wiley

NEWSLETTER

Keeping the Faith: Ninth Circuit Reinstates Ban on Political and Issue Ads in Public Broadcasting

January 2014

Corporations and advocacy groups seeking to place political and issue advertisements on noncommercial educational TV or radio stations (often referred to as public stations) may have thought a 2012 Ninth Circuit decision striking down a ban on such advertising was too good to be true. They would have been right. In December 2013, the Ninth Circuit reinstated the ban when it found that Congress properly relied on evidence that such forms of advertising would degrade the noncommercial nature of public stations.[1]

The Initial Ninth Circuit Decision in 2012

In April 2012, the Ninth Circuit initially addressed the question of whether Congress could constitutionally enact the free speech restrictions contained in 47 U.S.C. § 399b, which prohibits public stations from accepting paid promotional advertising from for-profit entities as well as certain political and issue advertising.[2] The case, *Minority Television Project, Inc. v. FCC*, 676 F.3d 869 (9th Cir. 2012), was brought by Minority Television Project, the licensee of a public broadcast television station in San Francisco that the Federal Communications Commission (FCC) previously had fined for airing paid advertisements from for-profit entities.

The Ninth Circuit's 2012 decision struck down the restrictions on political and issue advertising. Because the law is a content-based restriction, the court applied intermediate scrutiny, meaning that the government must show that it has a substantial interest in restricting speech, and that the ban is narrowly tailored to serve that interest. Minority Television Project did not take issue with the government's

Authors

Kathryne C. Dickerson
Partner
202.719.7279
kdickerson@wiley.law

substantial interest "in ensuring high-quality educational programming on public broadcast stations." Instead, the meat of the dispute centered on whether the advertising ban was narrowly tailored to Congress' goal of preventing the commercialization of public broadcast stations. Initially, the Ninth Circuit found it was not. Unlike the ban on for-profit advertisements, which *was* substantiated by evidence before Congress, the court found *no* evidence supporting Congress' conclusion that political and issue advertising would impair the noncommercial educational nature of public broadcast stations.

Changing Course: A Recent Reversal

In December 2013, the Ninth Circuit reversed. *See* 736 F.3d 1192 (9th Cir. 2013) (*en banc*). Sitting *en banc* (meaning an expanded panel reviewed the earlier decision of a three-judge panel), the court found that Congress could ban political and issue advertising from public airwaves.

Again, the dispositive question was whether the ban was narrowly tailored to prevent the commercialization of public airwaves. Despite the "special place [of] political speech," the court found that Congress could limit such speech by public broadcasters within the bounds of the Constitution. According to the court, political and issue advertising threatened public broadcasting for the same reason as for-profit advertising. Namely, all three types of advertising "seek the largest possible audience" and thus have the potential to cause public broadcasters to "distort programming decisions" and curtail diverse content in favor of programming designed to appeal to the largest possible audience.

What's Next?

The *en banc* decision may not be the end of this story. Minority Television Project may still decide to petition the Supreme Court of the United States for review. In addition to the merits question (whether the political and issue advertising ban is consistent with free speech principles), two interesting procedural questions could provide additional reason for the high court to review this dispute.

- **The broadcast spectrum debate.** Four of the six opinions written in the Ninth Circuit proceedings resurrect an issue ducked on several recent occasions by the Supreme Court: whether courts should continue to uphold greater speech restrictions on broadcast stations than in other mediums. The original justification for this position, first announced in 1969, was based on the scarcity of broadcast spectrum. Some critics (and courts)assert that technological advancements in the intervening years have made this rationale obsolete. On appeal to the Supreme Court, therefore, Minority Television Project may argue that the stricter scrutiny that protects political speech in other contexts (recall *Citizens United*) should finally extend to broadcast television and radio.
- **The congressional record debate.** The Ninth Circuit based its decision to uphold the ban on political and issue advertising partly on testimony given 30 years after the ban was enacted. The case therefore tees up a question first posed by the Supreme Court in 1994—whether "new" testimony given in District Court can supplement the "old" record relied upon by Congress at the time of a statute's enactment. The high court may decide to answer this question should Minority Television Project appeal.

For now, absent any appeal, the important takeaway is that section 399b remains intact and that public broadcasters face greater speech restrictions than their Internet, mobile, or cable counterparts.

---

[1]Public broadcast stations occupy channels specifically set aside for them by the FCC and have a different purpose than commercial stations—namely, providing a "high-quality type of programming" aimed at "educating the people both in school—at all levels—and also the adult public."

[2]Specifically, section 399b prohibits three types of paid advertising on public broadcast stations: (1) for-profit advertising that promotes any service, facility, or product; (2) issue advertising that expresses the views of a person on an issue of public importance or interest; and (3) political advertising that supports or opposes candidates for public office.