
***SESAME STREET*—BROUGHT TO YOU BY THE LETTER \$: HOW POLITICAL ADVERTISING COULD IMPACT PUBLIC BROADCASTING**

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I. INTRODUCTION

Regular viewers of public television who see their local, noncommercial educational broadcast station as a refuge from negative political advertisements may soon be in for a rude surprise during a future episode of the popular dramas *Sherlock* or *Downton Abbey*. For this, viewers can thank a recent Ninth Circuit Court of Appeals decision overturning a federal statute banning political and public issue advertising.¹ Now, in addition to the litany of underwriter spots that begin and end any public broadcast, the phrase “and I approved this message”² could become a common refrain on some PBS and unaffiliated non-commercial stations.

In *Minority Television Project, Inc. v. F.C.C.*, the Ninth Circuit raised a series of practical as well as fundamental questions about the mission and future of public broadcasting when it held that the long-standing restrictions on political and public issue advertisements were unconstitutional violations of public broadcast stations’ First Amendment rights.³ As a facial challenge to the government’s restrictions on advertising on public broadcast stations, the case involves novel arguments on the legislative distinction between different types of

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¹ *Minority Television Project, Inc. v. F.C.C.*, 676 F.3d 869, 889 (9th Cir.), *reh’g en banc granted*, 704 F.3d 1009 (9th Cir. 2012).

² See 47 U.S.C. § 315(b)(2)(C)(ii) (2006).

³ *Minority Television Project*, 676 F.3d at 888-89.

advertisements, whether the Commission is regulating economics or speech, and the preservation of the core First Amendment right to political speech. As stations across the country unpack the court's ruling, they have reason to believe that this new interpretation of the statutory prohibition against political advertising on public broadcast stations could significantly impact the programming decisions made by public broadcasters. Despite concerns that the Ninth Circuit's ruling could alter the nature of public programming, Congress has already adopted alternative funding models, such as logograms and corporate underwriting announcements, that allow these stations to generate revenue without diminishing their ability to develop local and educational content.⁴

This Note focuses on how the ruling could create new economic models for noncommercial broadcasters, which had previously been off-limits to them.⁵ Part II provides the background and reasoning for the Federal Communications Commission's ("FCC" or "Commission") ban on noncommercial broadcast advertising. Part III, discusses the case law that shaped the court's decision in *Minority Television Project*, including a description of the unique level of scrutiny applied in the panel's First Amendment analysis. Part IV explains the instant case and the arguments offered by the majority and dissenting opinions. Part V examines the impact of the holding on the ability of public broadcasters to participate in upcoming election cycles. The article concludes with an analysis of whether or not the ability to air political and public issue advertisements can be reconciled with public broadcasting's noncommercial mission of "creat[ing] a well-educated, well-informed, cultured and civil society capable of performing the duties of self-government in the world's greatest democracy."⁶

II. UNDERSTANDING THE ADVERTISING BAN ON PUBLIC BROADCAST STATIONS

The prohibition of traditional advertising on public broadcast stations can best be understood against the backdrop of the public trustee obligations assumed by American television broadcasters.⁷ Under the Communications Act

⁴ Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, §§ 1230-33, 95 Stat. 357, 730 (1981) (codified at 47 U.S.C. § 399 (2006) and 47 U.S.C. § 399b (2006)).

⁵ See 47 U.S.C. § 399b(b)(2) (2006) (prohibiting public broadcasters from advertising); see also Joseph A. Morris, *Should WTTW-TV Broadcast Paid Political Commercials?*, ILL. REV. (June 18, 2012), <http://commcns.org/14wg6oy>; Steve Behrens, *Court Would Let Public Stations Sell Candidate and Issues Ads*, CURRENT.ORG (Apr. 23, 2012), <http://commcns.org/12CEZ0s>.

⁶ See Patrick Butler, President, Ass'n of Pub. Television Stations, Remarks at the Media Institute Luncheon (May 17, 2012), available at <http://commcns.org/16B18cV>.

⁷ See Office of Comm'n of United Church of Christ v. F.C.C., 707 F.2d 1413, 1430-31 (D.C. Cir. 1983) (holding that the Commission's imposition on radio licensees of an

of 1934, the Federal Communications Commission provides broadcasters with airwaves that are exclusive to the public through spectrum licenses.⁸ These provisions are in exchange for a commitment to serve the “public interest.”⁹ In 1938, the FCC established a new classification for noncommercial broadcasting.¹⁰ As television grew in popularity,¹¹ so did the public interest obligations of noncommercial licensees and, in 1952, the FCC adopted a *Report and Order* prohibiting the use of paid advertisements on public television.¹² In its decision, the Commission rejected pleas from broadcasters to allow limited advertising on public broadcast stations and expressed concerns that any use of advertising by broadcasters would fundamentally undermine their noncommercial status.¹³

By 1967, President Lyndon B. Johnson and Congress mutually identified television as having the “revolutionary power” to “change our lives.”¹⁴ The Public Broadcasting Act of 1967 created the Corporation for Public Broadcasting (“CPB”) as a means to “facilitate the full development of public telecommunications . . . in ways that will most effectively assure the maximum freedom of the public telecommunications entities and systems from interference with, or control of, program content or other activities.”¹⁵ The 1967 Act also ensured that noncommercial stations would be eligible for the Corporation’s

obligation to provide programming responsive to community issues constituted a reasonable interpretation of the public-interest standard); 47 C.F.R. §§ 73.3526(e)(11)(i), 73.3527(e)(8)(i) (2011) (requiring television broadcasters to maintain in their public file forms detailing the stations’ “efforts to determine the issues facing [their] commun[ities] and the programming aired . . . in response to those issues”).

⁸ 47 U.S.C. § 303 (2006).

⁹ Communications Act of 1934 § 307, 47 U.S.C. § 307 (2006) (directing the Commission to grant and renew broadcast license applications “if [the] public convenience, interest, or necessity will be served thereby”).

¹⁰ STEVEN WALDEN, FCC, THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE 314 (July 2011), available at <http://commcns.org/LfsIbI>.

¹¹ *Id.* at 72 (“Between 1945 and 1952, television’s audience grew from being almost nonexistent to including more than 33 percent of American households.”).

¹² See *In re* Amendment of Section 3.606 of the Commission’s Rules and Regulations; Amendment of the Commission’s Rules, Regulations and Engineering Standards Concerning the Television Broadcast Service; Utilization of Frequencies in the Band 470 to 890 Mcs. For Television Broadcasting, *Sixth Report and Order*, 41 F.C.C. 148, ¶¶ 54-59 (Apr. 11, 1952) [hereinafter *Advertising Prohibition Report & Order*]; see also Defendant-Appellee Petition for Rehearing or Rehearing En Banc at 1, *Minority Television Project v. F.C.C.*, 676 F.3d 869 (9th Cir. 2012) (No. 09-17311), available at <http://commcns.org/175hgCR> (stating that regulations have barred public stations from accepting paid advertising since 1952).

¹³ See *Advertising Prohibition Report & Order*, *supra* note 12, ¶¶ 54-59.

¹⁴ President Lyndon B. Johnson, Remarks Upon Signing the Bill Establishing the Corporation for Public Broadcasting (Nov. 7 1967), in 3 WEEKLY COMP. PRES. DOC. 1530, 1531 (1967).

¹⁵ Public Broadcasting Act of 1967, 47 U.S.C. § 396(g)(1)(A), (D) (2006).

Community Service Grant (“CSG”).¹⁶ CSG grants allowed station managers to maintain a level of independence and focus on developing regional content as opposed to chasing revenue from non-government sources.¹⁷ Public broadcasters were free to pursue the mission of informing and educating the nation in the areas of science, engineering, technology, and mathematics with a dedicated funding source in hand.¹⁸

In 1981, Congress enacted the Public Broadcasting Amendments Act and codified a general prohibition on advertisements on public broadcast radio and television stations.¹⁹ The 1981 Act added a new § 399b to the Communications Act to clearly prohibit public broadcast stations from “mak[ing] its facilities available to any person for the broadcasting of any advertisement.”²⁰ The Act delineated the prohibited advertisements into three categories: Commercial, public issue, and political.²¹ In promulgating the rules for the Act, the FCC emphasized a need to “remove the programming decisions of public broadcasters from the normal kinds of commercial market pressures under which broadcasters in the unreserved spectrum usually operate.”²²

Based on the idea that federal funding for noncommercial stations would be gradually reduced over time, Congress’s intended purpose with the 1981 Act was to “facilitate and encourage the efforts of public broadcasting licensees to

¹⁶ *Id.* § 396(g)(2)(B); *cf.* 47 U.S.C. § 394(b)(2)(B). Congress instituted a series of prohibitions in 1990 on commercial entities seeking CSG grants for the production of television programming directed towards the development of children’s intellectual skills. Commercial broadcasters seeking to add child-focused educational programming to its station could apply for CSG grants provided that no commercials aired with the program. *See* 47 U.S.C. § 394(b)(2)(B).

¹⁷ *See* 47 U.S.C. § 396(a)(6)-(7); Howard A. White, *Fine Tuning the Federal Government’s Role in Public Broadcasting*, 46 FED. COMM. L.J. 491, 492 (1994).

¹⁸ *See* 47 U.S.C. § 396(a)(1) (providing that “it is in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes”).

¹⁹ Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, § 1231, 95 Stat. 357, 730 (1981) (codified at 47 U.S.C. § 399b(b)(2) (2006)).

²⁰ 47 U.S.C. § 399b(b)(2) (2006).

²¹ *Id.* § 399b(a)(1)-(3) (defining “advertisement” 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”).

²² *In re* Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations, *Second Report and Order*, 86 F.C.C. 2d 141, ¶ 3 (Apr. 23, 1981) [hereinafter *Educational Broadcast Second Report & Order*]. Despite the general prohibition against commercial, public issue, and political advertisements, the Order actually amounted to a recognition that Congress intended to loosen the existing limitations on public broadcasters. The FCC eliminated its blanket proscriptions against the “promotion of [all] products” and instituted a “consideration received” rule in which the FCC could determine whether or not the promotion of goods and services was in the public interest. *Id.* ¶ 4.

seek and develop new sources of non-Federal revenue.”²³ To meet this goal, and despite the prohibitions on advertisements, the Commission sought to encourage private support for noncommercial broadcasters through a “liberalization of restrictions on donor acknowledgments.”²⁴ The Commission’s subsequent regulatory proceedings focused on the types of sponsorship announcements that would violate the statute’s prohibitions on advertising,²⁵ and for the first time, the FCC considered the role of “donor acknowledgments” on public broadcast stations.²⁶ The regulations maintained the long-standing rule that promotional announcements on behalf of for-profit entities could not “be broadcast at any time in exchange for the receipt . . . of consideration to the licensee” but now made an exception for the *announcement* of contributions so long as it did not interrupt regular programming.²⁷ The FCC noted that the liberalization of the policy was intended “to strike ‘a reasonable balance between the financial needs of public broadcast stations and their obligation to provide an essentially noncommercial broadcast service’ and eliminate those proscriptive regulations deemed unnecessary to preserve the media’s noncommercial nature.”²⁸

With the door opened to sponsorship announcements, noncommercial stations could offer limited acknowledgments of program underwriters regardless of whether they were for-profit or non-profit entities.²⁹ The Commission further relaxed the rules of donor acknowledgments in a 1984 *Report & Order* allowing public broadcasters to include “(1) logograms or slogans which identify and do *not* promote, (2) location [information], (3) value neutral descriptions of a product line or service, [and] (4) brand and trade names and product or service listings.”³⁰ To comply with the general prohibitions against adver-

²³ H. REP. NO. 97-82, at 6-7 (1981).

²⁴ *In re* Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations, *Memorandum Opinion and Order*, 90 F.C.C. 2d 895, ¶ 2 (July 15, 1982) [hereinafter *Educational Broadcast Memorandum Opinion & Order*]. The Commission emphasized that the amendments to regulations 47 C.F.R. § 73.503 and 47 C.F.R. § 73.621 were intended to preserve the “essentially noncommercial nature of public broadcasting *within a minimal regulatory framework*.” *Id.* ¶ 2 (emphasis original).

²⁵ See, e.g., *Educational Broadcast Second Report & Order*, *supra* note 22, ¶¶ 3-4.

²⁶ See 47 C.F.R. § 73.621(e) (2011).

²⁷ *Id.*

²⁸ *Educational Broadcast Memorandum Opinion & Order*, *supra* note 24, ¶¶ 2-3 (quoting *In re* Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations, *Second Report and Order*, 86 F.C.C. 2d 141, ¶ 1 (Apr. 23, 1981)). In its appellate brief, *Minority Television Project, Inc.* focuses its arguments on a station’s ability to balance the act of advertising with the preservation of its noncommercial nature.

²⁹ *Id.* ¶¶ 2, 8.

³⁰ *In re* Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations, *Memorandum Opinion and Order*, 97 F.C.C. 2d 255, ¶ 13 (Mar. 28, 1984) (emphasis original).

tisement, pricing information, calls to action, and inducements to buy were prohibited.³¹ Licensees were permitted to rely on “good faith” judgments in interpreting the rules, and violations of the *Order* were punishable by sanctions, including monetary forfeiture.³² In response to concerns that stations were using the donor acknowledgment rules inappropriately to raise funds for programming, the FCC offered a clarification of the sponsorship announcement rules in 1986 and noted that “announcements are permitted so long as the licensee (1) receives no consideration for the announcement; and (2) the materials are offered on the basis of public interest considerations and not the private economic interests of the offeror; or (3) the price of the materials offered is only nominal.”³³ According to the Commission, the donor acknowledgment rules represented an ongoing effort to balance noncommercial stations’ attempts to meet their public interest obligations against their increasing financial needs: “It was our view that “enhanced underwriting” would offer significant potential benefits to public broadcasting in terms of attracting additional business support and would thereby improve the financial self-sufficiency of the service without threatening its underlying noncommercial nature.”³⁴

The donor acknowledgment is widely used today across all public broadcasting platforms. Producers of content on public television and public radio work with donors and sponsors to determine whether the presentation, format,

³¹ *In re* Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations, *Public Notice*, 7 F.C.C.R. 827, 828 (Apr. 11, 1986) [hereinafter Educational Broadcasting *Public Notice*]; see also Educational Broadcast *Memorandum Opinion & Order*, *supra* note 24, ¶¶ 13-14 (clarifying “promotion vs. identification”). Today, on-air sponsors include individuals, trade associations, corporations, non-profit and philanthropic organizations, small businesses, and charitable trusts. Despite the Commission’s best efforts, however, determining when an underwriting acknowledgment “promotes” and when it “identifies” still causes consternation for donors and stations alike. For example, a recent episode of *MotorWeek* featured a donor acknowledgement of 3M, a diversified technology company. In describing the company’s fuel system tune-up kit, the spot omitted pricing information as well as inducements to buy and emphasized only that the kit could “prolong engine life, by removing carbon gums and resins, and cleaning fuel injectors and valves” and directing the viewer to 3M’s website. Minority Television Project, Inc., argued in its brief before the Ninth Circuit that § 399b is unconstitutionally vague, and that both the law and the standards of enforcement are amorphous and subjective. Plaintiff Motion for Summary Judgment at 21-15, *Minority Television Project, Inc. v. F.C.C.*, 649 F.Supp.2d 1025 (N.D. Cal 2009) (No. 306CV02699), 2009 WL 3662409. See the donor acknowledgment online at *MotorWeek: 2013 Lexus LS & 2013 Chevrolet Spark*, PBS VIDEO, <http://commcns.org/18egsxH> (last visited Apr. 13, 2013) (see video at 1:49).

³² Educational Broadcast *Public Notice*, *supra* note 31, at 828.

³³ *Id.* at 828. In the *Public Notice*, the FCC offered several practical examples of announcements that would “violate the rules,” including: “7.7% interest rate available now”; “Stop by our showroom to see a model!”; or “Try product X next time you buy oil!”; and “Six months free service!”; or “A bonus available this week!”; or “Special gift for the first 50 visitors.” *Id.*

³⁴ *Id.* at 827.

and tone subscribe to the FCC's rules on donor acknowledgments.³⁵ The donor acknowledgment rules are complaint-driven and donors are encouraged to develop an acknowledgment that will provide clear identification of the underwriter without directly promoting its products or services. An FCC enforcement proceeding on these underwriting spots can include a variety of outcomes, including dismissal, a fine, or a voluntary consent decree in which the two parties enter into an agreement that may include a payment to the U.S. Treasury and steps to ensure future compliance. As we will see, the case brought against Minority Television Project was an enforcement action based on community complaints about the tone and detail included in the station's donor acknowledgments.

While Minority Television Project marked the first time that a facial challenge under the First Amendment was brought against the Commission's advertising restrictions, other political speech-based restrictions of the Public Broadcasting Act have been challenged in court and an understanding of these proceedings is critical to understand the Ninth Circuit's holding.

III. CHALLENGING POLITICAL SPEECH RESTRICTIONS OF THE PUBLIC BROADCASTING ACT

Under this developing legal framework, a noncommercial broadcast revenue model evolved under the mantle of sponsor acknowledgments. However, the limitations imposed by the Commission on the acknowledgments raises the question of whether the regulation is economic or instead a content-based limitation on speech. By dictating the content noncommercial broadcasters could present, the Public Broadcasting Act is a government restriction on speech, which led to a series of questions about editorial control under the First Amendment of the United States Constitution.³⁶

One of the first legal challenges to the Act was 1984's *Federal Communications Commission v. League of Women Voters of California* in which a non-commercial educational broadcasting station challenged a provision that prohibited public broadcasters from "engaging in editorializing."³⁷ The Supreme Court's 5-4 decision finding the provision unconstitutional was pertinent to the Ninth Circuit's panel decision in *Minority Television Project* in two distinct

³⁵ See *How to Create PBS Underwriting Messages*, PBS, <http://commcns.org/14wgOIQ> (last visited Apr. 13, 2013).

³⁶ U.S. CONST. amend. I.

³⁷ *F.C.C. v. League of Women Voters*, 468 U.S. 364, 370-72 (1984) (holding that the ban on editorializing in 47 U.S.C. § 399 denied broadcasters the First Amendment right to address their audiences on matters of public importance and further challenged the original 1967 language providing that "[n]o noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office").

ways. First, *League of Women Voters* preserved public broadcasters' First Amendment rights to political speech as well as their ability to exercise "the widest journalistic freedom consistent with their public obligations."³⁸ Minority Television Project would later use this holding to argue that the ability to broadcast public issues and political advertising is a core First Amendment right that must be protected and any ban of that right must be precisely crafted. Second, it established intermediate scrutiny as the standard of review that courts are required to apply to First Amendment cases involving public broadcasters.³⁹

The threshold question for determining the appropriate standard of review in a First Amendment case is whether a government restriction is content-based and "limits communications because of the message conveyed" or if the restriction is content-neutral and "limit[s] communications without regard to the message conveyed."⁴⁰ Content-based restrictions are "strongly disfavored and are often subject to strict scrutiny"⁴¹ as they are "presumptively invalid."⁴² Under the strict scrutiny standard, "the government [is] required to 'prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'"⁴³ For content-neutral restriction, the court imposes intermediate First Amendment scrutiny whereby "the government must prove a challenged statute is 'narrowly tailored to further a substantial governmental interest.'"⁴⁴ In an intermediate scrutiny analysis, the courts may also question if the restriction leaves open ample alternative channels for communication of information.⁴⁵

In *League of Women Voters*, Justice Brennan quickly indicated that the government restriction prohibiting public broadcasters from "engaging in editorializing" was a content-based restriction, and that despite this, the court would apply intermediate scrutiny:

Section 399 plainly operates to restrict the expression of editorial opinion on matters of public importance, and, as we have repeatedly explained, communication of this kind is entitled to the most exacting degree of First Amendment protection. . . . But . . . because broadcast regulation involves unique considerations, our cases have not fol-

³⁸ *Id.* at 379-80.

³⁹ *Id.* at 374-81.

⁴⁰ *E.g.*, Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM & MARY L. REV. 189, 189-90 (1983).

⁴¹ *Minority Television Project, Inc. v. F.C.C.*, 676 F.3d 869, 875 (9th Cir.), *reh'g en banc granted*, 704 F.3d 1009 (9th Cir. 2012).

⁴² *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

⁴³ *Minority Television Project*, 676 F.3d at 875 (quoting *Citizens United v. F.E.C.*, 130 S. Ct. 876, 898 (2010)).

⁴⁴ *Id.* at 876 (quoting *F.C.C. v. League of Women Voters*, 468 U.S. 364, 380 (1984)).

⁴⁵ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (noting that "the government may impose reasonable restrictions on the time, place, or manner of protected speech").

lowed precisely the same approach that we have applied to other media and have never gone so far as to demand that such regulations serve “compelling” governmental interests.⁴⁶

Justice Brennan’s opinion evaluated “fundamental principles” of broadcast regulation—some established as early as 1969 in *Red Lion Broadcasting Co. v. F.C.C.*⁴⁷—to demonstrate why intermediate scrutiny was applied.⁴⁸ Broadcast’s “distinguishing characteristic” as a scarce and valuable resource gives Congress the power under the Commerce Clause to “assure that the public receives . . . a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations.”⁴⁹ Brennan noted in his opinion that the First Amendment “preserve[s] an uninhibited marketplace of ideas” and that broadcast licensees “serve . . . as fiduciaries for the public by presenting ‘those views and voices which are representative of their community.’”⁵⁰ Although careful to point out that broadcasters are engaged in “a vital and independent form of communicative activity,” Brennan implied in his opinion that securing the public’s First Amendment interest in broadcast is the Court’s paramount concern and the reason why restrictions will be analyzed under intermediate scrutiny.⁵¹

Using an intermediate level of judicial scrutiny, the Supreme Court found that the restriction was not narrowly tailored to serve the government’s articulated interest of “protect[ing] noncommercial educational broadcasting stations from being coerced, as a result of federal financing, into becoming vehicles for Government propagandizing or the objects of governmental influence.”⁵² Instead, the statute’s effect “[wa]s plainly to diminish rather than augment ‘the volume and quality of coverage’ of controversial issues.”⁵³ The court affirmed the District Court’s finding that the statute was unconstitutional.⁵⁴

IV. MINORITY TELEVISION PROJECT, INC. V. F.C.C.

Although all noncommercial stations are subject to FCC regulations pursuant to the granting of broadcast licenses,⁵⁵ not all noncommercial stations

⁴⁶ *F.C.C. v. League of Women Voters*, 468 U.S. 364, 375-76 (1984) (citations omitted).

⁴⁷ *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367 (1969).

⁴⁸ *League of Women Voters*, 468 U.S. at 376-78.

⁴⁹ *Id.* at 377.

⁵⁰ *Id.* at 377 (quoting *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 389 (1969)).

⁵¹ *Id.* at 378.

⁵² *Id.* at 385.

⁵³ *Id.* at 399 (quoting *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 393 (1969)).

⁵⁴ *Id.* at 378.

⁵⁵ *See, e.g.*, 47 C.F.R. § 73.621 (2011).

choose to affiliate with the Corporation for Public Broadcasting and PBS.⁵⁶ These stations receive their programming from a variety of third-party sources and often decide to meet local community needs by addressing a specific issue through their programming.⁵⁷ One such station, KMTP-TV, is a noncommercial educational broadcast station that serves the San Francisco area and reaches approximately 1.9 million households in its coverage area.⁵⁸ Owned and operated by Minority Television Project, Inc., KMTP-TV is a non-CPB, non-PBS affiliated public broadcast station that focuses its programming on multicultural diversity, and in so doing offers a schedule that includes shows on business and culture in Germany, Africa, and Russia.⁵⁹ KMTP-TV meets its public trustee obligations by seeking to inform and educate underrepresented groups in the Bay Area through “information, education, and the arts.”⁶⁰

A. FCC Investigation of KMTP-TV’s Promotional Announcements

In 2002, KMTP-TV aired a series of donor acknowledgments for sponsors including State Farm, Cadillac Escalade, and Korean Airlines.⁶¹ Following complaints from other local broadcasters that KMTP-TV had repeatedly broadcast promotional advertisements on behalf of corporations, the FCC’s Media and Enforcement Bureaus launched an investigation and determined that the station was responsible for over 1900 violations of the agency’s advertising rules for noncommercial public broadcast stations.⁶² In its Notice of Apparent Liability, the FCC accused KMTP-TV of “willfully and repeatedly” violating 47 U.S.C. § 399b by broadcasting promotional advertisements.⁶³ The FCC found that several arguments made by KMTP-TV’s ownership were

⁵⁶ Cf. CORP. FOR PUB. BROAD., ALTERNATIVE SOURCES OF FUNDING FOR PUBLIC BROADCASTING STATIONS 16 (2012), available at <http://commcns.org/18egLIS> (discussing the organizational structure of public broadcasting).

⁵⁷ Michael Getler, *Caution: That Program May Not Be From PBS*, PBS OMBUDSMAN (May 20, 2008), <http://commcns.org/19TAfJj>.

⁵⁸ KMTP-TV, <http://commcns.org/175igxH> (last visited Apr. 13, 2013).

⁵⁹ *KMTP Programming*, KMTP-TV, <http://commcns.org/12CG1K2> (last visited Apr. 13, 2013). Minority Television Project, Inc. is a registered 501(c)(3) organization. KMTP-TV, *supra* note 58.

⁶⁰ See KMTP-TV, *supra* note 58.

⁶¹ *In re* Minority Television Project, Inc.; Licensee of Noncommercial Educational Television Station KMTP-TV, San Francisco, California, *Notice of Apparent Liability for Forfeiture*, 17 F.C.C.R. 15,646, ¶¶ 10, 14 (Aug. 7, 2002). For example, the State Farm “announcement,” for example, showed a house destroyed by fire. The narrator stated: “fortunately, they have a State Farm agent, and the help of the world’s largest claim network. And no one has more experts handling more claims more quickly and more fairly. That’s our ‘Good Neighbor’ promise.” The announcement concluded with an image of a happy family and their repaired home.” *Id.* ¶ 10.

⁶² *Id.* ¶¶ 2, 5.

⁶³ *Id.* ¶ 1.

“without merit” in regards to announcements made in English and Asian languages, such as Vietnamese, Mandarin, and Filipino.⁶⁴ Among the arguments rejected by the Commission were claims that the announcements were “harmless adjective-noun combinations that do not promote, but instead denote, without value, discrete categories of products or services”⁶⁵ and the announcements broadcast in Asian languages “do not always yield precise cross-cultural verbal equivalencies in English.”⁶⁶ Ultimately, the FCC issued a forfeiture order for \$10,000.⁶⁷ The FCC denied the station’s petition for review and a petition for reconsideration challenging the statute on both on First Amendment grounds as well as that the regulations were unconstitutionally vague.⁶⁸ Dissatisfied with the outcome at the FCC, Minority Television Project filed a petition for review of the order in the Court of Appeals for the Ninth Circuit, which transferred the case to the District Court for the Northern District of California.⁶⁹

B. Minority Television Project Challenges the FCC’s Advertising Rules in Court

In its filings before the district court, Minority Television Project alleged that the FCC’s advertising regulations promulgated under § 399b were unconstitutional under the First Amendment as content-based restrictions on speech.⁷⁰ Minority Television Project argued that the bans on commercial, public issue, and political advertising were unnecessary content-based restrictions in light of the government’s stated interest in addressing “certain programming voids that exist in commercial broadcasting due to its financial incentive structure.”⁷¹

To prove the government’s substantial interest in regulating the content of

⁶⁴ *Id.* ¶ 20.

⁶⁵ *Id.* ¶ 6.

⁶⁶ *Id.* ¶ 5.

⁶⁷ *Id.* ¶ 31.

⁶⁸ *Minority Television Project Inc. v. F.C.C.*, 649 F. Supp. 2d 1025, 1029 (N.D. Cal. 2009), *aff’d in part, rev’d in part*, *Minority Television Project, Inc. v. F.C.C.*, 676 F.3d 869 (9th Cir.), *reh’g en banc granted*, 704 F.3d 1009 (9th Cir. 2012).

⁶⁹ *Id.* at 1029.

⁷⁰ *See* *Minority Television Project, Inc. v. F.C.C.*, 676 F.3d 869, 873 (9th Cir.), *reh’g en banc granted*, 704 F.3d 1009 (9th Cir. 2012).

⁷¹ *Minority Television Project*, 649 F. Supp. 2d at 1034. In addition to its First Amendment challenge to 47 U.S.C. § 399b, *Minority Television Project* also alleged that the statute was vague because of the term “promote” in § 399b(a)(1). The district court rejected this argument claiming that the term “promote” was a “general concept . . . that is easily grasped by a person of ordinary intelligence” and that any station that was unsure whether or not an underwriting announcement or potential advertisement promoted a good or service could seek “informal guidance or formal clarification” from the FCC. *Id.* at 1046-47.

speech, the FCC submitted evidence that the commercial-free nature of public broadcasting allows public television stations to make determinations outside the “commercial market pressures” of commercial broadcast.⁷² This, in turn leads these stations to produce and air more educational programming than is available on other stations, therefore filling a void in community-responsive programming.⁷³ Minority Television Project chose not to argue with the government’s claimed interest, but rather focused on the notion that § 399b “substantially burdened more speech than is necessary” and favored some types of commercial and noncommercial speech over others.⁷⁴

Applying the robust intermediate scrutiny standard established in *League of Women Voters*, the District Court upheld the constitutionality of § 399b and granted the FCC’s motion for summary judgment.⁷⁵ In its opinion, the court noted that the FCC restrictions are applied only to a small number of stations and fail to violate the First Amendment because the public retains its “access to paid advertisements on the far more numerous commercial channels.”⁷⁶

While the court focused primarily on commercial advertising, it also insisted that the government’s interest in preserving educational programming would fail if noncommercial stations were allowed to air public issue and political advertising.⁷⁷ Allowing stations to solicit political advertising has the potential to endanger public broadcasting’s independence and give noncommercial educational stations “a financial incentive to create non-controversial programs with mass appeal.”⁷⁸ Furthermore, the court noted that the statute did not “impermissibly discriminate[] between different types of paid commercial

⁷² *Id.* at 1034 (citing *In re Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations, Second Report and Order*, 86 F.C.C. 2d 141, ¶ 3 (Apr. 23, 1981)).

⁷³ *Id.* at 1033-35.

⁷⁴ *See id.* at 1033-35; *see also* Plaintiff Motion for Summary Judgment, *supra* note 31, at 14-16 (arguing that there are “time, place and manner” restrictions that could be used, such as limiting the number of underwriting announcements, that would allow noncommercial stations to air some categories of commercial speech).

⁷⁵ *Minority Television Project*, 649 F. Supp. 2d at 1048.

⁷⁶ *Id.* at 1045. The court also noted in its decision that given the fact that this restriction affects such a small number of stations, the FCC’s restriction on advertisements “is somewhat analogous to a time, place and manner restriction.” *Id.* Minority Television Project had argued that instead of a complete prohibition, the FCC could place limitations on its advertising restrictions similar to those associated with time, place, or manner restrictions. The court argued that concept was already applied here as commercial, public issue, and political advertising were only being prohibited on a “small number of channels on television and radio.” *Id.*

⁷⁷ *Id.* at 1041. Here the court reiterated Congress’s substantial interest in using the advertising ban to “insulat[ing] public broadcasting from special interest influences, be they political, commercial, religious, or otherwise.” *Id.*

⁷⁸ *Id.*

speech.”⁷⁹ To that end, the court found significant similarities between commercial speech and noncommercial political announcements: “political candidate announcements have an inherently promotional quality. . . . It would be difficult to distinguish identifying a candidate from promoting that candidate. The candidate is what is being promoted, as opposed to a particular product or service sold by a corporate sponsor.”⁸⁰ Given these similarities, the court upheld the ban on public issue and political advertising as a reasonable determination that the inclusion of these announcements would “impact programming decisions of noncommercial stations.”⁸¹

In holding that § 399b was narrowly tailored to further the governmental interest in maintaining the educational programming available on public stations, the court endorsed the government’s argument that maintaining the advertising restrictions will keep public television “free from undue influence of paying advertisers.”⁸² Noncommercial educational stations are still allowed under the statute to broadcast “unpaid core political speech” in the form of station editorials or local content.⁸³ The court expressly rejected the plaintiff’s argument that the restrictions could be more narrowly tailored by limiting the length and frequency of the advertisements.⁸⁴

The District Court’s decision did nothing to upset the status quo or deviate from Congress’s original determination that limited underwriting announcements appear to be the only way under the current regulatory regime to highlight corporate sponsorship. However, the court’s finding that political advertisements are inherently promotional eliminated public broadcast stations’ opportunity to engage their constituents in a new and potentially dynamic form of political speech. In this regard, the posture that the Ninth Circuit panel of judges adopted on appeal caught most noncommercial broadcasters completely unaware and changed the conversation in regards to public issue and political advertising.

C. The Ninth Circuit Upends the Prohibition on Public Issue and Political

⁷⁹ *Id.* at 1046.

⁸⁰ *Id.* at 1043. The court further found that “there is a reasonable fit between the government’s purpose and the restriction imposed, since commercial and political advertisements all yield similar commercial pressures on public stations,” thus satisfying the requirement that the restriction on speech be narrowly tailored. *Id.* at 1043-44.

⁸¹ *Id.* at 1043.

⁸² *Id.* at 1041.

⁸³ *Id.* at 1042.

⁸⁴ *Id.* at 1041-42 (endorsing additional testimony offered by the government that non-commercial stations would still be forced to change its programming which in turn could lead to a “deviation from the public education mission” and a subsequent “loss of funds from viewers, government, foundations and other sources”).

Advertising

The Ninth Circuit took up de novo review of the district court's grant of summary judgment⁸⁵ and first addressed the nature of the federal regulations, finding them to be content-based restrictions since they "plainly restrict[ed] Minority's speech based on the speech's content."⁸⁶ Of particular interest to the panel was the distinction that the FCC made between the promotional messages of for-profit and not-for-profit organizations. Under the statute, public broadcasters "may not broadcast *most* types of advertising speech, but these stations may broadcast paid promotional messages for products and services of nonprofit corporations."⁸⁷ The court noted that the restriction "burdens speech on issues of public importance and political speech" referring to stations' ability to broadcast promotional messages from non-profits so long as they do not violate the public issue and political advertising bans of § 399b(a)(2) and § 399b(a)(3).⁸⁸ The court therefore found the nature of the FCC's advertising ban to be content-based.⁸⁹

The court also applied the First Amendment standard of review for public broadcast cases established in *League of Women Voters*.⁹⁰ The judges similarly rejected Minority Television Project's arguments that a stricter level of judicial scrutiny should be applied based on recent decisions in *F.C.C. v. Fox Television Stations* and *Citizens United v. FEC*.⁹¹ Instead, the panel determined that

⁸⁵ *Minority Television Project, Inc. v. F.C.C.*, 676 F.3d 869, 874 (9th Cir.), *reh'g en banc granted*, 704 F.3d 1009 (9th Cir. 2012).

⁸⁶ *Id.* at 874.

⁸⁷ *Id.* (emphasis original). The opinion refers to a situation in which the FCC allowed a public broadcast station in Indiana to air a paid message on behalf of Planned Parenthood. Judge Bea noted that under the statute, the station could not broadcast the organization's announcement if it had "express[ed] any views with respect to a matter of public importance" or "support[ed] any candidate for political office," however, the FCC had not considered the message a violation of § 399b and effectively allowing Planned Parenthood to "advertise to promote *itself*." *Id.* at 874-75.

⁸⁸ *Id.* at 874-75.

⁸⁹ *Id.*

⁹⁰ *Id.* at 876-77.

⁹¹ *Id.* Minority Television Project urged the court to apply strict scrutiny based on comments made in *F.C.C. v. Fox Television Stations, Inc.* by Justice Thomas that questioned the application of the *League of Women Voters of California* standard in broadcast regulation cases. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 533-35 (2009) (Thomas, J., concurring). Claiming that new technologies had eroded the "uniquely pervasive" character of broadcast media, Minority Television Project asserted that broadcast restrictions like the FCC's advertising ban should no longer be held to a lower standard of review. Noting that the Supreme Court would be ruling on *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012), following oral arguments in January 2012, the Ninth Circuit rejected the application of a new standard until the Supreme Court released its opinion. *Minority Television Project*, 676 F.3d at 876 ("Thus, just as golfers must play the ball as it lies, so too we must apply the law of broadcast regulation as it stands today."). In re-

the government would have to prove its case by showing that the statute met a “substantial government interest” that was “narrowly-tailored.”⁹² The court noted that in applying intermediate scrutiny, the government would be responsible for presenting substantial evidence of harm that was “‘in the record before Congress’ at the time of the statute’s enactment,” a standard developed in the *Turner Broadcasting v. F.C.C.* cases.⁹³ Furthermore, the court declared the government would be successful only in the event it could show that the speech *banned* by the advertising restriction posed a greater threat to the government’s interest than the speech *permitted* by the statute.⁹⁴

As a preliminary matter, the Court also determined that “each class of advertising” under § 399b(a) was severable and should be considered separately to ensure that the government can demonstrate that the regulation will “alleviate . . . harm[] in a direct and material way.”⁹⁵ Furthermore, the court confirmed that the government had “a substantial interest in ensuring high-quality educational programming on public broadcast stations.”⁹⁶ Minority Television Project once again chose not to dispute the claim that the government’s interest in “maintaining public broadcast stations’ niche programming [was] ‘substantial.’”⁹⁷

1. Commercial Advertising and the Ninth Circuit’s Review of § 399b(a)(1)

Like the district court, the Ninth Circuit found that the evidence before Congress was sufficient to show that commercial advertising poses a serious threat to public broadcasters’ programming decisions. Given the leeway to examine the three classes of advertising separately, the court first looked at the evidence before Congress at the time of the enactment of § 399b(a)(1) which restricts “paid advertisements for goods and services on behalf of for-profit corpora-

gard to Minority Television Project’s arguments based on *Citizen United v. F.E.C.*, 558 U.S. 310 (2010), the Ninth Circuit noted that the standard applied in that case was not decided under broadcast regulation jurisprudence. *Minority Television Project*, 676 F.3d at 877. Although a strict scrutiny standard was applied in that case due to FEC prohibitions on political speech by corporations, the result could not be transferred to a case involving broadcast speech restrictions. *See Minority Television Project*, 676 F.3d at 877.

⁹² *Minority Television Project*, 676 F.3d at 878.

⁹³ *Id.* at 880 (quoting *Turner Broad. Sys. v. F.C.C.*, 520 U.S. 180, 211 (1997)).

⁹⁴ *Id.* at 881 (referencing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425 (1993)).

⁹⁵ *Id.* at 882 (quoting *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 664 (1994)).

⁹⁶ *Id.* (holding that the government’s stated interest in preserving educational programming on noncommercial stations is consistent with Congress’s determination that some of the limited broadcast spectrum resources be reserved for stations willing to provide Americans with access to local programming “such as public affairs shows and educational programs for children”).

⁹⁷ *Id.* at 883.

tions.”⁹⁸ When the restriction was first being considered in 1981, Congress heard anecdotal testimony from National Public Radio, the American Foundation for the Blind, and the Association of Independent Video and Filmmakers that “advertising would harm the educational mission of public broadcast stations.”⁹⁹ Despite Minority Television Project’s argument that the lack of empirical data and academic studies should diminish the evidence and put it in question, the Ninth Circuit noted its resistance to “substitut[ing] [their] judgment for the reasonable conclusion of a legislative body” especially when the court was unable to pinpoint authority that mandates a “*type* of evidence in the record before Congress.”¹⁰⁰ Instead, the Ninth Circuit found a “strong connection” between the potential harm to noncommercial station niche programming and commercial advertising that was supported by evidence presented to Congress in 1981.¹⁰¹ Based on that connection, the Ninth Circuit concluded that the statute as it pertains to commercial advertising could not be said to “burden[] substantially more speech than is necessary to further the government’s legitimate interests” therefore meeting the intermediate scrutiny standard.¹⁰² As such, the court upheld the constitutionality of the ban on commercial advertising.

2. Public Issue and Political Advertising and the Ninth Circuit Review of § 399b(a)(2) and (a)(3)

The approach that the majority used to find that Congress had substantial evidence to uphold the proscription on commercial advertising by public broadcast stations under § 399b(a) rightfully yielded a very different result when applied to the subsections on public issue and political advertising.¹⁰³ The Ninth Circuit focused its *Turner II* analysis on the testimony given to Congress while the Public Broadcasting Amendment Act was debated in 1981.¹⁰⁴ The

⁹⁸ *Id.*

⁹⁹ *Id.* at 883-84. In its testimony, National Public Radio discussed an internal study that rejected “on-air advertising” for the reason that noncommercial stations broadcast “what commercial stations choose *not* to broadcast because of insubstantial income potential.” *Id.* at 883. The American Foundation for the Blind expressed concern that the “commercialization of public broadcasting” may disenfranchise “diverse audiences” such as minorities, women, and the handicapped. *Id.* The Association of Independent Video and Filmmakers testified that failing to prohibit commercial advertisements on public broadcasting “will make public television indistinguishable from the new commercial or pay culture cable services.” *Id.*

¹⁰⁰ *Id.* at 884.

¹⁰¹ *Id.*

¹⁰² *Id.* (quoting *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 665 (1994)).

¹⁰³ *Id.* at 885.

¹⁰⁴ *Id.* at 886 (observing that the witnesses from National Public Radio, the American Foundation for the Blind, and the Association of Independent Video and Filmmakers provided no testimony as to the “relative motivations of public issue and political advertisers

court declared that the record as to the potential impact of public issue and political advertisements on a station's editorial choices was inadequate to achieve the same result:

[T]here is simply no evidence in the record—much less “substantial evidence in the record before Congress” at the time of the statute’s enactment—to connect the ban on this speech to the government’s interest in maintaining certain types of programming. . . .

. . . [N]either logic nor evidence supports the notion that public issue and political advertisers are likely to encourage public broadcast stations to dilute the kind of noncommercial programming whose maintenance is the substantial interest that would support the advertising bans.¹⁰⁵

Calling the link between the restriction and the aforementioned governmental interest “tenuous,” the majority opinion argued that any notion of how the statutory ban might affect children’s or political programming on noncommercial stations was “pure speculation” because no evidence before Congress at the time of the enactment had been entered into the record.¹⁰⁶ The two-judge majority dismissed evidence offered by the government in the form of an article from *AdWeek Magazine* that provided details about the amount of money spent in the 2008 election.¹⁰⁷ Unlike their counterparts at the district court, the majority seemed unwilling to review any post-enactment evidence and this distinction may ultimately play a deciding role in how this case is decided.¹⁰⁸ The majority opinion noted that the “significance of the \$2.2 billion figure is unclear” as the article failed to consider concurrent, non-political advertising spending, giving the judges little opportunity to understand the figure as a per-

when compared to other advertisers” and that the witnesses only testified as to the “motivations of commercial advertisers or advertisers *generally*”).

¹⁰⁵ *Id.* at 885 (citation omitted).

¹⁰⁶ *Id.* Judge Bea dismissed the government’s arguments that these two classes of advertisements could “negatively affect the nature of children’s programming” as the majority of the viewership of shows like *Sesame Street* and *Mr. Roger’s Neighborhood* are prohibited from voting. *Id.* Judge Bea countered that noncommercial stations are unlikely to alter their programming to accommodate public issue advertisements or political candidate announcements. *Id.* Judge Bea’s opinion conveyed more concern over the idea that political advertising may lead a noncommercial station to “alter the content of its public affairs programming” to attract advertising dollars. *Id.* at 886. However, the Judge noted that the government failed to produce enough evidence to support this contention and that at this point any alterations to programming should be considered “speculation.” *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 886-87 (“[A] magazine article from 2008 is not ‘substantial evidence which was in the record before Congress’ 27 years earlier, in 1981, when § 399b was enacted.”); see also Defendant-Appellee Petition for Rehearing, *supra* note 12, at 6-10 (stating that the government’s principal argument that *Turner I and II* presents courts with the opportunity to review post-enactment evidence is incongruent with the application of the substantial evidence test in four other circuit courts).

centage of total ad sales.¹⁰⁹ The majority argued that an article from 2008 “certainly was not ‘substantial evidence [which was] in the record before Congress’ in 1981.”¹¹⁰

In addition to its *Turner II* analysis, the majority opinion reviewed de novo the question of whether Section 399b impermissibly discriminates between types of speech.¹¹¹ Here, Congress’s willingness to allow noncommercial stations to broadcast promotional advertisements on behalf of non-profits was “fatal” to the government’s case.¹¹² The Ninth Circuit asserted “the government must prove that public issue and political advertisements pose a greater threat to educational programming on public broadcast stations than promotional advertisements on behalf of non-profits.”¹¹³ Finding that all three forms of advertising are conducted by entities seeking to reach the largest audience, the majority reasoned that, “there is no basis for the content-based distinction drawn by § 399b.”¹¹⁴ Consequently, the court concluded that there was no relationship between the ban on public issue and political advertising and the government’s asserted interest and that the FCC had failed to establish the narrowly tailored prong of the intermediate scrutiny analysis.¹¹⁵ With that, the Court affirmed the government’s motion for summary judgment as to § 399b(a)(1), but reversed the District Court’s decision as to the constitutionality of § 399b(a)(2) and (a)(3).¹¹⁶

3. *The Dissent Raises an Alternative Perspective on Public Issue and Political Advertising*

Circuit Judge Richard A. Paez’s dissenting opinion rejected the analytical approach taken by the majority in regard to § 399b(a)(2) and (a)(3).¹¹⁷ Judge Paez concurred with the majority’s holding that the prohibition on commercial advertisements was narrowly tailored to meet the government’s educational interests, but argued that the decision on public issue and political advertising

¹⁰⁹ *Minority Television Project*, 676 F.3d at 886.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 888.

¹¹² *Id.* (citing to *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), a commercial speech case, in which the city failed to prove that handbill-dispensing news-racks posed a greater threat to public safety and aesthetics than newspaper-dispensing news-racks).

¹¹³ *Id.* (emphasizing that the burden on the government in this case is even higher than in the *Discovery Network* case, as *Minority Television Project*’s claims relate to political speech).

¹¹⁴ *Id.* at 889.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 890.

¹¹⁷ *Id.* at 892 (Paez, J., dissenting).

“could jeopardize the future of public broadcasting.”¹¹⁸ Where this case will be argued when it is reheard en banc and where the two sides appeared to differ was in the appropriate application of case precedent, including *League of Women Voters*, *City of Cincinnati v. Discovery Network*, *Turner I*, and *Turner II*.¹¹⁹ Judge Paez offered three arguments to counter the majority’s findings: 1) The prohibition on public issue and political advertising met the intermediate scrutiny test of *League of Women Voters*; 2) the application of *City of Cincinnati v. Discovery*, a non-broadcast commercial speech case, had “little relevance” to the case at hand; and 3) the majority misapplied the evidentiary framework required under *Turner I* and *II*.¹²⁰

To show that the prohibitions on public issue and political advertising were narrowly tailored, Judge Paez highlighted language from the Supreme Court’s opinion in *League of Women Voters* explaining that “a broadcasting regulation is narrowly tailored when it is not ‘manifestly imprecise’ . . . and when ‘less restrictive means’ of furthering a government’s interest are not ‘readily available.’”¹²¹ Judge Paez criticized the other panelists for failing to offer alternative means by which the government’s interest could be achieved more narrowly and argued that “there appear to be no ‘less restrictive means’ to further the government’s interest.”¹²² The legislative history of § 399b, the dissent argued, “demonstrates that the law was crafted to restrict the least possible amount of speech” and that the government restriction here merely afforded public broadcasters the opportunity to provide programming free from commercial market

¹¹⁸ *Id.* Judge Paez noted the almost sixty year policy of “insulat[ing]” public broadcasters from commercial sponsors and how the “court’s judgment will disrupt this policy” before discussing the three ways in which he disagreed with the Ninth Circuit’s decision. *Id.*

¹¹⁹ *Id.* (arguing that the court improperly used a commercial speech case and that the *Turner* cases require “‘substantial evidence in the record before Congress’ at the time of enactment”).

¹²⁰ *Id.* at 895-98.

¹²¹ *Id.* at 893 (quoting *F.C.C. v. League of Women Voters*, 468 U.S. 394, 395 (1984)).

¹²² *Id.* at 895. The dissent also noted that the FCC’s experts on public broadcasting advertising had researched “plausible alternatives” to § 399b and “conclude[d] that these alternatives are not reasonable.” *Id.* In his expert testimony on behalf of the government, Dr. Noll noted that plausible alternatives to the current system include:

[G]overnment-operated public television system or government regulation of the content of programs and of advertisements to children. The former would require replacing the existing set of licensees with a government entity, and so would eliminate the diversity of ownership among public television stations. Both alternatives would weaken the influence of viewers on the content of public television programs while increasing the direct influence of government officials. In addition, the regulatory approach raises first amendment issues that go beyond my expertise as an economist but that I understand make this approach legally problematic. Thus, I conclude that neither alternative is a reasonable alternative to the present system.

Declaration of Roger G. Noll in Support of Defendant’s Motion for Summary Judgment at 8, *Minority Television Project, Inc. v. F.C.C.*, 649 F.Supp.2d 1025 (2009) (No. C 06-02699 EDL), 2009 WL 7695715.

pressures.¹²³ The dissent also rejected the majority's notion that, because promotional advertisements for non-profit entities were allowed under § 399b, the restriction could not be narrowly tailored.¹²⁴ Judge Paez pointed to statements in the testimony made by experts who argued that non-profit announcements are consistent with public television's educational mission.¹²⁵

Judge Paez also dismissed the majority's reliance on *City of Cincinnati v. Discovery Network* noting that the case "involved non-broadcast commercial speech" and did not "interpret[] nor appl[y] the narrow tailoring requirement of intermediate broadcast scrutiny."¹²⁶ Instead, the application of the *Discovery Network* case would still support the FCC's prohibition as public issue and political ads "run directly counter to Congress's interest in barring political interest groups (and their advertising dollars) from affecting programming decisions."¹²⁷ Taken together with the government witnesses showing that political and public issue advertising produces the same harms as promotional advertisements by for-profit entities, Judge Paez insisted that *Discovery Network* could not serve as a controlling case.¹²⁸

The Supreme Court's "substantial evidence" test from the *Turner* cases served as the final disagreement between the judges.¹²⁹ Judge Paez contended that evidence that was not in the record before Congress when the statute was enacted was still viable and could be used to support the constitutionality of § 399b(a)(2) and (a)(3).¹³⁰ To formulate this conclusion, he highlighted language used by the Supreme Court in *Turner I* in which the Court noted that it was remanding the case "for further factual development . . . 'of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence.'"¹³¹ According to Judge Paez, this language justifies the reliance of the court on expert testimony as to the harms to public broadcasters that can result from all three kinds of advertising.¹³² The dissent asserted that there could be practical consequences on the Ninth Circuit's decision-making

¹²³ *Minority Television Project*, 676 F.3d at 893-94 (Paez, J., dissenting).

¹²⁴ *Id.* at 894.

¹²⁵ *Id.* at 894-95. Furthermore, Judge Paez argued that Congress specifically found non-profit advertisements to be harmless while it insisted on the exclusion of political advertisements. *Id.* at 895. The possibility also exists for these non-profit advertisements to "easily be swamped by the very large market for political advertising." *Id.* at 896.

¹²⁶ *Id.* at 895.

¹²⁷ *Id.* at 896.

¹²⁸ *Id.* at 895-97.

¹²⁹ *Id.* at 897.

¹³⁰ *Id.*

¹³¹ *Id.* at 898 (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 667 (1994)).

¹³² *Id.* ("Thus, I read the *Turner* cases as identifying two sources of evidence upon which a court may rely in assessing the constitutionality of a federal law: the record before Congress at the time of enactment and additional evidence presented in the district court.").

if they chose to follow that narrow holding.¹³³ Judge Paez pointed out that the majority's decision "permits the constitutionality of a statute to rest on Congress's attention to creating a sufficiently detailed record prior to the statute's enactment."¹³⁴

4. Following the Decision, Noncommercial Educational Stations Play the Waiting Game

Though the decision upends thirty years of precedent and appears to open the door to broadcasting political and public issue advertising, noncommercial broadcasters, even those geographically contained within the Ninth Circuit, appear to be taking a prudent wait and see approach following the decision. While the decision ends the proscription on placing political and public issue advertising on the station's airwaves, the ruling does not compel the stations to exercise that right. Although several stations located in the Ninth Circuit dismissed the notion of changing their advertising policies outright in the days after the ruling, other stations, buoyed by national organizations like National Public Radio, maintain that stations must make the decision for how to react to the decision on their own.¹³⁵

Public interest organizations that have championed noncommercial broadcasters' role as philanthropic and community leaders have been mostly critical of the Ninth Circuit's decision.¹³⁶ On the other end of the spectrum, most of the rule-making agencies and organizations associated with public broadcasting have declared that they will wait until the issue is fully resolved in the courts before adopting policy positions on the ruling.¹³⁷

To that end, the Department of Justice ("DOJ") and the FCC have appealed the decision.¹³⁸ Arguing that the majority applied an erroneous legal standard to

¹³³ *Id.* ("[The majority's] approach imposes a procedural requirement to the passage of a constitutional statute.").

¹³⁴ *Id.*

¹³⁵ See David Bauder, *Public Stations Considering Airing Political Ads*, HUFFINGTON POST (June 25, 2012, 12:57 PM), <http://commcns.org/1dgi94R> (noting that a representative of KPBS, a public television station in San Diego, California, suggested that the station would not accept political advertisements despite the court's ruling).

¹³⁶ See John Eggerton, *Free Press: Political Spots Would 'Pollute' Public Broadcasting*, BROADCASTING & CABLE (Apr. 13, 2012, 9:42 AM), <http://commcns.org/1fcRFOk>; see also John Eggerton, *Court Rules Noncoms Can Accept Paid Issue and Political Ads*, BROADCASTING & CABLE (Apr. 12, 2012, 7:10 PM), <http://commcns.org/15aZ5vE> (concluding with the reaction of the Media Access Project, which calls the court's decision a "disturbing development" that "threatens to undermine the very character of noncommercial broadcasting by subjecting it to political influence").

¹³⁷ See Eggerton, *Free Press*, *supra* note 136.

¹³⁸ See *Minority Television Project, Inc. v. F.C.C.*, 704 F.3d 1009 (9th Cir. 2012); see generally *Justice Dept. Asks Ninth Circuit to Reconsider Pubcasting Ad Decision*, CUR-

its decision, DOJ, on behalf of the FCC, asked the Ninth Circuit for a rehearing or en banc review in June 2012.¹³⁹ In seeking the rehearing, the DOJ and the FCC reiterated many of Judge Paez's arguments, and emphasized that the commercialization of noncommercial educational stations in the context of political and public issue advertisements could tempt a broadcaster to "alter the content of its public affairs programming if it thinks it can garner additional advertising dollars from one or another campaign."¹⁴⁰ The agency's filing declares that the court's misinterpretation of the record "threatens the noncommercial educational character of public broadcasting" and should be reconsidered before a full panel of judges.¹⁴¹ Despite arguments from Minority Television that the court correctly applied the law from the *Turner* cases, *City of Cincinnati v. Discovery Network*, and *League of Women Voters* in its decision,¹⁴² the Ninth Circuit announced on November 21, 2012, that the case would be reheard en banc in March 2013.¹⁴³

IV. MANAGING THE "VIRTUOUS CIRCLE": PRESERVING THE DUTY OF NONCOMMERCIAL BROADCASTERS WHILE ENCOURAGING NEW ECONOMIC MODELS

While the Ninth Circuit debated the merits of and ultimately reheard *Minority Television Project*, public broadcasters had little choice but to sit on the sidelines during one of the busiest election seasons for political advertisement spending on local, network, and cable television.¹⁴⁴ The 2012 election raised new questions about the amount of money spent on political advertisements as well as the government's role in providing the kind of educational program-

RENT.ORG (July 4, 2012), <http://commcns.org/18UvtGU>.

¹³⁹ Defendant-Appellee Petition for Rehearing, *supra* note 12, at 2, 4.

¹⁴⁰ *Id.* at 11 (quoting *Minority Television Project, Inc. v. F.C.C.*, 676 F.3d 869, 886 (9th Cir.), *reh'g en banc granted*, 704 F.3d 1009 (9th Cir. 2012) (arguing inconsistency between this statement made by Judge Bea and his overall conclusion that public issue and political advertisers are unlikely to "dilute" noncommercial programming)).

¹⁴¹ *Id.* at 9.

¹⁴² See Plaintiff-Appellant Response to Petition for Rehearing or Rehearing En Banc at 2-3, *Minority Television Project, Inc. v. F.C.C.*, 676 F.3d 869 (9th Cir. 2012) (No. 09-17311), available at <http://commcns.org/175hgcR>.

¹⁴³ *Minority Television Project, Inc. v. F.C.C.*, 704 F.3d 1009 (9th Cir. 2012).

¹⁴⁴ Press Release, Wesleyan Media Project, 2012 Shatters 2004 and 2008 Records for Total Ads Aired (Oct. 24, 2012), available at <http://commcns.org/17dLokk> (reporting that the 2012 presidential campaign surpassed the total number of political advertisements broadcast in the 2008 election with more than two weeks to go before the general election). While these ads were concentrated in fewer markets, the 915,000 advertisements broadcast at the time of the press release indicated a 44.5 percent increase over the 637,000 ads in 2008. *Id.*

ming found on public television.¹⁴⁵ *Adweek Magazine* reported in September 2012, that spending for political advertisements during the 2012 election would exceed \$3.37 billion and boost revenue for television stations by approximately twenty-three percent.¹⁴⁶ Accessing this market could prove to be a potential windfall for any public broadcaster willing to air political or public issue advertisements during an election. At the same time, questions about the sustainability of public broadcasting were being raised in Congress,¹⁴⁷ as well as on the campaign trail when Governor Mitt Romney asserted as part of his presidential platform that he would end federal funding to the Corporation for Public Broadcasting to help manage the federal budget and deficit.¹⁴⁸

Amid these outside influences, the *Minority Television Project* decision has the potential to serve as a rallying point between public broadcasters' dual goals of preserving their educational mission and answering political calls to be more entrepreneurial and self-sufficient. While the limitations on advertising have created a historical conflict between these two goals, the decision in *Minority Television Project* has actually created an opportunity to explore new economic models while serving the public through political and public issue education. Despite the concerns raised by public interest groups and current stations,¹⁴⁹ some industry leaders are convinced that public broadcasters can navigate the uncertainty left by the decision and use the ability to air political and public issue advertisements to meet both purposes:

I think this [decision] creates a virtuous circle for us that enlarges our ability to serve the public in a variety of ways and eliminates the kind of hand-to-mouth existence that public television stations have been enduring for the last several years, by creating some important new revenue streams.¹⁵⁰

¹⁴⁵ See generally Tom Gara, *Election Advertising Boomed in 2012, But the Shift to Online Advertising and Social Media Still Isn't Happening*, WALL ST. J. (Nov. 5, 2012, 6:05 PM), <http://commcns.org/17dLrg5>.

¹⁴⁶ Katy Bachman, *Analyst: TV Political Advertising to Top \$3.3 Billion*, ADWEEK (Sept. 5, 2012, 9:53 AM), <http://commcns.org/1c7N0NS>.

¹⁴⁷ Press Release, U.S. House of Representatives Comm. on Appropriations, Appropriations Committee Releases the Fiscal Year 2013 Labor, Health and Human Services Funding Bill (July 17, 2012), available at <http://commcns.org/1aGr5zp> (discussing efforts to end advanced appropriations for and to "encourage CPB to operate exclusively on private funds," cuts to the amount of funds requested).

¹⁴⁸ Governor Mitt Romney, Remarks at the First Presidential Debate at the University of Denver (Oct. 3, 2012), available at <http://commcns.org/17fBJrN>. In his remarks, Governor Romney famously noted that he would "stop the subsidy to PBS" despite how much he "like[d] Big Bird," a recurring character on the children's program, *Sesame Street*, which airs weekdays on PBS. *Id.*

¹⁴⁹ Michael D. Berg, *Noncom Political Ad Ruling: What's It Mean?*, TVNEWSCHECK (Aug. 3, 2012, 8:32 AM), <http://commcns.org/15aMjnT>.

¹⁵⁰ Interview with Patrick Butler, President and Chief Exec. Officer, Ass'n of Pub. Television Stations, in Wash., D.C. (Oct. 4, 2012) (on file with author). In the conversation, Mr. Butler added, "Everyone is encouraging [public broadcasters] to be as innovative, as re-

Much of the broadcasters' hesitancy to take advantage of the ruling in *Minority Television Project* during this election cycle may have been due to dual financial considerations related to viewership and confusion over how to set advertising rates using FCC rules written for commercial stations.¹⁵¹ Participating in this "virtuous circle" is possible, but will first require noncommercial educational stations to address a number of legal and policy-related questions in these areas.

A. Public Broadcasters Can Preserve the Viewer's Experience of Noncommercial Programming While Offering Political Advertisements by Looking to Corporate Underwriting Rules

Despite the majority's insistence in *Minority Television Project* that "public issue and political advertisements pose no threat of 'commercialization,'" public broadcasters are required to fulfill the provisions of their FCC license and may be wary of losing private donations from viewers accustomed to the station's position-neutral programming.¹⁵² Contributions by individuals who rely on public broadcasters to abide by public interest obligations to educate and serve the community make up approximately twenty-two percent of system revenue.¹⁵³

In June 2012, CPB published *Alternative Sources of Funding for Public Broadcasting Stations* in response to a request from Congress related to the Military Construction and Veterans Affairs and Related Agencies Appropriations Act of 2012.¹⁵⁴ The report, which considered a "broad range of possible funding sources," looked specifically at the potential impact of television advertising as a supplement for traditional system revenues.¹⁵⁵ The report considered five alternative funding options, including: "[T]elevision advertising, radio advertising, retransmission consent fees, paid digital subscriptions, and digital game publishing."¹⁵⁶ Notably, the report was drafted after the Ninth Cir-

sourceful, as entrepreneurial as we can be and as efficient as we can be. I think we can make a case for an enduring claim on public funding because of the public service work that we do, in education, in public safety, in job training, being the C-SPAN of the states, and those fundamental missions of public television are worthy public investment, federal investment, irrespective of other revenue streams that we may be able to generate, through political advertising, or through spectrum leasing, or channel sharing or anything else."

¹⁵¹ Berg, *supra* note 149.

¹⁵² *Minority Television Project, Inc. v. F.C.C.*, 676 F.3d 869, 887 (9th Cir.), *reh'g en banc granted*, 704 F.3d 1009 (9th Cir. 2012).

¹⁵³ CORP. FOR PUB. BROAD., *supra* note 56, at 17.

¹⁵⁴ *Id.* at 1 (noting that CPB was required to develop the report after a Conference Report request during negotiations over the Military Construction and Veterans Affairs and Related Agencies Appropriations Act of 2012).

¹⁵⁵ *Id.* at 1.

¹⁵⁶ *Id.* at 26.

cuit panel decided *Minority Television Project* and it incorporated CPB's understanding of the ramifications of the decision on the regulatory framework for advertisements on noncommercial educational stations.¹⁵⁷

Amidst the broad conclusion that "there is simply no substitute for . . . federal investment to accomplish [public broadcasters'] public service mission," the report warned that a shift to a commercial model of advertising "would produce net negative financial results" and endanger a station's support from "traditional voluntary sources," such as individuals and community groups.¹⁵⁸ The report also offered a specific conclusion on the sale of political advertisements that should stand as a potential warning to all noncommercial stations.¹⁵⁹ According to CPB, the sale of political or public issue advertising would have the effect of "erod[ing] the public's trust in the integrity of public broadcasting's content."¹⁶⁰ However, despite the warnings about the cyclical and volatile nature of political and public issue advertising, the report failed to provide additional information that might identify alternative means for delivering a political advertisement without disenfranchising viewers.¹⁶¹

The success of the FCC's rules on corporate underwriting and logograms illustrates one method by which public broadcasters could control the content of a public issue or political advertisement in order to dampen any adverse effect that such an announcement would have on programming.¹⁶² Enacting "acknowledgment rules" for political candidates and organizations seeking to advertise public issues ensures that public broadcasters will maintain the educational character of noncommercial television, while supporting the stations' ability to develop new economic models that supplement its revenue.¹⁶³ Similar to the rules that are applied to corporate underwriters, public issue and political acknowledgments can be tailored as well as evenly and uniformly applied to ensure that the announcements contribute to the public affairs programming of

¹⁵⁷ *Id.* at 17.

¹⁵⁸ *Id.* at 2, 26. The report also noted that "a greater dependence on advertising as a source of revenue is likely to precipitate a shift in the nature of the content available on public television and ultimately put in jeopardy the diverse educational, informational and cultural mission of public television." *Id.* at 30.

¹⁵⁹ *Id.* at 4. Drawing from the conclusion presented, the report further notes that "[n]one of the five options for alternative sources of revenue offers a realistic opportunity to generate significant positive net revenue that could replace the current amount of federal funding that CPB receives through the appropriations process on behalf of public broadcasting" and "[t]here is no combination of alternative sources of funding that together could replace or significantly reduce the federal appropriation." *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *See id.* at 43.

¹⁶² *See Educational Broadcasting Public Notice, supra* note 31, at 827-28.

¹⁶³ *Id.* at 827 (explaining that striking a balance between preserving the mission of public television and attracting additional business support on behalf of the stations is the stated goal of the Commission order).

the station.¹⁶⁴ Furthermore, careful conditioning of candidate or issue announcements ensures that noncommercial stations avoid any action that puts them dangerously near political activity¹⁶⁵ or may appear to promote one candidate over another, such as in situations where one candidate runs unopposed or significantly outspends her opponent. If the result in *Minority Television Project* is eventually upheld and § 399b(a)(2) and (a)(3) are found unconstitutional, noncommercial educational broadcasters, in association with CPB, already have the means by which to condition public issue and political advertising so as to preserve the station's status as a purveyor of high quality educational and public affairs programming.

B. CPB's Rules on Ancillary and Supplementary Services Provide the Blueprint for Developing an Economic Model Based on Public Issue and Political Advertising

In addition to relying on voluntary contributions from individuals, public broadcasters rely on federal funding from the CPB for an additional eighteen percent of their revenue.¹⁶⁶ Approximately seventy-two percent of CPB's federal appropriation¹⁶⁷ is made available to local public broadcast stations in the form of Direct Community Station Grants ("CSGs").¹⁶⁸ Under the Public Broadcasting Act, stations are allowed to use the grant "for purposes related primarily to the production or acquisition of programming."¹⁶⁹ Because the decision regarding the constitutionality of § 399b(a)(2) and (a)(3) only affects noncommercial educational stations in states within the Ninth Circuit,¹⁷⁰ the Corporation has maintained the restrictions on public issue and political advertisement. Broadcasters' uncertainty about how the decision to air these announcements will affect their eligibility for the CSG has the potential to chill legal speech. In response, CPB should adopt a rule on par with one it uses in the ancillary and supplementary use of digital broadcasting that allows non-

¹⁶⁴ See Educational Broadcasting *Second Report & Order*, *supra* note 22, ¶ 48 (providing guidance as to how public broadcasters tailor corporate underwritings); see also Educational Broadcasting *Memorandum Opinion & Order*, *supra* note 24, ¶ 2.

¹⁶⁵ See, e.g., 47 U.S.C. § 396(k)(12) (2006) (prohibiting public funding to noncommercial broadcasters who make their donor lists available to political candidates or parties).

¹⁶⁶ CORP. FOR PUB. BROAD., *supra* note 56, at 17.

¹⁶⁷ *How CPB Funding Works*, CPB.ORG, <http://commens.org/17WW0Cx> (last visited Apr. 13, 2013).

¹⁶⁸ *CPB's Appropriation Request & Justification*, CPB.ORG, <http://commens.org/12C1aW3> (last visited Apr. 13, 2013).

¹⁶⁹ 47 U.S.C. § 396(k)(7).

¹⁷⁰ *But see* *Minority Television Project, Inc. v. F.C.C.*, 704 F.3d 1009-10 (9th Cir. 2012) ("The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.").

commercial stations to explore this new economic opportunity while ensuring it maintains its public trustee commitments.¹⁷¹

In accordance with the Communications Act and FCC regulations, digital television (“DTV”) stations are allowed to provide “ancillary and supplementary services on designated frequencies” of a licensee spectrum as long as the uses are “consistent with the public interest, convenience, and necessity.”¹⁷² Common services provided by DTV licensees include computer software distribution, data transmissions, paging services, and subscription video.¹⁷³ Under this framework, public television stations are permitted to provide their spectrum for ancillary and supplementary services in commercial ventures, but the spectrum must be used “primarily for a non-profit, noncommercial, educational or broadcast service[.]”¹⁷⁴ Reaffirming its strong commitment to public broadcasters’ “noncommercial, educational mission,” the Corporation subsequently ruled that CPB funding could not be used to “support . . . commercial and advertiser-[affiliated] ancillary and supplementary services.”¹⁷⁵ Furthermore, CPB asserted a policy in which noncommercial stations were disallowed from counting revenues received through these services as “non-Federal financial support” or matching funds when developing CPB grants.¹⁷⁶

In its *Report on Alternative Sources of Funding for Public Broadcasting*, CPB argued that the Ninth Circuit’s decision in *Minority Television Project* “would quickly erode the public’s trust in the integrity of public broadcasting’s content.”¹⁷⁷ However, the ancillary and supplementary use rules illustrate that when conditioned properly, noncommercial educational stations can take advantage of emerging economic models to supplement revenues. Conditioning the ancillary and supplementary rules to ensure that public broadcasters are not allowed to use revenue for federal matching funds in a grant proposal requires

¹⁷¹ See Press Release and Board Resolution, Corp. for Pub. Broad., Corporation for Public Broadcasting Board Clarifies Rule on Revenues Derived from Ancillary and Supplementary Services (Nov. 19, 2001), available at <http://commcns.org/1c7Nkfv>.

¹⁷² 47 U.S.C. § 336(a)(2) (2006); see also Digital Television Broadcast Stations, 47 C.F.R. § 73.624(c) (2011); *In re Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, *Fifth Report and Order*, 12 F.C.C.R. 12,809, ¶ 20 (Apr. 3, 1997).

¹⁷³ 47 C.F.R. § 73.624(c) (listing other services such as teletext, interactive materials, aural messaging, and audio signals). Licensees must charge a fee for such ancillary and supplementary services and are not allowed to abandon the free DTV channel in favor of such uses.

¹⁷⁴ See *In re Ancillary or Supplementary Use of Digital Television Capacity by Non-commercial Licensees*, *Report and Order*, 16 F.C.C.R. 19,042, ¶¶ 15-18 (Oct. 11, 2001).

¹⁷⁵ See Corp. for Pub. Broad. Press Release, *supra* note 171.

¹⁷⁶ See Board Resolution, Corp. for Pub. Broad., Corporation for Public Broadcasting Board Clarifies Rule on Revenues Derived from Ancillary and Supplementary Services (Nov. 16, 2001), available at <http://commcns.org/18eig9S>.

¹⁷⁷ CORP. FOR PUB. BROAD., *supra* note 56, at 4.

the stations to spend subsequent time tending to the cultural, informational, and educational needs of the community. Revenues generated by noncommercial educational stations from tailored issue and political advertisements should similarly be conditioned as “non-Federal financial support” for calculation purposes when attempting to match a CPB funding requirement. While a grantee may not be able to count revenue against a match requirement, the station can present issue and candidate announcements without risking its ability to pursue federal funding. This treatment would sanction the “virtuous circle” by providing the community with public affairs programming that served to inform and educate the community while affording struggling stations a new revenue opportunity.

V. CONCLUSION

Throughout the 2012 election, pundits across the major news networks decried their own inability to foster a serious debate on public issues and domestic policy. As the primary agent for educational and local content, public broadcasters are well situated to immediately explore the many benefits of offering public issue and political advertisements. The initial resistance to the Ninth Circuit’s unexpected decision in *Minority Television Project* and concern that stations may eventually choose to participate in political and issue advertising is misplaced. Rather than seeing this as the death knell of public broadcasting’s mission to educate and inform the community in line with its public trust obligations, noncommercial stations and public broadcasting’s administrative agencies should embrace this unique opportunity and develop policy that will allow struggling television licensees to develop a solid, if cyclical, economic model for future prosperity. At the same time, the *Minority Television Project* decision gives public broadcasters a chance to engage in important political speech that perhaps has been missing from the airwaves.

There are two ways in which public broadcasters can leverage the opportunities created by public issue and political advertising. Instituting internal controls over the content of these messages, like the FCC’s regulations on corporate underwriting, will benefit a community that might not get substantive political discussion on commercial stations. Developing political and public issue advertisements using this framework could lead to constructive and positive political discourse that makes the public broadcast networks that much more attractive to an informed citizenry seeking a substantive political discussion. Similarly, allowing channels to offer political and public issue announcements with the knowledge that they have not jeopardizing their ability to apply for a CPB grant will ensure that stations will continue to meet their public interest goals so as to secure other sources of funding that count against federal match

requirements. These two measures may be able to help struggling stations achieve the goal of preserving the educational mission of public broadcasters while developing new sources of revenue. Without a doubt, noncommercial educational stations interested in the possibilities that political and issue advertising present will be watching and waiting to see how *Minority Television Project* progresses and how they can support this new virtuous cycle—where the goals of offering premium educational content while maintaining economic subsistence are no longer mutually exclusive.