

Ninth Circuit Court of Appeals Finds Public Television Ban for Issue and Political Advertisements Unconstitutional

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On April 12, 2012, a divided three-judge panel of the U.S. Court of Appeals for the Ninth Circuit ruled in *Minority Television Project v. FCC* that the Communications Act's ban on noncommercial broadcast stations airing political and issue advertising violated the First Amendment. Applying intermediate scrutiny, the court found "no evidence in the record" that the ban under 47 U.S.C. § 399b was necessary to further the government's interest in "ensur[ing] that high quality educational and noncommercial programming is broadcast on the public airwaves." Though the court struck down the political and issue advertising provisions for public stations, the court upheld the prohibition on running advertisements for goods and services by for-profit entities.

In "synthesizing three decades of First Amendment cases," the majority opinion held that the government must provide "substantial evidence in the record before Congress at the time of the statute's enactment" that the statute "does not burden more speech than necessary." The majority also applied commercial speech precedents and held that "the government must prove that the speech *banned* by a statute poses a greater threat to the government's purported interest than the speech *permitted* by the statute."

Applying these standards, the majority ruled that "neither 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." However, neither the concurring opinion nor the dissent agreed with the majority's reliance on commercial speech

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In a separate and unpublished opinion, the court rejected the Appellant's claim that the statute was unconstitutionally vague.