



Virginia Association of Broadcasters Legal Review



Brooks, Pierce, McLendon, Humphrey & Leonard, LLP
Counsel to VAB • (919) 839-0300

250 West Main Street, Suite 100
Charlottesville, VA 22902 • (434) 977-3716

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FEDERAL COURT STRIKES DOWN BAN ON POLITICAL AND ISSUE ADVERTISEMENTS FOR PUBLIC BROADCASTERS

Last week, a federal court based in California issued a surprising and sure to be controversial decision finding the Communication Act's ban on the airing of political and issue advertisements by public broadcasters to be a violation of their First Amendment rights. By a two to one majority, the court held that the ban on all paid public issue and political speech by public broadcasters is an unconstitutional content-based restriction on speech because the statute permits paid promotional messages by non-profit advertisers on these same stations. While the court struck down the ban on issue and political advertisements, the court upheld the statute's ban on advertisements for goods and services by for-profit entities.

Should this decision be affirmed on what would appear to be an inevitable appeal, the effect of the court's decision will be to permit public broadcasters to carry paid political and issue advertisements but not regular commercial advertisements. It should be emphasized that this decision does not *require* public broadcasters to air political and issue advertisements, but, rather, it simply permits public broadcasters to accept such ads if they choose to do so. Public broadcasters remain exempt under a separate provision of the Communications Act from "reasonable access" claims by federal candidates.

The case raises important questions about the nature of public broadcasting, as it threatens to blur the lines between commercial and public broadcasting—at least as to political and issue advertisements.

The decision came in response to a challenge to the law by Minority Television Project ("Minority"), a nonprofit California corporation that operates the San Francisco public broadcast station KMTP-TV. On August 9, 2002, pursuant to a complaint by another broadcaster, the FCC determined that Minority had violated Section 399b approximately 1,900 times over a three-year period by broadcasting paid promotional

messages from for-profit corporations. Minority was fined \$10,000 by the FCC, which it paid, and then filed a complaint in the Northern District of California federal court seeking reimbursement of the \$10,000 and declaratory relief. After losing at the district court level, Minority appealed to the Ninth Circuit.

The Ninth Circuit panel concluded that the ban on all paid public issue and political speech was not narrowly tailored to the substantial government interest of ensuring high-quality educational programming on public broadcast stations, and was therefore unconstitutional. In particular, the court found there was no evidence in the record before Congress at the time of the statute's enactment connecting the ban on issue and political ads to the government's interest in maintaining certain types of "niche" programming offered by public broadcasters. The court also found there was no evidence that public issue and political advertisements are more harmful than promotions for goods and services by non-profits, which are allowed by the statute.

By contrast, in upholding the statute's ban on regular commercial advertising, the court concluded there was ample evidence before Congress of a connection between the airing of advertisements for for-profit entities and a threat to public broadcast stations' "niche" programming.

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The decision raises numerous complexities for public broadcasters, including the following.

- Public broadcasters cannot be assured that the decision will be binding in courts outside of the Ninth Circuit. (The Ninth Circuit includes the far western states—AK, AZ, CA, HI, ID, MT, NV, OR, and WA.) Therefore, unless and until the FCC provides notice that it will no longer enforce the ban on issue and political ads for public broadcasters, public broadcasters in states outside of the Ninth Circuit's jurisdiction are potentially subject to enforcement proceedings notwithstanding the Ninth Circuit decision.
- For public broadcasters that are licensed to state governmental entities, there may be separate state law restrictions on their ability to air issue or political advertisements.
- The decision does not overturn any private contractual restrictions that may exist as a condition of receipt of funding or programming affiliation. To the extent that such conditions prohibit issue or political ads, those conditions will remain enforceable.
- Public broadcasters will wish to consider the potential tax implications of accepting issue and political ads with respect to nonprofit or tax-exempt status. For example, under the tax laws, tax-exempt Section 501(c)(3) corporations may not ". . . participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." Such entities will

need to consider whether they are permitted to accept political advertisements within the parameters of this prohibition.

- To the extent that a public broadcaster accepts political ads, it will be required to offer such ads at the “lowest unit charge” consistent with the rules applicable to broadcasters generally. How these rules will be applied to a station that does not air regular commercial advertising is not clear at this point.

There are several options for further review of the Ninth Circuit’s panel decision. The government may seek rehearing of the decision by the full Ninth Circuit court; it could seek review by the U.S. Supreme Court; or it could ask Congress to revisit this issue. Given these options, and the likely controversy flowing from the decision, it is quite possible that the Ninth Circuit panel decision will not be the final word on this issue.

Given this, combined with the potential for further judicial review of the decision and the legal complexities it generates, public broadcasters should tread very carefully in this area until the full implications of the decision are known and evaluated.

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If you should have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.

Wade H. Hargrove
Mark J. Prak
Marcus W. Trathen
David Kushner
Coe W. Ramsey
Charles E. Coble
Charles F. Marshall
Stephen Hartzell
J. Benjamin Davis
Julia C. Ambrose
Elizabeth E. Spainhour
Eric M. David
Mary F. Peña
Dorrian H. Horsey
Laura S. Chipman

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