

10-1293

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Petitioners,

—v.—

FOX TELEVISION STATIONS, INC., ET AL.,

Respondents.

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

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

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INTEREST OF *AMICI CURIAE*¹

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

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

⁵ 319 U.S. 190 (1943).

⁶ 436 U.S. 775 (1978).

⁷ 453 U.S. 367 (1981).

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

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

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

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

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

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

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

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

ARGUMENT

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