

# The First Amendment and Public Television Advertising: The Need for Clarity After *Minority Television*

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## I. INTRODUCTION

Seeking to liberalize its regulatory scheme of advertisements on public television, the Federal Communications Commission (“FCC”) in 1981 did away with its long-standing prohibition of public television broadcasters airing any promotional content and adopted “the minimum regulatory structure that preserves a reasonable distinction between commercial and noncommercial broadcasting.”<sup>1</sup> Congress followed by codifying the FCC’s new regulatory framework at 47 U.S.C. sections 399a and 399b.<sup>2</sup> Section 399b specifically prohibits public television stations from airing three types of advertisements: for goods and services, regarding public issues, and supporting or opposing any political candidate.<sup>3</sup>

In 2006, Minority Television Project, Inc. (“Minority Television” or “Minority”) brought suit, claiming these statutes and regulations were facially unconstitutional as abridging the First Amendment’s protection of the freedom of speech.<sup>4</sup> The U.S. District Court for the Northern District of California upheld the laws, applying intermediate scrutiny and determining that the prohibitions were narrowly tailored to further the substantial governmental interest in preserving public broadcasting as a source of programming unavailable on commercial stations.<sup>5</sup>

On appeal, a sharply divided panel of the U.S. Court of Appeals for the Ninth Circuit upheld the ban on advertisements for goods and services, but struck down as unconstitutional the prohibitions on public issue and political advertisements.<sup>6</sup> Each judge on the panel wrote separately: Judge Bea wrote for the court,<sup>7</sup> Judge Noonan concurred in the judgment but disagreed strongly with Judge Bea’s analysis and reasoning,<sup>8</sup> and Judge Paez dissented and would have upheld all the restrictions as constitutional.<sup>9</sup>

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1. Comm’n Policy Concerning the Noncommercial Nature of Educ. Broad. Stations, *Second Report and Order*, FCC 81-204, 86 F.C.C. 2d 141, para. 6 (1981) [hereinafter *1981 Report & Order*].

2. 47 U.S.C. §§ 399a, 399b (2006 & Supp. V 2011). Section 399a authorizes public television stations to broadcast announcements that include organizations’ logograms, as long as the announcements do not interrupt regular programming. 47 U.S.C. § 399a (2006 & Supp. V 2011).

3. 47 U.S.C. § 399b (2006 & Supp. V 2011); see also 47 C.F.R. § 73.621(e) (2013).

4. *Minority Television Project, Inc. v. FCC (Minority I)*, 649 F. Supp. 2d 1025, 1027 (N.D. Cal. 2009).

5. *Id.* at 1042.

6. *Minority Television Project, Inc. v. FCC (Minority II)*, 676 F.3d 869, 872 (9th Cir. 2012).

7. *Id.*

8. *Id.* at 890 (Noonan, J., concurring in the judgment).

9. *Id.* at 892 (Paez, J., dissenting).

The Ninth Circuit then voted to accept the case for en banc review.<sup>10</sup> The en banc court reversed the panel and upheld the restrictions as constitutional.<sup>11</sup> Judge McKeown wrote for the court and seven other judges applying intermediate scrutiny and finding the three restrictions to be narrowly tailored to a substantial governmental interest.<sup>12</sup> Judge Callahan partially concurred and partially dissented. She would have upheld the ban on ads for goods and services, but would have struck down the ban on public issue and political ads.<sup>13</sup> Chief Judge Kozinski, joined by Judge Noonan, dissented. He would have held all the restrictions unconstitutional under the First Amendment.<sup>14</sup>

Generally, a content-based line between permitted and prohibited speech, like the one drawn in section 399b, would be heavily disfavored in our First Amendment law.<sup>15</sup> However, the Supreme Court has long accepted different standards of scrutiny for laws that regulate the broadcast medium due to the unique considerations and scarcity of spectrum.<sup>16</sup> Even operating within this unique analytical framework, the Ninth Circuit failed to adequately take into account three considerations: (1) the full range of relevant First Amendment interests, (2) the proper rigor needed in an intermediate scrutiny analysis, and (3) the impact of recent First Amendment case law, especially concerning issue and political advertisements.

This Comment critically evaluates the Ninth Circuit's opinions in *Minority Television Project, Inc. v. Federal Communications Commission* and argues that the en banc court failed to take the full range of First Amendment interests into account and conduct a proper intermediate scrutiny analysis under current First Amendment jurisprudence. Part II

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10. *Minority Television Project, Inc. v. FCC (Minority III)*, 704 F.3d 1009, 1009–10 (9th Cir. 2012).

11. *Minority Television Project, Inc. v. FCC (Minority IV)*, 736 F.3d 1192, 1195 (9th Cir. 2013) (en banc).

12. *Id.* at 1205–06.

13. *Id.* at 1211 (Callahan, J., concurring and dissenting).

14. *Id.* at 1211, 1223 (Kozinski, C.J., dissenting).

15. *See, e.g., United States v. Stevens*, 559 U.S. 460, 468 (2010) (“[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002))).

16. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 868 (1997) (citations omitted) (highlighting the “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,” “the scarcity of available frequencies at its inception,” and “its ‘invasive’ nature”); *see also FCC v. Pacifica Found.*, 438 U.S. 726, 731 n.2 (1978) (giving four reasons that “[b]roadcasting requires special treatment”: (1) children’s access to it; (2) an especially acute private interest in the home; (3) unconsenting adults may without warning be subject to offensive language; and (4) “there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest”); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 400–01 (1969) (acknowledging “the scarcity of broadcast frequencies” as justification for permitting greater governmental regulation).

recounts the factual and procedural history of this case, and Part III examines the en banc Ninth Circuit opinions. Part IV then critiques the Ninth Circuit's approach and argues for greater weight to be given to First Amendment interests, more rigor in its intermediate scrutiny analysis, and a more comprehensive consideration of the impact of recent First Amendment case law, particularly in the context of issue and political ads. Part V closes the Comment with an analysis of the implications of the *Minority Television* decision on future cases and the prospects for Supreme Court review.

## II. BACKGROUND

### A. *Facts of the Case*

Our story begins in 1952, when the FCC first reserved broadcasting channels for noncommercial educational stations (“NCEs” or “public broadcast stations”).<sup>17</sup> When licensing noncommercial educational stations, the FCC, at the time, imposed an outright prohibition against public broadcast stations airing any promotional content to enable and encourage public broadcast stations to develop unique educational programming options free from market pressures.<sup>18</sup> By 1982, however, public broadcasters were in a bind. Growing financial pressures, coupled with anemic federal appropriations, prompted Congress and the FCC to revisit the restrictions on NCE promotional content, seeking to strike “a reasonable balance between the financial needs of [public broadcast] stations and their obligation to provide an essentially non-commercial service.”<sup>19</sup>

Congress thus adopted 47 U.S.C. sections 399a and 399b,<sup>20</sup> and the FCC promulgated 47 C.F.R. section 73.621(e) to implement these statutes.<sup>21</sup> Section 399a authorizes a public television station to broadcast “any business or institutional logogram” so long as any such announcement does not “interrupt regular programming.”<sup>22</sup> A public broadcast station may

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17. Amendment of Section 3.606 of the Comm'n's Rules & Regs., *Sixth Report and Order*, 41 F.C.C. 148, paras. 33–36 (1952) (reserving channels for NCE television stations). See also 47 U.S.C. §§ 303(a), (b) (2006 & Supp. V 2011) (giving the FCC authority to “[c]lassify radio stations” and “[p]rescribe the nature of the service to be rendered by each class of licensed stations”). The FCC first set aside broadcasting channels for NCEs in the radio context in 1938 soon after passage of the original Communications Act. See 3 Fed. Reg. 312 (Feb. 9, 1938).

18. 17 Fed. Reg. 3905, 4062 (May 2, 1952); see also *1981 Report & Order*, *supra* note 1, at para. 4.

19. *1981 Report & Order*, *supra* note 1, at para. 1.

20. See 47 U.S.C. §§ 399a, 399b (2006 & Supp. V 2011).

21. See 47 C.F.R. § 73.621(e) (2013).

22. 47 U.S.C. § 399a(b) (2006 & Supp. V 2011).

not, however, “make its facilities available to any person for the broadcasting of any advertisement,”<sup>23</sup> which is defined as

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.<sup>24</sup>

In this framework, Congress sought to find a balance that enabled broadcasters to secure funding beyond federal appropriations while insulating them from commercial influences so that public television could maintain its unique programming niche and not succumb to market pressures to change its content.<sup>25</sup>

Fast forward to 1999. Minority Television Project, Inc. owns and operates the public television station KMTP-TV in San Francisco, which focuses on multicultural programming and non-English language television programs.<sup>26</sup> KMTP-TV does not receive funding from the Corporation for Public Broadcasting.<sup>27</sup> Over the course of its operations from 1999–2002, Minority Television broadcast approximately 1,900 announcements that, in 2003, the FCC’s Enforcement Bureau determined violated section 399b’s prohibition against advertisements.<sup>28</sup> The FCC subsequently fined Minority \$10,000, which Minority paid in full.<sup>29</sup> When Minority appealed the fine,

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23. 47 U.S.C. § 399b(b)(2) (2006 & Supp. V 2011).

24. 47 U.S.C. § 399b(a) (2006 & Supp. V 2011). The FCC’s implementing regulations give more guidance as to what types of announcements violate the statutory ban on advertisements. The FCC has permitted “logograms or slogans which identify and *do not* promote” and “value neutral descriptions of a product line or service,” among others. Comm’n Policy Concerning the Noncommercial Nature of Educ. Broad. Stations, *Public Notice*, FCC 86-161, 7 FCC Rcd. 827, 827 (1992) (emphasis in original).

25. See Comm’n Policy Concerning the Noncommercial Nature of Educ. Broad. Stations, *Memorandum Opinion and Order*, FCC 82-327, 90 F.C.C. 2d 895, paras. 2–3 (1982).

26. *Minority II*, 676 F.3d at 872.

27. *Id.* Like all other public broadcasting stations, however, KMTP-TV relies on federal and state subsidies, individual donors, corporation contributions, foundation grants, and income from special events. See *id.*

28. Minority Television Project, Inc., *Notice of Apparent Liability for Forfeiture*, DA 02-1945, 17 FCC Rcd. 15646 (2002); *Minority II*, 676 F.3d at 873.

29. Minority Television Project, Inc., *Forfeiture Order*, DA 03-4062, 18 FCC Rcd. 26611 (2003); *Minority IV*, 736 F.3d at 1196.

the FCC denied its Application for Review<sup>30</sup> and its Petition for Reconsideration.<sup>31</sup> Minority then sought review in the federal courts.

### B. Procedural History and Lower Court Opinions

Minority filed a Petition for Review of the FCC orders in the Ninth Circuit, and that court transferred the case to the district court.<sup>32</sup> The district court upheld the prohibitions on advertisements as narrowly tailored to further the substantial governmental interest “of insulating broadcasters from special interests and ensuring high quality programming.”<sup>33</sup>

The district court, while applying intermediate scrutiny pursuant to *Federal Communications Commission v. League of Women Voters*,<sup>34</sup> gave considerable deference to the determinations of Congress and the FCC that an advertising ban targeting those particular types of ads was narrowly tailored to the FCC’s interest in “remov[ing] the programming decisions of public broadcasters from the normal kinds of commercial market pressures”<sup>35</sup> so they are able to “air programs with particular qualities consistent with their educational mission,” particularly children’s programming.<sup>36</sup> Minority Television did not contest this substantial government interest; it targeted instead the tailoring of the statute.<sup>37</sup> To determine the law’s tailoring, the court looked to the tests established in *Turner I*<sup>38</sup> and *Turner II*<sup>39</sup>: the government must demonstrate that the harms it addresses are real and the regulation will in fact alleviate those harms in a direct and material way,<sup>40</sup> and the law must be reasonable and supported by substantial evidence in the record before Congress.<sup>41</sup> The district court found these tests satisfied, and it found the same justifying rationale applied to each category of banned advertisement in its analysis.<sup>42</sup>

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30. Minority Television Project, Inc., *Order on Review*, FCC 04-293, 19 FCC Rcd. 25116 (2004); *Minority IV*, 736 F.3d at 1196.

31. Minority Television Project, Inc., *Memorandum Opinion and Order*, FCC 05-180, 20 FCC Rcd. 16923 (2005); *Minority IV*, 736 F.3d at 1196.

32. *Minority IV*, 736 F.3d at 1196.

33. *Minority I*, 649 F. Supp. 2d at 1033.

34. 468 U.S. 364 (1984). *League of Women Voters* addressed the prohibition against NCEs “engag[ing] in editorializing.” *Id.* at 366. The Court struck down this ban by applying intermediate scrutiny, where the restriction must be narrowly tailored to further a substantial governmental interest. *Id.* at 380.

35. *Minority I*, 649 F. Supp. 2d at 1034 (quoting *1981 Report & Order*, *supra* note 1, at para. 3).

36. *Id.* at 1034–35.

37. *Id.* at 1035.

38. *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 664 (1994) (opinion of Kennedy, J.).

39. *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 211 (1997).

40. *Minority I*, 649 F. Supp. 2d at 1031 (quoting *Turner I*, 512 U.S. at 664 (opinion of Kennedy, J.)).

41. *Id.* (quoting *Turner I*, 512 U.S. at 665–66 (opinion of Kennedy, J.)).

42. *Id.* at 1037–41, 1042.

Further, the district court found the advertising ban to be a content-based restriction on speech because section 399b “requires a content-based evaluation of advertisements.”<sup>43</sup> It noted that the statute allows paid promotional use of logograms and identification of services, but prohibits advertisements on issues of public importance and political candidates, which “lie at the core of the First Amendment.”<sup>44</sup> However, the court also noted that the statute permits unpaid political speech, such as a station editorial.<sup>45</sup> The court then deferred to Congress’s judgment that allowing paid commercial, issue, and political advertisements (potentially making public broadcasting stations financially dependent on advertising) would impact programming choices of public broadcasting stations, replacing niche educational programs with more popular programs with greater mass-market appeal.<sup>46</sup> The court similarly rejected the notion that the FCC’s allowance of paid, promotional advertising by non-profits undercuts the narrow tailoring argument.<sup>47</sup>

Finally, the court rejected reliance on other First Amendment cases striking down content-based restrictions, particularly *Metromedia, Inc. v. City of San Diego*<sup>48</sup> and *City of Cincinnati v. Discovery Network, Inc.*,<sup>49</sup> because of the pervasive regulation and unique nature of the broadcasting spectrum.<sup>50</sup>

On appeal, a three-judge panel of the Ninth Circuit took a different approach and upheld the prohibition of advertisements for goods and services, but struck down the prohibition of public issue and political advertisements.<sup>51</sup> The panel, like the district court, found “clear content-based restrictions on the station’s speech” and held that intermediate scrutiny applied under *League of Women Voters* because “content-based speech restrictions that apply to broadcasters are subject to a less demanding form of judicial scrutiny.”<sup>52</sup> The court, however, found that a “robust form of intermediate scrutiny applies to content-based restrictions on broadcast speech which burden political expression” and that *League of Women Voters* requires “judicial ‘wariness’ within [intermediate scrutiny].”<sup>53</sup>

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43. *Id.* at 1042.

44. *Id.*

45. *Id.*

46. *Id.* at 1033–35, 1042.

47. *Id.* at 1043, 1046.

48. 453 U.S. 490, 521 (1981) (plurality opinion) (regulations of outdoor advertising displays).

49. 507 U.S. 410, 430–31 (1993) (ban on distribution of commercial handbills in news racks on public sidewalks).

50. See *Minority I* at 1045 n.8 (“[T]he First Amendment permits more intrusive regulation of broadcast speakers than of speakers in other media.” (quoting *Turner I*, 512 U.S. at 637)).

51. *Minority II*, 676 F.3d at 872.

52. *Id.* at 875.

53. *Id.* at 878 (emphases in original).

The panel largely agreed with the district court on the characterization and analysis of the substantial governmental interest and agreed that the ban on advertisements for goods and services was narrowly tailored to further that interest because “Congress’s conclusion that paid promotional messages by for-profit entities pose a threat to extinguish public broadcast stations’ niche programming was supported by substantial evidence.”<sup>54</sup>

The panel parted ways with the district court, however, in its analysis of the public issue and political advertising bans. It found “no evidence in the record—much less ‘substantial evidence’ . . . to connect the ban on this speech to the government’s interest in maintaining certain types of programming.”<sup>55</sup> The panel found this part of the ban to be based, at best, on “pure speculation” and emphasized that “[u]pholding the ban on public issue and political advertising requires more than speculation.”<sup>56</sup> Critically, the panel differentiated these categories from advertisements for goods and services because public issue and political ads “pose no threat of commercialization [and so] cannot be narrowly tailored to serve the interest of preventing the commercialization of broadcasting.”<sup>57</sup> The panel faulted the district court for being too deferential to Congress and the FCC in its intermediate scrutiny review, and relied on non-broadcast First Amendment cases to reach its result.<sup>58</sup>

Judge Noonan, concurring in the judgment, asserted that drawing guidance from these non-broadcast First Amendment cases was inappropriate and suggested eliminating the lesser scrutiny that regulations of political speech on broadcast media receive under the First Amendment.<sup>59</sup> Judge Paez, dissenting, would have affirmed the district court, and also criticized Judge Bea for his reliance on “cases involving non-broadcast, content-neutral, and commercial speech restrictions” and for demanding too much proof from Congress instead of deferring to congressional predictive legislative judgments, findings, and the measures adopted to address them.<sup>60</sup>

Following the panel’s decision, Minority requested rehearing en banc, and the Ninth Circuit voted to accept it.<sup>61</sup> The en banc court proceeded to largely reverse the three-judge panel, upholding all the prohibitions on advertisements against First Amendment challenges.<sup>62</sup> The

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54. *Id.* at 884.

55. *Id.* at 885.

56. *Id.*

57. *Id.* at 887 (internal quotations omitted).

58. *See id.* at 887–89 (discussing and citing *Discovery Network*, 507 U.S. 410).

59. *Id.* at 890–91 (Noonan, J., concurring in the judgment) (referencing *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 326 (2010)).

60. *Id.* at 893 (Paez, J., dissenting).

61. *Minority III*, 704 F.3d at 1009–10.

62. *Minority IV*, 736 F.3d at 1195.



court applied intermediate scrutiny and held that the ban was narrowly tailored to further a substantial governmental interest.<sup>63</sup>

### III. THE *MINORITY TELEVISION* EN BANC OPINIONS

#### A. *The Majority*

Judge McKeown, for the en banc Ninth Circuit, agreed that intermediate scrutiny was the applicable standard of review under *League of Women Voters*.<sup>64</sup> The court declared that this standard was “deferential” and was “not strict scrutiny light,” but was instead a balancing test between the statute and the First Amendment interests.<sup>65</sup> The court accordingly rejected any hard look at the evidence before Congress, giving “credence to congressional findings” because “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.’”<sup>66</sup>

Turning to the substantial governmental interest, the court found two: (1) “maintaining the unique, free programming niche filled by public television” and (2) “ensuring the diversity and quality of public broadcast programming.”<sup>67</sup> Again, *Minority* did not dispute the existence of the substantial governmental interest.<sup>68</sup>

The more difficult inquiry was to the statute’s narrow tailoring. The court began by emphasizing “the contrast between this case and the ban on editorialization in *League of Women Voters*.”<sup>69</sup> In contrast to the outright ban on editorializing in that case, the “targeted” advertisement ban here was “specifically targeted at the real threat—the influence of paid advertising dollars” and left “untouched speech that does not undermine the goals of the statute.”<sup>70</sup> The court found that the statutory allowance for paid advertisements from non-profits and the targeting of three specific categories of ads for prohibition to reflect Congress’s tailoring of the statute.<sup>71</sup> According to the court, such legislative choices did not doom the statute.<sup>72</sup> Congress’s definition of advertisement, the court said, demonstrated its focus on “prevent[ing] the commercialization of public broadcasting,” and thus brought political and issue ad money into the definition of commercialization.<sup>73</sup>

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63. *Id.* at 1206.

64. *Id.* at 1197–98.

65. *Id.* at 1200–01.

66. *Id.* at 1199 (quoting *Turner I*, 512 U.S. at 666 (opinion of Kennedy, J.)).

67. *Id.* at 1201.

68. *Id.*

69. *Id.* at 1204.

70. *Id.* at 1205.

71. *Id.*

72. *Id.* at 1205–06.

73. *Id.* at 1205.

The court rejected the contentions that the statute was either overinclusive or underinclusive. First, the court dismissed the attack on political and issue ads as overinclusive, in contrast to the ads for goods and services, as “a distinction without a difference,” looking to congressional intent on the attempt to minimize commercialization.<sup>74</sup> Citing the vast amount of money that political advertisers spent in 2008 and a “bombard[ment] with political and issue advertising,” the court found the prohibition on political and issue ads served the same purpose as the prohibition on ads for goods and services.<sup>75</sup> While “recogniz[ing] the special place political speech has in our First Amendment jurisprudence,” the court found “no evidence that Congress was targeting political speech . . . as opposed to the programming influence exerted by advertising dollars.”<sup>76</sup>

The court then dismissed the underinclusiveness attack on the statute based on the allowance of paid promotional messages from non-profits because “non-profit advertising is a drop in the bucket money wise and . . . has no programmatic impact.”<sup>77</sup> The court called Minority’s reliance on cases such as *Discovery Network*<sup>78</sup> and *Metromedia*<sup>79</sup> “misplaced” because “public broadcasting stations are not billboards.”<sup>80</sup> At bottom, the court found that “exempting non-profit advertising underscores, rather than undermines, Congress’s narrow tailoring” and that there were no sufficient less restrictive means to accomplishing its goals.<sup>81</sup>

### B. *The Partial Concurrence and Dissent*

Judge Callahan wrote a two-paragraph partial concurrence and dissent.<sup>82</sup> She would have upheld the prohibition against ads for goods and services, but she would have struck down the prohibition against political and issue advertisements because those “restrictions implicate the First Amendment’s core concerns and are not justified on this record even under [intermediate scrutiny].”<sup>83</sup>

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74. *Id.* at 1206.

75. *Id.*

76. *Id.*

77. *Id.* at 1207.

78. 507 U.S. 410.

79. 453 U.S. 490.

80. *Minority IV*, 736 F.3d at 1208.

81. *Id.* at 1209–10.

82. *Id.* at 1211 (Callahan, J., concurring and dissenting).

83. *Id.*

### C. *The Dissent*

Chief Judge Kozinski, joined by Judge Noonan in dissent, would have struck down all the prohibitions in section 399b as unconstitutional.<sup>84</sup> Chief Judge Kozinski began his dissent by emphasizing that the court should exercise “skepticism, not deference” when it comes to First Amendment questions and faulted the court for “embrac[ing] every justification advanced by the government without the least hesitation.”<sup>85</sup> The dissent warned that the court did not do intermediate scrutiny “how [it] *should* be done,” as in *League of Women Voters*, where the Supreme Court struck down the restrictions on speech “because the government’s justifications were speculative.”<sup>86</sup> Instead, the dissent charged, the court’s opinion was “a fine example of rational basis review,” but not intermediate scrutiny, “if [it] is to have any bite.”<sup>87</sup>

On the question of the substantial governmental interest, the dissent began by being “doubly skeptical” because the statute’s “curious line between permissible and impermissible speech” is content-based and because the prohibited political and issue speech has traditionally been treated “with the greatest solicitude.”<sup>88</sup> The dissent objected to the majority’s definition of commercialization; the dissent instead found that “commercialization . . . deals with commerce; it says nothing at all about advertising for political candidates or on issues of public interest.”<sup>89</sup> Those types of ads “implicate[] the First Amendment’s core concern with ensuring an informed electorate”—a mission that should be shared by the educational mission of public television.<sup>90</sup> The record did not explain “why political and issue ads are dangerous, if advertising for non-commercial entities . . . isn’t.”<sup>91</sup> The dissent determined that key differences between political and issue ads and ads for goods and services discredited the attempt to uphold the statute under intermediate scrutiny.<sup>92</sup> The dissent focused on political ads’ “transitory and episodic” nature, noting that they do not “present the same capture problem” as ads for goods and services because producers are “in the market for the long haul.”<sup>93</sup>

Dismissing the testimony in the congressional record as speculation and “a bunch of talking heads bloviating about their angst,”<sup>94</sup> the dissent

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84. *Id.* at 1211–12, 1223 (Kozinski, C.J., dissenting).

85. *Id.* at 1212.

86. *Id.*

87. *Id.*

88. *Id.* at 1213.

89. *Id.*

90. *Id.*

91. *Id.* at 1214.

92. *Id.*

93. *Id.* Chief Judge Kozinski is referring to the intuition that NCEs would change their programming to attract long-term commercial advertisers, but would not be under the same pressure to do so with political or issue advertisers because of their ephemeral nature.

94. *Id.* at 1216.

identified “structural constraints” that undermine the claim that accepting these three types of ads would fundamentally change the nature of public broadcasting programming.<sup>95</sup> In fact, the dissent argued, accepting advertising dollars could help stations “acquire or produce programs that they could not otherwise afford” and “would help public broadcast stations gain independence from the federal government.”<sup>96</sup> And if those structural constraints are not enough to prevent the harm, “there are many intermediate restraints, far short of a complete prohibition,” such as “limiting the duration and placement of advertisements, and ensuring diversity of funding.”<sup>97</sup>

Positing that “it’s time to reconsider the applicability of intermediate scrutiny to broadcast restrictions,” the dissent argued that “advertisements are speech” and that “[e]xcluding advertising from public broadcasting deprives viewers of the opportunity to obtain . . . important information.”<sup>98</sup> It closed by arguing that striking down the prohibitions “would set public television . . . free to pursue its public mission to its full potential.”<sup>99</sup>

#### IV. A CRITIQUE OF THE EN BANC NINTH CIRCUIT’S APPROACH

##### A. *Applicable First Amendment Law*

An analysis of the questions presented in *Minority Television* begins where the courts have started their discussions—with an assessment of the fact of this case in the context of the Supreme Court’s decisions in *League of Women Voters*, *Turner I*, and *Turner II*.

In *League of Women Voters*, the Supreme Court invalidated a prohibition on editorializing by public broadcasters who receive federal funding.<sup>100</sup> The Court began by emphasizing that expression on matters of public importance “is entitled to the most exacting degree of First Amendment protection.”<sup>101</sup> But “broadcast regulation involves unique considerations,” including spectrum scarcity, so the Court applied intermediate scrutiny, upholding a restriction only when it is “narrowly tailored to further a substantial governmental interest.”<sup>102</sup> To evaluate the narrow tailoring of the law, the Court conducted “a critical examination” of

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95. *Id.* at 1217 (for instance, “[f]ederal funding for public broadcasting stations is also conditioned on their maintaining programming that is consistent with the goals of the statute”).

96. *Id.* at 1220.

97. *Id.* at 1221.

98. *Id.* at 1212, 1220.

99. *Id.* at 1223.

100. 468 U.S. at 395–401.

101. *Id.* at 375–76.

102. *Id.* at 380–81.

each party's interests in the unique facts of each case.<sup>103</sup> *League of Women Voters* was also a case that directly addressed content-based restrictions on speech, striking at the heart of the First Amendment.<sup>104</sup> The Court closely examined the tailoring of the law and found it lacking, and the Court also decried the law's "patent overinclusiveness and underinclusiveness."<sup>105</sup> Faced with the exacting demands of the First Amendment, and remembering to be "particularly wary" of content-based restrictions on speech, the Court held the ban on editorializing could not stand.<sup>106</sup>

The Court clarified the test for determining the sufficiency of a statute's tailoring in *Turner I* and *Turner II*. In *Turner I*, the Court concluded that intermediate scrutiny was appropriate to judge the constitutionality of the statute's must-carry provisions applied to cable as content-neutral restrictions with only incidental burdens on speech.<sup>107</sup> It further concluded that the government must prove the tailoring of the law—that the law will in fact alleviate real harms in a direct and material way.<sup>108</sup> While "Congress' predictive judgments are entitled to substantial deference," they are not "insulated from meaningful judicial review altogether."<sup>109</sup> Instead, a court should conduct its own "independent judgment of the facts" to determine whether "Congress has drawn reasonable inferences based on substantial evidence."<sup>110</sup> After vacating and remanding for further development of the record,<sup>111</sup> the case reached the Court again in *Turner II*. There, the Court upheld the must-carry provisions under intermediate scrutiny, holding that the substantial evidence before Congress and the more fully developed record before the district court supported Congress's determinations.<sup>112</sup>

### B. Shortcomings of the *En Banc* Ninth Circuit's Opinion

With this background in mind, the en banc Ninth Circuit's opinion fails to adequately take into account three considerations: (1) the full range of relevant First Amendment interests, (2) the proper rigor needed in an intermediate scrutiny analysis, and (3) the impact of recent First Amendment case law, especially concerning issue and political ads.

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103. *Id.*

104. *Id.* at 383–84. *League of Women Voters* addressed a content-based restriction in section 399 (the ban on editorializing) that is analogous to the current content-based restrictions in section 399b (the ban on three types of advertisements).

105. *Id.* at 396.

106. *Id.* at 384.

107. 512 U.S. at 641, 661–62.

108. *Id.* at 664 (opinion of Kennedy, J.).

109. *Id.* at 666.

110. *Id.* (quoting *Sable Commc'ns v. FCC*, 492 U.S. 115, 129 (1989)).

111. *Id.* at 668.

112. *Turner II*, 520 U.S. at 185.

## 1. The Full Range of Relevant First Amendment Interests

First, a careful reading of the Ninth Circuit's opinion in *Minority Television* reveals that the court almost exclusively focused its analysis on the justifications offered by the government in defense of section 399b—important considerations, to be sure. However, the opinion includes scant—if any—independent discussion of the countervailing First Amendment interests at stake.

The court's opinion largely recites the government's proffered explanations and justifies why the government's testimony supports section 399b.<sup>113</sup> In this respect, the opinion much more resembles *Turner II* than *League of Women Voters*.<sup>114</sup> *Turner II* was about a content-neutral regulation of cable, not broadcast, that only incidentally burdened speech rather than being focused on political and issue speech.<sup>115</sup> The Supreme Court in *League of Women Voters*, however, demonstrated how to do intermediate scrutiny in this context correctly. It critically evaluated the government's evidence, instead of simply repeating it, and gave independent consideration to First Amendment interests in order to carefully determine whether the law was narrowly tailored to the substantial governmental interest.<sup>116</sup> Making a determination of substantial evidence without close examination of its relationship to tailoring, as the Ninth Circuit did, is more consistent with a deferential form of review. Intermediate scrutiny demands something more.<sup>117</sup>

The court's attempts to draw a distinction between the outright ban in *League of Women Voters* and the targeted ban in this case overlook the fact that drawing this sort of content-based line is disfavored in our First Amendment law.<sup>118</sup> No one disputes that a total ban on all advertisements on public television, as was the law until 1981, would be constitutional.<sup>119</sup> Selecting particular categories of speech to prohibit, however, signals

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113. See *Minority IV*, 736 F.3d at 1202–04.

114. Compare *id.*, and *Turner II*, 520 U.S. at 191–93, with *League of Women Voters*, 468 U.S. at 384–95.

115. See *Turner II*, 520 U.S. at 185.

116. See *League of Women Voters*, 468 U.S. at 384–95.

117. See, e.g., *id.* (demonstrating an intermediate scrutiny analysis of a restriction on speech in the broadcast medium).

118. During the en banc oral argument, however, some of the judges simply dismissed the notion that this is a regulation of speech: “Congress saw this as economic regulation, not as speech regulation. . . . It’s economic regulation that affects speech. . . .” Oral Argument at 36:56, *Minority IV*, 736 F.3d 1192 (No. 09-17311) [hereinafter Oral Argument Audio], available at [http://www.ca9.uscourts.gov/media/view.php?pk\\_id=0000010583](http://www.ca9.uscourts.gov/media/view.php?pk_id=0000010583).

119. See 47 U.S.C. §§ 399a, 399b (2006 & Supp. V 2011); 1981 Report & Order, *supra* note 1; 17 Fed. Reg. 4062 (May 2, 1952); see also Christopher L. Shipley, *Sesame Street-Brought to You by the Letter S: How Political Advertising Could Impact Public Broadcasting*, 21 COMM.LAW CONSPECTUS 336, 337–40 (2013).

discrimination, not tailoring.<sup>120</sup> The court also too casually dismissed the dearth of evidence supporting the ban on issue and political ads. When the court noted that there was “no evidence that Congress was targeting political speech,”<sup>121</sup> it must not have taken a second glance at the text of section 399b, which specifically singles out and prohibits issue and political advertisements.<sup>122</sup> Further, the court’s reference to the money spent in the 2008 election cannot justify the constitutionality of a law passed in 1982.<sup>123</sup> More fundamentally, speech does not lose its protection because money is spent to project it.<sup>124</sup> Lastly, the court’s similar dismissal of the exemption for non-profit advertisements was also inappropriate for intermediate scrutiny review, where a more searching inquiry is required.<sup>125</sup> While perhaps it is not fatal to the law, the court dismissed it too easily without even a discussion of the associated First Amendment interests.<sup>126</sup> A paragraph-by-paragraph review of the court’s opinion reveals a continued focus on the congressional action and justifications.<sup>127</sup> Little, if anything, in the court’s opinion is structured around a discussion of the countervailing interests in protecting free speech.<sup>128</sup>

Of course, there are different First Amendment interests for the ban on goods and services and the ban on issue and political ads. Commercial speech (the category for ads for goods and services) only received First

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120. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–93 (1992) (describing an ordinance that prohibited hate speech against certain groups as content discrimination).

121. *Minority IV*, 736 F.3d at 1206.

122. 47 U.S.C. §§ 399b(a)(2), (3) (2006 & Supp. V 2011).

123. See *League of Women Voters*, 468 U.S. at 394 (examining the legislative history of section 399 and refusing to consider post-enactment justifications). More generally, intermediate scrutiny, unlike rational basis review, demands that courts examine only the justifications asserted by the government at the time the law was passed. See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996).

124. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc. (Va. Pharmacy)*, 425 U.S. 748, 761 (1976).

125. *Minority IV*, 736 F.3d at 1207–09. An example in this litigation illustrating the tension here was the fact that Planned Parenthood could broadcast a paid message promoting its services, but not to support a candidate who shares its views or to promote sex education in schools. See, e.g., *Minority II*, 676 F.3d at 874–75. A pregnancy counselor, moreover, could not advertise her services under section 399b(a)(1). *Id.* The issue need not be an all or nothing proposition, though. Congress can regulate public television advertising, just not by drawing content-based lines in this way. Furthermore, at oral argument, regarding this possible distinction, counsel for the FCC was asked, “Specifically, what was it that supports the distinction [between allowing non-profit advertisements, but not issue or political ads] drawn by Congress? . . . What evidence is there supporting that distinction?” Counsel admitted, “Well, if the distinction is for the non-profit groups, there is no, there is nothing.” Oral Argument Audio, *supra* note 118, at 43:17. Again, later in oral argument during a discussion of the permissible scope of the record, counsel for the FCC was asked, “Is the answer is there is nothing on that distinction before Congress?” He responded, “Your Honor, the short answer is going to be yes.” *Id.* at 49:34. The questioning moved on before he was able to elaborate.

126. See *Minority IV*, 736 F.3d at 1207–09.

127. See generally *id.*

128. See generally *id.*

Amendment protection in 1976.<sup>129</sup> Soon afterward, the Supreme Court coalesced around a modified *Central Hudson* test for the constitutionality of restrictions on commercial speech, which generally allows for more restrictions than do the Court's tests for other types of speech, although the test has been tightened recently.<sup>130</sup> On the other hand, political speech and speech on matters of public importance receive the highest form of protection.<sup>131</sup> They are at the summit of our First Amendment hierarchy. While a court would generally apply strict scrutiny to restrictions on political and issue speech, even in the broadcast medium it receives special protection: a particularly skeptical version of intermediate scrutiny applies.<sup>132</sup>

The Ninth Circuit further erred when it accepted the idea of "insulating" broadcasters.<sup>133</sup> Properly understood, the First Amendment does not insulate. It does the opposite—it exposes. At its core is the idea that the government may not "prescribe what shall be orthodox"<sup>134</sup> in society; it demands the acceptance of a diversity of viewpoints and thoughts in the marketplace of ideas. The United States often stands alone in our protection of free speech; our usual response to offensive or disagreeable speech is not to suppress it, but is instead to expose the paucity of its persuasiveness through counter-speech.<sup>135</sup> Further, the insulation here is not of the broadcasters, for they still need, pursue, and

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129. See *Va. Pharmacy*, 425 U.S. at 761–62.

130. See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667–68 (2011) (describing the test for regulating commercial speech); see also *Central Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). The Ninth Circuit drew all three types of ads into the definition of "commercialization," presumably because section 399b only defines advertisement as a message broadcast "for any remuneration." *Minority IV*, 736 F.3d at 1196. Because only the ban on ads for goods and services should fall into a commercial speech analysis, *contra Minority IV*, 736 F.3d at 1196, the Ninth's Circuit's analysis raises a new problem that it does not adequately address—the unequal regulation of paid and unpaid speech. Take, for instance, two identical ads on any topic—one would be restricted if the advertiser paid the broadcaster, and the identical one would be permitted to air if no money is paid. See 47 U.S.C. § 399b(a) (2006 & Supp. V 2011) (defining advertisement only as programming material broadcast "in exchange for any remuneration"). Speech cannot lose protection simply because money is spent to project it. *Va. Pharmacy*, 425 U.S. at 761; *Citizens United*, 558 U.S. at 351; *Buckley v. Valeo*, 424 U.S. 1, 35–59 (1976) (per curiam). Further, it seems natural to differentiate between commercial advertising—and apply *Virginia Pharmacy* and its progeny—and political advertising, which receives more protection, as in *Citizens United*. The program at issue in *Citizens United* did not receive mere commercial speech protection despite money paid to produce, market, and broadcast it. *Citizens United*, 558 U.S. at 319–20, 372.

131. See, e.g., *League of Women Voters*, 468 U.S. at 381 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

132. See *id.* at 380–81, 384.

133. *Minority IV*, 736 F.3d at 1203, 1205.

134. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

135. See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012) (opinion of Kennedy, J.).



obtain funding from a variety of sources, but is of the public, so a court should be especially skeptical.<sup>136</sup>

More fundamentally, the Ninth Circuit did not address the fact that removing section 399b's prohibition on advertising would not *force* broadcasters to accept ads; it would *permit* them to. They would still be able to exercise their normal editorial discretion to be able to accept or reject any proffered advertisement.<sup>137</sup> This goes to the question of the government's central proposition, mostly unquestioned by the court, that permitting broadcasters to accept ads would induce them to change their content. While this is asserted by the government and readily accepted by the Ninth Circuit, its premise deserves a closer look, especially by a court undertaking an intermediate scrutiny analysis.

Public broadcasters already accept paid advertisements from non-profits and other funding from commercial sources (for example, underwriting, logograms, or benefit events). Acceptance of these channels of funding did not suddenly cause the broadcasters to drop their ordinary programming in favor of more commercially viable options. Indeed, it seems strange to think that an ad promoting a non-profit that works on diabetes issues would not affect programming, while an ad selling hamburgers would be corrupting.

Looking at these questions with a critical eye, a court should examine the funding sources already permitted by Congress and the FCC, and critically consider their effects, if any, on public broadcast programming. Such a court would find that many sources—including underwriting,<sup>138</sup> logograms,<sup>139</sup> unpaid advertisements,<sup>140</sup> and paid advertisements from non-profits<sup>141</sup>—did not threaten programming. Given these facts, the assertion that allowing commercial, political, or issue advertisements will destroy the niche programming should not be so unquestionably accepted. The unique and valuable programming public television offers has survived the expansion of promotional messaging through each of these iterations. Logograms and paid non-profit ads looked as harmful in 1952 as these three types of advertisements look today.<sup>142</sup> Public television survived those changes, and courts should be wary of claims that public television would not survive future changes.

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136. *Minority II*, 676 F.3d at 872; *League of Women Voters*, 468 U.S. at 384.

137. *See, e.g., Turner II*, 520 U.S. at 222.

138. *Minority IV*, 736 F.3d at 1205.

139. *Id.* at 1210; *see also* 47 U.S.C. § 399a(b) (2006 & Supp. V 2011).

140. *Minority IV*, 736 F.3d at 1208.

141. *Id.* at 1208–09.

142. *See* 17 Fed. Reg. 4062 (May 2, 1952); *1981 Report & Order*, *supra* note 1, at paras. 2–6, 35–37. Relatedly, the FCC has not determined whether public broadcasters are permitted to air political logograms (for instance, the logo of a political campaign, such as one might see on a yard sign).

Indeed, it seems likely that public television would not only survive after removing the advertisement ban—it would thrive.<sup>143</sup> Allowing ads would not only provide more funding for public television—which presumably would help further stations' public education missions—but allowing issue and political ads in particular would directly further the public education goals by contributing to the exchange of ideas.

## 2. The Proper Rigor in an Intermediate Scrutiny Analysis

Second, the Ninth Circuit's analysis in *Minority Television* is in stark contrast with the Supreme Court's analysis in *League of Women Voters*. The Court there was skeptical of the government, and it critically examined the proffered explanations and the tailoring of the law.<sup>144</sup> The Ninth Circuit here did no such thing. Instead, it accepted the evidence in the record before Congress with no further thought given in its opinion, with none of the skepticism inherent in intermediate scrutiny, and without undergoing a critical examination, as *League of Women Voters* requires.<sup>145</sup> The Ninth Circuit's opinion more closely resembles the Court's opinion in *Turner II*, a content-neutral regulation of cable, not broadcast, that burdened speech only incidentally and did not touch political and issue speech at the core of the First Amendment.<sup>146</sup> A factual situation more analogous to *League of Women Voters* makes additional judicial wariness appropriate.<sup>147</sup> While the *Turner II* Court looked to the fully developed record in front of the district court, it is not clear whether such a look is appropriate when a reviewing court is performing *League of Women Voters*'s style of intermediate scrutiny given the critical factual differences between the two cases.<sup>148</sup>

Even within the unique framework of the special First Amendment justifications for broadcast regulation, the Ninth Circuit did not adequately perform its intermediate scrutiny analysis. On the first component, both sides agree that there is a substantial government interest, and the court was correct in concluding that as well.<sup>149</sup> The more challenging analysis, however, relates to the law's tailoring and the credibility of the evidence used to support it.<sup>150</sup> While Chief Judge Kozinski's dissent likely discounts

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143. *Minority IV*, 736 F.3d at 1219–20 (Kozinski, C.J., dissenting).

144. *See generally League of Women Voters*, 468 U.S. at 384–95.

145. *Compare id.* at 384, with *Minority IV*, 736 F.3d at 1202–04.

146. *Turner II*, 520 U.S. at 185, 189.

147. *Cf. id.* at 217. However, Justice Stevens recognized as much concurring in *Turner II*: “If this statute regulated the content of speech rather than the structure of the market, our task would be quite different.” *Id.* at 225 (Stevens, J., concurring).

148. *See League of Women Voters*, 468 U.S. at 384; *Minority IV*, 736 F.3d at 1197 (looking to the “evidence before Congress”).

149. *Minority IV*, 736 F.3d at 1200–03.

150. The en banc court found the law to satisfy the narrow tailoring requirement. *Id.* at 1209–10. However, a variety of less restrictive means comes to mind, some mentioned by

the evidence before Congress too heavily and does not give even a modicum of respect to Congress's predictive judgment, the majority is likely too deferential under any serious form of intermediate scrutiny review.

The court failed to distinguish among the three different prohibitions for purposes of First Amendment analysis.<sup>151</sup> As applied to the restriction on advertisements for goods and services, there is a stronger case that the evidence shows that the restriction is narrowly tailored for this purpose, would survive intermediate scrutiny, and would be upheld. More testimony and evidence speaks directly to the commercialization of public television than speaks to the effects of political or issue ads, where advertisers would have different interests and priorities.<sup>152</sup> However, as applied to the ban on issue and political speech, the court further failed in its duty under *League of Women Voters* to be particularly skeptical in the tailoring analysis. The majority does not point to any evidence in support of these particular prohibitions, instead lumping all three prohibitions together and doing a disservice to careful judicial analysis and the First Amendment.<sup>153</sup> This is perhaps the most significant flaw in the majority's analysis.

### 3. The Impact of Recent First Amendment Case Law

Third, the Ninth Circuit failed to consider adequately the potential impact of recent changes in our First Amendment law since 1984, when *League of Women Voters* was decided, especially regarding issue and political speech.

This case law, while not directly on point in the broadcast media context, strongly suggests that our First Amendment jurisprudence has evolved in recent years toward stronger skepticism of content-based

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Chief Judge Kozinski in dissent: (1) a number of content-neutral time, place, and manner restrictions, including (a) limiting the duration of an advertisement, or (b) only allowing ads during certain times of the day (the evening or overnight hours, for instance, to avoid any possible corruption of children's programming during the day); or (2) providing in law that no one advertiser could be responsible for more than 1% of a public broadcaster's annual income. *See generally id.* at 1221 (Kozinski, C.J., dissenting).

151. The Supreme Court's cases seem to counter the Ninth Circuit's analytical approach. *Compare Va. Pharmacy*, 425 U.S. 748 (commercial advertising), with *Citizens United*, 558 U.S. 310 (political advertising). The Court has developed separate tests for judging the validity of regulations of commercial and political speech. *Compare Central Hudson*, 447 U.S. at 566, and *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 475–78 (1989), with *Citizens United*, 558 U.S. 310. The Ninth Circuit, however, did not perform these separate analyses.

152. *Compare Minority IV*, 736 F.3d at 1203, with *id.* at 1213–15 (Kozinski, C.J., dissenting).

153. *Id.* at 1203, 1205 (majority opinion) (not particularly categorizing the three prohibitions, but holding that all of them contribute to the "commercialization" of public television).

restrictions.<sup>154</sup> Cases like *Discovery Network*, *44 Liquormart*, and the other cases modifying *Central Hudson* have tightened the test for commercial speech, making prohibitions harder to maintain.<sup>155</sup> More recently, a series of cases has cemented strong presumptions against speech restrictions of many types in our law. Cases like *Ashcroft v. ACLU*, *Snyder*, *Stevens*, *Brown*, *Citizens United*, *Sorrell*, *Bennett*, *Alvarez*, and *Agency for International Development* all have as a common theme that restrictions on speech presumptively are strongly disfavored and that the Court will examine them with a highly skeptical eye.<sup>156</sup> Of course, each of those cases arose with a distinct factual background and posed different legal questions, but they are instructive as to the general trend of movement in our First Amendment law.

The Supreme Court has been strongly protective of the First Amendment in recent years in a variety of different contexts, even when the outcome may be unpopular.<sup>157</sup> In light of this and the exacting form of intermediate scrutiny required by *League of Women Voters*, the Ninth Circuit should have acknowledged this trend and afforded greater recognition of the First Amendment interests at stake than it did, especially for issue and political advertisements. The court should have affirmed the principle that speech does not lose its protection because money is spent to project it<sup>158</sup> and the bedrock notion that government may not lead us away

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154. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

155. *Discovery Network*, 507 U.S. at 415–18; *44 Liquormart*, 517 U.S. at 511–12. See also, e.g., *Sorrell*, 131 S. Ct. at 2667–68; *Fox*, 492 U.S. at 469, 475–78.

156. See generally *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (Child Online Protection Act); *Stevens*, 559 U.S. 460 (depictions of animal cruelty); *Citizens United*, 558 U.S. 310 (independent campaign expenditures); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (military funeral protests); *Brown*, 131 S. Ct. 2729 (violent video games); *Sorrell*, 131 S. Ct. 2653 (prescription information confidentiality); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) (campaign matching funds); *Alvarez*, 132 S. Ct. 2537 (plurality opinion) (Stolen Valor Act); *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (2013) (HIV & AIDS funding condition). This trend has continued after the en banc Ninth Circuit's decision in *Minority Television*. See *McCutcheon v. Fed. Election Comm'n*, 572 U.S. \_\_\_, \_\_\_ (2014) (slip op., at 3) (opinion of Roberts, C.J.) (aggregate campaign contribution limits); see also *id.* at \_\_\_ (slip op., at 2) (“Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects.”).

157. See, e.g., *Snyder*, 131 S. Ct. at 1219.

158. *Va. Pharmacy*, 425 U.S. at 761. Additionally, when pressed on the question of suppression of political speech, the justification offered by the government was inadequate: “Because we have three billion dollars that was spent last year on political advertising.” Oral Argument Audio, *supra* note 118, at 53:12. Not only does an explanation of what happened in 2012 (in all media, not only broadcast) fail to justify a congressional action in 1982, but the amount or vigor of speech alone cannot justify its suppression. See, e.g., *Buckley*, 424 U.S. at 19, 48–49; *Cohen v. California*, 403 U.S. 15, 25–26 (1971); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 739 (2008).

from that “fixed star in our constitutional constellation” by drawing content-based lines in order to ban speech.<sup>159</sup>

### C. Other Implicated Questions

Consideration of the questions in *Minority Television* gives rise to other tangential issues of perennial concern in our First Amendment jurisprudence.

At a basic level, the Ninth Circuit failed to identify whose speech is restricted by section 399b—the broadcaster or the would-be advertiser. The court also failed to consider whether the restrictions violate the public’s right to “receive suitable access . . . to . . . ideas and experiences.”<sup>160</sup> Answering these questions can be a vital precursor to the subsequent First Amendment analysis, especially in helping to identify alternative channels of communication and questions of government speech.

This case also implicates the questions of whether public television broadcasting can properly be understood as government speech,<sup>161</sup> or whether some form of a public forum analysis should be undertaken.<sup>162</sup> While the Supreme Court has previously held that the government does not create a public forum when it creates or provides subsidies for public

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159. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

160. *Red Lion*, 395 U.S. at 390; *see also Va. Pharmacy*, 425 U.S. at 757 (“If there is a right to advertise, there is a reciprocal right to receive the advertising.”); *id.* (stating that there is a right to “receive information and ideas” (quoting *Procurier v. Martinez*, 416 U.S. 396, 408–09 (1972))). *But see, e.g., Muir v. Ala. Educ. Television Comm’n*, 688 F.2d 1033, 1042 (5th Cir. 1982) (finding no right of an individual viewer to compel the broadcast of a program). The Ninth Circuit quoted from and cited favorably to *Red Lion*, but then gave the idea no further discussion. *Minority IV*, 736 F.3d at 1201. In the en banc oral argument, counsel for *Minority* indicated that “we are talking about the First Amendment rights of the people who want to put the underwriting announcements on,” which gave rise to questions about *Minority*’s standing to make the First Amendment challenge on behalf of would-be advertisers. Oral Argument Audio, *supra* note 118, at 5:22. The en banc opinion, however, did not squarely address this question.

161. *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009).

162. *See, e.g., Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–80 (1992). The question of conceiving of public broadcasting as a limited purpose public forum came up during the Ninth Circuit panel oral argument. Judge Bea called the difference between a regulation of the advertiser and a regulation of the broadcaster “similar to the difference that we have between public forums and limited public forums. The limited public forum here is the broadcast band. It’s a limited public forum. It’s regulated by the government. Has been since 1939.” Oral Argument at 8:35, *Minority II*, 676 F.3d 869 (No. 09-17311), available at [http://www.ca9.uscourts.gov/media/view.php?pk\\_id=0000006391](http://www.ca9.uscourts.gov/media/view.php?pk_id=0000006391). This idea received no further discussion, though, and was not addressed in the panel’s opinion. The idea that section 399b could be interpreted as merely a condition affixed to government funding, to being a public broadcasting licensee, or to being tax exempt, was also considered but was not addressed in any way in either the panel or en banc opinions.

broadcasting,<sup>163</sup> the public forum doctrine and its theoretical underpinnings still have important analytical contributions to the questions here.

While a government speech framework is probably not applicable in this context, on its face it would appear that the government, in creating and funding public television stations, is providing a public forum for others to speak, much like in *Rosenberger* and *Velazquez*.<sup>164</sup> Consequently, more thought should be given to whether we should take a second look at applying the public forum doctrine to public television broadcast stations that receive federal funds, not in the framework in *Forbes*, granting a right of access to the public,<sup>165</sup> but instead as limiting the types of distinctions the government can make in its restrictions on speech.

All of these examples are variants of the underlying concern: whether broadcast should continue to be treated differently in our First Amendment law. While the Supreme Court has consistently refused to alter its framework, recently we have seen some interesting language—albeit dictum—from the Court suggesting that the Justices’ attitudes may be shifting.<sup>166</sup> Continued debate is appropriate on this challenging question as an original matter and in light of rapid technological change that may abrogate the purpose of the rule.<sup>167</sup>

## V. CONCLUSION

If the Ninth Circuit’s opinion in *Minority Television* is the final word in this case, it could have implications on courts’ analyses of similar questions around the country. The court’s lack of consideration of a variety of First Amendment interests may lead other courts to perform a similarly narrow-sighted analysis. Its relatively lax form of intermediate scrutiny may lead to other courts engaging in the same type of highly deferential

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163. See *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 679 (1998). The Court applied the public forum analysis in *Forbes* to a debate that aired on public television, but found the *debate* to be a nonpublic forum. *Id.* at 669. Advertisements are not like the rest of public television programming in that they are third-party speech. The public forum doctrine could be applied to advertising, therefore, without applying it generally to public television programming, regardless of what the Court’s result would be on the merits of the question.

164. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001). Perhaps the special treatment of broadcast would counsel for a different analysis in that context, however.

165. *Forbes*, 523 U.S. at 678.

166. *Citizens United*, 558 U.S. at 326; *Brown*, 131 S. Ct. at 2733; see also *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 812 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part) (“The text of the First Amendment makes no distinctions among print, broadcast, and cable media . . .”).

167. *Minority IV*, 736 F.3d at 1223 (Kozinski, C.J., dissenting) (noting that “[w]e shouldn’t turn a blind eye to the vast technological changes in the field of mass communications that make broadcasting less significant and pervasive everyday”); see also *id.* at 1212–13.

evaluation in similar cases. And its cursory treatment of recent First Amendment law may provide precedential authority for other courts to distinguish those cases as well, when perhaps those cases properly provide applicable principles more than a court would otherwise acknowledge.

The Ninth Circuit's analysis, reasoning, and rationale could be expanded in future cases to cover issues not like the factual situation in *Minority Television*.<sup>168</sup> Given the analytical shortcomings of the Ninth Circuit's opinion, and the Supreme Court's recent rigorous protection of First Amendment rights regarding political expression and expression on matters of public importance,<sup>169</sup> Supreme Court review of *Minority Television* could be an ideal vehicle for the Court to provide some much-needed clarity in how lower courts should analyze similar questions. However, the unique factual situation in *Minority Television*—in the context of advertising (a decidedly unpopular funding device) on public television broadcasting (a beloved fixture of American life)—may dissuade the Court from disrupting the Ninth Circuit's decision. Perhaps, even, the Ninth Circuit's conclusion would still be reached using a proper analytical framework.<sup>170</sup>

The other major question looming in the background—whether broadcast media should continue to be treated differently in our First Amendment jurisprudence—is also not necessarily squarely presented in this case, although the Court could certainly reach that question in this case if it so chose. But if the Justices are inclined to reconsider that big question, the presence of a narrower ground of decision, such as the shortcomings identified above, might dissuade the Court from granting certiorari. With those caveats, *Minority Television* at its core appears to be a prime candidate for Supreme Court review and is particularly cert-worthy not only because it resulted in a divided en banc Ninth Circuit, but also because it would give the Court a chance to clarify the proper analytical framework that applies in similar cases.

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168. For instance, an analogous analysis could sustain a governmental limitation of expression of other categories of advertisement or other types of speech on public broadcasting stations, as long as the restriction does not approach the outright ban that was invalidated in *League of Women Voters*. Similar reasoning could provide justification for the government drawing further content-based lines on advertisements and other speech on public television, or perhaps even drawing viewpoint-based lines, although the analytical jump needed to get there would be more of a step.

169. See, e.g., *McCutcheon*, 572 U.S. at \_\_\_ (slip op., at 14–17) (opinion of Roberts, C.J.), *Snyder*, 131 S. Ct. 1207; *Brown*, 131 S. Ct. 2729; *Citizens United*, 558 U.S. 310.

170. The Justices may wonder then if the Court's review of this case is proper, instead of waiting for a case where reversal and a clarified framework are both more appropriate.

