No. 13-1124

IN THE

# Supreme Court of the United States

MINORITY TELEVISION PROJECT, INC.,
*Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF FORMER FCC OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER


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## BRIEF OF FORMER FCC OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

This brief is submitted on behalf of Adam Candeub, Christopher Wright, Harold Furchtgott-Roth, J. Gregory Sidak, Jennifer A. Manner, Jeremy M. Kissel, Jonathan Emord, and Thomas W. Hazlett (collectively, "Former FCC Officials") as *amici curiae* in support of petitioner.[1]

## INTEREST OF *AMICI CURIAE*

*Amici* are former commissioners, officials, and attorneys of the Federal Communications Commission ("FCC").

Adam Candeub, currently Professor of Law and Director of the Intellectual Property, Information & Communications Law Program at Michigan State University College of Law, served as Attorney-Advisor in the FCC's Media and Common Carrier Bureaus from 2000 to 2004. Christopher Wright was General Counsel of the FCC from 1997 to 2001 and served as FCC Deputy General Counsel from 1994 to 1997. Harold Furchtgott-Roth was FCC Commissioner from 1997 to 2001; prior to that he was the Chief Economist for the U.S. House Committee on Commerce, where he was one of the principal staff involved in drafting the Telecommunications Act of

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[1] No counsel for a party has authored this brief in whole or in part, and no person or entity other than *amici* or their counsel has made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice of *amici*'s intent to file this brief at least ten days before the due date. Letters reflecting the consent of all parties to the filing of this brief have been filed with the Clerk.

1996. J. Gregory Sidak is the Ronald Coase Professor of Law and Economics at Tilburg University in The Netherlands and a founding editor of the *Journal of Competition Law & Economics*. He served as Deputy General Counsel of the FCC from 1987 to 1989. Jennifer A. Manner was Deputy Chief of the FCC's Office of Engineering and Technology in 2012 and Deputy Bureau Chief of the Public Safety and Homeland Security Bureau of the FCC from 2009 to 2012. She also served as Senior Counsel to FCC Commissioner Kathleen Abernathy from 2003 to 2005. Jeremy M. Kissel served as Acting Legal Advisor to the Chief of the FCC's Media Bureau and as Attorney-Advisor in the Policy Division of the Media Bureau. Jonathan Emord, author of *Freedom, Technology, and the First Amendment* (1991), began his career as an attorney in the Mass Media Bureau of the FCC in 1985. Thomas W. Hazlett, now Professor of Law & Economics at George Mason University School of Law, served as Chief Economist of the FCC from 1991 to 1992.

*Amici* join this brief in their individual capacities, but with the benefit of years of experience at the FCC. Over the courses of their careers, *amici* have thought deeply about communications law and policy. The signatories to this brief have different views about some regulatory issues, but all agree that the reduced level of First Amendment protection afforded broadcast speech under this Court's decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), is unjustified. *Amici* urge the Court to grant the petition for certiorari and overturn *Red Lion*.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), singles out broadcast speech for reduced First Amendment protection based on the "scarcity" of broadcast frequencies, *id.* at 390. This rationale was always the subject of criticism, and it has been seriously undermined by intervening developments in both technology and this Court's First Amendment jurisprudence. The Court should grant the petition for certiorari to overturn *Red Lion*.

First, numerous scholars and jurists have questioned the foundation of *Red Lion*'s scarcity rationale, reasoning that *all* resources are scarce, so scarcity alone provides no reason for drawing a distinction between broadcasting and other media. Observers have also critiqued the rationale on the basis that the scarcity cited in *Red Lion* results as much from regulatory decisions about access to and use of the electromagnetic spectrum as it does from the spectrum's inherent physical limitations.

Second, developments in technology over the last four decades have eliminated the distinctions among media on which *Red Lion* depended. Modern technology now allows more efficient use of the broadcast spectrum, effectively multiplying the available frequencies. And, most importantly, the alternatives to broadcast television and radio have dramatically expanded since 1969, with countless new options from YouTube to Pandora providing news, culture, and entertainment to American society.

Finally, this Court's cases after *Red Lion* have exposed the inconsistencies produced by the scarcity doctrine. Under *Red Lion*, the same television program could be subject to regulation under intermediate scrutiny when broadcast on television, but under strict scrutiny when streamed over the internet. There is no basis in the First Amendment to single out a specific medium for diminished protection.

The time has come for the Court to reconsider *Red Lion*, and this case provides the right vehicle to do so. As explained in the petition for certiorari, in the decision below the en banc Ninth Circuit relied on *Red Lion* to limit the ability of public broadcasters to present programming that reflects and caters to the diverse populations they serve. This decision illustrates how the rule in *Red Lion*—designed to ensure that the broadcast spectrum can effectively accommodate a diverse variety of subjects and viewpoints—no longer serves those interests, if it ever did.

As Chief Judge Kozinski explained in dissent below, "[t]o the extent *Red Lion* was justified by the state of technology at the time it was written, it's certainly not justified by the state of technology today." Pet. App. 79a. The Court should grant the petition for certiorari to overturn the anachronistic rule of *Red Lion*.

## ARGUMENT

### I. *RED LION*'S SCARCITY DOCTRINE HAS BEEN CRITICIZED BY A DIVERSE ARRAY OF COMMENTATORS

This Court's decision in *Red Lion*—under which broadcast regulation is subject to a "less rigorous standard of First Amendment scrutiny" than that applied to other media, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994)—rests on the notion that broadcast frequencies are a uniquely scarce resource, *see Red Lion*, 395 U.S. at 390. That reasoning has been questioned ever since it was first articulated, and it has only grown more unconvincing with time. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 530 (2009) (Thomas, J., concurring).

#### A. *Red Lion* Relies On Spectrum Scarcity To Justify Disparate Treatment of Broadcast Speech

In *Red Lion*, this Court upheld the "fairness doctrine," an FCC policy that required "that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage." 395 U.S. at 369. The Court began its assessment of the broadcaster's First Amendment challenge to the doctrine with the observation—ungrounded in the text or history of the First Amendment—that "[a]lthough broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Id*. at 386 (internal citation omitted).

To explain why regulation of broadcasting in particular should be subject to a less rigorous First Amendment standard, the Court noted that the broadcast spectrum is a scarce resource—that is, "there are substantially more individuals who want to broadcast than there are frequencies to allocate." *Id.* at 388. And interference, the Court posited, is a significant problem in the broadcast realm: "[O]nly a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology." *Id.* Based on this understanding, the Court reasoned that absent "government control," the broadcast medium "would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." *Id.* at 376.

Because there were more individuals who would like to access the broadcast spectrum than there were frequencies to allocate, the Court found it "idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.* at 388. There would always be some people who would be unable to transmit their views over the spectrum. Rather than afford those who *did* have access to the broadcast spectrum full First Amendment protections, the Court concluded that spectrum scarcity permitted the government "to put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Id.* at 390. The First Amendment, the Court held, does not "prevent[] the Government from requiring a licensee to share his

frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." *Id.* at 389.

*Red Lion* thus directed courts to "apply[] a less rigorous standard of First Amendment scrutiny to broadcast regulation," which "permit[s] more intrusive regulation of broadcast speakers than of speakers in other media." *Turner Broad. Sys.*, 512 U.S. at 637.

### B. Commentators Have Long Challenged The Logic Of The Scarcity Doctrine As A Basis For Regulating Broadcast Speech

1. The scarcity doctrine enshrined by the Court's decision in *Red Lion* draws a distinction between broadcasting and all other media that persists to this day in this Court's First Amendment jurisprudence. But "courts and commentators have criticized the scarcity rationale since its inception." *Turner Broad. Sys.,* 512 U.S. at 638 & n.5.

Among the most prominent of the scarcity doctrine's early detractors was Ronald Coase, who in 1959 articulated an economic critique of the rationale that challenged its most basic assumptions. R. H. Coase, *The Federal Communications Commission*, 2 J.L. & Econ. 1, 14 (1959). First, Coase observed that, to the extent scarcity is meaningful at all to the First Amendment analysis, it applies with equal force to all media—indeed, to all resources more generally—and therefore does not differentiate broadcasting:

> [I]t is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor, and capital are all scarce, but this, of itself, does not call for government regulation.

*Id.* Numerous later commentators agreed. *See* Thomas G. Krattenmaker & Lucas A. Powe, Jr., *Regulating Broadcasting Programming* 204 (1994) ("'Scarce resource' is a redundant phrase. Every resource is scarce, be it oil, gas, clean water, trees, or iron ore."); Thomas W. Hazlett, Sarah Oh & Drew Clark, *The Overly Active Corpse of Red Lion*, 9 Nw. J. Tech. & Intell. Prop. 51, 54-55 (2010) ("Rights to use frequencies . . . are no more 'physically scarce' than paper, water, or diamonds."); Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207, 221 (1982) ("[V]irtually all goods in society are scarce.").

Second, and relatedly, Coase observed that the potential for interference where there are multiple speakers is not unique to broadcast media. Coase, *supra*, at 14. "[I]f everyone at a park speaks at the same time, no one can hear and . . . if one reporter writes her message on a piece of paper and another writes over it, no one can read either message." Krattenmaker & Powe, *supra*, at 206.

For these reasons, Coase argued that the problems of scarcity and interference—the twin pillars of *Red Lion*'s justification for diminished First Amendment protection of broadcast speech—do not

provide a sound basis for distinguishing between broadcasting and other media under the First Amendment. Others subsequently picked up this thread, arguing that because neither scarcity nor interference is unique to broadcasting, content regulation cannot be justified or explained by the fact "that broadcast frequencies are scarce" or "that broadcasters face the problem of interference, so that the government must define usable frequencies and protect those frequencies from encroachment." *Telecomms. Research & Action Ctr. v. FCC*, 801 F.2d 501, 508-09 (D.C. Cir. 1986); *see* Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 Colum. L. Rev. 905, 910 (1997) (fact that "exclusive rights to spectrum are necessary for the efficient functioning of the broadcasting industry" does not "call for government regulation of the content of programs broadcast"); *id.* at 910-11 ("Regulation of content is not required to solve the technical commons problem in airwave usage.").[2]

Coase's critique of the scarcity doctrine was considered "radical" by his contemporaries, *see* Henry Kalven, *Broadcasting, Public Policy, and the First*

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[2] It does not necessarily follow from this view that regulation of broadcast *spectrum* is unwarranted. It is one thing to regulate the structural features of the broadcast market—e.g., determining how many broadcasting licenses will be issued and how they will be distributed—and to formulate technical rules to govern spectrum access and use. The need to impose such structural and technical regulation, however, does not mean that governmental controls must or should extend to the content of whatever speech occurs on the structurally regulated broadcast spectrum. The fact that government can regulate the use of real property through zoning does not justify government control over speech that occurs on the regulated property.

*Amendment*, 10 J.L. & Econ. 15, 30 (1967), but it has since been labeled "the conventional wisdom," Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 Geo. L.J. 245, 269 (2003); *see* Hazlett et al., *supra*, at 71-72. Ideologically diverse commentators too numerous to catalog have embraced the critique. *See, e.g.*, Jim Chen, *Conduit-Based Regulation of Speech*, 54 Duke L.J. 1359, 1403 & n.310 (2005) (arguing that "[n]o one besides the Supreme Court actually believes the scarcity rationale" and collecting critiques of *Red Lion*); J. Gregory Sidak, *Telecommunications in Jericho*, 81 Calif. L. Rev. 1209, 1231 n.63 (1993) (collecting critiques). And its logic has been endorsed by jurists with differing ideological outlooks over the last several decades. *E.g.*, *Fox*, 556 U.S. at 532 (Thomas, J., concurring); *Action for Children's Television v. FCC*, 58 F.3d 654, 675-76 (D.C. Cir. 1995) (en banc) (Edwards, C.J., dissenting); *Telecomms. Research & Action Ctr.*, 801 F.2d at 508 (Bork, J.).

2. Critics have also leveled a second type of attack on *Red Lion*'s scarcity rationale, arguing that it relies on conditions that have been shaped by regulation in an effort to justify more regulation—that is, the scarcity cited is partially artificial. *See*, *e.g.*, Yoo, *supra*, at 269-75. These critics emphasize that the total amount of spectrum allocated to broadcasting—a major constraint on the availability of broadcasting frequencies—was largely a product of regulatory choice, not the inherent physical limitations of the electromagnetic spectrum. *See id.* at 269, 272-75; John W. Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose*

*Time Has Passed* 11-12 (FCC Media Bureau Staff Research Paper No. 2005-2) (2005).

Taking a slightly different tack, former FCC Chairman Mark Fowler has questioned the scarcity rationale on the ground that even assuming a fixed, limited portion of the available spectrum is allocated to radio and television broadcasting, scarcity is still "a relative concept." Fowler & Brenner, *supra*, at 222. Evolving "spectrum efficiency techniques" allow for an ever-increasing number of broadcasters to make use of the spectrum. *Id.* For example, additional channels can be added, without increasing the total portion of the spectrum reserved for broadcasting, by decreasing the bandwith reserved for each channel. *Id.* And "[c]hannels can also be added by revising the interference rules," such that the spacing between stations is reduced. *Id.* at 222-23.

Finally, some observers have posited that the federal government originally made broadcast licenses more scarce than they otherwise might have been by setting the price of a license at zero.[3] "If a valuable thing is given away for free, it should not be surprising that the demand exceeds the supply." Berresford, *supra*, at 12. The phenomenon, they say, is hardly unique to the broadcast spectrum: "If the government seized all the paper (and made it illegal to cut trees for private manufacture of paper) and gave it away . . . there would be an 'excess demand'

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[3] Since 1994, the FCC has assigned many licenses for available frequencies on the electromagnetic spectrum by auction. *See About Auctions, Introduction*, FCC (Aug. 9, 2006), http://wireless.fcc.gov/auctions/default.htm?job=about_auctions; *see also* Berresford, *supra*, at 12 n.66.

for paper. That is, we would be able easily to observe people who 'wanted' but did not 'receive' paper." Krattenmaker & Powe, *supra*, at 210. These commentators note that excess demand for paper would not justify curtailing the First Amendment protections afforded to print communications, and the fact that regulators' early decisions about access to the broadcast spectrum helped create excess demand similarly "does not justify government control of the content of programs broadcast over the spectrum." *Id.*

* * * *

*Amici* take different views on whether the arguments discussed above show that *Red Lion* was wrong when it was decided. They agree, however, that the doctrine has not weathered well in the subsequent decades, and that any original justifications no longer apply, as the following sections demonstrate.

## II. CHANGES IN COMMUNICATIONS TECHNOLOGY HAVE RENDERED THE SCARCITY DOCTRINE OBSOLETE

When this Court decided *Red Lion* in 1969, the communications realm looked dramatically different than it does today. At that time, the primary means of reaching mass audiences was through the broadcast spectrum, and "no medium of communication approached the power of radio and television to reach into people's homes with sounds and images." Pet. App. 52a (Kozinski, C.J., dissenting).

But members of this Court recognized as early as 1973 that changes in communications technology might eventually render the scarcity doctrine obso-

lete. In that year, Justice Douglas suggested that "[s]carcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion*," as a result of predicted "advances of cable television." *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 158 n.8 (1973) (Douglas, J., concurring). A decade later, the Court acknowledged that "[t]he prevailing rationale for broadcast regulation based on spectrum scarcity ha[d] come under increasing criticism," with "[c]ritics, including the incumbent Chairman of the FCC, charg[ing] that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete." *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376 n.11 (1984).

Technological change has only accelerated over the last three decades. Whatever *Red Lion*'s merits at the time it was decided, modern technology has eliminated the distinctions among media on which the decision depends, and its analysis no longer makes sense against the backdrop of today's communications landscape.

### A. Broadcasting Has Changed Significantly Since *Red Lion* Was Decided

1. In recent years, technological advances such as the conversion from analog to digital transmission have allowed for more efficient use of the electromagnetic spectrum.[4] Since June 13, 2009, all full-

[4] These changes have, in essence, altered "the special physical characteristics of broadcast transmission" that this Court has said "underlie[] [its] broadcast jurisprudence." *Turner Broad. Sys.*, 512 U.S. at 640.

power television stations in the United States have been required to broadcast exclusively in a digital format. *Digital Television*, FCC, http://www.fcc.gov/digital-television (last visited Apr. 16, 2014). While "the vulnerability of analog broadcasts to interference mean[t] that only a few channels actually c[ould] be used in any geographic area," that is no longer an issue with digital television. *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 294 (D.C. Cir. 2003). Digital transmission permits broadcast channels to be stacked "right beside one another along the spectrum," so that the same number of channels uses up much less of the available spectrum than it would if transmitted via the old analog system. *Id.*; *see Fox*, 556 U.S. at 533 (Thomas, J., concurring).

In addition, with the transition to digital, many broadcasters now "are broadcasting two or more channels of content ('multicasting')," which provides consumers with a wider range of broadcast content. Berresford, *supra*, at 13; *see Digital Television*, FCC, http://www.fcc.gov/digital-television (last visited Apr. 16, 2014). Digital technology allows broadcasters to transmit "up to four" times "more information over a channel of electromagnetic spectrum than is possible through analog broadcasting." *Consumer Elecs. Ass'n*, 347 F.3d at 293. And other emerging technologies promise to provide additional means of better using the broadcast spectrum in the future. *See*, *e.g.*, Yoo, *supra*, at 281-83.

2. Broadcast frequencies are much less scarce today than they were in 1969. Between 1969 and 2004, for instance, the number of over-the-air broadcast stations more than doubled, growing from 7,411

stations to 15,273. Berresford, *supra*, at 12-13; *see Fox*, 556 U.S. at 533 (Thomas, J., concurring). To the extent broadcast channels could fairly have been described as scarce when *Red Lion* was decided, "[b]y no rational, objective standard can it still be said that, today in the United States, channels for broadcasting are scarce." Berresford, *supra*, at 18. In fact, the average household now has (and has had for some time) more options for broadcast television and radio than for daily newspapers. *See Telecomms. Research & Action Ctr.*, 801 F.2d at 508 n.4; *see also* Cass R. Sunstein, *Democracy and the Problem of Free Speech* 54 (1993) (noting that most cities have far more television and radio stations than major newspapers). In 2011, there were 1,382 daily newspapers in the U.S.[5] There were more than 30,000 licensed broadcast stations (television and radio) that same year.[6] If scarcity alone were a valid basis for intrusive government regulation of content and reduced First Amendment protections, then newspaper outlets, not broadcast stations, would "deserve greater attention" today. Berresford, *supra*, at 18.

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[5] *See* Rick Edmonds, Emily Guskin, Amy Mitchell & Mark Jurkowitz, *The State of the News Media 2013, Newspapers: By the Numbers* (May 7, 2013), http://stateofthemedia.org/2013/newspapers-stabilizing-but-still-threatened/newspapers-by-the-numbers.

[6] *Broadcast Station Totals as of September 30, 2011*, FCC, http://www.fcc.gov/document/broadcast-station-totals-september-30-2011 (last visited Apr. 16, 2014).

### B. The Number Of Alternatives To Broadcast Has Increased Dramatically

Even if the number of broadcast channels were still what it was in 1969—or if there were even fewer broadcast channels today than there were then—the scarcity rationale would nonetheless no longer make sense in today's mass communications world. Since 1969, the number of alternatives to broadcast television and radio has exploded, rendering the number of available broadcast channels essentially irrelevant in determining who is able to transmit audio and video content to the public on a mass scale.

1. For most consumers, traditional broadcast television programming is now bundled with cable or satellite television services. Approximately 85 to 90 percent of American households pay for a television subscription of some sort (whether cable, satellite, or a telephone company service like AT&T's UVerse or Verizon's FIOS).[7] And today's cable television systems often carry hundreds of channels, dwarfing the

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[7] *See* Todd Spangler, *As Netflix Rises, Subscriptions to HBO, Showtime and Other Premium Nets Shrink as Percentage of U.S. Households: Report*, Variety (Jan. 20, 2014), http://variety.com/2014/digital/news/as-netflix-rises-more-people-are-canceling-hbo-and-showtime-1201065399/ (reporting 86 percent subscription rate as of August 2013); *Cross-Platform report Q3 2011*, Nielsen (Feb. 10, 2012), http://www.nielsen.com/us/en/reports/2012/cross-platform-report-q3-2011.html (reporting 90.4 percent subscription rate among U.S. TV households); Vikas Bajaj, *Ready to Cut the Cord?*, N.Y. Times (Apr. 6, 2013), http://www.nytimes.com/2013/04/07/opinion/sunday/ready-to-cut-the-cord.html ("More than 90 percent of American households pay for TV.").

offerings of broadcasters.[8] Satellite radio is also expanding as an alternative to AM/FM broadcast stations: as of 2012, SiriusXM satellite radio had 23.9 million subscribers.[9]

2. In addition, both broadcast and other video programming are now widely available online. The major broadcast networks provide free access to full episodes of many popular network shows on their websites.[10] And platforms like Hulu, Netflix, iTunes, Amazon Instant Video, and YouTube provide viewers with access to a wide variety of broadcast programming and other video content. At the close of 2013, Netflix had 31.7 million paid subscribers in the United States.[11] Earlier that year, Hulu's owners

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[8] *See, e.g.*, *Average U.S. Home Now Receives a Record 118.6 Channels, According to Nielsen*, Nielsen (June 6, 2008), http://www.nielsen.com/us/en/press-room/2008/average_u_s__home.html (average U.S. home received 118.6 cable channels and 17 broadcast television stations in 2008).

[9] Laura Santhanam, Amy Mitchell & Kenny Olmstead, *The State of the News Media 2013, Audio: By the Numbers*, http://stateofthemedia.org/2013/audio-digital-drives-listener-experience/audio-by-the-numbers/ (last visited Apr. 16, 2014).

[10] *See FOX Broadcasting Company Full Episodes*, FOX, http://www.fox.com/full-episodes/ (last visited Apr. 16, 2014); *NBC Video Library Full Episodes*, NBC, http://www.nbc.com/video/library/full-episodes/ (last visited Apr. 16, 2014); *ABC TV Shows, Specials & Movies*, ABC, http://abc.go.com/shows (last visited Apr. 16, 2014); *Watch Full Episodes*, CBS, http://www.cbs.com/watch/ (last visited Apr. 16, 2014).

[11] Bill Carter, *Strong Finish to 2013 for Netflix as Profit and Subscriptions Soar*, N.Y. Times (Jan. 22, 2014), http://www.nytimes.com/2014/01/23/business/media/growth-of-netflix-subscribers-surpasses-analysts-expectations.html.

announced that the service had more than 30 million unique monthly visitors.[12] In total, some 183.8 million Americans watched nearly 48.7 billion online content videos in January 2014 alone.[13] Devices such as Roku, Apple TV, and wireless-equipped Blu-ray players allow consumers to view video content accessed over the internet on their television screens, further reducing the illusive distinction between broadcast television programming and internet video content.

Internet radio options have also expanded substantially in recent years.[14] Thousands of traditional AM/FM stations are available as streaming radio over the internet.[15] Internet-only radio platforms also attract large audiences. In February 2014, Pandora had 75.3 million "active" users (those who listen at least once a month),[16] and its total regis-

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[12] Dan Primack, *Hulu is no longer for sale*, Fortune (July 12, 2013), http://finance.fortune.cnn.com/2013/07/12/hulu-no-sale/.

[13] *comScore Releases January 2014 U.S. Online Video Rankings*, comScore (Feb. 21, 2014), https://www.comscore.com/Insights/Press_Releases/2014/2/comScore_Releases_January_2014_US_Online_Video_Rankings.

[14] *See* Laura Houston Santhanam, Amy Mitchell & Tom Rosenstiel, *The State of the News Media 2012, Audio: By the Numbers*, http://stateofthemedia.org/2012/audio-how-far-will-digital-go/audio-by-the-numbers/ (last visited Apr. 16, 2014).

[15] *See Streaming Radio Guide*, http://streamingradioguide.com/ (last visited Apr. 16, 2014).

[16] *Pandora Announces February 2014 Audience Metrics*, Pandora (Mar. 6, 2014), http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol-newsArticle&ID=1906773&highlight=; *see* Laura Santhanam, Amy Mitchell & Kenny Olmstead, *The State of the News Media*

tered users passed the 200 million mark in 2013.[17] A survey conducted in early 2013 reported that roughly 120 million Americans had listened to online radio in the last month.[18] Consumers are also able to purchase songs and albums online for instant listening through iTunes, Amazon, Google Play, and other outlets.

The power of the internet to reach mass audiences can hardly be overstated. As this Court observed almost 20 years ago—a virtual millennium in internet-years—the internet "provides relatively unlimited, low-cost capacity for communication of all kinds," including "not only traditional print and news services, but also audio, video, and still images, as well as interactive real-time dialogue." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). And the varied content distributed over the internet is widely accessible—87 percent of American adults now use the internet, and the percentage is even higher among young adults.[19]

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*2013, Audio: By the Numbers*, http://stateofthemedia.org/2013/audio-digital-drives-listener-experience/audio-by-the-numbers/ (last visited Apr. 16, 2014).

[17] *200 million strong!*, Pandora Blog (Apr. 9, 2013), http://blog.pandora.com/2013/04/09/200-million-strong/.

[18] Presentation, Arbitron Inc. & Edison Research, *The Infinite Dial 2013: Navigating Digital Platforms*, at 12 (2013), *available at* http://www.edisonresearch.com/wp-content/uploads/2013/04/Edison_Research_Arbitron_Infinite_Dial_2013.pdf.

[19] Pew Research Center, *The Web at 25 in the U.S.*, at 4-5 (Feb. 27, 2014), *available at* http://www.pewinternet.org/files/2014/02/PIP_25th-anniversary-of-the-Web_0227141.pdf.

The massive growth of alternative communications technologies has, "in effect, eliminated the scarcity of the spectrum as a constraint to television-based communications." Yoo, *supra*, at 280; *see Action for Children's Television*, 58 F.3d at 675 (Edwards, C.J., dissenting) ("[W]ith the development of cable, spectrum-based communications media now have an abundance of alternatives, essentially rendering the economic scarcity argument superfluous."); Hazlett, *supra*, at 929 ("The ability to replicate a 'physically scarce' technology with 'non-physically scarce' conduits leaves the former concept an empty box."). When *Red Lion* was decided, "broadcasters were perceived as powerful, perhaps dominant players in the media landscape." Hazlett et al., *supra*, at 53. Now, however, "the broadcast media appear to be just one set of rivals competing for audience share," *id.*, and there are many effective alternatives to broadcasting in the mass communications realm. To repeat Judge Kozinski's unassailable observation: "To the extent *Red Lion* was justified by the state of technology at the time it was written, it's certainly not justified by the state of technology today." Pet App. 79a (Kozinski, C.J., dissenting).

## III. *RED LION* CREATES DISCORD IN FIRST AMENDMENT JURISPRUDENCE

The free expression protected by the First Amendment is one of the cornerstone values of our nation. As a society, we have made a commitment to public discourse that is "uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Yet *Red Lion* allows the government to control the content of speech transmitted

over broadcast frequencies more heavily than other speech based on a scarcity rationale with no foundation in the First Amendment and at odds with this Court's other First Amendment decisions.

1. To protect speech under the First Amendment, the Court applies strict scrutiny to government regulation of the content of most forms of expression. *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 382 (1992). Regulation of the content of books, newspapers, CDs, DVDs, movies, internet blogs, and even cable television are all subject to close scrutiny. *E.g.*, *Reno*, 521 U.S. at 870 (internet content); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822 (2000) (cable television content).

But based on the scarcity rationale set out in *Red Lion*, regulation of broadcast television and radio speech is subject to lower scrutiny. *See League of Women Voters*, 468 U.S. at 380 (intermediate scrutiny for content-based regulation of broadcast speech); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection."). For example, "although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the [FCC] decides that such an action would serve 'the public interest, convenience, and necessity.'" *Pacifica Found.*, 438 U.S. at 748.

a. A case decided by the Court five years after *Red Lion* illustrates the gulf in treatment between broadcasting and print media. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the

Court assessed a Florida statute that granted a "right of reply" to those criticized in newspapers, *id.* at 244, just as the FCC regulation assessed in *Red Lion* gave a right of reply to those criticized on radio or television, 395 U.S. at 378-79. The Florida Supreme Court drew from *Red Lion* in upholding the state law, explaining that because economics prevented most people from publishing their views in newspapers, regulation was permissible to ensure all viewpoints were given access to the forum. *Tornillo v. Miami Herald Publ'g Co.*, 287 So. 2d 78, 83 (Fla. 1973). *Red Lion*'s scarcity doctrine "was the very center of the *Tornillo* briefs and oral arguments." William W. Van Alstyne, *The Mobius Strip of the First Amendment: Perspectives on* Red Lion, 29 S.C. L. Rev. 539, 547 (1978).

Yet on review of the Florida Supreme Court's *Red Lion*-based decision, this Court concluded the First Amendment barred states from requiring a right of reply in the newspaper context—without once citing or distinguishing *Red Lion*. 418 U.S. at 258. Instead, the Court simply explained that the "choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.*

Exactly the same could be said about the choice of material to go into a broadcast program. Not even *Red Lion* questioned that speech and artistic judg-

ment were at play in decisions made by broadcasters. Yet despite this essential similarity, the Court has relied on *Red Lion* to embrace the different treatment of broadcast and print media under the First Amendment. *Pacifica Found.*, 438 U.S. at 748 ("[A]lthough the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, [citing *Tornillo*], it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism [citing *Red Lion*]."). Even if the scarcity rationale made sense on its own terms, it would still be difficult to reconcile this Court's broadcast and print cases in accordance with a single, coherent theory of permissible speech regulation under the First Amendment. *See* Van Alstyne, *supra*, at 544; *see id.* at 544-48 & nn.30-49.

b. Determining what level of scrutiny applies based on the particular medium used to convey the speech has become even more problematic as historically distinct forms of media have converged. As explained in Part II, *supra*, broadcasting is no longer the sole—or even the primary—way of reaching American audiences with audio and video content. Broadcast television and radio shows are routinely made available over the internet to reach an even broader audience. But when the same programs are sent out over the internet, any regulation of their content is subject to strict scrutiny because the internet is not a "scarce" resource. *Reno*, 521 U.S. at 870.

The result is a bizarre situation where the same television program is subject to regulation under intermediate scrutiny when broadcast on standard tel-

evision channels, but subject to strict scrutiny when distributed through Hulu, Netflix, or other websites that offer streaming video. This inconsistent regulation makes little sense. *See*, *e.g.*, *In re Industry Guidance on Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999, 8022 n.11 (2001) (statement of Commissioner Furchtgott-Roth) ("It is ironic that streaming video or audio content from a television or radio station would likely receive more constitutional protection than would the same exact content broadcast over-the-air." (citations omitted)).

This disparity in treatment is all the more perplexing because virtually all types of media rely at least in part on the "scarce" spectrum regulated by the FCC. Cable, satellite television, and the wireless industry are the most obvious, but even traditional newspapers now rely heavily on access to the spectrum to gather breaking stories, rapidly transmit news reports, and provide their customers with online access. Given this broad dependence on "scarce" spectrum resources, it makes little sense to single out the broadcast industry for lowered First Amendment protection. *See* Hazlett et al., *supra*, at 51, 64.

2. The First Amendment has no carve-out simply because a form of media is scarce. By its terms, of course, the Constitution provides no textual basis for the scarcity rationale, or anything like it. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press"); *see Fox*, 556 U.S. at 532 (Thomas, J., concurring) ("[T]he original meaning of the Constitution

cannot turn on modern necessity . . . . In breaching this principle, *Red Lion* adopted, and *Pacifica* reaffirmed, a legal rule that lacks any textual basis in the Constitution."); *see also Action for Children's Television*, 58 F.3d at 673 (Edwards, C.J., dissenting) ("There is no justification for this apparent dichotomy in First Amendment jurisprudence.").

Nor is the underlying rationale for the scarcity doctrine—that government regulation will facilitate free speech over broadcast frequencies—consistent with normal First Amendment principles. To the contrary, "[a]s a matter of constitutional tradition . . . we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it." *Reno*, 521 U.S. at 885. In sum, the *Red Lion* "policy cannot be justified on a social cost-benefit calculus or via First Amendment jurisprudence." Hazlett et al., *supra*, at 51-52. It should be overturned.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari and overrule the *Red Lion* decision.

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