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,

and

LINCOLN BROADCASTING CO.,

Intervenor.

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

REPLY BRIEF

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

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REPLY ARGUMENT

Respondents' opposition is remarkable for what it does *not* say. Namely, it does not try to defend the rationale of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)—the 1969 case that the Ninth Circuit used to justify the Government's power to regulate the content of broadcast speech without satisfying strict scrutiny. The extraordinary power granted in *Red Lion* was avowedly premised on a technological state of affairs that no longer exists today. Respondents do not contest that each of *Red Lion*'s key factual predicates has been eliminated.

Unable to defend *Red Lion*'s rationale, Respondents try to change the subject, spouting supposed alternative justifications for the Ninth Circuit's ruling in an attempt to paint this case as a poor vehicle for *Red Lion*'s long-overdue burial. None has merit.

The Government contends that because it granted Petitioner a license without charge, it can impose content- and speaker-based regulation of speech and bar all paid political messages. This Court squarely rejected that expansive theory of Government power decades ago in *FCC v. League of Women Voters of California*, 468 U.S. 364, 377 (1984).

The Government also cites its authority to regulate broadcasts for indecency. But the principles that support such regulation have no application to the far broader and more intrusive regulation of speech by content and identity of the speaker at issue here. *Id.* at 380 n.13.

The Government cannot explain why strict scrutiny should not apply to rules, like 47 U.S.C. § 399b, that ban core political speech. Respondents do not deny that, in *Citizens United v. FEC*, 558 U.S. 310 (2010), this Court held that regulation of political speech, always triggers strict scrutiny. The Ninth Circuit's ruling permitting the Government to ban political messages without satisfying strict scrutiny cannot be permitted to stand.

Review is also warranted to address the application of intermediate scrutiny. Respondents try to brush off the confusion among the circuits concerning how intermediate scrutiny applies to content- and speaker-based regulations of broadcast speech. But, as Chief Judge Kozinski detailed, that confusion is very real and in need of this Court's resolution. The need for review is highlighted by Government counsel's concession that the record before Congress was indeed silent concerning support for certain of section 399b's critical features: "Yes, there are no bananas." En Banc Oral Argument, Mar. 19, 2013, https://www.youtube.com/watch?v=6xGgGwuDj3Y, at 50:30-51:00.

Finally, the Government resorts to scare tactics, insinuating that granting certiorari here will endanger the essential nature of public broadcasting. To the contrary, review here is necessary to *preserve* it. If the Ninth Circuit's ruling is allowed to stand, Minority Television Project and other niche public broadcasters will have to shut down. Only large public megastations fixated on wealthy donors and big underwriters will remain. *That* is antithetical to what public broadcasting is all about.

I. THIS COURT SHOULD REJECT THE GOVERNMENT'S ATTEMPT TO RETAIN ITS EXTRAORDINARY POWER TO REGULATE THE CONTENT OF BROADCAST SPEECH LONG AFTER *RED LION*'S FACTUAL PREDICATES HAVE ERODED.

A. The Premises Underlying The Government's Broad Power Over Broadcast Speech Have All Dissolved.

The Government's extraordinary power to regulate the content of broadcast speech, as bestowed by this Court in *Red Lion,* was keyed to three salient attributes of broadcasting circa 1969:

1. The power of broadcasting was "incomparably greater" than any other media. 395 U.S. at 388.

2. "[T]he … state of commercially acceptable technology" created "a technological scarcity of frequencies limiting the number of broadcasters" to "only a few." *Id.* at 388, 401 n.28.

3. As a matter of supply and demand, "there [we]re substantially more individuals who want[ed] to broadcast," and who had the "resources and intelligence" to do so, than the spectrum could accommodate. *Id.* at 388-89.

These three factors were central to this Court's conclusion that the Government had to be allowed to invasively regulate the content of broadcast speech in order to avoid the situation where a small group consisting of "station owners and a few networks would have unfettered power" over the "market-place of ideas." *Id.* at 389, 390, 392. The Court acknowledged, however, that "[a]dvances in technology" could change the calculus. *Id.* at 396-97.

In their opposition, Respondents do not deny that, since *Red Lion* was decided in 1969, "[a]dvances in technology" have eliminated each of the three factual predicates that this Court relied upon in that decision.

Broadcasters no longer enjoy "incomparably great[]" control over the "market-place of ideas." Alternative technologies have taken over. For example, Respondents do not contest that today the internet's "relatively unlimited, low-cost capacity for communication of all kinds" allows practically "any person … [to] become a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Today, non-broadcast media rule the "market-place of ideas." Pet. 5-6, 16-17.

Moreover, as Respondents admit, the broadcast spectrum now can accommodate "numerous licensees." Opp. 17. Thanks to digital compression technology and other advances, there are now 10 times as many broadcast television stations as in 1969. Pet. 19.

Nor are there "substantially more individuals" who "want to broadcast" than the available spectrum can accommodate. Today the spectrum at issue in *Red Lion* is so underutilized that Congress has ordered that 83 percent of it be repurposed for other uses. Pet. 19-20.

The Government argues that, notwithstanding the undisputed technological advances, it should retain its extraordinary power to regulate the content of broadcast speech so long as the number of persons seeking broadcast licenses exceeds the number available. Opp. 17. That particular predicate, however, required not merely that demand exceed supply, but that it do so "*substantially*." Additionally, Respondents' assertion does not distinguish broadcasting from other media. Brief for Former FCC Officials at 8-9; *see also* Brief for Cato Institute at 6-9.

Unable to support *Red Lion* on the merits, Respondents try to insulate it from review by arguing that its obsolescence is demonstrated only by facts beyond the record "petitioner created … below." Opp. 12. But that is hardly a reason to deny certiorari: The district court was bound by *Red Lion* and had no authority to hold it overtaken by technological advances. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Thus, Petitioner had no reason or ability to make such a record. (Nor would any lower-court litigant.) In any event, the relevant technological developments are not in dispute, and as our petition demonstrated, nearly all of them are voluminously chronicled in Respondents' own documents. The suggestion that the record here is inadequate is a red herring.[1]

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[1] So is Respondents' suggestion that review is inappropriate because "the [Ninth Circuit] found that there was no juris-

B. The "Bat Signal" Has Been Activated.

Thirty years ago, this Court already began to suspect that technological advancements would require abandonment on *Red Lion*. In *League of Women Voters*, the Court asked the FCC and Congress to signal when they believed that "technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *Id.* at 376 n.11. Both entities sent out this virtual "bat signal" long ago.

For example, in 1987, the FCC announced that "an explosive growth in both the number and types of outlets providing information to the public" had "vastly transformed" the telecommunications market. *In re Syracuse Peace Council*, 2 F.C.C.R. 5043, 5052, 5053 ¶¶ 64, 66 (1987). And in 1997, Congress ordered the FCC to auction off and repurpose for other uses 83 percent of the spectrum that the *Red Lion* Court thought "scarce" in 1969. Pet. 19-20.

Respondents are wrong to suggest that the FCC's ruling in *Syracuse Peace Council* lost its "signal" value after the FCC backed away from its statements "regarding the appropriate level of First Amendment scrutiny." Opp. 18. The Court did not ask for legal analysis; it simply called for a "signal" reflecting relevant "technological developments."

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diction over petitioner's as-applied First Amendment claims." Opp. 14. Respondents do not dispute that Petitioner properly asserted its facial challenge to section 399b. That challenge squarely presents the question of the ongoing vitality of *Red Lion*.

The FCC has never disavowed *Syracuse Peace Council*'s extensive discussion of precisely that.

Likewise, it is irrelevant that that the multiple Congressional "signal[s]" that Petitioner identified (Pet. 24-25) did not by their terms advocate "that [Congress's] own statutes regulating broadcasters should be subject to more stringent First Amendment scrutiny." Opp. 18. Those signals unequivocally reflected the "technological developments" undermining *Red Lion*'s factual predicates—which answers this Court's invitation.

Moreover, Respondents cannot and do not dispute the "signal[s]" sent repeatedly by members of this Court, lower courts, and the academy. Brief for Law Professors at 1 n.2, 11-12.

C. *Red Lion* Is Outcome-Determinative Here.

Recognizing that *Red Lion* is unsupportable on its own terms, the Government searches in vain for alternatives to justify its power over broadcast speech. But there are none. And as the Government does not argue that section 399b survives strict scrutiny, *Red Lion* decides this case, and the issue of its ongoing vitality is therefore squarely presented.

Respondents derive no support from "the rule that the government may provide financial support for certain activities (as it has done here by allocating free spectrum to licensees like petitioner …) while defining the contours of what it intends to support." Opp. 14. The Ninth Circuit below never considered that "rule." And this Court has rejected it.

In *League of Women Voters*, the Government (as here) claimed that intrusive content-based restrictions on public broadcasters that receive federal funds "[are] constitutional" because "[a] federal agency providing financial assistance to a public television station may, of course, attach conditions to its subsidy that will have the effect of subjecting such licensee to more stringent requirements than must be met by a commercial licensee." Brief for United States at 24, *League of Women Voters*, 468 U.S. 364 (No. 82-912). This Court rejected that theory as "misapprehend[ing] the essential meaning of [its] prior decisions concerning the reach of Congress's authority to regulate broadcast communication." 468 U.S. at 377. *A fortiori*, that discredited rationale cannot support the Ninth Circuit's decision to apply only intermediate scrutiny to section 399b here, where Petitioner (like certain other public stations) does not receive *any* federal funds at all.

Nor can Respondents seek refuge in the principles justifying "regulation of broadcasted indecent material." Opp. 19. The rationale for regulating indecency does not support invasive regulation of broadcast content generally. In *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978), this Court likened "[p]atently offensive, indecent material" to an "intruder" in the home and permitted the Government to regulate it "[b]ecause[,] [as] the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer" from such an intruder's "assault." Respondents do not claim that Petitioner's broadcasts share any of these attributes. The Ninth Circuit below did not consider this theory. Nor should it have: As this Court made clear in *League of Women Voters*, where, as here, the case concerns not the regulation of "indecent expression, but rather [of] expression that is at the core of First Amendment protections," like the political speech banned by section 399b, indecency principles have no force. 468 U.S. at 380 n.13.

Simply put, Respondents' "alternative rationales" are not alternatives at all. This Court has rejected all of them. The Ninth Circuit's decision stands or falls based upon the vitality of *Red Lion*.

II. THE GOVERNMENT PROVIDES NO LEGITIMATE BASIS FOR BANNING POLITICAL SPEECH WITHOUT SATISFYING STRICT SCRUTINY.

Just a couple months back, this Court reiterated how "the First Amendment vigorously protects" a core type of political speech that section 399b covers: "television commercials touting a candidate's accomplishments or disparaging an opponent's character." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014). There can be little question that the Ninth Circuit here erred in reviewing the ban on paid political messages under the more lenient intermediate-scrutiny standard. As we demonstrated, the Ninth Circuit's application of that lower standard to political speech conflicts with *Citizens United*, *FCC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), and *McConnell v. FEC*, 540 U.S. 93 (2003), all of which applied strict scrutiny to Bipartisan Campaign Reform Act ("BCRA") section 203's prohibition on certain political broadcast speech.

Respondents do not dispute that speech banned by section 399b includes core political speech. Nonetheless, Respondents argue that there is no conflict with *Citizens United*. Respondents try to distinguish that case on the ground that "this Court invalidated [BCRA section 203] as an unconstitutional prohibition on political speech based on the speaker's corporate identity." Opp. 20.

Respondents miss the forest for the trees. The conflict between the Ninth Circuit's decision below and this Court's decisions is about *what level* of scrutiny applies, not *the result* of applying it. *Citizens United* may well have held that BCRA section 203 *flunked* strict scrutiny because it discriminated against corporations. But Respondents cannot dispute that, as the Court explained, BCRA section 203 *triggered* strict scrutiny because it "burden[ed] political speech." 558 U.S. at 340. Indeed, Respondents do not contest that the Ninth Circuit's ruling conflicts with *WRTL* and *McConnell*—which applied strict scrutiny to the same BCRA provision for the same reason.

These conflicts concerning regulation of political speech strike at the core of the First Amendment, where it "has its fullest and most urgent application." *McCutcheon*, 134 S. Ct. at 1441. They plainly warrant this Court's immediate review.

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

The circuits are conflicted on to whether intermediate scrutiny requires the Government to point to concrete facts supporting their asserted rationale for restricting speech. Respondents do not dispute this conflict or its importance. Rather, they claim that the Ninth Circuit's decision does not "implicate[]" this conflict, because (in their view) it did require the Government to point to concrete facts supporting the contours of section 399b's speech ban. Opp. 27. But, as we demonstrated in our petition (Pet. 33-36), and as Chief Judge Kozinski explained in his dissent (Pet. App. 53a-76a), the Ninth Circuit allowed Respondents to justify its content- and speaker-based rules based on little more than rank speculation. *See also* Brief for Institute for Justice at 8-10.

The circuits are also in conflict about whether, as this Court spelled out in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 211 (1997), the government's proof must include "substantial evidence in the record before Congress." Again, Respondents do not disagree. Instead, they claim that the Ninth Circuit's decision does not tee up the conflict "since the … the record before Congress provides a sufficient basis to uphold the statute even without the supplemental evidence offered in the district court." Opp. 28. Again, however, simply saying it does not make it so. Pet. 37-38. Indeed, Respondents admitted that nothing in the record before Congress supported the decision to prohibit paid messages on behalf of for-profits yet allow them on behalf of non-profits; as they put it during en banc oral argument (at 50:30-51:00): "Yes, there are no bananas."

The reality is that both conceded circuit conflicts are implicated here, and they fully warrant this Court's review.

IV. GRANTING CERTIORARI WILL NOT JEOPARDIZE THE CHARACTER OF PUBLIC BROADCASTING.

Unable to justify denial of the petition for any legitimate reason, Respondents resort to scare tactics. They insinuate that if section 399b's ban is lifted, public broadcasting will lose its essential character. *See, e.g.*, Opp. 3-5, 6.

As an initial matter, this case is about the level of First Amendment scrutiny applicable to content- and speaker-based broadcast regulation. If the Government has a compelling argument that section 399b survives strict scrutiny, then it can be maintained.

But the Government knows that the current rules are haphazard at best and in many ways irrational. While Respondents cry "wolf" at the threat of paid messages, the Government already allows paid goods-and-services messages by non-profits, many of which have very deep pockets. Pet. App. 55a-56a (Kozinski, C.J., dissenting). The Government permits paid "underwriting" announcements that can include "a logogram or slogan that identifies" the sponsor, the sponsor's "location[]," and "descriptions of a product line or service." Brief for Public Broadcasters at 16. Also, public stations can essentially air infomercials under the guise of pledge drives. *Id.* at 18 ("PBS member stations regularly air infomercial-like programs promoting lifestyle books or DVDs and CDs of performances."). Perhaps a limited time, place, and manner restriction on paid messages could be justified. But strict scrutiny cannot countenance the decision to completely ban paid messages by for-profits and paid political issue and candidate messages while permitting all of the above activities.

Finally, the fears that public broadcasters will abandon their mission and overhaul their programming are unfounded. Public broadcasters must comply with statutory and regulatory obligations constraining them to act in the public interest. Otherwise, they can be stripped of their licenses. *Id.* at 20-21; Pet. App. 64a-65a (Kozinski, C.J., dissenting). Further, Petitioner and the other public broadcasting stations are all deeply committed to their public missions. That is why they became public broadcasters in the first place. Accordingly, many have established their internal guidelines, mission statements, codes of conduct, and other governance structures that ensure that they remain on course. Brief for Public Broadcasters at 18-19 & n.8.; Pet. App. 61a-62a (Kozinski, C.J., dissenting).

Small public broadcasters like Minority Television Project, that do not receive federal funds, need to be able to try (within reasonable limits) to remain self-sufficient by airing paid messages of the sort covered by section 399b. Upholding the Ninth Circuit's ruling will force those broadcasters to shut down—as some already have. *See, e.g.*, Matthai Kuruvila, *KCSM TV to Close, Sell Off Its Spectrum*, SFGate, May 21, 2013, http://www.sfgate.com/tv/article/KCSM-TV-to-close-sell-off-its-spectrum-4536859.php. Viewers will be left only with behemoth public megastations fixated on wealthy donors and large underwriters—and not on the needs of their communities. That result does not serve the ends of the First Amendment or the public good.

CONCLUSION

Certiorari should be granted.

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

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