No. 07-582

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,
V.
FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* FREE PRESS, CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION, NEW AMERICA FOUNDATION, PARTICIPATORY CULTURE FOUNDATION, CUWIN FOUNDATION, ETHOS GROUP, ACORN ACTIVE MEDIA FOUNDATION, FREENETWORKS.ORG, MONROE PRICE, SUSAN CRAWFORD IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICI*

Amici include consumer groups, think tanks, nonprofit organizations working with community wireless Internet networks, and First Amendment and media scholars.[1]

This Court's decision could have broad implications for rules fostering a more diverse, democratic media, as well as for government flexibility in implementing 21st Century spectrum policy. The *amici*'s interest is to ensure government policy can act to further more robust democratic participation through wireless and wired media.

Free Press is a national, nonpartisan, nonprofit organization using education, organizing, and advocacy to increase informed public participation in crucial media policy debates.

Consumer Federation of America is an advocacy, research, educational, and service organization working to advance pro-consumer policy on a variety of issues before government institutions.

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[1] Pursuant to Rule 37.2 of the Rules of this Court, letters of consent to the filing of this brief have been submitted to the Court. Pursuant to Rule 37.6 of the Rules of this Court, counsel for the *amici* state that no counsel for either party to this matter authored the brief in whole or in part. Further, no persons or entities, other than the *amici* and their counsel, contributed monetarily to the preparation or submission of this brief.

Consumers Union, publisher of Consumer Reports, is an independent, nonprofit testing and information organization serving only consumers

The New America Foundation is a think tank whose purpose is to bring exceptionally promising new voices and new ideas to the fore of our nation's public discourse. One of its major projects is the Wireless Future Program.

The Participatory Culture Foundation is a nonprofit whose core project is Miro, a free open-source software for online television and video designed to make mass media more open and accessible for everyone.

The CUWiN Foundation develops decentralized, open source, community-owned networks that foster democratic cultures and local content.

The Ethos Group is a telecommunications consulting firm focusing on the community benefits of wireless technology.

The Acorn Active Media Foundation engages in software, website, and technical development in support of the global justice movement.

FreeNetworks.org is a voluntary cooperative dedicated to collaboration and advocacy of free networks, particularly wireless networks.

Monroe Price, now a professor at the University of Pennsylvania's Annenberg School for Communication, was dean of Cardozo School of Law from 1982 to 1991. He is the author of several books on free speech and new-media

policy and clerked for Associate Justice Potter Stewart.

Susan Crawford is a Visiting Professor at Yale Law School and will join the faculty of the University of Michigan Law School in the fall. She teaches and writes in communications, First Amendment and Internet law.

SUMMARY OF ARGUMENT

Amici urge the Court neither to question nor to rely on the precedent of *Red Lion Broadcasting Co. v. FCC*[2] or other cases resting on the "scarcity rationale"[3] because *Red Lion* and the other cases are irrelevant to indecency regulation, which is at issue in this case.

In *Red Lion*, this Court unanimously held that the judiciary should defer to attempts by Congress and the Federal Communications Commission ("FCC") to structure access to spectrum where government's intent and effect is to promote the widest possible dissemination of information from diverse and antagonistic sources under the First Amendment.[4] Although

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[2] 395 U.S. 367 (1969).

[3] *See, e.g.*, NBC v. United States, 319 U.S. 190 (1943); FRC v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 279 (1933); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940); NBC v. United States, 319 U.S. 190, 213 (1943).

[4] Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994) ("*Turner I*") ("[I]t has long been a basic tenet of national communications policy that the widest

(footnote continued...)

the holding in *Red Lion* pertained to two rules that are now long-repealed, the principles of *Red Lion* have been repeatedly reaffirmed by this Court and lower courts.[5] *Red Lion*'s standard of scrutiny has been described by this Court as a "less rigorous standard of First Amendment scrutiny,"[6] and, by several circuit courts, as "rational basis."[7] This Court has upheld laws or regulations that are "a reasonable means" of "promoting the public interest in diversified mass communications."[8] Interpreting Supreme Court precedent, the D.C. Circuit has stated simply that "[b]roadcasting regulations that affect speech have been upheld when they further [the] First Amendment goal" of promoting "the widest possible dissemination of information from diverse and antagonistic

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dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.") (citations and internal quotations omitted). *See also* U.S. Const. Amend. I.

[5] *See, e.g.*, Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180, 227 (1997) ("*Turner II*") (Breyer, J., concurring). Time Warner Entm't Co., L.P. v. FCC, 93 F.3d 957, 975 (D.C. Cir. 1996) ("*Time Warner I*").

[6] *See Turner I*, 512 U.S. 622, 637 (1994).

[7] *See, e.g.*, Prometheus Radio Project v. FCC, 373 F.3d 372, 401-02 (3d Cir. 2004); Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 167 (D.C. Cir. 2002); Fox TV Stations v. FCC, 280 F.3d 1027, 1046 (D.C. Cir. 2002).

[8] *See* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 802 (1978) ("*NCCB*").

sources is essential to the welfare of the public."[9]

The precedent for broadcast indecency is not *Red Lion* but *FCC v. Pacifica*.[10] In *Pacifica*, a divided Court upheld an FCC fine for a radio broadcast of "Filthy Words." In doing so, the Court refused to rely on *Red Lion* or spectrum scarcity for its holding. Indeed, *Red Lion* has never been a basis for indecency regulation.

Red Lion is a red herring in this case, though both sides have incentives to raise *Red Lion* here. Defenders of indecency regulations, such as the Petitioners, can attempt to stand on the strong and consistent ground of *Red Lion*, seeking firmer footing to defend indecency regulations. Opponents of *Red Lion*, such as Respondents in this case, argue in almost every case and proceeding that *Red Lion* should be overruled. But the Respondents cannot bury *Red Lion* under the weight of *Pacifica* or any other indecency regulation. *Red Lion* has nothing to do with indecency regulation, whether in the broadcasting medium or any other medium. Therefore, the Court should not rely on *Red Lion* to uphold the FCC's challenged policy, nor reach out to question *Red Lion* in striking down that indecency policy.

Even if the Supreme Court reaches the constitutional issues in this case and questions

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[9] *Time Warner I*, 93 F.3d at 975.

[10] FCC v. Pacifica Found., 438 U.S. 726 (1978).

Pacifica, it need not question *Red Lion*. Rather, the Court can merely distinguish *Red Lion*, as it would distinguish any irrelevant case cited by the parties. Questioning *Red Lion*, even in dicta, could upset all broadcast ownership limits, broadcast must-carry rights, spectrum build-out provisions, political content obligations, and the wide range of spectrum policy decisions. It could also require the FCC either to justify every existing spectrum license under strict scrutiny, or to justify any change to existing licenses under intermediate scrutiny. Either result would throw media, Internet, and spectrum policy into chaos—though *Red Lion* is not even at issue in this case. The sounder course is to neither rely on nor under mine *Red Lion*.

ARGUMENT

Amici urge the Court to limit any constitutional analysis to considering *Pacifica*, and not to question the continuing vitality of *Red Lion*'s precedent. Despite the FCC's arguments below, *Red Lion* and its underlying rationales are irrelevant to this case. While the Court may reconsider *Pacifica* in this case, such reconsideration would have at best a minimal impact on rarely enforced rules for a few traditional media outlets. Meanwhile, questioning *Red Lion* could undermine current and forward-looking laws, and cast doubt on every spectrum license.

I. DESPITE THE FCC'S ARGUMENTS BELOW, BOTH *RED LION* AND SCARCITY ARE IRRELEVANT TO THIS CASE

Parties in this case have wrongly suggested that the Supreme Court should reconsider *Red Lion* and one of its underlying rationales known as the "scarcity" rationale. In opposing the FCC's petition for certiorari, NBC Universal wrote: "To the extent that the [Federal Communications] Commission argues that the so-called 'scarcity rationale' dictates that this Court apply a more permissive standard of review to its content-based restrictions on broadcasters' speech, this proffered rationale may make it necessary for this Court to reconsider its decision in Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969), the foundations of which are even more moth-eaten than those of *Pacifica*."[11] In briefing to the Second Circuit, the FCC cited *Red Lion* and referenced "spectrum scarcity" in arguing for a lenient standard of review for indecency regulation.[12] The Second

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[11] Brief in Opposition of NBC Universal and NBC Telemundo License Co., On Petition for a Writ of Certiorari, No. 07-582, Feb. 1, 2008, at 32 n.9.

[12] Specifically, the FCC cited FCC v. League of Women Voters, 468 U.S. 364, 376 (1984), *Red Lion*, and CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981) for the propositions that "regulation of the broadcast spectrum—a scarce and valuable national resource" involves "unique considerations"; that there are more people wanting to

(footnote continued...)

Circuit itself suggested that "at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television," without distinguishing between indecency and other broadcast regulations.[13]

Despite these references, the Supreme Court need not reconsider *Red Lion* in this case, even if it reconsiders *Pacifica*. The FCC (1) did not rely on *Red Lion* or scarcity in its orders in this case. Moreover, this Court (2) has specifically held that *Red Lion* and *Pacifica* are unrelated and that the two cases, (3) rest on different premises, and (4) serve as precedent for different types of laws, (5) respond to different governmental interests, and (6) apply apparently even to different classes of media.

First, the FCC relied on *Pacifica*, not *Red Lion*, in its Omnibus Order,[14] its Golden Globes

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broadband than "frequencies to allocate" so there is no "unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish"; that broadcasters granted "free and exclusive use of" the limited spectrum licenses can be "burdened by enforceable public obligations." FCC 2d Cir. Brief at 58.

[13] Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 465 (2007).

[14] Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664 (2006) ("Omnibus Order").

Order,[15] and its Remand Order.[16] This Court need not, and cannot, evaluate a basis for an agency decision not provided by the agency.[17]

Second, this Court has recognized that *Red Lion* is not precedent for indecency regulation. In *Pacifica* itself, this Court explicitly rejected grounding indecency regulation on the *NBC*/*Red Lion* scarcity rationale though the FCC order upheld in *Pacifica* listed scarcity as one of its four bases for authority.[18] This Court disregarded that basis and rested its decision instead on the FCC's three other bases.[19] Dissenting in that case, Justice Brennan commended the majority opinions for rejecting scarcity as a basis for indecency regulation: "The opinions … rightly refrain from relying on the notion of 'spectrum scarcity' to support their result. … '[A]lthough scarcity has justified increasing the diversity of speakers and speech,

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[15] Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, at ¶ 3 n.4 (2004) ("Golden Globes").

[16] Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCC Rcd 13299, n.18 (2006) ("Remand Order").

[17] *C.f.* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43(1983) (a court may not "supply a reasoned basis for the agency's action that the agency itself has not given.").

[18] Pacifica, 438 U.S. at 731, n. 2.

[19] *Compare id.* at 731 n.2 with *id.* at 748-51.

it has never been held to justify censorship.'"[20]

Third, as the Court noted, *Red Lion* and *Pacifica* rest on different bases. *Red Lion* rests not only on "the scarcity of broadcast frequencies," but also on the government's "role in allocating" those frequencies, and the "legitimate claims" of competing "possible users" of the spectrum.[21] *Pacifica*, by contrast, rests on broadcast media's pervasiveness, accessibility to children, and invasiveness.[22]

Fourth, the governmental interests furthered in indecency cases differ from those in *Red Lion* cases. The government interest in indecency is generally to protect children from harmful materials.[23] The government interest in *Red Lion* cases is to ensure the public's free speech rights to "the widest dissemination of diverse and antagonistic sources,"[24] as well as the right to "receive suitable access to social, political, esthetic, moral and other ideas and experiences,"[25] and the right to the most effective use of the spectrum for communication.

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[20] *Id.* at 770, n. 4 (Brennan, J., dissenting) (citations omitted).

[21] *See Red Lion*, 395 U.S. at 400-01.

[22] Pacifica, 438 U.S. at 748-51.

[23] *See, e.g.*, Sable Communications, 492 U.S., at 126.

[24] *See* Associated Press v. United States, 326 U.S. 1, 20 (1945).

[25] *See Red Lion*, 395 U.S. at 390.

Fifth, *Pacifica* and *Red Lion* apply to different types of laws.[26] *Pacifica*'s constitutional holding applies exclusively to laws restricting indecency.[27] *Red Lion* applies to more pervasive laws, including (1) laws structuring the media environment to ensure the widest dissemination of diverse sources (such as ownership limits, must-carry rules, and universal service mandates),[28] (2) laws ensuring an informed citizenry through promoting political, educational, or noncommercial

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[26] *Accord* Br. Amici Curae Brennan Center for Justice et al. at 16-17 (noting scarcity only justified either "structural regulation of industry" or "certain public interest obligations such as equal access for political candidates" (or content-based promotion of democratic content) but not "censorship" (or content-based suppression)); *see also* 2d Cir. Br. Amici CDT et al., at 21, n.26 (distinguishing *Pacifica* from Prometheus Radio Project, 373 F.3d 372).

[27] *See, e.g.*, Action for Children's Television v. FCC, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc); Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 743-47 (1996) (Breyer, J., plurality) ("*Denver Area*").

[28] *See, e.g.*, C. Edwin Baker, *Turner Broadcasting: Content-based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57; Michael J. Burstein, Note, *Towards a Standard for First Amendment Review of Structural Regulation*, 79 N.Y.U. L. REV. 1030 (2004); Marvin Ammori, *Content Neutrality and Promotion of Content*, 61 FED. COMM'S L. J. __ (forthcoming 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1139961.

content,[29] and (3) spectrum policy rules, from satellite television to wireless Internet. These

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[29] These laws are not considered "content-based" as, doctrinally, content-based laws are those laws singling out particular content for suppression. *See, e.g.*, Ammori, *supra* note 28; Monroe E. Price & Donald W. Hawthorne, *Saving Public Television: The Remand of Turner Broadcasting and the Future of Cable Regulation*, 17 HASTINGS COMM. & ENT. L.J. 65 (1994). Laws designed promote political, educational, and noncommercial content do not singling out any content *for suppression*. Contrast a library stocking its shelves with one book, out of the millions of options, which does not suggest hostility to particular content, with removing a controversial book from its shelves, which does. *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853 (1982); Pratt v. Independent Sch. Dist. No. 831, Forest Lake, Minn., 670 F.2d 771, 773 (8th Cir. 1982). In a range of different areas, promoting democratic speech is subject to little scrutiny; these areas include subsidies, limited public fora, speech exceptions, exceptions in copyright laws, media policy, and broadcast regulation. *See* Ammori, *supra* note 28. *See also* Regan v. Taxation without Representation of Wash., 461 U.S. 540 (1983) (government need not meet intermediate or strict scrutiny to subsidize some nonprofit speech without subsidizing other nonprofit speech); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (same for limited public fora); Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217 (2000) (same); Walsh v. Brady, 927 F.2d 1229 (D.C. Cir. 1991) (same for exceptions to general laws for certain speech purposes); Weinberg v. Chicago, 310 F.3d 1029, 1035-36 (7th Cir. 2002) (same); Eldred v. Ashcroft, 537 U.S. 186, 219-20 (2003) (same for copyright law, which provides exceptions to foster "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," 17 U.S.C. § 107).

structural, informational, and spectrum policies receive different—and far more deferential—treatment and analyses than laws targeting and restricting indecent speech.

Sixth, *Pacifica* and *Red Lion* affect different media. *Pacifica* applies only to radio and television terrestrial broadcasting and perhaps to programming on the basic cable tier.[30] *Red Lion*'s has been cited as support for cases involving terrestrial radio and TV broadcasting, satellite broadcasting,[31] and (though the *Red Lion* "scrutiny standard" does not explicitly apply) for the regulation of phone companies[32] and cable companies.[33]

The Court's precedent therefore recognizes that the Court should not rely on or question *Red Lion* here.

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[30] *See Denver Area*, 518 U.S. at 743-47 (Breyer, J., plurality) (analyzing by analogy to *Pacifica* rather than explicitly announcing a constitutional standard).

[31] *See, e.g.*, *Time Warner I*, 93 F.3d at 975-79. *See also* Satellite Broad. & Commc'ns Ass'n v. FCC, 275 F.3d 337, 356 (4th Cir. 2001) (finding the challenged rules met even *Turner* scrutiny).

[32] United States v. AT&T, 552 F.Supp. 131, 183-86 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983).

[33] *Turner II*, 520 U.S. 180, 227 (1997) (Breyer, J., concurring).

II. REVISITING *PACIFICA* WOULD AFFECT A LIMITED DOMAIN, WHERE STRICT SCRUTINY MAY ALREADY APPLY

Revisiting *Pacifica* would affect, at most, indecency regulation in broadcast media, and upset a plurality opinion regarding cable basic-tier programming.[34] This effect would likely be small, as the FCC has historically been cautious in policing indecency.[35]

Moreover, revisiting *Pacifica*, as broadcasters seek, may not even affect the reigning scrutiny standard among many circuit courts. In *Fox v. FCC*, below, the Second Circuit did not reach the constitutional question, but instructed the FCC that strict scrutiny may soon apply to broadcast indecency regulation.[36] The only circuit court cases since *Pacifica* that reached the constitutional issue interpreted *Pacifica* to apply strict, not intermediate, scrutiny to broadcast indecency regulation.[37] The Supreme Court case applying *Pacifica* to

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[34] *Denver Area*, 518 U.S. at 743-47 (Breyer, J., plurality).

[35] *See, e.g.*, Fox v. FCC, 489 F.3d 444, 450 (2007) (discussing the Commission's historically "restrained enforcement policy.").

[36] *See* Fox, 489 F.3d at 465.

[37] *See* Action for Children's Television, 58 F.3d at 660 (applying "strict scrutiny to regulations of this kind regardless of the medium affected by them," and asserting the court's "assessment … must necessarily take into account the unique context of the broadcast medium.").

basic cable did not announce a standard, but merely reasoned by analogy to *Pacifica*.[38] Therefore, no case relying on *Pacifica* has explicitly applied a standard other than strict scrutiny. So reconsidering *Pacifica* to provide broadcasters greater breathing room on indecency would likely have a minimal, predictable impact.

III. REVISITING *RED LION* WOULD UNPREDICTABLY AFFECT NUMEROUS FOUNDATIONAL LAWS SUPPORTING MEDIA DIVERSITY AND DEMOCRATIC CONTENT IN NUMEROUS MEDIA

Because of the confusion surrounding *Red Lion* and the interests of both sides of this case to extend *Red Lion*, we provide our understanding of how *Red Lion* continues to serve as a bedrock for valuable telecommunications policy and how questioning *Red Lion* would throw media, spectrum, and Internet policy into chaos.

Despite the repeal of rules like the fairness doctrine and the personal attack rule, *Red Lion* and its associated line of cases remain precedent for three major classes of laws, each of which have numerous subclasses, and all of which differ from indecency regulations.

First, structural regulations include

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[38] *Denver Area*, 518 U.S. at 743-47 (Breyer, J., plurality).

attempts to foster the wide dissemination of diverse and antagonistic sources such as through ownership limits, access rules, and build-out/universal service rules. Second, laws meant to promote an informed electorate include limited attempts to ensure political, educational, and noncommercial programming. Third, laws structuring spectrum include wide-ranging and diverse regulatory choices. None faces or should face strict or intermediate constitutional scrutiny.

Since every American has a legitimate claim to speak using the radio spectrum,[39] this Court has recognized that the government must receive *some* deference to balance those rights in structuring access to the radio spectrum to promote First Amendment goals.[40] In balancing those rights, the government must recognize that the "rights of the public" are "paramount"[41]—not the rights of powerful lobbies such as the broadcasters, cable operators,

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[39] *See Red Lion*, 395 U.S. at 389 ("[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused.").

[40] Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102-03, 110 (1973).

[41] *Red Lion*, 395 U.S. at 390 ("But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.").

phone companies, or even the technology companies.[42] Those paramount public rights include the right to diverse sources and political information.

A. *Red Lion* Supports Structural Regulation for Universal Access to Diverse Information Sources

Red Lion has served as precedent supporting the government's ability to structure media to foster the "basic tenet" of American communications policy with two distinct parts.[43] The public should receive access to "information from diverse and antagonistic sources" and these

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[42] *See, e.g.*, J.H. SNIDER, SPEAK SOFTLY AND CARRY A BIG STICK: HOW LOCAL BROADCASTERS EXERT POLITICAL POWER (2006); Gregory P. Magarian, *Market Triumphalism, Electoral Pathologies, and the Abiding Wisdom of First Amendment Access Rights*, 35 HOFSTRA L. REV. 1373 (2007); Center for Responsive Politics, *Networks of Influence*, OPENSECRETS.ORG, Feb. 28, 2006 (providing figures that the communications industry spent at least $900 million on campaign contributions, lobbying expenditures and related spending between 1998 and 2004); Ken Auletta, *The Search Party: Google Squares Off with its Capitol Hill Critics*, NEW YORKER, Jan. 14, 2008.

[43] In line with this tenet, the first Congresses structured the postal system and postal subsidies to spread diverse sources of public information to all Americans. *See, e.g.*, RICHARD B. KIELBOWICZ, NEWS IN THE MAIL: THE PRESS, POST OFFICE, AND PUBLIC INFORMATION, 1700-1860s (1989). PAUL STARR, THE CREATION OF THE MEDIA 47-152 (2004); Ammori, *supra* note 28.

diverse sources should be disseminated widely to all.[44]

The Court has endorsed attempts to foster diverse information sources in cases involving broadcasting,[45] cable,[46] and newspapers,[47] and has upheld lower courts endorsing diversity of information sources through telephone networks.[48] In the seminal cable television case, *Turner Broadcasting Sys., Inc. v. FCC*,[49] the Court held that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[50] Despite recognizing this interest in every medium, the Court appears to grant the greatest deference to government attempts to promote diverse sources in the field of

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[44] *See* cases cited in note 4.

[45] *See, e.g.*, CBS, Inc. v. FCC, 453 U.S. 367 (1981).

[46] *Turner I*, 512 U.S. 622, 663 (1994); United States v. Midwest Video Corp., 406 U.S. 649, 668, n.27 (1972) (plurality opinion).

[47] *See, e.g.*, Associated Press v. United States, 326 U.S. 1, 20 (1945); *see also NCCB*, 436 U.S. 775, 799 (1978) (upholding limitation on broadcasters merging with the local newspapers).

[48] *See* United States v. AT&T, 552 F.Supp. 131, 183-86 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983).

[49] 512 U.S. 622, 663 (1994).

[50] *Turner I*, 512 U.S., at 663; Turner II, 520 U.S. at 190; *id.* at 227 (Breyer, J., concurring).

broadcasting or structuring spectrum.[51]

Laws that further diverse and antagonistic sources include ownership limits and must-carry rules. For example, relying partly on *Red Lion*, this Court[52] and lower courts[53] have upheld broadcast media ownership limits (for radio and TV,[54] locally and nationally,[55] vertically[56] and horizontally[57]) with minimal scrutiny under the First Amendment, as fostering diverse sources.[58]

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[51] We say this largely because the Court does not impose a narrow tailoring requirement under *Red Lion*, as discussed below.

[52] *NCCB*, 436 U.S. 775 (1978).

[53] *See, e.g.*, Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004); Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 167 (D.C. Cir. 2002).

[54] Prometheus Radio Project, 373 F.3d at 413, 428.

[55] *Id.* (addressing three local caps); *cf. also* United States v. Storer Broad. Co., 351 U.S. 192 (1956) (upholding national cap in face of statutory challenges).

[56] *See* Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 476-77 (2d Cir. 1971) (upholding financial interest and syndication rules and prime time access rules); *see also id.* at 477 ("[T]he prime time access rule, far from violating the First Amendment, appears to be a reasonable step toward fulfillment of its fundamental precepts, for it is the stated purpose of that rule to encourage the 'diversity of programs and development of diverse and antagonistic sources of program service.' ").

[57] *See* Prometheus Radio Project, 373 F.3d at 413, 428.

[58] *NCCB*, 436 U.S. at 802 ("The regulations are a *reasonable means* of promoting the public interest in diversified mass communications; thus they do not violate

(footnote continued...)

Relying on *Red Lion*, the D.C. Circuit upheld a law granting noncommercial programmers must-carry rights to digital broadcast satellite systems, again with minimal scrutiny as fostering diverse sources.[59]

This Court has also upheld attempts to ensure the "widest possible dissemination" of such information sources, including the FCC's allocation of broadcast licenses to favor universal service—ensuring at least one station per locality before ensuring multiple stations per larger localities.[60] The FCC routinely imposes build out requirements on wireless licensees[61]

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the First Amendment rights of those who will be denied broadcast licenses pursuant to them.") (emphasis added).

[59] *Time Warner I*, 93 F.3d at 975-79.

[60] FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 360 (1958) ("Allentown had three local stations; Easton only one. The Commission recognized that Allentown was a city almost triple the size of Easton and growing at a greater pace, but held that Easton's need for a choice between locally originated programs was decisive."). *See also* Amendment of Section 3.606 of Comm'n's Rules & Regulations, Sixth Report & Order, 41 F.C.C. 148, 167 (1952) (providing as the first three priorities of allocation: "(1) To provide at least one television service to all parts of the United States. (2) To provide each community with at least one television broadcast station. (3) To provide a choice of at least two television services to all parts of the United States.").

[61] *See, e.g.*, Service Rules for the 698-746, 747-762 And 777-792 Mhz Bands, WT Docket No. 06-150, May 14, 2008, 2008 WL 2066005, at *5 (regarding build-out for public
(footnote continued...)

without the First Amendment challenges raised by cable operators for similar build-out laws.[62]

Unlike indecency laws, none of these laws suppress disfavored content. Questioning *Red Lion* here would shake every one of these structural laws.

B. *Red Lion* Supports Political and Educational Content Ensuring an Informed Citizenry

In the broadcast arena, this Court has consistently upheld laws designed to promote an "informed electorate"[63] by promoting "suitable access" to diverse political and educational

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safety network); Written Statement of the Honorable Kevin J. Martin, Chairman Federal Communications Commission, April 15, 2008, 2008 WL 1733628, at *4 ("To help ensure that rural and underserved areas of the country benefit from the new services that this spectrum will facilitate, the Commission adopted the most aggressive build-out requirements ever applied to wireless spectrum.").

[62] *See, e.g.*, Century Federal, Inc. v. City of Palo Alto, 719 F.Supp. 1552, 1554 (N.D. Cal. 1987) (striking down cable build-out rules). Even when applying a more intrusive scrutiny standard than *Red Lion*, this Court has upheld attempts to ensure universal access to local news and public information through cable. *See Turner I*, 512 U.S. at 652 (upholding broadcaster must-carry on cable partly "to ensure that broadcast television remains available as a source of video programming for those without cable.").

[63] *See Turner I*, 512 U.S. at 648.

speech. That is, government can engage in "efforts to enhance the volume and quality of coverage of public issues through regulation of broadcasting."[64] In *CBS, Inc. v. FCC*, the Court upheld the requirement that broadcasters grant access to federal candidates, because the rule promoted "the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."[65] In 2004, this Court also relied on *Red Lion* to support disclosure requirements regarding political campaigns, meant to inform the public about political campaign activity.[66] In 1975, the Second Circuit upheld the FCC's program access rules forbidding television stations in the 50 largest metropolitan areas from broadcasting network programs in more than three of the four evening hours; these rules provided exceptions to encourage news programming, including exceptions "one-half hour of 7 P.M. network news programs provided the station had carried one hour of local news

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[64] *NCCB*, 436 U.S. 775, 800 (1978).

[65] CBS, Inc. v. FCC, 453 U.S. 367 (1981). Markets often fail to provide the optimal amount of public information based on economic considerations. *See* C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 1-96 (2002).

[66] McConnell v. Federal Election Commission, 540 U.S. 93, 237, 240-41 (2003) (upholding requirements that broadcast requirements regarding elections, relying on *Red Lion*).

before seven o'clock" and "on-the-spot news and political broadcasts."[67] In 1996, the FCC adopted rules that effectively required broadcasters to air three hours of children's educational programming every week, analyzing the requirement under *Red Lion* and concluding the rules were constitutional.[68]

In addition to these limited content obligations, many of the structural rules discussed above also seek to promote an informed electorate. A structure of diverse sources is assumed to produce diverse political views and content and to better inform voters.[69]

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[67] National Assoc. of Independent Television Producers & Distributors v. FCC, 516 F.2d 526, 529, 537-38 (2d Cir. 1975).

[68] Children's Television Programming, 11 FCC Rcd 10660, 10729-34 (1996). These rules implemented the The Children's Television Act of 1990, 47 U.S.C. §§ 303a-303b. The accompanying Senate Report analyzed the constitutional issues and concluded the Act was constitutional under *Red Lion*. S. Rep. No. 227, 101st Cong., 1st Sess. 17 (1989).

[69] *See, e.g.*, United States v. Associated Press, 52 F.Supp. 362 (S.D.N.Y. 1943) ("[T]he First Amendment ... presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."); *NCCB*, 436 U.S. at 797 ("[I]t is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run.") (quoting the FCC).

Must-carry rules often favor sources that provide noncommercial educational content.[70]

C. *Red Lion* Supports Flexible and Dynamic Spectrum Policy to Further Citizen and Consumer Rights

Beyond structural rules and political and educational access rules, spectrum policies also rest on *Red Lion* and the cases resting on spectrum scarcity. The FCC structures spectrum for private use; the National Telecommunications and Information Administration allocates, assigns, and regulates government spectrum. Both do so in conjunction with international coordination and treaty obligations.[71] In structuring spectrum use, the FCC adopts a wide range of possible technical and economic plans, permitting experimentation and development based on the economic and technical characteristics of the spectrum at issue. The FCC has issued licenses for terrestrial radio broadcasting, terrestrial television broadcasting, satellite television broadcasting, satellite radio broadcasting, wireless cell phone networks, taxi dispatching, public safety, unlicensed uses, microwaves, etc. The FCC has also used several models for

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[70] *Time Warner I*, 93 F.3d at 975-79 (must-carry for noncommercial stations on satellite); *cf. Turner I*, 514 U.S. at 630 (same for cable).

[71] *See, e.g.*, Biennial Regulatory Review, International Bureau, 22 F.C.C.R. 3138, 3142 (2007).

assigning licenses, including comparative hearings, first-come first-serve, lotteries, and auctions. The FCC has used several models for the rights attached to licenses, from flexible-rights licenses to licenses for particular services. In establishing licenses, the FCC determines the geographical makeup of band plans, such as national licenses, large regional licenses, or small local licenses, or a mixed combination.[72] Often, the FCC must "clear" bands of existing users.[73] The FCC must also determine the length of any license term, which could vary greatly, in theory, from years to seconds. For example, recently, a Google co-founder proposed a simple model for government agencies to auction off particular spectrum every second, using algorithms similar to those used on Google's search engine to auction advertising

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[72] *See, e.g.*, Service Rules for the 698-746, 747-762, and 777-792 MHz Bands, Second Report & Order, 22 FCC

Rcd. 15,289 (August 10, 2007) ("*700 MHz Auction Order*").

[73] *See, e.g., id.* at 15296 ("The DTV Act set a firm deadline of February 17, 2009 for the 700 MHz Band spectrum to be cleared of analog transmissions and made available for public safety and commercial services as part of the DTV transition."); Improving Public Safety Communications in the 800 MHz Band, 19 F.C.C.R. 14,969, 14978 (2004) ("We require Nextel to reimburse UTAM Inc. (UTAM) for the cost of clearing the 1910-1915 MHz band, and to clear the 1990-2025 MHz band of BAS incumbents within thirty months of the effective date of this Report and Order.").

spots.[74]

Beyond licensing, the FCC authorizes specific "unlicensed" uses. Though the 1969 *Red Lion* Court could not have anticipated this development, the advances in technology have eliminated the need to assign licenses to particular users.[75] End-user "smart radios" can manage interference on their own using advanced computing technologies.[76] The most famous example of unlicensed use today is likely wi-fi wireless Internet.[77] Today, almost every laptop is manufactured with wi-fi capability built into it and billions use the technology daily. Innovators created wi-fi by using unlicensed allocations of "garbage spectrum bands" long considered useless, which had been used by microwaves and garage door openers.[78] Minimal

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[74] Elizabeth Woyke, *Google's Mobile Ambitions*, FORBES, May 22, 2008.

[75] *See* Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287 (1998); Yochai Benkler, *Some Economics of Wireless Communications*, 16 HARV. J.L. & TECH. 25 (2002).

[76] Benkler, *Overcoming Agoraphobia*, *supra* note 75, at 394-400.

[77] *See, e.g.*, FCC, *Spectrum Policy Task Force Report*, ET Docket No. 02-135 (rel. Nov. 2002), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.doc.

[78] *See, e.g., Wireless: WiFi: Unlicensed : Part 15*, CYBERTELECOM, http://www.cybertelecom.org/broadband/Wifi.htm.

certification ensures unlicensed devices do not interfere.[79] Indeed, as a matter of physics, each unlicensed device may increase capacity—not increase interference—because devices can provide capacity in a peer-to-peer, "mesh" network; each device uses other devices as "hops" to transmit messages.[80] That is, the more devices, the more capacity for all.[81]

The major, and minor, decisions of communications policy should not be subject to second-guessing by non-expert judges, who could "constitutionalize" and handcuff the FCC's broad, flexible mandate to regulate the spectrum to serve the public's interest. Even if this Court would subject spectrum policy to intrusive second-guessing by the judiciary, this case is not the appropriate vehicle for that decision.

D. *Red Lion* Does Not Support Content-Based or Viewpoint-Based Suppression of Disfavored Speech

Red Lion does not support content-based suppression. While *Red Lion* serves as precedent for ownership limits and must-carry laws, political access laws, and spectrum policy, some have criticized the *Red Lion* standard for

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[79] *See, e.g.*, 47 C.F.R. § 15.5.

[80] Benkler, *Some Economics*, *supra* note 75, at 44-47.

[81] *Id.* The FCC can also permit limited unlicensed uses in bands that are licensed. *See* FCC, supra note 77, at 5 (discussing underlays).

permitting viewpoint- or content-based decisions. Some argue that the fairness doctrine itself could be enforced to reduce the diversity of viewpoints and to target certain disfavored views.[82] Reconsidering *Red Lion*, however, would not affect the fairness doctrine, which is long-repealed.[83] Even were this argument at issue here, however, the argument merely suggests that this Court misapplied the *Red Lion*/basic-tenet standard in evaluating the fairness doctrine, not that the *Red Lion* standard should be abandoned.[84] Indeed, in *Red Lion*, the Supreme Court said it would revisit the issue of the fairness doctrine's constitutionality if evidence demonstrated the doctrine reduced, rather than enhanced, the quality and diversity of political coverage.[85] Years later, the FCC abandoned the doctrine based on such

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[82] Syracuse Peace Council v. FCC, 867 F.2d 654, 665 (D.C. Cir. 1989).

[83] *See* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989) (fairness doctrine); Radio-Television News Directors Ass'n v. FCC, 229 F.3d 269 (D.C. Cir. 2000) (political editorial and political attack rules).

[84] *See, e.g.*, Yochai Benkler, *Free Markets vs. Free Speech: A Resilient Red Lion and its Critics*, 8 INT'L J.L. & INFO. TECH. 214, 215 (2000).

[85] *Red Lion*, 395 U.S. at 393 ("And if experience with the administration of those doctrines indicates that they 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.").

evidence.[86]

And, in the case of broadcast regulation, courts have been able to determine where government is attempting to target and suppress particular views and particular content, applying a heightened scrutiny for suppressing editorializing,[87] commercial speech,[88] indecency,[89] or particular political viewpoints.[90] Under the *status quo*, *Red Lion* is not permitting content-based laws. If *Red Lion* were, broadcasters can bring the appropriate case.

IV. UNDER ANY SCENARIO, NOTHING GOOD COMES FROM REVISITING *RED LION*, AN IRRELEVANT CASE HERE

If the Court reconsiders *Red Lion*, either all spectrum licenses would be constitutionally suspect or constitutionally protected such that modifications would face heighted scrutiny.

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[86] Syracuse Peace Council, 867 F.2d 654.

[87] *See* FCC v. League of Women Voters of California, 468 U.S. 364 (1984).

[88] *See, e.g.*, Greater New Orleans Broadcasting Ass'n v. FCC, 527 U.S. 173 (1999).

[89] *See* Action for Children's Television v. FCC, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc).

[90] *See* News America Publishing Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988).

A. Under Scenario #1: Reconsidering *Red Lion* Results In Chaos By Rendering Unconstitutional Every Single FCC Spectrum License

Reconsidering *Red Lion* could undermine every spectrum license held by a private or government party. Ordinarily, under cases like *Hague v. CIO*[91] and *Forsyth County, Georgia v. Nationalist Movement*,[92] government cannot license speakers. More importantly, government cannot silence the millions of Americans lacking a license.[93] Yet government can license speakers in broadcasting unlike in parks, print journals, or the Internet. Spectrum licensing rests not on *Hague v. CIO* and *Forsyth County* but on the *Red Lion* and the "scarcity rationale." This scarcity rationale was the subject of sustained attack by some academics and judges, based on two main arguments.[94] First, scarcity is less significant now than when *Red Lion* was decided, because technological changes enable more broadcasters to use the spectrum. Second, scarcity is a fact of economic life; like spectrum, ink and paper used

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[91] 307 U.S. 496 (1939).

[92] 505 U.S. 123 (1992)

[93] *Cf. Red Lion*, 395 U.S. at 389 ("[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused.").

[94] *See, e.g.*, Time Warner Entm't Co., L.P. v. FCC, 105 F.3d 723 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing *en banc*); R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959)

by newspapers are scarce. Rather, many of these critics argue, the response to scarcity should be creating and enforcing property rights in spectrum—though even its proponents admit creating such rights would be highly complicated.[95]

But property rights are neither the only option nor the constitutionally preferred option under *Hague v. CIO*. With advances in technology, unlicensed use of spectrum is possible and efficient and ensures all Americans can use the spectrum to speak.[96] As noted, wi-fi uses unlicensed spectrum, providing million of Americans with access to the Internet. The FCC currently has an open proceeding considering whether to allocate "white spaces" on the television dial to unlicensed devices.[97] Though a television dial may include 60 channels, in any town fewer than half are in use, and other channels are allocated to neighboring and regional cities. Permitting unlicensed uses on the unused white spaces would enable "wi-fi" on steroids, making high-speed, mobile, open

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[95] Dale N. Hatfield & Phil Weiser, *Toward Property Rights in Spectrum: The Difficult Policy Choices Ahead*, Cato Institute Policy Analysis Series No. 575, August 17, 2006, http://ssrn.com/abstract=975679.

[96] Yochai Benkler & Lawrence Lessig, *Net Gains: Will Technology Make CBS Unconstitutional?*, NEW REPUBLIC, Dec. 14, 1998, at 12.

[97] *See* Unlicensed Operation in the TV Broadcast Bands, 19 FCC Rcd 10018 (2004).

Internet access available and affordable to far more Americans,[98] at a time when we have fallen alarmingly behind our global competitors in Internet speeds, price, and adoption.[99] The Internet, of course, provides access to thousands of websites and channels available online. Through ubiquitous unlicensed Internet access, Americans could have access to 3500 channels of high-definition television—not merely a few dozen—through one noncommercial website alone.[100]

Rather than cause interference, the initial result of unlicensed uses would probably result in far more effective use of the spectrum for far more communications through open Internet systems. Currently, most spectrum is not used at any given time.[101] There is no benefit to letting spectrum lie fallow. Unlike water or

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[98] *See* Woyke, *supra* note 74 (quoting Google co-founder Larry Page).

[99] *See* Derek Turner, Broadband Reality Check II (2006), at 2, *available at* www.freepress.net/docs/bbrc2-final.pdf.

[100] *See* Miro - Free, Open Source Internet TV and Video Player, http://www.getmiro.com/.

[101] *See* FCC, *supra* note 77, at 3-4 ("preliminary data and general observations indicate that many portions of the radio spectrum are not in use for significant periods of time); Free Press & New America Foundation, *Measuring the TV "White Space" Available for Unlicensed Wireless Broadband*, Jan. 5, 2006, http://www.newamerica.net/files/whitespace%20summary.pdf.

food, we cannot "save" unused spectrum for later communications, commerce, or public safety.[102] Indeed, government's failure to put such speech resources to use may itself violate the First Amendment, and unlicensed uses better serve freedom of speech.[103]

As a result, to the extent that reconsidering *Red Lion* could undermine the reigning "scarcity rationale," government may be required to stop licensing speakers and to permit *all* Americans to use *all* of their airwaves to speak.[104] Without the scarcity rationale, under *Forsythe*, the government would have to defend each license under strict scrutiny, and would likely fail for most of them. Indeed, since fewer than 15% of Americans receive broadcast programming over the air (rather than through cable or satellite), the government would be unable to justify its gross misallocation of valuable spectrum to television broadcasting and to the vast white spaces designed to protect those unwatched signals.[105] Indeed, the real economic value in

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[102] *See, e.g.*, Benkler, *Some Economics*, *supra* note 75.

[103] *See, e.g.*, Harold Feld, *From Third Class Citizen to First Among Equals, Rethinking the Place of Unlicensed in the FCC Hierarchy*, 15 COMMLAW CONNSPECTUS 53 (2007)

[104] Perhaps with some dedicated bands or preemption rights for public safety and national security, which could likely meet strict scrutiny, depending on the plan.

[105] Sascha D. Meinrath & Michael Calabrese, *Unlicensed "White Space Device" Operations on the TV Band and the Myth of Harmful Interference*, March 2008,

(footnote continued...)

broadcast stations now derives from their must-carry rights for cable and satellite. This misallocation of spectrum resources cannot be justified under any heightened scrutiny.

Whether or not unlicensed uses should be expanded and licensed uses reduced as a policy matter, this Court should not now decide this issue as a constitutional matter. Doing so would throw into doubt every single one of the thousands of spectrum licenses conferred by the FCC or held by the government, even though this case is limited to a few particular indecent remarks on broadcast television.

B. Under Scenario #2, Reconsidering *Red Lion* Results in Chaos By Granting Incumbent Licensees Heightened Scrutiny and Constitutional Claims Regarding Any Advances in Spectrum Licensing

Another possible result of questioning *Red Lion* in dicta would turn over *Red Lion*'s domain to the intermediate scrutiny enunciated in *Turner Broadcasting Sys., Inc. v. FCC*.[106] This scenario is less likely than the first proposed

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http://www.newamerica.net/files/WSDBackgrounder.pdf. *See also* Bill McConnell, *Radical Thinker: Hazlett's Theories Attract Feds, Repel Broadcasters*, BROADCASTING & CABLE, Apr. 26, 2004.

[106] *Turner I*, 512 U.S. 622 (1994); *Turner II*, 520 U.S. 180 (1997).

scenario, but lower courts have applied *Turner*'s intermediate scrutiny to media ownership limits and must-carry rules to certain media.

The big difference between *Red Lion* scrutiny and *Turner*'s intermediate scrutiny is that *Turner* protects incumbent speakers at the expense of other speakers through a narrow tailoring requirement. Under *Red Lion*, laws that promote the basic tenet—the widest dissemination of information from diverse and antagonistic sources—are upheld. Under *Turner*, furthering the basic tenet is not enough; rather, doing so would meet only one prong of *Turner*—requiring government to further an important governmental interest.[107] The second major prong has been interpreted by lower courts to require the government to further that important goal in a narrowly tailored way *vis a vis* the incumbent speaker's speech. Therefore, under *Turner*, the government can promote the widest dissemination of diverse and antagonistic sources, but only if the "burden" on an incumbent speaker is relatively minimal.

As a result, under *Turner*'s intermediate scrutiny, lower courts have struck down, as violations of the freedom of speech, national cable ownership limits;[108] vertical cable

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[107] *Turner I*, 512 U.S. at 662-63.

[108] Time Warner Ent. Co., L.P. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001).

ownership limits;[109] common carriage rules applied to telephone video service;[110] and even rules meant to ensure competition and openness in the provision of Internet service.[111] These cases—striking down ownership limits and access rules—ensure the narrowest dissemination of information from the same sources. Because many ownership and access rules aim to increase economic competition in concentrated media markets, *Turner* handicap government attempts to increase competition.[112]

Such cases and the lower courts' interpretation of *Turner*'s narrow tailoring requirement have encouraged cable operators and phone carriers to challenge dozens of rules imposed on them. Cable operators and phone carriers have challenged, under the First Amendment, rate regulation,[113] permitting local governments to provide cable service (and

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[109] *Id.*

[110] Chesapeake & Potomac Telephone Co. v. United States, 42 F.3d 181 (4th Cir. 1994).

[111] Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F.Supp. 2d 685 (S.D. Fla. 2000); *but see* AT & T Corp. v. City of Portland, 43 F.Supp.2d 1146, 1154 (D.Or. 1999), *aff'd in* 216 F.3d 871 (9th Cir. 2000) (rejecting First Amendment challenge, classifying the law as an economic regulation).

[112] *See* Time Warner Ent. Co., L.P. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001)

[113] *Time Warner I*, 93 F.3d 957, 965-67 (D.C. Cir. 1996).

upsetting cable monopolies),[114] rules forbidding exclusive agreements with apartment complexes,[115] retransmission consent,[116] carriage for public, educational, and governmental channels,[117] carriage for commercial leased access channels,[118] program access requirements,[119] and national horizontal and

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[114] Americable Int'l, Inc. v. Dept. of Navy, 129 F.3d 1271, 1275 (D.C. Cir. 1997) (rejecting a First Amendment argument against federal law permitting a local governmental authority to enter the cable business and compete with incumbent); Warner Cable Communications, Inc. v. City of Niceville, 911 F.2d 634, 636-38 (11th Cir. 1990) (rejecting a First Amendment challenge by a cable operator that a city could not enter the cable business, holding that a city does not lawfully "abridge" speech by interfering with the continuation of an operator's "profitable position as the only speaker in a captive cable market.").

[115] *Cf.* AMSAT Cable Ltd. v. Cablevision of Ct., L.P., 6 F.3d 867 (2d Cir. 1993) (rejecting First Amendment claims by apartment complex owner and satellite operator against a state statute guaranteeing cable operators access to apartment complexes; holding the satellite operator had no free-speech right to be a monopoly and no right "to speak profitably," and the complex owner was not the school child in West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) unconstitutionally "compelled to speak").

[116] Daniels Cablevision, Inc. v. United States, 835 F.Supp. 1 (D.D.C. 1993), *aff'd in part on other challenges sub nom. Time Warner I*, 93 F.3d 957 (D.C. Cir. 1996).

[117] *Time Warner I*, 93 F.3d at 967-71.

[118] *Id.* at 971-73.

[119] *Id.* at 977-79.

vertical ownership limits.[120]

The *Turner* Court did not ask whether the means burdened more "speech" than necessary to advance government's interest. The Court seemed to ask whether the governmental means burdened more of the *incumbent*'s speech than necessary to do so. The law in *Turner* did not burden speech—it merely furthered the speech interests/economic interests of broadcasters and viewers of broadcast television over the speech/economic interests of cable operators and programmers, seeking to ensure the widest availability of local broadcasting content and diversity for the public.

Lower courts continue to invoke the *Turner* cases for a scrutiny-framework effectively constitutionalizing background property rules in the name of the First Amendment, even though *Turner* resists that notion. Justice Breyer's fifth-vote concurring opinion in *Turner II*, following a factual remand, is widely considered the key opinion in the *Turner* cases.[121] Justice

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[120] Time Warner Entertainment Co. v. United States, 211 F.3d 1313 (D.C. Cir. 2000) (facial challenge), Time Warner Ent. Co., L.P. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001) (applied challenge).

[121] *See, e.g.*, National Cable & Telecommunications Association ("NCTA"), ex parte, CS Dkt. No. 98-120, filed July 9, 2002 (by Laurence Tribe, for cable industry lobby); NCTA, ex parte, CS Dkt. No. 98-120, filed Nov. 24, 2003 (same); NCTA ex parte, CS Dkt. No. 98-120, filed September 6, 2005 (by Cooper & Kirk LLP); National

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Breyer's opinion most explicitly rejected the notion of constitutionalizing background contract and property rules through the First Amendment, stating there were "important First Amendment interests on both sides of the equation," and the government must merely strike "a reasonable balance between potentially speech restricting and speech enhancing consequences" when acting to further the public's right to diverse and antagonistic sources.[122]

If *Turner* applied to spectrum, rules to promote the widest dissemination of diverse sources in spectrum would be subject to incessant constitutional litigation. These constitutional lawsuits would mean to overturn diversifying rules and ensure the narrowest diversity of sources for Americans, at the

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Association of Broadcasters ("NAB"), ex parte, CS Dkt. No. 98-120, filed August 5, 2002 (by Jenner & Block LLP); NAB, ex parte, CS Dkt. No. 98-120, filed June 6, 2006 (by Wiley, Rein & Fielding LLP).

[122] *Turner II*, 520 U.S. 180, 227 (1997) (Breyer, J., concurring). *See also* Respondents' Oral Argument, 1995 WL 733396, at 34-35 (Dec. 6, 1995) United States v. Chesapeake & Potomac Tel. Co., 516 U.S. 415 (1996) (Justice Breyer suggesting the media regulation cases resemble *Lochner*). *See also id.* at *58 (Petitioners' Rebuttal Argument) (government counsel noting that free speech challenge to media regulation involved what "Solicitor General [Charles] Fried used to call Lochnerizing the First Amendment").

expense of both competition and democracy. Every broadcast ownership rule would receive heightened scrutiny, as would every access rule. Every single decision regarding the allocation, licensing, unlicensing, band clearing, and conditioning spectrum for any purpose will be subject to *Turner* attack, miring the FCC in years of litigation, expending valuable resources and time to uphold laws meant to foster greater competition and more diverse democratic participation.

We can take one example. The wireless industry is attempting to invoke *Turner*, though it does not apply, to overturn minimal rules requiring a spectrum-auction winner to sever and connect with all devices on its network.[123] Ironically, this open device rule is modeled on a long-enforced telephone rule that created the standard phone jack and eliminated AT&T's control of consumer phones.[124] This reading of *Turner* could invalidate even common carriage for wireless phone companies as overly burdensome on their "speech" rights to control

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[123] CTIA v. FCC, Case No. 07-1432 (D.C. Cir., filed Oct. 22, 2007) (challenging Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, 22 FCC Rcd 15289, ¶201 (2007)).

[124] *See* Use of the Carterfone Device in Message Toll Telephone Service, 13 FCC 2d 420 (1968); Tim Wu, *Wireless Carterfone*, 1 INT'L J. COMMUNICATION 389 (2007).

consumer devices and citizens' content.[125] Just like common carriage on wired and wireless networks, which promote the largest number of sources, such laws should receive little First Amendment scrutiny as furthering free speech goals.[126]

If the Court seeks to make a decision miring the FCC in years of First Amendment litigation over every change to an incumbent's spectrum rights, the Court should wait for an appropriate case.

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[125] *See* Chesapeake & Potomac Telephone Co. v. United States, 42 F.3d 181 (4th Cir. 1994).

[126] *See Turner I*, 512 U.S. at 684 (O'Connor, J., dissenting) ("it stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies").

CONCLUSION

For these reasons, the Court should not question *Red Lion* or the scarcity rationale. Both are irrelevant in this case and doing so would inject chaos and confusion into media, Internet, and spectrum policy.

Respectfully submitted,

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