

No. 13-1124

IN THE
Supreme Court of the United States

MINORITY TELEVISION PROJECT, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE
IN SUPPORT OF PETITIONER

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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 audiovisual 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 Should this Court overrule *Red Lion's* outdated rationale for diminishing the First Amendment protection of broadcasters?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?

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INTEREST OF *AMICUS CURIAE*¹

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. Cato also participates as *amicus curiae* in key cases before this Court.

This case concerns *amicus* because the technology-specific approach to constitutional interpretation exemplified by *Red Lion Broadcasting Co. v. FCC* is antithetical to basic First Amendment principles.

BACKGROUND AND SUMMARY OF ARGUMENT

Fifty years ago, the Supreme Court heralded the modern era of First Amendment jurisprudence by holding that an editorial advertisement was fully protected speech because it was “an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities.” *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964). As this Court observed, the

¹ All parties have timely received notice and have consented to this *amicus curiae* brief and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

fact “[t]hat the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.” *Id.* Allowing restrictions on ads such as those in *Sullivan*, the unanimous Court said, would “shackle the First Amendment in its attempt to secure ‘the widest possible dissemination of information from diverse and antagonistic sources.’” *Id.* (quoting *AP v. United States*, 326 U.S. 1, 20 (1945)).

Contrary to these most basic First Amendment principles, Section 399b of the Communications Act prohibits public television stations from airing paid advertisements, including those advocating issues of public importance or for political candidates. 47 U.S.C. § 399b. Under current law, no broadcast station licensed as non-commercial can accept or air the video equivalent of “Heed Their Rising Voices,” the advertisement at the heart of the civil rights protest in *Sullivan*.

The court below upheld the law under intermediate scrutiny pursuant to this Court’s 45-year-old precedent. *Minority Television Project, Inc. v. FCC*, 736 F.3d 1192, 1197-98, 1200-01 (9th Cir. 2013) (*en banc*) (applying *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984)). Although the longevity of the precedent on which the Ninth Circuit relied makes it seemingly normal, these cases represent a complete repudiation of traditional First Amendment concepts.

Broadcast licensing should be seen for what it is: A system for granting permission slips for speech. As such, the licensing restrictions deserve the

highest scrutiny, especially those that do not directly pertain to the government's purported interest in regulating a scarce broadcast spectrum. Each prohibition in § 399b must be scrutinized for whether it advances that asserted interest. Although *amicus* believes that all the restrictions are suspect, the prohibition on political ads is particularly egregious.

Cases upholding such regulations, like *Red Lion*, do not effect a minor adjustment in the applicable constitutional test. Instead, they represent “a complete conceptual reordering” of First Amendment principles and a “virtual celebration of public regulation” of the press. The difference in perspective is so radical it appears to come from “another world.” Lee C. Bollinger, *Images of a Free Press* 71-72 (1991).

In this Bizarro World version of the First Amendment,² up is down, black is white, and banning political speech is acceptable because of the “collective right” of viewers and listeners “to have the medium function consistently with the ends and purposes of the First Amendment.” *Red Lion*, 395 U.S. at 390. According to this philosophy, the government must destroy First Amendment rights in order to preserve First Amendment values.

This divergent constitutional scheme is grounded on “the present state of commercially acceptable technology’ as of 1969.” *News America Publ’g, Inc. v.*

² Bizarro World is a fictional planet introduced in Superman comics, and widely referenced in popular culture, where everything is weirdly inverted or opposite of expectations. *See* Action Comics, Vol. 1 #263 (Apr. 1960).

FCC, 844 F.2d 800, 811 (D.C. Cir. 1988) (quoting *Red Lion*, 395 U.S. at 388). Yet it is quite obvious that we no longer live in a pre-cable and pre-Internet world in which people consume information and entertainment only from three broadcast networks. Nevertheless, the Ninth Circuit reasoned that any change in the level of constitutional protection for broadcasting was above its pay grade, and that it should await “a change of direction by the Supreme Court.” *Minority Television Project*, 736 F.3d at 1198.

However, this Court historically has been reluctant to wade into this area. Chief Justice Taft described the initial resistance to addressing the constitutional status of radio by saying “interpreting the law on this subject is something like trying to interpret the law of the occult.” Clarence C. Dill, *Radio Law 1-2* (1938). He wrote that he wanted “to put it off as long as possible in the hope that it becomes more understandable before the court passes on the questions involved.” *Id.*

Unfortunately, neither the passage of time nor increased understanding of the medium has lessened the Court’s reticence. In *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012), the Court avoided ruling on the First Amendment questions presented, and decided the case on due process grounds. But this Court would be shirking its responsibilities if it allows these sorts of questions to arise again and again without resolving broadcast television’s proper status under the First Amendment. As Justice Kennedy wrote in *Citizens United v. FEC*, 558 U.S. 310, 329 (2010), “a court

would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling.” More recently, a plurality of this Court explained that the “collective rights” theory of the First Amendment, like the idea articulated in *Red Lion*, is illegitimate. *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (plurality op. of Roberts, C.J.).

That Section 399b continues to exist as a stark exception to established First Amendment principles flies in the face of this Court’s recognition, expressed most recently in *Shelby County v. Holder*, that “current burdens . . . must be justified by current needs.” 133 S. Ct. 2612, 2619 (2013) (quoting *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203-04 (2009)). Where time and technology have obliterated the excuse for an exception to well-established constitutional protections, it is incumbent on the judiciary to bring the law in line with reality.

The issue here is even more fundamental. Beyond the specific facts relating to the broadcast medium, this Court should accept review to consider the legitimacy of its technology-specific First Amendment analysis. Until recently, the Court has been slow to extend full constitutional protection to emerging media, an approach that has resulted in great uncertainty and illogical rules. The Court has had to make a series of course corrections for other media, and a similar fix for broadcasting is long overdue. But the Court also now has an opportunity to shed this failed approach and to embrace

technology as a positive force for free expression, not a threat to be confined.

ARGUMENT

THE COURT MUST ABANDON ITS TECHNOLOGY-SPECIFIC APPROACH TO THE FIRST AMENDMENT

Judges are bound by the First Amendment, and this Court has warned that “[w]e 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.” *Citizens United*, 558 U.S. at 326. Contrary to this cautionary principle, the Ninth Circuit upheld Section 399b’s ban on paid messages under a relaxed level of scrutiny that uniquely applies to the broadcast medium. *Minority Television Project*, 736 F.3d at 1198. It did so despite the fact that we self-evidently live in a vastly different world than the one that gave rise to the separate and unequal doctrine that governs broadcast speech. *Id.* at 1212-13, 1222 (Kozinski, C.J., dissenting).

A. A History of Failed Doctrine

If you overlook the fact that Section 399b bans political speech, the decision below is unexceptional in one sense: Broadcasting historically has received second-class status under the First Amendment, primarily because of allegations of spectrum scarcity. *Red Lion*, 395 U.S. at 390. Serious questions have long been raised whether spectrum is “scarce” in a way that differs from any other economic good, and if so, whether that fact would justify a diminished level

of First Amendment protection, *see, e.g.*, Ronald Coase, *The Federal Communications Commission*, 2 J. Law & Econ. 1 (1959), but the issue here is even more basic.

The root question is whether it makes any sense to modify First Amendment doctrine based on the particular technological characteristics of a transmission medium. This is a recurring problem in the law of free expression. New communications technologies generally have received diminished protection until long after they have become mainstream. *See generally* Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 Hastings Comm./Ent. L.J. 247 (1994); Ithiel de Sola Pool, *Technologies of Freedom* 14-15 (1983).

This Court initially denied First Amendment protection to cinema, *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230 (1915), only to reverse course nearly four decades later, holding that film is governed by “the basic principles of freedom of speech and the press” notwithstanding technological differences. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). The Court took a similar approach to radio, *NBC v. United States*, 319 U.S. 190 (1943), but has not yet accorded full protection to the broadcast medium. Likewise, this Court was slow to recognize the First Amendment status of cable television, *e.g.*, *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 495 (1986) (“We do not think . . . that it is desirable to express any more detailed views on the proper resolution of the First Amendment question raised by respondent’s

complaint . . .”), and only later applied traditional protections. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 812-14 (2000) (content-based restrictions are subject to strict scrutiny).

With the advent of Internet communications, this Court finally recognized that “our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.” *Reno v. ACLU*, 521 U.S. 844, 870 (1997). It was the first time the Court applied traditional First Amendment protection to a new communications technology from the outset. As a consequence, the Internet has been allowed to develop into “a vast library including millions of readily available and indexed publications” that is as “diverse as human thought,” with the capability of providing instant access on topics ranging from “the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls.” *Id.* at 851.

It should by now be clear that there are immense costs to pursuing an incremental, technology-based approach to the First Amendment. Sorting out the respective standards requires “substantial litigation over an extended period of time,” and when the courts begin to sort one technology from another, “those differentiations . . . soon prove to be irrelevant or outdated by technologies that are in rapid flux.” *Citizens United*, 558 U.S. at 326. In the meantime, “the interpretive process itself . . . create[s] an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would be questionable.” *Id.* at 326-27.

In this case, the piecemeal approach means tolerating a ban on core political speech that this Court held – half a century ago – to be essential to our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Sullivan*, 376 U.S. at 270. It also entails upholding a restriction, unthinkable in other media, prohibiting a source of financial support for non-commercial broadcast stations. And, at the same time the FCC enforces restrictions such as Section 399b, it also studies ways to “save” the broadcast media from extinction. *See, e.g.*, Federal Communications Commission, *The Information Needs of Communities* (June 2011), *available at* <http://www.fcc.gov/info-needs-communities>.

The agency’s overall regulatory approach to broadcasting brings to mind the adage, frequently said of Washington, that “if you think the problems we create are bad, just wait until you see our solutions.”

B. Maintaining a Legal Fiction

The “facts” on which the FCC justifies a different constitutional standard for broadcast-content regulation have long since passed from legal fiction and now inhabit a legal fantasyland. To understand the law, the current generation of law students would have to ask their parents or grandparents what it was like when media outlets were “scarce” and broadcasting was the only game in town.

The Ninth Circuit majority refused to acknowledge this transformation that is all around us, and faulted the dissent for relying on press

accounts documenting the changed conditions. *Minority Television Project*, 736 F.3d at 1198 n.5. But one need not read *ESPN Playbook* or *Variety* to know that things have changed since 1969. The seismic shifts in the media landscape are not just part of our everyday experience; they are a matter of public record (and are well-documented by the FCC).

Over 20 years ago, when the FCC began issuing annual reports on the state of competition in the video marketplace, the four major broadcast networks (ABC, CBS, NBC, and Fox) held 72 percent of the prime time audience. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd. 7442, ¶ 97 (1994). As of the FCC's most recent video competition report, that figure had dropped to 33 percent. *Annual Assessment of Status of Competition in the Market for the Delivery of Video Programming*, 28 FCC Rcd. 10496, ¶ 199 & Table 18 (2013) ("*Fifteenth Annual Report*"). Meanwhile, ad-supported cable viewing grew to just over 50 percent for primetime and daytime viewing, with premium cable accounting for another 3-4 percent. *Id.* ¶ 199 & Table 18.

Media platforms have become abundant, programming more diverse, and numerous tools have been developed to enable individualized tailoring, acquisition, and consumption of content. *See, e.g., Empowering Parents and Protecting Children in an Evolving Media Landscape*, 24 FCC Rcd. 13171, ¶¶ 2, 11-13, 44 (2009). Today, about 90 percent of TV households subscribe to multichannel services that bring hundreds of programming channels into

the home, none of which existed in 1969. *Fifteenth Annual Report*, ¶¶ 17-18, 177 & Table 6.

Traditional video providers – including broadcast networks – also continue to develop alternative programming on out-of-home platforms. Television stations use online and mobile platforms to address consumers’ desires to view programming in more places, at more times, and on more devices, deploying their websites as extensions of their local brands and offering advertisers online promotions coordinated with on-air advertisements. *Id.* ¶ 191. Broadcasters also use mobile DTV, video-on-demand, and other means to respond to consumers’ desire to watch video on a time-shifted basis – increasingly on screens other than TV sets. *Id.* ¶ 7.

Other online video distributors are expanding the amount of video content available to consumers through original programming and new licensing agreements with traditional content creators. *Id.* ¶ 9. Companies like Amazon, Apple, Google, and Microsoft deliver end-to-end solutions of Internet infrastructure, software, devices, and video programming, *id.*, while viewing Internet-delivered programming on TV sets is becoming increasingly prevalent. *Id.* ¶ 10. Well before these developments, the FCC “characterized the number of suppliers of online video as almost limitless.” *Media Bureau Seeks Comment on Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding*, 27 FCC Rcd. 3079, ¶ 12 n.46 (MMB 2012) (quoting *Implementation of the Child*

Safe Viewing Act, 24 FCC Rcd. 11413, ¶ 126 (2009)) (internal quotation marks omitted).

Ultimately, the legal fiction at the foundation of Section 399b is not just a numbers game, but is doctrinal as well. It is predicated on the idea, articulated in *Red Lion*, that individual First Amendment rights may be sacrificed in the service of a “collective” good, that somehow will produce more information overall. But to whatever extent this theory may have had some superficial appeal in the past, a plurality of this Court recently spotlighted its intellectual bankruptcy in *McCutcheon*, 134 S. Ct. at 1449-50 (plurality op. of Roberts, C.J.).

Chief Justice Roberts made clear that “[t]he First Amendment does not protect the government, even when the government purports to act through legislation reflecting ‘collective speech.’” *Id.* at 1449. The government exercises power, not rights, and “[t]he whole point of the First Amendment is to afford individuals protection against such infringements.” *Id.*

Amicus urges this Court to accept review in this case to ensure that the constitutionality of broadcast regulations is governed neither by outdated facts nor by illegitimate doctrine. If it does so and reaches the merits of this case, it should repudiate *Red Lion* as an anachronistic anomaly. The answer to the second question, whether the applicable constitutional standard is strict scrutiny, should be obvious as well. Upon rejecting broadcasting cases as the relevant precedent in *Playboy Entertainment Group*, 529 U.S. 813-15, this Court held that “a content-based speech restriction . . . can stand only if it satisfies strict

scrutiny.” This Court should make clear that the same standard governs any review of Section 399b.

CONCLUSION

Section 399b’s departure from established First Amendment doctrine is as profound as would be a law that authorizes press licensing, actions for seditious libel, or imposition of a prior restraint. The fact that this divergent strain of First Amendment doctrine has existed for a number of decades cannot justify its continuation. The Alien and Sedition Acts once were the law of the land, but, as Thomas Jefferson later wrote, “I . . . consider that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.” *Sullivan*, 376 U.S. at 276.

This Court’s technology-bound analysis of First Amendment rights has proven its demerits time after time. For the broadcast medium in particular, it has been used to justify a statute that is precisely the opposite of what traditional First Amendment rules would permit. This approach was never sound, but even if it once was valid, that time has long since passed. Only this Court can correct this fundamental error in constitutional analysis.

Respectfully submitted,

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