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 FOR *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

We, the professors of law whose names appear in the attached Appendix, file this brief *amicus curiae* in support of Petitioner Minority Television Project, Inc., in *Minority Television Project v. FCC*, No. 13-1124 (filed March 17, 2014). In accordance with Rule 37.1 of this Court, we wish to provide "considerable help to the Court" by emphasizing how this petition provides an ideal vehicle for reconsidering and ultimately overruling *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Although it lies beyond dispute that a law may be unconstitutional despite being "supported by all the law professors in the land," *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 11, 228 (1995), the legal academy — a community not particularly known for its ability to reach consensus on any issue, let alone controversial constitutional doctrines — has reached a strong, even overwhelming consensus that *Red Lion* should be overruled and that the regulation of broadcast speech should accordingly be reviewed under First Amendment standards governing all other communications media.[2] This brief expresses our belief that this Court,

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief.

[2] *See*, *e.g.,* LEE C. BOLLINGER, IMAGES OF A FREE PRESS 87-90 (1991); LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 197-209 (1987); MATTHEW SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES 7-18 (1986); Stuart Minor Benjamin, *Evaluating the Federal Communications Commission's National Television Ownership*

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and our country at large, would be best served by a thorough reconsideration and repudiation of *Red Lion*.

SUMMARY OF THE ARGUMENT

Mindful that this Court welcomes briefs *amicus curiae* only insofar as they present "relevant matter not already brought to its attention by the parties," Sup. Ct. R. 37.1, this brief will emphasize three reasons favoring a grant of certiorari and the overruling of *Red Lion*. First, overwhelming technological change compels reexamination of *Red Lion*. The proliferation of electronic media for distributing multichannel audio and video programming has

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New Age, 47 DUKE L.J. 899, 903-04 (1988); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 991 (1989); Laurence H. Tribe, *Freedom of Speech and Press in the 21st Century: New Technology Meets Old Constitutionalism*, http://www.tvworldwide.com/events/pff/070819 (Aug. 20, 2007); William W. Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on* Red Lion, 29 S.C. L. REV. 539, 574 (1978); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1103, 1106 (1993); Lawrence H. Winer, *The* Red Lion *of Cable, and Beyond?* — Turner Broadcasting v. FCC, 15 CARDOZO ARTS & ENT. L. REV. 1, 21-25 (1997); Lawrence H. Winer, *The Signal Cable Sends — Part I: Why Can't Cable Be More like Broadcasting?*, 46 MD. L. REV. 212, 221-22 (1987); Brittney Pescatore, Note, *Time to Change the Channel: Assessing the FCC's Children's Programming Requirements Under the First Amendment*, 33 COLUM. J. L. & ARTS 81, 84-90 (2009); Roxana Wizorek, Comment, *Children's Television: The FCC's Attempt to Educate America's Children May Force the Supreme Court to Reconsider the* Red Lion *Rationale*, 47 CATH. U. L. REV. 153, 182-84 (1998). *See generally* Symposium, *Does* Red Lion *Still Roar?*, 60 ADMIN. L. REV. 767 (2008).

undermined *Red Lion*'s scarcity rationale. Second, *Red Lion* has been so thoroughly discredited in all branches of government that further adherence to that precedent would undermine rather than promote respect for this Court's decisionmaking process and for the rule of law. Finally, this case demonstrates how the continued isolation of broadcast media from First Amendment norms that govern all other media and conduits inflicts serious harm to the constitutional interest in free speech.

ARGUMENT

Red Lion, of course, remains valid precedent, and this Court retains "the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *accord*, *e.g*, *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Absent some "special justification" for departing from precedent, *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), this Court honors *stare decisis* as the "preferred course" for "promot[ing] the even-handed, predictable, and consistent development of legal principles." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). By the same token, *stare decisis* is neither an "inexorable command," *Lawrence v. Texas*, 539 U.S. 558, 557 (2003), nor "a mechanical formula of adherence," *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Rather, inasmuch as it "counsel[s] … caution in rejecting established law" without "mandat[ing] that earlier decisions be enshrined forever," *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980), *stare decisis* provides the flexible means by which this Court, especially in constitutional cases,

see, *e.g.*, *Payne*, 501 U.S. at 828; *United States v. Scott*, 437 U.S. 82, 101 (1978), "ensures that the law … will develop in a principled and intelligible fashion." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). "[W]hen fidelity to any particular precedent does more to damage th[e] constitutional ideal" of the rule of law "than to advance it," it becomes incumbent upon this Court "to depart from that precedent." *Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring).

In the decision for which Minority Television Project has petitioned for a writ of certiorari, the Court of Appeals for the Ninth Circuit, *en banc*, applied the intermediate scrutiny standard adopted by *FCC v. League of Women Voters*, 468 U.S. 364 (1984), for upholding content-based regulation of broadcasting only if it is "narrowly tailored to further a substantial governmental interest," *id.* at 380, in explicit reliance upon *Red Lion* (*see id.* (citing 395 U.S. at 377)). Observing that this Court has not overruled "precedent providing for less rigorous scrutiny of broadcast regulation," the Court of Appeals declined to engage in "fundamental reconsideration of longstanding precedent." *Minority Television Project, Inc. v. FCC*, 736 F.3d 1192, 1198 (9th Cir. 2013) (Pet. App. 15a-16a). This petition for certiorari explicitly asks this Court to reconsider and to overrule *Red Lion*. Inasmuch as that precedent proved dispositive to the judgment below, and inasmuch as this petition squarely presents the issue, we urge the Court to grant the writ of certiorari and to overrule *Red Lion*.

I. TECHNOLOGICAL CHANGE COMPELS REEXAMINATION OF *RED LION* AND ITS SCARCITY RATIONALE

By its own terms, *Red Lion* confined the scope of its holding to the technological constraints on broadcasting as of the date of decision. The Court's opinion acknowledged "[t]he rapidity with which technological advances succeed one another to create more efficient use of spectrum space." 395 U.S. at 399; *see also id.* at 396-97 ("Advances in technology have led to more efficient utilization of the frequency spectrum"). Accordingly, *Red Lion* declared it "unwise to speculate on the future allocation of that space." *Id.* at 399. Not five years after *Red Lion*, Justice Douglas predicted that "the advances of cable television," to say nothing of other technological developments, would expand the choices of "television viewers" hundredfold to no fewer than "400 channels" of programming and thereby would render scarcity in broadcasting a "constraint of the past." *CBS v. Democratic Nat'l Committee*, 412 U.S. 94, 158 n.8 (1973). The lower courts have always understood that "the rationale of *Red Lion* is not immutable," *Meredith Corp. v. FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987), given that *Red Lion* had confined its own reasoning to "'the present state of commercially acceptable technology as of 1969," *News Am. Publishing, Inc., v. FCC*, 844 F.2d 800, 811 (D.C.Cir. 1988) (quoting *Red Lion*, 395 U.S. at 388). *See generally* Robert Corn-Revere, *Regulating Media Content in an Age of Abundance*, 27:3 COMMUNICATIONS LAWYER 21, 22 (Sept. 2010). *Cessat ratione legis, cessat ipse lex. E.g.*, *Funk v. United States*, 290 U.S. 371, 385 (1933).

Minority Television Project's petition and the dissent from the Ninth Circuit's *en banc* decision are far from the only sources to identify the technological pressure on the First Amendment jurisprudence of the "rapidly fluctuating" and "dynamic [field] of radio transmission." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). Five Terms ago, in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), Justice Thomas identified the technological circumstances that have come to cast "increased doubt regarding [the] continued validity" of *Red Lion*. *Id.* at 530 (Thomas, J., concurring). Ten years ago, as Justice Thomas noted in *Fox*, "the number of over-the-air broadcast stations" more than doubled in 35 years, "from 7,411 in 1969, when *Red Lion* was issued, to 15,273 by the end of 2004." *Id.* at 533. The completion of the FCC's transition of broadcast television from analog to digital transmission has fulfilled the Commission's promise that high-definition television would "stack broadcast channels right beside one another along the spectrum, and ultimately utilize significantly less than the 400 MHz of spectrum" that analog broadcasting, long ago, once demanded. *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 294 (D.C. Cir. 2003); *accord Fox*, 556 U.S. at 533 (Thomas, J., concurring). In the words of the FCC's own Media Bureau, the "scarcity rationale for regulating traditional broadcasting" is "an idea whose time has passed." John W. Berresford, FCC Media Bureau Staff Research Paper No. 2005-2, at 12-13 (March 2005).

Continued adherence to *Red Lion* isolates conventional broadcast media — specifically, terrestrial radio and television — from the First Amendment

standards that govern virtually all other channels of communication. Confronted in 1974 with a state right-of-reply law that was practically indistinguishable from the fairness doctrine upheld in *Red Lion*, this Court condemned this intrusion on a newspaper's "exercise of editorial control and judgment." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *accord Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 16 (1986) (characterizing the "kind of forced response" at issue in *Tornillo* as "antithetical to the free discussion that the First Amendment seeks to foster"). This Court has consistently declined to apply the weakened level of scrutiny adopted by *Red Lion* and *League of Women Voters* in every other electronic communications medium. *See Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 127-28 (1989) (telephone dial-in services); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994) (cable television); *Reno v. ACLU*, 521 U.S. 844, 867-68 (1997) (Internet); *see also Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983) ("[T]he special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication."); *cf.* Ronald J. Krotoszynski, Jr., *The Irrelevant Wasteland: An Exploration of Why* Red Lion *Doesn't Matter (Much) in 2008*, 60 ADMIN. L. REV. 911, 932 (2008) (observing that this Court's refusal to apply or extend *Red Lion* to other media constitutes "strong evidence" of that decision's infirmity); Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 146 (noting that "broadcasting cases have generally had little

gravitational force"); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 292 (2003)

> The Court's apparent reluctance to rely on the scarcity doctrine … raises the distinct possibility that, having stopped short of overruling the scarcity doctrine outright, the Court is nonetheless distancing itself from it. Given its conceptual and empirical infirmities, I would certainly welcome any indication that the doctrine is losing its vitality

See generally Fox, 556 U.S. at 533-35 (Thomas, J., concurring) (reviewing the relevant case law and technological developments).

At a minimum, this Court should treat this petition as an opportunity to reassess whether "differences in the First Amendment standards applied" to broadcast media are justified by the technological, economic, and social characteristics of this "medium of expression." *Red Lion*, 395 U.S. at 386. In *Reno*, this Court was presented with the question of how it should approach content-based regulation of speech transmitted over the Internet. This Court evaluated that question according to three criteria: (1) "the history of extensive Government regulation," (2) the scarcity of available" avenues for expression, and (3) the putatively "'invasive' nature" of the medium in question. 521 U.S. at 868; *cf. FCC v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978) (upholding the FCC's power to regulate the timing of profane and potentially offensive radio broadcasts because of that

medium's "uniquely pervasive" presence and its "accessib[ility] to children, even those too young to read"). Inasmuch as technological innovation provides "a singularly uncontroversial justification for modifying established doctrine," Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV. 976, 1008 (1997), this Court should accept the invitation to consider the appropriate constitutional treatment of broadcasting *de novo*, in light of that medium's interaction with numerous contemporary rivals and substitutes, from cable and direct broadcast satellite to the Internet.

Far from fixing the Court's broadcasting jurisprudence to a permanent, inflexible standard, *Red Lion* has always held open the possibility that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." 395 U.S. at 286; *accord City of Los Angeles v. Preferred Communications, Inc.,* 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) ("Different communications media are treated differently for First Amendment purposes."); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression … must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."). Nearly half a century after *Red Lion*, broadcasting and its technological, economic, and social context have been so thoroughly transformed that the Court would greatly advance the law's dual interests in freedom of speech and in the rationalization of complex media markets by reevaluating anew the constitutional

standards that should govern the regulation of broadcast speech.

II. ALL BRANCHES OF THE FEDERAL GOVERNMENT HAVE SIGNALED THEIR REJECTION OF *RED LION*

No fewer than four current Justices of this Court have expressed a willingness to reconsider *Red Lion* and cases resting on its rationale. *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2321 (2012) (Ginsburg, J., concurring in the judgment) ("[T]he Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) was wrong when it was issued. Tim[e] [and] technological advances … show why *Pacifica* bears reconsideration."); *Fox* (2009), 556 U.S at 533 (Thomas, J., concurring) (inviting "reconsideration of *Red Lion*" on the basis of "dramatic changes in factual circumstances"); *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 813 (1996) (Thomas, J., concurring and dissenting in part, joined by Rehnquist, C.J., and Scalia, J.) (describing the scarcity doctrine as "dubious from [its] infancy"); Elena Kagan, *Remarks at the 1995 Libel Conference of the Newspaper Association of America* (Sept. 21, 1995) ("[D]id the scarcity rationale ever make sense with respect to broadcasting?"); *cf. Denver*, 518 U.S. at 813 (Thomas, J., concurring in the judgment in part and dissenting in part) (describing this Court's resolution of free speech controversies involving cable television as a "doctrinal wasteland"). *See generally* Petition at 21. Lower courts have expressed their frustration with *Red Lion*. *See*, *e.g.*, *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 877 n.3 (D.C. Cir. 1999);

Time Warner Entertainment Co. v. FCC, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing *en banc*); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) (Edwards, C.J., dissenting) ("[I]t is no longer responsible for courts to apply a reduced level of First Amendment protection … on the indefensible notion of spectrum scarcity."); *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1443 (8th Cir. 1993) (R. Arnold, C.J., concurring in the judgment); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 682-83 (D.C. Cir. 1989); *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 507-09 (D.C. Cir. 1986); *cf. US West, Inc. v. United States*, 48 F.3d 1092, 1098 (9th Cir. 1995) (observing that "*Red Lion*, and other broadcast regulation cases are based on the 'scarcity rationale,' which makes them fundamentally different from other First Amendment cases" and inapplicable to the regulation of cable television). As much as lower courts may wish to declare that *Red Lion* "no longer makes sense," however, they rightly confess that they are "not in a position to reject" that decision's "scarcity rationale." *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002). Indeed, absent some willingness by this Court to reconsider *Red Lion* and to indicate precisely how even "venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets," *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 342 (1969), *Red Lion*'s scarcity rationale will be self-perpetuating.

To the extent that this Court has deferred its reconsideration of *Red Lion* until the political branches transmit "some signal … that technological developments have advanced so far that some revision of the system of broadcast regulation may be required," *League of Women Voters*, 468 U.S. at 376 n.11, that day of reckoning has arrived. In *Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C.R. 5043 (1987), the FCC not only repealed the fairness doctrine, but also specifically concluded that "the increase in the number of media outlets available to the public" had, a quarter-century ago, already "discredit[ed] the claim of numerical scarcity in the electronic media." *Id.* at 5055 n.151. The FCC accordingly repudiated *Red Lion*, reasoning that "the scarcity rationale developed in [that] decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press." *Id.* at 5053. This conclusion unequivocally provides this Court "the signal [requested] … in *League of Women Voters*." *Id.* Commissioners Powell and Furchtgott-Roth later confirmed that the FCC "has unequivocally repudiated spectrum scarcity as a factual matter," *Personal Attack and Political Editorial Rules*, 13 F.C.C.R. 21,901, 21,940 (1998). That conclusion compelled the Court of Appeals for the District of Columbia Circuit to issue a writ of mandamus directing the FCC to repeal the last administrative relics of the *Red Lion* regime, the personal attack and political editorializing rules. *See Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269, 308 (D.C. Cir. 2000).

By deed if not by word, Congress, too, has refuted the scarcity rationale animating *Red Lion*. We

need not fully embrace the notion that Congress and the FCC have an affirmative, constitutional obligation to deploy the entire electromagnetic spectrum, *see generally* Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1 (2002), in order to infer, as reason demands that we must, that repeated congressional directives to deploy spectrum by auction collectively convey a firm legislative conclusion that there is no economically or legally meaningful scarcity of broadcast spectrum. In 1993, Congress signaled the first retreat from the comparative licensing model for allocating radio spectrum in the public interest, *see generally Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), by authorizing the FCC to allocate licenses by competitive auction. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 312, 387-88. In 1997, Congress emphatically reinforced its view on the highest, best use of spectrum by ordering the FCC to conduct competitive auctions. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002(a)(1), 111 Stat. 251, 258-60 (amending 47 U.S.C. § 309(j)). From 1997 through 2012, Congress has ordered the FCC to auction broadcast spectrum for other uses no fewer than four times. *See id.* § 3003, 111 Stat. at 265-66; Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 3003(b), 120 Stat. 4, 22 (2006); DTV Delay Act, Pub. L. No. 111-4, § 5, 123 Stat. 112, 114 (2009); Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6403, 126 Stat. 156, 225. The FCC has acted on these successive directives. *See, e.g.*, *700 MHz Guard Bands Auction Closes*, 15 F.C.C.R. 18,026 (2000).

Over time, these legislative enactments acquire and convey legal meaning, significance that the judiciary must respect in crafting its own interpretations of the law. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). Congressional enactments since the time of *Red Lion* necessarily inform the "classic judicial act of reconciling many laws enacted over time, and getting to 'make sense' in combination." *United States v. Fausto*, 484 U.S. 439, 453 (1988). The "specific policy embodied" in congressional directives regarding the auctioning of broadcast spectrum should at least guide, if not affirmatively "control," this Court's evaluation of the interplay between federal regulation of the electromagnetic spectrum and the First Amendment. *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998). This treatment of statutes as sources of principled law, though usually associated with statutory interpretation and the elaboration of federal common law, *compare Brown & Williamson*, 529 U.S. at 133, 143 *with Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), finds an especially appropriate use in broadcast regulation. As always, this Court is "guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Brown & Williamson*, 529 U.S. at 133; *cf. MCI Telecommunications. Corp. v. American. Telephone & Telegraph Co.*, 512 U. S. 218, 231 (1994). "[I]n an industry so regulated and so largely closed" as broadcasting has been, *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 97 (1953), it will not do to freeze constitutional doctrine on unexamined as-

sumptions regarding spectrum scarcity, especially not when Congress and its designated expert agency have actively, emphatically rejected the scarcity rationale that originally underlay *Red Lion*.

III. THE ISOLATION OF BROADCASTING FROM FIRST AMENDMENT STANDARDS GOVERNING OTHER MEDIA DAMAGES THE CONSTITUTIONAL INTEREST IN FREE SPEECH

This petition provides an exceptionally attractive vehicle for addressing *Red Lion* and its scarcity rationale. Significant amounts of the paid advertising at issue in this case included paid political messages by candidates or advocacy groups. This is core speech, deserving of this Court's greatest vigilance. In *McConnell v. FCC*, 540 U.S. 93 (2003), this Court applied strict scrutiny to a federal ban on the use of corporations' or labor unions' general treasury funds to finance "electioneering communications." *See id.* at 205-07. Although the Bipartisan Campaign Reform Act (BCRA) defined "electioneering communications" to include "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office," 2 U.S.C. § 434(f)(3)(A)(i), *McConnell* asked "whether a compelling governmental interest justifies [the] burden" that the electioneering ban placed on communications in *all* three conduits addressed by the BCRA: satellite, cable, and broadcast. 540 U.S. at 205. In *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), the strict scrutiny test of *McConnell* applied with full force, *see id.* at 464 (citing *McConnell*, 540 U.S. at 205), even though the advocacy advertising

in *Wisconsin Right to Life* had been broadcast over terrestrial radio. *See* 551 U.S. at 458-59.

Cementing this line of reasoning is this Court's decision in *Citizens United*. Applying the full force of the First Amendment's protection for free speech, *Citizens United* found "[n]o sufficient governmental interest [to] justif[y] limits on the political speech of nonprofit or for-profit corporations." 558 U.S. at 365. In entertaining arguments regarding "what means of speech should be preferred or disfavored," this Court observed that "those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux." *Id.* at 326. On this reasoning, this Court specifically refused to distinguish between "movies shown through video-on-demand" from traditional advertising on "conventional television" and to "draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech." *Id.*

Nor is this petitioner's constitutional claim affected by the paid nature of the messages that Minority Television Project is forbidden from carrying. Whatever this Court might withhold in constitutional protection for so-called commercial speech, *see Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667 (2011), it is beyond dispute that the "First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with [its] message,'" *id.* at 2664 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The failure of the *en banc* Ninth Circuit to accord full constitutional protection to Minority Television Project is especially ironic in light of the

history of struggles in Congress, the FCC, and this Court, *see generally Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *NAACP v. FCC*, 425 U. S. 662, 670 (1976), to ensure that the public interest in "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S. 1, 20 (1945), includes the recognition and empowerment of audiences belonging to racial and ethnic minorities — a perfect description of Minority Television Project's mission.

Reliance on *Red Lion* in the decision below played a dispositive role in defeating petitioner Minority Television Project's constitutional claims. Just as the invocation of the rule of lenity in criminal cases should not "automatically permi[t] a defendant to win," *Muscarello v. United States*, 524 U.S. 125, 139 (1998), the mere recitation of *Red Lion* and its scarcity rationale should not entitle the FCC to regulate broadcast media without regard to First Amendment values. *Cf. United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) ("The sole consistency that I can find is that … the Government always wins.").

The upshot of this petition is that *Red Lion* is not only technologically obsolete, but also legally repugnant to the political and expressive values enshrined in the First Amendment. "This Court has not hesitated to overrule decisions offensive to the First Amendment." *Wisconsin Right to Life,* 551 U.S. at 500 (Scalia, J., concurring). We urge this Court to grant this petition for certiorari and to subject *Red Lion* and its scarcity rationale to withering scrutiny.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

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