06-1760ag(L)

Nos. 06-1760-ag, 06-3750-ag, 06-5358-ag

In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FOX TELEVISION STATIONS, INC.,
WLS TELEVISION, INC.,
KTRK TELEVISION, INC.,
KMBC HEARST-ARGYLE TELEVISION, INC.,
ABC INC.,
and
CBS BROADCASTING INC.,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., NBC TELEVISION AFFILIATES, FBC TELEVISION AFFILIATES ASSOCIATION, CBS TELEVISION NETWORK AFFILIATES, CENTER FOR THE CREATIVE COMMUNITY, INC., DOING BUSINESS AS CENTER FOR CREATIVE VOICES IN MEDIA, INC., FUTURE OF MUSIC COALITION and ABC TELEVISION AFFILIATES ASSOCIATION,
Intervenors.

On Petitions for Review of Orders
of the Federal Communications Commission

BRIEF FOR INTERVENORS CENTER FOR CREATIVE VOICES AND FUTURE OF MUSIC COALITION

Andrew Jay Schwartzman
Parul P. Desai
Matthew Wood
Media Access Project
1625 K Street, NW, Suite 1000
Washington, DC 20006
(202) 454-5681
Counsel for Center for Creative Voices in Media and Future of Music Coalition

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Intervenors Center for the Creative Community, Inc. d.b.a. Center for Creative Voices in Media, Inc. ("Center") and Future of Music Coalition respectfully submit this corporate disclosure statement.

The Center does not have a parent company and no publicly held company owns 10 percent or more of stock in the Center.

The Future of Music Coalition does not have a parent company and no publicly

September 16, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

ADMINISTRATIVE MATERIALS:

STATUTES:

LEGISLATIVE MATERIALS:

OTHER:

JURISDICTIONAL STATEMENT

Intervenors adopt the jurisdictional statement of Petitioner Fox Television Stations, Inc.

QUESTION PRESENTED

Whether the FCC's revised indecency enforcement policies violate the First and Fifth Amendments.

STATEMENT OF THE CASE

Intervenor Center for Creative Voices in Media ("CCV") is an organization dedicated to protecting and promoting the interests of its constituents, who create and provide artistic content to broadcast programs. CCV's Board of Advisors includes writers, producers, actors, authors, and other creative professionals. CCV seeks to safeguard and enrich the vitality and diversity of our nation's democracy and culture, by educating legislators, regulators, the press, and the public on the significant social benefits the American people will realize when our nation's media environment nurtures and supports independent, original, diverse, and creative voices.

Intervenor Future of Music Coalition ("FMC") Future of Music Coalition is a national nonprofit organization that works to ensure a diverse musical culture where artists flourish, are compensated fairly for their work, and where fans can

find the music they want. Founded in June 2000 by musicians, artist advocates, technologists and legal experts, Future of Music Coalition works to ensure that musicians have a voice in the issues that affect their livelihood. FMC's work is rooted in the real-world experiences and ambitions of working musicians, whose perspectives are often overlooked in policy debates. Guided by a firm conviction that public policy has real impact on the lives of both musicians and fans, FMC advocates for a balanced approach to music in the digital age - one that reflects the interests of all stakeholders, and not just the powerful few. FMC has been a strong proponent of development of community-based low power FM radio stations which support local and regional music tastes often ignored by large group-owned stations. It has been an active participant in FCC proceedings concerning limits on broadcast ownership, taking the position that concentration of media ownership has restricted program format diversity.

Both CCV and FMC have actively participated in FCC proceedings relating to insuring that broadcast licensees contribute to the marketplace of ideas and provide opportunities for artistic expression. For example, both have filed comments supporting limits on broadcast ownership as a means of promoting diversity.[1]

[1]FMC has submitted several detailed analyses to the FCC showing a relationship between group ownership and the loss of diversity in radio music formats. *See, e.g.*, Future of Music Coalition, "Do Radio Companies Offer More Variety When They Exceed the Local Ownership Cap?"

They have also participated in the FCC's pending "localism" docket. In that proceeding, CCV has argued for restoration of rules promoting the use of independently produced TV programming and giving expedited treatment to license renewal applications for certain TV stations which have aired 25 percent or more independently-produced programming in primetime.[2] FMC filed comments addressing how effective enforcement of statutorily mandated "payola" rules can improve responsiveness to local needs.[3]

Creators such as those represented by CCV and FMC are at the forefront in the actual process of creating and delivering speech. Although the FCC's enforcement proceedings are directed at licensees, the pressure of stiff indecency penalties is passed on to the artists who actually produce their programming. The

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http://futureofmusic.org/filing/fmc-comments-filed-fcc-broadcast-ownership-proceeding
See Prometheus Radio Project v. FCC, 373 F.3d 372, 432 (3d Cir. 2004) (citing FMC comments).

[2]These comments may be viewed at http://www.creativevoices.us/cgi-upload/news/news_article/LocalismCommentsApril2008.pdf
The provisions sought by CCV are not dissimilar in structure and goals from the "prime time access" rules which this Court upheld in *Mt. Mansfield Television v. FCC*, 442 F.2d 470 (2d Cir. 1971). *See also, Nat'l Assn. of Independent Television Producers and Distributors v. FCC*, 516 F.2d 526 (2d Cir. 1975) (substantially affirming a revised version of the "prime time access" rules).

[3]These comments may be viewed at http://futureofmusic.org/files/FMClocalismreplycomments08.pdf

inhibiting environment thus created directly interferes with the process of artistic and creative expression which lies at the heart of what the First Amendment was designed to protect. This chilling effect is most pronounced upon non-commercial and other small stations, especially the low power FM stations FMC has fought to create.[4]

The constraint generated by the Commission's action in this and other cases affects creators in a number of ways. For example, licensees have mandated that creators edit their programming simply as a precautionary measure; the inevitable tendency to err on the side of caution means that the impact of the Commission's action is often broader than its plain language would suggest. In other cases, licensees have flatly refused to air certain programming for fear of being subject to complaints of indecency. Moreover, the vague and confusing nature of the FCC's actions has resulted in uncertainty as to what constitutes "indecent" programming.

The net effect of these restrictive pressures is incalculable. The freedom of creators to express themselves has been stifled because creators are now under a great deal of pressure to speculate as to how far their creativity and expression can reach before it constitutes an actionable complaint. The Commission's decisions,

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[4]See *FCC v. Fox Television Stations, Inc.,* 129 S.Ct 1800, 1835-38 (2009) (Breyer, J., dissenting) (addressing "likelihood that smaller independent broadcasters, including many public service broadcasters,...would reduce local coverage, indeed cancel coverage, of many public events....")

therefore, have resulted in a palpable chill on free speech. Without coherent and consistent guidelines as to what constitutes indecent programming, creators are literally at a loss for words.

Artists are also viewers and listeners of television and radio, albeit with a heightened interest in observing and building upon the work of other creators in their industry. Be they painters, writers, playwrights, or television creators, artists do not work in isolation, but rather within the context of each other's works. Creators often build upon or distinguish their work from that of their peers. Thus, a critical aspect of the creative process is to have access to diverse programming, which enables and fosters further creative expression.

Creators are also "ordinary" viewers and listeners of broadcast programming. In their "off duty" and recreational viewing and listening by themselves and in the company of friends and family, they partake of television and radio just as the rest of the public does. As individual viewers and listeners, they are entitled to expect a diversity of creative expression. Instead, under the current indecency regime, viewers and listeners are being prevented from receiving access to protected speech and expression.

STATEMENT OF FACTS

Intervenors incorporate by reference their comments as submitted to the FCC during proceedings held pursuant to this Court's September 7, 2006 remand. (JA 11). The comments are reproduced at JA 343-378.

Because this Court has throughly outlined the facts of this case in its earlier opinion in this case, there is no additional need to elaborate thereupon.

SUMMARY OF ARGUMENT

The policies enunciated in the FCC's *Omnibus Order* and *Remand Order* should be invalided under the First and Fifth Amendments. This Court can and should do so by application of existing precedent under *Pacifica*.

The FCC's framework for evaluating indecency is hopelessly vague and cannot be reconciled with existing case law.

Strict scrutiny is the proper standard for First Amendment review of indecency cases. No court has construed *Pacifica* differently. So viewed, the FCC's policies are unconstitutional, as they clearly chill artistic expression by imposing stiff fines based on standardless and subjective criteria.

Intervenors urge this Court neither to question nor to rely on the "scarcity rationale" articulated in *Red Lion* because it is irrelevant to indecency regulation,

which is at issue in this case.[5]

The *Red Lion* Court unanimously held that the judiciary should defer to attempts by Congress and the 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. Although the holding in *Red Lion* pertained to two rules that are now long-repealed, the principles of *Red Lion* have been repeatedly reaffirmed by the Supreme Court and lower courts. Under *Red Lion*'s less rigorous standard of scrutiny, the courts have upheld laws or regulations that promote the public interest in diversified mass communications.

The precedent for broadcast indecency is not *Red Lion* but *Pacifica*. In upholding the FCC's enforcement action, the *Pacifica* court refused to rely on *Red Lion* or spectrum scarcity for its holding. *Red Lion* has nothing to do with indecency regulation, whether in the broadcasting medium or any other medium.

Even if this Court should find the need to question *Pacifica*, it need not question *Red Lion*. Rather, it should merely distinguish *Red Lion*, as it would dis-

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[5]The discussion of *Red Lion* in this brief is based upon the brief *amicus curiae* filed in the Supreme Court in this case by Free Press, *et al.* The full brief can be viewed at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-582_NeutralAmCu9OrgsPriceCrawford.pdf

tinguish 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. Moreover, the factual underpinnings of *Red Lion* remain sound; spectrum allocated by the government for broadcast use are more valuable than ever, and the demand for it has increased.

The sounder course is to neither to rely on nor to undermine *Red Lion*.

STANDARD OF REVIEW

Constitutional challenges to agency orders are subject to *de novo* review. 5 U.S.C. §706(2)(B).

Regulation of allegedly indecent broadcast speech is subjected to strict scrutiny. *Action for Children's Television v. FCC*, 58 F.3d 654, 661 (D.C. Cir. 1995) (*en banc*).

ARGUMENT

Intervenors note that this Court observed in *dicta* 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.[6] Intervenors respectfully suggest that this Court maintain that distinction by holding that the FCC's actions are unconstitutional under *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). Should this Court disagree, they urge this Court to limit any constitutional analysis to considering *Pacifica*, and not to question the continuing vitality of *Red Lion*'s precedent. *Red Lion Broadcasting Co.v. FCC*, 395 U.S. 367 (1969).

Despite the FCC's earlier arguments to this Court, and three networks' arguments to the Supreme Court, *Red Lion* and its underlying rationales are irrelevant to this case. While the Court may wish to review the factual premises underlying *Pacifica,* such reconsideration would have at best a minimal impact limited to broadcast outlets. By contrast, questioning *Red Lion* could undermine current and forward-looking laws, and cast doubt on every spectrum license.

I. THE FCC'S INDECENCY POLICIES ARE UNCONSTITUTIONALLY VAGUE.

The FCC's indecency policy as articulated in the orders under review is unconstitutionally vague in violation of the First Amendment and the due process clause of the Fifth Amendment. Construing the term "patently offensive" - the

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

same one used by the FCC - in a similar context in *Reno v. ACLU*, 521 U.S. 844 (1997), the Supreme Court said that "[t]he vagueness of;...a content based regulation,...coupled with its increased deterrent effect as a criminal statute,...raise special First Amendment concerns because of its obvious chilling effect on free speech. *Reno v. ACLU*, 521 U.S. at 871-72.[7]

> [B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly....[W]here a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone'... than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

The FCC simply has not provided meaningful guidance on what may or may not be sanctioned. How is a writer or musician to reconcile the FCC's acceptance of repeated use of strong expletives in *Saving Private Ryan* with *the* FCC's disapproval of the culturally contextual use of milder expletives in a documentary on the Blues music? Compare *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 FCCRcd 4507 (2005) with

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[7]The fact that criminal sanctions remain in the U.S. Code is no less chilling because their validity was not determined in *Pacifica*. *Pacifica*, 438 U.S. at 739 n.13.

Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCCRcd. 2664 (2006) (''*Omnibus Order*''). And how is a writer, director or musician, working under deadline pressure, to decide if a particular use of a particular phrase is so "demonstrably essential to the nature of an artistic work" that it creates an "unusual" need for its use? *Id.,* 21 FCCRcd at 2670 (SPA 7). Certainly the Commission's strained effort to authorize broadcast of *Saving Private Ryan* by stating that the film's explicit language reflected "strong human reactions," 20 FCC at 4512-13, offers scant guidance to lyricists and dramatists who are always seeking to appeal to "human reactions."

II. THE FCC'S INDECENCY POLICIES CHILL SPEECH AND FREE EXPRESSION IN VIOLATION OF THE FIRST AMENDMENT.

The chilling effect of the FCC's indecency policies violate the First Amendment and cannot be sustained by reliance on *Pacifica*. The Commission's action cannot be reconciled with the principle that indecent or "profane" speech is fully protected by the First Amendment. *United States v. Playboy Entm't Group*, 529 U.S. 803, 814 (2000). *See also Cohen v. California*, 403 U.S. 15 (1971), and restrictions thereupon must withstand strict scrutiny.

A. *PACIFICA* REQUIRES STRICT SCRUTINY OF EFFORTS TO PENALIZE ALLEGEDLY INDECENT EXPRESSION.

This Court should apply strict scrutiny to the FCC's orders under the *Pacifica* precedent.

The only circuit which has considered the constitutionality of broadcast indecency regulation since *Pacifica* interpreted the decision to apply strict, not intermediate, scrutiny to broadcast indecency regulation. In *Action for Children's Television v. FCC*, *supra*, 58 F.3d at 661, the D.C. Circuit sitting *en banc* applied "strict scrutiny to regulations of this kind regardless of the medium affected by them," while asserting that the Court's "assessment… must necessarily take into account the unique context of the broadcast medium." Although four judges dissented, there was no disagreement with respect to the need to apply strict scrutiny. *See, id.*, 58 F.3d at 670 (Edwards, J., dissenting) (requiring "least restrictive means to effective promote an articulated compelling interest"); *id.,* 58 F.3d at 684 (Wald, J., joined by Tatel, J. and Rogers, J.)(indecency regulation "must be narrowly tailored to a compelling government interest"). The only other Supreme Court decision of relevance is *Denver Area*, which addressed *Pacifica* in the context of "basic" (*i.e.*, not pay-per-view) cable. In his plurality decision, Justice Breyer did not announce a standard, but merely reasoned by analogy to *Pacifica*.[8]

B. THE COMMISSION'S POLICIES SUPPRESS SPEECH AND EXPRESSION.

Nothing in *Pacifica* authorizes the FCC's new, harder line on indecent

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[8] *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 743-47 (1996) (Breyer, J., plurality) ("*Denver Area*").

speech, and most certainly did not give the green light to restrict fleeting and isolated images or words. The Supreme Court ruled only that the particular program "as broadcast" was indecent. *Pacifica*, 438 U.S. at 734. *See id.*, at 742 ("Our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast...."). The decisive votes in *Pacifica* were those of Justices Powell and Blackmun, who stated an understanding that there would be no chilling effect upon broadcasters arising from the sanction of repeated use of expletives because the FCC would "proceed cautiously, as it has in the past." *Pacifica*, 438 U.S. at 761 n. 4.

The FCC now seeks to follow an extreme approach which will have a profound impact on artists seeking to express themselves as creatively as possible. Contrary to what the FCC now claims in the *Remand Order*, *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCCRcd 13299, 13304-5 (2006) (SPA 81-82), *Pacifica* did not contemplate that the FCC could create a new regime based on its own highly subjective judgment of "contextual" factors. Far from giving a framework for analysis, much less guidance that working artists can use to anticipate what would pass muster, the FCC seeks to uses" context" as a standardless mechanism for penalizing artistic expression. By claiming to be judging the "context" of a single word or phrase, the

Commission purports to be examining "the nature of the artistic work," *Omnibus Order,* 21 FCCRcd at 2689-90 (SPA 25-26), its "authentic feel," *id.*, 21 FCCRcd at 2704 (SPA 39) and whether the goal of the work was "fulfilled" by employing such expression. *Id.* This standardless and largely meaningless framework cannot be reconciled with *Pacifica*, or with the First Amendment.

III. THIS COURT NEED NOT, AND SHOULD NOT, CONSIDER *RED LION* IN RESOLVING THIS CASE.

In *Red Lion*, the Supreme Court unanimously held that the judiciary should defer to attempts by Congress and the 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.[9] Although the holding in *Red Lion* pertained to two rules that are now long-repealed, the principles of *Red Lion* have been repeatedly reaffirmed.[10] *Red Lion*'s standard of scrutiny has been described Court as a "less rigorous standard of First

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[9] *Turner Broadcasting System, 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 dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.") (citations and internal quotations omitted).

[10] *See, e.g.*, *Turner Broadcasting System., 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*").

Amendment scrutiny,"[11] and, by several circuit courts, as "rational basis."[12] Under that test, the Supreme Court has upheld laws or regulations that are "a reasonable means" of "promoting the public interest in diversified mass communications."[13] 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 sources is essential to the welfare of the public."[14]

Three of the TV networks (NBC, CBS and ABC, but not Fox) wrongly suggested that the Supreme Court should reconsider *Red Lion* and one of its underlying rationales known as the "scarcity" rationale.[15] Although they acknowledged

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

[12] *See, e.g.*, *Prometheus Radio Project v. FCC*, *supra*, 373 F.3d at 401-02; *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).

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

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

[15]Brief of Respondents NBC Universal, Inc., NBC Telemundo License Co., CBS Broadcasting, Inc., and ABC, Inc.. No. 07-582, August 1, 2009 ("*Three Networks' Brief"*). The brief an be viewed at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-582_RespondentNBCTelemundoCBSABC.pdf

that "*Red Lion* itself recognizes that the scarcity rationale supported only making room for *additional* speech deemed to be in the public interest- not governmental *censorship* of a particular program," *Three Networks' Brief* at 36, the three networks nonetheless told the Supreme Court that "the scarcity rationale is totally, surely, and finally defunct." *Id.* at 37. They argued that "The antiquated notion of spectrum scarcity can no longer serve as a basis for according only 'relaxed scrutiny' to content restrictions in the broadcast media." *Id.* at 38.[16]

Perhaps in response to these arguments, Justice Thomas stated in his concurrence that "I am open to reconsideration of *Red Lion* and *Pacifica* in the proper case." *FCC v. Fox Television Stations, Inc.*, 129 S.Ct at 1822. He repeatedly referred to the two cases together, opining that "*Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity." *Id.*, 129 S.Ct at 1820[17]

Although it evidently abandoned reliance on *Red Lion* in the Supreme Court, in its earlier brief to this Court, the FCC cited *Red Lion* and referenced "spectrum

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[16]See also 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. ("foundations of [*Red Lion*] are even more moth-eaten than those of *Pacifica*")

[17]See also, *id.* at 3 ("*Red Lion* adopted, and *Pacifica* reaffirmed, a legal rule that lacks any basis in the Constitution"); *id.* ("the doctrinal incoherence of *Red Lion* and *Pacifica*"), *id.* at 4 ("[t]he justifications relied upon by the Court in *Red Lion* and *Pacifica*"); *id.* ("treatment of broadcasters under...*Red Lion* and *Pacifica*").

scarcity" in arguing for a lenient standard of review for indecency regulation.[18]

Despite these references, there is no need to reconsider *Red Lion* in this case, even if it proves necessary to revisit *Pacifica*.

A. THERE ARE SIX REASONS WHY *RED LION* IS IRRELEVANT HERE.

Red Lion is inapposite. The FCC (1) did not rely on *Red Lion* or scarcity in its orders in this case. Moreover, the Supreme 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*, its *Golden Globes Order,* and its *Remand Order.* This Court need not, and cannot,

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[18] 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 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." Brief of Petitioners Federal Communications Commission and United States, No. 06-1760ag, December 6, 2006 at 58.

evaluate a basis for an agency decision not provided by the agency.[19]

Second, the Supreme Court has recognized that *Red Lion* is not precedent for indecency regulation. In *Pacifica* itself, it explicitly rejected grounding indecency regulation on the *Red Lion* scarcity rationale though the FCC order upheld in *Pacifica* listed scarcity as one of its four bases for authority.[20] The Court disregarded that basis and rested its decision instead on the FCC's three other bases.[21] 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, it has never been held to justify censorship."[22] Indeed, in 1987, the Commission explicitly abandoned scarcity as a justification for indecency regulation, stating that "we no longer consider the argument of spectrum scarcity to provide a sufficient basis for indecency regulation...." *Pacifica Found., Inc.,* 2 FCCRcd

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[19] *SEC v. Chenery Corp*., 332 U.S. 194 (1947); *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.").

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

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

[22] *Id.* at 770, n 4 (Brennan, J., dissenting) (citations and internal quotations omitted).

2698, 2699, *aff'd on recon., Infinity Broadcasting Corp. of Pa.*, 3 FCCRcd 930 n. 11 (1987), *aff'd in part, rev'd in part on other grounds, Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

Third, *Red Lion* and *Pacifica* rest on entirely 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.[23] *Pacifica*, by contrast, rests on broadcast media's pervasiveness, accessibility to children, and invasiveness.[24]

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.[25] 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,"[26] as well as the right to "receive suitable access to social, political, esthetic, moral and other ideas and experiences,"[27] and the right to the most effective use of the spectrum for communication.

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

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

[25] *See, e.g.*, *Sable Communications Inc. v. FCC*, 492 U.S., 115, 126 (1987).

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

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

Fifth, *Pacifica* and *Red Lion* apply to different types of laws. *Pacifica*'s constitutional holding applies exclusively to laws *restricting* indecency.[28] *Red Lion* applies to more pervasive laws which *promote* discussion of issues 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),[29] (2) laws ensuring an informed citizenry through promoting political, educational, or noncommercial content,[30] and (3) spectrum policy rules, from

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

[29] *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. 273 (2009).

[30] 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 29; 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 to promote political, educational, and noncommercial content do not single out any content *for suppression*. In a range of different areas, promoting democratic speech is subject to little scrutiny; these areas include subsidies, limited public forums, speech exceptions, exceptions in copyright laws, media policy, and broadcast regulation. *See* Ammori, *supra* note 29. *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.*

satellite television to wireless Internet. These 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.[31] *Red Lion* has been cited as support for cases involving terrestrial radio and TV broadcasting, satellite broadcasting,[32] and (though the *Red Lion* standard does not explicitly apply) for the regulation of phone companies[33] and cable companies.[34]

Strong Supreme Court precedent therefore shows that the panel should not

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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).

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

[32] *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).

[33] *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).

[34] *Turner II,* 520 U.S. at 227 (Breyer, J., concurring).

rely on or question *Red Lion* here.

B. UNLIKE *RED LION*, REVISITING *PACIFICA* WOULD AFFECT A LIMITED DOMAIN, WHERE STRICT SCRUTINY ALREADY APPLIES.

For reasons set forth above, Intervenors believe that the FCC's policies do not pass the standard approved in *Pacifica*. However, even if this Court were to find it necessary to suggest that *Pacifica* should be reconsidered, such an action would be of limited effect on the broader regulatory landscape.

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

As shown above, no case relying on *Pacifica* has explicitly applied a standard other than strict scrutiny. Thus, reconsidering *Pacifica* to provide broadcasters greater breathing room on indecency would likely have a minimal, predictable impact.

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

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

Red Lion continues to serve as a bedrock for valuable telecommunications policy. Although Intervenors have already explained why it would be error to reach *Red Lion* in this case, the *Red Lion* principles are so important that Intervenors will nonetheless explain 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[36] 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 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.

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[36] *See, e.g.*, *FCC v. NCCB, supra; 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).

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,[37] the Supreme 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.[38] In balancing those rights, the government must recognize that the "rights of the public" are "paramount"[39] - not the rights of powerful lobbies such as the broadcasters, cable operators, phone companies, or even the technology companies.[40] Those paramount public rights include the right

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[37] *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.").

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

[39] *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.").

[40] *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

to diverse sources and political information.

1. *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.[41] The public should receive access to "information from diverse and antagonistic sources" and these diverse sources should be disseminated widely to all.

The Supreme Court has endorsed attempts to foster diverse information sources in cases involving broadcasting,[42] cable,[43] and newspapers,[44] and has upheld lower courts endorsing diversity of information sources through telephone

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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.

[41] 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 29.

[42] *See, e.g.*, *CBS, Inc. v. FCC*, *supra*.

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

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

networks.[45] In the seminal cable television case, *Turner Broadcasting System v. FCC*, 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."[46] 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 broadcasting or structuring spectrum.[47]

Laws that further diverse and antagonistic sources include ownership limits and must-carry rules. For example, relying partly on *Red Lion*, the Supreme Court[48] and lower courts[49] have upheld broadcast media ownership limits (for radio

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[45] *See United States v. AT&T*, 552 F. Supp. at 183-86.

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

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

[48] *FCC v. NCCB*, *supra*.

[49] *See, e.g.*, *Prometheus Radio Project v. FCC*, *supra*; *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d at 167.

and TV,[50] locally and nationally,[51] vertically and horizontally[52]) with minimal scrutiny under the First Amendment, as fostering diverse sources.[53] 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.[54]

This Circuit's consideration of the FCC's "fin-syn" and "prime time access" rules presents a paradigmatic example of the importance of the Red Lion precedent. *See Mt. Mansfield Television, Inc. v. FCC*, *supra*; *Nat'l Assn. of Independent Television Producers and Distributors v. FCC*, *supra*. "Between 1957 and 1968, the share of network evening program hours either produced or directly controlled by networks rose from 67.2% to 96.7%," *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d at 482. To address this diminution in program source diversity, the FCC adopted rules requiring that one half hour of "prime time" be programmed by in-

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

[51] *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).

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

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

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

dependent (*i.e.*, non-network affiliated) programming and prohibiting networks from controlling re-run "syndication" rights. In response to First Amendment challenge, Judge Hays relied on *Red Lion* in holding that "[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.'" *Id.*, 442 F.2d at 477. *See also Nat'l Assn. of Independent Television Producers and Distributors v. FCC*, 516 F.2d at 531-32 (reaffirming Mt. Mansfield against renewed challenge).

The Supreme Court has also upheld attempts to ensure the "widest possible dissemination" of various 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.[55] When the FCC rou-

[55] *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.").

tinely imposes build out requirements on wireless licensees, [56] it does not face First Amendment challenges like the ones raised by cable operators against similar build-out laws.[57]

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

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

In the broadcast arena, the Supreme Court has consistently upheld laws designed to promote an "informed electorate"[58] by promoting "suitable access" to diverse political and educational speech. That is, government can engage in "efforts

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[56] *See, e.g.*, *Service Rules for the 698-746, 747-762 And 777-792 Mhz Bands, WT Docket No. 06-150*, 23 FCCRcd 8047, 8053-54 (2008) (regarding build-out for public safety network); *id.*, 23 FCCRcd at 8135 (Statement of Chairman Martin) ("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.").

[57] *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*, the Supreme 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.").

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

to enhance the volume and quality of coverage of public issues through regulation of broadcasting."[59] 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."[60] In 2004, the Supreme Court also relied on *Red Lion* to support disclosure requirements regarding political campaigns, meant to inform the public about political campaign activity.[61] Similarly, the "PTAR" rules upheld in *Nat'l Assn. of Independent Television Producers and Distributors v. FCC* contained incentives to encourage news programming. *Id.*, 516 F.2d at 529, 537-38. 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.[62] Significantly, no party challenged the adoption of these

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[59] *FCC v. NCCB*, 436 U.S. at 800 (1978).

[60] *See, e.g., Becker v. FCC,* 95 F.3d 75 (D.C. Cir. 1996) (applying *CBS, Inc. v. FCC* in finding that Congressional candidate had the right to buy prime time for commercials addressing abortion issues).

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

[62] *Children's Television Programming*, 11 FCCRcd 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

rules.

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.[63] Must-carry rules often favor sources that provide noncommercial educational content.[64]

3. *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

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concluded the Act was constitutional under *Red Lion*. S. Rep. No. 227, 101st Cong., 1st Sess. 17 (1989).

[63] *See, e.g.*, *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943), *aff'd sub nom. Associated Press v. United States*, 326 U.S. 1 (1945). ("[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).

[64] *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).

do so in conjunction with international coordination and treaty obligations.[65] 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 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.[66] Often, the FCC must "clear" bands of existing users.[67] The FCC must also determine the length of any license term,

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[65] *See, e.g.*, *Biennial Regulatory Review, International Bureau*, 22 FCCRcd. 3138, 3142 (2007).

[66] *See, e.g.*, *Service Rules for the 698-746, 747-762, and 777-792 MHz Bands, Second Report & Order*, 23 FCCRcd 8047, 8053-54 (2007) ("*700 MHz Auction Order*").

[67] *Improving Public Safety Communications in the 800 MHz Band*, 19 FCCRcd. 14969, 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-

which could vary greatly, in theory, from years to seconds. For example, Google co-founder Larry Page recently 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 spots.[68]

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.[69] End-user "smart radios" can manage interference on their own using advanced computing technologies.[70] The most famous example of unlicensed use today is likely Wi-Fi wireless Internet.[71] Today, almost every laptop is manufactured with Wi-Fi capability built into it and hundreds of millions use the technology daily. Innovators created Wi-Fi by using unlicensed allocations of "garbage spectrum

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2025 MHz band of BAS incumbents within thirty months of the effective date of this Report and Order.").

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

[69] *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).

[70] Benkler, *Overcoming Agoraphobia*, *supra* note 69, at 394-400.

[71] *See, e.g.*, *Spectrum Policy Task Force Report*, ET Docket No. 02-135 (rel. Nov. 25, 2002) http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.doc.

bands" long considered useless, which had been used by microwaves and garage door openers.[72] Minimal certification ensures unlicensed devices do not interfere.[73] 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.[74] That is, the more devices, the more capacity for all.[75]

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 some Court would someday subject spectrum policy to intrusive second-guessing by the judiciary, this case is not the appropriate vehicle for that decision.

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

[73] *See, e.g.*, 47 CFR §15.5.

[74] Benkler, *Some Economics*, *supra* note 69, at 44-47.

[75] *Id.* The FCC can also permit limited unlicensed uses in bands that are licensed. *See Spectrum Policy Task Force Report*, *supra* note 71, at 5 (discussing underlays).

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 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.[76] Reconsidering *Red Lion*, however, would not affect the fairness doctrine, which is long-repealed.[77] 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.[78] 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

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[76] *Syracuse Peace Council v. FCC*, 867 F.2d 654, 665 (DC Cir. 1989).

[77] *See id.* (fairness doctrine); *Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269 (DC Cir. 2000) (political editorial and political attack rules).

[78] *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).

political coverage.[79] Years later, the FCC abandoned the doctrine based on its evaluation of such evidence.[80]

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,[81] commercial speech,[82] indecency,[83] or particular political viewpoints.[84] Under the *status quo*, *Red Lion* is not permitting content-based laws. If *Red Lion* were nonetheless ripe for revisitation, broadcasters can bring the appropriate case. This is not such a case.

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

If *Red Lion* were revisited, either all spectrum licenses would be consti-

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[79] *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.")

[80] *Syracuse Peace Council*, *supra*.

[81] *See FCC v. League of Women Voters of California*, *supra*.

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

[83] *See Action for Children's Television v. FCC*, *supra*. 58 F.3d at 660.

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

tutionally suspect or constitutionally protected such that modifications would face heightened scrutiny.

1. 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,* 307 U.S. 496 (1939), and *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992), government cannot license speakers. More importantly, government cannot silence the millions of Americans lacking a license.[85] 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.[86] First, it is said, scarcity is less significant now than when *Red Lion* was decided, because technological changes enable more broadcasters to use the spectrum. Second, it is argued that scarcity is

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[85] *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.").

[86] *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)

a fact of economic life; like spectrum, ink and paper used 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.[87]

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.[88] As noted, Wi-Fi uses unlicensed spectrum, providing million of Americans with access to the Internet. Responding to advances in technology, the FCC has recently adopted rules allowing unlicensed use of "white spaces" on the television dial.[89] 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 Internet access a-

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

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

[89] *See In the Matter of Unlicensed Operation in the TV Broadcast Bands, Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, 23 FCCRcd 16807 (2008), review pending.

vailable and affordable to far more Americans,[90] at a time when we have fallen alarmingly behind our global competitors in Internet speeds, price, and adoption.[91] 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.[92]

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.[93] There is no benefit to letting spectrum lie fallow. Unlike water or food, we cannot "save" unused spectrum for later communications, commerce, or

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[90] *See* Woyke, *supra* note 68 (quoting Google co-founder Larry Page).

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

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

[93] *See See Spectrum Policy Task Force Report*, *supra* note 71, 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.

public safety.[94] 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.[95]

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.[96] 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.[97] Indeed, the real economic

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[94] *See, e.g.*, Benkler, *Some Economics*, *supra* note 69.

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

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

[97] Sascha D. Meinrath & Michael Calabrese, *Unlicensed "White Space Device" Operations on theTV Band and the Myth of Harmful Interference*, March 2008, http://www.newamerica.net/files/WSDBackgrounder.pdf.
See also Bill McConnell, *Radical Thinker: Hazlett's Theories Attract Feds, Repel*

value in 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.

2. 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 System v. FCC*.[98] This scenario is less likely than the first proposed 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 speak-

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Broadcasters, BROADCASTING & CABLE, Apr. 26, 2004.

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

ers 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.[99] 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 First Amendment, national cable ownership limits;[100] vertical cable ownership limits;[101] common carriage rules applied to telephone video service;[102] and even rules meant to ensure competition and openness in the

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

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

[101] *Id.*

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

provision of Internet service.[103] 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* handicaps government attempts to increase competition.[104]

Such cases and the 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,[105] permitting local governments to provide cable service (and upsetting cable monopolies),[106] rules forbidding exclusive

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[103] *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.Ore.1999), *aff'd in* 216 F.3d 871 (9th Cir. 2000) (rejecting First Amendment challenge, classifying the law as an economic regulation).

[104] *See Time Warner Entm't. Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001)

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

[106] *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.").

agreements with apartment complexes,[107] retransmission consent,[108] carriage for public, educational, and governmental channels,[109] carriage for commercial leased access channels,[110] program access requirements,[111] and national horizontal and vertical ownership limits.[112]

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

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[107] *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").

[108] *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).

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

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

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

[112] *Time Warner Entm't. Co., LP v. United States*, 211 F.3d 1313 (D.C. Cir. 2000) (facial challenge), *Time Warner Entm't. Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (applied challenge).

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.[113] Justice 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

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[113] *See, e.g.*, National Cable & Telecommunications Association, *ex parte* submission, CS Dkt. No. 98-120, filed July 9, 2002 (by Laurence Tribe, for cable industry lobby)
http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513201336
National Association of Broadcasters, *ex parte* submission, CS Dkt. No. 98-120, filed August 5, 2002 (by Jenner & Block LLP)
http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513284982

sources.[114]

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 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.

F. BROADCAST SPECTRUM IS MORE SCARCE AND VALUABLE THAN EVER.

Even if one were to find it necessary in this case to examine if spectrum scarcity still pertains, there is no question that spectrum is more scarce and more valuable in the sense contemplated by *Red Lion.*

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[114] *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 Fried used to call Lochnerizing the First Amendment").

Red Lion makes plain that the scarcity to which the Court referred was determined by demand:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same 'right' to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

Red Lion, 395 U.S. at 388-89.

Congress greatly increased the value of television licenses in 1992 by affording, free of charge, free cable must-carry rights to all incumbent television stations.[115] And, while Congress could have opened more spectrum for broadcast use, or move to more technologically advanced spectrum sharing and unlicensed models for broadcasting, it has not done so. Indeed, as amended in 1996, the Communications Act not only reserves some of the most valuable spectrum for the exclusive use of broadcasters, free of charge, but it makes that reservation more exclusive than before by eliminating "comparative applications" whenever an in-

[115] *See* Sections 3 and 4 of the Cable Television Consumer Protection and Competition Act of 1992, codified at 47 U.S.C. §§534-535. These are the provisions upheld against constitutional challenge in the *Turner* cases.

cumbent broadcaster seeks renewal.[116]

In the Telecommunications Act of 1996, Congress also facilitated the transition to digital television by providing that each incumbent television station would automatically receive a bloc of "new" digital spectrum similar in size and propagation qualities to its "old" analog allocation.[117] With the repeal of "comparative hearings" incumbents were the only parties eligible to utilize the "new" digital spectrum and the must-carry and other privileges which came with it. Parts of the "old" analog TV spectrum were reserved for public safety uses and the remainder was auctioned off, realizing approximately $19 billion dollars.[118] This helps value the adjacent digital television spectrum which has been given, free of charge, exclusively and without competition, to incumbent television stations.[119] One

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[116] *See* Section 204(a), Telecommunications Act of 1996, codified as 47 U.S.C. §309(k); Christopher Sterling, *Transformation: The 1996 Act Reshapes Radio*, 58 FED. COMM'S L. J. 593, 595-96 (2006) ("Put simply, the 'comparative' aspect of renewals was eliminated. Renewals became all but automatic, making the eight-year term more a matter of minor administrative review than any real threat of a loss of license for outlets that broadcast for decades.")

[117] *See* 47 U.S.C. §336(a)(1).

[118] One reason this spectrum is so valuable is because it has superior propagation qualities.

[119]There is also great demand for much of the broadcast radio band. Indeed, when the FCC created a new "low power" FM radio service, Congress enacted legislation restricting the number of such stations that could be authorized. See Section 632 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001, Public Law No. 106-553.

article predicted that the "old" spectrum

> has the potential to change the course of history for every player in the communications-services business.
>
> The spectrum, which was previously used for UHF and VHF television, happens to be ideal for wireless-broadband applications. It easily penetrates walls, and you could use it for voice, data or video -- which means it could offer new competition for cell phones, for DSL and cable modems, and for cable- and satellite-TV service.

Big Bidding Battle Shapes Up for "Beachfront" Spectrum, BARRON'S, Dec. 3, 2007,
http://online.barrons.com/article/SB119646744776010089.html

Thus, the proper question is not how many outlets there are, or how many outlets are technologically feasible, but how much demand is there for the available spectrum in light of the regulatory scheme. Viewed in that context, broadcast spectrum is far more scarce than ever. Until such time as Congress opens up more spectrum for broadcast use, or takes away the special privileges given only to those licensed to use the spectrum reserved for broadcasting, the spectrum is "scarce" for purposes of public policy.

CONCLUSION

Applying *Pacifica*, this Court should rule that the orders under review were issued in violation of the Constitution. Even if this court finds it necessary to revisit the factual underpinnings of Pacifica's "pervasiveness" rationale, it should do so, and find that the orders were unconstitutional. However, this Court need not

and 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.

WHEREFORE, this Court should vacate the *Omnibus Order* and the *Remand Order* in the manner described above, and grant all such other relief as may be just and proper.

Respectfully submitted,

Andrew Jay Schwartzman
Parul Desai
Matthew Wood
Media Access Project
Suite 1000
1625 K Street, NW
Washington, DC 20006
(202) 232-4300

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(5)-(7), FEDERAL RULES OF APPELLATE PROCEDURE

This brief complies with the type volume limitations of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because it contains 11463 words.

This brief complies with the typeface requirements of Rule 32(a)(5), Federal Rules of Appellate Procedure, and the type style requirements of Rule 32(a)(6), Federal Rules of Appellate Procedure, because it has been prepared in a proportionately based typeface using WordPerfect in 14 point New Times Roman.

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Andrew Jay Schwartzman