at 3954. Since Congress intended to shield public programming from "special interests—be they commercial, *political*, or religious," this proposition holds no merit. 127 Cong. Rec. 13145 (June 22, 1981) (remarks of Rep. Gonzalez) (emphasis added). Political ads run directly counter to Congress's interest in barring political interest groups (and their advertising dollars) from affecting programming decisions. There was no similar concern by Congress regarding advertisements by non-profit entities. We are not entitled to simply dismiss congressional intent on this matter. *See Turner II*, 520 U.S. at 196 ("[D]eference must be accorded to [congressional] findings as to the harm to be avoided and to the remedial measures adopted for that end, lest [the courts] infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.").

Moreover, the government has produced evidence that political advertising presents a greater harm to public broadcasting than non-profit advertising. As described above, non-profit announcements on public broadcasts are virtually negligible, and could easily be swamped by the very large market for political advertising. Congress could have reasonably feared the corrosive impact of advertising in general, but viewed non-profit advertisements as harmless to the

public interest mission of public broadcasting.[21] In addition, while Congress has long sought to shield public broadcasting from political influences, there is no evidence that Congress has viewed non-profit entities as a harmful outside influence. As Ozier's declaration makes clear, the content and quantity of non-profit advertising do not pose the same sort of threat to public broadcasting's financial model as other sorts of advertisements.[22]

III.

Finally, Judge Bea errs in his narrow view of what evidence we may consider when determining the constitutionality of § 399b. In my view, Judge

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[21] It bears repeating that $2.2 billion represents a large market by any measure. Moreover, Judge Bea's analysis of the potential effects of political advertising on the "nature and prevalence" of public television's unique programming, Op. at 3948, examines only one side of the coin. While he may be correct that a political candidate cartoon is a laughable prospect, Congress could well have feared that market pressures would entice public television stations to limit children's and other educational programming in favor of more lucrative advertising. Indeed, as Judge Bea acknowledges, "[e]specially in an election season, we see how a news broadcaster may be tempted to alter the content of its public affairs programming if it thinks it can garner additional advertising dollars from one or another campaign, SuperPAC, or advocacy group by doing so." Op. at 3949. In light of the record evidence supporting such a conclusion, I find Congress's determination infinitely reasonable.

[22] Specifically, Ozier explains in his declaration that "WGBH, like other noncommercial educational stations, currently accepts announcements from not-for-profit entities . . . These announcements do not present the same danger to public television's other funding sources, or its cost structure, as would for-profit advertising . . ."

Bea misreads *Turner II* to conclude that the government must prove its case by presenting "'[s]ubstantial evidence[,]' [which] must include 'substantial evidence in the record before Congress' at the time of the statute's enaction." Op. at 3938 (quoting *Turner II*, 520 U.S. at 211) (internal citation omitted). I disagree with Judge Bea's view that we may not consider evidence supporting the constitutionality of §§ 399b(a)(2) and (3) unless some of that evidence was present in the record before Congress at the time of the statute's enactment.

The Constitution imposes only two procedural requirements that Congress must follow in enacting laws: bicameralism and presentment. In *INS v. Chadha,* 462 U.S. 919, 951 (1983), the Court explained: "It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government can be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *See also Sable Comm'n of California, Inc. v. F.C.C.,* 492 U.S. 115, 133 (1989) (Scalia, J., concurring) ("Neither due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote."). Judge Bea's conclusion that the constitutionality of a federal law might turn on the quantity and quality of evidence before Congress at the time of enactment violates this fundamental principle by effectively imposing a procedural requirement on Congress's legislative process.

Judge Bea acknowledges that there is no requirement of a "particular type of evidence in the record before Congress," Op. at 3946, and rightly declines Minority's request to weigh the "quality of the evidence" before Congress, *id* at 3946. Yet Judge Bea repeatedly characterizes the government's burden as requiring a showing of "'[s]ubstantial evidence[,]' [which] must include 'substantial evidence in the record before Congress' at the time of the statute's enaction" to support § 399b. *See* Op. at 3940; *see also* Op. at 3944, 3946, 3947, 3949.

Judge Bea's characterization misrepresents one sentence from *Turner II*. In reading the *Turner* cases together, it is apparent that the Supreme Court did not intend for lower courts to be restricted to the record before Congress, as an antecedent and necessary prerequisite to the consideration of other evidence, in assessing the constitutionality of federal laws. In *Turner I*, the Court expressly recognized that the parties might introduce additional evidence on remand that was not contained in the record before Congress at the time of the challenged law's enactment. In remanding the case for further factual development, the Court stated that "[w]ithout a more substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, *or the introduction of some additional evidence* . . . we cannot determine whether the threat to broadcast television is real enough to overcome the challenge to the provisions made by these appellants." *Id.* at 667 (emphasis added). Three years later, in *Turner II*, the Court considered evidence that was not contained in the record before Congress at the time of the challenged

law's enactment. *See generally Turner II*, 520 U.S. at 200-12 (repeatedly referencing expert declarations that were not part of the congressional record at the time of the challenged law's passage). In outlining its task, the Court explained, "[w]e examine first the evidence before Congress and then the *further evidence presented to the District Court on remand to supplement the congressional determination." Id.* at 196 (emphasis added).

Thus, I read the *Turner* cases as identifying two sources of evidence upon which a court may rely in assessing the constitutionality of a federal law: the record before Congress at the time of enactment, and additional evidence presented in the district court. To the extent that a district court considers evidence in the record before Congress at the time of enactment, it must defer to Congress's reasonable judgments. Accordingly, the Court explained that for purposes of considering evidence from the congressional record, "[t]he question is not whether Congress, as an objective matter, was correct to determine [that the challenged law] was necessary to [further the government's interest]. Rather, the question is whether the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress." 520 U.S. 211. I do not interpret this sentence to mean that courts must locate evidence in the record before Congress at the time of the statute's enactment which supports Congress's legislative determination *before* it may consider additional evidence regarding the statute's constitutionality. I could not uncover any case in

which a court took this extreme approach, and I would not do so here.

Judge Bea's contention that his reading of *Turner II* imposes a substantive rather than a procedural requirement on the legislative process, Op. at 3951-52, n. 10, does not alter my conclusion. His approach imposes a procedural requirement to the passage of a *constitutional* statute. Otherwise stated, Judge Bea's analysis permits the constitutionality of a statute to rest on Congress's attention to creating a sufficiently detailed record prior to the statute's enactment, rather than on the practical force and effect of the statute at the time it is challenged. I do not believe this additional requirement finds support in the Constitution. *See Chadha*, 462 U.S. at 951.

IV.

For the foregoing reasons, I would affirm the district court's order granting the FCC's motion for summary judgment and denying Minority's motion for summary judgment.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MINORITY TELEVISION PROJECT, INC.,
Plaintiff,

No. C-06-20699 EDL

FEDERAL COMMUNICATIONS COMMISSION;
Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Minority Television Project ("Minority TV" or "Plaintiff"), a non-profit California corporation, is the licensee of non-commercial educational television station KMTP-TV, San Francisco, pursuant to a license granted by Defendant Federal Communications Commission ("FCC"). First Amended Complaint ("FAC") ¶ 5. As

the operator of KMTP-TV, Plaintiff is subject to the restrictions on broadcasting announcements acknowledging donors and the prohibition against certain paid promotional announcements set forth in 47 U.S.C. § 399b and 47 C.F.R. § 73.621(e). FAC ¶ 17. Plaintiff challenges these restrictions as facially unconstitutional under the First Amendment. In particular, Plaintiff claims that the ban on paid advertisements relaying views on matters of public importance or supporting or opposing political candidates facially discriminates against non-commercial speech and favors certain types of commercial speech over non-commercial speech. Plaintiff also contends that the regulations restricting paid advertisements to promote services, facilities, or products are unconstitutionally vague.

Plaintiff filed its original complain on September 19, 2006, alleging numerous constitutional causes of action. Defendant moved to dismiss those claims. On March 13, 2007, the Court dismissed certain claims with prejudice, and the following claims with leave to amend: (1) the facial constitutional challenge to 47 U.S.C. § 399b (contained in the first claim) for violation of the First Amendment for imposition of greater restriction on certain non-commercial speech than on certain commercial speech; (2) the facial constitutional challenge to 47 U.S.C. § 399b (contained in the third claim) for violation of the First Amendment for imposition of greater restrictions on certain non-commercial speech than on other non-commercial speech; and (3) the facial constitutional challenge to 47 U.S.C. § 399b (contained in fifth claim) for violation of the First

and Fifth Amendments for unconstitutionally vague restrictions on protected speech.

Plaintiff filed an amended complaint on February 28, 2007, re-alleging the claims previously dismissed with prejudice as well as the facial constitutional challenges. Defendant filed a motion to dismiss. On December 21, 2007, the Court granted Defendant's motion with respect to the previously dismissed claims. The Court denied Defendant's motion as to the remaining claims for relief. The Court noted that while the prohibitions in Section 399b seemed to further the substantial interest of insulating broadcasters from special interests and ensuring high quality programming, dismissal would be premature without further development of the factual record. *See* Dec. 21, 2007 Order Granting in Part and Denying in Part Defendant's Motion to Dismiss ("Dec. 21 Order") at 13-18.

The parties filed cross motions for summary judgment on the remaining claims. For the following reasons, the Court grants Defendant's motion for summary judgment and denies Plaintiff's motion for summary judgment.

I. BACKGROUND

A. Regulation of Public Broadcast Stations

Pursuant to its statutory authority "[c]lassify radio stations" and "[p]rescribe the nature of the service to be rendered by each class of licensed stations," 47 U.S.C. § 303(a)-(b), the FCC has set

aside certain channels to be "licensed only to nonprofit educational organizations upon a showing that the proposed stations will be used primarily to serve the educational needs of the community . . . and to furnish a nonprofit and noncommercial television broadcast service," 47 C.F.R. § 73.621(2). Such stations are referred to as noncommercial educational stations or public broadcast stations. 47 U.S.C. § 397(6).

In regulating public broadcast stations, Congress and the FCC have sought to strike "a reasonable balance between the financial needs of [those] stations and their obligation to provide an essentially non-commercial broadcast service." *In re Comm'n Policy Concerning the Noncommercial Nature of Educ. Broad. Stations,* 90 F.C.C. 2d 895, 897 ¶ 3 (1982) (internal quotations omitted) (hereinafter "*Educ. Broad. Stations*"). Congress enacted Section 399b as part of the Public Broadcasting Amendments Act of 1981. To help fund programming, 47 U.S.C. § 399a(b) allows non-commercial educational stations to identify their financial supporters in a manner that does not promote the sale of goods or services. A non-commercial educational station may thus "broadcast announcements which include the use of any business or institutional logogram and which include a reference to the location of the corporation, company or other organization involved," so long as

such announcements do not "interrupt regular programming." 47 U.S.C. § 399a(b).[1]

Such stations may not, however, "make its facilities available to any person for the broadcasting of any advertisement." 47 U.S.C. § 399b(b)(2). The challenged statute defines "advertisement" as follows:

> For purposes of this section, the term "advertisement" means for any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended-
>
> > (1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit;
> >
> > (2) to express the views of any person with respect to any matter of public importance or interest; or
> >
> > (3) to support or oppose any candidate for political office.

47 U.S.C. § 399b(a). Section 399b thus regulates both "commercial" speech (§ 399b(a)(1)) and "non-commercial" speech (§ 399b(a)(2) and (3)), to the

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[1] A logogram is "any aural or visual letters or words, or any symbol or sign, which is used for the exclusive purpose of identifying any corporation, company, or other organization, and which is not used for the purpose of promoting the products, services or facilities of such corporation, company, or other organization." 47 U.S.C. § 399a(a).

extent such programming material is broadcast in exchange for remuneration. As this Court previously recognized, this statutory framework strikes "a balance that affors broadcasters financing beyond federal appropriations, while maintaining insulation from special influences, whether commerical or political." Dec. 21 Order at 12.

The FCC promulgated 47 C.F.R. § 73.621(e) to implement the statute and has issued several orders describing types of sponsorship announcements that do or do not violate the statute's prohibition on advertising. Donor acknowledgments may include: "(1) logograms or slogans which identify and do not promote, (2) location information, (3) value neutral descriptions of a product line or service, and (4) brand and trade name and product o[r] service listings." *In re Comm'n Policy Concerning the Noncommercial Nature of Educ. Broad. Stations*, 7 F.C.C. Rcd 827 (1992). Donor announcements, however, may not include price information, calls to action, or inducements to buy. *Id.* at 828.

B. FCC Proceedings Against Plaintiff

Minority TV is the licensee of non-commerical educational television stations KMTP-TV, located in San Francisco. KMTP-TV is one of only a handful of non-commercial stations that are not affiliated with the Public Broadcasting Service ("PSB"). Declaration of Roger Noll, Ex. A at 22. In the course of its operations, Plaintiff has broadcast a number of announcements identifying its donors. As a consequence of complaints from another broadcaster, the FCC commenced a proceeding against Plaintiff

for repeatedly going beyond the limited identification of donors permitted under 47 U.S.C. § 399b. In 2002, the FCC's Enforcement Bureau determined that Minority TV violated Section 399bb approximately 1,900 times by broadcasting promotional advertisements on behalf of corporations such as State Farm and Chevrolet, among others. FAC, Ex. A (Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 15646 (2003)) (broadcasting, for example, advertisements with phrases such as "highly regarded product").

The FCC found "that Minority Television Project, Inc. ("Minority"), licensee for non-commerical educational television station KMTP-TV, San Francisco, California, apparently violated Section 399b of the Communication Act of 1934, as amended ("the Act"), 47 U.S.C. § 339b, and Section 73.621 of the Commission's Rules, 47 C.F.R. § 73.621, by willfully and repeatedly broadcasting advertisements. Based on our review of the facts and circumstances of this case, we conclude that Minority is apparently liable for a monetary forfeiture in the amount of Ten Thousand Dollars ($10,000)." FAC, Ex. A.

The FCC followed with a Forfeiture Order for $10,000.00 for "willful and repeated broadcast of advertisements over the station, in violation of Section 399b of the Communications Act of 1934, as amended ("the Act"), and section 73.621(e) of the Commission's rules." FAC, Ex. B (Forfeiture Order, 18 FCC Rcd 26661 (2003)). In doing so, the Forfeiture Order acknowledged that "the Commission has recognized that 'it may be difficult

to distinguish at times between announcements that promote and those that identify.' Thus it defers to 'reasonable, good faith judgments' by licensees and finds violations only where material is 'clearly' promotional as opposed to identifying." *Id.*

The FCC denied Plaintiff' Petition for Review, specifically rejecting Plaintiff's First Amendment arguments and request that the Commission revisit its underwriting announcement rules to make them clearer. FAC, Ex. C (Order on Review, 19 FCC Rcd 25116 (2004)). The FCC also denied Plaintiff's Petition for Reconsideration. FAC, Ex. D.

On December 23, 2005, Plaintiff filed a Petition for Review of the FCC orders in the United States Court of Appeals for the Ninth Circuit. On April 18, 2006, the Ninth Circuit transferred the case to this Court. *See* Docket No.1 (Transfer Order).

The parties agree that the above material facts are undisputed. Minority TV has not submitted evidence to support its constitutional challenge. Instead, it argues that neither the evidence before Congress nor Defendants' evidence before the Court supports the Constitutionality of the statute.

II. LEGAL STANDARD

Summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c). Material

facts are those that may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is a sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* The court must view the facts in the light most favorable to the non-moving party and give it the benefit of all reasonable inferences to be drawn from those facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The court must not weigh the evidence or determine the truth of the matter, but only determine whether there is a genuine issue for trial. *Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir. 1999).

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions for the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue where the nonmoving party will bear the burden of proof at trial, the moving party can prevail merely by pointing out the district court that there is an absence of evidence to support the nonmoving party's case. *Id.* If the moving party meets its initial burden, the opposing party must then set forth specific facts showing that there is some genuine issue for trial in order to defeat the motion. *See* Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 250. If the nonmoving party fails to show that there is a genuine issue for trial,

"the moving party is entitled to judgment as a matter of law." *Celotex*, 477 at 323.

III CROSS MOTIONS FOR SUMMARY JUDGMENT

A. Standing

To demonstrate standing, a plaintiff "must allege (1) a 'district and palpable' injury-in-fact that it (2) 'fairly traceable' to challenged provision or interpretation and (3) would 'likely . . . be redressed' by a favorable decision." *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1033 (9th Cir. 2006) (internal citation omitted). Additionally, special standing principles apply in First Amendment cases. In a facial challenge, a plaintiff seeking to vindicate his own constitutional rights may argue that an ordinance "is unconstitutionally vague or impermissibly restricts a protected activity." Alternatively, "an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statue on its face because it also threatens others not before the court. *Id.* (citations omitted).

Defendant does not contest Plaintiff's standing. Plaintiff plainly has standing to challenge Section 399b(a)(1), as the FCC has found it violated that section. Plaintiff maintains that it also has standing to challenge Sections 399b(a)(2) and (3), noting that the FCC has conceded that it has enforced Section 399b(2)(3) and admits that it will enforce both sections where appropriate. The FCC has also issued at least one advisory opinion concluding that

an underwriting announcement for Planned Parenthood was permissible under Section 399b(a)(1) because Planned Parenthood was a non-profit and under Section 399b(a)(2) because the announcement was not an expression of the views of any person with respect to a matter of public importance or interest. *See* Diercks Affidavit, Ex. A; Scheibel Depo. Ex. 18. The FCC has initiated enforcement pursuant to Section 399b(a)(3) at least twice, and the FCC is not aware of any published decisions enforcing Section 399b(a)(2). Fed. Mot. at 19 n.5 (citing *Applications of WQED Pittsburgh*, 15 FCC Rcd 202, 209 (1999); *J.C. Maxwell Broadcasting Group, Inc.*, 7 FCC Rcd 3218 (1992)).

Since the FCC is generally enforcing the provisions, Plaintiff has standing. In addition, while Plaintiff has not introduced specific evidence that it has a real intention or desire to broadcast announcements that would violate subsections (a)(2) and (a)(3) of Sections 399b, Plaintiff has alleged such an intention, discovery has not shown otherwise, and Defendant has not contested Plaintiff's claim.

B. Whether Section 399b Violates the First Amendment

As the Court has already determined, Section 399b is subject to review under intermediate First Amendment scrutiny and will be upheld if it is "narrowly tailored to further a substantial government interest." *FCC v. League of Women Voters of California*, 468 U.S. 364, 380 (1984)

(internal quotations omitted).[2] Under this test, "the government may employ the means of its choosing so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation, and does not burden substantially more speech than is necessary to further that interest." *Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 214-15 (1997) ("*Turner II*") (internal quotation omitted). The regulations need not be the least restrictive mean to achieve the government's end. *Id.* at 217. "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' (citation omitted). It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad Sys. v. FCC*, 512 U.S. 622, 664 (1994) ("*Turner I")* (citations omitted). Accordingly, the Court must consider the question of "whether the legislative conclusion was reasonable and supported by substantial evidence in the record Congress." *Turner I*, 512 U.S. at 665-66; *Turner II*, 520 U.S. at 211. Where the evidence in the record could support opposite conclusions, "it [i]s for Congress to determine the better explanation," and the Court is "not at liberty to substitute [its] judgment for the reasonable conclusion of a legislative body." *Turner II*, 520 U.S. at 212 *see also*

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[2] While Plaintiff halfheartedly argues that strict scrutiny should apply, *FCC v. Fox Television Stations, Inc.*, __ U.S. __, 129 S. Ct. 1800 (2009), relied upon by Plaintiff, does not support Plaintiff's conclusion.

Turner I, 512 U.S. at 666 (citing *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987) ("When trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures."). *See generally* Dec. 21 Order at 8-11.

Here, there are a few threshold issues which the Court must address before analyzing whether or not the statute is narrowly tailored to further a substantial governmental interest. First, the parties dispute whether or not the Court may consider facts outside of those considered by Congress when it enacted the statute. The government has submitted a report by Roger G. Noll, a Professor of Economics at Stanford University, and a declaration by Lance Ozier, the Vice President for Planning and Policy of the WGBH Educational Foundation, neither of which was considered by Congress.

As Defendant notes, in *Turner I*, the Supreme Court expressly permitted the government to supplement the legislative record to support the constitutionality of a federal statute, and indeed remanded the case for that very purpose. *Turner I*, 512 U.S. at 668 ("Because of the unresolved factual questions, the importance of the issues to the broadcast and cable industries, and the conflicting conclusions that the parties contend are to be drawn from the statistics and other evidence presented, we think it necessary to permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining, before passing upon the constitutional

validity of the challenged provisions."). In *Turner II*, the Court held: "We have no difficulty in finding a substantial basis to support Congress' conclusion that a real threat justified enactment of the must-carry provisions. We examine first the evidence before Congress and then the further evidence presented to the District Court on remand to supplement the congressional determination." *Turner II*, 520 U.S. at 196. The Supreme Court stated that the evidence before Congress supported its conclusions, and "the reasonableness of Congress' conclusion was [also] borne out by evidence on remand." *Id.* at 200. In accordance with the *Turner* decisions, this Court has considered both evidence before Congress and additional evidence not before Congress in evaluating the reasonableness of Congress' decision.[3]

Plaintiff also argues that the Ozier declaration should be stricken because the government did not identify Mr. Ozier as an expert pursuant to Federal

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[3] Plaintiff argues that the Court cannot consider evidence outside of the congressional record if that record revealed that Congress did not have substantial evidence before it supporting its conclusion. *See Turner II*, 520 U.S. at 211 ("question is whether the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress") (citing *Turner I*, 512 U.S. at 665-666). Because the Court finds that there was substantial evidence in the record before Congress, as discussed below, the Court need not reach this issue. Plaintiff also maintains that a plaintiff could successfully challenge a statute if overwhelming evidence contradicted the evidence before Congress. Again, however, Plaintiff has not submitted any significant contradictory evidence here, so the Court need not address this hypothetical scenario.

Rule of Civil Procedure 26(a)(2). Mr. Ozier's testimony qualifies as lay opinion testimony under Federal Rule of Evidence 701 if it is rationally based on his perception, helpful to clear understanding of the witness' testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge. Most if not all of Mr. Ozier's testimony is based upon his particularized knowledge that he has by virtue of his or her position in a business, as opposed to training or specialized knowledge within the realm of an expert, and is lay opinion. *See* Fed. R. Evid. 701 adv. comm. note (2000). As the Vice President of a foundation that operates numerous noncommercial educational radio and television stations, as well as the prior underwriting director of that entity, his opinions are based largely on his role at WGBH. *See* Ozier Decl. ¶¶ 2-4. In addition, the Federal Rules of Civil Procedure provide that a party that does not identify a witness may still use that witness if the failure to disclose is harmless. *See* Fed. R. Civil. Pro. 37(c)(1). Here, in February 2009, the government identified Mr. Ozier in a Rule 27(a)(1) disclosure as having information regarding the effect that airing of advertising or underwriting announcements from commerical, non-commerical or political sources would have on public broadcast stations, and Defendants made him available for a deposition, which Plaintiff declined to take. Consequently, the failure to disclose him as an expert is harmless. The Court, therefore, has considered Mr. Ozier's testimony, although it would reach the same conclusion without it.

As an additional threshold matter, the parties dispute whether or not, "[w]here the First Amendment is implicated the tie goes to the speaker, not the censor." Pl. Opp. at 3 (quoting *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 127 S. Ct. 2652 (2007) ("*WRTL*")).[4] Plaintiff claims this principle should be applied here, at least to the extent political speech is involved, but the government counters that *WRTL* is inapposite because there, strict scrutiny applied, requiring the government to use the least restrictive means to achieve its goal. Here, by contrast, the Court must give considerable deference to Congress in examining the evidence before it under *Turner II*, 520 U.S. at 199, rather than simply apply the "tie goes to the speaker" rule. The Court agrees that the *WRTL* strict scrutiny test is inapplicable here, where the government need not choose the latest restrictive means to achieve its goal.

Turning to the constitutionality of the statute, the government argues that Section 399b's restrictions on the broadcast of political and issue

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[4] In *WRTL*, a nonprofit political advocacy corporation asserted that the organization's advertisements were not barred by Bipartisan Campaign Reform Act of 2002 ("BCRA"). *Id*. at 460. The Court found that BCRA unconstitutionally precluded the advertisements, but there was no majority consensus concerning the basis for the unconstitutionality. Two Justices found that the specific advertisements at issue were not the functional equivalent of express campaign speech, and that the BCRA was unconstitutional as applied to them, while three other Justices deemed the specific statutory prohibition to be facially unconstitutional, and would have overruled the Court's prior holding that the BCRA was constitutional. *Id*. at 483, 504.

advertisements for remuneration are a narrowly tailored means of advancing the government's substantial interest of insulating broadcasters from special interests and ensuring high quality programming. Fed. Mot. at 6. The government maintains that the allure of remuneration from special influences, whether commercial or political, would undermine the touchstone of the noncommercial educational service – the independence of the public broadcaster's programming judgment. *Id.* In response, Plaintiff argues that Congress passed the statute on an insufficient factual record, and that the statute does not pass intermediate scrutiny.

1. The Government's Substantial Interest in Preserving Public Broadcasting as a Source of Programming Unavailable on Commercial Stations.

Congress has recognized that "it is in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes." 47 U.S.C. § 396(a)(1). The FCC first set aside TV channels for the exclusive use of educational broadcasters on the basis of its conclusion that "there is a need for non-commercial education stations" and that such stations can make "important contributions . . . in the education of the in—school and adult public." *Television Assignments,* 41 F.C.C. 148, 159-160 ¶¶ 36-38 (1952). The FCC dedicated these stations in this

manner because of the "high quality type of programming which would be available in such stations – programming of an entirely different character from that available on most commercial stations." *Nat'l Pub. Radio, Inc. v. FCC,* 254 F.3d 226, 227 (D.C. Cir. 2001) (internal citations and quotations omitted).

Congress has recognized the unique programming niche filled by public television by finding, in the Public Television Act, that "[i]t furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence, and which will constitute a source of alternative telecommunications services for all the citizens of the Nation." 47 U.S.C. § 396(a)(5); *see also* 47 U.S.C. § 396(a)(6) (referring to the public interest in seeking to "encourage the development of programming that involves creative risks and that addresses the needs of unserved and underserved audiences, particularly children and minorities"). To achieve these goals, Congress has appropriated substantial funds over the years for non-commercial broadcasting. *See e.g.,* 47 U.S.C. § 396(k). It also created the Corporation for Public Broadcasting ("CPB") in order to "facilitate the full development of public telecommunications" and make available "programs of high quality, diversity, creativity, excellence, and innovation." 47 U.S.C. 396(g)(1)(a).

The government submitted expert opinion regarding how public broadcasting addresses certain

programming voids that exist in commercial broadcasting due to its financial incentive structure. Roger Noll, Professor *Emeritus* of Economics at Stanford University and a Senior Fellow at the Stanford Institute for Economic Policy Research, explained persuasively that public broadcasting alleviates an "inherent 'market-failure' in commercial, advertiser-supported broadcasting," which "causes the nature and diversity of content in programs to fall short of the social optimum." Expert Report of Roger G. Noll ("Noll Report") at 5; *see also Id.* at 25-27 (citing studies comparing program diversity and program content of commercial and non-commercial stations). The market failure in commercial broadcasting results from the fact that commercial broadcasters derive most of their revenue from advertising sales. *Id.* at 11. "Advertisers buy access to viewers and are interested only in whether potential customers are watching," and they "have no interest in the size of the benefit that a program providers viewers as long as that benefit is sufficient to keep them viewing." *Id.* Commercial broadcasters therefore have an incentive to create and broadcast programming that appeals to the largest possible audience because "[a]dvertising revenues from for-profit advertisers depend upon the expected viewership of a particular program." Declaration of Lance Ozier ("Ozier Decl.") ¶ 12; *see also Turner II*, 520 U.S. at 208 ("a television station's audience size directly translates into revenue – large audiences attract larger revenues, through the sale of advertising time."). The net effect "is that a competitive, advertiser-supported television system leads to an emphasis on mass

entertainment programming with insufficient attention to programs that serve a small audience, even if that audience has an intense desire to watch programs that differ from standard mass entertainment programs." Noll Report at 5; *see also* Ozier Decl. at ¶15.

By contrast, public broadcasting's increased diversity of programming is made possible by different financial incentive structures, which "arise primarily from the prohibition against advertisments on non-commercial broadcasting and the practice of making federal subsidies depend on a station's success in obtaining financial support from other sources." Noll Report at 5. Unlike commercial stations, non-commercial educational stations receive funding not from paid advertising but from federal and state subsidies, individual donors, special events, foundation grants, and corporate contributions that are primarily in form of payments for underwriting announcements that acknowledge the donation before or after a sponsored program. Noll Report at 16-17; Ozier Decl. at ¶6. The FCC's interest in creating noncommercial channels is "to remove the programming decisions of public broadcasters from the normal kinds of commercial market pressures under which broadcasters . . . usually operate." *In re Comm'n Policy Concerning the Noncommerical Nature of Educ. Broad. Stations*, 86 F.C.C.2d 141, 142 (1981) *("Pub. Broad. Serv.")*. Unlike commercial stations, "non-commercial educational stations do not attempt to shape editorial content to maximize viewership for the programs that they offer, but instead attempt to air program with particular qualities consistent with

their educational mission." Ozier Decl. ¶12. The relative absence of advertising pressures allows the viewing public to rely on public television for "program content that is unlike the content for commercial stations and networks, which in turn is the kind of content that is less interest to advertisers." Noll Report at 29. For this reason, the FCC has recognized a "compelling government interest in separating public broadcasting station programming decisions from commercial considerations as much as possible." *Pub. Broad. Serv.,* 86 F.C.C.2d at 147.

Non-commercial programming differs from commercial programming in a number of ways. In particular, non-commercial broadcasters provide more public affairs programming and children's and family programming, while showing significantly less violent programming. Noll Report at 25-27. Studies have found the children's programming on public stations better serve certain educational and instructional criteria than children's programming on non-public stations. *Id.* at 33-34.

A strong example of public broadcasting's special benefits is provided by children's programming, which continues to be largely absent from commercial stations. The Government Accountability Office has determined that children's programming accounts for 16 percent of all program hours broadcast by public television stations and represents "over 40 percent of weekday programming schedule for many stations." *Id.*, Ex. B at 22 (*Issues Related to the Structure and Funding of Public Television*, GAO-07-150 (Jan. 2007)).

Commercial broadcasters, by contrast, have been found to average about 3.32 hours *per week* of educational or informational children's programming. *Id.*. Ex. C. at 11 (Wilson, Barbara J. Kunkel, Dale, and Drogos, Kristin L., *Educational/Insufficient? An Analysis of Availability & Educational Quality of Children's E/I Programming*, Children Now (November 2008)). According to a Senate report, public television is "the primary source of educational children's programming in the United States." Children's Television Act of 1990, S. REP. NO. 101-66, at 3, reprinted in 1990 U.S.C.C.A.N. 1628, 1633. Among other things, public broadcasting has served as an incubator for acclaimed children's programs such as "Mister Roger's Neighborhood," "Sesame Street," "Electric Company," "3-2-1 CONTACT," "Square One TV," and "Reading Rainbow" that educate and teach children specific skills, *Id.* at 23-26, 1990 U.S.C.C.A.N. at 1631-33 (citing studies, that for example, show that "viewing Mister Rogers Neighborhood leads to increased prosocial behavior, task persistence and imaginative play" and that "[e]ven a skeptical interpretation of the data concluded that children learned letter and number skills from unaided viewing").

Therefore, the government notes that is has a substantial interest in maintaining the educational programming available on public stations, which are heavily subsidized by the government. Congress's intent in amending sections 399a and 399b in 1981 was to insulate public broadcasting from special interest influences, including political and commercial influences. 127 Cong. Rec. 13145 (June

22, 1981) (remarks of Rep. Gonzalez). Plaintiff has not even attempted to refute this point. Rather, Plaintiff maintains that Section 399b does not further the asserted governmental interest and is not narrowly tailored.

2. Whether § 399b Furthers the Government's Interest and is Narrowly Tailored

In analyzing whether Section 399b furthers a substantial governmental interest, the government must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) ("*Turner I*") (citations omitted). Accordingly, the Court must consider the question of "whether the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress." *Turner I*, 512 U.S. at 665-66; *Turner II*, 520 U.S. at 212.

When the FCC established noncommercial television half a century ago, it found that the "achievement of the objective for which special educational reservations have been established – i.e., the establishment of a genuinely educational type of service – would not be furthered by permitting [non-commercial stations] to operate in substantially the same manner as commercial applicants." *Television Assignments,* 41 F.C.C. 148, 166 ¶ 57 (1952). Thirty years later, the FCC noted that "[p]ublic stations have relied primarily on government and private contributions; private commercial stations have

relied primarily upon revenue paid in consideration for the airing of advertising to promote goods and services. So long as [that distinction] is maintained . . . programming broadcast in return for receipt of consideration and used to promote the sale of goods and services is not appropriate for non-commercial broadcasting." *Pub. Broad. Serv.*, 86 F.C.C.2d at 147.

Until shortly before Congress adopted Section 399b's advertising restrictions, the FCC's existing regulations allowed broadcasting of a sponsor's name on a public station. In adopting Section 399b, Congress struck a balance between the need to ensure that public broadcasting remained financially viable in the face of substantial federal funding reductions and the need to preserve its essential character as a non-commercial, educational service. Accordingly, Congress allowed public stations to broadcast "logograms" identifying their corporate financial sponsors. *See* 47 U.S.C. § 399a. But Congress heard testimony that "to put direct advertising messages on the air . . . would tend to blur the distinction between [noncommercial] and commercial stations." *Hearings before the Subcomm. on Telecommns. Consumer Protection, and Finance of H. Comm. on Energy and Commerce on H.R. 3238 and H.R. 2774*, 97th Cong. 1st 229 (1981) (testimony of David Ives, president of WGBH-TV Boston) (1981 House Hearings).[5]

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[5] Shortly before the 1981 House hearings on Section 399b, the FCC changed its regulations to allow non-commercial broadcasters to convey information that is informational,

In other words, when Congress adopted Section 399b, Congress loosened somewhat the existing limitations on public broadcasters. Congress had many years of experience behind it regarding the benefits of public radio and television, which had existed with even greater advertising restrictions. Congress did not write on a blank slate when it enacted Section 399b; rather, after a half-century of experience with public broadcasting, the record before Congress showed that public television and radio stations carry very different programming than do commercial stations. Congress, therefore, was aware of the stark differences in programming which arose from differences in funding between commercial and non-commercial stations, including the absence of commercial pressures on public stations.

Congress also heard evidence that the advertising prohibitions were necessary to preserve the unique programming presented by public stations. For example, one witness testified that "commercialization of public broadcasting" threatened to re-focus its programming toward the

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though not promotional, including the donor's logo, location, and product lines or services. *See Pub. Broad. Serv.*, 86 F.C.C.2d at 155. In enacting this change, which was ratified by Congress in Section 399a, the FCC hoped to "increase both the total contributions and the number of individual contributors to stations" in order to "reduce the ability of any single, private or public entity to affect programming decisions" and to "help ensure that public stations provide an alternative programming service to the commercial programming service." 1981 Hearings at 37. (testimony of FCC Commissioner Washburn).

"lowest common denominator," rather than "diverse audiences," including "minorities and women" as well as "to the print handicapped." 1981 House Hearings, at 129-130 (testimony of John C. DeWitt, American Found. for the Blind). When asked about National Public Radio ("NPR"), Walda Roseman, Senior Vice President of NPR testified that public radio allows "7 or 15 minutes to explore an issue, rather than being confined to the 30-60- and 90 second snatches common to commercial stations," provides "the only network for the blind," and "gives you jazz live" and "theatre." *Id.* at 323. Public radio also provides four hours of daily news of a different nature than that provided by commercial stations, for example covering Congressional hearings live and examining the Jonestown events in depth, among other things. *Id.* While Plaintiff contends that NPR's witness lacked support for her statement that allowing on-air advertising would not benefit public radio, her statement was based upon NPR's study of the issue. Diercks Decl., Ex. 1 at 212.

Similarly, when Congress later examined children's programming after enacting Section 399b,[6] its members found that "the marketplace has simply failed to produce [educational children's programming] on its own, in large part because the advertiser-driven television industry does not find children's programming to be a particularly lucrative venture." 136 Cong. Rec. 18242 (daily ed. July 19, 1990) (remarks of Sen. Wirth) (further noting that

[6] The Court may consider evidence outside of the Congressional record, including testimony before Congress post Section 399b enactment, as noted above.

the need for a program to promote educational children's programming "has been clearly demonstrated over the years"); *see also* S. Rep. No. 101—66, *reprinted in* 1990 U.S.C.C.A.N. 1628, 1639 ("Commercial broadcasters have little incentive to produce or carry [children's educational] programming because of the high cost of producing the programs and the low level of advertising revenue the programming generates."). "[P]ublic television is the primary source of children's educational programming in the United States." *Id.* at 1633; *see also* 136 Cong. Rec. 18241 (daily ed. July 19, 1990) (remarks of Sen. Wirth) ("[E]ducational [children's] programs have literally disappeared from the airwaves on all but PBS stations.").

Subsequent testimony before Congress also confirmed that many children's programs would not be broadcast but for non-commercial television. When asked whether the classic children's program "Sesame Street" would be "able to get a good time slot and get advertisers" if it "decided to go commercial," the President and Chief Operating Officer of Children's Television Workshop responded that "in the 20 years that we have been at Sesame Street, to my knowledge commercial broadcasters have not expressed very much interest in wanting our show on a normal basis in terms of advertising." *Hearing Before the Subcomm. on Communications of the S. Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. 81-82 (1989) (testimony of David Britt). Commercial broadcasters "certainly would not give us twice a day scheduling, because children's programming is the least profitable programming that they have. And in most

public television stations we get at least two hours a day in the time slot that we want." *Id.*

Representative Wirth explained:

> If we get public broadcasting into the selling of time, how do we avoid then getting public broadcasting, as I believe somebody mentioned 3 weeks ago, into a very large commitment of their own to figure out what demographics they are touching or what the measurement is going to be of that particular population, and how much X program sells for and how much Y program sells for? And the minute you get into that ... you are really threatening ... the independence of public broadcasting, and you ... then automatically get into the ratings game. And pretty soon people are going to be comparing PBS to CBS, NBC, and ABC.

1981 House Hearings at 71. *See also Id.* at 149 (testimony of Association of Independent Video and Filmmakers, Inc.) (noting that advertising will cause program choices to be made on the "basis of the needs of the sponsor, not the public").

Plaintiff argues that the evidence before Congress does not show that allowing advertisements on public stations would eviscerate the distinction between commercial and non-commercial stations. Pl. Mot. at 12. Plaintiff argues that Defendant's admission that public stations already carry advertisements under Section 399b in

the form of logograms undercuts their argument. But Plaintiff's argument that advertisement is an all-or-nothing proposition is not supported by any evidence. Rather, Plaintiff's claim that Congress improperly adopted the theory that you can be "a little bit pregnant" (*see* Pl. Reply at 6) when it enacted Section 399b and therefore must allow for more advertising is an inapt analogy in this legislative context; enacting laws is not an all-or-nothing proposition, but instead often involves weighing competing interests and striking an appropriate balance. Plaintiff has submitted no evidence showing that allowing limited underwriting announcements, product descriptions, or logograms has significantly altered the nature of public programming. Yet, allowing full-blown advertising on commercial stations has been shown over many years, both before and after Section 399b was enacted, to yield starkly different programming on commercial stations than that on public stations. In other words, while Plaintiff argues that the list of possible problems with permitting non-commercial stations to broadcast advertisements is speculative, commercial station content is itself evidence of what programming could be expected to look like if full-blown advertising were allowed. In addition, the testimony before Congress included testimony of representatives of the Association of Independent Video and Filmmakers and National Public Radio, all of whom had expertise in public broadcasting.

Plaintiff argues that Congress adopted Section 399b in an environment "full of speculation, surmise and conjecture about possible problems if noncommercial stations were permitted to broadcast

advertising." Pl. Mot. at 6. However, as noted above, Congress enacted Section 399b after a half-century of experience in both public broadcasting and commercial broadcasting. Testimony before Congress showed that public television stations have very different programming than do commercial stations. This difference in programming arose in the absence of ordinary commercial advertisements on public stations. Therefore, Congress's conclusions were not based on mere speculation and conjecture, but on reasoned legislative judgment. If hypothetically Congress had instead arrived at the same conclusion without such experience, Plaintiff would have a stronger argument requiring Congress to assemble a more extensive factual record on which to base its conclusions. But Congress did have a long history on which to base its deductions and inferences, and it reasonably predicted that advertising restrictions were necessary to preserve the unique programming presented by non-commercial stations.

As the Supreme Court has recognized, "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner I*, 512 U.S. at 665. While Congress must base its conclusions upon substantial evidence, "deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest [courts] infringe on traditional legislative authority to make predictive judgment when enacting nationwide regulatory policy." *Turner II*, 520 U.S. at 196.

Moreover, Congress may enact protective legislation to avoid foreseeable problems, and it need not "wait until the entire harm occurs" and may act to prevent it. *Id.* at 212.

Plaintiff also argues that sponsors of noncommercial stations are still "free to give the money to non-commercial stations and to attempt to 'buy' influence" in that manner, regardless of whether they have paid for advertising. Pl. Mot. at 13. But the strict limitations on advertising exist to insulate public stations from dependence on advertising dollars and to preserve the independence of their programming decisions. Preserving diverse sources of funding helps insulate those same stations from those who might attempt to buy influence. In any event, Plaintiff cites no facts or evidence showing that the supposed ability of groups and individuals to "buy" influence in non-commercial stations has affected the quality of public programming.

Furthermore, additional material before the Court demonstrates that the legislative conclusions are supported by substantial evidence. The Temporary Commission on Alternative Financing for Public Telecommunications ("TCAF") was charged with examining the feasibility of public broadcasting advertising through a limited advertising demonstration program after Congress passed Section 399b. It explored financing options to maintain, enhance, and expand public broadcast services to the American people, and as part of that task, it oversaw an experiment in which some public television stations were permitted to broadcast

advertisements under certain restricted conditions. Pl.'s Mot., Ex. C at i.

The October 1983 report concluded that the benefit to noncommercial stations of broadcasting commercial advertising "does not balance the potential risks identified in this report. In sum, the demonstration program indicated that potential revenues from advertising are limited in scope, while it did not show that significant risks to public broadcasting clearly would be avoidable." *Id.* at iii. TCAF therefore recommended continuing the advertising prohibition unless it could be established that the overall benefits to public broadcasting would exceed the costs and that stations that chose not to carry limited advertising would not share the risks associated with advertising while not receiving direct benefits. *Id.* at iv.

Plaintiff attacks TCAF's October 1983 Report's findings, arguing that the factual results of the only experiment where public broadcasters actually aired paid commercials refute the conclusion that paid advertising affects programming. Pl. Mot. at 12-13. Specifically, Plaintiff notes that TCAF:

> discovered no negative impact on viewing patterns, numbers of subscribers, or contributions except that the data did raise a question concerning a possible adverse impact on the average contribution per subscriber. Also, under the conditions of the experiment, the Commission found no advertising-related effects on programming.

Pl. Mot., Ex. C at ii. However, as the government notes, the conditions of the experiment were artificial, involving agreements to freeze labor and copyright costs under the assurance that such freezes would not constitute precedent if limited advertising were later allowed. *Id.* at 14, 37. TCAF also noted that the risks associated with limited advertising could not be restricted solely to the public stations who chose to advertise. *Id.* at 14.

Plaintiff criticizes TCAF's ultimate findings as being conclusory and speculative, pointing to a dissent to the TCAF's recommendations which argued that the majority minimized quantitative data regarding the benefits of advertising and stressed subjective and conjectural views. *See* Separate Statement of National Telecommunications and Information Administration at 1-3. However, Plaintiff ignores the fact that TCAF was not operating in a vacuum. It was charged with exploring financing options that would help public radio and television maintain and enhance their services to the American people. *Id.* at 1. Congress directed TCAF to "ensure that no proposed new funding device would present an unacceptable risk of compromising the quality or content of public broadcast programming." In other words, the existing quality of public broadcasting under the current diverse public broadcasting funding scheme depicted in the report is the factual background underlying the report.

In addition, TCAF identified numerous problems that could result from permitting non-commercial educational stations to broadcast advertisements,

including prohibitively higher labor and union costs, *Id.* at 27-30, increased payments to copyright owners, *id.* at 30-31, and reduced funding from government, which then provided 36% of total public television income. *Id.* at 35. Increased union and copyright fees themselves could lead to a "shift in the mix of programming available to the public on public broadcasting." *Id.* at 37. Accordingly, TCAF urged Congress to continue the advertising ban.

Furthermore, the government submitted evidence in the form of the Noll Report and Ozier declarations that the commercial-free nature of public broadcasting furthers the government's interest because it "substantially increases the amount of certain kinds of programming that are rarely provided by commercial broadcasters." Noll Report at 5-6 (noting that "a great deal of research" shows that an "advertiser-supported television system leads to an emphasis on mass entertainment programming with insufficient attention to programs that serve a small audience," including educational programming; further noting prevalence of advertising of nutritionally undesirable food and inclusion of violent content on commercial television); *see also* Ozier Decl. ¶¶12-13; Yoo, Christopher S., Architectural Censorship and the FCC, Regulation, vol. 28, issue 1 (2005), at 24 (describing threat of consumer boycott of products advertised during a mini-series on the Reagans aired on commercial television because of dissatisfaction with portrayal of former president, as well as advertiser backlash resulting from NBC's attempt to air a movie about *Roe v. Wade*, 410 U.S. 113 (1973)). Furthermore, "[i]f non-commercial educational

stations were permitted to air paid advertisements from for-profit entities," their other sources of funding would be "jeopardized," because viewers would be less inclined to support the activities of a station that they do not perceive to be distinct from a commercial station, Ozier Decl. ¶¶ 7-9, constituencies would be less likely to advocate for public funding, and underwriters would be less willing to pay for credits to air alongside normal commercial advertisements. *Id.*; *see also* Noll Report at 7, 19 (noting that the system of government subsidies is tied to the ability of stations to attract donations, and that allowing advertising would "call into question the legitimacy of subsidies"). Moreover, if "non-commercial broadcasters were permitted to transform corporate underwriting to commercial advertising," "non-commercial educational stations would become direct competitors of for-profit stations," which would end the distinction between commercial and public broadcasting. Noll Report at 20; *see also* Ozier Decl. ¶ 10.

Finally, the government's interest would not be met by allowing paid advertising from political candidates and advocacy organizations. As noted above, Congress's goal was to insulate public broadcasting from special interest influences, be they political, commercial, religious, or otherwise. 127 Cong. Rec. 13145 (June 22, 1981) (remarks of Rep. Gonzalez). If non-commercial educational stations were permitted to solicit underwriting from certain advertisers such as political candidates, they would have a financial incentive to create non-controversial programs with mass appeal,

endangering the independence "that makes American public broadcasting the artistic and journalistic prize that it is." *Id.* at 13146.

As to whether or not Section 399b is narrowly tailored to further the government's substantial interest in preserving non-commercial broadcasting, the government notes that restricting paid advertisements is the only way to ensure broadcast television programming free from undue influence by paying advertisers on programming content. Thus, there is a reasonable fit between the government's goal and the restriction imposed. It is difficult to imagine another effective way the government could carry out its goal of insulating public broadcasters from the pressures of advertisers other than by restricting advertising.

Further, Section 399b restricts only *paid* speech that promotes a product or service offered by a profit-seeking advertiser, expresses views with respect to a matter of public importance or interest, or supports or opposes a political candidate. Stations may still carry programming that addresses public issues and political candidates so long as they receive no remuneration for such programming. 47 U.S.C. § 399b(a). They may also air advertisements from non-profit entities. 47 U.S.C. § 399b(a)(1). Meanwhile, the public maintains its unfettered access to paid advertisements on the hundreds of other commercial broadcast stations. In addition, the number of commercial cable stations without any advertising restrictions have dramatically increased in recent years due to the growth of cable networks.

As this Court previously recognized, the alternative advanced by Plaintiff of limiting the length and frequency of political announcements or issue announcements would likely be ineffective, because it would not protect broadcasters from the programming pressures resulting from monetary incentives to accept paid advertising. *See* Dec. 21 Order at 13 n.3; Pl. Mot. at 16. As WGBH Vice-President Ozier states in his declaration, "a noncommercial educational station would be forced to change its programming if it were forced to rely on advertising from for-profit sources . . . even if advertisements did not interrupt programming or if they were limited in length." Ozier Decl. ¶ 13; *see also Id.* ¶ 16 (noting that even if a handful of noncommercial stations were to air for-profit advertising, all public stations would face "consequences of a perceived deviation from the public education mission" and hence "loss of funds from viewers, government, foundations, and other sources," as well as "favorable treatment for labor contracts, agreements with individual talent, broadcast rights, and copyright privileges"). Such a restriction might partially mitigate, but would not eliminate the same pressure. Significantly, the government's choice need not be the least restrictive means of achieving its goals. *Turner I*, 512 U.S. at 662. The government has demonstrated that the statute is narrowly tailored to further a substantial government interest. *See League of Women Voters*, 468 U.S. at 380.

3. Whether Section 399b Impermissibly Discriminates Between Types of Speech

Plaintiff's first and third causes of action challenge the constitutionality of subsections (2) and (3) of Section 399b(a), which prohibit broadcasters from broadcasting in exchange for remuneration any program material intended to support or oppose any candidate for political office or to express the views of any person on a matter of public importance. The challenged statutes, while viewpoint neutral, are not content neutral. The statute does, however, allow unpaid speech relating to political campaigns and issues of public importance. The statute also prohibits promotion of "any service, facility, or product offered by any person who is engaged in such offering for profit." 47 U.S.C. § 399b(a)(1). But it allows identifications of donors and their services, including "any aural or visual letters or words, or any symbol or sign, which is used for the exclusive purpose of identifying any corporation, company, or other organization, and which is not used for the purpose of promoting the products, services, or facilities of such corporation, company, or other organization." *Id.* § 399a. Plaintiff therefore maintains that the statute imposes greater restrictions on certain non-commercial speech than on other types of commercial speech and non-commercial speech. FAC ¶¶ 28-29, 34-35.

Whether or not the statute impermissibly discriminates against non-commercial speech presents a more difficult issue. Section 399b allows limited commercial speech, and in doing so requires

a content-based evaluation of advertisements. Specifically, the statute allows commercial advertising in the form of logograms and identification of services, while prohibiting paid advertising about views on matters of public importance and political candidates that lie at the core of the First Amendment. Again, the statute allows unpaid core political speech, such as station editorials.

As an initial matter, there is no evidence before the Court demonstrating that the statute actually "imposes greater restrictions on noncommercial than on commercial" advertising. *Cf. Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996) (citing *National Advertising Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988) (citing *Metromedia*, 453 U.S. at 513, 516)) (noting that ordinance is invalid if it imposes greater restriction on noncommercial billboards or regulates those billboards based on their content). At the hearing, the FCC pointed out that it has not yet addressed whether or not logograms may be used to identify political donors. Consequently, it is not clear whether political candidates would be prevented from running non-advocacy logograms on public television or radio. The Court cannot theorize about the potential application of the statute to resolve Plaintiff's facial challenge.

Assuming that the statute permits limited non-promotional paid commercial speech via underwriting announcements but does not allow such paid announcements for political candidates, the government argues that the latter

announcements would be inherently promotional. The Court agrees that political candidate announcements have an inherently promotional quality. "For example, while an announcement identifying Exxon Corporation, producer of petroleum products would be permissible, announcements identifying Exxon as the producer of 'fine' or the 'best' petroleum products would be prohibited." *Pub. Broad Serv.*, 86 F.C.C. 2d at 155. But an announcement identifying a particular politician's campaign, for example, is of an inherently more promotional nature. It would be difficult to distinguish identifying a candidate from promoting that candidate. The candidate is what is being promoted, as opposed to a particular product or service sold by a corporate sponsor.[7]

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[7] The government also relies on *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993), noting that Congress may advance its interest in preserving the unique character of non-commercial broadcasting by limiting the types of messages for which non-commercial educational stations can receive remuneration, even if advertising is not completely eradicated. While this case only involved commercial speech, it supports the general proposition that Congress may validly limit the content of advertising on public broadcasting stations. In *Edge*, a broadcaster licensed in a state that prohibited lotteries brought an action against petitioners seeking a declaration that the Charity Games Advertising Clarification Act of 1988, 18 U.S.C. §§ 1304, 1307, violated its rights under the First Amendment. The broadcaster wished to broadcast lottery advertisements to its viewers in a state which sponsored a lottery, but such advertising was prohibited under the Act. Applying the four-factor test for commercial speech, the Court found that the statute directly advanced the governmental interest of supporting the anti-gambling law of one state, while

Congress reasonably determined that certain types of paid programming will undermine the purposes of noncommercial programming, but that other types of paid programming will not. Paid-for political, issue, and commercial advertisements were determined by the government to impact programming decisions of noncommercial stations. By contrast, Congress determined that limited underwriting announcements, which have now been used for nearly thirty years, would not threaten programming. Similarly, Congress did not find that promotional materials sponsored by non-profit organizations threatened the programming content of public stations.

Plaintiff relies heavily on the case *Ballen v. City of Redmond*, 466 F.3d 736 (9th Cir. 2006) in support of its argument that Section 399b's different treatment of types of speech unconstitutional. *Ballen* was a First Amendment commercial speech case arising from a conflict between a business's use of outdoor advertising and a municipality's signage ordinance. *Id.* at 740. The city's ordinance prohibited portable signs, such as sandwich boards, but carved out ten exceptions, including allowing portable real estate and political signs. *Id.* The stated purpose of the ban was to promote traffic safety and community aesthetics. *Id.* The Court struck down the restriction because the exceptions to the ban, which discriminated between types of speech, demonstrated that the ban was not reasonably tailored to fit the purposes it purportedly

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not unduly interfering with the pro-gambling law of another, and that it was narrowly tailored. *Id.*

served. The advertising sign appellant wanted to display contained purely commercial speech.

The Court applied the four-part test of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561—62 (1980), under which the validity of the restriction depends on: (1) whether the expression is protected by the First Amendment, which requires the speech to concern lawful activity and not be misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is not more extensive than necessary to serve that interest. *Ballen*, 466 F.3d at 742 (*citing Central Hudson*, 447 U.S. at 566). The Court held that the regulation did not satisfy *Central Hudson*'s fourth prong, which requires "that there be a reasonable fit between the restriction and the goal" and that the regulation be narrowly tailored to achieve that goal, because the exceptions to the sign ordinance were all content-based, and the city failed to show how the exempted signs reduced "vehicular and pedestrian safety or besmirch[ed] community aesthetics any less than the prohibited signs." *Id.* at 743. In addition, the Court noted that, while the City chose to protect "ubiquitous real estate signs," which could "turn an inviting sidewalk into an obstacle course challenging even the most dextrous hurdler," its ordinance "unfairly restrict[ed] the First Amendment rights of, among others, a lone bagel shop owner." *Id.*

As the government notes, the situation here is very different from that in *Ballen*. The limited

broadcasting spectrum presents a significantly different context than do billboards. In *Ballen*, the Ninth Circuit emphasized that the Supreme Court, in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981), "cautioned that '[e]ach method of communicating ideas is a law unto itself and that law must reflect the differing natures, values, abuses and dangers of each method.'" *Ballen*, 466 F.3d at 744. In *Metromedia*, the Court noted that the "law of billboards" was distinguishable from the law of portable sandwich boards, since "billboards are fixed, permanent structures that are more intrusive to community aesthetics." *Metromedia*, 453 U.S. at 501.

Outdoor signage restrictions differ even more starkly from the public broadcasting restrictions at issue here, which are intended to protect the quality, character, and benefits of public broadcasting from the influence of market forces, in order to prevent it from becoming similar to commercial television. If precedent regarding billboards is inapplicable to sandwich boards even though both employ outdoor print media, then precedent regarding outdoor signs is even less applicable to public broadcasting – a completely different method of communicating ideas.

Moreover, in *Ballen*, the Court found that the city failed to show how the exempted signs reduced "vehicular and pedestrian safety or besmirch[ed] community aesthetics any less than the prohibited signs." 466 F.3d at 743. Similarly, in *Metromedia*, the Supreme Court noted that the city did "not explain how or why noncommercial billboards located in places where commercial billboards are

permitted would be more threatening to safe driving or would detract more from the beauty of the city." 453 U.S. at 513. *See also Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009) (where the City of Seattle's rules required, in part, that street performers obtain permits for performance at an entertainment center, the Court struck down the regulation, noting that the city's asserted interests in reducing disputes involving street performers and coordinating uses at a public park were not promoted by the permitting requirements, because the permits were freely issued, did not screen out hostile performers, and did not aid in coordinating multiple uses of the center's grounds); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425-26 (1993) (striking down a content based regulation that favored non-commercial speech over commercial speech, where the city did not establish a reasonable fit between its legitimate interests in safety and aesthetics and its selective ban of commercial handbills, but not newspapers).[8] By

[8] In addition, this case is distinguishable from *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814, 820 (9th Cir. 1996), in which the court applied strict scrutiny. There, the applicable "exemptions require[d] City officials to examine the content of noncommercial off-site structures and signs to determine whether the exemption applies, [so] the City's regulation of noncommercial speech [wa]s content-based." Here, in contrast, intermediate scrutiny applies. In addition, the Court held that "Moreno Valley Ordinance No. 133 [under which on-site structures and signs were limited to commercial structures and signs] unconstitutionally imposes greater restrictions upon noncommercial structures and signs than it does upon commercial structures and signs." *Id.* As the government notes, the First Amendment permits more intrusive regulation of broadcast speakers than of speakers in

contrast, here, there is a reasonable fit between the government's purpose and the restriction imposed, since commercial and political advertisements all yield similar commercial pressures on public stations, as discussed below.

Plaintiff also argues that *Ballen*'s holding that "the City's use of a content-based ban rather than a valid time, place, or manner restriction indicates that the City has not carefully calculated the costs and benefits associated with the burden on speech imposed by its discriminatory, content-based prohibition" indicates that Section 399b is unconstitutional. 466 F.3d. at 743. The *Ballen* Court noted that the city "could impose time, place, and manner restrictions on all commercial signs." *Id.* at 744. Here, however, it is not clear that limiting the number or length of announcements, as Plaintiff suggests (Pl. Reply at 6), would further the governmental interest, as noted above. Even allowing limited advertising would force public stations to divert a great deal of resources into the market analysis that must accompany reliance on advertising income. Nor would allowing paid political and issue advertisements serve the government's purpose, as political and issue advertisers, like commercial advertisers, generally want to reach as large an audience as possible. While Congress did not undertake specific factual

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other media. *Turner I*, 512 U.S. at 637. Furthermore, similar to the above cases, the Court in *Desert Outdoor* found that the City failed to show that it enacted its ordinance to further its articulated interests in aesthetics and safety. *See* 103 F.3d at 819.

analysis to determine whether or not issue and political advertisements specifically created commercial pressure on stations, Congress's determination that allowing such advertisements would create commercial pressures was a reasonable, predictive legislative judgment that political advertisers would generally seek large audiences.

Furthermore, broadcasters accepting money for paid political advertisements would also be subject to pressure to tailor programming, since a great deal of money is spent on such advertising. *See* Fed. Mot. at 15 (citing Appendix of Authorities, Tab 2 (AdWeek, Dec. 15, 2008 at 3) (noting $2.2 billion spent on political advertisements in 2008). In addition, the government's regulations only apply to a small number of channels on television and radio. The public has access to paid advertisements on the far more numerous commercial channels. In other words, the restriction itself, by being limited to certain public stations, is somewhat analogous to a time, place, manner restriction, if the Court were to apply the billboard and signage line of cases here.

Plaintiff also argues that the FCC's allowance of promotional advertisements by non-profits undercuts the government's arguments that promotional issue and political advertisements "are . . . dangerous to . . . non-commercial broadcasters." Pl. Reply at 6. Specifically, Plaintiff points out that Planned Parenthood was allowed to run a promotional advertisement, which Plaintiff seems to equate with promoting abortions, a controversial topic. The underwriting announcement in question,

however, merely identified the organization Planned Parenthood, noting that it offers reproductive health care services, including pregnancy testing and annual exams, among other things. The announcement did not list abortion among those services. *See* Diercks Affidavit, Ex. A. The FCC's advisory opinion stated that the announcement was not an advertisement, because Planned Parenthood was not a for-profit; did not violate Section 399b(1); and did not express views on matters of public importance or interest in violation of Section 399b(2). In sum, the announcement was neither specifically promotional nor expressive of a view on a matter of public importance. This particular advisory opinion, therefore, does not support Plaintiff's case.

Finally, to the extent that Plaintiff claims that the statute impermissibly discriminates between different types of paid commercial speech, that claim fails. Section 399b allows paid messages promoting products and services on behalf of non-profits, but does not allow other types of paid advertising. Commercial speech may be content regulated. *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 n.6 (1980) ("Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad

regulation.") (internal citations and quotations omitted). In addition, Congress reasonably concluded that the broadcast of paid, promotional material for non-profit organizations did not threaten the character and programming of public broadcasting, as viewers have not seen messages from such entities as being inconsistent with the public education mission of public television, and the small market for non-profit advertising is less likely to generate conflicts with a public broadcaster's educational mission and does not threaten traditional funding sources. *See* Ozier Dec. ¶ 15.

C. Whether § 399b is Unconstitutionally Vague

"To pass constitutional muster against a vagueness attack, a statute must give a person of ordinary intelligence adequate notice of the conduct it proscribes." Dec. 21 Order at 15-16 (citing *U.S. v. 594,464 Pounds of Salmon*, 871 F.2d 824, 829 (9th Cir. 1989)). Plaintiff claims that Section 399b(a)(1), which prohibits any paid message intended to promote any service, facility, or product offered by any person who is engaged in such offering for profit, is vague because of the term "promote." Yet, as this Court previously noted, the general concept of promoting a product or service is one that is easily grasped by a person of ordinary intelligence in this modern age of commercial marketing and would appear to be a term of "common understanding." Dec. 21 Order at 17 (citing *Cal. Teachers Ass'n v. Board of Educ.*, 271 F.3d 1141, 1152 (9th Cir. 2001)). This Court further stated:

> The term is no less precise than the terms cited in *California Teachers* that survived facial vagueness challenges. In addition, it is not likely that any ambiguity in the terms of § 399b(a)(1) will chill any more than a negligible amount of commercial speech. *See Id.* at 1151 (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 380-81 (1977) (commercial speech unlikely to be chilled because commercial entities have strong economic interest in engaging in such speech).

Dec. 21 Order at 17.

Assuming that the Court may "perhaps to some degree" consider the FCC's interpretation of the statute in evaluating whether the statute is vague, *see Grayned v. City of Rockford* 408 U.S. 104, 110 (1972), as Plaintiff urges the Court to do, arguable inconsistencies in a statute's application in a handful of cases do not condemn a statute. If such limited inconsistencies rendered statutes unconstitutionally vague, the majority of statutes would probably not survive a vagueness challenge. Rather, "uncertainty at a statute's margins will not warrant facial invalidation if it is clear what the statute proscribes 'in the vast majority of its intended applications.'" *California Teachers Ass'n*, 271 F.3d at 1151 (quoting *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (rejecting vagueness challenge) (quotation marks omitted)). As in *Grayned*, the words of the statute here are marked by "flexibility and reasonable breadth, rather than meticulous specificity," and "it is clear what the ordinance as a whole prohibits." 408 U.S.

at 110 (quoting *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1088 (8th Cir. 1969)).

Plaintiff argues that the FCC has made numerous "admissions" by acknowledging that it is difficult at times to distinguish between which announcements promote and which merely identify, and that it only expects "public broadcast licensees to exercise reasonable, good faith judgments in this regard." *See* FAC ¶ 14 (quoting Memorandum Opinion and Order in Docket No. 21134, 90 F.C.C.2d 895, 911 (1982)). As the government points out, however, the fact that it may at times be difficult to distinguish promotional announcements from identifying announcements simply illustrates the utility of the Commission's periodic guidance on its underwriting standards, and does not mean that the statute is unconstitutionally vague.[9] In fact, under the FCC's rules, a station that is unsure of whether a particular underwriting announcement would run afoul of the statute may seek informal guidance or formal clarification from the agency. 47 C.F.R. § 1.2. Plaintiff also maintains that the FCC's statements show that the prohibitions are not set out "precisely," but precision is not constitutionally

[9] The government also notes that the agency's administrative guidance serves to further "narrow potentially vague or arbitrary interpretations" of the statute. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 504 (1982) ("In economic regulation especially, such administrative regulation will often suffice to clarify a standard with an otherwise uncertain scope."). However, the ordinance in *Hoffman* did not embrace non-commercial speech and only had an attenuated relationship to commercial speech, so it is not clear that this principal applies here.

required. Finally, Plaintiff argues that the FCC's amorphous and subjective enforcement standards lead to arbitrary and discriminatory enforcement by the FCC. Plaintiff's examples, however, do not show that the FCC's enforcement is arbitrary or discriminatory.

Plaintiff cites a handful of examples of FCC interpretations permitting broadcasters to run underwriting announcements that Plaintiff contend are clearly promotional. *See, e.g.*, Diercks Affidavit, Ex. D & Brown Decl. ¶ 2, Ex. A (announcement run by Lakeshore Communications stating "I wish there was a place to buy all the Christian music I hear on Q90. . ."); Ex. E (announcement run by WESM-FM Radio reading "This hour of Rhythm and Romance is made possible by a grant from Arista Records . . . . New this month from Arista, Lisa Stanfield's All Around the World . . ."). As the government notes, however, the FCC sent Lakeshore Communications a warning letter about the Christian music announcements, stating that although the announcements were not as egregious as some others, the FCC expected the station to better conform its underwriting announcements to FCC guidelines in the future. Diercks Affidavit, Ex. D; Brown Reply Decl., Ex. A. While Plaintiff disputes that this letter constituted a warning, it clearly put Lakeshore on notice. The Commission issues warning letters in lieu of formal enforcement if it appears that the violation complained of was minor or the licensee has an otherwise unblemished record. *See In re Commission's Forfeiture Policy Statement & Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd

17087, 17102 (1997) ("We agree that warnings can be an effective compliance tool in some cases involving minor or first time violations."). As the government notes, the second announcement by WESM-FM identifying Arista Records is more in the nature of an identification than overt marketing. Diercks Affidavit, Ex. E.

Plaintiff also cited two underwriting announcements from WETA FM, which apparently violated the FCC Rules. *See* Pl. Mot. at 24—25; Diercks Affidavit, Ex. F at 84-85. But the agency never received a complaint about the first announcement to which Plaintiff refers, and with respect to the second underwriting announcement, the FCC dismissed the complaint on procedural grounds without deciding whether or not the language contained a substantive violation. *See* Brown Reply Decl. ¶ 3, Ex. B.

In any event, a handful of examples of FCC rulings and guidance that arguably tolerate some promotional announcements does not suffice to show that the statute is unconstitutionally vague. Plaintiff has failed to introduce evidence of FCC enforcement decisions sufficiently inconsistent as to show that the statute is unconstitutionally vague on its face and not capable of giving notice of the proscribed conduct. In sum, Plaintiff does not identify anything in Section 399b(a)(1) itself that is unconstitutionally vague.

IV. CONCLUSION

For the foregoing reasons, the Court grants Defendant's motion for summary judgment and denies Plaintiff's motion for summary judgment.

IT IS SO ORDERED.

Dated: August 19, 2009 /s/ Elizabeth D. Laporte
ELIZABETH D.
LAPORTE
United States Magistrate
Judge

APPENDIX E

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	File Nos. EB-00-IH-0153
MINORITY	)	and EV-01-1H-0652
TELEVISION	)	NAL/Acct.
PROJECT, INC.	)	No. 200232080020
	)	FRN 0005704366
Licensee of	)	Facility ID No. 43095
Noncommercial	)	
Educational	)	
Television Station	)	Release Number
MTP-TV,	)	FCC 05-180
San Francisco,	)	
California	)	

MEMORANDUM OPINION AND ORDER

20 FCC Rcd 16923

October 26, 2005, Released; October 20, 2005, Adopted

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we dismiss in part and otherwise deny a Petition for Reconsideration filed on January 24, 2005, by Minority Television Project, Inc. ("Minority"), licensee of noncommercial educational Station KMTP-TV, San Francisco, California ("*Petition*"). Minority seeks reconsideration of the

Commission's denial of its January 22, 2004, Application for Review.[1] In its Application for Review, Minority sought review of a *Forfeiture Order*[2] issued by the Chief, Enforcement Bureau ("Bureau"), which imposed a monetary forfeiture in the amount of $10,000 against it for willful and repeated violation of the statute and Commission's rules prohibiting the broadcast of advertisements on noncommercial educational stations.[3]

II. BACKGROUND

2. In the underlying *NAL* and *Forfeiture Order* proceeding, the Bureau sanctioned Minority for its willful and repeated broadcast of approximately 1,911 prohibited advertisements over noncommercial educational Station KMTP-TV, San Francisco, California, during a 26-month period commencing in January 2000.[4] In so acting, the Bureau also dismissed, as moot, Minority's related June 13, 2000, Request for Declaratory Ruling.[5]

3. Thereafter, in the December 23, 2004, *Order on Review*, the Commission found that Minority's arguments had been fully and correctly addressed and rejected in the Bureau's underlying

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[1] *Minority Television Project, Inc.*, Order on Review, 19 FCC Rcd 25116 (2004) ("*Order on Review*").
[2] *Minority Television Project, Inc.*, Forfeiture Order, 18 FCC Rcd 26611 (Enf. Bur. 2003) ("*Forfeiture Order*"); *Minority Television Project, Inc.*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 15646 (Enf. Bur. 2002) ("*NAL*").
[3] *See* 47 C.F.R. § 73.621(e).
[4] *See Order on Review*, *supra*, at ¶ 4.
[5] *See Forfeiture Order*, *supra*, at ¶ 15.

proceeding.[6] The Commission noted that the current statutory scheme, rules and policies governing noncommercial educational broadcasters have been in place for more than twenty years, and that, in this proceeding, the Bureau fully considered language-specific issues in reaching its findings at every stage of this proceeding.[7] Furthermore, the Commission rejected Minority's argument that the noncommercial underwriting statute, rules and policy impose an English-only standard or discriminate against non-English speakers or specific ideas in violation of the First Amendment or the equal protection guarantee of the Due Process Clause of the Fifth Amendment, finding that neither section 399B of the Act nor section 73.621(c) of the Commission's rules prohibit the use of a foreign language or discriminate against foreign language programming under the regulatory scheme.[8] Accordingly, the Commission found no constitutional infirmity in the regulatory scheme.[9] The Commission further declined Minority's request that it revisit its underwriting announcement standards and adopt ones that are "capable of meaningful prospective use."[10] Significantly, the Commission found that the existing standards are already clear.[11]

4. In its *Petition*, Minority repeats constitutional and other arguments previously made and rejected in this proceeding. It also advances an

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[6] *See Order on Review*, *supra*, at ¶ 2.
[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*.

additional argument which it maintains warrants reconsideration and reversal of the *Order on Review*. Minority claims that it has recently adopted new "quantitative" methods to distinguish acceptable underwriting announcements from unacceptable commercial advertisements, and maintains that its methods are less subjective and more reliable than the Commission's standards,[12] and enjoy academic support.[13] Minority contends that these factors demonstrate that it has made "good faith" efforts to comply with the Commission's underwriting rules, and that the sanctioned underwriting announcements were within the discretion accorded it under pertinent Commission precedent and, accordingly, permissible.[14] For these reasons, Minority urges that the Commission either mitigate or rescind the forfeiture imposed against it in this case.[15]

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[12] *Id*. at 8-14. Minority claims that it conducts focus group, academic text, educator, and advertising agency review to evaluate potential underwriting announcements, which steps include asking potential viewers to numerically grade sample announcements as to their relative degree of commercialism. *Id*.

[13] *See Addendum to Petition*, submitted May 2, 2005, at Attachment 1 (letter from Miriam A. Smith, Associate Professor, Broadcast & Electronic Communication Arts Department, San Francisco State University, to Bonnie Asano, President, KMTP-TV, dated April 8, 2005).

[14] *Id*. at 14-15; *Xavier University*, Letter of Admonition (Mass Med. Bur. 1989), *recon granted*, Memorandum Opinion and Order, 5 FCC Rcd 4920 (1990).

[15] *Petition* at 14-15.

III. DISCUSSION

5. Reconsideration is appropriate only where the petitioner either demonstrates a material error or omission in the original order or raises new facts or changed circumstances not known or existing until after the petitioner's last opportunity to present such matters.[16] A petition that merely repeats arguments previously considered and rejected will be denied or dismissed as "repetitious."[17]

6. The *Petition* repeats constitutional or other arguments regarding our underwriting standards that we have already considered and rejected.[18] We will not reconsider those already rejected arguments and dismiss the *Petition* in part as "repetitious" pursuant to 47 C.F.R. § 1.106(b)(3).

7. With regard to Minority's remaining argument, it does not warrant reconsideration of the *Order on Review* because the "quantitative" methods to evaluate underwriting announcements that Minority claims to have begun to develop in March 2003, are not timely presented facts or circumstances that warrant reconsideration. Minority fails to demonstrate, why, "through the

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[16] *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(b)(2)(ii), (b)(3) and (c).

[17] *Bennett Gilbert Gaines*, Memorandum Opinion and Order, 8 FCC Rcd 3986 (Rev. Bd. 1993); 47 C.F.R. § 1.106(b)(3).

[18] *Order on Review*, *supra*, ¶¶ 2-4; *Forfeiture Order*, *supra*, 18 FCC Rcd at 26613-18, ¶¶ 9-15.

exercise of ordinary diligence," it could not have at least supplemented its then pending Application for Review to raise this issue.[19]

8. Nor does Minority's *post-hoc* adoption of quantitative methods to screen its underwriting message content demonstrate that the licensee has made "good faith" efforts to comply with the Commission's standards. Even if Minority's use of these quantitative methods was effective in complying with the Commission's standards, Minority did not begin to implement these methods until March 2003, more than a year after the January 2000, to February 2002, period of its violations of the Commission's rules prohibiting the broadcast of advertisements on noncommercial educational stations. Moreover, we are unconvinced that Minority's use of quantitative methods is, in fact, any substitute for our established methods of evaluating whether a noncommercial station has broadcast commercial advertisements, or that Minority made a good faith effort to comply with our underwriting rules. We therefore deny Minority's *Petition*.[20]

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[19] *See* 47 C.F.R. § 1.106(b)(2)(ii); *see also Sagir, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 15967, 15972 (2003) (burden squarely on petitioner to satisfy threshold showing under 47 C.F.R. § 1.106).

[20] We also note that the Commission has declined to adopt quantitative timing and message frequency limitations in light of the effectiveness of extant deterrents. *See Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, Second Report and Order, 86 FCC 2d 141, 156 (1981) (finding that quantitative timing and message frequency limitations were unnecessary); *WNYE-TV*,

IV. ORDERING CLAUSES

9. **ACCORDINGLY, IT IS ORDERED** that, pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.106(b)(2), (b)(3), the Petition for Reconsideration filed on January 24, 2005, by Minority Television Project, Inc., **IS DISMISSED IN PART AND OTHERWISE DENIED**.

10. **IT IS FURTHER ORDERED** that a copy of this *Memorandum Opinion and Order* shall be sent by Certified Mail/Return Receipt Requested, to Minority Television Project, Inc., c/o its attorney, James L. Winston, Esq., Rubin, Winston, Diercks, Harris & Cooke, L.L.P., Sixth Floor, 1155 Connecticut Avenue, N.W., Washington, D.C. 20036, and by regular mail to Lincoln Broadcasting Company, c/o its attorney, Michael D. Berg, Esq., Law Offices of Michael D. Berg, 1730 Rhode Island Avenue, N.W., Suite 200, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Secretary

Memorandum Opinion and Order, 7 FCC Rcd 6864, 6865 (Mass Med. Bur. 1992).

APPENDIX F

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	File Nos. EB-00-IH-0153
MINORITY	)	and EV-01-1H-0652
TELEVISION	)	NAL/Acct.
PROJECT, INC.	)	No. 200232080020
	)	FRN 0005704366
Licensee of	)	Facility ID No. 43095
Noncommercial	)	
Educational	)	
Television Station	)	Release-Number:
MTP-TV,	)	FCC 04-293
San Francisco,	)	
California	)	

MEMORANDUM OPINION AND ORDER

19 FCC Rcd 25116

Dec. 23, 2004, Released; Dec. 21, 2004, Adopted

I. INTRODUCTION

1. In this *Order on Review*, we deny an Application for Review filed by Minority Television Project, Inc. ("Minority"), pursuant to section 1.115 of the Commission's rules.[1] Minority seeks review of

[1] 47 C.F.R. § 1.115.

a Forfeiture Order[2] in which the Enforcement Bureau (the "Bureau") imposed against Minority a forfeiture of $ 10,000 for its willful and repeated broadcast of advertisements over noncommercial educational Station KMTP-TV, San Francisco, California, in violation of section 399B of the Communications Act of 1934, as amended (the "Act"),[3] and section 73.621(e) of the Commission's rules.[4] In so acting, the Bureau also dismissed, as moot, Minority's related June 13, 2000, Request for Declaratory Ruling.

2. In its Application for Review, Minority reiterates past arguments raised at the Bureau level. We find that these arguments were fully and correctly addressed in the Bureau's Order except to the extent that we take the opportunity to elaborate here on certain issues. Minority reiterates its past argument that the Commission cannot sanction it for the underwriting announcements at issue due to constitutional and statutory provisions protecting the rights of foreign-language speakers and viewers. It also again contends that section 399B of the Act, as well as the Commission's rules and policies promulgated thereunder, constitute unconstitutional restrictions on commercial speech.[5] We reject these

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[2] *See Minority Television Project, Inc. (KMTP-TV), Forfeiture Order,* 18 FCC Rcd 26611 (Enf. Bur. 2003) ("Forfeiture Order").
[3] 47 U.S.C. § 399b.
[4] 47 C.F.R. § 73.621(e).
[5] In support, Minority cites several cases regarding the limits placed on government, in varied contexts, when it attempts to abridge free speech. *See U.S. v. O'Brien*, 391 U.S. 367 (1968); *Yniguez v. Arizona*, 69 F.3d 920, 941 (9th Cir. 1995) (en banc) (reversed and remanded on other grounds); *Arizonians for*

arguments. The current statutory scheme, rules and policies governing noncommercial educational broadcasters have been in place for more than twenty years.[6] The Bureau fully considered language-specific issues in reaching its findings in this proceeding.[7] Furthermore, we reject Minority's argument that the noncommercial underwriting statute, rules and policy imposes an English-only standard or discriminates against non-English speakers or specific ideas in violation of the First Amendment or the equal protection guarantee of the Due Process Clause of the Fifth Amendment. To the contrary, neither section 399B of the Act nor section 73.621(c) of the Commission's rules prohibit the use of a foreign language or discriminate against foreign language programming under the regulatory scheme.[8] Accordingly, we see no constitutional

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Official English v. Arizona, 517 U.S. 1102 (1996), on remand at 118 F.3d 667 (9th Cir. 1997), remanded with instructions to dismiss at 119 F.3d 795 (9th Cir. 1997); and *Virginia State Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976).

[6] *See* 47 U.S.C. § 399b, which was added by Public Law 97-3, 95 Stat. 357, 731, Aug. 13, 1981; 47 FR 36179, Aug. 19, 1982; and *Commission's Policy Concerning the Noncommercial Educational Nature of Educational Broadcasting Stations*, Memorandum Opinion and Order, 90 FCC 2d 895 (1982) ("Policy Statement"), recon. granted in part, 97 FCC 2d 255 (1984).

[7] *See Forfeiture Order*, 18 FCC Rcd 26611, 26614 at P10, citing *Licensee Responsibility to Exercise Adequate Control Over Foreign Language Programs*, Memorandum Opinion and Order, 39 FCC 2d 1037 (1973).

[8] Minority cites several cases regarding the limits placed on government in varied contexts when it attempts to abridge free speech. *See* n. 5, *supra*. We find these cases inapplicable to the facts at issue here because they do not address the statutory

infirmity in the regulatory scheme. Minority also again asks the Commission to revisit its underwriting announcement standards and to adopt ones that are "capable of meaningful prospective use." We agree with the Bureau's rejection of this request, for the reasons explained in the Bureau's *Forfeiture Order*.[9] The standards are already clear.

3. We also reject Minority's claim here that the Bureau relied on an inadequate translation of the broadcast material in question. Our review of the record confirms that the Bureau considered carefully the underwriting announcements at issue, but, consistent with applicable Commission precedent, rejected certain linguistic connotations Minority had urged that the Commission accept. We note, however, that, in evaluating the announcements, the Bureau also specifically deferred to the translations provided by Minority itself, except in those instances in which the licensee had failed to provide any.[10] Finally, although

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provision at issue and they interpret a purported government limitation on the use of foreign language, which is not the case here.

[9] *See Forfeiture Order*, 18 FCC Rcd 26611, 26613 at P7.

[10] *See id*., 18 FCC Rcd 26611, 26615 at P12. As correctly noted by the Bureau in the *Forfeiture Order*, Minority failed to provide specific translations for the Met-Life, Scandinavian Furniture, Sincere Plumbing, and East West Bank announcements. *Id*. Instead, Minority commented on the translations provided by the complainant, which were found at Attachment P to Minority's March 25, 2002, response, and identified as *Announcements 4, 5, 6* and *7*. *See id*., *citing NAL* at PP23-25. We find that the Bureau properly evaluated Minority's comments, and correctly concluded that they did not alter the announcements' overall promotional nature, which

Minority claims that its underwriting announcements were drafted in accordance with standards enunciated and observed by Public Broadcasting Service stations, that claim, even if true, offers no defense or basis for mitigation. The practices followed, or opinions rendered, by other broadcasters or trade organizations are not binding on the Commission.[11] Rather, licensees should rely only on the official Commission sources and precedents themselves.[12]

4. Minority argues that the Bureau failed to accord proper weight to two additional mitigating factors. First, Minority argues that only the aggregate number of announcements in question, 18, and not the number of times that they were aired, 1,911, should be determinative in setting the forfeiture amount.[13] Second, it argues that the continuing nature of the violation over the period 2000 through 2002 should be mitigated by the fact that the Bureau had not advised Minority of its obligations by ruling on its declaratory ruling

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was demonstrated by the announcements' linguistic and visual elements. *See Forfeiture Order*, 18 FCC Rcd 26611, 26615 at P12.

[11] *See Board of Education of New York (WNYE-TV)*, Letter of Caution, 7 FCC Rcd 6864 (MMB 1992).

[12] *Cf. Pine-Aire Broadcasting Corporation, Inc. (WRLS-FM)*, Memorandum Opinion and Order, 4 FCC Rcd 1553 (1989) (reliance on advice rendered by Commission officials may, in appropriate circumstances, constitute a mitigating factor to be considered in determining forfeiture amount).

[13] Minority misstates the *Forfeiture* Order's holding. The Bureau cited only 17 announcements in setting the forfeiture amount at $ 10,000. *See Forfeiture Order*, 18 FCC Rcd 26611, 26616-17 at P15.

request, which sought approval to air the announcements in question. Minority cites no authority or precedent for either of its contentions. We find that the Bureau properly rejected the first argument for the reasons stated in the *Forfeiture Order*, which are consistent with precedent.[14] Both the number of announcements and the number of times they aired are relevant to the amount of the forfeiture, and these factors were properly considered by the Bureau.[15] In any event, we agree with the *Forfeiture Order's* alternative holding that a $ 10,000 forfeiture would hardly be excessive even if the number of cited announcements were fewer or if they had been run substantially fewer times.[16] As to the second argument, we note that Commission precedent affords mitigation in circumstances where licensees rely to their detriment on official advice that later proves to have been erroneous or incomplete.[17] However, having not received any specific Commission advice concerning the instant announcements in this case, it was incumbent on Minority, as it is upon all similarly situated noncommercial licensees, to consult pertinent Commission precedent and to make its own good-faith determinations as to the announcements' acceptability. Ambiguity is not created simply by the filing of a request for further guidance regarding

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[14] *See id.*; 47 U.S.C. § 503(b)(2); note to 47 C.F.R. § 1.80(b)(4). Under section 503(b) of the Act, each prohibited broadcast is deemed to constitute a separate offense.

[15] *See Forfeiture Order*, 18 FCC Rcd 26611, 26616-17 at P15, n.55.

[16] *Id.*

[17] *See Pine-Aire Broadcasting Corporation, Inc. (WRLS-FM)*, *supra*.

a clear rule. For the reasons set forth above, we conclude that Minority ignored settled precedent and failed to properly exercise its good-faith discretion in broadcasting the underwriting announcements in question.[18] Therefore, the fact that Minority had earlier requested, but had failed to receive, a declaratory ruling on the acceptability of the underwriting announcements, is not a mitigating factor under the circumstances of this case.

5. Upon review of the Application for Review and the entire record herein, we conclude that Minority has failed to demonstrate that the Bureau erred. The Bureau properly decided the matters raised below, and we uphold its decision for the reasons stated in its *Forfeiture Order*.[19]

6. Accordingly, **IT IS ORDERED**, pursuant to section 1.115(g) of the Commission's

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[18] *See Xavier University*, Memorandum Opinion and Order, 5 FCC Rcd 4920 (1990) (the Commission defers to the "reasonable, good faith judgments" exercised by licensees and finds violations only where material is "clearly" promotional as opposed to merely identifying).

[19] Minority further argues that the announcement made on behalf of State Farm could not be deemed to violate section 399B of the Act because consideration was not supplied by the sponsor to the broadcaster itself. First, we note that Minority cites no statutory language or case law supporting its assertion, and pertinent precedent has held precisely otherwise. *See Forfeiture Order*, 18 FCC Rcd 26611, 26616 at P13, *citing 1982 Policy Statement*, 90 FCC 2d at 911-12, PP26-28. Moreover, Minority ignores that the Bureau found the circumstances surrounding Minority's broadcast of the State Farm announcement to be mitigating, and did not include that announcement in its determination of the forfeiture amount.

rules, 47 C.F.R. § 1.115(g), that the Application for Review filed by Minority Television Project, Inc. **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Secretary

APPENDIX G

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	File Nos. EB-00-IH-0153
MINORITY	)	and EV-01-1H-0652
TELEVISION	)	NAL/Acct.
PROJECT, INC.	)	No. 200232080020
	)	FRN 0005704366
Licensee of	)	Facility ID No. 43095
Noncommercial	)	
Educational	)	
Television Station	)	Release-Number:
MTP-TV,	)	DA 03-4062
San Francisco,	)	
California	)	

MEMORANDUM OPINION AND ORDER

18 FCC Rcd 26611

Dec. 23, 2003, Released; Dec. 19, 2003, Adopted

I. Introduction

1. By this *Forfeiture Order*, we impose a forfeiture of $ 10,000 on Minority Television Project, Inc. ("Minority"), licensee of noncommercial educational television Station KMTP-TV, San Francisco, California, for its willful and repeated broadcast of advertisements over the station, in violation of section 399B of the Communications Act

of 1934, as amended (the "Act"),[1] and section 73.621(e) of the Commission's rules.[2] We take this action pursuant to *47 U.S.C. § 503(b)(1)(D)* and *47 C.F.R. § 1.80(f)(4)*. We further dismiss Minority's pending June 13, 2000, Request for Declaratory Ruling as moot.

II. BACKGROUND

2. This case arose from allegations raised in a Media Bureau ("MB") proceeding and referred to the Enforcement Bureau ("Bureau") for resolution. In the MB proceeding, Minority submitted a Petition for Declaratory Ruling that sought Commission approval of numerous underwriting announcements that the station had broadcast, arguing that the announcements comply with the pertinent statutory and Commission rule provisions that prohibit the broadcast of commercial messages over noncommercial educational stations. In response, AT&T Broadband, LLC ("AT&T"), operator of cable systems in the San Francisco market, and Lincoln Broadcasting Company ("Lincoln"), licensee of commercial Station KTSF(TV), Brisbane, California, opposed Minority's Request, and complained that KMTP-TV has continuously broadcast prohibited underwriting announcements since June 1999. By letters dated November 9, 2001, and February 25, 2002, the Bureau inquired of Minority, and received numerous responsive pleadings thereafter from both Minority and Lincoln.

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[1] 47 U.S.C. § 399b.
[2] 47 C.F.R. § 73.621(e).

3. By *Notice of Apparent Liability for Forfeiture*,[3] the Chief, Enforcement Bureau rejected Minority's arguments, and found that it had apparently violated the pertinent statute and Commission rules, and proposed a monetary forfeiture of $ 10,000.[4] On September 9, 2002, Minority responded to the *NAL*, arguing that the Bureau's ruling was erroneous, and that the proposed forfeiture should be rescinded.[5] Minority further asks that the Commission act on its Petition for Declaratory Ruling, which sought to establish that the announcements in controversy comply with Commission underwriting announcement guidelines.

III. DISCUSSION

4. Advertisements are defined by the Act as program material broadcast "in exchange for any remuneration" and intended to "promote any service, facility, or product" of for-profit entities. *47 U.S.C. § 399b(a).* As noted above, noncommercial educational stations such as Station KMTP-TV may not broadcast advertisements. Although contributors to noncommercial stations may receive on-air acknowledgements, the Commission has held that such acknowledgements may be made for identification purposes only, and should not promote the contributors' products, services, or business.

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[3] *In the Matter of Minority Television Project, Inc.*, 17 FCC Rcd 15646 (EB 2002) ("NAL").

[4] *See id.*

[5] *See Response of Minority Television Project, Inc.*, filed September 9, 2002 ("Response").

5. Specifically, such announcements may not contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent or lease.[6] At the same time, however, the Commission has acknowledged that it is at times difficult to distinguish between language that promotes versus that which merely identifies the underwriter. Consequently, it expects only that licensees exercise reasonable, good faith judgment in this area.[7]

6. Commission Standards. Minority first argues that the difficulty licensees encounter in distinguishing language that "identifies" versus that which "promotes" a contributor's products or services is "so pervasive--no matter the language involved" [8] that it renders the Commission's policy identified in either the *Public Notice* or the Commission precedent underlying that Notice[9] "incapable of being applied in a consistent and objective manner,"[10] and that the Bureau's *NAL* relying on that policy was "based solely on subjective judgments."[11] Minority further contends that the

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[6] *See In the Matter of the Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, *Public Notice* (1986), republished, 7 FCC Rcd 827 (1992) ("*Public Notice*").

[7] *See Xavier University*, 5 FCC Rcd 4920 (1990).

[8] *Response* at 3.

[9] *See Commission's Policy Concerning the Noncommercial Educational Nature of Educational Broadcasting Stations*, 90 FCC 2d 895 (1982) ("*1982 Policy Statement*"), recon., 97 FCC 2d 255 (1984) ("*1984 Policy Statement*") (collectively, the "*Policy Statements*").

[10] *Response* at 3.

[11] *Id.*

NAL failed to provide "much needed guidance in attempting to comply with the Commission's rules,"[12] and asks that the Commission "re-visit the issue and clarify its standards."[13]

7. The Commission has recognized that "it may be difficult to distinguish at times between announcements that promote and those that identify."[14] Thus, it defers to "reasonable, good faith judgments" by licensees and finds violations only where material is "clearly" promotional as opposed to identifying.[15] We believe that this test is sufficiently clear and objective particularly as applied in this case. As discussed in further detail below, we believe that any reasonable licensee, acting in good faith, would have readily concluded that these announcements were "clearly" promotional.

8. Minority contends that the *NAL* erred in citing announcements that included language or images that "'heavily dwelled' on the sponsor's product's particular features, or "'encouraged patronage."[16] Minority argues that, because the Commission did not articulate these particular factors in either the *Public Notice* or the *1984 Policy Statement*, they cannot be relied on as a basis for Commission sanction in this case. Similarly, Minority argues that the *NAL*'s reliance on

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[12] *Id*.
[13] *Id*.
[14] *Xavier*, 5 FCC Rcd at 4920.
[15] *Id*.
[16] See NAL at PP15, 25.

unpublished or staff-level precedent undermines the NAL's validity.[17]

9. First, the validity of findings proposed in the *NAL* is not called into question merely because the Commission itself has not, in its earlier policy pronouncements--including the *Public Notice* and the *Policy Statements*--or in subsequent cases, directly discussed each possible factor that might be present in explaining a prohibited comparative or promotional expression. Specifically, Minority objects to the *NAL*'s explanation that certain announcements were promotional because they "heavily dwell on their underwriter's products or services at length"[18] or "encourage patronage."[19] Minority points to no precedent, issued by the Commission or its staff, substantively at odds with the *NAL*'s analysis. Indeed, the analysis is fully consistent with prior Commission precedent. We believe that any reasonable licensee acting in good faith would recognize that announcements that heavily dwell on the products or services at length and/or encourage or induce patronage are promotional rather than simply used to identify. Indeed, contrary to Minority's argument that it lacked notice that the airing of such announcement was impermissible, the *Public Notice* unambiguously reminds licensees that Commission policy specifically forbids the use of announcements that

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[17] *See NAL* at PP12, 13, 15, 17, 22, 25, 28.

[18] *See Board of Education of New York (WNYE-TV)*, 7 FCC Rcd 6864 (MMB 1992).

[19] The actual language used in the **NAL** was "induce patronage." *NAL* at P25.

"contain an inducement to buy, sell, rent or lease" the underwriter's products.[20] The fact that the NAL noted that such finding was consistent with the approach also followed in past unpublished letter rulings does not diminish its validity.[21] Indeed, while we did not cite the unpublished letters to suggest they be used against Minority, they do underscore the consistency in the Commission's handling of such matters.

10. *Foreign-Language Broadcasts*. Minority argues further that our application of the statute to its announcements was constitutionally suspect because we did not take into account aspects of Asian culture inherent in the text of each announcement.[22] Minority contends that, in so doing, the *NAL* improperly discriminated against licensees, such as Minority, whose programming

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[20] *Id*.

[21] *See*, *e.g.*, Letter of the Chief, Complaints & Political Programming Branch, Enforcement Division, to Evansville-Vanderburgh School Corporation (WPSR(FM)) (MMB March 23, 1999).

[22] *Response* at 5. Minority argues that, in failing to apply to this case the standards set forth in the federal Court Interpreter's Act, the NAL improperly rejected the congressional mandate of "cultural analysis." Id. at 7. Minority further contends that the NAL, in proposing a monetary fine for announcements that, if analyzed that in their proper cultural context, would be deemed to comply with Commission policy, imposed a "chilling effect" on the licensee's speech, and did not afford the "quasi-suspect class" of foreign language-speaking broadcasters like itself with the appropriate standard of heightened constitutional protection, citing *U.S ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970) and *Olagues v. Russioniello*, *797 F.2d 1511 (9th Cir. 1995) (en banc)*, in support. Id. at 7-8.

caters to members of minority populations who speak foreign languages.[23] Minority's arguments are without merit. First, we accepted the English translation of the broadcasts that Minority proffered, and, consistent with the Act and applicable precedent, found that the announcements violated the provisions of section 399B.[24] Moreover, licensees are responsible for ensuring that material broadcast in a foreign language conforms to the requirements of the Act and the Commission's rules.[25] Thus, the Commission does not recognize any special exception to licensee responsibility based upon the fact that the programming at issue is in a foreign language.[26] Moreover, for the reasons specifically noted in the *NAL*, the federal Court Interpreters' Act[27] 28 U.S.C. § 1827(j). cited by Minority in its response to the *NAL*[28] does not bear on the Commission's substantive analysis of foreign-language underwriting announcements,[29] and Minority has not demonstrated otherwise.

11. *Good Faith Judgment*. Minority further contends that the *NAL* failed to defer to the licensee's reasonable good faith judgment consistent with the Commission's pronouncements in *Xavier*. [30] Minority contends that its internal station

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[23] *Id*. at 8.
[24] *NAL* at PP7-9.
[25] *See Licensee Responsibility to Exercise Adequate Control Over Foreign Language Programs*, 39 FCC 2d 1037 (1973).
[26] *Id*.
[27] 28 U.S.C. § 1827(j).
[28] *Response* at 6.
[29] NAL at P8, n.7.
[30] *Response* at 9.

underwriting policy is consistent with both the Commission's standards and those of leading public broadcasters, and that the *NAL* failed to accord due deference to it, as the licensee, in its application of those standards regarding the announcements in question.[31] Moreover, Minority argues that the *NAL* did not explain how Minority "lacked good faith" in broadcasting them.[32] We reject these arguments. Contrary to Minority's implication, licensee discretion under *Xavier* is not unlimited, but is constrained by the bounds of reason.[33] The *NAL* properly evaluated Minority's discretion under *Xavier* through a reasonable objective intent standard,[34] and concluded that the announcements in question violated section 399B of the Act based on the total circumstances of the case, including the text and visual aspects of the announcements themselves, and Minority's explanations, and then applying the pertinent Commission underwriting policy and precedent.[35] After again reviewing the record, we conclude that no reasonable licensee, exercising its good faith judgment, could conclude that these announcements are anything but promotional.

12. *Record Evidence and Specific Announcements*. Minority alleges that the *NAL*

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[31] *Id.*
[32] *Id.*
[33] *See In re Window to the World Communications, Inc.* (WTTW(TV)), DA 97-2535 (MMB December 3, 1997), forfeiture reduced, 15 FCC Rcd 10025 (EB 2000).
[34] *Id.*
[35] *NAL* at PP4-9.

"overlooked and mischaracterized record evidence,"[36] and that its determinations as to specific announcements are erroneous.[37] Except as to the station's broadcast of the State Farm announcement, we disagree. Minority contends that its translations for those announcements are contained in its March 25, 2002, Reply to the staff's February 25, 2002, letter of inquiry ("Reply") at Exhibit L-3. Id. at 11. However, its Reply contains no such material, only an Exhibit marked with the letter "L," which is comprised only of the one-page Statement of announcement reviewer Candy Chan. Moreover, Ms. Chan's Statement does not address the announcements in question, nor has Minority provided them in its Response to the NAL. The translations provided by Minority in its Reply are contained at Exhibit P to that pleading, and include its translations for the announcements made on behalf of Yip's Auto World and Ulfert's Furniture, which were duly acknowledged in the NAL. See NAL at P23. Contrary to Minority's assertion, the *NAL* properly relied on the complainant's translations for the Met-Life, Scandinavian Furniture, Sincere Plumbing and East West Bank announcements because the licensee failed to provide any alternative versions.[38] Moreover, to the extent that Minority commented on the complainant's translations for those announcements, we accepted Minority's version of the translation and

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[36] *Response* at 10.

[37] *Id.* at 11.

[38] For the reasons discussed *infra*, we agree with Minority that its broadcast of the State Farm announcement should not have been considered against it in the *NAL*.

Minority's stated reasons for airing them, and accorded the licensee due accord in light of the full evidence of record.[39] Contrary to Minority's assertion, the *NAL* acknowledged that the licensee had disputed aspects of the complainant's grammar and phrasings, but after accepting Minority's views, concluded that these differences did not impact the announcements' overall meaning.[40] As discussed in the *NAL*, that analysis was not limited to the announcements' linguistic elements alone, but also considered their visual aspects. [41]

13. Minority specifically asserts that the NAL's finding that the announcement made on behalf of State Farm was erroneous. [42] *Response* at 12-13. Minority argues that the Act requires there to have been a *quid pro quo* exchange of consideration between the underwriter and the licensee for a violation of section 399B to exist.[43] Minority contends that, in this case, there was no violation because no support of any kind was given except for the underlying program and announcement themselves, and that these materials were not provided by State Farm, but by an independent producer.[44] Minority argues that the station's broadcast of the State Farm announcement was therefore unsupported and harmless. We reject this argument. The Act does not require that the consideration involved be supplied directly by the

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[39] *NAL* at PP23-25
[40] *NAL* at P23, n.19.
[41] *NAL* at P23-29.
[42] Response at 12-13.
[43] *Id*.
[44] *Id*.

sponsor or underwriter itself.[45] The Commission has long held that promotional statements made on behalf of for-profit entities, made in exchange for the receipt or reasonable anticipation of consideration, are prohibited under section 399B, and that cognizable consideration may take many forms.[46] In this case, the fact that a third-party independent producer, and not State Farm, supplied the programming and promotional announcement to the station, though immaterial to the issue of whether the licensee violated section 399B, is, however, a mitigating factor under the circumstances of this case.[47] Therefore, we will not consider Minority's

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[45] 47 U.S.C. § 399b(a)(1) specifically provides: "for purposes of this section, the term 'advertisement' means any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended to promote any service, facility or product offered by any person who is engaged in such offering for profit."

[46] *1982 Policy Statement*, 90 FCC 2d at 911-12, PP26-28. While the Commission has acknowledged that noncommercial licensees have discretion to air announcements promoting for-profit entities where the station wishes to make listeners aware of a for-profit entity's "transitory events," it required that licensees make such announcements only where public-interest determinations, and not economic considerations, were the basis for the announcements. In this case, Minority made no such claim concerning any announcement.

[47] *See In re Window to the World Communications, Inc. (WTTW(TV))*, DA 97-2535 (MMB December 3, 1997), *forfeiture reduced, 15 FCC Rcd 10025 (EB 2000).* In that case, the Mass Media Bureau found consideration to exist where an announcement made on behalf of Prudential Securities and its underlying programming were supplied by a third-party producer. However, the Mass Media Bureau took cognizance of, and found mitigating, the manner in which the announcement and programming were supplied to the station that they were not station-produced but were supplied

broadcast of the State Farm announcement in assessing the forfeiture amount. [48]

14. Minority also argues that the *NAL* erred in concluding that the announcements made on behalf of Gingko-Biloba Tea and Korean Airlines were promotional, contending that the *NAL* wrongly rejected its explanation that the presentations were value-neutral because they were intended to be "farcical" or "harmless image announcements," respectively.[49] We disagree. For the reasons set forth in the *NAL*, the announcements in question exceeded the identification-only purpose of underwriting announcements and were clearly promotional.[50]

15. We further reject Minority's argument that the *NAL* erred in proposing the forfeiture amount based on the 1,911 times that the announcements were aired during the years 2000 through 2002, instead of the number of announcements at issue, 18.[51] Minority cites no

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automatically through satellite feed and inadvertently aired. In this case, Minority similarly claimed that the State Farm announcement was contained as part of a satellite-feed contained in the program "Minority Business Report," and was inadvertently aired. *See* Response of Minority Television Project, Inc., to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, dated December 20, 2001, at 2, n.1

[48] Minority broadcast the State Farm announcement only once, on September 25, 2000. *See NAL* at 13.

[49] *Response* at 13.

[50] NAL at P21.

[51] *Response* at 14; NAL at P30, n.24. Although Minority contends that we took into consideration the broadcast of 20

authority for its contention that repeated broadcasts of prohibited underwriting announcements should be aggregated, and the applicable statute and Commission rule on this issue provides otherwise.[52] Except as it pertained to the State Farm announcement, the NAL properly considered the total circumstances of the case, including the number of announcements, the duration, gravity, egregiousness, and continuing nature of the violations involved.[53] In any event, given the large number of promotional announcements, we believe that a $10,000 forfeiture is hardly excessive in light of the $2,000 base amount for a single violation.[54] Finally, Minority seeks a ruling on its Petition for Declaratory Ruling in which it requested that the Commission declare that the specific underwriting announcements in question are consistent with

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separate underwriting announcements, both the discussion contained in the NAL and the list set forth in the ruling's appended Table A indicate that only 18 announcements were considered.

[52] *See* 47 U.S.C. § 503(b)(2); note to 47 C.F.R. § 1.80(b)(4). Under section 503(b) of the Act, each prohibited broadcast may be deemed to constitute a separate offense. *See also The Commission's Forfeiture Policy Statement and Amendment of Section* 1.80 of the Rules to Incorporate the Forfeiture Guidelines, 12 FCC Rcd 17087, 17113 (1997), recon. denied 15 FCC Rcd 303 (1999) ("Forfeiture Policy Statement"). The base amounts for enhanced underwriting violations listed in the Commission's *Forfeiture Guidelines* are $2,000.00 for a single violation or single day of a continuing violation.

[53] *NAL* at PP30-32.

[54] Indeed, even if we took out of the forfeiture the six specific announcements challenged by Minority, apart from the State Farm announcement that we now exclude, the remaining 11 unlawful announcements would still justify a forfeiture of $10,000. *See* PP12-14, *supra*.

applicable statutory and regulatory standards.[55] In view of our action affirming, in all but one instance, the NAL's finding that the subject announcements violated section 399B of the Act and Section 73.621 of the Commission's rules, we shall dismiss Minority's Petition for Declaratory Ruling as moot.

IV. FORFEITURE

16. Under section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a monetary forfeiture penalty.[56] In

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[55] *Response* at 14.

[56] 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); see also 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 14 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. See, e.g., Application for Review of Southern California Broadcasting Co., Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("Southern California Broadcasting Co."). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. See, e.g., Callais Cablevision, Inc., Grand Isle, Louisiana, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, inter alia, a cable television operator's repeated signal leakage). "Repeated" merely means that the act was committed or omitted more than once, or lasts more than one day. Southern California Broadcasting Co., 6 FCC

order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.[57] The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.[58] As set forth above, we conclude under this standard that Minority is liable for a forfeiture for its apparent willful violation of *47 U.S.C. § 399b* and *47 C.F.R. § 73.621*.

17. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of $2,000 for enhanced underwriting rule violations.[59] The Forfeiture Policy Statement also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D) of the Act, *47 U.S.C. § 503(b)(2)(D)*, such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[60] In this case, taking all of these factors

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Rcd at 4388, P5; Callais Cablevision, Inc., 16 FCC Rcd at 1362, P9.

[57] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

[58] *See*, *e.g., SBC Communications, Inc., Apparent Liability for Forfeiture, Forfeiture Order*, 17 FCC Rcd 7589, 7591, P4 (2002) (forfeiture paid).

[59] *See Forfeiture Policy Statement*, 12 FCC Rcd at 17113; 47 C.F.R. § 1.80(b).

[60] *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01, P27.

into consideration, we find that the *NAL* properly proposed that the compounded forfeiture amount of $10,000 is the appropriate sanction for the violations described above. Consequently, Minority is liable for a forfeiture of Ten Thousand Dollars ($10,000).

V. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended,[61] and Sections 0.111, 0.311 and 1.80 of the Commission's rules,[62] that Minority Television Project, Inc., licensee of noncommercial educational Station KMTP-TV, San Francisco, California, FORFEIT to the United States the sum of Ten Thousand Dollars ($10,000) for willfully and repeatedly broadcasting advertisements in violation of Section 399B of the Act, *47 U.S.C. § 399b*, and Section 73.621 of the Commission's rules, *47 C.F.R. § 73.621*. **IT IS ALSO ORDERED** that Minority's Petition for Declaratory Ruling dated June 13, 2000, **IS DISMISSED AS MOOT**.

19. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482, within thirty (30) days of the release of this Forfeiture Order. *See 47 C.F.R. § 1.80(h).* The payment MUST INCLUDE the FCC Registration

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[61] *See* 47 U.S.C. § 503(b).
[62] See 47 C.F.R. §§ 0.111, 0.311, and 1.80.

Number (FRN) referenced above, and also should note the NAL/Acct. No. referenced above. If the forfeiture is not paid within that time, the case may be referred to the Department of Justice for collection pursuant to *47 U.S.C. § 504(a)*.

20. **IT IS FURTHER ORDERED** that a copy of this *Forfeiture Order* shall be sent, by Certified Mail Return Receipt Requested, to Minority Television Project, Inc., care of its attorney, James L. Winston, Esq., Rubin, Winston, Diercks, Harris & Cooke, LLP, 1155 Connecticut Avenue, N.W., Washington, DC 20036.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon

Chief, Enforcement Bureau

APPENDIX H

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	File Nos. EB-00-IH-0153
MINORITY	)	and EV-01-1H-0652
TELEVISION	)	NAL/Acct.
PROJECT, INC.	)	No. 200232080020
	)	FRN 0005704366
Licensee of	)	Facility ID No. 43095
Noncommercial	)	
Educational	)	
Television Station	)	Release-Number:
MTP-TV,	)	DA 02-1945
San Francisco,	)	
California	)	

MEMORANDUM OPINION AND ORDER

17 FCC Rcd 15646

Aug. 9, 2002, Released; Aug. 7, 2002, Adopted

I. Introduction

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that Minority Television Project, Inc. ("Minority"), licensee of noncommercial educational television station KMTP-TV, San Francisco, California, apparently violated Section 399B of the Communications Act of 1934, as amended ("the Act"), 47 U.S.C. § 399b, and Section 73.621 of the Commission's rules, 47 C.F.R.

§ 73.621, by willfully and repeatedly broadcasting advertisements. Based on our review of the facts and circumstances of this case, we conclude that Minority is apparently liable for a monetary forfeiture in the amount of Ten Thousand Dollars ($10,000.00).

II. Background

2. This case arises from allegations raised in a pending Media Bureau ("MB") proceeding, and referred to the Enforcement Bureau for resolution. In the MB proceeding, Minority submitted a Petition for Declaratory Ruling, on June 13, 2000, which sought Commission approval of numerous underwriting announcements the station has broadcast, arguing that the announcements comply with the pertinent statutory and Commission rule provisions that prohibit the broadcast of commercial messages on noncommercial educational stations. In response, AT&T Broadband, LLC ("AT&T"), operator of cable systems in the San Francisco market, and Lincoln Broadcasting Company ("Lincoln"), licensee of commercial television station KTSF(TV), Brisbane, California, opposed Minority's request, and complained that KMTP-TV has continuously broadcast prohibited underwriting announcements since June 1999. By letters dated November 9, 2001, and February 25, 2002, we inquired of the licensee.

3. Advertisements are defined by the Act as program material broadcast "in exchange for any remuneration" and intended to "promote any service, facility, or product" of for-profit entities. 47 U.S.C. § 399b(a). As noted above, noncommercial

educational stations may not broadcast advertisements. Although contributors of funds to noncommercial stations may receive on-air acknowledgements, the Commission has held that such acknowledgements may be made for identification purposes only, and should not promote the contributors' products, services, or business.

4. Specifically, such announcements may not contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent or lease. *See Public Notice, In the Matter of the Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations* (1986), *republished,* 7 FCC Rcd 827 (1992) ("*Public Notice*"). At the same time, however, the Commission has acknowledged that it is at times difficult to distinguish between language that promotes versus that which merely identifies the underwriter. Consequently, it expects only that licensees exercise reasonable, good-faith judgment in this area. *See Xavier University*, 5 FCC Rcd 4920 (1990).

III. Discussion

5. *Preliminary Matters*. At issue are approximately twenty underwriting announcements from eighteen entities admittedly broadcast by the station approximately 1,900 times since June 1999, that appear to have been in exchange for consideration, and on behalf of for-profit sponsors.[1]

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[1] In its April 17, 2002, reply, Lincoln submitted a new videotape citing three additional underwriting announcements

Minority argues that the foregoing announcements comply with Section 399B of the Act, the pertinent Commission policies and rules, and are consistent with its "good faith" discretion under Xavier. Minority contends that, as a foreign-language programmer, it faces a daunting challenge in attempting to fashion underwriting acknowledgments that identify but do not promote the messages' sponsors. Minority notes that many of the announcements at issue are broadcast in Asian languages, Vietnamese, Mandarin, Filipino, or Korean, and argues that those languages do not always yield precise cross-cultural verbal equivalencies in English.[2]

6. Minority contends that other federal agencies, consistent with U.S. policies supporting multiculturalism, have, in federal legal settings, accepted "dynamic equivalencies" in lieu of word-for-word renditions.[3] Minority explains that "dynamic equivalencies" emphasize the speaker's intent over translation errors and misused words, and argues that its own in-house interpreters have correctly followed this approach in fashioning the station's underwriting announcements, consistent with the aims of the federal Court Interpreters' Act, 28 U.S.C.

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allegedly broadcast by KMTP-TV during the period January 2002 through March 2002. We will review those allegations separately.

[2] Minority cites Gonzalez, Fundamentals of Court Interpretation: Theory, Policy and Practice, Carolina Press (1991); Gerson and Gerson, Technical Writing: Process and Product, pp. 60-73, Prentice Hall (1997).

[3] *See id*.

§ 1827(b); 28 U.S.C. § 604(a).[4] n4 The licensee contends also that certain phrases it utilizes are harmless adjective-noun combinations that do not promote, but instead denote, without value, discrete categories of products or services like the "fine dining" example the Commission found permissible in *Xavier*. AT&T and Lincoln disagree, arguing that Minority's interpretation of the Xavier case's "good faith" discretion standard is overbroad by elevating the broadcaster's subjective intent over the commonly understood meaning that listeners ascribe to everyday phrases. The complainants argue that accepting Minority's theory would essentially nullify the statutory proscription of Section 399B of the Act and thus that theory is invalid.

7. The Commission has long warned that foreign-language programmers must take care to ensure that their programming material is consistent with the pertinent statutes and Commission rules and policies concerning underwriting. *See Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, 90 FCC 2d 895 (1982), recon., 97 FCC 2d 255 (1984) ("*Policy Statement*"); *Public Notice*, *supra*. Minority argues that its translations are acceptable and that the announcements comply with Commission underwriting policy and precedent,[5]

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[4] *See* Exhibit C to Minority's Reply to Opposition to Complaint for Carriage, June 26, 2000, Declaration and Memorandum of Arlene Stevens.

[5] The translations actually provided by Minority do not coincide with every announcement under consideration. In certain cases, Minority declined to provide its own versions, instead criticizing the translations offered by the complainants. In

even though its translations may be at odds with those provided by the complainants. Minority argues that we should accept its translations as accurate because they were prepared by trained linguists with superior qualifications, and with due regard for overall federal policy concerning multiculturalism and the special demands of foreign-language translation.[6] Minority further asserts that we should accept its translations as evidence that the announcements comply with Section 399B of the Act because the translations were prepared in the exercise of the licensee's good faith discretion under *Xavier*.

8. We note that the linguists presented by both sides appear to be highly qualified. Although we do not accept all of Minority's arguments, a key factor warrants crediting its translations over those of the complainants. That is, consistent with *Xavier*, licensees have good faith discretion in preparing their underwriting announcements. In the case of

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other instances, we did not inquire about announcements for which Minority provided translations. The specifics of the textual evidence will be discussed *infra*.

[6] *See* Attachments B, J, K, L, N and O, Minority's Response, March 25, 2002, and captioned Statements of Margaret Lacson, Arlene Stevens, Sohyoun Kim, Candy Chan, Lorraine Mallore, and Joung-Mi Nam, respectively, which array their educational and linguistic backgrounds. Lincoln's versions were provided by a professional translator and native speakers who appear to possess training, background and expertise comparable to the licensee's expert witnesses. *See* Attachment D to Lincoln's Reply, April 17, 2002, and Declaration of Yan Fen Liu Madjd-Sadjadi; Attachment A to Lincoln's Complaint, November 9, 2001, and Supporting Declarations of Kevin Ho, David Shin-Ho Kim, Art Gubisch, and Frances Chan Lee.

foreign-language announcements, we believe a licensee's use of translations of underwriting announcements prepared by linguists who are sensitive to the native speaker's intent, as Minority has done, supports their reliability.[7]

9. While we recognize that foreign languages may pose special translation difficulties, we find that the foregoing announcements, based on Minority's own translations, nevertheless appear to exceed the bounds of what is permissible under Section 399B of the Act, and the Commission's pertinent rules and policies, taking into account the "good-faith" discretion afforded licensees under *Xavier*, *supra*. We find they do not appear to be

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[7] Minority suggests that the Court Interpreters' Act expresses a substantive policy for foreign-language translations that we should consider when evaluating its efforts to comply with Section 399B of the Act. We reject any implication that the provisions of the Court Interpreters' Act govern proceedings under Title III of the Communications Act, and note that the Court Interpreters' Act sets forth guidelines the Administrative Office of the U.S. Courts shall employ in appointing certified interpreters in court cases.
Specifically, the applicability of the Court Interpreters' Act has been narrowly construed to apply to U.S. District Court judicial proceedings only. *See* 28 U.S.C. § 1827 (j); *U.S. v. Lira-Arredondo*, 38 F.3d 531 (Tenth Cir. 1994) (where the Tenth Circuit held that the Court Interpreters' Act did not apply to non-judicial proceedings; that it applied only to testimony and communications that took place before the court); *In re Morrison*, 22 B. R. 969, recon. den., 26 B. R. 57 (Bankr. N.D. Ohio 1982) (where the bankruptcy court determined the Court Interpreters' Act did not require the provision of interpreting services at a meeting of creditors and discharge hearing). Thus, the cited provisions of the Court Interpreters' Act do not appear to bear on this case.

reasonably intended to connote value-neutral meanings concerning the underwriters' products or services. In this regard, we note that the announcements at issue contain not only textual but visual elements that need no translation. The combined text and images must be evaluated, in the full context presented, in order to ascertain the messages' overall meaning and reasonable objective intent. *See In re Window to the World Communications, Inc.* (*WTTW(TV*)), DA 97-2535 (MMB December 3, 1997), *forfeiture reduced*, 15 FCC Rcd 10025 (EB 2000). We find that the subject underwriting messages, viewed in their totality, appear promotional in nature and thus appear to constitute prohibited advertisements.

10. *English-Language Announcements*. We will first address the several announcements that were broadcast aurally in English or contained English-language video messages; namely, those on behalf of State Farm, U-tron Computers, and Caliber Dual Monitor Computers. The State Farm announcement visually depicts the aftermath of a home ruined by fire. The narrator intones: "fortunately, they have a State Farm agent, and the help of the world's largest claims network. And no one has more experts handling more claims quickly and more fairly. That's our 'Good Neighbor' promise." The visual element concludes with the image of happy family members apparently restored to their repaired home. Similarly, the U-tron Computers' announcement verbally describes its sponsor as "offering distinctive computer products" while visually depicting its product, a computer set,

through flashing graphics containing the terms "high-end" and "heavyweight."

11. Minority acknowledges that the State Farm and U-tron announcements should not have been aired because they contain promotional language. Minority argues, however, that we should find mitigating the fact that their broadcast was inadvertent,[8] and in the case of the State Farm announcement, find that the broadcast did not violate Section 399B of the Act because it was mere program "filler," and not specifically supported by *quid pro quo* consideration. Taking into account the licensee's discretion under *Xavier*, *supra*, we find that Minority's broadcast of both the State Farm and U-tron announcements appears to exceed the bounds of what is permissible under the Act, and appears to violate our underwriting rules.

12. In addition, Minority's further arguments have been specifically rejected in previous cases. "Consideration," for purposes of Section 399B of the Act, may consist of the program material itself. *See Policy Statement*, *supra*, 90 FCC 2d at 911; *Window to the World Communications, Inc., supra.* Thus, even if the program material were un-sponsored "filler," that fact has no bearing on the question of its compliance with Section 399B of the Act. Moreover, even if Minority's airing of the State Farm and U-tron announcements were through inadvertence, and not intention, that does not excuse

[8] The licensee admits that it failed to edit properly the U-tron announcement from the version that had been aired on commercial stations.

Minority's rule violation. *See In re Rego, Inc. (WGEZ(AM))*, 16 FCC Rcd 16795 (EB 2001), *citing Gaffney Broadcasting, Inc.*, 23 FCC 2d 912, 913 (1970).

13. The underwriting announcement for Caliber is also broadcast in English and visually depicts costumed characters dancing across its product's dual computer screens. The accompanying narrative describes the computer as featuring "revolutionary dual display functions" and advises viewers that they will "see more, get more" with it, while the graphic message urges them not to "miss a thing" and presumably make a purchase. Minority contends that the message merely identifies the sponsor and describes the product. While announcements may identify underwriters and their products, they may not promote. In this case, the message makes descriptive, qualitative references that appear impermissibly to promote the underwriter's product and otherwise invites patronage of the sponsor's business. *See Public Notice, supra; Kosciusko Educational Broadcasting Foundation (WJTA(FM))*, 5 FCC Rcd 7106 (MMB 1990).

14. *Foreign-Language Announcements*. The underwriting announcements made on behalf of Gingko-Biloba Tea, Call-One Global Air Cellular Telephone, Chevy Venture, Chevy Impala, Cadillac Escalade, Ford Windstar, Ford Explorer and Expedition, Ford Motor Company, Korean Airlines, and Asiana Airlines were broadcast in Asian languages and appear similar in many salient respects. Generally speaking, they depict the

underwriters' products or services being used and enjoyed by customers or heavily dwell on their particular features and qualities. Minority argues that the messages are merely value-neutral "image announcements" broadcast in good faith, consistent with Commission policy and precedent, and that they do not promote.

15. We disagree, and find that the foregoing announcements, with the exception of the Call One Global Cellular Telephone and generic Ford Motor Company messages,[9] viewed in their entirety, are promotional in nature. First, the announcements heavily dwell on their underwriters' products or services at length, both visually and textually, focusing on their salutary qualities, and feature their customers' approving responses. *See Board of Education of New York (WNYE-TV)*, 7 FCC Rcd 6864 (MMB 1992) (where announcement emphasized in imagery, the demonstration, use, consumption, and customers' apparent satisfaction with the underwriter's products, the message was found to be qualitative and promotional).

16. Minority contends further that the Cadillac Escalade and Asiana Airlines

[9] The visual aspects of the Call One Global Cellular Telephone and generic Ford Motor Company announcements dwell heavily on the products in use and thus appear to be inconsistent with the Commission's underwriting policies. However, because we are unable to correlate the English language translated text of these two specific announcements with their corresponding video, we do not have a complete context on which to evaluate them. Accordingly, we decline to rule on them at this time.

announcements, although utilizing seemingly qualitative or price-referent phrases such as "highly regarded product," "quality SUV," "best level," and "free travel," respectively, do not, in their native tongue, convey promotional meanings, but, instead denote categorical and value-neutral expressions. We reject these arguments. While we acknowledge that categorical identifiers are not necessarily promotional, the Cadillac Escalade announcement, in its full context, belies Minority's claim that mere product-identification is taking place. In this regard, the announcement dwells on images of the SUV automobile in use, focusing on its special navigation and entertainment features.

17. Furthermore, contrary to Minority's contention, its own Korean-English translation describes the Cadillac Escalade's navigation feature in a comparative manner. Thus, although Minority argues that the adjective-noun combination "quality SUV," standing alone, denotes a categorical and value-neutral designation, the actual phrase at issue is not expressed so narrowly. In this case, by distinguishing the automobile as "the only quality SUV with On Star," the announcement goes beyond categorization, by focusing on the vehicle's select and favorable standing among competing vehicles by virtue of its unique equipment.[10] Where the term "only" has been used to suggest a product's unique

[10] Minority concedes that one version of this announcement, broadcast seven times during the period February 25, through March 9, 2000, contained the following calls to action "drive Escalade"; "buy or lease Escalade now!"; "a folding viewfinder and cassette player [are included] now until March 31, 2000"; and should not have been aired.

quality or attribute, it has been found to be promotional. *See Agape Broadcasting Foundation (KNON-FM)*, 13 FCC Rcd 13154 (MMB 1998).

18. Similarly, we reject Minority's argument that the Asiana Airlines announcement makes value-neutral references to the underwriter's bonus mileage plan. The visual aspect of the announcement depicts two characters discussing their airline tickets. Minority provides the following translation[11]:

Female Character: "Did you get the surprising news Asiana Airlines sent to you? Now you can get American Airline [sic] free tickets using Asiana mileage."

Male Character: "Asiana Air now combines mileage with American Airlines."

Female Character: "Now you can travel free to America, Central or South America and even Europe--to 270 cities around [sic] world earning mileage with Asiana Airlines. Although you travel with Asiana Airlines or with American Airlines."

Male Character: "Now where do you want to go?"

Female Character: "Well. . . . (laughter)."

Male Character: "Mileage benefits with the best airline in the world. Asiana Airlines."

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[11] *See* Attachment A, Minority's Reply to AT&T Broadband LLC Comments, July 27, 2000; Announcement # 11.

19. Minority contends that, in this announcement, the characters neutrally discuss the airline's bonus mileage plan and how viewers may qualify for "the opportunity for free travel." Minority argues that Asiana's reference to its mileage plan is not promotional, and that the Commission's proscription on the use of pricing information is not applicable because it does not extend to terms used, as here, to convey "free," "zero," or "value-*less*" information, only price-specific information. Minority also likens the context of this announcement to that of the mention of toll-free "800" telephone numbers, and argues that "value is not attached to [such] calls."

20. These arguments are without merit. First, the Commission has specifically found references to "free" products or services to be prohibited language of inducement. *See Public Notice*, *supra*.[12] Secondly, we do not agree that the reference to Asiana's bonus mileage plan is, in this instance, value-neutral. The announcement dwells singularly on a discussion of the underwriter's business marketing program that offers purchase enhancements to potential customers, and also refers to it as the "best airline in the world." As such, the presentation attempts to induce business patronage, and to present the underwriter in comparative and qualitative terms. It is thus prohibited. *See id.* Also, we note that Minority's

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[12] In describing the prohibition against language that contains inducements to buy, sell, rent or lease, the Commission specifically identified the following example: "six months' *free* service." (Italics added.)

argument concerning broadcast invitations to utilize underwriter's toll-free telephone numbers is inapposite. Moreover, Minority cites no authority supporting its proposition that the noncommercial broadcast encouragement to contact an underwriter through the use of toll-free telephone numbers is, in fact, categorically non-promotional.

21. Elsewhere, Minority makes arguments particular to specific announcements. It argues that the Gingko Biloba Tea announcement, which depicts a grandson enjoying tea that his encouraging grandfather explains will make him smarter, should be deemed value-neutral because it is "farcical." Minority offers no support for this assertion and we reject it. Similarly, we reject Minority's argument that the Korean Airlines announcement is a harmless "image announcement" consistent with Commission underwriting policy. The announcement features an airliner being prepared for flight by a busy crew that labors happily, singing the lyrics "fill sky with love, love. Spread smile over face--smile, smile, smile, smile. Fill sky with love, love, love, love. Fill sky with love. Between you and the sky is Korean Air."[13] The message exceeds the identification-only purpose of underwriting announcements by presenting Korean Airlines to the viewing audience as a competent, harmoniously-run carrier and an inviting host to potential travelers. The overall message seeks to induce patronage and is therefore promotional and prohibited.

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[13] *See* Attachment A to Minority's Reply to AT&T Broadband LLC Comments, dated July 27, 2000; Announcement # 52.

22. Minority argues that the Ford Windstar announcement's reference[14] to the vehicle's "five-star safety rating in government crash tests four years in a row" is factually verifiable and therefore non-promotional. The factual veracity of a claim made in an underwriting announcement is irrelevant to the issue of whether it is promotional. *See Tri-State Inspirational Broadcasting Corporation*, 16 FCC Rcd 16800 (EB 2001).[15] In this case, the announcement's reference to the vehicle's superior safety characteristics is impermissibly comparative and descriptive in nature. Moreover, Minority's announcement on behalf of the Ford Explorer and Expedition SUVs is similarly indistinguishable from commercial advertising in that it dwells singularly on the products being vigorously used, featuring them as being able to overcome obstacles to which lesser vehicles might impliedly succumb: "the ditch is deep; but no problem, the minute you show your power [sound of racing motor]"; and "with Ford Explorer and Expedition, [you] can handle any road, anywhere."[16] *See WNYE-TV*, 7 FCC Rcd at 6865. Similarly, the Chevy Venture and Impala announcements make improper reference to the products' favorable visual and mechanical features and appeal--"that should be pretty to catch my fancy" and "be strong; be sharp; beautiful safety

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[14] *See id*.; Announcement # 23.

[15] This analysis is also consistent with past unpublished letter rulings. *See, e.g., Letter of the Chief, Investigations and Hearings Division, Enforcement Bureau, to Station KOUZ(FM)* (EB July 12, 2000).

[16] *See id*.; Announcement # 24.

design . . . detailed lines, gorgeous power acceleration."[17]

23. On February 25, 2002, we inquired further concerning seven additional announcements submitted by Lincoln on behalf of station underwriters Yip's Auto World, Ulfert's Furniture, Met-Life (Retirement and Insurance--Great Wall of China), Scandinavian Concepts, Sincere Plumbing, and East West Bank. In its March 25, 2002, response, Minority did not provide its own translations for any of the announcements other than those for Yip's Auto World and Ulfert's Furniture,[18] but commented on Lincoln's translations as to all.[19] In its response, Minority argues that the foregoing announcements are acceptable because they are similar to material aired by other leading public television stations, and claims that they were fashioned in good-faith reliance on several of the guidelines set forth by the Public Broadcasting System for its own member stations.

24. We reject Minority's contentions. Noncommercial licensees are responsible for complying with Section 399B of the Act. As to the substance of the announcements, we note that their

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[17] See id.; Announcements # 44 and # 47.

[18] *See* Attachment P, Minority's Response dated March 25, 2002.

[19] Minority cavils with certain grammatical aspects of Lincoln's translations but does not challenge their overall meaning. Moreover, in those instances where Minority failed to provide its own translations we must presume that it concedes the basic accuracy of Lincoln's interpretations.

visual aspects, viewed in the context of their accompanying text, appear to be promotional. To the extent that Minority may have relied upon external advice in determining whether to air questionable program material, such factor has been found mitigating only in cases where the advice is sought from the Commission itself, and is then strictly followed. *See, e.g,. Pine-Aire Broadcasting Corp*., 4 FCC Rcd 1553 (1989) (seeking and following Commission advice may, in appropriate instances, constitute a mitigating factor in the event of a rule violation).[20]

25. Minority's translation for the Yip's Auto announcement states that "Yip's Auto cannot guarantee that you're lucky all the time. But Yip's assures its repairs for as long as you have your car. Yip's stands behind this protection." The mention of a product or service guarantee is promotional because it seeks to induce patronage.[21] In addition, both Met-Life announcements contain promotional elements, characterizing the company as "offering excellent products and services" in discussing the financial product as a solution to a customer's

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[20] Although Minority does not pursue this point, it bears noting that the licensee first sought a declaratory ruling on the acceptability of several of the announcements in question. However, Minority did not refrain from broadcasting them in advance of receiving Commission advice, so mitigation under the basis articulated in Pine-Aire would not apply.

[21] This analysis is consistent with past unpublished letter rulings. *See*, *e.g., Letter of the Chief, Complaints & Political Programming Branch, Enforcement Division, to Evansville-Vanderburgh School Corporation (WPSR(FM))*, (MMB March 23, 1999).

problem, and by favorably describing the strength of its insurance product, in both image and text, as "a good protector as the Great Wall of China was against the enemy."

26. Minority insists that no analogy was intended and that the Great Wall was being compared only to itself, not to the product. That interpretation, however, is inconsistent with the message's image and text. Contrary to Minority's contention, it appears that more than valueneutral "image identification" is taking place. The announcement for Sincere Plumbing makes a prohibited call to action when it invites viewers to "come to visit our showroom." Similarly, the announcement for Scandinavian Furniture describes the showroom's atmosphere and products as so "romantic, soft[] and gentle. . . you don't want to leave." Thus, it improperly characterizes the underwriter's furniture products and business setting in a comparative, qualitative manner. Additionally, the announcement for Ulfert's Furniture calls listeners to action by urging "if you're shopping for furniture, please come to Ulfert's." In addition, the announcement for East West Bank depicts characters describing the services of the bank in prohibited comparative and qualitative terms: "it's so easy and fast to be approved for a house loan at East West Bank."

27. Lincoln argues that the placement, duration and frequency of broadcast of the foregoing announcements constituted substantial interruptions of regularly scheduled programming in further violation of Section 399A(b) of the Act.

Lincoln further asserts that the announcements failed to identify their specific underwriters, and that this fact underscores their commercial nature and demonstrates a violation of the Commission's underwriting rules. With regard to Section 399A(b), the Commission has construed this restriction as one not limiting the number of underwriting acknowledgments that may be aired, but instead as one channeling their placement such that the flow of regular programming is not "unduly disrupted." *See Policy Statement*, 90 FCC 2d 895 at 902-03. We note that the announcements in question uniformly appear to be thirty seconds or less. Minority contends that it broadcasts no more than three to four such announcements per half-hour segment, and our review supports that claim.[22]

28. The Commission has not adopted quantitative guidelines on the length of announcements or the number of repetitions except to note that the longer announcements are, the more likely they are to be promotional, and that licensees should avoid placing them with such frequency so as to constitute "commercial clutter." *See WNYE-TV*, 7 FCC Rcd at 6865; *Policy Statement, supra*. First, even if a noncommercial licensee takes several breaks per half-hour segment to run underwriting announcements, this does not, by itself, demonstrate a violation of Section 399A(b). n23[23] Having

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[22] *See* Minority's Response to Letter of Inquiry, December 20, 2001, pp. 6-7.

[23] This analysis is also consistent with past unpublished letter rulings. *See, e.g., Letter of the Chief, Investigations and Hearings Division, to Hispanic Broadcast System, Inc. (WLAZ(FM))* (EB Feb. 11, 2002).

reviewed the evidence in this case, we find neither the overall number, frequency of broadcast announcements, nor length of the individual messages at issue to be inconsistent with the Commission's noncommercial rules or underwriting policy. Based on the overall evidence submitted, we find that they appear to occur at natural program breaks and that they do not recur with undue frequency.

29. However, we find also that the videotaped evidence depicts announcements that do not contain specific acknowledgments identifying their sponsors as station underwriters. As the purpose of underwriting acknowledgments is to identify those station donors who have sponsored specific programming, Minority's omission of this identifying information is improper. Thus, to the extent that the station's underwriting acknowledgments have been lacking in this respect, we will caution Minority to make appropriate underwriter identifications in the future.

30. *Sanction.* In view of the foregoing, we find that Minority has apparently violated Section 399B of the Communications Act, 47 U.S.C. § 399b, and Section 73.621(e) of the Commission's rules, 47 C.F.R. § 73.621(e), by airing impermissible donor and underwriting announcements on its noncommercial educational television station. In this case, the violations were numerous and continued for an extended period of time. In this regard, from the information supplied by the licensee, it appears that the foregoing announcements were broadcast in excess of 1,911

times during the January 2000 through March 2002 period.[24] Lincoln urges that we impose a substantial forfeiture in addition to other extraordinary relief, including enjoining the licensee from broadcasting further non-compliant announcements and requiring it to submit to monitoring under the threat of license revocation, although it cites no precedent in support of our taking these measures.

31. Considering the entire record, including the complaints, the pleadings responsive to our inquiries, and the applicable law, we conclude that a proposed forfeiture of Ten Thousand Dollars ($ 10,000.00) is appropriate in this case. In this regard, we note that the apparent duration, gravity, egregiousness, and continuing nature of the violations is more serious than what is contemplated by the base amount of $ 2,000 per underwriting rule violation. Moreover, the facts of this case are more troubling than those present in proceedings involving other noncommercial stations. *See J.C. Maxwell Broadcasting Group, Inc. (WMPR(FM))*, 8 FCC Rcd 784 (MMB 1993) ($7,500 forfeiture imposed for repeated underwriting violations on fourteen dates during a two-year period that persisted even after several complaints were received and two letters of inquiry issued); *Window to the World*

[24] The number of repetitions of the announcements in question cannot be precisely determined on the record. In Attachment A to its December 20, 2001, response to our initial inquiry, and Attachment Q to its March 25, 2002, response to our second inquiry, Minority provided information pertaining to eighteen of the announcements under consideration, contending that they were broadcast 1,911 times during the years 2000 through 2002. See also Table A to this decision.

Communications, Inc., supra (where $5,000 forfeiture was originally imposed for numerous noncompliant television underwriting announcements repeated over one-year period).[25] This case is more serious, as it involves the broadcast of a larger number of advertisements on many occasions over a lengthy period of time. These factors warrant substantial compounding of the base forfeiture amount. *See* 47 C.F.R. § 1.80(b)(4). However, we do not find any other type of sanction to be necessary or justified at this time.

32. Finally, Lincoln asserts that we should sanction Minority for filing frivolous pleadings that have abused the Commission's processes. We decline to do so. Minority's pleadings filed relative to our underwriting investigation were not unauthorized from a procedural standpoint. *See, e.g.*, 47 C.F.R. § 1.41 and § 1.45. From a substantive standpoint, while we do not accept most of Minority's contentions, we do not find that the licensee has presented facts or legal arguments in a manner lacking good-faith or inconsistent with its right to advocate its views.

IV. Ordering Clauses

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[25] The original forfeiture amount in *Window to the World Communications, Inc.* was based on a finding that the station had broadcast numerous impermissible underwriting announcements over an extended period of time. It was later reduced to $2,000 based on the staff's later conclusion that only one of the announcements at issue violated Section 399B of the Act.

33. Accordingly, **IT IS ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended,[26] and Sections 0.111, 0.311 and 1.80 of the Commission's rules,[27] that Minority Television Project, Inc., licensee of noncommercial educational television station KMTP-TV, San Francisco, California, is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of Ten Thousand Dollars ($ 10,000.00) for willfully and repeatedly broadcasting advertisements in violation of Section 399B of the Act, 47 U.S.C. § 399b, and Section 73.621 of the Commission's rules, 47 C.F.R. § 73.621.

34. **IT IS FURTHER ORDERED,** pursuant to Section 1.80 of the Commission's rules, that within thirty days of the release of this Notice, Minority **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

35. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment MUST INCLUDE the FCC Registration Number (FRN) referenced above and also should note the NAL/Acct. No. referenced above.

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[26] *See* 47 U.S.C. § 503(b).
[27] *See* 47 C.F.R. §§ 0.111, 0.311, and 1.80.

36. The response, if any, must be mailed to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W, Room 3-B443, Washington DC 20554 and MUST INCLUDE the NAL/Acct. No. referenced above.

37. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

38. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554. [28]

39. **IT IS ALSO ORDERED** that the complaints filed by AT&T Broadband LLC and Lincoln Broadcasting Company **ARE GRANTED** to the extent indicated herein and **ARE OTHERWISE**

[28] See 47 C.F.R. § 1.1914.

DENIED, and the complaint proceeding **IS HEREBY TERMINATED**.[29]

40. **IT IS FURTHER ORDERED** that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to Counsel for Minority Television Project, Inc., James L. Winston, Esq. and Paul M. Breakman, Esq., Rubin, Winston, Diercks, Harris & Cooke, LLP, 1155 Connecticut Avenue, NW, Suite 600, Washington, DC 20036, and by first-class mail to Michael D. Berg, Esq., Shook, Hardy & Bacon, LLP, 600 14th Street, NW, Suite 800, Washington, DC 20005-2004, Steven J. Horvitz, Esq. and Frederick W. Giroux, Esq., Cole, Raywid & Braverman, LLP, 1919 Pennsylvania Avenue, NW, Suite 200, Washington, DC 20006-3458.

David H. Solomon

Chief, Enforcement Bureau

APPENDIX:

Table A

Based on information supplied by the licensee, set forth below is a list of the announcements cited in the foregoing NAL indicating their broadcast dates.[30]

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[29] For purposes of the forfeiture proceeding initiated by this NAL, Minority Television Project, Inc. shall be the only party to this proceeding.

[30] Bold-face type indicates dates on which two broadcasts took place.

Underwriter's Name	Date(s)
State Farm Insurance	[Year 2000]: 9/25
U-tron Computers	[Year 2000]: 7/1; 7/4; 7/7; 7/12; 7/17; 7/20; 7/25; 7/26; 8/2; 8/11; 8/14; 8/17; 8/22; 8/25; 9/1; 9/4; 9/6; 9/13; 9/15; 10/2; 10/5; 10/9; 10/11; 10/16; 10/19; 10/24
Caliber Dual Monitors Computers	[Year 2000]: 7/12; 7/13; 7/18; 7/20
Gingko-Biloba Tea	[Year 2000]: 9/15; 9/19; 9/21; 9/26; 9/29; 10/3; 10/6; 10/9; 10/12; 10/18; 10/25; 10/27; 11/2; 11/4; 11/8; 11/9; 11/14; 11/17
Chevy Venture	[Year 2000]: 4/6; 4/7; 4/13; 4/14; 4/20; 4/21; 5/8; 5/9; 5/10; 5/11; 5/16; 5/17; 5/18; 5/22; 5/23; 5/24; 5/25; 6/7; 6/9; 6/14; 6/16; 6/20; 6/23; 7/5; 7/7; 7/12; 7/14; 8/9; 8/11; 8/16; 8/18; 8/23; 8/25; 9/7; 9/8; 9/14; 9/15; 9/21; 9/22; 10/10; 10/11; 10/12; 10/13; 10/17; 10/18; 10/19; 10/20; 11/14; 11/15; 11/16; 11/17; 11/21; 11/22; 11/23; 11/24; 12/19; 12/20; 12/21 [Year 2001]: 1/22; 1/23;

	1/25; 1/29; 1/30
Chevy Impala	[Year 2000]: 3/13; 3/14; 3/15; 3/16; 3/17; 3/22; 3/23; 3/24; 4/6; 4/7; 4/13; 4/14; 4/20; 4/21; 5/8; 5/9; 5/10; 5/11; 5/15; 5/17; 5/18; 5/19; 5/22; 5/23; 5/24; 5/25 [Year 2001]: 1/19; 1/24; 1/29; 1/31; 2/22; 2/23; 2/26; 2/27; 2/28; 4/30; 5/1; 5/2; 5/3; 5/4
Asiana Airlines	[Year 2000]: 2/25; 2/29; 3/2; 3/3; 3/6; 3/7; 4/5; 4/6; 4/7; 5/9; 5/10; 5/16; 9/25; 9/26; 9/27; 10/16; 10/17; 10/18 [Year 2001]: 2/23; 2/25; 3/13; 3/14; 3/15; 4/3; 4/4; 4/5; 4/6; 4/7; 4/10; 4/13; 4/14; 4/17; 4/18; 4/19; 4/20; 4/21; 4/24; 4/25; 4/26
Cadillac Escalade	[Year 2000]: 2/25; 3/2; 3/3; 3/6; 3/7; 3/8; 3/9; 3/10; 3/13; 3/14; 3/15; 3/16; 3/17; 3/20; 3/21; 3/22; 3/23; 3/24; 4/13; 4/14; 5/9; 5/11; 6/6; 6/8; 7/5; 7/6; 7/7; 7/12; 7/13; 7/14 [Year 2001]: 6/11; 6/12; 6/13; 6/14; 6/15; 6/16; 6/17; 6/18; 6/19; 6/20; 6/21; 6/22; 6/26; 6/27; 10/1; 10/2; 10/3; 10/4; 10/5

Ford Windstar	[Year 2000]: 2/10; 2/11; 2/14; 2/15; 2/16; 2/18; 2/21; 2/22; 2/25; 2/28; 2/29; 3/1; 3/2; 3/3; 3/6; 3/7; 3/8; 3/9; 3/10; 3/14; 3/16; 3/17; 3/20; 3/21; 3/23; 3/28; 3/30; 4/3; 4/4; 4/5; 4/6; 4/7; 4/10; 4/11; 4/12; 4/13; 4/14; 4/17; 4/18; 4/19; 4/20; 4/21; 4/24; 4/25; 4/26; 4/28; 5/1; 5/2; 5/3; 5/4; 5/5; 5/8; 5/10; 5/11; 5/15; 5/16; 5/18; 5/19; 5/22; 5/23; 5/26
Ford Explorer and Expedition	[Year 2000]: 2/23; 2/24; 3/13; 3/15; 3/22; 3/23; 3/24; 3/27; 3/29; 4/11; 4/17; 4/19; 4/21; 4/26; 4/27; 5/9; 5/12; 5/17; 5/24; 5/25; 5/29; 5/30; 5/31; 6/1; 6/2; 6/5; 6/6; 6/7; 6/8; 6/9; 6/12; 6/13; 6/14; 6/15; 6/16; 6/19; 6/20; 6/21; 6/22; 6/23; 6/26; 6/27
Korean Airlines	[Year 2000]: 7/25; 7/26; 7/27; 7/28; 7/31; 8/1; 8/2; 8/3; 8/4; 8/9; 8/11; 8/14; 8/15; 8/16; 8/17; 8/18; 8/19; 8/21; 8/22; 8/23; 8/24; 8/25 [Year 2001]: Each weekday January through November except 9/24 to 10/14
Yip's Auto World	[Year 2000]: 7/3; 7/4; 7/5; 7/6; 7/7; 7/8; 9/25; 10/17

	[Year 2001]: 2/1; 2/2; 2/3; 2/4; 2/5; 2/6; 2/7; 2/8; 2/9; 2/10; 2/12; 2/13; 2/15; 2/17; 2/18; 2/20; 2/21; 2/23; 5/23; 6/2; 9/4; 9/20; and once daily from October through December [Year 2002]: 1/2; 1/3; 1/4; 1/5; 1/7; 1/8; 1/9; 1/10; 1/11; 1/12; 1/14; 1/15; 1/16; 1/17; 1/21; 1/22; 1/23; 1/24; 1/25; 1/26; 1/28; 1/29; 1/30; 1/31; 2/1; 2/2; 2/4; 2/5; 2/6; 2/7; 2/8; 2/9; 2/11; 2/12; 2/13; 2/14; 2/15; 2/16; 2/17; 2/18; 2/19; 2/20; 2/22; 2/23; 2/25; 2/26; 2/27; 2/28; 3/1; 3/2; 3/3; 3/4; 3/5; 3/6; 3/8 3/9; 3/10; 3/11; 3/12; 3/13; 3/14; 3/15
Ulfert's Furniture	[Year 2000]: Once daily during August through December; twice daily on 21 Year 2001]: Once daily; twice daily on 21 days [Year 2002]: Once daily
Met Life: Retirement	[Year 2001]: 6/2
Met Life: Great Wall	[Year 2001]: 6/2
Scandinavian Concepts	[Year 2000]: 2/25; 7/18; 7/20; 7/25; 7/27; 8/1; 8/3; 8/8; 8/10; 8/15; 8/17; 8/22; 8/24; 8/29; 8/31; 9/5; 9/7; 9/12;

	9/17; 9/26; 9/28; 10/3; 10/5; 10/10; 10/12; 10/17; 10/19; 10/24; 10/26; 10/31; 11/2; 11/7; 11/9; 11/14; 11/16; 11/21; 11/23; 11/28; 11/30; 12/5; 12/7; 12/12; 12/14; 12/19; 12/21; 12/26; 12/28 [Year 2001]: 1/2/; 1/3; 1/5; 1/7; 1/8; 1/9; 1/10; 1/12; 1/14; 1/15; 1/16; 1/17; 1/21; 1/22; 1/23; 1/24; 1/26; 1/28; 1/29; 1/30; 1/31; 2/1; 2/2; 2/6; 2/8; 2/13; 2/15; 2/20; 2/22; 2/27; 3/1; 3/6; 3/8; 3/13; 3/15; 3/20; 3/22; 3/27; 3/29; 4/3; 4/5; 4/10; 4/12; 4/17; 4/19; 4/24; 4/26; 5/23; 5/31; 6/2; 11/15; 11/17; 11/19; 11/20; 11/21; 11/22; 11/27; 11/28; 11/29; 12/1; 12/3; 12/4; 12/5; 12/6; 12/8; 12/10; 12/11; 12/12; 12/14; 12/15; 12/17; 12/18; 12/19; 12/20; 12/21; 12/22; 12/24; 12/26; 12/27; 12/29; 12/30 [Year 2002]: Once daily
Sincere Plumbing	[Year 2000]: 7/3; 7/5; 7/7; 7/8; 7/10; 7/12; 7/14; 7/15; 7/16; 7/17; 7/19; 7/21; 7/22; 7/24; 7/26; 7/28; 7/29; 7/31; 8/2; 8/4; 8/5; 8/7; 8/9; 8/11; 8/12; 8/14; 8/15; 8/17; 8/19; 8/21; 8/23; 8/25; 8/26; 8/28; 8/30; 9/1; 9/2; 9/4; 9/6; 9/7;

	9/8; 9/9; 9/11; 9/13; 9/15; 9/16; 9/18; 9/20; 9/22; 9/23; 9/25; 9/27; 9/29; 9/30; 10/2; 10/4; 10/6; 10/7; 10/9; 10/11; 10/13; 10/15; 10/16; 10/18; 10/20; 10/21; 10/23; 10/25; 10/27; 10/28; 10/30; 11/1; 11/3; 11/4; 11/6; 11/8; 11/10; 11/11; 11/13; 11/15; 11/17; 11/18; 11/20; 11/22; 11/24; 11/25; 11/27; 11/29; 12/1; 12/2; 12/4; 12/6; 12/9; 12/11; 12/13; 12/15; 12/16; 12/18; 12/20; 12/22; 12/23; 12/25; 12/27; 12/29; 12/30 [Year 2001]: 2/1; 2/6; 2/8; 2/13; 2/15; 2/20; 2/22; 2/25; 2/27; 4/3; 4/5; 4/10; 4/12; 4/17; 4/19; 4/24; 4/26; 6/2; 12/1; 12/2; 12/3; 12/4; 12/5; 12/6; 12/8; 12/9; 12/10; 12/11; 12/12; 12/15; 12/16; 12/17; 12/18; 12/19; 12/20; 12/21; 12/22; 12/23; 12/24; 12/25; 12/26; 12/27; 12/28; 12/29; 12/30 [Year 2002]: Once daily
East West Bank	[Year 2001]: 7/14; 7/21; 7/28; 8/4; 8/11; 8/18; 8/25; 9/1; 9/8; 9/15; 9/22; 9/29; 10/6; 10/13; 10/20; 10/27; 11/3; 11/10; 11/17; 11/24

APPENDIX I

TITLE 47 – TELECOMMUNICATIONS

§ 399b. Offering of certain services, facilities, or products by public broadcast stations

(a) "Advertisement" defined. For purposes of this section, the term "advertisement" means any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended—

(1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit;

(2) to express the views of any person with respect to any matter of public importance or interest; or

(3) to support or oppose any candidate for political office.

(b) Offering of services, facilities, or products permitted; advertisements prohibited.

(1) Except as provided in paragraph (2), each public broadcast station shall be authorized to engage in the offering of services, facilities, or products in exchange for remuneration.

(2) No public broadcast station may make its facilities available to any person for the broadcasting of any advertisement.

(c) Use of funds from offering services, etc. Any public broadcast station which engages in any offering specified in subsection (b)(1) may not use any funds distributed by the Corporation under section 396(k) *[47 USC § 396(k)]* to defray any costs associated with such offering. Any such offering by a public broadcast station shall not interfere with the provision of public telecommunications services by such station.

(d) Development of accounting system. Each public broadcast station which engages in the activity specified in subsection (b)(1) shall, in consultation with the Corporation, develop an accounting system which is designed to identify any amounts received as remuneration for, or costs related to, such activities under this section, and to account for such amounts separately from any other amounts received by such station from any source.

APPENDIX J

FIRST AMENDMENT TO THE US CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for a redress of grievances