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

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 Should this Court overrule *Red Lion*'s outdated rationale for diminishing the First Amendment protection of broadcasters?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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional and Legislative Materials

Administrative Materials

Other Authorities

OPINIONS BELOW

The FCC's orders are published at 17 F.C.C.R. 15,646, 18 F.C.C.R. 26,611, 19 F.C.C.R. 25,116, and 20 F.C.C.R. 16,923. They are reprinted at Pet. App. 199a-263a.[1] The district court's opinion is published at 649 F. Supp. 2d 1025. It is reprinted at Pet. App. 146a-98a.

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,

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