No. 13-1124

In the Supreme Court of the United States

MINORITY TELEVISION PROJECT, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
MARK B. STERN
SAMANTHA L. CHAIFETZ
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

JONATHAN B. SALLET
Acting General Counsel
DAVID M. GOSSETT
Acting Deputy General Counsel
JACOB M. LEWIS
Associate General Counsel
MAUREEN K. FLOOD
Attorney
Federal Communications Commission
Washington, D.C. 20554

QUESTIONS PRESENTED

Federal law prohibits non-commercial broadcasters from airing "advertisement[s]," defined as paid material intended "to promote any service, facility, or product offered by any person who is engaged in such offering for profit," "to express the views of any person with respect to any matter of public importance or interest," or "to support or oppose any candidate for political office." 47 U.S.C. 399b(a); see 47 U.S.C. 399b(b)(2). The questions presented are as follows:

1. Whether this Court should overrule its precedent and subject broadcast regulation to strict scrutiny under the First Amendment.

2. Whether the restrictions on non-commercial broadcasters' ability to air paid political and issue advertisements should be invalidated as an impermissible regulation of political speech.

3. Whether the restrictions on non-commercial broadcasters' ability to air advertisements are narrowly tailored to advance a substantial government interest.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 12
Conclusion 29

TABLE OF AUTHORITIES

Cases:

CBS, Inc. v. *FCC*, 453 U.S. 367 (1981) 17
Citizens United v. *Federal Election Comm'n*, 558 U.S. 310 (2010) 8, 20, 21
FCC v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009) 16
FCC v. *League of Women Voters*, 468 U.S. 364 (1984) 3, 8, 13, 16, 17
FCC v. *Pacifica Found.*, 438 U.S. 726 (1978) 15, 19
FCC v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940) 16
National Broad. Co. v. *United States*, 319 U.S. 190 (1943) 16, 18
National Endowment for the Arts v. *Finley*, 524 U.S. 569 (1998) 14, 15
Nixon v. *Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000) 27
Red Lion Broad. Co. v. *FCC*, 395 U.S. 367 (1969) 13, 16
Sabri v. *United States*, 541 U.S. 600 (2004) 15
Syracuse Peace Council, *In re*, 2 F.C.C.R. 5043 (1987), review denied, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990) 17
Texas v. *Johnson*, 491 U.S. 397 (1989) 14

Cases—Continued: Page

Turner Broad. Sys., Inc. v. *FCC*, 512 U.S. 622 (1994) 15, 16, 17, 20, 26, 28

Turner Broad. Sys., Inc. v. *FCC*, 520 U.S. 180 (1997)........28

United States v. *IBM Corp.*, 517 U.S. 843 (1996)................12

Constitution, statutes and regulations:

U.S. Const. Amend. I 7, 14, 16, 17, 18

Educational Television Act of 1962, Pub. L. No. 87-447, 76 Stat. 64 3

Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365....................3

Radio Act of 1927, ch. 169, 44 Stat. 1162 2

2 U.S.C. 441b....................20

47 U.S.C. 301 2

47 U.S.C. 303 (2006 & Supp. V 2011) 2

47 U.S.C. 303(a)-(b) 22

47 U.S.C. 307 2

47 U.S.C. 309(j)(1) 22

47 U.S.C. 309(j)(2)(C)....................22

47 U.S.C. 394 22

47 U.S.C. 396 22

47 U.S.C. 396(a)(5)....................3

47 U.S.C. 396(a)(8)....................3

47 U.S.C. 396(a)(9)....................3

47 U.S.C. 396(b) 3

47 U.S.C. 396(g) 3

47 U.S.C. 396(k) 3

47 U.S.C. 399a 5, 6, 22, 23

47 U.S.C. 399b....................*passim*

47 U.S.C. 399b(a) 6

Statutes and regulations—Continued: Page

47 U.S.C. 399b(a)(1) ... 11
47 U.S.C. 399b(a)(2) ... 12, 20
47 U.S.C. 399b(a)(3) ... 12, 20
47 U.S.C. 399b(b)(2) ... 6
47 U.S.C. 504(a) ... 7
47 U.S.C. 534 ... 20
47 U.S.C. 534(b)(6) ... 20
47 U.S.C. 535 ... 20
47 U.S.C. 535(g)(5) ... 20
47 C.F.R.:
  Section 3.621 (1953) ... 3
  Section 3.621(d) (1953) ... 4
  Section 3.621(e) (1953) ... 4
  Section 73.503 ... 22
  Section 73.503(d) ... 6
  Section 73.621(a) ... 2, 14
  Section 73.621(b) ... 2
  Section 73.621(e) ... 6

Miscellaneous:

Amendment of Section 3.606 of the Commission's Rules and Regulations, In re, 41 F.C.C. 148 (1952) ... 2, 22
Amendment of Those Provisions of Pt. 73 of the Commission's Rules which Describe & Delimit the Nature of Noncommercial, Educ. FM & Television Broad. Serv., and Related Matters, In re, 22 F.C.C.2d 903 (1970) ... 3
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, In re, 28 F.C.C.R. 10,496 (2013) ... 19

Miscellaneous—Continued: Page

Commission Policy Concerning the Noncommercial Nature of Educ. Broad. Stations, In re:
69 F.C.C.2d 200 (1978) 22
86 F.C.C.2d 141 (1981) 3, 4, 5, 23, 26
90 F.C.C.2d 895 (1982) 5, 6, 23
3 Fed. Reg. 312 (Feb. 9, 1938) 2, 3
17 Fed. Reg. (May 2, 1952):
pp. 3908-3909 2
p. 3911 4
H.R. Rep. No. 82, 97th Cong., 1st Sess. (1981) 23
Repeal or Modification of Personal Attack & Political Editorial Rules, In re, 15 F.C.C.R. 19,973 (2000) 18
S. Rep. No. 227, 101st Cong., 1st Sess. (1989) 18
TVB Local Media Marketing Solutions:
Local Market Broadcast Television Overwhelmingly the Biggest Media Impact Maker on the 2102 Presidential Election (Jan. 17, 2013), http://www.tvb.org/4685/about_tvb/press_room/press_room_article/1366430 25
The 2012/2013 Television Season: The More Things Change . . . , http://www.tvb.org/measurement/2012-13_Season_Recap (last visited May 20, 2014) 19

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-80a) is reported at 736 F.3d 1192. The earlier opinion of a panel of the court of appeals (Pet. App. 83a-145a) is reported at 676 F.3d 869. A separate memorandum opinion of the court of appeals panel is not published in the *Federal Reporter* but is reprinted at 475 Fed. Appx. 671. The opinion and order of the district court (Pet. App. 146a-198a) is reported at 649 F. Supp. 2d 1025.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 2013. On February 25, 2014, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including March 17, 2014, and the petition was filed on that date. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Federal law requires radio and television stations wishing to transmit over-the-air signals to obtain licenses to broadcast on particular frequencies. See Radio Act of 1927, ch. 169, 44 Stat. 1162; see also 47 U.S.C. 301, 307. The Federal Communications Commission (FCC or Commission) is authorized to regulate use of the radio frequency spectrum, and since the 1930s, the FCC has set aside certain broadcasting frequencies for noncommercial educational radio stations. See 3 Fed. Reg. 312 (Feb. 9, 1938). In 1952, the Commission extended its spectrum reservation policy to set aside certain television channels for use by noncommercial educational stations. See 17 Fed. Reg. 3908-3909 (May 2, 1952) (*In re Amendment of Section 3.606 of the Commission's Rules & Regulations*, 41 F.C.C. 148, 158-159 (1952) (*Sixth Report and Order*)).

The channels set aside for noncommercial use may be "licensed only to nonprofit educational organizations upon a showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service." 47 C.F.R. 73.621(a); see 47 C.F.R. 73.621(b); see also 47 U.S.C. 303 (2006 & Supp. V 2011) (authorizing the FCC to classify stations and to "[p]rescribe the nature of the service to be rendered by each class of licensed stations").

In addition to reserving channels for noncommercial broadcasting (without charge to licensees), the federal government offers noncommercial broadcasters direct financial support. Congress first provided

significant federal aid in the 1960s, see Educational Television Act of 1962, Pub. L. No. 87-447, 76 Stat. 64, and funding was increased following the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, which created the Corporation for Public Broadcasting (CPB). See 47 U.S.C. 396(k); see also *FCC* v. *League of Women Voters*, 468 U.S. 364, 367-369 (1984).

The CPB is a non-profit corporation established to disburse funding to noncommercial stations in support of operations and educational programming. 47 U.S.C. 396(b) and (g); see 47 U.S.C. 396(a)(5), (8) and (9) (explaining that public stations are "a source of alternative telecommunications services for all citizens of the Nation," and that it is "in the public interest * * * to ensure that all citizens have access" to their programming). The vast majority of public stations (though not petitioner) receive funds from the CPB. See Pet. App. 151a.

b. From the beginning of public broadcasting, the Commission's regulations have prohibited public broadcasting licensees from airing paid advertising. See 47 C.F.R. 3.621 (1953); 3 Fed. Reg. at 312; see also, *e.g.*, *In re Amendment of Those Provisions of Pt. 73 of the Commission's Rules Which Describe & Delimit the Nature of Non-Commercial, Educ. FM & Television Broad. Serv., and Related Matters*, 22 F.C.C.2d 903 (1970); *In re Commission Policy Concerning the Noncommercial Nature of Educ. Broad. Stations*, 86 F.C.C.2d 141 (1981) (*Second Report*). Public broadcasters were initially not permitted to air any promotional content for goods and services (even if uncompensated), and announcements of program underwriters or donors were limited to identifying

them by name only. *E.g.*, 47 C.F.R. 3.621(d) and (e) (1953). The FCC explained that "the objective for which special educational reservations [were] established—i.e., the establishment of a genuinely educational type of service—would not be furthered by permitting [noncommercial educational stations] to operate in substantially the same manner as commercial applicants." 17 Fed. Reg. at 3911.

In 1978, the FCC initiated a rulemaking proceeding "with an eye toward striking a reasonable balance between the financial needs of [non-commercial] stations and their obligation to provide an essentially noncommercial broadcast service." *Second Report*, 86 F.C.C.2d at 141. In undertaking that effort, the FCC noted that its "interest in creating a 'noncommercial' service has been to remove the programming decisions of public broadcasters from the normal kinds of commercial market pressures under which broadcasters in the unreserved spectrum usually operate." *Id.* at 142.

At the conclusion of that proceeding, the FCC determined that some of its rules restricting unpaid content and underwriter announcements could be relaxed, but that the general ban on paid advertising remained necessary to preserving the noncommercial nature of public broadcasting. See *Second Report*, 86 F.C.C.2d at 142-143. The FCC's "major reexamination," *id.* at 142, confirmed that the differences in the programming offered by noncommercial and commercial broadcasters reflected their disparate funding sources, with the former relying on donations and government support and the latter relying on advertising revenues and thus being sub-

ject to significant "marketplace pressures," *id*. at 145-146.

The Commission found that preserving this distinction was critical to promoting and maintaining the distinctive "noncommercial character for public broadcasting." *Second Report*, 86 F.C.C.2d at 144; see *id*. at 142, 147; see also *In re Commission Policy Concerning the Noncommercial Nature of Educ. Broad. Stations*, 90 F.C.C.2d 895, 896 (1982) (*1982 Order*) (explaining that the FCC's revised rules "were designed to further the important governmental interest in preserving the essentially noncommercial nature of public broadcasting within a minimal regulatory framework by insulating public broadcasters from commercial marketplace pressures and decisions") (emphasis omitted).

c. In 1981, Congress enacted 47 U.S.C. 399a and 47 U.S.C. 399b in order to effectively codify the FCC's rules. Section 399b codified the prohibition on public broadcast stations airing "advertisement[s]," defined as:

> any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended—
>
> > (1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit;
> >
> > (2) to express the views of any person with respect to any matter of public importance or interest; or
> >
> > (3) to support or oppose any candidate for political office.

47 U.S.C. 399b(a); see 47 U.S.C. 399b(b)(2); see also 47 U.S.C. 399a (regulating underwriter/donor acknowledgements).

In 1982, the FCC revised its regulations to reflect the new legislation, see 47 C.F.R. 73.503(d), 73.621(e), and subsequently issued guidance regarding the implementation of Sections 399a and 399b. The FCC observed that the new statutory provisions, like the preceding regulatory framework, sought to protect the "noncommercial nature of public broadcasting" while "providing public broadcasters the opportunity to attract additional financial support." *1982 Order*, 90 F.C.C.2d at 896.

2. a. Petitioner is the licensee of KMTP-TV, a noncommercial television station in San Francisco, California. Following complaints by another broadcaster about KMTP-TV's underwriting announcements, the Commission's Enforcement Bureau (Bureau) determined in 2002 that, in exchange for consideration, petitioner had broadcast more than 1900 announcements for for-profit underwriters that included promotional language, in violation of 47 U.S.C. 399b and 47 C.F.R. 73.621(e). See Pet. App. 238a-242a. The announcements included advertisements for State Farm, U-tron Computers, Ginko-Biloba Tea, Chevy Impala, Ford Explorer, and Korean Airlines. See *id.* at 239a, 241a.

The Bureau issued a Notice of Apparent Liability for Forfeiture in the amount of $10,000. Pet. App. 152a, 252a-253a, 255a. In later imposing the forfeiture recommended by the Bureau, the Commission found that the announcements at issue "exceeded the identification-only purpose of underwriting announcements and were clearly promotional," and thus were prohibited "advertisement[s]" within the meaning of 47 U.S.C. 399b. Pet. App.

226a. The Commission accordingly ordered petitioner to pay a $10,000 forfeiture "for willfully and repeatedly broadcasting advertisements in violation of Section 399B." *Id.* at 230a.

b. In the district court, petitioner attempted to challenge the forfeiture order and also asserted a facial First Amendment challenge to the constitutionality of 47 U.S.C. 399b. Pet. App. 147a-148a.[1]

The district court concluded that it lacked jurisdiction to hear petitioner's challenge to the forfeiture order (as well as petitioner's related, as-applied challenge to the constitutionality of Section 399b) because petitioner had paid the $10,000 to the FCC. See C.A. E.R. 55-58 (concluding that the district court's jurisdiction under 47 U.S.C. 504(a) was limited to the review of unenforced orders).

On cross-motions for summary judgment, the district court rejected petitioner's facial challenge to Section 399b. Pet. App. 146a-198a. The court observed that a "half-century of experience in both public broadcasting and commercial broadcasting" supported Congress's "reasoned legislative judgment" that these restrictions protect the fundamental distinction—in purpose and operation—between public and commercial broadcasting. *Id.* at 175a. The court concluded that Congress had made a "reasonable, predictive legislative judgment" when it determined that, if permitted, for-profit and political advertising would place "commercial pressures" on public broadcasters

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[1] Petitioner had originally filed a petition for review in the court of appeals, after which it paid the $10,000 forfeiture. Pet. App. 11a. The court of appeals transferred the case to the district court. *Ibid.*

that would threaten their unique programming. *Id.* at 191a.

c. A panel of the court of appeals unanimously upheld Section 399b as applied to advertising for the goods and services of for-profit entities, while invalidating it with respect to paid political advertising. Pet. App. 83a-145a. Judge Paez dissented in part, arguing that Section 399b should be upheld in its entirety. *Id.* at 130a-145a. In a separate, unpublished disposition, the court of appeals panel affirmed the district court's conclusion that it lacked jurisdiction to address petitioner's as-applied challenge to the FCC forfeiture order. See 475 Fed. Appx. 671.

d. The court of appeals granted the government's petition for rehearing en banc. Pet. App. 81a-82a. The en banc court then upheld Section 399b in its entirety and thus affirmed the district court's grant of summary judgment to the government. *Id.* at 1a-80a.

i. The en banc court reviewed the statutory restrictions under the intermediate scrutiny standard set out in *League of Women Voters*, *supra*. Pet. App. 13a-15a. The court observed that "[t]his case is not a suitable one for * * * fundamental reconsideration" of that standard because of the absence of any record evidence that would permit the court to evaluate petitioner's arguments premised on the current state of communications technology. *Id.* at 16a & n.5. The court also rejected petitioner's contention that *Citizens United* v. *Federal Election Commission,* 558 U.S. 310 (2010), required application of strict scrutiny. The court noted that *Citizens United* "was not about broadcast regulation" but instead concerned "the validity of a statute banning political speech by corporations." Pet. App. 15a.

Applying intermediate scrutiny, the court of appeals noted that petitioner "does not contest the government's substantial interest" in "maintaining the unique, free programming niche filled by public television and radio" and "ensuring the diversity and quality of public broadcast programming." Pet. App. 21a-22a; see *id.* at 23a-26a. The court also found that the record before Congress in 1981, as well as the government's submissions in the district court, demonstrated that Section 399b was narrowly tailored to achieve that objective. The court observed that Congress's judgment in enacting the statute was informed by decades of experience, the extensive FCC rulemaking, and the "dozens of witnesses who testified, among other things, that '[c]ommercialization will make public television indistinguishable from the new commercial or pay culture cable services,' and that [noncommercial]-type programming 'is just not possible with the commercial constraints of providing a commercial service.'" *Id.* at 25a-26a (citations omitted); see *id.* at 16a-17a (discussing the "ample record," including the prior FCC proceedings, congressional hearings, and "thoughtful committee report"); *id.* at 27a-28a (discussing congressional record).

The court of appeals explained that "[t]he commercialization Congress feared was not restricted to typical commercial business advertising. Rather, Congress was worried about the commercialization of public broadcasting itself: the selling of airtime." Pet. App. 27a-28a; see *id.* at 33a, 35a-36a (observing that petitioner "mistakenly * * * equate[s] congressional focus on commercialization with for-profit businesses," when the threat Congress confronted was,

more broadly, "commercialization through advertising").

The court of appeals found that the summary-judgment record confirmed that the nature of public broadcast programming would be altered if public stations were permitted to compete with their commercial counterparts for advertising dollars. Pet. App. 19a (summarizing the evidence, including government and expert reports). The court noted the expert report of Stanford University Professor Emeritus Roger Noll, which concluded that "commercial broadcasting suffers from a 'market failure' in that a 'competitive, advertiser-supported television system leads to an emphasis on mass entertainment programming with insufficient attention to programs that serve a small audience, even if that audience has an intense desire to watch programs that differ from standard mass entertainment programs.'" *Id.* at 29a (quoting C.A. Supp. E.R. 14). As the court summarized, Professor Noll explained that, "in order to attract advertising dollars, [non-commercial] stations would have to change their programming to be more like that on commercial stations—programming that advertisers prefer because it attracts large audiences." *Ibid.*

The court of appeals also cited the testimony of Lance Ozier, the Vice-President for Planning and Policy of the WGBH Educational Foundation, who explained "that funding from federal and state government sources as well as foundations and other not-for-profit underwriters would be jeopardized if [non-commercial] stations were permitted to air paid advertisements." Pet. App. 29a-30a; see C.A. Supp. E.R. 3-4. The court noted Ozier's testimony "that the loss

of funding would not be restricted to those stations who chose to air advertisements: 'Every public station would face the consequences generally of a perceived deviation from the public education mission.'" Pet. App. 30a (quoting C.A. Supp. E.R. 8).

The court of appeals found the regulatory scheme to be neither under- nor over-inclusive. The court noted that petitioner "makes much of the fact that [Section] 399b does not prohibit advertising by non-profit entities." Pet. App. 39a. The court explained that "[t]here is, however, a documented reason for exempting this tiny slice of advertising from the overall restrictions—non-profit advertising is a drop in the bucket money wise and this limited advertising has no programmatic impact." *Ibid.*; see *id.* at 42a. By contrast, the court found that "[t]he government's evidence regarding the enormous sums spent on political advertising confirms Congress's prediction that, like advertising by for-profit entities, political advertising dollars have the power to distort programming decisions." *Id.* at 36a; see *id.* at 33a (observing that "Congress identified significant special interests that pump money into advertising" and that, "taken together," barring their advertisements has a "single effect: to prevent the commercialization of public broadcasting by prohibiting nearly all advertising").[2]

ii. Judge Callahan concurred in the majority's opinion insofar as it upheld 47 U.S.C. 399b(a)(1)'s prohibition on paid advertisements for for-profit entities. Pet. App. 49a. She dissented, however, from the

[2] Like the panel, the en banc court held that petitioner's as-applied challenge had correctly been dismissed for lack of jurisdiction. Pet. App. 47a-48a.

majority's determination that the prohibitions on issue and political-candidate advertisements under Section 399b(a)(2) and (3) are constitutional. *Ibid.*

iii. Chief Judge Kozinski, joined by Judge Noonan, dissented. Pet. App. 49a. The dissenters concluded that the government had not presented enough evidence "to satisfy a skeptical mind," and that the statute therefore should be struck down in its entirety. *Id.* at 76a, 80a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. In addition, this case is a poor vehicle for the wholesale re-examination of the constitutionality of broadcast regulation that petitioner seeks. That is so both because the case involves unique obligations placed on noncommercial broadcasters (rather than broadcast regulation generally), and because petitioner created no factual record below to support the contentions it now advances about economic and technological changes. Finally, petitioner has forfeited any as-applied challenge to the rules it challenges. Further review is not warranted.

1. Petitioner urges the Court to overrule its precedents establishing an intermediate standard of review for broadcast regulations and to subject such regulations to strict scrutiny instead. Pet. 14-28. "[E]ven in constitutional cases," however, *stare decisis* "carries such persuasive force" that the Court has "always required a departure from precedent to be supported by some 'special justification.'" *United States* v. *IBM Corp.*, 517 U.S. 843, 856 (1996) (brackets in original; citation omitted). No such special justification is present here. To the contrary, several circumstances

make this petition a particularly inapt vehicle for considering whether to overrule this Court's precedents.

a. Petitioner asks the Court to overrule *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) (*Red Lion*) and the decisions following it, *e.g.*, *FCC* v. *League of Women Voters*, 468 U.S. 364, 380 (1984) (intermediate scrutiny standard for broadcast regulation) (citing *Red Lion*, 395 U.S. at 377), based on what petitioner characterizes as "dramatic change" in the technology and economics of mass communications. Pet. 2; see Pet. 5-7, 15-20. As the court of appeals explained, however, "a thoughtful examination of the impact of * * * changes on the use of broadcast spectrum, market segmentation, and the like can hardly occur on a record bare of evidence of the impact of technological change." Pet. App. 16a n.5. The court further explained that the record here precluded such an examination because petitioner had "offered nothing other than sound bite platitudes" in support of its claims regarding technological change. *Ibid.* (noting that the en banc dissent likewise "offered nothing" to support its contentions "other than a series of newspaper articles, with the weight of such publications as ESPN Playbook and Variety"). The Court should decline a party's invitation to overrule longstanding precedent based on factual contentions that the party made no effort to substantiate in the record of the case.

This case also presents a poor vehicle for reconsidering the standard of review for broadcast regulation because the regulations at issue here apply only to non-commercial broadcasters. The question in this case is not (as it was in *Red Lion* and similar cases)

whether spectrum scarcity or other factors support general regulation of all broadcasters. Instead, the question is whether the government may permissibly set aside a small number of channels for licensees that commit to exclusively broadcast educational and other non-commercial programming, see 47 C.F.R. 73.621(a), and then hold those licensees to the terms of that bargain.

At bottom, petitioner's contention is that the First Amendment gives it the right to retain the valuable benefit it has received without payment—a broadcast license set aside for a non-commercial licensee—and then disregard the terms on which that license was granted. It is not clear that overruling *Red Lion* would advance petitioner's contention, or whether instead the claim would fail in light of the rule that the government may provide financial support for certain activities (as it has done here by allocating free spectrum to licensees like petitioner that promise to use it for noncommercial purposes) while defining the contours of what it intends to support. See *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 587-588 (1998); see also p. 3, *supra* (noting that most noncommercial licensees, unlike petitioner, receive funding from the CPB in addition to free broadcast spectrum).

Finally, further review is not warranted because the court of appeals found that there was no jurisdiction over petitioner's as-applied First Amendment claims, Pet. App. 47a-48a, and petitioner does not challenge that holding here. This Court has often decided First Amendment cases presenting both facial and as-applied claims on the "narrower," as-applied grounds. *E.g.*, *Texas* v. *Johnson*, 491 U.S. 397, 403 n.3

(1989). That approach is consistent with the principle that "[f]acial invalidation is, manifestly, strong medicine that has been employed by the Court sparingly and only as a last resort." *Finley*, 524 U.S. at 580 (internal quotation marks and citation omitted); see *Sabri* v. *United States*, 541 U.S. 600, 608-609 (2004) ("Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks."). Petitioner's failure to properly assert its as-applied challenge below precludes that sound adjudicative practice.

b. Even apart from the case-specific problems described above, petitioner identifies no sound basis for overruling this Court's precedents.

This Court has "long recognized that each medium of expression presents special First Amendment problems." *FCC* v. *Pacifica Found.*, 438 U.S. 726, 748 (1978) (*Pacifica*). "And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Ibid.*; see *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 637 (1994) (*Turner I*) ("[O]ur cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media."). As relevant here, this Court's decisions identify two primary rationales—the scarcity of available broadcast frequencies and the pervasive presence of the broadcast media—for the established rule that broadcast speech may be subject to greater content-based restrictions than other forms of communication. Although the record in this case does not permit "a thoughtful examination" of the impact of technological changes on the factors underlying this

Court's broadcast jurisprudence, Pet. App. 16a n.5; see p. 13, *supra*, the government would be prepared to demonstrate in the proper forum that the predicates underlying those decisions remain sound.

In applying the First Amendment to broadcast television and radio, this Court has attached significance to "the unique physical limitations of the broadcast medium." *Turner I*, 512 U.S. at 637.

> As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum. And if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all. The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters.

Id. at 637-638 (citation omitted); see, *e.g.*, *Red Lion*, 395 U.S. at 386-388; *National Broad. Co.* v. *United States*, 319 U.S. 190, 226 (1943); *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

Broadcast licensees have thus received important government assistance, *i.e.*, the license itself, and the availability of government enforcement mechanisms to prevent others from making unauthorized use of the licensee's allotted frequency or otherwise interfering with the licensee's use of the spectrum. The licensee's acceptance of those benefits has historically carried with it an enforceable obligation to operate the franchise in a manner that serves the public interest. See, *e.g.*, *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 505-506 (2009); *League of Women Voters*,

468 U.S. at 377; *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395 (1981). To be sure, a broadcaster's acceptance of a license does not constitute a waiver of all First Amendment protection. See *League of Women Voters*, 468 U.S. at 376-381. But, in light of the distinct physical attributes of broadcast media and the benefits licensees obtain from the government, restrictions on broadcast speech have long been subjected to less demanding First Amendment scrutiny than comparable restrictions on other forms of communication.

Petitioner contends (Pet. 15-20) that intervening technological developments have rendered the spectrum-scarcity rationale obsolete. It remains true, however, that "there are more would-be broadcasters than frequencies available in the electromagnetic spectrum." *Turner I*, 512 U.S. at 637. Broadcast licensees thus continue to receive important benefits from the federal regulatory scheme, even though they face competition from a greater range of alternative media than they did previously. So long as the federal government must exercise selectivity in allocating limited spectrum among numerous licensees (and broadcasters benefit from the use of a valuable public resource), it may constitutionally require licensees to accept content-based restrictions that could not be imposed on other communications media.

Petitioner relies on a Commission statement from 1987 disavowing the scarcity rationale for broadcast regulation, claiming that the statement represents an FCC "signal" that the rationale should be abandoned. Pet. 23 (citing *In re Syracuse Peace Council*, 2 F.C.C.R. 5043, 5053 (1987) (para. 65), review denied, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990)). Petitioner fails to mention, however,

that the Commission later "repudiated" that statement. *In re Repeal or Modification of Personal Attack & Political Editorial Rules*, 15 F.C.C.R. 19,973, 19,973 (2000) (para. 1); see *id.* at 19,979-19,981, (paras. 17-20). As the Commission explained, "the dicta in *Syracuse Peace Council* regarding the appropriate level of First Amendment scrutiny" on which petitioner now seeks to rely "has been rejected by Congress, this Commission, and the courts." *Id.* at 19,979 (para 17). The Commission further explained that the *Syracuse Peace Council* dictum's error (like petitioner's here) was in assuming that "the long-standing basis for the regulation of broadcasting" is "the absolute number of media outlets," when the actual rationale for the established regulatory regime is that "the radio spectrum simply is not large enough to accommodate everybody," so that "some are granted the 'exclusive use' of a portion of this 'public domain,' even though others would use it if they could." *Id.* at 19,980 (para. 18) (quoting *National Broad. Co.*, 319 U.S. at 213, and *CBS*, 453 U.S. at 395).

Equally unpersuasive is petitioner's contention that Congress has sent a "signal" that its own statutes regulating broadcasters should be subject to more stringent First Amendment scrutiny. Pet. 24-25. Congress has not amended or repealed the provisions of the Communications Act that authorize the FCC to regulate the distribution of broadcast licenses in the public interest. Congress also has not amended or repealed Section 399b, nor has it enacted any statute that directs reviewing courts to apply heightened scrutiny to any broadcast regulation. If anything, Congress has "signaled" (Pet. 24) precisely the opposite intent. See S. Rep. No. 227, 101st Cong., 1st

Sess. 10-16 (1989) (providing extensive analysis supporting the ongoing validity of the scarcity rationale and "strongly disagree[ing]" with contention that "technological changes in the broadcast media" had rendered it obsolete).

Even apart from the scarcity of broadcast spectrum and the nature of broadcast licensing, the Court in *Pacifica*, explained that regulation of broadcasted indecent material appropriately reflected the "uniquely pervasive presence in the lives of all Americans" established by broadcasting. 438 U.S. at 748. Broadcasting remains a pervasive medium of communications. Although substantial numbers of households now subscribe to cable or satellite, broadcast programming has retained a dominant position in the media universe. Broadcast television continues to be used exclusively in approximately 11.1 million households. See *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 28 F.C.C.R. 10,496, 10,592-10,593 (2013) (para. 198). Even households that subscribe to cable and satellite often use those technologies to access broadcast programming. See TVB Local Media Marketing Solutions, *The 2012/2013 Television Season: The More Things Change* . . . , http://www.tvb.org/measurement/2012-13_Season_Recap (last visited May 20, 2014) (reporting that "broadcast television dominates the American television landscape" and "closed another season as the mainstay of home entertainment," providing 96 of the top 100 programs among adults 25-54).

The continuing dominance of broadcast programming—despite the growth of non-broadcast means of accessing it—is in part attributable to regulatory

design. Cable and satellite services are required by statute to retransmit the programming aired by local broadcast stations, see 47 U.S.C. 534, 535, and to provide them favored channel positions, 47 U.S.C. 534(b)(6), 535(g)(5). In enacting these provisions, "Congress sought to preserve the existing structure of the Nation's broadcast television medium while permitting the concomitant expansion and development of cable television, and, in particular, to ensure that broadcast television remains available as a source of video programming for those without cable." *Turner I*, 512 U.S. at 652.

2. Petitioner contends (Pet. 28-32) that *Citizens United* v. *Federal Election Commission,* 558 U.S. 310 (2010), requires the application of strict scrutiny to Section 399b's prohibition on non-commercial stations' broadcast of paid political messages. See 47 U.S.C. 399b(a)(2) and (3). That argument lacks merit.

The court of appeals correctly recognized that *Citizens United* did not alter the relevant standard of review. Pet. App. 15a. In *Citizens United,* a corporation challenged, *inter alia*, the applicability and constitutionality of a provision of the Bipartisan Campaign Reform Act making it unlawful for a corporation (in contrast to an individual) to engage in certain political speech termed "electioneering communications." 558 U.S. at 318-319, 321 (quoting 2 U.S.C. 441b). Applying strict scrutiny, this Court invalidated the provision as an unconstitutional prohibition on political speech based on the speaker's corporate identity. *Id.* at 340, 342-366.

Petitioner notes that the restrictions on political speech at issue in *Citizens United* applied to communications distributed in various ways, including those

made via cable, satellite, and broadcast transmission, and that the Court declined to distinguish between "movies shown through video-on-demand"—which were at issue there—and "television ads." Pet. 30 (quoting *Citizens United*, 558 U.S. at 326). But as the Court's opinion makes clear, *Citizens United* involved a congressional effort to limit certain political speech by corporations, not an effort to regulate television broadcasters. See *Citizens United*, 558 U.S. at 354 ("By suppressing the speech of manifold corporations, * * * the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.").

The provisions at issue here, in contrast, do not single out any speaker or type of speaker, and they prevent no voices and viewpoints from reaching the public. The restrictions on political advertising, together with the other advertising restrictions in Section 399b, instead form part of the scheme by which a small portion of the broadcast spectrum is reserved for stations not dependent on advertising revenues.

3. The court of appeals correctly held that Section 399b is narrowly tailored to advance a substantial government interest. See Pet. App. 13a-16a, 20a-46a.

a. Petitioner "does not contest the government's substantial interest" in "maintaining the unique, free programming niche filled by public television and radio." Pet. App. 21a-22a; see *id.* at 23a-26a. The restrictions in Section 399b are narrowly tailored to further that purpose.

i. The restrictions on advertising are "an important piece of a comprehensive scheme to promote programming that is differentiated from the typical

commercial fare." Pet. App. 23a. The restrictions work together with other parts of "the integrated legislative package," *ibid.*, that authorize the FCC to set aside specific channels for noncommercial educational use, to exempt public television licensees from the competitive bidding process, and to grant them licenses without charge. 47 U.S.C. 309(j)(1) and (2)(C). Congress has also provided funding for public television stations through the CPB and has established a variety of other special requirements for public television stations. See, *e.g.,* 47 U.S.C. 303(a)-(b), 394, 396, 399a, 399b; 47 C.F.R. 73.503; see generally Nat'l Pub. Radio & PBS C.A. Amicus Br. Supporting the Govt's Pet. for Reh'g En Banc (NPR-PBS C.A. Amicus Br.).

Both the record before Congress and the evidence submitted to the district court amply demonstrate the critical importance of the advertising restrictions to this integrated scheme. Indeed, the absence of advertising has been the hallmark of public broadcasting from its inception. When the Commission first reserved frequencies for noncommercial television broadcasting in 1952, it already understood that commercial broadcasting, with its reliance on advertising sales for revenue, could not be expected to produce "a genuinely educational type of service." *Sixth Report and Order*, 41 F.C.C. at 166.

In 1978, the FCC undertook a multi-year study of the issue, including opportunities for public comment. *In re Commission Policy Concerning the Noncommercial Nature of Educ. Broad. Stations*, 69 F.C.C.2d 200 (1978). The FCC concluded in 1981 that the broad ban previously imposed on all announcements promoting the sale of products or services could be replaced

by a narrower ban on promotions aired in exchange for consideration, but that such a limitation was necessary to preserve non-commercial broadcasting. *Second Report,* 86 F.C.C.2d at 142-143, 154-155. Consistent with the Commission's conclusions, the 1981 legislation enacting Sections 399a and 399b sought to liberalize restrictions on public broadcasters to the greatest extent possible while continuing to protect "the noncommercial nature of public broadcasting in general." *1982 Order*, 90 F.C.C.2d at 895-896; see H.R. Rep. No. 82, 97th Cong., 1st Sess. 23-24 (1981).

Thus, "Congress did not write on a blank slate when it enacted Section 399b; rather, after a half-century of experience with public broadcasting, the record before Congress showed that public television and radio stations carry very different programming than do commercial stations." Pet. App. 170a; see *id.* at 24a. The 1981 legislation reflected Congress's judgment that the prior absolute ban on all promotional announcements (even if unpaid) and on descriptions of an underwriting entity (even if non-promotional and for purposes of identification) had swept more broadly than was necessary to protect the nature of public television. Congress also recognized, however, that the nature of noncommercial programming is incompatible with the model of market-driven advertising relied on by commercial stations.

Experience in the 30 years since the enactment of Section 399b underscores the continuing validity of the fundamental premises of the 1981 legislation. See generally NPR-PBS C.A. Amicus Br. 5, 7-8 (explaining that Section 399b "has operated to shield [noncommercial] television and radio broadcast stations from commercial market forces and to preserve [non-

commercial] broadcasting as a unique source of educational, informational, and cultural programming distinct from commercial broadcasting"). For example, "public broadcasters devote 16 percent of all program hours to educational children's programming, compared to the 3.32 hours per week the average commercial broadcaster gives to such programming." Pet. App. 25a (footnote omitted); see C.A. Supp. E.R. 34-36 (discussing study published in 2007 comparing stations' content).

"A great deal of research" establishes that these differences in programming reflect "differences in [the financial] incentive structures" behind commercial and noncommercial broadcasters. C.A. Supp. E.R. 14. In the absence of an advertising bar, public broadcasters would become "direct competitors of for-profit commercial stations." *Id.* at 29. "[A]dvertising is the least expensive avenue for raising funds," and thus less costly than public television stations' current practice of fundraising from individuals. *Id.* at 27. In the absence of a statutory restriction, stations would have strong incentives "to transfer funds that they now use to generate donations from individuals to the sale of advertising to corporations." *Ibid.* Additionally, the practice of corporate underwriting without advertising is premised on the existence of an advertising prohibition. If a corporation can lawfully demand advertising in exchange for financial support, it would have compelling reasons to do so.

ii. As the court of appeals explained, the advertising restrictions are neither over- nor under-inclusive. Instead, they "are specifically targeted at the real threat—the influence of paid advertising dollars." Pet. App. 33a.

Petitioner "focuse[s] its attack" on Section 399b's restrictions on candidate and issue advertising. Pet. App. 35a. Congress and the FCC, however, have consistently recognized that the efficacy of the scheme would be undermined if an exception were created for such advertisements. The dramatic rise in paid political advertisements reinforces that conclusion. See *id.* at 34a.[3]

Petitioner "does not point to any evidence indicating that issue and political advertising are less likely to result in commercialization than corporate goods and services advertising." Pet. App. 39a. Much of petitioner's argument reduces to the contention that the precise impact and implications of permitting all noncommercial educational stations to air political advertising, or advertising generally, are unknown because such advertising has never been permitted. Cf. *id.* at 127a (Noonan, J., concurring in the judgment). As the court of appeals explained, however, "[t]he First Amendment does not require Congress to wait for a feared harm to take place before it can act. Such a high bar would make little practical sense—it would tie Congress in knots and strip it of its ability to adopt forward thinking public policy." *Id.* at 18a-19a (noting this Court's recognition that "[s]ound policymaking often requires legislators to forecast future events and * * * anticipate the likely impact of

[3] Television Bureau of Advertising, Inc.—a nonprofit industry trade group—estimated that $2.9 billion was spent on political advertisements on "local market TV broadcast stations" in 2012. TVB Local Media Marketing Solutions, *Local Market Broadcast Television Overwhelmingly the Biggest Media Impact Maker on the 2012 Presidential Election* (Jan. 17, 2013), http://www.tvb.org/4685/about_tvb/press_room/press_room_article/1366430.

these events based on deductions and inferences") (citing *Turner I*, 512 U.S. at 665 (opinion of Kennedy, J.)).

The court of appeals also correctly held that Section 399b is not rendered fatally underinclusive because the advertising restrictions do not apply to paid promotions by non-profit entities. In promulgating its 1981 regulations, the FCC noted commenters' concerns about restricting announcements promoting the sale of products or services "as applied to announcements made on behalf of non-profit entities or the station itself." Pet. App. 41a-42a (citing *Second Report*, 86 F.C.C.2d. at 144). The Commission responded by limiting the ban to announcements for which consideration was received. *Id.* at 42a (citing *Second Report*, 86 F.C.C.2d at 148-149). "Congress went one step further in narrowly tailoring the legislation, by allowing non-profit advertising for goods and services without regard to whether consideration was received." *Ibid.*

As the court of appeals explained, "non-profit advertising is a drop in the bucket money wise and this limited advertising has no programmatic impact." Pet. App. 39a; see *id.* at 33a. "[N]on-profit advertising sales are so small that they did not even register on the breakdown of public television revenue sources presented by the government. Indeed, there is only a single actual non-profit announcement in the record before us, and it is not one that [petitioner] sought to broadcast." *Id.* at 42a; see C.A. Supp. E.R. 7; NPR-PBS C.A. Amicus Br. 8-9. "In the end," the court concluded, "exempting non-profit advertising underscores, rather than undermines, Congress's narrow tailoring." Pet. App. 43a.

b. Petitioner contends that there are "multiple circuit conflicts concerning the application of intermediate scrutiny." Pet. 32 (capitalization altered). No such conflicts are implicated here.

Petitioner argues that "[a]t least three circuits properly require the government to point to concrete facts" when defending a challenge to a statute under intermediate scrutiny, Pet. 34, while the court of appeals here required "little more than hand-waving," Pet. 36. That contention reflects a misreading of the court of appeals' decision. As explained above, see pp. 9-11, 21-26, *supra*, the court's decision was based on its detailed review of the "ample record" before it, "consisting both of evidence that was before Congress in 1981 and evidence before the district court that covered the period after enactment." Pet. App. 16a.

The court of appeals described comprehensively the basis for Congress's determination that permitting advertising on public television would undermine its objectives in establishing and fostering noncommercial educational broadcasting through license set-asides, funding by the CPB, and other means. Pet. App. 21a-46a. In light of this ample evidence, the court determined that "[t]his case 'does not present a close call' requiring [it] to elaborate on what evidentiary burden Congress bears in enacting a law that implicates First Amendment rights." *Id.* at 17a (quoting *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 393 (2000)). The court of appeals' case-specific assessment of the record before it does not warrant this Court's review.

Petitioner also suggests (Pet. 37-38) that there is disagreement among the circuits as to the evidentiary submissions a court may consider in evaluating a

regulation that implicates speech, and that the court of appeals erred here by considering the additional evidence submitted by the government in the district court. Adoption of petitioner's proposed evidentiary restriction would not affect the outcome here, since the court of appeals found that "the record before Congress provides a sufficient basis to uphold the statute even without the supplemental evidence offered in the district court." Pet. App. 17a. In any event, the court of appeals correctly "[f]ollow[ed] [this Court's] lead" by "look[ing] to 'the evidence before Congress and then the further evidence presented to the [d]istrict [c]ourt.'" *Id.* at 16a (quoting *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 196 (1997) (*Turner II*)); see *Turner II*, 520 U.S. at 212 (relying on "the considerable evidence before Congress and adduced on remand"). Indeed, this Court's second *Turner* decision came about only because the Court in *Turner I* remanded the case in order to permit "a more substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence." *Turner I*, 512 U.S. at 667 (opinion of Kennedy, J.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Assistant Attorney General
MARK B. STERN
SAMANTHA L. CHAIFETZ
Attorneys

JONATHAN B. SALLET
Acting General Counsel
DAVID M. GOSSETT
Acting Deputy General Counsel
JACOB M. LEWIS
Associate General Counsel
MAUREEN K. FLOOD
Attorney
Federal Communications Commission

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