No. 13-1124

IN THE

Supreme Court of the United States

MINORITY TELEVISION PROJECT, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents,

and

LINCOLN BROADCASTING CO.,
Intervenor.

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

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on whether certiorari should be granted in this case to decide whether the First Amendment to the United States Constitution allows Congress to ban the broadcasting of certain paid advertisements on public television. This case is significant to NELF and its constituents because, if certiorari is granted, a decision from this Court will clarify the First Amendment protections afforded to a nonprofit corporation in its efforts to fund its mission, which in this case is the broadcasting of educational speech over the electromagnetic spectrum.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.2(a), amicus also states that all parties were provided with timely notice of NELF's intent to file this brief, and that counsel of record for all parties have consented to its filing, copies of which are filed herewith.

NELF is committed to the protection of a nonprofit corporation's right, under the First Amendment, to engage in truthful speech that is instrumental in securing funds that are necessary for its operations. NELF also adheres to the principle that the First Amendment should generally bar the Government from imposing content-based restrictions on protected speech. Instead, the First Amendment should limit the Government to implementing content-neutral, reasonable time, place, manner restrictions on such speech, to the extent that the Government has established a substantial or compelling basis for such restrictions.

In this connection, NELF filed an amicus brief in *Sorrell v. IMS Health Inc.,* 131 S. Ct. 2653 (2011), arguing that a content-based restriction on truthful speech that facilitates a business's economic activities warrants strict scrutiny under the First Amendment. NELF also filed an amicus brief in *Spirit Airlines, Inc. v. DOT*, *cert. denied*, 133 S. Ct. 1723 (Apr. 1, 2013) (12-656), arguing that, under *IMS Health*, the First Amendment should bar a content-based restriction on protected speech that lacks a neutral justification.

For these and other reasons discussed below, NELF believes that its brief will assist this Court in deciding whether to grant certiorari and determine whether the First Amendment allows Congress to ban the broadcasting of certain paid advertisements on public television.

SUMMARY OF ARGUMENT

This Court should grant certiorari and decide that public television stations have a First Amendment right to broadcast paid commercial advertisements, subject to reasonable limits, to supplement the funding of their educational speech. The educational mission of an independent public station such as the petitioner could be endangered if that station is denied the right to seek additional revenue from the limited broadcasting of commercial advertisements.

The statutory ban on paid commercial advertisements on public television, 47 U.S.C. § 399b(a)(1), is a content-based and speaker-based restriction on protected speech that cannot survive scrutiny under the First Amendment. The FCC argues that the ban is necessary to preserve the educational content of programming on public television. But the Government's fears are both implausible and impermissibly paternalistic. Indeed, this Court has held that the First Amendment rejects the rationale, offered here by the FCC, that the fundraising-related speech of a nonprofit corporation must be regulated for its own benefit. Moreover, the FCC has ignored the many obvious and fundamental differences between a for-profit, commercial station and a nonprofit, public station. These key differences would prevent public stations from abandoning their educational mission if they were allowed to supplement their revenues with commercial advertisements. The FCC has confused the commercial source of the funding with the non-commercial purpose and use of that funding --i.e., to assist in the broadcasting of educational

programs that serve the needs of the community.

The FCC has also disregarded the fact that viewers contribute substantially to public television and, therefore, exert a strong influence over programming decisions. The FCC has further disregarded the uniquely charitable, non-commercial role assumed by public television's corporate supporters. Corporations have long contributed to public television, even though they have never been allowed to promote their products or services as they would on commercial television. Clearly, corporations support public television because of its unique programs, and not because of the audience ratings or marketing opportunities that those programs may offer. Allowing commercial advertisements on public television would simply encourage current corporate supporters to contribute more money, and it could also attract new corporate support to public television. Finally, available empirical evidence, including the factual record in this case, shows that the limited use of commercial advertisements on public television has not influenced programming decisions.

Section 399b(a)(1) fails First Amendment scrutiny for the additional reason that the Government has drawn an arbitrary, content-based line between permissible, "enhanced" corporate underwriting statements and impermissible commercial advertisements. The FCC has allowed enhanced corporate underwriting statements for over thirty years. These statements closely resemble commercial advertisements because they are an implied promotion of a company's products or

services. And yet there is *no* indication whatsoever that resulting corporate contributions have exerted any commercializing influence on the programming content of public television.

It strains credulity to conclude that the mere addition of some expressly promotional language to these enhanced corporate underwriting statements would somehow transform public television into commercial television. To the contrary, permitting promotional language to enter these corporate statements could attract much-needed additional support for underfunded public stations, such as the petitioner, and allow them to fulfill their charitable mission.

The long use of enhanced corporate underwriting statements also defeats the FCC's argument that commercial advertisements would cause viewers to abandon their support of public television. The available evidence indicates that viewer support has not diminished, and has actually increased, during the past 30 years of these corporate statements. Viewers would therefore be likely to tolerate the limited appearance of commercial advertisements as a necessary inconvenience for the funding of the programs that they value so highly on public television.

And, even if viewers reacted negatively to commercial advertisements, the First Amendment should permit public station managers to respond intelligently to the situation, such as by withdrawing the advertisements, reducing their frequency, or toning down their promotional content. Conversely,

the First Amendment should prohibit the Government from substituting its judgment about the wisdom of commercial advertisements for that of public stations and their viewers. Free and robust debate on this public issue cannot take place with such governmental interference.

Finally, to the extent that the FCC has identified a substantial interest in regulating commercial advertisements on public television, the Government could implement less restrictive, content-neutral limits, rather than banning commercial advertisements altogether. Such reasonable restrictions would allow public stations to benefit from additional funding, while maintaining the educational purpose and character of public television. Such restrictions would also remove the Government from the undesirable role of evaluating the content of public broadcasters' speech. For example, the Government could limit the percentage of a public station's revenue that is derived from commercial advertisements, to preserve the current diversity of funding sources for public television.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI AND DECIDE THAT PUBLIC TELEVISION STATIONS HAVE A FIRST AMENDMENT RIGHT TO BROADCAST COMMERCIAL ADVERTISEMENTS, SUBJECT TO REASONABLE CONTENT-NEUTRAL LIMITS, TO SUPPLEMENT THE FUNDING OF THEIR EDUCATIONAL SPEECH.

A. The Educational Speech Of An Independent Public Television Station Such As The Petitioner Is Endangered If That Station Is Denied The Right To Seek Additional Funding From the Broadcasting Of Paid Commercial Advertisements.

At issue in this case is whether this Court should grant certiorari to decide whether the First Amendment to the United States Constitution, U.S. Const. amend. I, allows Congress to ban the broadcasting of certain paid advertisements on public television. 47 U.S.C. § 399b.[2] The petitioner,

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[2] 47 U.S.C. § 399b provides, in relevant part:

(a) "Advertisement" defined

For purposes of this section, the term "advertisement" means any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended--

Minority Television Project, Inc., is a California nonprofit corporation that operates KMTP–TV, an independent public television station committed to providing multicultural programming to underrepresented groups in the San Francisco Bay area. *See* KMTP-TV website, http://www.kmtp.tv/about.html (as visited Apr. 18, 2014).[3]

Unlike most public television stations, KMTP-TV has been unable to obtain federal funding from the Corporation for Public Broadcasting ("CPB"), the nonprofit corporation chartered by Congress to disburse federal monies to public stations. *See Minority Television Project, Inc. v. FCC*, 676 F. 3d 869, 872 (9th Cir. 2012), *overruled in part*, 736 F. 3d 1192 (9th Cir. 2013) (en banc). *See also* 47 U.S.C.

> (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.

(b) . . . [A]dvertisements prohibited . . .

> (2) No public broadcast station may make its facilities available to any person for the broadcasting of any advertisement.

[3] For example, KMTP-TV broadcasts foreign-language programs, a program on the subject of living with HIV/AIDS, and a news program addressing the concerns of the African-American community. *See* http://www.kmtp.tv/programs.html (as visited April 18, 2014).

§ 396(g)(2)(B) (granting CPB authority to distribute federal funds to public stations). In this connection, it should be noted that federal funding constitutes nearly 20% of most public stations' revenues.[4]

It is no secret that public television generally is in a precarious financial state, due to its dependence on dwindling sources of voluntary contributions.[5] It should also be noted that KMTP-TV's predecessor station remained entirely *off the air* for over five years, due to the lack of funds and, apparently, also due to the lack of interest in serving the educational needs of the community.[6]

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[4] *See* CPB, *Alternative Sources of Funding for Public Broadcasting Stations* 17 (June 20, 2012) (available at http://www.cpb.org/aboutcpb/Alternative_Sources_of_Funding_for_Public_Broadcasting_Stations.pdf (as visited on April 18, 2014) (federal funding constituted 18% of public television's revenues for fiscal year 2010).

[5] *See* CPB, *Alternative Sources of Funding* at 18 ("[C]haritable giving for public television declined by 13 percent between 2005 and 2010, wiping out a decade's worth of revenue growth."). *See also id.* at 19 ("Revenue from state and local governments, universities, and from the provision of services to state and local agencies and educational institutions has declined significantly.").

[6] KMTP-TV's predecessor station was KQEC, which was owned and operated by KQED TV, Inc. *See* Alex Friend, *FCC revokes license for San Francisco public TV station KQEC*, Current, May 11, 1988 (available at http://www.current.org/wp-content/themes/current/archive-site/ptv/ptv888kqed.shtml) (as visited April 18, 2014). KQED lacked the funding to operate KQEC. *See id.* Consequently, KQEC remained off the air from 1972 through 1977, and again from November 1979 to May 1980. *Id.* Since 1974, community broadcasting groups had petitioned the FCC not to renew KQED's license in KQEC, arguing that KQED was unresponsive to the needs of the

While NELF agrees with the petitioner's First Amendment challenge to all three categories of advertisements prohibited by § 399b,[7] NELF limits its discussion in this brief to the ban on a for-profit entity's paid promotion of its goods or services, i.e., commercial advertisements. 47 U.S.C. § 399b(a)(1). This statutory ban was the basis for the FCC's underlying enforcement action in this case. *See Minority Television Project, Inc. v. FCC*, 736 F. 3d 1192, 1196 (9th Cir. 2013) (en banc). Moreover, NELF believes that, among the proscribed categories of advertisements, commercial advertisements could provide the most viable source of additional funding for financially challenged public television stations. If permitted, under reasonable, content-neutral limits, the airing of commercial advertisements could assist such public stations substantially in fulfilling their mission--namely, the broadcasting of educational speech that is responsive to the needs of viewers.

And, while NELF also agrees with the petitioner that the Court should grant certiorari to reconsider *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (scarcity of broadcast spectrum warrants greater deference to governmental regulation of broadcaster's speech), NELF argues that the Court need not reach that issue. This is because § 399b(a)(1) should not even survive the

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community. *Id*. After many rebuffs by the FCC, the community groups finally prevailed. In 1988, after a remand from the Ninth Circuit on the issue, the FCC revoked KQED's license in KQEC and assigned that license to Minority Television Project. *Id*.

[7] *See* n.3, above.

intermediate scrutiny established under *Red Lion* and its progeny. *See FCC v. League of Women Voters of California*, 468 U.S. 364, 380 (1984) (announcing standard of First Amendment review for regulation of broadcast spectrum). For this and other reasons that NELF argues below, certiorari should be granted to consider whether § 399b(a)(1) imposes an unjustified, content-based restriction on protected speech and should therefore be invalidated.

B. The Statutory Ban On Paid Commercial Advertisements Does Not Survive First Amendment Scrutiny Because the Government Has Failed To Show How The Limited Use Of Commercial Advertisements On Public Television Would Corrupt Its Educational Mission.

Section 399b(a)(1) is a content-based and speaker-based restriction on speech. It singles out public television stations and bans them from broadcasting commercial advertisements, which Congress defines as paid speech that promotes a company's products or services. 47 U.S.C. § 399b(a)(1). This categorical, content- and speaker-based ban on protected speech warrants close First Amendment scrutiny. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) ("The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys" and because of identity of speaker).

The prohibited speech does not lose any

degree of First Amendment protection because it is paid for, or because it addresses a company's economic motives. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 420 (1993) ("[S]peech does not lose its First Amendment protection because money is spent to project it, as in a *paid advertisement* of one form or another.") (citations and internal quotation marks omitted) (emphasis added). *See also IMS Health*, 131 S. Ct. at 2665 ("While the burdened speech results from an economic motive, so too does a great deal of vital expression.").

Therefore, the prohibited speech enjoys, at the very least, the full First Amendment protection afforded to the broadcast spectrum. As such, the statutory ban must be "narrowly tailored to further a substantial governmental interest . . . ." *League of Women Voters*, 468 U.S. at 380. The FCC has, however, failed to justify § 399b(a)(1) under this standard of review.

The FCC argues that the ban is necessary to preserve educational programming on public television. *See Minority Television Project*, 736 F. 3d at 1203. If commercial advertisements were permitted, argues the FCC, public stations would be enticed to "follow the money" by making programming decisions based on the advertising value of a program, and not on its intrinsic educational worth. *See id.* As a result, the FCC asserts, public stations would abandon their educational mission and would choose instead to broadcast programs of mass-market appeal. In short, concludes the FCC, public television would

suffer the same "market failure" that plagues commercial television, in which programming content becomes homogenous and banal to attract a general audience, and the needs of many audience members are ignored. *See id.*

But the Government's fear of this "market failure" in public broadcasting cannot withstand First Amendment scrutiny because it is both implausible and impermissibly paternalistic. "When the Government defends a regulation on speech as a means to . . . prevent *anticipated harms*, it must do more than simply posit the existence of the disease sought to be cured. . . . It must demonstrate that the recited harms are *real, not merely conjectural* . . . ." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (citation and internal quotation marks omitted) (emphasis added). Indeed, this Court has held that the First Amendment rejects the "*paternalistic premise*," here offered by the FCC, "that charities' speech must be regulated for their own benefit . . . . [By contrast,] [t]he First Amendment mandates that we presume that speakers, *not the government*, know best both what they want to say and how to say it." *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 790-91 (1988) (invalidating, under First Amendment, state law regulating solicitation of charitable contributions by professional fundraisers) (emphasis added).

The FCC has apparently ignored the many obvious and fundamental differences between a for-profit, commercial station and a nonprofit, public station. These key differences, discussed further

below, would prevent any such "market failure" or profit motive from overtaking and corrupting the educational mission of public television. *See Minority Television Project*, 736 F. 3d at 1216-18 (Kozinski, C.J., dissenting) (discussing same). In effect, the FCC has confused the commercial *source* of the funding with the non-commercial *purpose* and use of that funding--i.e., to assist in the broadcasting of educational programs that serve the needs of the community. The First Amendment should not tolerate such a muddled and conjectural justification for an outright ban on protected speech.

In particular, the FCC has disregarded the basic fact that public stations are not subject to the market pressures that drive the programming content of commercial television. Unlike a public station, a commercial station must maximize its earnings for the sake of its shareholders, by increasing the value of its air time and selling it to corporate sponsors. "[C]ommercial broadcast stations . . . transmit signals at no charge to viewers and generate revenues by selling time to advertisers . . . ." *Turner*, 512 U.S. at 629. And, to maximize the value of their prime asset, commercial stations must garner high ratings by reaching the widest audience possible with their programs. Hence, programming decisions must generally follow the money on commercial television.

None of these market pressures, however, applies to nonprofit, public stations, which cannot be motivated by profits and which have no investors' interests to serve. To the contrary, public stations are subject to numerous statutory, regulatory, and

organizational strictures that remove any such market forces and instead require the station to serve its educational mission. For one, federal law requires a public station to be owned and operated by, *inter alia*, a nonprofit corporation, as this case illustrates. *See* 47 U.S.C. § 397(6)(A). And Congress has expressly defined this nonprofit corporation as an entity "no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual." 47 U.S.C. § 397(8). Moreover, the FCC requires that its license issued to a public station "[must] be used primarily to *serve the educational needs of the community [and] for the advancement of educational programs . . . .*" 47 C.F.R. § 73.621(a) (emphasis added). A station would therefore risk losing its FCC license if it departed from its educational mission.[8]

In addition to these federal safeguards, there are numerous state-law constraints that would prevent a public television station from abandoning its educational purpose. For example, states generally impose fiduciary duties on a nonprofit corporation's officers and directors in their governance of the organization. *See* Thomas Lee Hazen, Lisa Love Hazen, *Punctilios and Nonprofit Corporate Governance--A Comprehensive Look at Nonprofit Directors' Fiduciary Duties*, 14 U. Pa. J. Bus. L. 347, 380-85 (2012). Moreover, many states'

[8] Moreover, a nonprofit corporation can lose its federal tax-exempt status if it strays from its public purpose. *See* Thomas Lee Hazen, Lisa Love Hazen, *Punctilios and Nonprofit Corporate Governance--A Comprehensive Look at Nonprofit Directors' Fiduciary Duties*, 14 U. Pa. J. Bus. L. 347, 384 (2012) (citing 26 U.S.C. § 501).

attorneys general are empowered to police nonprofit corporations and remedy a breach of those duties, such as by depriving a nonprofit corporation of its nonprofit status, removing directors from office, or even dissolving the nonprofit corporation altogether. *See id.*, 14 U. Pa. J. Bus. L. at 405 (director removal); *id.* at 410 (loss of nonprofit status); *id.* at 384 & n.187, 405 n.281 (dissolution).

Quite apart from these constraints under federal and state law, the FCC has also ignored the "market" forces unique to public television that would prevent a public station from abandoning its educational mission. Unlike commercial stations, for example, public stations are supported substantially by donations from their viewers.[9] A station would risk losing or eroding the much-needed financial support of its viewers if it altered the educational content of its programming. Unlike the "free" viewers of commercial television, then, contributing viewers of public television have a direct influence on programming decisions because they pay a substantial portion of a public station's revenues.

The Government has thus disregarded the unique power that viewers of public television can exert over its programming decisions. In the same vein, the FCC has also disregarded the uniquely charitable, non-commercial role assumed by public television's corporate supporters. Corporations have contributed substantially to public television for

[9] *See* CPB, *Alternative Sources* at 17 (viewers contributed 22% of public television's revenues for fiscal year 2010).

decades, and continue to do so,[10] even though they have never been allowed to promote their products or services as they would on commercial television.

Clearly, corporate supporters of public television have been motivated primarily by charitable and *not* commercial interests when they contribute to public television. Corporations undoubtedly recognize the educational content of the programs that they fund on public television, along with the limited, niche audiences that those programs are likely to attract. Simply put, corporations support public television *because of* its unique programs, and not because of the audience ratings or promotional opportunities that those programs may offer. *See, e.g.*, Public Broadcasting System ("PBS") website, http://www.pbs.org/about/support-our-mission/corporate-partnerships/ (as visited Apr. 18, 2014) ("Each year hundreds of corporate partners work with PBS and our member stations--providing funds that ensure that high quality programming and services remain available to every American . . . .").

In this light, allowing commercial advertisements on public television would simply encourage current corporate supporters to contribute more money, and it could also attract new corporate

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[10] *See* CPB, *Alternative Sources of Funding* at 17 (businesses contributed 13% of public television's revenues for fiscal year 2010). *See also* Temporary Commission on Alternative Financing for Public Telecommunications, *Final Report* 5 (October 1, 1983) (businesses contributed 10.7% of public television's revenues for fiscal year 1982).

support to public television. This potential increase in corporate funding of public television could hardly exert a corrupting commercial influence on its programming content, as the FCC so fears. After all, there is no indication, nor has the FCC argued in this case, that the substantial current levels of corporate support have corrupted public television's educational mission.

The FCC's concern apparently rests, in part, on the unstated and improbable assumption that, if corporations were allowed to advertise on public television, corporations would suddenly treat public television as if it *were* commercial television. That is, corporations would choose not to underwrite public television programs unless those programs could deliver large audiences and promotional opportunities equivalent to those associated with commercial television.

But this pivotal assumption on the part of the Government defies common sense. It is implausible to conclude that the introduction of commercial advertisements on public television would cause longstanding corporate supporters to abandon both their charitable role and their understanding of public television's unique programming. If commercial advertisements were permitted, a corporation could certainly decide not to "purchase" air time on public television due to low ratings. But this would only leave the public station in the same financial position that it occupies now. An existing corporate supporter could simply choose to continue underwriting at its current levels, and a potential new corporate contributor could simply decide not to

pay for a commercial advertisement on public television.

Finally, it should be noted that available empirical evidence defeats the Government's concerns. This evidence shows that the limited use of commercial advertisements on public television has had no influence on programming decisions.[11] Moreover, the factual record in this case confirms this empirical evidence. The FCC cited the petitioner for broadcasting commercial advertisements approximately 1,911 times. *Minority Television Project*, 736 F. 3d at 1196. But there is no indication, nor has the FCC argued, that this practice had any influence on the petitioner's programming decisions.

In sum, the Government has failed to justify the statutory ban on paid commercial advertisements on public television. Accordingly, certiorari should be granted to invalidate § 399b(a)(1) under the First Amendment.

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[11] *See* Temporary Commission, *Final Report* at ii, 20 41 (no change in programming content from limited use of commercial advertising under Government-conducted experiment). *See also id.* at 15 (discussing scheduling limits for commercial advertisements, such as no interruption of regular programming and limiting advertisement blocks to two minutes).

C. The Government Has Drawn An Arbitrary, Content-Based Line Between Permissible Corporate Underwriting Statements and Impermissible Commercial Advertisements That Does Not Withstand First Amendment Scrutiny.

The Government's defense of § 399b(a)(1) fails First Amendment scrutiny for the additional reason that both Congress and the FCC have drawn a content-based line between permissible and impermissible speech that does not advance any substantial governmental interest. Instead, the line drawing is arbitrary, and it deprives public stations of much-needed additional funding to fulfill their educational purpose.

For over thirty years, Congress and the FCC have effectively permitted corporations to buy air time on public television, in the form of "enhanced" corporate underwriting statements. *See* 47 U.S.C. § 399a.[12] *See also In the Matter of Commission*

[12] 47 U.S.C. § 399a provides:

(a) "Business or institutional logogram" defined

For purposes of this section, the term "business or institutional logogram" means any aural or visual letters or words, or any symbol or sign, which is used for the exclusive purpose of identifying any corporation, company, or other organization, and which is not used for the purpose of promoting the products, services, or facilities of such corporation, company, or other organization.

(b) Permitted uses

Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations, 7 F.C.C.R. 827, 827-28 (1992) (discussing FCC's allowance of enhanced corporate underwriting statements since March of 1984). To "attract[ ] additional business support" to public television, 7 F.C.C.R. at 827, the FCC has allowed companies to describe their products or services and to depict them with appealing visual images. *See id*. Corporate underwriters may even use their familiar commercial slogans, even if those slogans contain promotional-sounding language. *See id*. *See also* Andrew D. Cotlar, *You Said What? The Perils of Content-Based Regulation of Public Broadcast Underwriting Acknowledgments*, 59 Fed. Comm. L.J. 47, 59 (2006) ("For instance, the [FCC] has stated that DuPont's slogan 'Makers of Better Things for Better Living' is more of an established slogan than a promotional statement."). The corporation may even provide its location and phone number. *See* 47 U.S.C. at 399a(b); 7 F.C.C.R. at 827.

Each public television station and each public radio station shall be authorized to broadcast announcements which include the use of any business or institutional logogram and which include a reference to the location of the corporation, company, or other organization involved, except that such announcements may not interrupt regular programming.

(c) Authority of Commission not limited

The provisions of this section shall not be construed to limit the authority of the Commission to prescribe regulations relating to the manner in which logograms may be used to identify corporations, companies, or other organizations.

These corporate underwriting statements closely resemble commercial advertisements because they are, at the very least, an *implied* promotion of a company's products or services. After all, the FCC permitted these enhanced corporate statements precisely to attract more corporate support for public television. *See* 7 F.C.C.R. at 827. That is, the FCC recognized that corporations would have a greater incentive to contribute money if they were allowed, in return, to air more information to viewers about themselves, i.e., to advance their commercial interests.[13] And yet there is *no* indication whatsoever that resulting corporate contributions have exerted any commercializing influence on the programming content of public television, during the past three decades that the FCC has permitted enhanced corporate underwriting statements.

It therefore strains credulity to conclude, as the FCC apparently has, that the mere addition of some expressly promotional language to these enhanced corporate underwriting statements would somehow transform public television into commercial television. That is, if enhanced corporate underwriting statements resemble commercial advertisements, and if these corporate underwriting statements have had no adverse effect on programming content, why would the introduction of more overtly promotional language cause public stations and their corporate supporters

[13] The FCC's strategy has apparently worked. *Compare* Temporary Commission, *Final Report* at 5 (corporations contributed 10% of public television's revenues for fiscal year 1982) *with* CPB, Alternative Sources at 17 (corporate contributions increased to 13% of revenues for fiscal year 2010).

to abandon public television's educational mission? There is no discernible answer to this key question. This is reason alone to invalidate § 399b(a)(1) under the First Amendment.

To the contrary, permitting promotional language to enter these corporate statements could attract much-needed additional support for underfunded public stations such as the petitioner. The First Amendment should not tolerate a restriction on protected speech when the costs are so high and the benefits so slight, if not illusory. "[T]he sacrifice of First Amendment protections for so speculative a gain is not warranted. . . ." *League of Women Voters*, 468 U.S. at 397 (citation and internal punctuation marks omitted). Depriving public stations like KMTP-TV of the opportunity to secure additional revenue through commercial advertisements could silence their educational speech altogether.

The long use of enhanced corporate underwriting statements also defeats the FCC's argument that commercial advertisements would cause viewers to abandon their support of public television. *See, e.g., Minority Television Project*, 736 F. 3d at 1209 (Government expert discussing same). For the reasons discussed above, enhanced corporate statements resemble commercial advertisements, albeit in a lean, understated form. But the available evidence indicates that viewer support has not diminished, and has actually *increased*, during the past 30 years of these corporate statements.[14]

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[14] *Compare* Temporary Commission, *Final Report* at 5 (viewers contributed 16.7% of public television's revenues for fiscal year

This enduring viewer support of public television indicates that viewers recognize that corporate underwriting statements are a necessary inconvenience for the funding of the programs that they value so highly on public television. Viewers should therefore be trusted to understand the same economic realities if full-blown commercial advertisements were permitted, especially if they were permitted under the same or similar scheduling restrictions applicable to enhanced underwriting statements. *See, e.g.*, 47 U.S.C. § 399a(b) (no interruption of regular programming).

And, even if viewers reacted negatively to commercial advertisements, the First Amendment should permit public station managers to respond intelligently to the situation, such as by withdrawing the advertisements, reducing their frequency, or toning down their promotional content. After all, "the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of *speakers and listeners*; free and robust debate cannot thrive if directed by the government." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. at 791 (emphasis added). *See also id.* (discussing other Court decisions criticizing paternalistic governmental justifications for regulation of protected speech).

In this light, the First Amendment ensures an open marketplace of competing views, free of governmental interference, from which the truth can emerge. *See New York State Bd. of Elections v.*

1982) *with* CPB, *Alternative Sources* at 17 (viewers contributed 22% of revenues for fiscal year 2010).

Lopez Torres, 552 U.S. 196, 208 (2008). If the broadcasting of commercial advertisements proves to be a bad idea among viewers of a particular public station, then "the remedy to be applied [under the First Amendment] is more speech, not enforced silence." *Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

In short, the dialogue between a public television station and its supporters is a kind of public debate about the appropriate ways for a nonprofit entity to raise much-needed revenue to fund its educational mission. And the First Amendment ensures that "[s]ociety has the right and civic duty to engage in *open, dynamic, rational discourse*. These ends are not well served when the government seeks to orchestrate public discussion through *content-based mandates*." *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (plurality opinion) (Kennedy, J.) (citation omitted).

To address these salient First Amendment concerns, this Court should therefore grant certiorari and review the arbitrary, content-based line that Congress has drawn between permissible and impermissible speech.

D. The Government Could Avoid A Content-Based Ban On Paid Commercial Advertisements By Implementing Less Restrictive, Content-Neutral Limits, To The Extent Necessary To Maintain The Educational Purpose Of Public Television.

Finally, to the extent that the FCC has identified a substantial interest in regulating commercial advertisements on public television, the Government could implement less restrictive, content-neutral limits, rather than banning commercial advertisements altogether. *See League of Women Voters*, 468 U.S. at 395 (invalidating statutory ban on editorializing by public television stations receiving federal funds, in part because Congress could simply require stations to air disclaimer that opinions expressed were not those of Government). *See generally Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989) (discussing content-neutral, reasonable time, place, manner restrictions applicable to public forum).

Implementing reasonable, content-neutral restrictions on the broadcasting of commercial advertisements on public television would allow public stations to obtain additional funding, while maintaining the educational purpose and character of public television. Such restrictions would also remove the Government from the undesirable role of evaluating the content of public broadcasters' speech. *See League of Women Voters*, 468 U.S. at 383 (discussing disapprovingly FCC's content-based evaluation of speech in enforcing statutory ban on

editorializing by public stations). *See also* Cotlar, *You Said What?*, 59 Fed. Comm. L.J. at 53-59 (analyzing inconsistencies among numerous FCC corporate underwriting decisions concerning "promotional" language).

For example, the Government could simply limit the percentage of a public station's revenue that is derived from commercial advertisements. *See Minority Television Project*, 736 F. 3d at 1220, 1221 (dissent) (approving same). Such a reasonable restriction would allow public stations to benefit from additional corporate funding while maintaining the current diversity of funding sources available to public television.[15] Maintaining diverse sources of funding should, in turn, prevent any undue influence that corporate contributions could have on programming decisions.[16] The Government could also implement the same or similar restrictions applicable to corporate underwriting statements, such as limits on duration and frequency, and a ban on interrupting regular programming. *See, e.g.*, 47 U.S.C. § 399a(b) (no interruption of regular programming).[17]

In sum, this Court should grant certiorari to consider the invalidity of § 399b(a)(1)'s content-based

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[15] See CPB, *Alternative Sources* at 17 (listing sources of funding for public television).

[16] *See* Temporary Commission, *Final Report* at 21 (discussing same).

[17] *See also* Temporary Commission, *Final Report* at 15 (discussing scheduling restrictions on commercial advertisements in Government-conducted experiment).

ban on protected speech under the First Amendment, in part because there are less burdensome, content-neutral restrictions that would serve the Government's ends. Instead of banning commercial advertisements outright, the Government should permit this speech, subject to reasonable time and placement limits, if necessary. As a result, a public broadcasting station such as the petitioner could seek substantial, and even necessary, additional funding to fulfill its mission of broadcasting educational speech.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court grant the petitioner's petition for certiorari.

Respectfully submitted,

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