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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* YALE LAW SCHOOL INFORMATION SOCIETY PROJECT SCHOLARS, NEW AMERICA FOUNDATION, AND PROFESSOR MONROE PRICE IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Amici include Yale Law School Information Society Project scholars, the New America Foundation, and Professor Monroe Price, a First Amendment and media scholar.[2]

The Information Society Project at Yale Law School (ISP) is an intellectual center addressing the implications of new information technologies for law and society. Marvin Ammori, a Visiting Scholar at Stanford Law School and an Affiliated Fellow of the Yale ISP, publishes in First Amendment and Internet policy. Nicholas Bramble, a Lecturer in Law at Yale Law School and Director of the Law and Media Program at the Yale Law School ISP, has written articles on First Amendment law and information policy.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made any monetary contribution toward the preparation or submission of this brief. Counsel for the respondents, on June 28, 2011, June 29, 2011, and July 1, 2011, and counsel for the petitioners, on July 8, 2011, have filed in this Court consent to the filing of amicus curiae briefs in support of either party or of neither party in fulfillment of S. Ct. Rule 37.3. This brief was written by Nicholas Bramble, Lecturer in Law at Yale Law School and Director of the Law and Media Program at the Information Society Project at Yale Law School, under the supervision of the undersigned Senior Fellow of the ISP, Priscilla Smith. Portions of this brief are derived from a brief written by Marvin Ammori and submitted to the Court in *FCC v. Fox Television Stations, Inc.*, 556 U.S. __, 129 S. Ct. 1800 (2009).

[2] The amici participate in this case in their personal capacity; titles are used only for purposes of identification.

The New America Foundation is a nonprofit, nonpartisan public policy institute that invests in new thinkers and new ideas to address the next generation of challenges facing the United States. One of its major projects is the Wireless Future Project, which develops and advocates policy proposals to promote universal, affordable and ubiquitous broadband and improve the public's access to critical wireless communication technologies.

Monroe Price, now a professor at the University of Pennsylvania's Annenberg School for Communication, was dean of Cardozo School of Law from 1982 to 1991. He is the author of several books on free speech and new media.

SUMMARY OF ARGUMENT

This case rests on a fairly narrow question concerning the constitutionality of broadcasting regulations designed to suppress and censor indecent speech. However, parties on both sides of this case have argued that this Court, in addressing such indecency regulations, should consider a much broader set of constitutional rationales for spectrum regulation. Broadcasters explicitly suggest that the "scarcity rationale" is properly before the Court. Amici submit this brief in support of neither party to stress that this overreaching is both unnecessary and unwise.

First, this Court's decision in *FCC v. Pacifica*[3] squarely addresses the constitutionality of indecency regulations and does not rely on the scarcity rationale. The Court can and should review the continuing vitality of *Pacifica* without questioning other lines of this Court's precedent wholly unrelated to indecency regulation. Simply put, the scarcity rationale associated with *Red Lion v. FCC*,[4] *NBC v. United States*,[5] *FCC v. Nat'l Citizens Comm. for Broad.*,[6] and *CBS v. FCC*[7] is wholly irrelevant to this case. The Court should follow its prudential rule of avoiding constitutional questions irrelevant to the case or controversy before this Court and merely address the indecency issue actually before the Court.

Moreover, a dispute over broadcasting indecency regulations offers an extremely ill-suited forum for revisiting the scarcity rationale and needlessly hurling into doctrinal chaos all of the spectrum policy that rationale supports. This rationale has never been invoked as a basis for indecency regulation. Indeed, Justice Brennan's dissent in *Pacifica* commends the majority, with which he disagrees, for understanding that the scarcity rationale is not relevant to indecency regulation. Nothing in the scarcity rationale underpinning *Red*

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[3] *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

[4] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

[5] 319 U.S. 190 (1943).

[6] 436 U.S. 775 (1978).

[7] 453 U.S. 367 (1981).

Lion, *NBC v. U.S.*, and other Court precedents justifies governmental decisions to engage in censorship or suppression of certain viewpoints.

Casting doubt on the scarcity rationale would inject uncertainty into a wide variety of actions that the government adopted by government in reliance on that rationale. These actions, many of which have been upheld by this Court, include imposing ownership limits and universal service obligations, promoting diverse uses of spectrum, experimenting with the limited authorization of unlicensed spectrum usage, implementing new economic models for the allocation of spectrum, providing equal time for political candidates, and so on. These laws generally attempt to broaden access to spectrum rights for more speakers, and are easily distinguishable from the suppression of speech evident in indecency regulations. It is for this reason, in fact, that this Court has clearly held that indecency regulations do not rely on the scarcity rationale implicated by these other governmental decisions.

The scarcity rationale forms the backdrop for all spectrum regulation, from television broadcasting to mobile Internet services. It suggests that because there are constraints on the availability and simultaneous usage of spectrum, the government must play a role in allocating rights to this spectrum, and the government may pursue allocations that ensure the widest availability of diverse and antagonistic sources of speech. Compared to other justifications for First Amendment scrutiny of spectrum licensing decisions, the scarcity rationale provides greater leeway for governmental decisions

to promote nondiscriminatory, universal access to diverse sources of speech.

While scarcity was a rationale in the *Red Lion* decision, which upheld a fairness doctrine repealed almost 25 years ago, many other decisions also rely on scarcity. For example, the government is currently seeking to auction billions of dollars of spectrum both to address debt obligations and to transfer more spectrum from older technologies like broadcast television to modern technologies including mobile Internet access. When the government seeks to auction this spectrum, it will decide among a range of auction mechanisms (possibly including two-sided auctions with broadcasters) and will impose rules ranging from nondiscrimination rules to build-out and service obligations. Such decisions enable spectrum to be used widely and effectively for a range of purposes. Without the scarcity rationale, these speech-focused government regulations might be subject to intrusive judicial second-guessing.

Even though, under this Court's precedent, indecency regulation does not implicate the scarcity rationale at all, several parties before the Court use this appeal of an indecency order to argue that the scarcity rationale for limiting judicial scrutiny of spectrum allocations has faded in importance. But a case concerning indecency regulations presents a dangerously underdeveloped vehicle for evaluating, questioning, or updating the rationales underlying spectrum regulation. Given that scarcity currently serves as the primary justification for the government's attempts to allocate spectrum and balance the claims of competing users, any effort by

the Court to evaluate this rationale requires more consideration than passing references in this case's briefs could ever provide.

Evaluation of this rationale should occur in the context of a proceeding that actually relies upon the scarcity rationale. Such a proceeding would offer the opportunity for greater analysis of the factual predicates for this rationale, and would give parties the chance to describe alternative rationales upon which the government might rely in allocating and structuring spectrum usage.

ARGUMENT

Amici caution the Court not to undermine the continuing vitality of the scarcity rationale underlying *Red Lion v. FCC*, *NBC v. United States*, *FCC v. Nat'l Citizens Comm. for Broad.*, and *CBS v. FCC* when determining whether the Federal Communications Commission's context-based approach to determining indecency is unconstitutionally vague. The Court may wish to extend its analysis beyond vagueness in order to examine prior justifications for limiting the degree of First Amendment scrutiny applied to broadcasting indecency regulations. But in evaluating the broader constitutionality of *indecency* regulations, which have heretofore been justified solely by the pervasiveness of broadcasting, its intrusive nature, and its accessibility to children, the Court need not examine the rationales underlying other broadcast decisions.

The scarcity rationale does not serve as a justification for indecency regulations and has not served as a justification for the FCC's actions in these proceedings. To question the scarcity rationale in this case would cast doubt upon every spectrum license and jeopardize a broad range of complex spectrum-structuring actions entirely unrelated to the promulgation of indecency regulations.

I. The Court Should Limit Its Inquiry to the Facts and Justifications of Indecency Regulations Rather Than Using This Case as a Forum to Examine Unrelated Controversies Concerning Spectrum Policy.

This Court's limited scrutiny of broadcasting indecency regulations has heretofore been justified by a set of rationales—pervasiveness, intrusiveness, and accessibility to children—having to do with the characteristics of broadcast media, not the scarcity of the spectrum on which that media is transmitted. The "scarcity rationale," which has never served as a justification for indecency regulations, is not at issue in this case. The Court should confine its analysis of the constitutionality of indecency regulations to the actual rationales that have been used to support such regulations.

A. When the Federal Communications Commission Promulgates Indecency Regulations, The Scarcity Rationale Is Not Implicated.

The government structures spectrum licenses in numerous ways. Typically, the government employs a wide range of spectrum allocation decisions, auctions, ownership limits, and authorizations of unlicensed use to ensure that those who obtain access to spectrum are not creating interference and are promoting wide access by the public to diverse and antagonistic sources of speech.[8] In a narrower range of cases,[9] the government seeks to condition spectrum licenses upon an obligation to stamp out indecent or obscene speech.[10] With the former set of actions, the government is attempting to add speech and speakers into the mix available to the public. With the latter set of actions, the government is attempting to remove certain kinds of speech from the mix.[11]

Two different lines of precedent govern the constitutionality of these two different sets of governmental actions.[12] Under *Red Lion* and

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[8] *See, e.g.*, *CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

[9] *See, e.g.*, *Action for Children's Television v. FCC*, 58 F.3d 654, 658 (D.C. Cir. 1995) (en banc).

[10] *See, e.g.*, 18 U.S.C. § 1464 (prohibiting the broadcasting of indecent language).

[11] *See, e.g.*, *Action for Children's Television*, 58 F.3d at 658 (describing regulations that "ban[] all broadcasts of indecent material").

[12] *Compare FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding the FCC's fine for a radio broadcast of George Carlin's "Seven Dirty Words" monologue) *with Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (articulating a less rigorous standard of scrutiny for broadcasting laws or

associated cases, constraints on the *availability* of spectrum justify governmental policies that ensure spectrum is used widely and effectively for a range of purposes. By contrast, under *Pacifica* and associated cases, the *characteristics* of broadcasting—including its pervasiveness, intrusiveness, and accessibility to children—have justified censorship of certain kinds of disfavored speech.[13] It is important to maintain a firm distinction between these two lines of precedent, given that one is primarily about the addition of speech and serves to support numerous technical spectrum-allocation policies, while the other is primarily concerned with the suppression of speech in a narrower range of contexts.

Yet broadcast network respondents, in their opposition to the government's petition for certioriari in this case, indicated that they plan to bring up "fundamental questions" relating to "the underlying constitutionality of regulating broadcast speech" as well as "whether the Court's decisions in *Pacifica* and *Red Lion* should be overruled."[14] ABC argues that "developments since *Red Lion* have rendered the predicate for that decision untenable today" and

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regulations that promote the wide dissemination of diverse content).

[13] *Pacifica*, 438 U.S. at 748-49; *see also Action for Children's Television*, 58 F.3d at 660-61 (identifying governmental interests in "support for parental supervision of children" and "a concern for children's well-being" as sufficient to support indecency regulations).

[14] Brief in Opp'n of Fox, On Petition for a Writ of Certiorari, No. 10-1293, May 23, 2011, at 27.

suggests that the Court subject all "content-based restrictions on broadcasters' expression" to strict scrutiny.[15] The government itself attempts to link *Red Lion* and the spectrum-scarcity rationale to this case by describing scarcity as one of three primary justifications—along with the pervasive presence of broadcast media and the unique accessibility of such media to children—for limited First Amendment scrutiny of a requirement that licensees "accept content-based restrictions that could not be imposed on other communications media."[16]

In seeking review of these "fundamental questions," respondents are attempting to bootstrap their opposition to the *Pacifica* indecency regime into a much broader attack upon the FCC's ability to structure spectrum licenses. Petitioners, meanwhile, attempt to frame this case around fundamental questions about the sources of authority for broadcast regulation, rather than defending indecency regulations solely on the narrower "pervasive and uniquely accessible" rationales set forth in *Pacifica*. But both sides reach far beyond the facts of this case. The Court need not and should not deal with these broader theoretical questions when it is capable of tethering its analysis to the facts and rationales of the indecency regulations presently before it.[17] This case concerns the constitutionality of

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[15] Brief in Opp'n of ABC, Inc. et al., On Petition for a Writ of Certiorari, No. 10-1293, May 23, 2011, at 30, 32.

[16] Pet'r's Br. 42-44.

[17] *See Kremens v. Bartley,* 431 U.S. 119, 136 (1977) ("[The] Court will not formulate a rule of constitutional law broader

regulations that suppress speech, not the constitutionality of rules and requirements that promote wider access by the public to more diverse types of speech. To support this distinction in its analysis of the constitutionality of indecency regulations, the Court should train its attention on *Pacifica*, not on *Red Lion*.

B. Indecency Regulations Are Premised Upon the Rationale Recognized in *Pacifica*, Not the Scarcity Rationale Recognized in *Red Lion* and Other Precedents.

Although *Red Lion*, *NBC v. United States*, *FCC v. NCCB*, and *CBS v. FCC* rest upon a set of rationales that have been the subject of strenuous academic debate, these rationales are simply not at issue in this case, and this case does not present a proper vehicle for questioning such rationales.

First, the FCC did not rely upon the scarcity rationale of *Red Lion* in issuing the broadcasting indecency orders at issue here.[18] This Court cannot

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than is required by the precise facts to which it is to be applied.").

[18] *See* Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCC Rcd 2664 (2006); Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd 4975, at ¶ 3 n.4 (2004); Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCC Rcd 13299, n.18 (2006).

supply and then evaluate a basis for the FCC's actions that the FCC itself did not provide.[19]

Second, this Court has explicitly rejected the FCC's attempt to offer the *Red Lion* scarcity rationale as a basis for its indecency regulations. Justice Brennan, dissenting in *Pacifica*, approvingly described the majority's rejection of scarcity as a basis for indecency regulation: "The opinions . . . rightly refrain from relying on the notion of 'spectrum scarcity' to support their result. . . . '[A]lthough scarcity has justified increasing the diversity of speakers and speech, it has never been held to justify censorship.'"[20]

Third, this Court has cited three primary reasons for limiting its scrutiny of government regulation of broadcasters' indecent speech: the broadcast media "have established a uniquely pervasive presence in the lives of all Americans," "confront[] the citizen . . . in the privacy of the home," and are "uniquely accessible to children, even those too young to read."[21] *Pacifica* thus squarely articulates the rationale for broadcasting indecency regulations. Because this case concerns the constitutionality of such indecency regulations, the rationales in *Pacifica* for limited scrutiny of indecency regulations are now open to reanalysis. The Court may wish to consider whether

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[19] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[20] *Pacifica*, 438 U.S. at 770 n.4.

[21] *Id.* at 748-49.

broadcasting retains its characteristics of pervasiveness, intrusiveness, and accessibility to children, particularly in light of the diminishing power of broadcasting in a world with countless new sources of information and media distribution.[22]

But these rationales for limiting scrutiny of indecency regulations—pervasiveness, intrusiveness, and accessibility to children—are absent from cases that justify the constitutionality of spectrum regulations. *Red Lion* rests on a different set of bases: "the scarcity of broadcast frequencies," the government's "role in allocating" those frequencies, and the "legitimate claims" of competing "possible users."[23] In a case concerning the constitutionality of regulations designed to suppress and censor indecent speech, it is the rationales in *Pacifica*, not those in *Red Lion*, that are at issue.

Fourth, the Court has articulated two starkly different approaches towards speech in *Pacifica* and *Red Lion*. The line of precedent associated with *Pacifica* is about censorship and suppression of

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[22] *See Fox v. FCC*, 613 F.3d 317, 326 (2d. Cir. 2010) ("[W]e face a media landscape that would have been almost unrecognizable in 1978. Cable television was still in its infancy. The Internet was a project run out of the Department of Defense with several hundred users. . . . The same cannot be said today. The past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus.").

[23] 395 U.S. at 400-01.

indecent speech.[24] In *Red Lion*, by contrast, the Court was not concerned with censorship of speech.[25] *Red Lion* focused on something different: the addition and diversification of speech.[26] The point of *Red Lion* and associated cases is that when (a) there are constraints on the availability of spectrum and (b) the government is responsible for allocating this spectrum, the government can try to ensure that this spectrum facilitates diverse, antagonistic, and high-value speech. Such cases pertain to communications laws and regulations that are designed to promote the availability of diverse and antagonistic sources of information and the wide distribution of this information to all members of the public.[27]

Fifth, the two lines of cases rest on different and sometimes incompatible governmental interests. *Pacifica* and related cases set forth a governmental interest—protecting children from harmful information—squarely related to the regulations at

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[24] *See, e.g.*, *Action for Children's Television*, 58 F.3d at 660; *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 743-47 (1996) (Breyer, J., plurality).

[25] *See* 395 U.S. at 396 (declining to address whether the First Amendment authorizes "government censorship of a particular program").

[26] *Id.* at 401 n.28 (freedom of speech is not abridged where the government "directly or indirectly multipl[ies] the voices and views presented to the public.").

[27] *See, e.g.*, *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) (summarizing the underlying principle of communications laws and policies "that the dissemination of information from diverse and antagonistic sources is essential to the welfare of the public").

issue in this case.[28] The Court acknowledged a separate set of governmental interests in *Red Lion*: ensuring public access to "the widest dissemination of diverse and antagonistic sources," allowing the public to "receive suitable access to social, political, esthetic, moral and other ideas and experiences," and promoting effective use of the spectrum for communication.[29] These governmental interests in promoting wide access to diverse speech are unrelated to the suppression of speech and the protection of children.

Finally, the laws that have been built up around these two contrasting lines of cases differ in their focus and function. The constitutional holding in *Pacifica* justifies laws or regulations that allow the government to engage in suppression of certain content or viewpoints.[30] In contrast, *Red Lion* justifies (1) laws structuring the media environment to ensure the widest dissemination of information from diverse sources (such as ownership limits, must-carry rules, and universal service mandates); (2) laws ensuring an informed citizenry through promotion of political, educational, or noncommercial information; and (3) spectrum policy rules governing technologies as diverse as satellite television and the wireless internet. The laws enabled by *Pacifica*

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[28] *See Sable Communications v. FCC*, 492 U.S. 115, 126 (1989).

[29] *Red Lion*, 395 U.S. at 360.

[30] *See e.g.*, *Action for Children's Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc); *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 743-47 (1996) (Breyer, J., plurality).

target and restrict speech, whereas the structural laws and regulations enabled by *Red Lion* support wide access to diverse speech.

II. Despite Criticism, the Scarcity Rationale Now Occupies a Bedrock Role in Telecommunications Policy, Underlying a Wide Variety of Spectrum-Structuring Laws and Regulations.

If this Court concludes that justifications for limited scrutiny of indecency regulations are no longer sustainable, such a conclusion should not affect the constitutional status of laws and regulations premised on the spectrum-scarcity rationale associated with *Red Lion*. If anything, the reevaluation of the constitutional basis for indecency regulations—in conjunction with the repeal of other regulations that had the potential to reduce media diversity and accessibility—offers an opportunity to clarify that the rationales for censorious broadcast regulation are irrelevant to the rationales for spectrum access regulation in general.

Red Lion and its associated line of cases serve as bedrock precedent for several classes of laws, all of which differ from indecency regulations and enable what this Court recently reaffirmed as a guiding First Amendment principle: "the unfettered exchange of ideas" in a variety of forums.[31] Revisiting

[31] *See Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. __, 131 S. Ct. 2806 (2011) (citing *Buckley v. Valeo*, 424 U. S. 1, 14 (1976)).

or questioning *Red Lion* in this proceeding would have numerous unpredictable effects upon these foundational laws governing United States media, spectrum, and Internet policy.

A. The Spectrum Scarcity Rationale Supports Structural Regulations That Enable Wide Access to Diverse Information Sources.

The spectrum scarcity rationale underpins a wide variety of laws and regulations—including ownership limits, access rules, and universal service rules—that attempt to foster broad access to communications tools and broad distribution of information via those tools.

Relying in part on the *Red Lion* interest in fostering diverse and antagonistic sources of information, this Court and lower courts have upheld broadcast media ownership limits[32] and must-carry rights.[33] In *Turner Broadcasting Sys., Inc. v. FCC*, which relied on the spectrum scarcity rationale,[34] the

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[32] *See, e.g.*, *FCC v. NCCB*, 436 U.S. at 802; *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004); *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 476-77 (2d Cir. 1971) (upholding financial interest and syndication rules and prime time access rules);

[33] *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 975-79 (D.C. Cir 1996).

[34] 512 U.S. at 637 ("As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum. And if two broadcasters were to attempt to transmit over the same frequency in the same locale,

Court held that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[35] And relying on the separate *Red Lion* interest in promoting the wide dissemination of information, this Court has upheld the FCC's attempt to implement universal service goals[36] through its allocation of broadcast licenses.[37]

Unlike indecency laws, these structural laws and regulations do not suppress disfavored content, and have been subject to only minimal First Amendment scrutiny. Questioning the spectrum scarcity rationale in this case would, as discussed *infra*, likely lead to unintended and wide-ranging consequences for a range of laws and regulations unrelated to those at issue in this case.[38]

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they would interfere with one another's signals, so that neither could be heard at all.").

[35] *Id*. at 663.

[36] *See, e.g.*, Amendment of Section 3.606 of Comm'n's Rules & Regulations, Sixth Report & Order, 41 F.C.C. 148, 167 (1952) (providing as the first three priorities of allocation: "(1) To provide at least one television service to all parts of the United States. (2) To provide each community with at least one television broadcast station. (3) To provide a choice of at least two television services to all parts of the United States.").

[37] *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 360 (1958).

[38] *See infra* Part III.

B. The Spectrum Scarcity Rationale Supports Laws Providing Wide Access to Political and Educational Information.

Second, *Red Lion* retains precedential value for laws that seek to promote an informed electorate through encouraging the provision of wide access to political, educational, and noncommercial programming. Many such laws are currently in place.

In *CBS, Inc. v. FCC*, the Court upheld the requirement that broadcasters grant access to federal candidates, because the rule promoted "the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."[39] This Court has permitted governmental efforts "to enhance the volume and quality of coverage of public issues through regulation of broadcasting."[40] And *Red Lion* served as one basis for the implementation of a campaign disclosure requirement,[41] which this Court has noted "can provide shareholders and citizens

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[39] 453 U.S. at 396.

[40] *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. at 800, 802 (upholding broadcasting ownership limitations as reasonable means to "enhance the diversity of information heard by the public").

[41] *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 237, 240-41 (2003) (reasoning that record-keeping requirements would assist in determining whether "broadcasters are too heavily favoring entertainment, and discriminating against broadcasts devoted to public affairs").

with the information needed to hold corporations and elected officials accountable for their positions and supporters."[42]

Even laws that more directly solicit diverse speech, such as equal time provisions, are dependent upon the scarcity rationale. Section 315 of the Communications Act, for instance, states that "[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station."[43]

Such laws are best seen as speech-promoting alternatives to the direct regulation of political speech. Rather than suppressing or chilling speech, Section 315, which seeks to give lower-cost time to a broader array of candidates and thereby increase decentralized public participation in the political process, helps ensure that no candidate or issue is "free from vigorous debate."[44] Impeding the operation of this law would harm discussion of public issues by narrowing the scope of political speech to those candidates and those issues that a small handful of broadcasters deemed worthy of airtime.

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[42] *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 916 (2010).

[43] 47 U.S.C. § 315.

[44] *See Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U. S. 1, 14 (1986).

As this Court has recently affirmed, "'[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation' of our system of government."[45] "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."[46] *Red Lion* and associated cases support the creation of infrastructure in which this right can be effectively exercised. Questioning the scarcity rationale would risk dismantling this infrastructure by casting serious doubt upon laws and policies that ensure the doors to debate are open and the discussions taking place therein are vigorous and antagonistic. This case, narrowly concerned with the constitutionality of indecency regulations, does not represent a useful forum for considering such consequences.

C. *Red Lion* Enables the FCC and NTIA to Tailor Spectrum Policy to Evolving Technological and Economic Circumstances.

Third, beyond structural rules and political and educational access rules, a large number of the government's spectrum policies also rest upon rationales articulated in *Red Lion* and associated cases. The FCC structures spectrum for private use, while the National Telecommunications and

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[45] *Arizona Free Enterprise Club*, 564 U.S. at __, 131 S.Ct. __ (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)).

[46] *Citizens United*, 130 S.Ct. at 898.

Information Administration allocates, assigns, and regulates government spectrum. The framework of *Red Lion* continues to allow these agencies to take into consideration a wide-ranging set of regulatory choices when adapting spectrum licenses to private and governmental parties.

Red Lion enables the FCC to experiment with different possible technical and economic plans in structuring spectrum allocation and use. The FCC can tailor different licenses to different types of use, including terrestrial radio broadcasting, terrestrial television broadcasting, satellite television broadcasting, satellite radio broadcasting, wireless cell phone networks, taxi dispatching, public safety, unlicensed uses, and microwaves. It can assign licenses via comparative hearings, lotteries, auctions, and on a first-come first-served basis. It can exercise its authority to clear bands of existing users to enable new uses.[47]

Beyond licensing, the FCC has used its spectrum policy authority to authorize a variety of "unlicensed" uses of spectrum. Rather than assigning licenses to particular users, these allocations of unlicensed spectrum rely upon "smart radios" possessed by end users that are capable of managing interference on their own using advanced computing

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[47] *See, e.g.*, Service Rules for the 698-746, 747-762, and 777-792 MHz Bands, Second Report & Order, 22 FCC Rcd 15,289, 15,296 (Aug. 10, 2007) ("The DTV Act set a firm deadline of February 17, 2009 for the 700 MHz Band spectrum to be cleared of analog transmissions and made available for public safety and commercial services as part of the DTV transition.").

technologies.[48] A large variety of laptops and mobile telephones today, for instance, are equipped with wi-fi radios that enable wireless connections to Internet routers. The FCC has a minimal certification process in place to ensure that these and other devices can take advantage of the broad potential uses of unlicensed spectrum without creating interference.[49]

As spectrum becomes increasingly important to the satisfaction of basic communications needs, and as control over existing spectrum becomes more concentrated, it becomes correspondingly important for the government to have the tools it needs to ensure broad and open access to this communications capability.

It would be particularly unfortunate if, in a case about the constitutionality of broadcast indecency regulations, the Court inadvertently undermined the authority for these technical policy decisions and handcuffed the FCC's broad, flexible mandate to regulate the spectrum to serve the public's interest.

D. When the Federal Communications Commission Promulgates Indecency Regulations, The

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[48] *See* Eli Noam, *Spectrum Auction: Yesterday's Heresy, Today's Orthodoxy, Tomorrow's Anachronism. Taking the Next Step to Open Spectrum Access*, 41 J. LAW & ECON. 765, 778-80 (1998) (discussing how to enable dynamic real-time markets in spectrum usage).

[49] *See, e.g.*, 47 C.F.R. § 15.5.

Scarcity Rationale Is Not Implicated.

Nothing in the rationale for the laws and regulations listed above should be understood to justify laws that support the censorship or suppression of certain viewpoints. Were the government to use *Red Lion* as a pretext to target and suppress particular views and particular content, courts can rely upon heightened standards of First Amendment scrutiny for laws or regulations that suppress editorializing,[50] commercial speech,[51] indecency,[52] and particular political viewpoints.[53] This particular case—and the effort to evaluate the constitutionality of censorship and content regulation separately from the constitutionality of access and structural regulation—is in large part about ensuring that the government does not engage in censorship under the cover of decisions regarding spectrum licensing and access.

Some have argued that *Red Lion* serves to justify viewpoint- and content-based restrictions of speech based on the Court's approving references to the fairness doctrine in that case. But *Red Lion* is

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[50] *See FCC v. League of Women Voters of California*, 468 U.S. 364 (1984).

[51] *See, e.g.*, *Greater New Orleans Broadcasting Ass'n v. FCC*, 527 U.S. 173 (1999).

[52] *See Action for Children's Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc).

[53] *See News America Publishing Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988).

not the fairness doctrine. Indeed, in *Red Lion*, the Court said it would revisit the issue of the fairness doctrine's constitutionality if evidence demonstrated that the doctrine reduced, rather than enhanced, the quality and diversity of political coverage.[54] When the fairness doctrine was later repealed, neither the FCC nor courts suggested that *Red Lion* itself should be overturned.[55]

With the repeal of the personal attack rule and the fairness doctrine, the government took affirmative steps to ensure that spectrum access policies could be justified without reference to regulations that censor, target certain viewpoints, or seek to level a playing field.[56] In separating its analysis of the justification for indecency regulations from any analysis of the spectrum scarcity rationale, the Court can continue to maintain this firm distinction between censorship-promoting rationales and access-promoting rationales. Maintaining the separateness of these rationales will ensure that this case does not inadvertently hinder Congress, the FCC, and the NTIA from tailoring longstanding

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[54] 395 U.S. at 393 ("And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.").

[55] *See, e.g.*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

[56] *Cf. Arizona Free Enterprise Club*, 564 U.S. at __ ("We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech.").

public interest concerns to the challenges brought about by new technologies and communications tools.

III. Questioning the Scarcity Rationale in Dicta in This Unrelated Controversy Would Result In Unexpected, Systemic Consequences to the Current Model of Spectrum Allocation, Potentially Undermining Decades of Precedent Extending Far Beyond the Repeal of Indecency Regulations.

Any reconsideration of the scarcity rationale for spectrum allocation and regulation should occur in the context of a proceeding that tees up the numerous complex issues that would arise in the event that the current rationale for spectrum licensing were undermined. These complex technological and legal issues include: whether current allocations of spectrum are defensible under strict scrutiny; whether any shift away from spectrum licensing should involve the assignment of property rights in spectrum or the facilitation of unlicensed uses of spectrum; how to handle the sudden jeopardization of thousands of spectrum licenses conferred by the FCC or held by the government; and other unforeseeable consequences of the abandonment of relied-upon rules of the road.

Questioning the justifications for *Red Lion*, *NBC v. United States*, *FCC v. NCCB*, and *CBS v. FCC* in a case where these issues have not been properly briefed would both distract from the reevaluation of the constitutional basis for limited First Amendment scrutiny of indecency regulations and likely generate wide-ranging unintended effects.

First, if the scarcity rationale were deemed an invalid basis for spectrum licensing, any licenses to use spectrum to engage in speech would be subject to a more rigorous standard of scrutiny, given the general presumption that the government should not be in the business of licensing speakers.[57] If the standard in *Forsyth County* were held to prevail, the government would need to defend each spectrum license under a standard of strict scrutiny, particularly where it was granting disproportionate benefits and spectrum to certain types of speakers over others.

Under intermediate or strict scrutiny, the government might be unable to justify the current highly broad allocation of spectrum to broadcasters. Such allocations of spectrum to broadcasters include the vast "white spaces" of spectrum set aside to protect broadcasting signals from interference. The FCC has recognized that these "white spaces" could instead be used to provide high-speed, mobile Internet access to millions of underserved Americans.[58]A decision to continue to dedicate this valuable swath of spectrum to over-the-air broadcasting, which provides access to limited

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[57] *See Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992); *see also Hague v. CIO*, 307 U.S. 496 (1939).

[58] *See* Unlicensed Operation in the TV Broadcast Bands, Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, Second Memorandum Opinion & Order, 25 FCC Rcd 18,661 (Sept. 23, 2010) (updating rules authorizing the operation of unlicensed wireless devices in areas of broadcast television spectrum unused by licensed services).

programming upon which an increasingly diminishing number of Americans rely,[59] as opposed to Internet access, which provides access to a wider breadth of diverse and antagonistic information sources, would be difficult to justify under any form of heightened First Amendment scrutiny.

Even if the lesser standard of intermediate scrutiny under *Turner* were to apply, such a standard would subject the FCC's decisions to constant scrutiny as spectrum licensees argued that burdens placed upon their speech by a variety of structural rules were disproportionate to the governmental interests thereby furthered.[60] Applying *Turner* to spectrum policy would mire the FCC in years of litigation with respect to decisions regarding spectrum allocation, licensing, authorization for unlicensed use, band-clearing, and conditioning existing licenses for data roaming or open access. Such action by the Court would disturb reliance interests based upon current spectrum allocation and structuring policies. Such action would additionally constitutionalize a framework for judicial supervision of FCC action that is far less conducive to public interest regulation and less

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[59] A study from 2008 estimated that only 13% of American households with television service relied primarily on broadcast programming over the air, compared to 87% of households subscribing to cable and satellite television services. *See* Sascha D. Meinrath & Michael Calabrese, *Unlicensed "White Space Device" Operations on the TV Band and the Myth of Harmful Interference* (Mar. 2008), *available at* http://www.newamerica.net/files/WSDBackgrounder.pdf.

[60] *See Turner I*, 512 U.S. at 662.

responsive to evolving industry characteristics than the current model of agency rulemaking.

For example, the FCC is in the process of making difficult technical and policy decisions as to whether and where unlicensed uses of spectrum should be expanded and licensed uses reduced.[61] For this Court to question the scarcity rationale and require that the government shift away from its current model for spectrum-allocation decisions would cast doubt upon the constitutionality of such ongoing regulatory processes. This judicial resolution of a highly technical issue regarding spectrum allocation would be troubling in its own right, and particularly troubling given that parties to a case concerning indecency regulations are unlikely to brief this issue—or any of the other issues described above—in detail.

There may be some "special justification" in the evolving character of the technology and media landscape to support a departure from precedent in the context of broadcasting indecency regulations,[62] but this case does not offer a clear forum for examining the risks and justifications of a sharp departure from precedent in the context of scarcity-based regulations.

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[61] *See* Unlicensed Operation in the TV Broadcast Bands, Second Memorandum Opinion & Order, 25 FCC Rcd 18,661.

[62] *See Dickerson v. United States*, 530 U.S. 428, 443 (2000).

CONCLUSION

Upon reassessing the basis for limited constitutional scrutiny of broadcast indecency regulations, the Court may choose to strike down the government's reliance on *Pacifica* to limit speech. But in fighting back this censorship, the Court should not reach beyond the immediate case and controversy surrounding indecency regulations and jeopardize the feasibility of an array of spectrum-structuring laws and policies.

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