

No. 10-1293

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., *et al.*,
Respondents.

On Petition For A Writ of Certiorari to the United
States Court of Appeals for the Second Circuit

**BRIEF IN OPPOSITION OF INTERVENORS
CENTER FOR CREATIVE VOICES IN MEDIA AND
THE FUTURE OF MUSIC COALITION**

*Andrew Jay Schwartzman
Chrystiane B. Pereira
Media Access Project
1625 K Street, NW
Suite 1000
Washington, DC 20006
(202) 232-4300
andys@mediaaccess.org

May 23, 2011

* Counsel of Record

QUESTION PRESENTED

Whether the court of appeals properly determined that the Federal Communications Commission's (FCC) context-based indecency policy is unconstitutionally vague and accordingly unenforceable.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Center for Creative Voices in Media and Future of Music Coalition (jointly “Center”) respectfully submit this corporate disclosure statement. The Center of Creative Voices in Media does not have a parent company and no publicly held company owns 10 percent or more of stock therein. The Future of Music Coalition does not have a parent company and no publicly held company owns 10 percent or more of stock therein.

TABLE OF CONTENTS

QUESTION PRESENTED.....i
CORPORATE DISCLOSURE STATEMENTii
TABLE OF AUTHORITIES.....iv
REASONS FOR DENYING THE
 PETITION..... 1
CONCLUSION 8

TABLE OF AUTHORITIES

| | Page |
|---|---------|
| Cases | |
| <i>Associated Press v. United States</i> , 326 U.S. 1 (1945)..... | 3 |
| <i>FCC v. Nat'l Citizens Comm. for Broad.</i> , 436 U.S. 775 (1978) | 3 |
| <i>FCC v. Pacifica Found.</i> , 438 U.S. 726 (1978)..... | 1, 3, 4 |
| <i>Fox TV Stations v. FCC</i> , 280 F.3d 1027 (D.C. Cir. 2002) | 2 |
| <i>Prometheus Radio Project v. FCC</i> , 373 F.3d 372 (3d Cir. 2004)..... | 2 |
| <i>Red Lion Broadcasting Co. v. FCC</i> , 395 U.S. 367 (1969)..... | 1, 3, 5 |
| <i>Sable Commc'ns, Inc. v. FCC</i> , 491 U.S. 115 (1987)..... | 3 |
| <i>Sinclair Broad. Group, Inc. v. FCC</i> , 284 F.3d 1027 (D.C. Cir. 2002)..... | 2 |
| <i>Turner Broad. Sys., Inc. v. FCC</i> , 512 U.S. 622 (1994)..... | 2 |
| Statutes | |
| 124 Stat. 4071 | 6 |
| Administrative Orders | |
| <i>Pacifica Found., Inc.</i> , 2 FCCRed 2698 (1987) | 4 |
| Other Authorities | |
| <i>Connecting America: National Broadband Plan</i> , at http://download.broadband.gov/plan/national-broadband-plan-chapter-5-spectrum.pdf | 6 |

TABLE OF AUTHORITIES—Continued

Page

| | |
|--|------|
| FCC Chairman Genachowski Prepared Remarks at NAB Show 2011 (“Genachowski NAB Remarks”), Apr. 12, 2011, at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0412/DOC-305708A1.pdf | 5, 7 |
| Jasmin Melvin, Reuters, “FCC head says mergers can’t solve the spectrum crunch,” Apr. 13, 2011, at http://www.msnbc.msn.com/id/42566661/ns/technology_and_science-wireless | 7 |
| “Latta Bill Would Authorize Incentive Auctions, But Talks Continue,” COMM. DAILY, Apr. 19, 2011, at http://www.capitolsolutions.com/CommDaily.4.19.11.pdf | 5 |
| Lee Petro, “Three Incentive Auction Bills Introduced in Congress,” Comm. Daily Blog, Mar. 10, 2011, at http://www.commlawblog.com/2011/03/articles/broadcast/three-incentive-auction-bills-introduced-in-congress/ | 5 |

REASONS FOR DENYING THE PETITION

I. The Court of Appeals properly invalidated the FCC’s “indecentcy” findings at issue, which relied on application of an unconstitutionally vague, context-based policy. Neither the Court of Appeals nor the FCC revisited or relied upon *Red Lion Broadcasting Co. v. FCC*,¹ respectively, in reaching their differing decisions. Yet in an earlier opinion in this case, one member of this Court wrote separately to express his belief that “*Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity.” *FCC, et al. v. Fox Television Stations, Inc., et al.*, 129 S. Ct. 1800, 1820 (2009) (Thomas, J., concurring). “[E]ven if this Court’s disfavored treatment of broadcasters under the First Amendment could have been justified at the time of *Red Lion* and *Pacifica*,” the same continued, “dramatic technological advances have eviscerated the factual assumptions underlying those decisions. Broadcast spectrum is significantly less scarce than it was 40 years ago.” *Id.* at 1821.

II. This case presents a poor vehicle for revising *Red Lion*. The policies here at issue are unconstitutionally vague without reference to either *Pacifica*² or *Red Lion*. In any event, *Red Lion* is inapposite and, like its “spectrum scarcity” rationale, irrelevant to this case. The precedent for broadcast indecency is not *Red Lion* but *Pacifica*, which holding did not rely on *Red Lion* or spectrum scarcity. *Red Lion* serves as precedent for different, wider ranging types

¹ 395 U.S. 367 (1969) (“*Red Lion*”).

² *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

of laws and responds to different governmental interests than the Court's narrower *Pacifica* holding, and even the prospect of reconsideration would wreak havoc in ongoing media, broadband and spectrum policy debates at the FCC and in Congress. Moreover, whether or not "spectrum scarcity" at one time had ceased to be a policy problem, it is certainly one now. Spectrum is more scarce and valuable in the sense this Court earlier contemplated in *Red Lion*. Thus *Red Lion* would be a red herring here.

a. In *Red Lion*, this Court unanimously held that the judiciary should defer to attempts by Congress and the FCC to structure access to spectrum where governmental intent and effect is to promote the widest dissemination of information from diverse and antagonistic sources under the First Amendment.³ To reach this holding, the Court applied a "less rigorous standard of First Amendment scrutiny,"⁴ which several circuit courts since have described as "rational basis,"⁵ and which this Court since has applied to uphold laws or regulations that are "a reasonable means"

³ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) ("Turner I") ("[I]t has long been a basic tenet of national communications policy that the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." (internal quotations and citations omitted)).

⁴ See *Turner I*, 512 U.S. 622, 637 (1994).

⁵ See, e.g., *Prometheus Radio Project v. FCC*, 373 F.3d 372, 401-02 (3d Cir. 2004); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 167 (D.C. Cir. 2002); *Fox TV Stations v. FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002).

of “promoting the public interest in diversified mass communications.”⁶

b. *Red Lion* and *Pacifica* rest on entirely different bases. While the latter rests on broadcast media’s pervasiveness, invasiveness and accessibility to children,⁷ the former rests on “the scarcity of broadcast frequencies,” “legitimate claims” of their “possible users,” and the “government’s role in allocating” them.⁸ These bases correspond to the differing governmental interests furthered by indecency cases – to protect children from harmful materials⁹ – and by *Red Lion*’s line – to ensure the public’s rights to “receive suitable access to social, political, esthetic, moral and other ideas and experiences,”¹⁰ to “the widest dissemination of diverse and antagonistic sources,”¹¹ and correspondingly to the most effective use of the spectrum for communication. The Court affirmed the separation of the two cases when more narrowly ruling that a particular program “as broadcast” was indecent in *Pacifica*.¹² Though the FCC order upheld in *Pacifica* listed

⁶ See *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 802 (1978) (“*FCC v. NCCB*”).

⁷ *Pacifica*, 438 U.S. at 748-51.

⁸ See *Red Lion*, 395 U.S. at 400-01.

⁹ See, e.g., *Sable Commc’ns, Inc. v. FCC*, 491 U.S. 115, 126 (1987).

¹⁰ See *Red Lion*, 395 U.S. at 390.

¹¹ See *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

¹² See *Pacifica*, 438 U.S. at 734, 742 (“Our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast....”).

scarcity among its bases for authority, the Court explicitly rejected grounding indecency regulation on the *Red Lion* scarcity rationale.¹³ Subsequently the Commission itself abandoned scarcity as a justification for indecency regulation.¹⁴

c. *Red Lion* and *Pacifica* apply to different types of laws. *Pacifica*'s constitutional holding applies exclusively to laws *restricting* indecency. By contrast, *Red Lion* applies to a broader *discourse-promoting* body, such as laws structuring the media so as to ensure widest dissemination by diverse sources (e.g. spectrum policy rules, ownership limits, universal service mandates) and promoting political, education and noncommercial content toward building an informed citizenry.

Recent events make this an even less appropriate vehicle for *Red Lion*'s reexamination – “spectrum scarcity” as contemplated in *Red Lion*¹⁵

¹³ *Id.* at 731, n 2. *See also id.* at 770, n 4. (“The opinions of my Brothers POWELL and STEVENS rightly refrain from relying on the notion of spectrum scarcity to support their result. As Chief Judge Bazelon noted below, although scarcity has justified increasing the diversity of speakers and speech, it has never been held to justify censorship.” (Brennan, J., dissenting) (internal quotations and citations omitted)).

¹⁴ *Pacifica Found., Inc.*, 2 FCCRcd 2698, 2699 (1987), *aff'd on recon.*, *Infinity Broadcasting Corp. of Pa.*, 3 FCCRcd 930 n. 11 (1987), *aff'd in part, rev'd in part on other grounds*, *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). Having since abandoned “scarcity” as an argument in favor of indecency regulation, the FCC did not base its underlying decision here on *Red Lion*.

¹⁵ Plainly, *Red Lion* referred to spectrum scarcity resulting from demand, 395 U.S. at 388-89 (“Where there are substantially more individuals who want to broadcast than there are frequencies to allocate...[i]t would be strange if the First

has increased. Recently Congress and the FCC have focused energies on “reclaiming” TV spectrum by inducing broadcasters to turn in their licenses and moving the remaining stations to a smaller, contiguous portion of the TV band.¹⁶ The freed-up spectrum would be auctioned off for broadband use. As discussion coalesces on a plan for “incentive auctions,”¹⁷ broadcasters and wireless companies are engaged in a related fight over

Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.”).

¹⁶ “Three bills have been introduced this year that would allow the Commission to spread the spectrum wealth around; reports of still more bills in the works continue to surface. (This is in addition to several bills introduced last year.)” Lee Petro, “Three Incentive Auction Bills Introduced in Congress,” *Comm. Daily Blog*, Mar. 10, 2011, at <http://www.commlawblog.com/2011/03/articles/broadcast/three-incentive-auction-bills-introduced-in-congress/> Most recently, a fourth bill was proposed. “Latta Bill Would Authorize Incentive Auctions, But Talks Continue, *COMM. DAILY*, Apr. 19, 2011, at <http://www.capitolsolutions.com/CommDaily.4.19.11.pdf>.

¹⁷ FCC Chairman Genachowski Prepared Remarks at NAB Show 2011 (“Genachowski NAB Remarks”), Apr. 12, 2011, p. 5, at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0412/DOC-305708A1.pdf (“Authorized in 1993, spectrum auctions replaced an outdated system of comparative hearings and lotteries, letting the market determine spectrum allocation instead....FCC auctions have raised more than \$50 billion in revenue for the Treasury....The reasons for voluntary incentive auctions are as compelling as for the original auctions. We need to free up more spectrum for mobile broadband, and there are no easy reallocations ahead of us...”).

the special nature and value of broadcasting in the TV spectrum.¹⁸ Among the recommendations in the National Broadband Plan are several with respect to spectrum, intended to address America's growing broadband spectrum needs.¹⁹ In prepared comments before the National Association of Broadcasters this year, FCC Chairman Genachowski again stressed the "spectrum crunch":

At last year's NAB, I spoke about how demand for spectrum was dramatically outstripping supply – driven by smart-phones, which places a demand on spectrum that is 24 times as much as feature phones. The consensus projection at the time was that mobile data traffic would increase 35X over a 5-year period. Well, that was before tablets were introduced and took off at a faster pace than anybody projected. This year, analysts expect 55 million tablets to be sold, making it a \$35 billion business.

¹⁸ Demand for radio spectrum also remains high. Pressure to create new low-power FM radio stations led to the recent enactment of the Local Radio Community Act of 2010, Pub. L. No. 111-371, 124 Stat. 4071 (2011). The statute requires the FCC to modify its rules to reduce the minimum distance separation requirements between low-power and full-service FM stations, FM translators and FM booster stations. It also gives the FCC discretion to grant waivers of other distance separation requirements under certain conditions.

¹⁹ Connecting America: National Broadband Plan, Part I, Ch. 5 "Spectrum," pp. 73-105, at <http://download.broadband.gov/plan/national-broadband-plan-chapter-5-spectrum.pdf>.

Already. And those tablets place a demand on spectrum that is 120 times that of old feature phones....This growing demand is not going away. The result is a spectrum crunch. No matter what happens in the marketplace, the only thing that can address the growing overall demand for mobile is increasing the overall supply of spectrum and the efficiency of its use....I believe the single most important step that will drive our mobile economy and address consumer frustration is authorizing voluntary incentive auctions.”²⁰

Most recently, Chairman Genachowski knocked down claims that a combined AT&T-T-Mobile entity could nullify the “spectrum crunch” for mobile broadband, noting “The math that drives the spectrum crunch is aggregate demand from all consumers in the U.S. compared to aggregate supply of spectrum.” Jasmin Melvin, Reuters, “FCC head says mergers can’t solve the spectrum crunch,” Apr. 13, 2011, at http://www.msnbc.msn.com/id/42566661/ns/technology_and_science-wireless. No matter where the math driving a “spectrum crunch” and “incentive auctions” takes the TV spectrum, for now one thing is certain: there is no record on which this or any court can assess the complicated factual question of whether or not the supply of spectrum exceeds demand.

²⁰ Genachowski NAB Remarks, at 4-5.

CONCLUSION

The petition for a writ of certiorari should be denied, but in any event this Court need not, and should not, question *Red Lion* or its prescient scarcity rationale, which are not explored in the opinions below and irrelevant to this case.

Respectfully submitted,

*ANDREW JAY SCHWARTZMAN
CHRYSIANE B. PEREIRA
MEDIA ACCESS PROJECT
1625 K STREET, NW
SUITE 1000
WASHINGTON, DC 20006
(202) 232-4300

May 23, 2011

*Counsel of Record