No. 09-17311

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MINORITY TELEVISION PROJECT,

Plaintiff-Appellant,

LINCOLN BROADCASTING, INC.,

Intervenor,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California,
Case No. 06-2699

BRIEF FOR THE FEDERAL APPELLEES

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BRIEF FOR THE FEDERAL APPELLEES

STATEMENT OF JURISDICTION

Plaintiff invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1331. The court entered summary judgment in favor of defendants on August 19, 2009. ER 1.[1] Plaintiff filed a notice of appeal on October 16, 2009. ER 61. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

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[1] "ER" refers to the excerpts of record filed by plaintiff-appellant. "SER" refers to the supplemental excerpts of record filed by defendants-appellees. "DE" refers to district court docket entries. "Pl. Br." refers to the opening brief filed by plaintiff-appellant.

STATEMENT OF THE ISSUES

1. Whether statutory provisions prohibiting public television stations from broadcasting paid advertisements involving political speech are properly upheld on the ground that they are narrowly tailored to advance a substantial government interest in independent, noncommercial public broadcasting. See 47 U.S.C. § 399b(a)(2), § 399b(a)(3).

2. Whether a statutory provision that prohibits public television stations from broadcasting paid advertisements that "promote" for-profit services, facilities, or products is unconstitutionally vague. See 47 U.S.C. § 399b(a)(1).

3. Whether the district court properly dismissed plaintiff's challenges to an FCC regulation and orders implementing the challenged federal statute for lack of jurisdiction. See 47 U.S.C. § 399b(a)(1); 47 C.F.R. § 73.621(e).

STATEMENT OF THE CASE

Under federal law, certain television channels are reserved for public broadcast stations, also known as noncommercial educational broadcast stations. The absence of advertising has been a hallmark of public television broadcasting from its inception. The governing statutory provisions – enacted in 1981, when Congress codified longstanding regulatory restrictions – provide that a public station may not, "in exchange for any remuneration," broadcast "any message or other programming

material" intended "(1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit; (2) to express the views of any person with respect to any matter of public importance or interest; or (3) to support or oppose any candidate for political office." 47 U.S.C. § 399b(a), (b)(2).

Plaintiff, the licensee of a public broadcast station, argues that 47 U.S.C. § 399b(a)(2) and § 399b(a)(3) impose impermissible restrictions on political speech. Plaintiff also urges that 47 U.S.C. § 399b(a)(1), which bars paid messaging or programming "intended to promote any service, facility, or product offered by any person who is engaged in such offering for profit," is unconstitutionally vague.

The district court granted summary judgment to the government with respect to plaintiff's facial challenges to the constitutionality of the statute. Plaintiff has appealed from that order, as well as from an earlier order which dismissed for lack of jurisdiction challenges to the FCC implementing regulation and orders.

STATEMENT OF FACTS

A. Statutory and Regulatory Framework

1. The federal government provides for the use of radio and television channels through licenses issued by the Federal Communications Commission ("FCC" or "Commission"). 47 U.S.C.

§ 301.[2] Since 1939, the FCC has set aside some frequencies for noncommercial radio broadcasting licenses. See 47 U.S.C. § 303(a)-(b) (authorizing the FCC to "[c]lassify radio stations" and to "[p]rescribe the nature of the service to be rendered by each class of licensed stations"); F.C.C. v. League of Women Voters, 468 U.S. 364, 367 (1984). In 1952, the Commission extended its spectrum reservation policy to set aside television channels for use by noncommercial educational stations. Id. (citation omitted).

The channels set aside for noncommercial use may be "licensed only to nonprofit educational organizations upon a showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service." 47 C.F.R. § 73.621(a); see also id. § 73.621(b). These stations are referred

[2] Radio and television broadcasting is achieved through the transmission of signals over the portion of the electromagnetic spectrum allocated for those uses; broadcast frequencies are divided by channel. Broad authority to allocate and to regulate spectrum licenses is delegated to the FCC under 47 U.S.C. § 303. In accord with its duty to promote the "effective use" of radio and television broadcasting "in the public interest," 47 U.S.C. § 303(g), the FCC may grant a broadcast license only if it finds that the "public convenience, interest, or necessity" will be served. 47 U.S.C. § 307(a); see also F.C.C. v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 780, 795 (1978). The Commission's powers include the authority to suspend or revoke a broadcast license for violations of governing statutes and regulations. 47 U.S.C. § 303(m), ®; id. § 312.

to as "noncommercial educational stations" or "public broadcast stations," 47 U.S.C. § 397(6) – terms used interchangeably (and also referred to here as "noncommercial stations" or "public stations"). Public stations are not subject to the competitive bidding process now generally used to assign spectrum licenses for commercial use, and the assignment of a license to a public broadcast station is without charge. See 47 U.S.C. § 309(j)(1)-(2).

As the FCC explained in 1952, the reservation of frequencies for noncommercial stations run by nonprofit educational organizations is justified by their provision of "programming of an entirely different character from that available on most commercial stations." Sixth Rep. & Order, In re...Television Broad., 41 F.C.C. 148, 166 ¶ 57 (1952) (DE 68-11); see id. ¶ 38 (citing support for the FCC's finding that such stations would make "important contributions" to the "education of the in-school and adult public"). At the same time, the FCC observed that the "objective for which special educational reservations [were] established – i.e., the establishment of a genuinely educational type of service" would not be advanced if noncommercial stations were allowed to "operate in substantially the same manner as commercial applicants." Id. ¶ 57.

As the FCC recognized, commercial broadcasters "depend on advertising revenue" to operate, and, as a result, are subject to

"marketplace pressures" that encourage, above all else, programming with mass-market appeal. Second Rep. & Order, In re...Noncommercial Nature of Educ. Broad. Stations, 86 F.C.C. 2d 141, ¶¶ 12, 15 (1981) (DE 68-7). The FCC has consistently sought "to remove the programming decisions of public broadcasters from the normal kinds of commercial market pressures under which broadcasters in the unreserved spectrum usually operate," id. ¶ 3, and to protect the "noncommercial character of educational broadcasting" by avoiding "undue commercialization of the medium," Mem. Op. & Order, In re...Noncommercial Educ. FM & Television Broad. Svc., 26 F.C.C. 339, ¶¶ 3, 10, 23 (1970) ("1970 Order"). See also 8/19/09 Op. 11-13 (ER 12-14).

From the outset, therefore, governing regulations sharply restricted advertising on public stations. Regulations promulgated in 1952 barred public broadcast stations from accepting any paid advertising, and further prohibited any "announcements (visual or aural) promoting the sale" of any product or service. 17 Fed. Reg. 4062 (1952) (47 C.F.R. § 3.621(d), (e)) (later moved to 47 C.F.R. § 73.621(d), (e), see 28 Fed. Reg. 13668-69 (1963)).[3] The FCC also placed strict

[3] See generally, e.g., The Legal Problems of Educational Television, 67 Yale L.J. 639, 640 (1958) ("[T]he pressure of sponsor demands for noneducational, mass-appeal programs is countered: educational stations must be operated by nonprofit organizations and may not raise funds by selling time.") (citing 47 C.F.R. § 3.621(d) (1957 Supp.)).

limits on the contents of announcements describing program underwriters or donors: a public station could neither describe a sponsoring entity nor mention any of its products. E.g., 1970 Order, 26 F.C.C. 339, ¶¶ 8-10 (1970) (discussing 47 C.F.R. § 73.621 and notes).[4] In sum, prior to 1981, public stations could broadcast no advertising, engage in no promotion of products and services, and were allowed only to indicate a sponsor by name. See id.; 8/19/09 Op. 15 (ER 16).

2. The Public Broadcast Amendments Act of 1981 relaxed these restrictions while preserving the general bar on paid advertising that has always been deemed essential to the character of public broadcasting. Building on regulatory initiatives by the FCC, Congress sought to expand the ability of public broadcasters "to generate additional private financial support" to ensure that stations would remain "financially viable," while still preserving their essential noncommercial character. Mem. Op. & Order, In re...Noncommercial Nature of Educ. Broad. Stations, 90 F.C.C. 2d 895, ¶ 3 (1982) (DE 68-6) ("1982 Order"); Mem. Op. & Order, In re... Noncommercial Nature of Educ. Broad. Stations,

[4] In addition, the FCC imposed limits on the number of times per program donor announcements could be made. An exception was made for non-profit organizations, however. 1970 Order, 26 F.C.C. 339, Appendix (adding Note 5 to § 73.621) ("The numerical limitations on permissible announcements . . . do not apply to announcements on behalf of noncommercial, non-profit entities, such as the Corporation for Public Broadcasting, State or regional entities, or charitable foundations.").

97 F.C.C. 2d 255, ¶ 1 (1984) ("1984 Order").

The 1981 amendments codified at 47 U.S.C. § 399a and § 399b allow broadcasters to include non-promotional identifying information (aural or visual logograms, slogans, and location details) in donor acknowledgments. 47 U.S.C. § 399a; see 1982 Order, 90 F.C.C. 2d 895, ¶ 3 (DE 68-6). The provisions codified at § 399b bar public television stations from broadcasting any "advertisement." 47 U.S.C. § 399b(b)(2). An advertisement is defined as "any message or other programming material, which is broadcast or otherwise transmitted in exchange for any remuneration" that is intended: "(1) to promote any service, facility or product offered by any person who is engaged in such offering for profit; (2) to express the views of any person with respect to any matter of public importance or interest; or (3) to support or oppose any candidate for political office." Id. § 399b(a).

In 1982, the FCC revised its regulations at 47 C.F.R. § 73.503(d) and § 73.621(e) to reflect the changes wrought by § 399a and § 399b.[5] Since then the Commission has issued several

[5] See 47 C.F.R. § 73.621(e) (requiring that noncommercial educational television broadcast stations "furnish a nonprofit and noncommercial broadcast service" and stating "[n]o promotional announcements on behalf of for profit entities shall be broadcast at any time in exchange for the receipt, in whole or in part, of consideration to the licensee, its principals, or employees," but allowing stations to make "acknowledgments of contributions" so long as the acknowledgments do "not interrupt regular programming").

further notices and orders implementing § 399b. Policy Guidance first issued in 1986, for example, explains that donor acknowledgments may properly include: "(1) logograms or slogans which identify and do not promote, (2) location information, (3) value neutral descriptions of a product line or service, and (4) brand and trade name and product o[r] service listings." Public Notice, In re....Noncommercial Nature of Educ. Broad. Stations, 7 F.C.C. Rcd. 827 (1992) ("Policy Guidance"), reprinted from 51 Fed. Reg. 21800 (1986) (SER 78). They may not contain "price information," "call[s] to action," or "inducement[s] to buy." Id. at 828.

3. In addition to reserving television channels for noncommercial broadcasting, the federal government has fostered the growth of public television by making federal funds available to public stations. Congress began providing significant federal aid in the 1960s, see Television Facilities Act of 1962, Pub. L. No. 87-447, 76 Stat. 64, and funding was increased following the Public Broadcasting Act of 1967, which created the Corporation for Public Broadcasting ("CPB"). 47 U.S.C. § 396(k); see League of Women Voters, 468 U.S. at 367-69. CPB is a non-profit corporation established to disburse funding to noncommercial stations in support of operations and educational programming. 47 U.S.C. § 396(b), (g). Creation of CPB was "intended to provide a funding mechanism for individual public broadcasting

stations, but not subject these stations to political influence or favoritism." Glenn J. McLoughlin, Cong. Res. Svc., Rep. for Congress, Corporation for Public Broadcasting: Federal Funding Facts and Status 1 (2009). The vast majority of public stations (though not plaintiff in this case) receive funds from CPB. See 8/19/09 Op. 4 (ER 5).

B. Prior Proceedings

1. Plaintiff is the licensee of KMTP-TV, a noncommercial television station in San Francisco, California. In 2003, the FCC determined that plaintiff had violated 47 U.S.C. § 399b by willfully broadcasting some 1,900 promotional advertisements on behalf of for-profit corporations. See 47 U.S.C. § 399b(a)(1); 47 C.F.R. § 73.621(e). Under its authority to impose civil penalties, the FCC imposed a forfeiture of $10,000. See 47 U.S.C. § 503(b)(1)(D); 47 C.F.R. § 1.80(f)(4).

The FCC found that the announcements at issue (for sponsors such as State Farm, U-Tron Computers, Caliber Dual Monitor Computers, Cadillac Escalade, and Korean Airlines) were "clearly" promotional, and thus "advertisements" within the meaning of 47 U.S.C. § 399b. Forfeiture Order, 18 F.C.C. Rcd. 26661, ¶ 14 (2003) (SER 89); see Notice of Apparent Liability ("Notice"), 17 F.C.C. Rcd. 15646, ¶¶ 10, 14 (2002) (SER 97-98). The State Farm "announcement," for example, showed a house destroyed by fire. The narrator stated: "Fortunately, they have a State Farm agent,

and the help of the world's largest claims network. And no one has more experts handling more claims quickly and more fairly. That's our 'Good Neighbor' promise." The announcement concluded with an image of a happy family and their repaired home. Notice, 17 F.C.C. Rcd. 15646, ¶ 10 (SER 97).

The forfeiture order was affirmed by the full Commission. 8/19/09 Op. 5 (ER 6); see Order on Review, 19 F.C.C. Rcd. 25116 (2004) (DE 34, Ex. C); Mem. Op. & Order, 20 F.C.C. Rcd. 16923 (2005).

2. Plaintiff petitioned for review of the FCC forfeiture order in this Court, which transferred the case to the district court.[6] The district court then dismissed plaintiff's claim challenging the forfeiture order, as well as plaintiff's as-applied challenges to § 399b and challenges to the FCC's implementing regulation, for lack of jurisdiction. 3/13/07 Op. 4-7 (ER 55-58).[7] The court gave plaintiff leave to amend its

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[6] When plaintiff filed in this Court, it had not yet paid the forfeiture. When transferring the case to the district court, this Court noted that 47 U.S.C. § 504(a) vests exclusive jurisdiction in the district court to hear suits by parties seeking to avoid enforcement of FCC forfeiture orders. Minority Television Project Inc. v. F.C.C., No. 05-77294 (9th Cir. Apr. 19, 2006) (citing Dougan v. F.C.C., 21 F.3d 1488, 1490-91 (9th Cir. 1994).

[7] Shortly before the case was transferred to the district court, plaintiff – in a belated (and thus unsuccessful) attempt to confer jurisdiction on this Court – elected to pay the forfeiture. Following the transfer, the district court held that its jurisdiction extended only to unenforced (unpaid) forfeiture orders. Plaintiff does not appeal that decision. The

complaint, however, to present a facial constitutional challenge to § 399b. ER 52 (DE 36).

Plaintiff's amended complaint set forth two new allegations. First, plaintiff alleged that it wished to broadcast paid political advertisements (i.e., candidate ads and issue ads), although it identified no examples of such advertisements or of persons who had sought to place them. First Am. Compl. ("FAC") ¶ 24 (ER 184). Plaintiff maintained that § 399b is unconstitutional because it bars these political advertisements (along with ads for the goods and services of for-profit entities), but seems to permit ads for the goods and services of non-profit entities. Id. ¶¶ 29, 35 (ER 186, 187).

Second, with regard to a "vagueness" claim, the amended complaint asserted that plaintiff "wishes to broadcast announcements where," in plaintiff's estimation, "it is unclear whether said announcements violate the prohibitions of 47 U.S.C. § 399B and/or 47 C.F.R. § 73.621(e)." FAC ¶ 25 (ER 184-85). Plaintiff alleged that these provisions "fail to give . . . adequate notice of what conduct is proscribed" and alleged, on that basis, that plaintiff "has declined to broadcast certain [announcements] because it is unclear whether said announcements

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constitutional challenges to the FCC's application of § 399b in this case, and to the FCC's regulation, were dismissed on the ground that this Court has exclusive jurisdiction over these claims under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). See 3/13/07 Op. 4-7 (ER 55-58).

are . . . prohibited." Id. ¶ 25 (ER 185); see also id. ¶¶ 40-41 (ER 187-88). Plaintiff did not provide examples of any such announcements.

3. The district court concluded that discovery was required with regard to plaintiff's constitutional claims. 12/21/07 Op. 13-14, 17-18 (ER 46-47, 50-51). After discovery was completed, on cross motions for summary judgment, the court granted summary judgment to the government. ER 1 (DE 80, DE 81).

After finding plaintiff's allegations sufficient to create standing, the district court addressed plaintiff's arguments on the merits. The court rejected plaintiff's "halfhearted[]" suggestion that strict scrutiny might apply. 8/19/09 Op. 8 (ER 9); see Pl. Cross-Mot. 2 n.2 (DE 72) (claiming in a footnote that, notwithstanding earlier filings to the contrary, plaintiff did "not concede" that intermediate scrutiny was proper). The court proceeded to analyze plaintiff's claims under the intermediate scrutiny standard set out in League of Women Voters, 468 U.S. at 380, and discussed in Turner Broadcasting Systems v. F.C.C., 520 U.S. 180, 213-14 (1997) ("Turner II"), to determine whether § 399b is "narrowly tailored to further a substantial government interest." 8/19/09 Op. 7 (ER 8).

The court summarized the extensive evidence of the government's substantial interest in "maintaining the educational programming available on public stations," id. at 14 (ER 15),

and, toward this end, in limiting the "advertising pressures" on public television, id. at 13 (ER 14). The court found that § 399b was intended "to insulate public broadcasting from special interest influences, including political and commercial influences," and observed that plaintiff had "not even attempted to refute" the substantial nature of the government's asserted interest. Id. at 14 (ER 15) (first quotation citing 127 Cong. Rec. 13145 (June 22, 1981) (remarks of Rep. Gonzalez)).

The court further concluded that § 399b is narrowly tailored to directly advance the government's interest. The court stressed that a "half-century of experience in both public broadcasting and commercial broadcasting" provided support for Congress's "reasoned legislative judgment" that allowing all paid commercial and political advertisements would undermine the fundamental distinction – in purpose and operation – between public and commercial television. Id. at 18 (ER 19). The court found ample support for Congress's judgment that allowing such advertising would lead public television stations to abandon their unique programming and to focus instead on "non-controversial program[ming] with mass appeal." Id. at 22 (ER 23); see id. at 15-17, 19-22 (ER 16-18, 20-23) (discussing evidence before Congress, and additional evidence before the

court).[8] The court noted that plaintiff did not attempt to make a showing to the contrary. Id. at 9 & n.3 (ER 10).

The court observed that § 399b affects only certain forms of paid speech, id. at 22 (ER 23), and imposes a restriction essential to avoid the "programming pressures resulting from monetary incentives" associated with advertising, id. at 23 (ER 24). The court found that Congress had reasonably determined that "[p]aid-for political, issue, and commercial advertisements" would negatively influence noncommercial stations' programming, but that "limited underwriting announcements" and "promotional materials sponsored by non-profit organizations" would not have such an effect. Id. at 25 (ER 26).

The court also rejected plaintiff's claim that 47 U.S.C. § 399b(a)(1)'s prohibition on messages "intended to promote any service, facility, or product" is unconstitutionally vague. The court declared that "the concept of promoting a product or service" is sufficiently specific and commonplace to survive a

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[8] The court considered what was known to Congress in 1981 when § 399b was enacted, and reviewed evidence of what has occurred in the thirty years since. See, e.g., 8/19/09 Op. 12, 16-17 (ER 13, 17-18); see also id. at 9 & n.3 (ER 10) (explaining that the court found the pre-1981 record alone to provide a sufficient basis to uphold § 399b). The post-1981 record included two declarations submitted by the government: one by an expert economist, Stanford University Professor Emeritus Roger Noll, and one by the Vice-President for Planning and Policy of the WGBH Educational Foundation, Lance Ozier, who had thirty-five years of experience in public broadcasting. See id. at 9, 13 (ER 10, 14); see also Ozier Decl. (SER 1); Noll Rep. (SER 9).

vagueness challenge. Id. at 30 (ER 31). The court found unpersuasive plaintiff's argument that the FCC's interpretation of the provision had introduced vagueness that might not have been inherent in the statute. The court assumed that it might, as plaintiff urged, "'perhaps to some degree' consider the [FCC]'s interpretation of the statute in evaluating whether the statute is vague." Id. at 30 (ER 31) (quoting Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)). The court concluded, however, that the Commission's statements and enforcement actions did not show the statute to be impermissibly vague. Id. at 32 (ER 33).

SUMMARY OF ARGUMENT

1. Since 1952, the federal government has reserved channels for public television stations to ensure "programming of an entirely different character from that available on most commercial stations." Sixth Rep. & Order, In re...Television Broad., 41 F.C.C. 148, ¶ 57 (1952) (DE 68-11). From the outset, it has been recognized that to provide such programming public television stations must be insulated from market pressures and from the influence wielded by advertisers. Accordingly, federal law has, since 1952, barred advertising on public broadcast stations. When Congress enacted the current restrictions in 1981, see 47 U.S.C. § 399b, it thus legislated on the basis of 30 years of regulatory experience in public television (and

additional years of experience in public radio). As the district court explained, the statute, like earlier FCC regulations, sought "to insulate public broadcasting from special interest influences, including political and commercial influences," id. at 14 (ER 15) (citing 127 Cong. Rec. 13145 (June 22, 1981) (remarks of Rep. Gonzalez)), a substantial governmental interest that plaintiff has "not even attempted to refute[.]" Id.

As the district court correctly concluded, 47 U.S.C. § 399b directly advances that substantial interest without burdening more speech than necessary – the standard applicable to broadcast regulation. See F.C.C. v. League of Women Voters, 468 U.S. 364, 380 (1984). Plaintiff now urges that League of Women Voters and other cases relied on by the district court, which establish this as the correct standard, have been implicitly overruled by Citizens United v. Federal Election Commission, - U.S. -, 130 S. Ct. 876 (2010), and that § 399b should be subject to strict scrutiny insofar as it restricts political advertisements. This attempt to avoid the relevant legal inquiry is unavailing. Citizens United, applying strict scrutiny, invalidated a restriction on political speech based on the speaker's corporate identity. In so doing, the Court did not cast doubt on the rationale of decades of decisions applying intermediate scrutiny standards to broadcast regulations.

As the district court concluded, plaintiff's objections to the advertising bar in § 399b as a means of furthering Congress's objectives with regard to public television are without merit. Plaintiff offers no support whatsoever for its invitation to set aside Congress's judgment that restrictions on advertising are required to ensure the type of programming provided on public television. Nor does plaintiff refute the evidence demonstrating that the absence of an advertising bar would jeopardize the financial structure that Congress established to support public television. The financial structure depends on contributions from station viewers, underwriters, and the Corporation for Public Broadcasting. As the record indicates, if advertising were permitted, stations would have strong incentives to seek to maximize advertising revenues. To that end, stations would be encouraged to broadcast programming with mass-market appeal. Viewers would be less likely to make voluntary contributions, and corporations would be less likely to underwrite programs without the quid pro quo of full-blown advertisements.

Plaintiff is equally wide of the mark in urging that the statute is fatally underinclusive because it does not also restrict promotions for services by persons who do not offer such services for profit. Plaintiff's reasoning is unclear. Advertising restrictions should be no more extensive than required, and underinclusiveness is fatal only when it indicates

a fundamental mismatch between a statute's purported goals and the ends selected. By barring commercial and political advertisements on public television, the statute has effectively kept public television free of advertisements since its enactment. Speculation about the possibility of future advertisements that might be consistent with the language of the statute provides no basis for facial invalidation of restrictions that plainly accomplish the statutory goal.

2. Plaintiff has never sought to air paid political advertisements, but it did willfully air approximately 1,900 commercial advertisements for for-profit entities. Although plaintiff argues that the prohibition on "promoting" products and services is unconstitutionally vague, "the general concept of promoting a product or service is one that is easily grasped by a person of ordinary intelligence in this modern age of commercial marketing and would appear to be a term of 'common understanding.'" 8/19/09 Op. 30 (ER 31) (citing Cal. Teachers Ass'n v. Bd. of Educ., 271 F.3d 1141, 1152 (9th Cir. 2001)). The application of that concept is illustrated by the advertisements aired by plaintiff, none of which is alleged to implicate constitutional vagueness concerns. The scope of asserted uncertainties is limited further by published FCC guidance and the opportunity for licensees to seek a declaratory ruling from the FCC if they have questions regarding the statute's

application.

3. Plaintiff also urges that the district court had jurisdiction over its as-applied challenge to the governing statute and its challenge to the related FCC regulation, although plaintiff does not contend that it can seek review of the forfeiture order for past violations that started this case. This argument offers no additional grounds for invalidating the statute beyond those stated in plaintiff's facial challenge, and, in any event, plaintiff's jurisdictional arguments are foreclosed by this Court's precedent.

STANDARD OF REVIEW

The district court's decisions are subject to de novo review. See, e.g., Rhoades v. Avon Products, Inc., 504 F.3d 1151 (9th Cir. 2007) (reviewing dismissal under Federal Rule of Civil Procedure 12(b)(1)); Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1153 (9th Cir. 2009) (reviewing grant of summary judgment).

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT REQUIRE CONGRESS TO AUTHORIZE PUBLIC TELEVISION STATIONS TO BROADCAST ADVERTISEMENTS.

A. Federal Regulations Have Always Recognized That The Restriction Of Paid Advertising Is Central To The Nature Of Public Broadcasting And Thus Advances A Substantial Government Interest.

As the Supreme Court observed in F.C.C. v. League of Women Voters, "[t]he fundamental principles that guide our evaluation of broadcast regulation are . . . well established." 468 U.S. at 376. First, Congress's power to regulate the use of the broadcasting spectrum is undisputed; what is "distinctive" about "Congress' efforts in this area" is that Congress has aimed to ensure "through the regulatory oversight of the FCC that only those who satisfy the 'public interest, convenience, and necessity' are granted a license to use radio and television broadcast frequencies." Id. Second, the Court has held that Congress, exercising this power, may take steps to ensure the public has access to programming that "otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations." Id. at 377. In light of these principles, the Court explained, broadcasting restrictions should be upheld when a court is satisfied that "the restriction is narrowly tailored to further a

substantial governmental interest." Id. at 380.[9]

The latitude this standard accords to Congress when it regulates broadcast media is rooted in the physical nature of the broadcast spectrum and the related history of extensive government oversight. See, e.g., Reno v. ACLU, 521 U.S. 844, 868 (1997) (noting that there are "'special justifications for regulation of the broadcast media that are not applicable to other speakers,'" including "the history of extensive Government regulation of the broadcast medium" and "the scarcity of available frequencies at its inception") (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)); Turner I, 512 U.S. at 637-38 (explaining that the "justification for [the Court's distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium"); League of Women Voters, 468 U.S. at 376-77 (describing the "fundamental principles that guide [the Court's] evaluation of broadcast regulation," including recognition of the fact that broadcast frequencies are a public resource that "must be portioned out among applicants," and noting that "given spectrum scarcity,

[9] This is the First Amendment standard for broadcast regulations, like statute at issue here, that are content-based, but not viewpoint based. Cf. Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 658-59 (1994) ("Turner I") (distinguishing content-based regulations from those that may "call for strict scrutiny" because they are viewpoint-based, demonstrating a "preference for the substance" of what one speaker says or an "aversion" to what another speakers says).

those who are granted a license to broadcast must serve in a sense as fiduciaries for the public"); see also F.C.C. v. Fox Television Stations, Inc., - U.S. -, 129 S. Ct. 1800, 1806 (2009) ("'A licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain [and] when he accepts that franchise it is burdened by enforceable public obligations.'") (quoting CBS, Inc. v. F.C.C, 453 U.S. 367, 395 (1981)) (internal quotation omitted).

1. Plaintiff does not dispute the government's substantial interest in promoting noncommercial television programming. 8/19/09 Op. 14 (ER 15); see also, e.g., id. at 11 (ER 12) (describing the longstanding congressional recognition of and support for the "unique programming niche filled by public television" reflected in federal statutory provisions, including funding appropriations) (citing 47 U.S.C. § 396(a), (g), (k)).

As the district court concluded, the 1981 amendments to the Communications Act, including 47 U.S.C. § 399b, are tailored to advance the government's substantial interest in preserving public broadcasting as a source of programming not available on commercial stations. See 8/19/09 Op. 14-22 (ER 15-23); see also 12/21/07 Op. 12-13 (ER 45-46). The statute is thus properly sustained as a measure that "promotes a substantial government interest that would be achieved less effectively absent the regulation, and does not burden substantially more speech than is

necessary to further that interest." Turner II, 520 U.S. at 213-14 (internal quotation marks omitted); see League of Women Voters, 468 U.S. at 380.

As plaintiff observes, because § 399b's restrictions are intended to "prevent anticipated harms," Turner I, 512 U.S. at 664, the government must show that Congress had a reasonable basis, supported by substantial evidence, for its concerns, id. at 666. See Pl. Br. 22-23. As Turner I also makes clear, however, "courts must accord substantial deference to the predictive judgments of Congress," because "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." Turner I, 512 U.S. at 665 (citing Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 103 (1973)). "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." Id. at 666; see also 8/19/09 Op. 8 (ER 9) (quoting Turner II, 520 U.S. at 212, and Turner I, 512 U.S. at 666).[10]

[10] Plaintiff misunderstands Turner I to state that a court should not consider any evidence that was not "'in the record before Congress'" in 1981. Pl. Br. 20. To the contrary, the Court in Turner I remanded to permit development of a record to support the statute at issue, and it relied on that evidence when it subsequently upheld the statute in Turner II. (The language quoted by plaintiff comes from Turner II where the Court explains

2. As the district court observed, "Congress did not write on a blank slate when it enacted Section 399b." 8/19/09 Op. 16 (ER 17). Indeed, even in 1981, the "record before Congress" already included "a half-century of experience with public broadcasting." Id.

a. The absence of advertising has been the hallmark of public broadcasting from its inception. When the Commission first determined to reserve frequencies for noncommercial television broadcasting in 1952, it already understood that commercial broadcasting, with its reliance on advertising sales for revenue, could not be expected to produce "a genuinely educational type of service." Sixth Rep. & Order, 41 F.C.C. 148, ¶ 57 (DE 68-11). The Commission's 1952 regulations barred not only paid advertising but also any "announcements (visual or aural) promoting the sale" of any product or service. 17 Fed. Reg. 4062 (1952) (47 C.F.R. § 3.621(e)) (later moved to 47 C.F.R. § 73.621(e), see 28 Fed. Reg. 13668-69 (1963)); see also In re ... Noncomm. Nature of Educ. Broad. Stations, 69 F.C.C. 2d 200, 206 (1978) (explaining that the agency had made "a public interest finding that in view of the proposed goal and purposes of [public television] it should be free of commercial or

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that "[t]he question is not whether Congress, as an objective matter, was correct to determine" that a particular statute "is necessary to prevent" some anticipated threat, but whether Congress's determination was reasonable. Turner II, 520 U.S. at 211 (emphasis added).)

commercial-like matter"). Later regulations further provided that a public station could neither describe a sponsoring entity nor mention any of its products. E.g., 1970 Order, 26 F.C.C. 2d 339, ¶¶ 8-10 (1970).

Between 1952 and 1981, the FCC addressed the issue of "commercialization" and nonprofit broadcasting on several occasions, as the Commission worked to establish the most effective set of regulations to promote funding for noncommercial broadcasting from diverse sources and to protect the independence of noncommercial television programming. E.g., 1970 Order, 26 F.C.C. 2d 339, ¶¶ 3, 10, 23 (1970) (relaxing limits on the number of announcements of underwriters permitted during a program of more than one hour duration, but rejecting a request to permit more description of donors or underwriters).

b. The 1981 legislation – 47 U.S.C. §§ 399a, 339b – was preceded by a two-year FCC study which concluded that the broad ban previously imposed on all announcements promoting the sale of products or services could be replaced by a narrower ban on promotions made in exchange for consideration. Second Rep. & Order, 86 F.C.C. 2d 141, ¶¶ 4, 36-37 (DE 68-7); see 8/19/09 Op. 15 & n.5 (ER 16). As the FCC observed in 1982, the 1981 legislation, consistent with the Commission's conclusions, sought to liberalize restrictions on public broadcasters to the greatest extent possible while continuing to protect "the noncommercial

nature of public broadcasting in general." 1982 Order, 90 F.C.C. 2d 895, ¶¶ 1, 23 (DE 68-6); see also 8/19/09 Op. 15-16 (ER 16-17) (describing the history of the 1981 legislation and the manner in which it "loosened" some of the limitations on public broadcasters while maintaining advertising prohibitions as "necessary to preserve the unique programming presented by public stations").

The 1981 legislation reflected a judgment that absolute bans on sponsor description were not required to protect the nature of public television. Equally clearly, however, the legislation recognized that the nature of noncommercial programming is incompatible with the model of market-driven advertising relied on by commercial stations.

As Congress recognized, the bar on advertising reflects fundamental tensions between a financial model based on advertising revenue and a model based on viewer contributions, foundation support, corporate underwriting, and public subsidies (for most stations, including funds from the Corporation for Public Broadcasting).[11] In their testimony to Congress, representatives of public television and radio stations stressed the adverse impact of permitting advertising on their stations.

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[11] Cf. Second Rep. & Order, 86 F.C.C. 2d 141, ¶ 15 (DE 68-7) (recognizing different funding sources); 8/19/09 Op. 11, 12-13 (ER 12, 13-14) (citing, e.g., Noll Rep. 16-17 and Ozier Decl. ¶ 6).

The President of WGBH-TV Boston testified that allowing noncommercial stations "to put direct advertising messages on the air" would "blur the distinction between" public and commercial stations, and expressed concerns for both public television's funding and programming. Hearings before the Subcomm. on Telecommns, Consumer Protection, and Finance of the H. Comm. on Energy and Commerce on H.R. 3238 and H.R. 2774 ("1981 House Hearings"), 97th Cong. 1st Sess. 229-30 (1981) (testimony of David Ives, President of WGBH-TV Boston).[12] The Senior Vice President of National Public Radio ("NPR") testified based on NPR's independent examination of the issue and also suggested that allowing advertising would not be to the benefit of public radio. 1981 House Hearings at 212-13, 323, 332 (testimony of Walda W. Roseman, Senior Vice President, National Public Radio) (explaining that public station-type programming "is just not possible with the commercial constraints of providing a commercial service"); see id. at 211 (testifying that "insulation" from "extraneous interference and control" "is

[12] 1981 House Hearings at 229 (condoning rules for public television that do "not permit huckstering" and that "encourage the image and the fact of [public television's] independence in programming integrity") (testimony of David Ives, WGBH-TV Boston). As Mr. Ives's testimony suggests, it is expected that advertising would negatively affect private donations to public television. See Ozier Decl. ¶¶ 7-10, 16 (SER 3-4, 7-8) (viewers "would be less inclined to support the activities of station that they do not perceive to be distinct from a commercial station," and might be inclined to doubt "that a station that accepts advertising" in fact "need[s] their donations").

imperative to the continued operation of an independent public broadcasting system"); 8/19/09 Op. 16 (ER 17). See also, e.g., 1981 House Hearings at 149 (testimony of the Association of Independent Video and Filmmakers, based on experience with both commercial and noncommercial stations, that allowing advertising would reduce the responsiveness of public stations to the programming needs of the public).

As Congress also recognized, the funding structure of public broadcasting--based on member contributions, program underwriting, and the availability of government funding through the CPB--is designed to "insulate public broadcasting from special interest influences – political, commercial, or any other kind." 127 Cong. Rec. 13145 (June 22, 1981) (remarks of Rep. Gonzalez); accord H.R. Rep. No. 97-82, 97th Cong., 1st Sess. 16 (1981) (emphasizing the need for "insulation of program control and content from the influence of special interests – be they commercial, political, or religious").

3. Experience in the 30 years since the enactment of 47 U.S.C. § 399b underscores the continuing validity of the fundamental premises of the 1981 legislation. Studies continue to show that noncommercial stations offer "more public affairs programming and children's and family programming" than commercial stations. 8/19/09 Op. 13 (ER 14); see Noll Rep. 25-27 (SER 34-36) (discussing study published in 2007 comparing

stations' content); see also Ozier Decl. ¶ 12 (SER 5-6) (describing noncommercial stations' ability to "air programs with particular qualities consistent with their educational mission," including "long-form documentaries" and educational television programs for children).

Noncommercial stations are, in fact, "the primary source of educational children's programming in the United States." Children's Television Act of 1990, S. Rep. No. 101-66, at 7, reprinted in 1990 U.S.C.C.A.N. 1628, 1633. Moreover, "[s]tudies have found the children's programming on public stations to better serve certain educational and instructional criteria than children's programming on non-public stations." 8/19/09 Op. 13 (ER 14); see Noll Rep. 6-7, 33-34 (SER 15-16, 42-43) (reporting on a study published in 2008 regarding quality of children's programming); see also Issues Related to the Structure and Funding of Public Television, GAO-07-150 (Jan. 2007) (Ex. B to Noll Rep., DE 67-2) (reporting on 2005 data).

"A great deal of research" establishes that these differences in programming reflect "differences in [the financial] incentive structures" behind commercial and noncommercial broadcasters. Noll Rep. 5 (SER 14). As the district court summarized, the research demonstrates that "'market-failure' in commercial, advertiser-supported broadcasting" leads to "'an emphasis on mass entertainment

programming with insufficient attention to programs that serve a small audience'" no matter how important the programming may be to that small audience. 8/19/09 Op. 12 (ER 13) (quoting Noll Rep. 5); see also Ozier Decl. ¶¶ 12, 15 (SER 5-7).[13] As the district court determined, the evidence demonstrates that "allowing full-blown advertising on commercial stations has been shown over many years, both before and after Section 399b was enacted, to yield starkly different programming on commercial stations than that on public stations." 8/19/09 Op. 18 (ER 19).

Stanford Professor Roger Noll, whose expert report was submitted by the government, explained that in the absence of an advertising bar, public broadcasters, regardless of their own best intentions or desires, would become "direct competitors of for-profit commercial stations." Noll Rep. 20 (SER 29). That outcome is inevitable for two principal reasons. First, "advertising is the least expensive avenue for raising funds." Id. at 18. It has never been suggested that the on-air fund-raisers that are a staple of public broadcasting are a more efficient means of raising revenue than advertising. In the absence of a statutory restriction, stations would have enormous incentives "to transfer funds that they now use to generate

[13] Cf. Turner II, 520 U.S. at 208 (explaining that "a television station's audience size directly translates into revenue--large audiences attract larger revenues, through the sale of advertising time").

donations from individuals to the sale of advertising to corporations." Id.

Second, the practice of corporate underwriting without advertising is premised on the existence of an advertising ban. If a corporation can lawfully demand advertising in exchange for financial support, it would have compelling reasons to do so. The incentives would be even further enhanced if competitors took advantage of the advertising opportunities. Noll Rep. 20 (SER 29). To maintain current funding levels, public broadcasters would have no choice but to accept full-blown advertising.

That prognosis is consistent with the findings of a temporary commission created by Congress to study alternative financing for public telecommunications in the 1980s. See Temporary Comm'n on Alt. Fin. For Pub. Telecomms. ("TCAF"), Final Report i-iv (Oct. 1983). The limited "advertising demonstration program" conducted by the commission did not provide sufficient data from which to draw firm conclusions, but its findings lend support to concerns articulated by witnesses at the 1981 House hearings regarding the impact of advertising on other fund-raising mechanisms. 8/19/09 Op. 20 (ER 21). The committee recommended that the advertising prohibition in § 399b be continued in the absence of evidence to the contrary, which has never been presented. Id. at 19-21 (ER 20-22) (summarizing the results of the TCAF report).

Throughout the history of public broadcasting, Congress and the FCC have recognized that political advertisers, like commercial advertisers, potentially influence programming choices. The potential weight of such influence has only increased with the dramatic rise in paid political advertisements. See, e.g., AdWeek 10 (Dec. 15, 2008) (DE 68-2) (estimating that more than $2.2 billion was spent on political advertisements in 2008). Political advertisers are no less capable of exerting influence on programmers than commercial advertisers, and, accordingly, political advertising has never been permitted in public broadcasting. Congress has been equally vigilant to avoid concerns that public funding might influence programming. Accordingly, Congress created the Corporation for Public Broadcasting to provide a funding mechanism for individual public broadcasting stations, but not subject these stations to "political influence or favoritism." McLoughlin, Cong. Res. Svc., Rep. for Congress at 1.

4. a. As the district court observed, plaintiff has not argued that the government's interest here is anything other than substantial. It has neither refuted the government's "substantial interest in maintaining the educational programming available on public stations," nor contested that Congress's intent in enacting § 399b "was to insulate public broadcasting from special interest influences, including political and

commercial influences." 8/19/09 Op. 14 (ER 15).

Likewise, plaintiff has not identified any basis on which to reject the government's evidence of the effects of advertising on television programming. As the district court concluded, plaintiff has supplied no evidence to contradict or undermine the reports and testimony cited by the government (and found persuasive by the court). See id. at 5, 9 n.3, 14 (ER 6, 10, 15) (noting that plaintiff did not submit evidence--either to support its challenge or to contradict the evidence presented by the government); see also id. at 18, 19 (ER 19, 20) (pointing to several claims made by the plaintiff without supporting evidence).

b. Plaintiff instead makes a variety of objections to testimony before Congress, which it dismisses as "nothing more than the opinions, predictions, and wishes of the witness[es]." Pl. Br. 27; see id. 24-27. As the district court observed, plaintiff attacks the considered views of public television and radio executives, "all of whom had expertise in public broadcasting," and whose insights were clearly germane to the legislation. 8/19/09 Op. 18 (ER 19); see id. at 16 (ER 17) (rejecting plaintiff's claim that the Senior Vice President of NPR lacked factual support for her testimony). Moreover, the hearing testimony was only one of the bases for Congress's 1981 legislative judgments. See id. 16, 18 (ER 17, 19) (noting

Congress's legitimate reliance on the government's own lengthy experience observing and regulating public broadcasting). Nor has plaintiff disputed the evidence amassed in the years since 1981, including Professor Noll's expert report and the testimony of Lance Ozier.

In any event, insofar as plaintiff contends that Congress was required to develop more of a record, plaintiff is mistaken as a matter of law. A record akin to that of an administrative agency is not required to sustain federal legislation. See Turner I, 512 U.S. at 666. And, even if it could be concluded that the evidence before Congress could have supported a contrary conclusion, Congress's judgment as to the "better explanation" and remedy would be entitled to deference. Turner II, 520 U.S. at 212. In short, plaintiff impermissibly asks the Court to substitute plaintiff's judgment for that of Congress, and does so without advancing any evidentiary support for its position.

B. The Constitution Did Not Require Congress To Use Alternative Means Proposed By Plaintiff; It Is Sufficient That § 399b Does Not Unduly Burden Speech.

Plaintiff's contention that Congress should have employed a "less restrictive means" essentially restates its claim that a bar on advertisement does not directly advance Congress's purpose, and that argument fails for the same reasons. The district court properly concluded that § 399b is calculated to

advance the government's substantial interests without burdening substantially more speech than necessary. As the court declared, "[i]t is difficult to imagine another effective way the government could carry out its goal of insulating public broadcasters from the pressures of advertisers other than by restricting advertising." 9/18/09 Op. 22 (ER 23).

Plaintiff does not attempt to explain how its proposed restriction on the frequency and duration of advertisements would accomplish that objective. Pl. Br. 33-35. Still less does plaintiff make the kind of showing that would be required to set aside Congress's contrary judgment. The Supreme Court's admonishment in Turner II applies here with full force. As the Court stressed, "deference must be according to [Congress's] findings as to the harm to be avoided and to the remedial measures adopted for that end, lest [the courts] infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." Turner II, 520 U.S. 196; see id. at 212.

Plaintiff's reliance on Ballen v. City of Redmond, 466 F.3d 736 (9th Cir. 2006), underscores the error of its analysis. Pl. Br. 34-35. The city ordinance at issue in that case regulated portable advertising signs with the asserted purpose of advancing pedestrian safety and community aesthetics. However, rather than regulating the attributes of the signs or the time or place of

their display, the provisions at issue treated signs differently based on their content. As the Court observed, the signs permitted by the ordinance presented the same threats to "vehicular and pedestrian safety" and "community aesthetics" as the prohibited sign that the plaintiff wished to display. Ballen, 466 F.3d at 743. The Court thus found that the ordinance did not offer "a reasonable fit between the restriction and the goal[.]" Id. at 744. Here, in contrast, the advertising restriction is tailored to the statute's objective, which would be frustrated if for-profit and political advertising were, in fact, allowed on public television. See 8/19/09 Op. 25-28 (ER 26-29); see also Turner II, 520 U.S. at 215, 217 (narrow tailoring standard requires congruence between the "burden imposed" and the "benefits it affords").

C. The Statute Has Effectively Restricted All Advertising On Public Television And Possible Gaps In Its Coverage Cast No Doubt On Its Constitutionality.

After urging that § 399b is not narrowly tailored, plaintiff further urges that it does not substantially advance the government's important concerns because, in plaintiff's view, it is fatally under-inclusive. E.g., Pl. Br. 37-38. The statute bars commercial advertising promoting "any service, facility, or product offered by any person who is engaged in such offering for profit." 47 U.S.C. § 399b(a)(1). It also bars all political

advertising (regardless of whether the source paying for the ad is for-profit or non-profit). 47 U.S.C. § 399b(a)(2); id. § 399b(a)(3). Taken together, these provisions have effectively kept advertising off of public television.

Plaintiff notes, however, that the statute leaves open the possibility of advertisements for services, facilities, or products that are purchased by persons who are not "engaged in such offering for profit." Plaintiff urges that this omission requires the facial invalidation of the statute. Pl. Br. 36-37.

Plaintiff's precise theory is unclear, and it offers no apposite support for its argument. As the Tenth Circuit observed in rejecting a challenge to the "Do-Not-Call" list, "First Amendment challenges based on underinclusiveness face an uphill battle in the commercial speech context." Mainstream Marketing Svcs., Inc. v. F.T.C., 358 F.3d 1228, 1238-41 (10th Cir. 2004). "The underinclusiveness of a commercial speech regulation is relevant only if it renders the regulatory framework so irrational that it fails materially to advance the aims that it was purportedly designed to further." Id. at 1238-39 (citing Rubin v. Coors Brewing Co., 514 U.S. 476, 489 (1995)). That was the case, the Tenth Circuit observed, in City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993), in which the Supreme Court struck down a law prohibiting commercial newsracks on public property, purportedly in order to promote the safety and

attractive appearance of its streets and sidewalks. Mainstream Marketing, 358 F.3d at 1239, 1245-46. In reality, as the Supreme Court observed, the challenged ordinance had not been enacted to address problems posed by newsracks, and applied to only 62 of the 1,500 to 2,000 newsracks in the city, thus addressing only a "minute" and "paltry" share of the problem. Discovery Network, 507 U.S. at 417-18. For these reasons, the Court held that "the city did not establish the reasonable fit we require." Id. In contrast, "so long as a commercial speech regulation materially furthers its objectives, underinclusiveness is not fatal under Central Hudson [Gas & Electric Corp. v. Pub. Svc. Comm'n, 447 U.S. 557 (1980)]." Mainstream Marketing, 358 F.3d at 1239 (discussing United States v. Edge Broad. Co., 509 U.S. 418, 423-24 (1993)).[14]

Plaintiff does not suggest that the objectives of the prohibition against advertising on public television have been frustrated by the absence of a provision banning advertising for non-profit organizations' goods, services, or facilities. The 1981 legislation addressed the principal sources of television advertising, and thus, as a practical matter, effectively bars advertising on public television. While it is not entirely clear

[14] In Edge Broadcasting, the Supreme Court explained that intermediate scrutiny and commercial speech scrutiny are "very similar" standards. 509 U.S. at 430. Indeed, the verbal formulations of the two standards are nearly identical.

what possibilities the wording of § 399b leaves open, it is clear that, in the three decades since its enactment, the statute has not – in fact – opened the door to advertising. Indeed, plaintiff cites only one instance in which a non-profit entity has sought to advertise a facility, product, or service.[15]

The case law regarding "underinclusiveness" makes clear that Congress may distinguish between types of commercial advertising without running afoul of the First Amendment. Here, Congress chose to regulate the type of speech clearly giving rise to the problem at hand.[16] It was not required to address all commercial speech at once – cf. Buckley v. Valeo, 424 U.S. 1, 105 (1976) (noting "the familiar principles that a statute is not invalid under the Constitution because it might have gone farther than it did,. . . that a legislature need not strike at all evils at the same time, . . . and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind) (internal quotation marks and citations omitted) – particularly since the provisions of § 339b

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[15] As plaintiff notes, the FCC staff has given one advisory opinion that concluded that a proposed underwriting announcement promoting the "confidential, affordable reproductive health care services" of Planned Parenthood of Southern Indiana was permissible under § 399b(a)(1) because Planned Parenthood was a non-profit. Pl. Br. 37.

[16] Cf., e.g., 8/19/09 Op. 29 (ER 30) (finding that Congress drew a reasonable distinction between for-profit and non-profit advertisers) (citing Ozier Decl. ¶ 15).

do address the vast bulk of potential paid advertisements. Cf. Turner II, 520 U.S. at 212 (describing deference owed to judgments of this nature).

Misunderstanding the import of the decisions addressing underinclusiveness, plaintiff attempts to distinguish § 399b by noting that its restrictions on public broadcasting cover both political advertising and commercial advertising by for-profit entities. Pl. Br. 38-39. But the point of cases such as Discovery Network and Mainstream Marketing is that the scope of a regulation must be calculated to advance the regulatory goal. See Mainstream Marketing, 358 F.3d at 1237 (explaining that a "reasonable fit" between the government's objectives and adopted means is necessary by virtue of the requirement that a regulation directly advance a governmental purpose and not restrict speech more than is necessary). The concern emphasized in Discovery Network was that commercial speech not be singled out for disfavored treatment that was not justified by the regulation's asserted purposes. No such problem is present here. Regulation of both for-profit and political advertising is central to Congress's objective, and Congress thus regulated both types of advertising. Congress plainly achieved the requisite "reasonable fit," Discovery Network, 507 U.S. at 417, between the scope of the restriction and the statutory purpose by regulating all significant sources of advertising on public television. Indeed,

eliminating the ban on candidate and issue advertising by any and all groups would strike at the heart of Congress's effort to insulate public broadcasting from outside influence.[17]

D. *Citizens United* Did Not Overrule Decades Of Precedent Regarding Broadcast Regulation To Require Application Of Strict Scrutiny.

1. Unable to establish a basis for reversal of the district court's judgment under the intermediate scrutiny standard, plaintiff urges a remand for consideration under strict scrutiny. Plaintiff argues that Citizens United v. Federal Election Commission, - U.S. -, 130 S. Ct. 876 (2010), implicitly overruled decades of Supreme Court precedent holding broadcast regulations subject to intermediate scrutiny, and that § 399b is now subject to strict scrutiny insofar as it bars public television stations from airing paid political advertisements (candidate ads and issue ads). Pl. Br. 14-18 (requesting remand).

As plaintiff seemingly recognized in its district court filings, Supreme Court precedent compelled the application of the

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[17] In addition to suggesting that § 399b fails because it does not – as a technical matter – ban all advertising on public television, plaintiff also claims that the statute does not go far enough because individuals may still "buy influence." Pl. Br. 30. Plaintiff seemingly accuses Congress and the district court of ignoring "how the real world works," id., but it is plaintiff who blinks reality. As the district court noted, there is no evidence to support plaintiff's claim that, in the absence of promotional opportunities, entities seek to "buy influence" so as to negatively affect public television's programming. 8/19/09 Op. 19 (ER 20).

intermediate scrutiny standard employed by the district court. The district court's December 2007 order correctly noted that plaintiff's opposition to the government's motion to dismiss conceded that the intermediate scrutiny standard set forth in League of Women Voters was the appropriate legal standard, and so the "parties agree[d]" as to the standard of review. 12/21/07 Op. 8 (ER 41).[18]

As discussed above, review of broadcast regulation is informed by the recognition that, even in the digital age, spectrum space is finite, and, must be managed to avoid interference between users, particularly in congested areas. As the Supreme Court has stressed, this makes government regulation necessary to ensure that the public has access to diverse ideas and viewpoints. League of Women Voters, 468 U.S. at 367. The government thus considers the public interest when granting broadcasting licenses, and reserves frequencies for noncommercial stations to ensure adequate educational programming. See Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 386, 388-89 (1969)

[18] Plaintiff's opposition acknowledged that the defendants had "correctly state[d] that the restrictions contained in Section 399B can pass muster under the First Amendment only if they are '[n]arrowly tailored to further a substantial governmental interest.'" Pl. Opp. 6 (DE 46) (quoting League of Women Voters, 468 U.S. at 380). A footnote in plaintiff's opposition and cross-motion for summary judgment later stated, without argument, that it did "not concede that in the broadcast area intermediate scrutiny, rather than strict scrutiny should apply where non-commercial speech is being prohibited." Pl. Cross-Mot. 2 n.2 (DE 72).

(citing, e.g., Nat'l Broad. Co. v. United States, 319 U.S. 190, 210-14 (1943)). Recipients of broadcasting licenses are, in return, expected to fulfill certain "public obligations." Fox Television, 129 S. Ct. at 1806. It is because "broadcast regulation involves [these] unique considerations," League of Women Voters, 468 U.S. at 376, that Congress may validly impose restrictions on broadcasters so long as they are properly tailored to advance a substantial and legitimate government interest.

2. Citizens United did not overrule the decisions relied on by the parties and the district court. In Citizens United, a non-profit corporation challenged, inter alia, the applicability and constitutionality of 2 U.S.C. § 441b, a provision of the Bipartisan Campaign Reform Act making it unlawful for a corporation (in contrast to an individual) to engage in certain political speech termed "electioneering communications." The particular speech at issue was a film about a political candidate that the nonprofit corporation wished to distribute via cable television's video-on-demand technology.

The Supreme Court invalidated the provision as an unconstitutional ban on political speech based on the speaker's corporate identity. In so doing, the Court expressly overruled two prior decisions holding to the contrary: Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) (allowing a ban based on

corporate identity), and McConnell v. Federal Election Comm'n, 540 U.S. 93, 203-09 (2003) (relying on Austin to uphold 2 U.S.C. § 441b, the same provision of the Bipartisan Campaign Reform Act of 2002 at issue in Citizens United).

In deciding Citizens United, the Supreme Court had no need to revisit precedent regarding the proper level of scrutiny to be applied in making its determination. As in the Court's prior decisions addressing the constitutionality of restrictions on campaign expenditures, the Court applied strict scrutiny. See Citizens United, 130 S. Ct. at 899, 903 (citing Fed. Election Comm'n v. Wisc. Right to Life, Inc., 551 U.S. 449, 464 (2007) (reviewing 2 U.S.C. § 441b under strict scrutiny)).[19] In this regard, Citizens United effected no change whatsoever in the relevant case law, and so provides no basis for reversal of the district court.

Plaintiff notes that the restrictions on political speech at issue in Citizens United applied to communications distributed in various ways, including those made via cable, satellite, and broadcast transmission. 2 U.S.C. § 441b. Pl. Br 16; id. at 17-18 (citing a reference to "television ads" in Chief Justice

[19] In turn, Wisconsin Right To Life cited McConnell for the fact that, as a campaign finance statute burdening political speech, 2 U.S.C. § 441b should be reviewed under the strict scrutiny standard. Wisconsin Right to Life, Inc., 551 U.S. at 464 (citing McConnell, 540 U.S. at 205); see McConnell, 540 U.S. at 205-06.

Roberts' concurrence).[20] But as the Court's opinion makes clear, Citizens United was a case about a Congressional effort to ban certain political speech by corporations--not about an effort to regulate television broadcast stations (which, as explained above, are licensed by the government to use the broadcasting spectrum, a public resource, and regulated to promote the public interest). See Citizens United, 130 S. Ct. at 897, 907 (describing the prohibition at issue in Citizens United as one that would have "suppress[ed] the speech of manifold corporations" and would have "prevent[ed] their voices and viewpoints from reaching the public").

In sum, plaintiff disregards the fundamental distinctions between this case and Citizens United--namely, that this is a case about the regulation of broadcasters, while Citizens United was not. Attempting in any case to locate some support in the Court's decision, plaintiff quotes comments by the Court regarding technological change without regard for their context. Pl. Br. 17-18 (quoting Citizens United, 130 S. Ct. at 891, 913).

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[20] This was, of course, equally true when the Court assessed the same statute in 2003 in McConnell and in 2007 in Wisconsin Right to Life. Plaintiff has never argued, however, that the application of strict scrutiny in those cases overruled League of Women Voters or requires strict scrutiny here. See Pl. Cross-Mot. 3 (discussing Wisconsin Right to Life but making no argument that it overruled broadcasting regulation cases such as League of Women Voters or that it requires the application of strict scrutiny in this case). As plaintiff seemingly recognized, such an argument would have no merit for all the reasons discussed here; in plaintiff's case, moreover, it is waived.

The Supreme Court declined to resolve Citizens United on one of the narrower grounds urged by the plaintiff: that the challenged statute should not apply to video-on-demand cable technology because individuals who view programming that way have typically taken various "'affirmative steps'" to access it, and are thus self-selecting. Citizens United, 130 S. Ct. at 890. The Court concluded that rapidly changing uses of particular technologies counseled against disposing of the case on that basis, 130 S. Ct. at 913, and indeed militated in favor of resolving the case as a broad facial challenge, rather than on an as-applied basis, id. at 891. Compare 130 S. Ct. at 933-34 (Stevens, J., dissenting) (responding to the Court's "facial vs. as-applied" analysis). That analysis has no bearing on the treatment long-afforded broadcast regulation by the Supreme Court, which reflects "unique considerations" inherent in the medium.[21] League of Women Voters, 468 U.S. at 376; see also ACLU, 521 U.S. at 868 (discussing the "special justifications for regulation of the broadcast media") (internal quotation marks omitted).

Finally, even assuming that this Court were to find tension between Citizens United and controlling cases, such as League of Women Voters, it should properly decline to "engage in

[21] As explained earlier, one of those "unique considerations" is the finite nature of the broadcast spectrum—a reality of the physical world, not equivalent to the constantly changing ways in which individuals make use of technologies like video-on-demand. Compare Citizens United, 130 S. Ct. at 890-91.

anticipatory overruling" of controlling precedent. Hoffman v. Arave, 236 F.3d 523, 542 (9th Cir. 2001); see Agostini v. Felton, 521 U.S. 203, 237 (1997) (courts of appeals must follow controlling Supreme Court precedent even if the decision "appears to rest on reasons rejected" elsewhere by the Court, as the Court alone retains "the prerogative of overruling its own decisions") (citation omitted); see also United States v. Pacheco-Zepeda, 234 F.3d 411, 414 (9th Cir. 2000) ("[S]peculation does not permit us to ignore controlling Supreme Court authority.").

II. SECTION 399b(a)(1) IS NOT UNCONSTITUTIONALLY VAGUE.

Since 1981, § 399b(a)(1) has provided that public television stations may not broadcast, for remuneration, messages or programming material that is "intended to promote any service, facility, or product offered by any person who is engaged in such offering for profit." 47 U.S.C. 399b(a)(1). Plaintiff now urges that the statute be invalidated on the theory that it is unconstitutionally vague on its face. As the district court concluded, plaintiff identifies no impermissible vagueness and misunderstands governing standards. "To pass constitutional muster against a vagueness attack, a statute must give a person of ordinary intelligence adequate notice of what it proscribes." United States v. 594,464 Pounds of Salmon, 871 F.2d 824, 829 (9th Cir. 1989). As the Supreme Court has observed, "[c]lose cases can be imagined under virtually any statute," United States v.

Williams, 553 U.S. 285, 306 (2008), and "adequate notice" therefore does not require that a statute provide certainty in every instance to survive a facial attack, Hill v. Colorado, 530 U.S. 703, 733 (2000).

1. Plaintiff argues that § 399b is unconstitutionally vague because the term "promote" leaves some room for interpretation. But as the district court explained, "the general concept of promoting a product or service is one that is easily grasped by a person of ordinary intelligence in this modern age of commercial marketing and would appear to be a term of 'common understanding.'" 8/19/09 Op. 30 (ER 31) (citing Cal. Teachers Ass'n v. Bd. of Educ., 271 F.3d 1141, 1152 (9th Cir. 2001)); Cal. Teachers Ass'n, 271 F.3d at 1151 (explaining that "[i]n the context of [a] facial challenge . . . [i]t is sufficient to note that [the words at issue] are words of common understanding").

That the application of a statute may require some interpretation or judgment in some cases does not render it unconstitutional. See Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language."). As this Court explained in California Teachers Association, "even when a law implicates First Amendment rights, the [C]onstitution must tolerate a certain amount of vagueness." 271 F.3d at 1151. "[U]ncertainty at a statute's margins will not warrant facial

invalidation if it is clear what the statute proscribes 'in the vast majority of its intended applications.'" Id. (quoting Hill, 530 U.S. at 733 (quotation marks omitted)).

Plaintiff's own violations of the statute are not alleged to have stemmed from impermissible statutory vagueness. See Forfeiture Order, 18 F.C.C. Rcd. 26661, ¶ 14 (2003) (SER 89). For example, the State Farm commercial, described supra, noted that "[f]ortunately" a family affected by a fire was working with State Farm, and claimed that "no one has more experts handling more claims quickly and more fairly." Notice, 17 F.C.C. Rcd. 15646, ¶ 10 (SER 97). In another announcement described in the Notice of Apparent Liability, U-Tron Computers were described as "high-end" and "heavyweight." Id.

These "donor announcements" plainly go well beyond the information permitted under 47 U.S.C. § 399a, which allows announcements that include a business's logogram (i.e., logo or slogan used to identify a company), as well as reference to the location of the business. 47 U.S.C. § 399a(a)-(b); see also Policy Guidance, 7 F.C.C. Rcd. 827 (SER 78) (explaining that only "value-neutral" descriptions of a product line or service are permitted). Indeed, plaintiff conceded to the FCC that both the State Farm and U-Tron announcements contained "promotional language." Notice, 17 F.C.C. Rcd. 15646, ¶ 11 (SER 97).

Even in instances where plaintiff contested the FCC's

conclusion, the promotional aspects of the announcements are readily apparent. For example, in an announcement for Asiana Airlines, two characters discuss their airline tickets:

> Female Character: "Did you get the surprising news Asiana Airlines sent to you? Now you can get American Airline[s] free tickets using Asiana mileage.
> Male Character: Asiana Air now combines mileage with American Airlines.
> Female Character: Now you can travel free to America, Central or South America and even Europe — to 270 cities around [the] world earning mileage with Asiana Airlines.
> Male Character: Now where do you want to go?
> Female Character: Well...(laughing)
> Male Character: Mileage benefits with the best airline in the world. Asiana Airlines."

Id. ¶ 18. This is standard promotional fare, and is flatly contrary to guidance previously issued by the FCC explaining, as one would expect, that touting a service as "free" is promotional and therefore proscribed. Here the content cannot be described as a "value neutral" description of a product line or service, as plaintiff argued. Id. ¶ 19.

2. On appeal, plaintiff finds evidence of impermissible vagueness in the fact that the FCC has issued guidance, offers advisory opinions, and considers the "reasonable, good faith" of the broadcaster before undertaking enforcement actions. Pl. Br. 47 (suggesting that giving broadcasters the benefit of a "reasonable, good faith judgment standard[]" renders the statute unconstitutional).

An agency's willingness to provide assistance to regulated

parties seeking to comply with the law has never been regarded as evidence of a statute's unconstitutionality. To the contrary, the FCC's administrative guidance, including its publicly-available adjudication of individual cases, serves only to further "narrow potentially vague or arbitrary interpretations" of § 399b(a)(1). See Vill. of Hoffman Est. v. Flipside, Hoffman Estates, 455 U.S. 489, 504 (1982); see also K-S Pharms., Inc. v. Am. Home Prods. Corp., 962 F.2d 728, 732 (7th Cir. 1992) ("[S]pecificity may be created through the process of construction.").

Likewise, the agency's willingness, in enforcing § 399b, to take into account "the good faith determinations of public broadcasters," Policy Guidance, 7 F.C.C. Rcd. at 828, only serves to reduce any burden on speech and minimize any due process concerns. See Vill. of Hoffman Est., 455 U.S. at 499 (recognizing "that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice ... that [the] conduct is proscribed");[22] cf. Bates v. State Bar, 433

[22] While plaintiff suggests that the FCC's "reasonable, good faith" standard has no roots in the statute, it arguably reflects the statute's bar on promotional messages or programming "intended ... to express the views of any person with respect to any matter of public importance or interest" or "intended ... to support or oppose any candidate for political office." 47 U.S.C. § 399b(a)(2)-(3) (emphasis added). Cf. Vill. of Hoffman Est., 455 U.S. at 502 (explaining that a "'marketed for use' standard" "requires scienter, since a retailer could scarcely 'market' items 'for' a particular use without intending that use").

U.S. 350, 380-81 (1977) (recognizing that commercial speech is particularly unlikely to be chilled given the speaker's economic incentives).

The Commission's observation that "it may be difficult to distinguish at times between announcements that promote and those that identify," 1982 Order, 90 F.C.C. 2d at 911, does not suggest that compliance is generally difficult or that the difficult cases reflect unresolvable ambiguities.[23] The Commission, instead, has made it possible for any non-commercial educational station to seek informal guidance from the agency or formal clarification pursuant to section 1.2 of the FCC's rules, by which "the Commission may, on motion . . . issue a declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2. Plaintiff is free to make use of this mechanism, although it offers no examples of future "announcements" that it plans to run that would require clarification of the statute's application.[24]

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[23] Plaintiff also urges this Court to strike down § 399b because some improper underwriting announcements may go undetected by the FCC. See Pl. Br. 46 (quoting two announcements that plaintiff maintains are improper and for which, plaintiff asserts, no enforcement action was taken). That an agency might, for any multitude of reasons, fail to discover or pursue every infraction cannot establish that the underlying statute is unconstitutionally vague.

[24] After several commercial broadcasters complained to the FCC that plaintiff was broadcasting commercials in violation of section 399b, plaintiff filed a petition for a declaratory ruling on June 13, 2000 asking the FCC to declare that six underwriting

III. THE DISTRICT COURT LACKED JURISDICTION TO CONSIDER PLAINTIFF'S CHALLENGES TO 47 C.F.R. § 73.621(E), AND AS-APPLIED CHALLENGES TO 42 U.S.C. § 399b.

In March 2007, the district court dismissed plaintiff's challenge to the $10,000 forfeiture order imposed by the FCC in 2003, holding that it had jurisdiction only over unpaid forfeiture orders. 3/13/07 Op. 7 (ER 58); see Dougan v. F.C.C., 21 F.3d 1488 (9th Cir. 1994). Plaintiff does not challenge that decision. Plaintiff does, however, challenge the district court's holding that it lacked jurisdiction over plaintiff's as-applied challenges to § 399b and the related regulation, 47 C.F.R. § 73.621(e). 3/13/07 Op. 7 (ER 58).[25]

1. Plaintiff's challenge to the regulation adds nothing to its challenge to the statute. The regulation mirrors the commercial speech portion of § 399b, and plaintiff alleges no

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announcements were permissible under the statute and the FCC's rules. Prior to filing the petition, however, plaintiff broadcast a number of the underwriting announcements described therein; it began broadcasting the other announcements described in the petition less than one month later, before the FCC had any meaningful opportunity to respond. Plaintiff's declaratory ruling request was dismissed as moot in the forfeiture order. See 18 F.C.C. Rcd. at 26611.

[25] The regulation, 47 C.F.R. § 73.621(e), provides in relevant part:

> No promotional announcements on behalf of for profit entities shall be broadcast at any time in exchange for the receipt, in whole or in part, of consideration to the licensee, its principals, or employees. However, acknowledgments of contributions can be made. The scheduling of any announcements and acknowledgments may not interrupt regular programming.

additional concerns raised by the regulation. In any event, the district court's March 2007 order properly dismissed plaintiff's regulatory challenge. Section 402 of Title 47 provides for judicial review of FCC "orders and decisions." Section 402(a) makes "[a]ny proceeding to enjoin, set aside, annul, or suspend any order" of the FCC involving wire or radio communication subject to the direct review provision found at 28 U.S.C. § 2342(1), which vests the federal courts of appeals with "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1). See F.C.C. v. ITT World Comm., Inc., 466 U.S. 463, 468 (1984) ("Exclusive jurisdiction for review of final FCC orders . . . lies in the Court of Appeals.") (citing 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a)).

Plaintiff's argument that 47 C.F.R. § 73.621(e) is not a reviewable "order" within the meaning of § 402(a) and § 2341(1) fails to come to grips with this Court's precedent. This Court has "squarely held . . . that challenging FCC regulations is equivalent to an action to enjoin, annul, or set aside an order of the FCC." United States v. Dunifer, 219 F.3d 1004, 1007 (9th Cir. 2000); see Sable Comm., Inc. v. F.C.C., 827 F.2d 640, 642 (9th Cir. 1987) (holding that "[t]he FCC regulation in this case

is a final order [under 28 U.S.C. § 2342] made reviewable by 47 U.S.C. § 402(a)" and rejecting plaintiff's argument that the remedy of court of appeals review was inadequate); see also Moser v. F.C.C., 46 F.3d 970, 973 (9th Cir. 1995).

2. Plaintiff further urges that its "as-applied" challenge to § 399b should not be subject to the review provisions requiring direct review in the court of appeals. But, as the district court recognized, plaintiff's "as-applied" challenge to the statute is nothing more than an appeal from a final order of the Commission. See 3/13/07 Op. (ER 58) (describing plaintiff's challenges as "constitutional challenges to Section 399b of the statute as applied through FCC rules and forfeiture orders"). A decision in plaintiff's favor with respect to its as-applied challenge would thus have "required the district court to enjoin, set aside, suspend, or determine the validity of" the FCC's final order, and, as this Court has recognized, a district court does not have jurisdiction under these circumstances. Wilson v. A.H. Belo Corp., 87 F.3d 393, 397 (9th Cir. 1996).

Moreover, plaintiff's "as-applied" challenge is a clear attempt to circumvent the district court's correct determination that it did not have jurisdiction over plaintiff's challenge to the paid forfeiture order, 3/13/07 Op. 4-7 (ER 55-58); a determination that plaintiff has not appealed. To allow plaintiff's "as-applied" challenge to go forward in the district

court would allow an end-run around the limitation on the district court's jurisdiction with respect to the forfeiture order.

Plaintiff suggests that this Court should ignore its controlling precedent because, in a 1999 case, the Supreme Court entertained a challenge to an FCC regulation that commenced in district court, rather than with direct review in the courts of appeals. Pl. Br. 48-49 (arguing that the Ninth Circuit's "exclusive jurisdiction" analysis is "flawed because the Supreme Court of the United States did not recognize or enforce this purported limit to district court jurisdiction in Greater New Orleans Broadcasting Association v. United States, 527 U.S. 173 (1999)").

The Court in Greater New Orleans Broadcasting was not asked to address, and did not address, whether subject matter jurisdiction was proper. Plaintiff contends that it is "not plausible" that the Supreme Court "improperly heard and decided [the] case," and therefore it must be concluded that the Court implicitly rejected the Ninth Circuit's approach to as-applied challenges to FCC regulations and related statutes. Pl. Br. 50. The Supreme Court itself, however, has accepted that it is indeed plausible that it might fail to recognize that jurisdiction is lacking in a given case. The Court has therefore declined to draw the kind of inference urged by the plaintiff. See United

States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952) (explaining that a case in which jurisdiction was neither argued by the parties nor discussed in the Court's opinion is "not a binding precedent on this point" and thus the Court "is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio"); see also Snow-Erlin v. United States, 470 F.3d 804, 808 (9th Cir. 2006) (recognizing this principle) (quoted in 3/13/07 Op. 7 (ER 58)). The district court properly rejected plaintiff's suggestion that Greater New Orleans Broacasting Ass'n v. United States, 527 U.S. 173 (1999), "extended" the district court's jurisdiction to hear such challenges. 3/13/07 Op. 7 (ER 58).

Plaintiff also suggests, as a policy matter, that FCC regulations cannot be deemed "orders" subject to direct review because then judicial review would only be available during the limited time for filing a petition for review. Pl. Br. 51; see 28 U.S.C. § 2344 ("Any party aggrieved by [a] final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.").

That is not the case. A party subject to an unpaid forfeiture order can seek review under 47 U.S.C. § 504(a). And even in the absence of such an order, alternate avenues for review are available. For example, Commission Rule 1.401, 47 C.F.R. 1.401, grants "any interested person" the right to

"petition [the Commission] for the issuance, amendment or repeal of a rule or regulation." See also 47 C.F.R. § 1.1 (Commission may "on its own motion or petition of any interested party" hold proceedings to formulate or amend its rules and regulations). Likewise, under Rule 1.2, 47 C.F.R. § 1.2, the FCC may, on motion or its own initiative, "issue a declaratory ruling terminating a controversy or removing uncertainty." The FCC order resulting from any such proceedings would be subject to judicial review pursuant to 47 U.S.C. § 402. See Dunifer, 219 F.3d at 1008 (noting that it was not the case that the plaintiff "had no means to obtain judicial review of the regulations," and identifying various alternative methods by which a plaintiff in such circumstances might have obtained relief, including applying for a license or filing a petition for a rulemaking for new regulations).

In any event, plaintiff's policy arguments, like its citation to Greater New Orleans Broadcasting, provides no basis for setting aside this Court's controlling precedent.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(B) AND NINTH CIRCUIT RULE 32-1

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and © and Ninth Circuit Rule 32-1, I certify that the attached Brief for Appellants is monospaced, has 10.5 or fewer characters per inch and contains 13,227 words.

/s/ Samantha L. Chaifetz
SAMANTHA L. CHAIFETZ
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Certificate of Service

I hereby certify that I caused to be filed an electronic copy of the foregoing brief with the United States Court of Appeals for the Ninth Circuit, with electronic service provided to opposing counsel, on April 22, 2010.

/s/ Samantha L. Chaifetz
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ADDENDUM

Statutory Addendum

28 U.S.C. § 2342

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of–

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47[.]

47 U.S.C. § 399a:

(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
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.

Statutory Addendum, cont'd

47 U.S.C. § 399b

(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–

(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) Offering of services, facilities, or products permitted; advertisements prohibited

(1) Except as provided in paragraph (2), each public broadcast station shall be authorized to engage in the offering of services, facilities, or products in exchange for remuneration.
(2) No public broadcast station may make its facilities available to any person for the broadcasting of any advertisement.

(c) Use of funds from offering services, etc.
Any public broadcast station which engages in any offering specified in subsection (b)(1) of this section may not use any funds distributed by the Corporation under section 396(k) of this title to defray any costs associated with such offering. Any such offering by a public broadcast station shall not interfere with the provision of public telecommunications services by such station.

(d) Development of accounting system
Each public broadcast station which engages in the activity specified in subsection (b)(1) of this section shall, in consultation with the Corporation, develop an accounting system which is designed to identify any amounts received as remuneration for, or costs related to, such activities under this section, and to account for such amounts separately from any other amounts received by such station from any source.

Statutory Addendum, cont'd

47 U.S.C. § 402(a)

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

47 C.F.R. § 73.621

In addition to the other provisions of this subpart, the following shall be applicable to noncommercial educational television broadcast stations:

(a) Except as provided in paragraph (b) of this section, noncommercial educational broadcast stations will be licensed only to nonprofit educational organizations upon a showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service.

(1) In determining the eligibility of publicly supported educational organizations, the accreditation of their respective state departments of education shall be taken into consideration.
(2) In determining the eligibility of privately controlled educational organizations, the accreditation of state departments of education or recognized regional and national educational accrediting organizations shall be taken into consideration.

(b) Where a municipality or other political subdivision has no independently constituted educational organization such as, for example, a board of education having autonomy with respect to carrying out the municipality's educational program, such municipality shall be eligible for a noncommercial educational television broadcast station. In such circumstances, a full and detailed showing must be made that a grant of the application will be consistent with the intent and purpose of the Commission's rules and regulations relating to such stations.

Statutory Addendum, cont'd

(c) Noncommercial educational television broadcast stations may transmit educational, cultural and entertainment programs, and programs designed for use by schools and school systems in connection with regular school courses, as well as routine and administrative material pertaining thereto.

(d) A noncommercial educational television station may broadcast programs produced by or at the expense of, or furnished by persons other than the licensee, if no other consideration than the furnishing of the program and the costs incidental to its production and broadcast are received by the licensee. The payment of line charges by another station, network, or someone other than the licensee of a noncommercial educational television station, or general contributions to the operating costs of a station, shall not be considered as being prohibited by this paragraph.

(e) Each station shall furnish a nonprofit and noncommercial broadcast service. Noncommercial educational television stations shall be subject to the provisions of § 73.1212 to the extent that they are applicable to the broadcast of programs produced by, or at the expense of, or furnished by others. No promotional announcements on behalf of for profit entities shall be broadcast at any time in exchange for the receipt, in whole or in part, of consideration to the licensee, its principals, or employees. However, acknowledgements of contributions can be made. The scheduling of any announcements and acknowledgements may not interrupt regular programming.

> Note: Commission interpretation of this rule, including the acceptable form of acknowledgements [sic], may be found in the Second Report and Order in Docket No. 21136 (Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations), 86 F.C.C. 2d 141 (1981); the Memorandum Opinion and Order in Docket No. 21136, 90 FCC 2d 895 (1982), and the Memorandum Opinion and Order in Docket 21136, 49 FR 13534, April 5, 1984.

(f) Telecommunications Service on the Vertical Blanking Interval and in the Visual Signal. The provisions governing VBI and visual signal telecommunications service in § 73.646 are applicable to noncommercial educational TV stations.

Statutory Addendum, cont'd

(g) Non-program related data signals transmitted on Line 21 pursuant to § 73.682(a)(22)(ii) may be used for remunerative purposes.

(h) Mutually exclusive applications for noncommercial educational TV stations operating on reserved channels shall be resolved pursuant to the point system in subpart K.

(i) With respect to the provision of advanced television services, the requirements of this section will apply to the entire digital bitstream of noncommercial educational television stations, including the provision of ancillary or supplementary services.