No. 11-696

IN THE

Supreme Court of the United States

TRIBUNE COMPANY, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, *et. al.*,

Respondents.

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

BRIEF FOR RESPONDENT CONSUMER FEDERATION OF AMERICA

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SUMMARY OF ARGUMENT

Petitioners incorrectly confuse scarcity of the broadcast medium, which most assuredly remains unchanged today, with scarcity of non-broadcast entertainment outlets. As the court of appeals reasoned, the reality is that broadcast radio and television remain "scarce" for *Red Lion* purposes because there plainly are far more potential speakers than available frequencies, licenses and channels.

That in the current media marketplace there are now a large number of cable, satellite and Internet-based sources for programming content does nothing to alter, let alone "undermine" or "invalidate," the factual premises on which the *Red Lion* doctrine is based. Pet. at 2. This is especially true today, as the single biggest driver of scarcity is a severe and chronic "spectrum crunch," *i.e.*, the lack of available and usable spectrum for mass media communications.

As long as the number of potential speakers exceeds the number of available licenses, undeniably as true now as in 1969, spectrum is scarce from a First Amendment point of view. Petitioners assume, as did Justice Douglas nearly 40 years ago,[1] that "alternative channels of communication" can render spectrum scarcity "a constraint of the past" for purposes of *Red Lion.* But cataloging *dicta* — of which there clearly are many — from the courts of appeals in

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1. *CBS, Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94, 158 n.8 (1973) (Douglas, J., concurring) (technology may render "[s]carcity . . . a constraint of the past, thus obviating the concerns expressed in *Red Lion*"), quoted at Pet. at 4.

which some Circuit Judges embrace such logic does not prove it is true. To the contrary, as this Court explained a short five years after Justice Douglas' observation, "[b]ecause of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public."[2]

Nothing at all has changed in this regard. The only space in the public airwaves in which one could argue that spectrum is not scarce in the relative sense is those few frequency bands set aside for unlicensed use. Unfortunately, there is little of this spectrum available to the public and it is confined to frequencies that are generally considered "junk" because of the noise created in that space by non-communications emissions and very unattractive propagation characteristics of the radio frequencies.

Viewed properly, therefore, the presumption of invalidity inherent in petitioners' argument is flawed. The most commercially vital and valuable input into mass media communication is spectrum, and its supply is vastly outstripped by demand today. Broadcasters do not remain "singularly constrained," Pet. at 16, on the ground that there were few speakers in 1969. The "undeniably large increase in the number of broadcast stations and other media outlets" on which petitioners rely, *id.* at 18, is thus immaterial to the economic regulation of broadcast licensees unless — as petitioners dare not suggest, because it is untrue — the increase has lessened the

2. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 799 (1978).

technical need for governmental entry and interference regulation.

Broadcasters enjoy a wealth of government-bestowed privileges which for constitutional purposes justify non-content based entry, economic and market structure regulation. A license once granted is in practical terms effectively perpetual; the FCC has only very rarely sought to cancel any broadcast license, leading to a legitimate (and legally protected) renewal expectancy among licensees. In another case pending this Term, the Court is being asked to assess the consistency of broadcast indecency regulation and the First Amendment. The considerations involved in indecency are quite different from the type of structural, non-content regulation reflected in the FCC's media ownership restrictions, and need not be premised on notions of physical scarcity. In the television "duopoly" and newspaper/broadcast cross-ownership regulations involved in this case, for instance, the TV networks and their local affiliates are being told *where* they can communicate, not *whether* or *how* to speak.

The foundation of the federal system of broadcast licensing was the recognition, drawn from a decade of prior experience in which there was an unregulated free-for-all on the airwaves,[3] that a regulatory mechanism for allocating and licensing spectrum use is necessary to prevent harmful interference. Re-examining *Red Lion* could, if the logic of critics is taken to its zenith, place in jeopardy the constitutional status of broadcast licensing itself.

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3. Radio Act of 1927, 47 U.S.C. § 81 *et seq.* (superseded by the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*).

That result counsels against review by the Court in this case, a conclusion reinforced by prudential reasons. To expect the FCC in the context of recurring, indeed almost endless, media regulation reviews mandated by Congress to take up a fundamental reconsideration of constitutional doctrine is shortsighted in an era of limited government resources. The Court should await a proper case, with a fully developed record, on which to assess the constitutional basis and impact of broadcast regulation. The FCC should as a prudential matter be allowed to compile a full administrative record and explore alternative regulatory rationales before *Red Lion* is re-examined or overruled.

REASONS FOR DENYING THE PETITION

I. THE *RED LION* DOCTRINE REMAINS VALID IN LIGHT OF NECESSARY GOVERNMENT LICENSING, CHRONIC SPECTRUM SHORTAGES AND THE LEGALLY PRIVILEGED POSITION OF BROADCASTERS

The thrust of petitioners' argument for review by this Court is the assertion — presented as all but *ipsi dixit* — that "lower courts and commentators have recognized for decades that the scarcity doctrine has long since been discredited, invalidated, or eroded by revolutions in the media marketplace [that] have undermined its factual premises." Pet. at 2, 17-24.[4]

4. In No. 11-691, petitioner Media General, Inc. likewise calls the scarcity doctrine "obsolete" based on what it characterizes as "dramatic technological and marketplace developments." Media Gen. Pet. at 16-17.

That conclusion is incorrect because it confuses scarcity of the broadcast medium, which most assuredly remains unchanged today, with scarcity of competing, non-broadcast alternative outlets. That the current media marketplace makes available a plethora of cable, satellite and Internet-based sources for entertainment programming, however, does nothing to alter, let alone "undermine" or "invalidate," the factual premises on which the *Red Lion* doctrine is based.

A. Oft-Repeated Dicta From the Courts of Appeal Do Not Demonstrate That Physical Scarcity Has Been Eliminated For Radio and Television Broadcasting

This Court is confronted with a stark contradiction in the depiction of the relative availability, and hence scarcity, of broadcasting spectrum. On the one hand, broadcasters insist that the opportunity to speak has become so abundant that imposing public interest obligations on holders of broadcast licenses can no longer be justified constitutionally. On the other hand, one need only listen to the television or radio for a couple of hours in Washington, D.C. to witness wireless trade associations complaining that spectrum is scarce and Congress needs to clear it of broadcasters so that it can be put to uses, like cellular data services, that maximize its economic value.

In reality, however, the foundational premise of *Red Lion* itself provides a straightforward way to reconcile these two views. The Court presciently recognized that scarcity of spectrum is a relative concept. As long as the number of potential speakers exceeds the available licenses, undeniably as true now as in 1969, spectrum is

scarce from a First Amendment standpoint. A license to broadcast, or speak, granted by the FCC puts the license holder in a class of highly privileged speakers, especially when the license is an exclusive right to speak (*i.e.,* to transmit signals) in the spectrum that has been set aside for broadcasting. As long as licenses are deemed necessary to control interference in utilization of radio frequency ("RF") spectrum, by granting exclusive use licenses to some (but not all) speakers the problem of relative scarcity will necessarily persist.

Petitioners assume, as did Justice Douglas nearly 40 years ago,[5] that "alternative channels of communication" can render spectrum scarcity "a constraint of the past" for purposes of *Red Lion.* But cataloging *dicta* — of which there clearly are many — from the courts of appeals in which some Circuit Judges embrace such logic does not prove it is true. To the contrary, as this Court explained a short five years after Justice Douglas' observation, "[b]ecause of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public."[6] Nothing at all has changed in this regard.

Broadcasters certainly continue to believe that interference is a problem. They have defended their

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5. *CBS, Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94, 158 n.8 (1973) (Douglas, J., concurring) (technology may render "[s]carcity … a constraint of the past, thus obviating the concerns expressed in *Red Lion*"), quoted at Pet. at 4.

6. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 799 (1978).

exclusive licenses vigorously and object to every attempt to allow others to share the spectrum which they hold against the world. Wireless service providers take a similar view with respect to the spectrum for which they hold licenses. The only space in the public airwaves where one could argue that spectrum is not scarce in the relative sense is those few frequency bands set aside for unlicensed use. Unfortunately, there is very little of this spectrum available to the public and it is largely confined to frequencies considered "junk" because of the noise created in that space by non-communications emissions and very unattractive propagation characteristics of the radio frequencies. Such unlicensed spectrum is the exception that proves the rule in two respects.

First, high-quality broadcast spectrum creates extremely powerful speakers compared to the rest of American citizens, who are relegated to a small sliver of second-tier bands. For First Amendment purposes, of course, this means that the vast majority of speakers simply cannot match the reach and ubiquity of either TV or radio, regardless of the communication technology employed.

Second, the possibility that spectrum may be made available to the public on an unlicensed basis reminds us that the federal interference management regime, adopted almost a century ago, is a time- and technology-bound legislative policy choice. The paramount goal of spectrum policy from the First Amendment perspective should be to *eliminate* licenses altogether, for that is the only way to eliminate the government-mandated creation of unequal classes of speakers. Neither our society nor technology are anywhere near that *Nirvana* of deregulation. Holders of

licenses to high-quality spectrum — of which broadcasters are the most prominent and, as a consequence of their privileged status as speakers, the most wealthy — are adamant that they must retain exclusive use licenses. So long as this state of affairs persists, which it will for the foreseeable future, spectrum remains scarce under the principles of *Red Lion*.

The many pronouncements to the contrary by lower courts and commentators confuse scarcity of the broadcast medium, which most assuredly remains unchanged today, with scarcity of competing, non-broadcast alternative outlets, *i.e.*, "outlets for mass communication."[7] As the court of appeals below put it succinctly, "[t]he abundance of non-broadcast media does not render the broadcast spectrum any less scarce." *Prometheus Radio Project v. FCC,* 373 F.3d 372, 402 (3d Cir. 2004), *cert. denied,* 545 U.S. 1123 (2005); *see Prometheus Radio Project v. FCC,* 652 F.3d 431, 464 (3d Cir. 2011); Pet. App. at 75a.

While it is self-evident that in today's 500-channel world television viewers have more programming options than in the three-channel broadcast-only environment of the early 1960s, the countless new sources of information and media distribution available now do not change the fact that *broadcast* speakers remain, and almost by definition must remain, scarce. That today's economy reveals "a media landscape that would have been almost unrecognizable in 1978 [when] [c]able television was still

7. "[T]here simply exists no true scarcity of outlets for mass communication." J. Emord, Freedom, Technology And the First Amendment 282 (1991). "[I]t is simply not the case that the broadcast media are more scarce than the print media. Indeed, the inverse is true and is exacerbated with each passing moment." *Id.* at 284.

in its infancy [and] [t]he Internet was a project run out of the Department of Defense with several hundred users," *Fox Television Stations, Inc. v. FCC,* 613 F.3d 317, 326 (2d. Cir. 2010), says nothing about whether the most established — and as discussed below powerful — portion of that "explosion of media sources," *id.,* deserves different First Amendment treatment.

Viewed properly, therefore, the presumption of invalidity inherent in petitioners' argument is flawed. Broadcasters do not remain "singularly constrained," Pet. at 16, on the ground that there were few speakers 45 years ago. When *Red Lion* was decided there were hundreds more newspapers in America, half a dozen or more in major cities like New York, national, weekly news and cultural magazines *(Life, Look,* etc.) and many other sources of information and entertainment that are no longer available in today's marketplace. Therefore, the "undeniably large increase in the number of broadcast stations and other media outlets" on which the D.C. Circuit and petitioners rely, *id.* at 18, is immaterial to the economic regulation of broadcast licensees unless — as petitioners dare not suggest, because it is untrue — the increase has lessened the technical need for governmental entry and interference regulation.

Whether there are three or six or ten television stations in a local market, however, does not at all mean there is enough spectrum to accommodate everyone who would like to use the airwaves. What some judges have called "the indefensible notion of spectrum scarcity," *Action For Children's Television v. FCC,* 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (Edwards, J., dissenting), is therefore totally true and completely defensible.

B. The *Red Lion* Analysis Is Buttressed Today By a "Spectrum Crunch" That Remains Chronic

Given the astonishing growth in wireless communication, mobile service providers are increasingly calling for "beachfront" high-quality spectrum to be wrested away from broadcasters and auctioned off to relieve chronic cellular network congestion and capacity shortages.[8] This demonstrates that the concept of *Red Lion* scarcity not only still exists, but is even more pronounced today than when a lesser First Amendment standard was first sanctioned for broadcast regulation. Simply put, the most commercially vital and valuable input into mass media communication is spectrum, and its supply is vastly outstripped by huge and rapidly increasing demand.

The relevance of this spectrum crunch is that broadcasters, almost alone among all FCC licensees, enjoy far more spectrum than is required by today's digital technologies. Partially as a result, they have fought quite hard politically to hold into it. In its 2010 National Broadband Plan, the FCC proposed to recapture 120 MHz of television broadcast spectrum, through a voluntary sale by some broadcasters of all or part of their

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8. *See, e.g.,* D. Goldman, *Sorry, America: Your Wireless Airwaves Are Full,* CNNMoney, Feb. 21, 2012, *available at* http://money.cnn.com/2012/02/21/technology/spectrum_crunch/; L. Downes, *At CES, FCC Chair Warns of Mobile 'Spectrum Crunch' – For the Third Time,* CNet.com, Jan. 12, 2012, *available at* http://cnet.com/xyk1AQ; J. Percha, *The Spectrum Crunch: President Obama Takes On the Shortage of Wireless Capacity,* Political Punch, ABC News, June 28, 2010, *available at* http://abcn.ws/x2nNX7.

spectrum, followed by a repacking of that spectrum for efficiency increases.[9] That follows by nearly a decade the Telecommunications Act of 1996, which envisioned that the digital television "transition" of the late 1990s would allow the FCC to reclaim and reissue most broadcast spectrum. While a bit was auctioned off, broadcasters have successfully resisted broader efforts to reclaim their spectrum. In short, without any technical need for their licensed spectrum, broadcasters — who of course received that exclusive use spectrum for free — will now be paid to surrender it.

The list of purported spectrum-efficient technologies that over the years have promised to replace, or at least compete with, broadcast television and radio is long and sad. MMDS, LMDS, DBS, "white spaces," etc., have all been touted as ways the FCC could authorize alternative RF bands to compete with broadcast licensees. Almost all have been commercial failures.[10] So while today's headlines are filled with stories of the migration of television viewing from broadcast and cable to tablet

9. Federal Communications Commission, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN at 84 (2010).

10. Direct Broadcast Satellite ("DBS") has succeeded commercially as a substitute for cable television distribution, but its market impact is relatively small and the available spectrum supports only two nationwide providers, DirecTV and Dish Network. Similarly, satellite-delivered radio has proven more successful in offering subscription music channels than in providing a competitive alternative for either local or national advertisers; the relatively small market for satellite radio led to the 2008 merger of XM Satellite and Sirius Radio, the only two FCC licensees.

computers and smartphones,[11] the factual reality is that there is a shortage of spectrum generally and a severe lack of the high-quality spectrum broadcast licensees hold, effectively in perpetuity, for free. In contrast, any other company wanting additional spectrum — whether to speak itself or, like wireless carriers, offer speaking opportunities for others — must pay billions of dollars, if they can find spectrum to buy. To suggest in the face of this evidence that technology has rendered the *Red Lion* physical scarcity rationale "discredited" or "invalidated" is false at best, hypocritical at worst.

C. Broadcasters Enjoy a Wealth of Government-Bestowed Privileges That Justify Non-Content Based Entry, Economic and Market Structure Regulation

A "licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *FCC v. Fox Television Stations, Inc.,* 129 S. Ct. 1800, 1806 (2009). Because of "the unique physical limitations of the broadcast medium," *Turner Broadcasting Sys., Inc.* v. *FCC,* 512 U.S. 622, 637 (1994) (*Turner I*), the number of would-be broadcasters has long exceeded the number of available frequencies.

Federal allocation of specific frequencies in the RF spectrum has been essential to effective broadcast

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11. *E.g.,* J. Louderback, *How Tablets Will Soon Top TVs For Most Video Viewing,* AdAge Digital, March 1, 2012, *available at* http://adage.com/article/digitalnext/tablets-top-tvs-video-viewing/233039/.

communication. A broadcast license consequently carries with it substantial benefits that would not be available in an unregulated market, and 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. Despite the intervening technological developments that petitioners identify, there continue to be more would-be broadcasters than available frequencies.

In another case pending this Term, the Court is being asked to consider the consistency of broadcast indecency regulation and the First Amendment. Although the considerations involved in indecency are quite different from the type of structural, non-content regulation reflected in the FCC's media ownership restrictions, the government's response is nonetheless telling. First Amendment protection of broadcasters does not require strict constitutional scrutiny, *even of content regulation,* the government explained, for a simple reason.[12]

> Broadcast licensees have ... received important government assistance, *i.e.*, the license itself (which authorizes use of a valuable public resource without charge) and the availability of government enforcement mechanisms to prevent others from making unauthorized use of the licensee's allotted frequency.... 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....

12. Brief For the Petitioners at 42-43, *FCC v. Fox Television Stations, Inc.,* No. 10-1293 (S. Ct. 2011) (citations omitted).

> [I]n 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.

The "benefits licensees obtain from government restrictions on broadcast speech," *id.*, is a subtle way of saying that broadcasters enjoy a wealth of government-created privileges which for constitutional purposes justify non-content based entry, economic and market structure regulation. These include mandatory cable carriage of local commercial television stations, commonly known as "must carry,"[13] the ability to simulcast multiple programming channels using digital transmission technology,[14] and network affiliation, among others. The consequence is an audience reach and scope, equating to speaking power, that despite technological change continues to dwarf those of alternative mass media outlets.

These advantages "are the fruit of a preferred position conferred by the Government" and "give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible." *Red Lion,* 395 U.S. at 400. In practical terms, a license once granted is effectively perpetual; the FCC has only very rarely sought to cancel any broadcast license, leading to a legitimate (and legally protected) renewal expectancy

13. 47 U.S.C. § 534.

14. *See generally American Library Assn. v. FCC,* 406 F.3d 689, 693-94 (D.C. Cir. 2005).

among licensees.[15] Broadcasting licenses are extremely valuable and new advances in technology will only increase the value of the broadcast spectrum. For instance, Sinclair Broadcasting, a company that probably holds more exclusive licenses to high-quality spectrum than any other commercial entity, has estimated that TV broadcast spectrum presently equates to at least $1 trillion in economic value.[16] In contrast, as recently as 1997 the Department of Commerce placed "the marketplace value of the current television and radio broadcast spectrum" at a relatively meager $11.5 billion.[17]

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15. *See, e.g.,* M. McGregor, *Assessment of the Renewal Expectancy in FCC Comparative Renewal Hearings,* 66 Journalism Q. 295 (1989); *Central Florida Enterprises, Inc. v. FCC,* 683 F.2d 503 (D.C. Cir. 1982); S. Breyer, Regulation and Its Reform 90-93 (1982). In the Telecommunications Act of 1996, Congress codified this renewal expectancy and prohibited comparative hearings by precluding the FCC from "consider[ing] whether the public interest … might be served by the grant of a license to a person other than the renewal applicant." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 204 (1996), *codified at* 47 U.S.C. § 309(k)(4).

16. Business Analytix, Inc., The Economic Value of Broadcast Innovation – Impact on the U.S. Treasury (Nov. 2011), a report prepared for Sinclair Broadcast Group, *available at* http://www.sbgi.net/reports/The-Economic-Value-of-Broadcast-Innovation-1.pdf; H. Jessell, *A Win-Win Alternative to Spectrum Auctions*, TVNewsCheck, Nov. 21, 2011, *available a*t http://www.tvnewscheck.com/article/2011/11/21/ 55559/a-winwin-alternative-to-spectrum-auctions/

17. C. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 Calif. L. Rev. 1687, 1729 (1997).

The privileged position of broadcasters extends to the commercial realm as well. Many if not most cable programming networks engage in "narrowcasting," targeting a particular audience based on interests or demographics. Nearly all top-rated prime time shows on television are those produced and distributed by the four national television networks and five integrated media conglomerates.[18] Advertising rates for cable, satellite and other non-broadcast programming are correspondingly lower.

Respondent CFA is not suggesting that this governmentally bestowed privilege warrants exempting broadcast speech from the First Amendment. To the contrary, we respectfully suggest to this Court that the scarcity rationale of *Red Lion* is far better adapted to non-content based market structure regulation than it is to explicit regulation of speech, such as indecency. Determining whether the economic and related advantages of an exclusive broadcast license justify restrictions on a licensee's ownership of other modes of communication is

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18. *E.g., Review of the Commission's Broadcast Ownerships Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Report and Order and Notice of Proposed Rulemaking, 18 F.C.C. Rcd. 13,620 at 13,981 & n.17 (2003) (70% prime time share collectively held by five media conglomerates: Viacom, Disney, AOL Time Warner, NewsCorp and NBC/GE), *aff'd in part, Prometheus Radio Project v. FCC,* 373 F.3d 372 (3d. Cir. 2004), *cert. denied,* 545 U.S. 1123 (2005). *See generally* J. Levy, *et al., Broadcast Television: Survivor In a Sea of Competition* at 12 (FCC Office of Plans and Policy, Working Paper No. 37, 2002).

far more akin to antitrust regulation than censorship.[19] "[A]lthough scarcity has justified increasing the diversity of speakers and speech, it has never been held to justify censorship." *Pacifica,* 438 U.S. at 770 n.4 (Brennan, J., dissenting).[20]

In the television "duopoly" and newspaper/broadcast cross-ownership regulations under consideration by the FCC in this case, for instance, the TV networks and their local affiliates are being told where they can communicate, not whether or how to speak. That is, broadcasters cannot "speak" in the same market where they have a government-created marketplace advantage by use of another dominant communications medium, but can employ those distribution methods in any other market, and also remain free to speak "at home" by any means other than (limited) broadcast television or mass circulation newspapers.

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19. M. Stucke & A. Grunes, *Antitrust and the Marketplace of Ideas,* 69 Antitrust L.J. 249, 275–78 (2001); G. Manishin, *An Antitrust Paradox for the 1990s: Revisiting the Role of the First Amendment In Cable Television,* 9 Cardozo Arts &. Ent. L.J. 1 (1990).

20. Consequently, the dispute over broadcasting indecency regulation and so-called "fleeting expletives" in *Fox Television Stations* (No. 10-1293) offers an ill-suited forum for revisiting the scarcity rationale and hurling into doctrinal chaos the spectrum policy that rationale supports. To respondent's knowledge, *Red Lion* has never been invoked as a basis for indecency regulation. Justice Brennan's dissent in *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978), commends the majority for understanding that the scarcity rationale is not relevant to indecency. Indeed, market structure regulations generally attempt to broaden access to spectrum rights for more speakers, and thus are easily distinguishable from the suppression of speech evident in content regulation.

That is a qualitatively different form of federal regulation than the type of indecency ban at issue in *Fox Television Stations* (No. 10-1293) and earlier in *Pacifica*, 438 U.S. at 726. If this Court does not agree that communications market structure regulation is non content-based, there is nonetheless a readily discernable difference between use of a fact-based test like spectrum scarcity as the constitutionally dispositive factor in cases of economic regulation and its use as the grounds for permissible censorship of content itself. At the very least, use in the former circumstance, as in this case, does not leave the Court open to criticism that its First Amendment jurisprudence is based on changing technology instead of neutral constitutional principles.

II. OVERRULING *RED LION* WOULD JEOPARDIZE THE ACCEPTED STATUS OF A HOST OF NECESSARY GOVERNMENT REGULATIONS ON USE OF THE AIRWAVES, INCLUDING LICENSING AND ELIMINATING INTERFERENCE

The foundation for a federal system of broadcast licensing was the recognition, drawn from a decade of experience in which there was an unregulated free-for-all on the airwaves,[21] that a regulatory mechanism for allocating and licensing spectrum use is necessary to prevent harmful interference. As this Court has described:

> If two broadcasters were to attempt to transmit over the same frequency in the same locale, they

21. Radio Act of 1927, 47 U.S.C. § 81 *et seq.* (superseded by the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*).

> 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.

Turner I, 512 U.S. at 637-38.

The consequences of this problem of interference are, like the "spectrum crunch," both highly visible and increasingly significant to today's communications industry. Just weeks ago, for instance, the FCC acted to halt the deployment of a nationwide wireless data network known as LightSquared after the Commerce Department's National Telecommunications & Information Administration reported that the proposed service would interference with Global Positioning System ("GPS") devices and services.[22]

Overruling the scarcity rationale would inject uncertainty into a wide variety of actions the government adopted in reliance on that justification. These regulatory initiatives, many of which have been upheld by this Court, include imposing universal service obligations, promoting diverse uses of spectrum, experimenting with the limited authorization of unlicensed spectrum usage,

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22. E. Wyatt, *F.C.C. Bars the Use of Airwaves for a Broadband Plan,* New York Times, Feb. 14, 2012, *available at* http://www.nytimes.com/2012/02/15/business/media/fcc-bars-airwave-use-for-broadband-plan.html; Bloomberg News, *LightSquared Faces U.S. Prohibition After Interference Report,* Feb. 14, 2012, *available at* http://news.businessweek.com/article.asp?documentKey=1377-atdSXhagGZ_0-62BFQVDHNUFUJLBAHQF393SQRR.

implementing new economic models for the allocation of spectrum, providing equal time for political candidates, and so on. The government employs a wide range of spectrum allocation decisions, auctions, ownership limits and authorizations for use to ensure that those who obtain access to spectrum are not creating interference and are promoting wide access by the public to diverse and antagonistic sources of speech.

Putting regulation of spectrum licensees in constitutional jeopardy is an untoward result whose full consequences can hardly be imagined. Beginning in 1927, the government has licensed broadcast spectrum in order to eliminate interference and oversee a rational, efficient means of allocating its use. Absent licensing, communications would return to the Wild West days, pre-Radio Act, where conflicting claims to broadcast channels were resolved, if at all, in state court by application of archaic property law principles.

Yet the same commentators who assert that *Red Lion* scarcity no longer exists in an age of "information overload" also contend that the First Amendment is not satisfied with a public domain rationale as the basis for broadcast licensing, insisting that without *Red Lion* licensing itself is constitutionally suspect.[23] It is difficult to craft a legal principle for broadcast licensing that does not give First Amendment significance to the fact that

23. *See, e.g.,* M. Spitzer, *The Constitutionality of Licensing Broadcasters,* 64 N.Y.U. L. Rev. 990 (1989); B. Fein, *First Class First Amendment Rights for Broadcasters,* 10 Harv. J.L. & Pub. Policy 81 (1987). *See generally* T. Hazlett, S. Oh & D. Clark, *The Overly Active Corpse of Red Lion,* 9 Northwestern J. Tech. and Intellectual Prop. 51 (2010).

if broadcasters "interfere with one another's signals, … neither could be heard at all." *Turner I,* 512 U.S. at 637-38. Thus, if *Red Lion* were to be overruled, the basic regime for spectrum licensing — the "regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters," *id.* — itself would be in constitutional peril. Indeed,

> [w]hen *Red Lion,* which involved a personal attack carried on a radio station, was decided in 1969, there were approximately seven thousand radio stations on the air. Today there are some eleven thousand radio stations on the air. . . . [I]t makes no sense to say that the [licensing] scheme is constitutional with seven thousand stations but not with eleven thousand stations.

A. Campbell, *Public Interest Obligations of Broadcasters In the Digital Era: Law and Policy,* Aspen Institute Communications and Society Program (1998).[24]

III. THE FCC SHOULD AS A PRUDENTIAL MATTER BE ALLOWED TO COMPILE A FULL ADMINISTRATIVE RECORD AND EXPLORE ALTERNATIVE REGULATORY RATIONALES BEFORE *RED LION* IS RE-EXAMINED

This is not the appropriate case in which to address whether *Red Lion* should be overruled. A record was not assembled below on these matters — which unlike media

24. *Available at* http://www.aspeninstitute.org/policy-work/communications-society/programs-topic/media-politics/digital-broadcasting-public-intere-0.

ownership limits was not described in the agency's public notices as a "subject involved" in the proceedings (5 U.S.C. § 553(b)) — nor is constitutional review required by section 202(h)'s command for periodic re-examination of whether broadcast regulations remain "necessary in the public interest" as a result of "competition."[25] The FCC has not, as yet, had the opportunity to solicit or analyze policy and jurisprudential alternatives to the *Red Lion* doctrine as a basis for broadcast regulation in today's more robust media environment.

More broadly, no court, including this Court, has held that for First Amendment purposes the only permissible constitutional basis for non-content media regulation is broadcast spectrum scarcity. The licenses awarded by the FCC are valuable rights that bestow a message "reach" far in excess of what other media outlets and technologies can support. Those advantages are multiplied in an era of digital television and HD radio, where a single broadcast station now can transmit multiple channels of digital programming. There is a range of reasons why these significant, and essentially perpetual, benefits should be balanced by laws that constrain the power of a select group of broadcast licensees to dominate media, and with it political social and cultural trends, in the United States.[26]

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25. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) (1996) ("The Commission . . . shall determine whether any [media ownership rules] are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest."). *See* Pet. App. at 29a.

26. *See, e.g.,* C. Logan, Jr., *Getting Beyond Scarcity, supra* note 17; A. Campbell, *Public Interest Obligations of Broadcasters In the Digital Era, supra* at p.21.

If and when a re-examination of *Red Lion* is commissioned, including if they desire by means of a petition for rulemaking by petitioners in this or its companion cases, will be the appropriate occasion for an informed and vibrant debate on such topics. To expect the FCC in the context of recurring, indeed almost endless, media ownership reviews mandated by Congress to take up a fundamental reconsideration of constitutional doctrine is shortsighted in an era of limited government resources.

On a singularly important issue as this, respondent suggests that the Court should await a proper case, with a fully developed record, on which to assess the constitutional basis and impact of broadcast regulation. The FCC should as a prudential matter be allowed to compile a full administrative record and explore alternative regulatory rationales before *Red Lion* is re-examined or overruled. As some of the *amici* in *Fox Television Stations* cogently summarized, "[e]valuation of this rationale should occur in the context of a proceeding that actually relies upon the scarcity rationale."[27] This is not such a case.

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27. Brief of Amici Curiae Yale Law School Information Society Project Scholars, New America Foundation and Professor Monroe Price In Support of Neither Party at 6, *FCC v. Fox Television Stations, Inc.,* No. 10-1293 (S. Ct. 2011).

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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