

ORIGINAL

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 82-912

**TITLE** FEDERAL COMMUNICATIONS COMMISSION, Appellant v.  
LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

**PLACE** Washington, D. C.

**DATE** January 16, 1984

**PAGES** 1 thru 59



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1                   IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -x  
3   FEDERAL COMMUNICATIONS COMISSION       :  
4                               Appellant       :  
5                   v.                        : No. 82-912  
6   LEAGUE OF WOMEN VOETERS OF           :  
7   CALIFCENIA, et al.                   :  
8   :  
9   - - - - -x

10   Washington, D.C.  
11   Monday January 16, 1984

12                   The above-entitled matter came on for oral  
13   argument before the Supreme Court of the United States  
14   at 1:50 p.m.

15  
16   APPEARANCES:

17  
18   SAMUEL A. ALITO, JR., ESQ., Office of the Solicitor  
19   General, Department of Justice, Washington, D. C.; on  
20   behalf of Appellant.

21  
22   FREDERIC D. WOOCHEE, ESQ., Los Angeles, California;  
23   on behalf of the Appellees.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Alito, I think you may proceed when you are ready.

ORAL ARGUMENT OF SAMUEL A. ALITO, JR., ESQ.,  
ON BEHALF OF APPELLANT

MR. ALITO: Mr. Chief Justice, and may it please the Court:

This case concerns the constitutionality of 47 U.S.C. Section 399 which prohibits editorializing by those public television and radio stations that receive federal subsidies from the Corporation for Public Broadcasting. This case is a direct appeal from a decision by the United States District Court for the Central District of California which invalidated Section 399.

Appellees have raised a question about this Court's jurisdiction over the case, and the Court has postponed further consideration of the jurisdictional issue to the hearing on the merits. We have fully briefed the jurisdictional issue, and therefore, unless the Court has some questions on that matter, I will move directly to the merits of the case.

QUESTION: I do have a question, actually, Counsel.

Did you cite the Griggs decision of last term

1 in connection with this, interpreting Rule 4(a)(4)?

2 MR. ALITO: Yes. That, of course, is one of  
3 the principal bases upon which Appellees rely. But of  
4 course, the appellate rules do not govern appeals to  
5 this Court, and there is a provision in 4(a)(4) which is  
6 noticeably absent from this Court's rules, and that  
7 provision says that a notice of appeal filed while  
8 certain post-trial motions are pending is a nullity.  
9 There is no such provision in this Court's rules. As I  
10 understand it, the rule prior to the 1980 amendment of  
11 the appellate rules which added that provision was that  
12 a notice of appeal filed under those circumstances would  
13 be valid, and therefore, I would believe that the  
14 absence of such a rule in this Court's rules means that  
15 our notice of appeal here is valid.

16 I would also point out that I think there is a  
17 question whether Rule 4(a)(4) applies to interlocutory  
18 appeals, even to the courts of appeals. But in any  
19 event, as I said, that rule does not apply to appeals to  
20 this Court.

21 QUESTION: But certainly the Griggs result  
22 creates a trap for the unwary, doesn't it?

23 MR. ALITO: It creates a trap for the unwary,  
24 and when there is no provision in the governing rules  
25 pointing that trap out, it is all the more dangerous and

1 unfair. There is nothing in this Court's rules that say  
2 that a notice of appeal filed while a motion for  
3 reconsideration is pending is a nullity, and I think  
4 that to reach that result in this case would frustrate  
5 the intent of Section 1252 under which we appealed,  
6 which of course is to allow a speedy and authoritative  
7 disposition of questions involving the constitutionality  
8 of acts of Congress.

9           If that had to wait while a collateral matter  
10 like attorneys' fees was decided, I think Congress'  
11 intent would be frustrated. For example, here nearly a  
12 year went by while the attorneys' fees question was  
13 being decided by the District Court.

14           Moving to the merits of the case, Section 399  
15 has two separate provisions. The first provision which  
16 is directly attacked here today of course provides, as I  
17 said, that stations receiving federal funds from the  
18 Corporation for Public Broadcasting may not engage in  
19 editorializing. In fact, every public television  
20 station at last count, and virtually every full service  
21 public radio station receives such funds.

22           The term editorializing has been  
23 authoritatively construed by the FCC, consistent with  
24 the legislative history, to mean only the official  
25 endorsement of views by station management, and

1 therefore, Section 399 does not prohibit the discussion  
2 of any topic or the expression of any viewpoint.  
3 Station employees, journalists, commentators, public  
4 officials and everybody else can express their views on  
5 any subject. The only thing that cannot be said is this  
6 editorial represents the position of station management,  
7 or something to that effect.

8 And of course, a station can say even that if  
9 only it is willing to give up federal funds. If these  
10 funds are as insubstantial as Appellees and the district  
11 court suggest, then that should not represent a major  
12 sacrifice.

13 There is a second provision of 399 that is not  
14 directly challenged here today, but we believe it is  
15 nevertheless very much at issue, and that provision  
16 prohibits public stations from supporting or opposing  
17 candidates for office.

18 Now, Appellees originally challenged that  
19 provision as well and advanced almost the same arguments  
20 they now advance in this court in attacking the first  
21 provision of Section 399. But they abandoned that  
22 appeal with Pacifica saying that at least for the  
23 present it has no intention of supporting or opposing  
24 candidates.

25 QUESTION: Mr. Alito, you sat they abandoned



1 that appeal. Do you mean they abandoned that prong of  
2 their attack in the district court?

3 MR. ALITO: Yes, I misspoke, Justice  
4 Rehnquist. They amended their complaint.

5 But the argument that they have made in this  
6 Court that Section 399 can survive only if it is the  
7 most narrowly drawn statute designed to serve a  
8 compelling governmental interest would surely call for  
9 the invalidation of the second provision of Section 399  
10 as well if it calls for the invalidation of the first.  
11 And indeed, that argument is so broad that it calls into  
12 question virtually all of the special rules that apply  
13 to public stations as well as rules like the fairness  
14 doctrine that apply to all broadcasters.

15 Appellees play a kind of hide and seek game  
16 with this regulatory structure. They deploy, as they  
17 said, a First Amendment argument that seems to require  
18 that most of it be swept away, yet at the same time they  
19 rely on these regulations, including the second  
20 provision of Section 399 to show that the provision on  
21 editorializing is unnecessary.

22 QUESTION: Well, the standard which you  
23 attribute to Appellee as the narrowest possibly tailored  
24 is really the standard that applies to the government as  
25 regulator, isn't it, not to the government as expending



1 public funds.

2 MR. ALITO: I'm not sure I understand your  
3 question, Justice Rehnquist.

4 QUESTION: Well, we have held, for instance,  
5 in cases like *Began v. Taxation with Representation*,  
6 *United States Postal Service v. Greenberg* and cases like  
7 that that where the government isn't acting as lawgiver  
8 in the sense of regulating private individuals, but  
9 instead, deciding how it is going to put its property to  
10 use or how it is going to spend its money, the standards  
11 are a good deal more lenient.

12 MR. ALITO: It certainly is, and that is our  
13 second argument in this case. Section 399 does not  
14 prohibit a public station from editorializing. It  
15 simply says that if it wants to do so, it can't receive  
16 funds from the Corporation for Public Broadcasting.

17 QUESTION: Did the government make that  
18 spending power argument below?

19 MR. ALITO: We did not couch it in those  
20 terms, but we certainly pointed out and relied upon the  
21 fact of government funding, and the district court  
22 addressed that question, and I don't really think that  
23 the spending power raises a different question. It's  
24 just an aspect of the same larger question, whether  
25 Section 399 violates the First Amendment, and I think

1 that is the same question whether the affirmative basis  
2 for Congress' action is the spending power or the  
3 commerce power.

4 QUESTION: But if you say that, you can't also  
5 be arguing, well, all they have to do is give up the  
6 money, and they can -- because your argument really  
7 would extend a blanket prohibition against  
8 editorializing by public stations.

9 MR. ALITO: We are making two arguments,  
10 Justice Stevens. We believe that Section 399 was  
11 constitutional as originally enacted in 1967, and we  
12 believe it is all the more constitutional as amended in  
13 1981. In fact, I think the effect of the amendment in  
14 practical terms was very slight since substantially all  
15 stations receive these funds, and it was Congress'  
16 belief in 1967 that they would receive those funds.

17 QUESTION: I think your basic argument would  
18 really apply not merely to public television but to all  
19 licensed television, wouldn't it?

20 MR. ALITO: No, not at all, Justice Stevens.  
21 Nothing in our submission has any implications for  
22 commercial broadcasting. The heart of our argument is  
23 that public broadcasting is very different in many ways  
24 from commercial broadcasting. It was created for a  
25 different purpose, and it is dominated by government

1 entanglements that have no parallel whatsoever in the  
2 world of public broadcast -- of commercial  
3 broadcasting. And it is that which supports the  
4 constitutionality.

5 QUESTION: Well, there is this parallel, that  
6 in both areas the government has the power to say you  
7 cannot continue to broadcast. I mean, because even in  
8 the private sector they have the licensing power.

9 MR. ALITO: Well, that is certainly true, and  
10 the government has considerable power over all  
11 broadcasting that it doesn't possess with respect to the  
12 print media. I think this Court's cases have recognized  
13 that the government's power with respect to all  
14 broadcasting permits restrictions on the right to  
15 editorialize. The right to editorialize is also the  
16 right not to editorialize, as the Court said in Miami  
17 Herald Company v. Tornillo, but commercial broadcasters  
18 are encouraged to editorialize, and they have to give up  
19 time for reply under certain circumstances when they  
20 make an attack on an individual or a group or they  
21 support or oppose a candidate. That is a restriction on  
22 editorializing that would not be tolerated in the print  
23 media.

24 The question here is whether a further  
25 restriction on editorializing that Section 399 puts into

1 effect is justified by the special characteristics of  
2 public broadcasting.

3 Let me turn to those special characteristics.  
4 First of all, there is the matter of funding.  
5 Sixty-seven percent of the income of public radio comes  
6 from direct government subsidies, and approximately 60  
7 percent of the income of public television --

8 QUESTION: We will resume there at 1:00  
9 o'clock.

10 (Whereupon, at 12:00 o'clock noon, the Court  
11 recessed, to reconvene at 1:00 o'clock p.m., this same  
12 day.)  
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1 AFTERNOON SESSION

2 (1:00 p.m.)

3 CHIEF JUSTICE BURGER: Mr. Alito, you may  
4 proceed when you are ready.

5 ORAL ARGUMENT OF SAMUEL A. ALITO, JR., ESQ.,

6 ON BEHALF OF APPELLANT -- Resumed

7 MR. ALITO: Mr. Chief Justice, and may it  
8 please the Court:

9 Before lunch I was beginning to talk about the  
10 enormous differences between public broadcasting which  
11 is involved here, and the commercial sphere of the  
12 industry, with which this Court is perhaps more familiar  
13 due to its prior decision.

14 Appellee has tried to -- the Appellees have  
15 tried to suggest in this case that public stations are  
16 generally just like commercial stations: they are free  
17 to do and say whatever they want with the sole exception  
18 of the ill-motivated restriction contained in Section  
19 399, and that is simply not true. Public stations are  
20 subject to many special restrictions designed to ensure  
21 that they remain true to their intended purpose and  
22 fulfill their public mission.

23 For example, they may not be profit-making  
24 institutions. They can only be licensed to units of  
25 government and non-profit groups. They may not sell air

1 time even for political or public affairs programming.  
2 They may not accept advertising, even political  
3 advertising. They have -- they are subject to special  
4 equal employment opportunity rules, special accounting  
5 rules, special open meeting requirements. They have to  
6 have community advisory boards to review their  
7 programming and see if they are serving the needs of the  
8 entire community.

9 Now, before lunch, before lunch I started to  
10 talk about the matter of funding, and of course, that is  
11 critical here. I pointed out that fully 60 percent of  
12 the income of public broadcasting comes from direct  
13 government grants, and that is really only the  
14 beginning. Virtually every public television station  
15 facility in this country was built with substantial  
16 federal funds, and many of public broadcasting's most  
17 popular shows, such as Sesame Street, are financed with  
18 federal dollars and are supplied to these stations at no  
19 cost or less than cost. And then, of course, there are  
20 the huge tax subsidies that these stations receive by  
21 virtue of their tax-exempt status.

22 Appellees have attempted to disparage the  
23 significance of the federal contribution to public  
24 stations, but on this point I think I will let the  
25 Corporation for Public Broadcasting speak for itself.



1 In its latest annual report, it says flatly, general tax  
2 revenues are the linchpin of a viable American Public  
3 Broadcasting Service.

4 And then there is the question of ownership.  
5 Two-thirds of these stations are actually owned outright  
6 by units of government or by government  
7 instrumentalities.

8 QUESTION: You don't mean the United States  
9 government, though

10 MR. ALITO: Not by the federal government, but  
11 by state and local governments, and typically, by boards  
12 or authorities that state government sets up to run  
13 these stations.

14 Let me take just one example, the example of  
15 Alabama, just because it is --

16 QUESTION: Well, Mr. Alito, are you suggesting  
17 that a state operated public broadcasting system or  
18 station is subject to more federal regulation under the  
19 Constitution than a privately owned -- well, there can't  
20 be a privately owned one, can there?

21 You say there can't be a privately -- say, is  
22 a state operated station subject to more regulation  
23 under the Constitution than a station owned by a  
24 nonprofit private corporation?

25 MR. ALITO: Section 399 does not draw that



1 sort of distinction, but our argument is that Congress  
2 was legislating against the backdrop of the type of  
3 public broadcasting system it intended to create, and it  
4 envisioned the fact that many of these stations were  
5 going to be governmentally owned.

6 QUESTION: But what if, say, the State of  
7 Alabama or the City of Birmingham, whatever the other,  
8 say we would like our station to editorialize?

9 MR. ALITO: Well, I think the Congress in  
10 regulating broadcasting can take into account the kinds  
11 of abuses that may develop when a publicly owned station  
12 using public funds, even state or local funds, engages  
13 in editorializing and supporting or opposing  
14 candidates. I think that creates the possibility of  
15 grave abuses that are not present, certainly in the area  
16 of commercial broadcasting. It creates the danger that  
17 the station will be used as an outlet for government  
18 propagandizing, and I think that one of the things the  
19 First Amendment tries to prevent is government at any  
20 level drowning out private voices in the media of  
21 communication. It creates the possibility that people  
22 will go into public broadcasting not because they are  
23 primarily concerned with excellence and diversity in  
24 broadcasting, which was the purpose for the Public  
25 Broadcasting Act, but because they are interested in

1 pushing a particular partisan or ideological message.

2 That's the --

3 QUESTION: Do they allow debates on local  
4 controversial issues if the city municipal corporation  
5 owns the station?

6 MR. ALITO: Absolutely. They are allowed to  
7 broadcast any view on any issue, and anybody can speak  
8 in an individual capacity or representing any group save  
9 one, and that is the management of the station.

10 QUESTION: Well, how does that avoid ideology  
11 then?

12 MR. ALITO: Because it avoids the labeling by  
13 the station of a particular view as official.

14 QUESTION: You mean they carry the Red Lion  
15 concept way beyond what it -- the way it regulates  
16 private profit stations.

17 MR. ALITO: It does carry the reasoning of Red  
18 Lion a step further, and it does that because these are  
19 public stations. They are not financed with private  
20 advertising dollars; they are financed in large measure  
21 by money that is supplied by the taxpayers, and it would  
22 in many ways be fundamentally unfair if public money  
23 were used to propagate a single, narrow set of partisan  
24 or ideological views.

25 QUESTION: Mr. Alito, would you make the same

1 argument for a newspaper if it received some kind of  
2 public subsidy?

3 MR. ALITO: If newspapers received subsidies  
4 of this order, I suppose some of the same arguments  
5 could be made, but that is a difficult question to  
6 answer because it presupposes a world of publishing that  
7 is alien to what we have always known. The federal  
8 government does not subsidize the print media in any way  
9 that resembles the subsidies that are given to  
10 public --

11 QUESTION: It perhaps may subsidize them  
12 indirectly through tax benefits of some kind or  
13 deductions.

14 MR. ALITO: It, it is --

15 QUESTION: Postage rates.

16 MR. ALITO: Well, I know Appellees have relied  
17 on postage rates. I seriously question whether those  
18 are subsidies of any sort, and in any event --

19 QUESTION: Well, you mean they are not  
20 consequential? The weekly news magazines couldn't  
21 function if they didn't get the special rates, couldn't  
22 stay in business.

23 MR. ALITO: Well, that is true, Mr. Chief  
24 Justice, but they operate in a very different way from  
25 the subsidies here. They allow -- they are not intended

1 to subsidize the publication. They are intended to make  
2 it --

3 QUESTION: It is an indirect subsidy.

4 MR. ALITO: Their purpose is to make it less  
5 expensive for an individual to receive the publication  
6 of his choice, and if I like Popular Mechanics and I  
7 don't like Field and Stream, I can't complain because my  
8 neighbor gets Field and Stream at a slightly lower price  
9 because I get the same break on Popular Mechanics.

10 But here, most communities have a single  
11 public television station and a single public radio  
12 station, and therefore, if my tax money is used to  
13 subsidize a station that continually espouses causes  
14 that I disagree with and candidacies that I oppose, then  
15 I am going to take objection.

16 QUESTION: Well, in many communities there is  
17 only one newspaper.

18 MR. ALITO: Well, that is not due to the fact  
19 of government regulation in any sense, and not due to  
20 the fact of government subsidy.

21 This Court has relied on the scarcity of  
22 broadcast frequencies to justify restrictions.

23 QUESTION: Well, isn't that changing? Aren't  
24 there far more frequencies available today than in the  
25 past?

1 MR. ALITO: There are, Justice O'Connor, but I  
2 think there is still a scarcity with respect to the most  
3 valuable frequencies, VHF television stations, for  
4 example, in the most desirable markets. And I think in  
5 any event that is a judgment for Congress to make.  
6 Congress certainly has not abandoned the scheme of  
7 licensing broadcasters in the public interest which  
8 rests upon an idea of frequency scarcity.

9 QUESTION: The government doesn't have to rely  
10 only on the Red Lion, does it? I mean, it can rely also  
11 on the right of any contributor to attach strings to its  
12 contributions.

13 MR. ALITO: Absolutely, Justice Rehnquist, and  
14 let me turn then to that point.

15 As I said, Section 399 does not prohibit a  
16 station from editorializing. It simply says if you want  
17 to editorialize, you have to do it with private money.

18 Congress has frequently enacted statutes like  
19 this which condition the receipt --

20 QUESTION: Well, would your position then be  
21 that as long as the station isn't using the public money  
22 for the editorializing aspect, that it is all right?

23 MR. ALITO: No, Justice O'Connor. I think  
24 that that is artificial economics. Federal support  
25 assists every aspect of station operations, and as the



1 sentence I read from the Corporation for Public  
2 Broadcasting report indicates, in many instances it is  
3 absolutely vital for the continued existence of public  
4 stations in their present form.

5           Therefore, if there were no such support, in  
6 many cases there would be no antenna, there would be no  
7 studio, there would be no employees, and it would not  
8 really make very much difference if the station could  
9 draw from private funds, the small, direct incremental  
10 amount necessary to broadcast the editorial. If funded  
11 public stations were permitted to editorialize, given  
12 the nature of funding for public broadcasting, the  
13 federal government would necessarily be subsidizing that  
14 editorializing, and that is one of the chief things that  
15 Congress sought to prevent.

16           Now, Appellees' argument is that Section 399  
17 is unconstitutional because it attaches an  
18 unconstitutional condition to the receipt of federal  
19 money, and they rely on cases like *Speiser v. Randall*  
20 and *Perry v. Sindermann*, and *Sherbert v. Verner*, but  
21 those cases I think are clearly distinguishable from  
22 this one on at least three major grounds.

23           First of all, this Section 399 is not in any  
24 way content-related. It does not prevent anybody from  
25 expressing any view or discussing any topic. An

1 argument very similar to Appellees' was made to this  
2 Court in FCC v. National Citizens Committee for  
3 Broadcasting in which the Court considered the  
4 constitutionality of regulations that prohibited  
5 newspapers from getting broadcast licenses in the same  
6 market, and the Court unanimously rejected on the ground  
7 that the regulations there were not content-related.  
8 And that distinguished Speiser in that line of  
9 authority.

10 And I think this --

11 QUESTION: I am puzzled but this argument. It  
12 seems to me the very test of what can't be broadcast is  
13 a content -- is defined in terms of content: that you  
14 can't give editorial.

15 MR. ALITO: I don't believe that's true,  
16 Justice Stevens. I think a measure is content-related,  
17 as I said, if it restricts the expression of any view  
18 or the discussion of a topic, and Section 399 does not  
19 do that. It simply says you cannot editorialize. It  
20 concerns the packaging of expressing rather than its  
21 content.

22 QUESTION: But you surely couldn't tell  
23 whether the program you listen to were an editorial or  
24 not without listening to its content, could you?

25 MR. ALITO: Well, I think that that is true,



1 but it is not content-related in the senses that I  
2 believe this Court has pointed out in its opinion, in  
3 its opinions.

4           The Speiser line of authority is  
5 distinguishable in any event, I think, on two other  
6 grounds. First of all, Section 399, as I said, prevents  
7 the use of federal money to subsidize editorializing,  
8 given the nature of the funding that public broadcasting  
9 receives, and in Speiser and those other cases there was  
10 no real question of subsidy. In Speiser, for example,  
11 taxpayers were denied a property tax exemption that was  
12 given to honorably discharged veterans, and they were  
13 denied that on the ground that they refused to sign a  
14 loyalty oath.

15           Well, you certainly couldn't say that the  
16 property tax exemption, if it had been given, would be  
17 subsidizing their refusal to sign the loyalty oath, and  
18 I think that is true of the other cases upon which  
19 Appellees have relied.

20           And finally, the restriction here is closely  
21 related to the purposes for Congress' funding. It is  
22 not simply an extraneous limitation that is tacked on.  
23 It helps to ensure that public broadcasting remains true  
24 to its intended purpose. It helps to preserve the  
25 public, nonpartisan character that is essential for

1 public broadcasting. And --

2 QUESTION: How can you say that, Mr. Alito,  
3 when apart from funding, the broadcaster may  
4 editorialize?

5 MR. ALITO: I am not sure that I understand  
6 the thrust of your question, Justice Blackmun.

7 If a station does not receive funding, it is  
8 not covered by the statute. In fact, every station,  
9 with a few exceptions in the field of radio, does  
10 receive that funding, and thus, the statute --

11 QUESTION: But it might be funded by state  
12 funds or otherwise.

13 MR. ALITO: Well, the pattern is that these  
14 stations receive funds from a diversity of public  
15 sources. They receive about 25 percent of their  
16 funds --

17 QUESTION: Are there any which do not receive  
18 federal funding?

19 MR. ALITO: We don't know whether there are  
20 any that do not receive federal funding. We know that  
21 all public television stations receive Corporation for  
22 Public Broadcasting grants, and then 90 percent of the  
23 public radio stations that are qualified for those  
24 grants -- and that is generally the professional,  
25 full-service stations.

1           QUESTION: I am frank to say what I am  
2 bothered about with your case is that it is a complete  
3 ban on editorializing in an area that is at the core of  
4 the First Amendment, and I think therefore it is a  
5 little different from, say, Harris v. McRae.

6           QUESTION: Is the rationale behind this  
7 statute much the same in your view as behind the statute  
8 that forbids USIA broadcasts, which go to all -- many  
9 other countries, but they cannot -- the same material  
10 cannot be broadcast in this country?

11          MR. ALITO: That is certainly one of the  
12 principal bases for this statute, to prevent the use of  
13 these stations for government propagandizing. And I  
14 think it is naive to believe that a medium that gets  
15 fully 60 percent of its income from government sources  
16 could take editorial positions and support or oppose  
17 candidates without taking into account the wishes of  
18 those who control the purse strings.

19          And in the case of those stations that are  
20 owned outright by local government, I think that the  
21 argument has all the more force.

22          QUESTION: When you make that statement, you  
23 are speaking of political propagandizing, or just USIA,  
24 Voice of America type of thing?

25          MR. ALITO: I think the statute is concerned

1 with political influence of all types, whether it comes  
2 from the federal government or from state and local  
3 government.

4 When Congress enacted Section 399, it received  
5 some very compelling testimony by people who operated  
6 municipal broadcasting stations. For example, the  
7 director of the New York City station said we don't take  
8 any editorial positions because if we did, they would  
9 have to be the positions of the mayor, and therefore, we  
10 take none. And I think that is one of the purposes of  
11 Section 399, to prevent the use of these stations which  
12 were intended to be a community resource, to provide  
13 excellent broadcasting, from being used for narrow  
14 partisan purposes. And it prevents them from posing an  
15 inviting target for narrow partisan and ideological  
16 groups.

17 QUESTION: Mr. Alito, do you think a station  
18 would be free to retain a prominent commentator who  
19 appeared regularly on the station advancing political  
20 views?

21 MR. ALITO: I think it certainly would.  
22 Editorializing has been defined to mean the official  
23 expression of views by management, and if a public  
24 station wanted to have their equivalent of Eric Sevareid  
25 or David Brinkley, I see no reason why they couldn't do

1 that.

2 QUESTION: Do you think it would have any less  
3 influence doing it that way?

4 MR. ALITO: I think that it would contribute  
5 equally to public debate. I do think that it lacks some  
6 of the abusive features that official editorializing  
7 has.

8 I would draw a rough analogy here to the  
9 establishment clause of the First Amendment. The  
10 establishment clause doesn't interfere with anybody's  
11 practice of religion, but it says that Congress cannot  
12 proclaim one religion as the official religion, and that  
13 is essentially what Section 399 does.

14 It doesn't interfere with any expression of  
15 views, but it just says that a public station using  
16 public money cannot put its official stamp of approval  
17 on any particular view or candidate.

18 QUESTION: Is your response to Justice Powell  
19 then that in your view or -- it must be your view that  
20 these national commentators are totally unbiased and  
21 nonpolitical.

22 MR. ALITO: No, I don't take that position at  
23 all, but they are --

24 QUESTION: Well, I thought you said that that  
25 would be proper to use some of these shows that appear



1 on the three networks, the three commercial networks.

2 MR. ALITO: Congress in no way wanted to  
3 prevent the lively discussion of public issues and the  
4 expression of every contrasting viewpoint. It just did  
5 not want an official expression of view on behalf of  
6 station management.

7 QUESTION: Well, Congress really shut one door  
8 and left about five doors open, didn't it, for anybody,  
9 any station that wants to put on various partisan  
10 views. As long as they are not the partisan views of  
11 management, they can be put on.

12 MR. ALITO: Well, of course, they are subject  
13 to the fairness doctrine like all other broadcasters.

14 QUESTION: But which isn't -- the fairness  
15 doctrine isn't attacked here, as I understand it.

16 MR. ALITO: No, it's not, but I'm saying the  
17 fairness doctrine provides a protection against slanted  
18 broadcasting.

19 QUESTION: So far.

20 MR. ALITO: Congress drew a line where a line  
21 could be drawn between editorializing and other public  
22 affairs presentations.

23 And I do think that in the case of  
24 editorializing, there is a special feature that lends  
25 itself to abuse because public money is being used to

1 stamp an official viewpoint as that of station  
2 management, and I think that's what Congress intended to  
3 prevent.

4 QUESTION: Well, what if it appeared that this  
5 management of one of these public stations was over a  
6 period of time, it was demonstrated that he selected, he  
7 or she selected commentators whose view was all one way,  
8 either on domestic tax policy or economic policy or  
9 foreign policy? What about that?

10 MR. ALITO: I think that's a fairness doctrine  
11 question, and fairness doctrine compliance.

12 QUESTION: Only the fairness doctrine would be  
13 a limitation on them, that they would have to, if they  
14 could find one, find a commentator the other day.

15 MR. ALITO: They have to present an adequate  
16 coverage of all issues of public importance in a fair  
17 presentation of contrasting views on those issues.

18 QUESTION: Is it your position that -- I take  
19 it it must be -- that the fairness doctrine is not  
20 sufficient protection?

21 MR. ALITO: It is not sufficient protection in  
22 this sphere.

23 QUESTION: And why?

24 MR. ALITO: Well, first of all, I have trouble  
25 with the idea of balanced editorializing. Presumably a



1 station cannot take a pro and con position on an issue.  
2 It has to -- editorializing is necessarily one-sided,  
3 and precisely for the reasons that Appellees say it is  
4 important for them to editorialize, the right of a  
5 private citizen to give a reply, which incidentally is  
6 not guaranteed except in narrower circumstances under  
7 the fairness doctrine, is not a complete answer to  
8 that.

9 QUESTION: Mr. Woocher?

10 CRAL ARGUMENT OF FREDERIC D. WOOCHEER, ESQ.,  
11 ON BEHALF OF APPELLEES

12 MR. WOOCHEER: Mr. Chief Justice, and may it  
13 please the Court:

14 At issue in this case is a statute that very  
15 straightforwardly and unabashedly suppresses speech of  
16 the highest order in our constitutional framework. If  
17 this statute were directed at the Washington Post or  
18 presumably even at CPS TV instead of at Pacifica  
19 Foundation, there would be no doubt of its  
20 unconstitutionality. Indeed, in *Mills v. Alabama*, this  
21 Court said with respect to a similar ban on editorials  
22 that it was difficult to conceive of a more obvious and  
23 flagrant violation of the First Amendment.

24 Yet here the government is saying that the  
25 same ban on editorializing can constitutionally be

1 applied against Pacifica and other noncommercial  
2 broadcasters.

3 QUESTION: Do you mean by that that the City  
4 of New York or the City of Chicago can own and control a  
5 public station and let the mayor of the town have  
6 special rights for broadcasting and have his views  
7 advocated over opposing views?

8 MR. WOCCHER: As long as there is fairness is  
9 assured, which is assured by the fairness doctrine, yes,  
10 that would be no problem. In fact, it would raise very  
11 substantial federalism issues if the federal government  
12 were permitted to suppress the viewpoints of the state  
13 or local governmental entities, particularly if their  
14 speech was directed at a federally related issue.

15 Now, in order to justify this distinction  
16 between this ban and those bans which would not be  
17 constitutional if applied in other contexts, the  
18 government jumps between two separate rationales. They  
19 rely upon the presence of a government subsidy, and they  
20 also rely upon the scarcity rationale and the scarcity  
21 of broadcast frequencies. But neither of these  
22 rationales, whether alone or in combination, can support  
23 their result. For the notion that the government can  
24 use its federal funds and its federal subsidy as a  
25 justification for imposing a restriction on the use of

1 private funds has never been accepted by this Court.

2 QUESTION: Well, Mr. Woocher, you agree, I  
3 take it, that the government could say we are going to  
4 give you 35 percent of your operating funds, and you  
5 can't use any of those funds for editorializing.

6 MR. WOOCHEER: That's exactly right.

7 QUESTION: Okay, now, supposing the government  
8 does that and they see that the station is just  
9 switching the government funds over to something else  
10 and pulling out some other funds and using the private  
11 funds to editorialize, and the government says, well, we  
12 are trying to have some -- we want to discourage  
13 editorializing. The way we are allotting the money  
14 isn't doing any good. So then the government says let's  
15 make it mean something. So we say, we will give you 35  
16 percent if you won't editorialize.

17 Now, what is so different about that?

18 MR. WOOCHEER: Well, there are two things.  
19 One, if the government's express purpose were to  
20 discourage editorializing with private funds, that would  
21 raise constitutional problems, even if they only imposed  
22 the restriction on the use of the federal funds.

23 But moreover, the notion of segregability --

24 QUESTION: Well, I think that answer is  
25 inconsistent with our opinion in Regan last year, Regan

1 v. Taxation without Representation.

2 MR. WOOCHEER: I believe the Regan decision  
3 laid forth two simple principles: one, that the  
4 government may refuse to expend its funds on a person's  
5 exercise of a constitutional principle, but even in that  
6 context, the Regan decision made clear that if the  
7 government did so with an intent to suppress dangerous  
8 views, that that would raise constitutional problems.

9 QUESTION: Yes, but I don't see this case as  
10 involving any suppression of "dangerous views" at all.  
11 No particular views are suppressed. The station is just  
12 told it cannot adopt an editorial policy, whatever that  
13 policy might be.

14 MR. WOOCHEER: The station is told that it  
15 cannot express its views on controversial issues of  
16 public importance. That's what the statute requires.  
17 In Consolidated Edison, for example, this Court held  
18 that a restriction that imposes such a restraint on the  
19 discussion of an entire topic is just as  
20 constitutionally infirm as one which prohibits --

21 QUESTION: But that wasn't a spending power  
22 case. You are treating this -- Consolidated Edison  
23 wasn't a spending power case. You are treating this as  
24 if the government had said to all private stations,  
25 whether they get government funding or not, all public

1 stations, you can't do this. The government didn't say  
2 that. It is saying only the ones that get government  
3 can't do this.

4 MR. WOOCHEER: And it is saying you cannot do  
5 it even with your own private funds. I think that is  
6 the distinction between this case and TWR, as -- in that  
7 opinion there were two principles. One is that the  
8 government may refuse to exercise -- may refuse to  
9 subsidize the exercise of a constitutional right, but  
10 the second principle was the reaffirmation of the  
11 longstanding prohibition against unconstitutional  
12 conditions.

13 QUESTION: Well, I agree that certainly Regan  
14 did not cover the situation, the distinction you make  
15 because it was not present in Regan. But what you are  
16 saying is that though the government may do something in  
17 an ineffectual way that doesn't have any result because  
18 the people just switched the funds, it can't do it in an  
19 effectual way.

20 MR. WOOCHEER: I think that the government may  
21 not suppress speech that is paid for with private  
22 funds.

23 Now, the notion of segregability is one that  
24 has been consistently accepted not only by Congress but  
25 by this Court's jurisprudence, in the establishment



1 clause area, for example. It is accepted that the  
2 government may spend money which goes to a religious  
3 institution, and presumably that religious institution  
4 may use that money to free up some other money and  
5 therefore expend that.

6 Congress does it all the time when they impose  
7 categorical grants. And in fact, the government has  
8 argued in the Grove City case that it is appropriate to  
9 segregate funds.

10 QUESTION: That is the government's own choice  
11 there. The government is saying we will do this, and if  
12 you want to switch funds, that's okay.

13 Here the government has said we don't want to  
14 risk your switching funds. Why shouldn't that be a  
15 decision of Congress rather than the courts?

16 MR. WOOCHEER: Because in doing that they have  
17 placed a prohibition on wholly private funds, and it is  
18 not a question --

19 QUESTION: Mr. Woocher, suppose a station just  
20 couldn't exist without public money, that it just would  
21 go out of business, and it is absolutely essential for  
22 the station to receive government money. So if it is  
23 going to editorialize or do anything else, it has to  
24 have the testimony money.

25 MR. WOOCHEER: The fact that the station needs

1 the money so much just points out what a coercive  
2 influence it is on the station. It is the same as the  
3 postal subsidy --

4 QUESTION: Well, I think that certainly, I  
5 would think, would read against you, because if you are  
6 so dependent upon the sources of funds, if you could  
7 editorialize, you would be bound to express the  
8 financier's view.

9 MR. WOOCHEER: Well, we have a situation  
10 here --

11 QUESTION: That's part of the argument.

12 MR. WOOCHEER: Even if that were the case, that  
13 is not the situation here. The government does not --  
14 the federal government does not supply 60 percent of the  
15 funding, for example. Pacifica Foundation, my client,  
16 who was prohibited from expressing its own views with  
17 its own privately supported, privately raised funds,  
18 cannot do so, and it gets only 20 percent of its funds  
19 from the federal government.

20 QUESTION: Well, you are making an argument  
21 though, here in this Court and in your brief, that this  
22 is unconstitutional on its face.

23 MR. WOOCHEER: Both on its face and as  
24 applied.

25 QUESTION: Well, I suppose all you really need



1 to represent your client, to win for your client is to  
2 have it be held unconstitutional as applied to your  
3 client.

4 But why would you say that's necessarily true  
5 countrywide?

6 MR. WOOCHEER: Well, because the facts support  
7 it. The facts are that the federal government  
8 supplies --

9 QUESTION: Do you think there is no station  
10 that you can think of in the country that wouldn't be  
11 shut down if government money was cut off?

12 I guess that just isn't --

13 MR. WOOCHEER: I don't think that's a relevant  
14 consideration, whether or not --

15 QUESTION: That isn't reality, Mr. Woocher.

16 MR. WOOCHEER: I just don't think that's a  
17 relevant consideration, whether or not --

18 QUESTION: Well, I know you must -- now you  
19 have to say that, but I was just -- so that was your  
20 answer to my original question, that it is just  
21 irrelevant that the station would shut down without the  
22 money.

23 MR. WOOCHEER: Right, because as the Chief  
24 Justice pointed out, many of the newspapers, many of the  
25 magazines that receive postal subsidies would shut down

1 without the government money. Many institutions in our  
2 country would shut down without government money. But  
3 if the government could apply the same rationale to all  
4 those institutions that receive any government funds,  
5 this would lead to a terrible parade of horrors. It  
6 would allow them to coerce the forfeiture of their  
7 constitutional rights because the government holds out  
8 the carrot of its funds and says if you want to receive  
9 these funds which you need to survive, which in our  
10 society is increasingly the case, you can't get them  
11 unless you promise that you are not going to  
12 editorialize, unless you promise you will not --

13 QUESTION: Unless you promise not to express  
14 our views.

15 MR. WOOCHE: I beg your pardon?

16 QUESTION: Unless you promise not to express  
17 our views.

18 MR. WOOCHE: Unless you promise not to  
19 express your own views.

20 QUESTION: Well, surely you cannot have the  
21 government fund a broadcast station in this country to  
22 advance the views of that government, would you not  
23 agree with that?

24 MR. WOOCHE: Well, certainly not, and that  
25 points up the distinction --

1 QUESTION: You wouldn't agree with it, or you  
2 do agree with it?

3 MR. WOOCHEER: Well, the government may choose  
4 to propagate its own views. It may choose to buy air  
5 time to propagate its views, for example.

6 QUESTION: Buy air, that's quite different,  
7 buying air time.

8 Why, then, do we forbid, does Congress forbid  
9 any broadcast of the USIA, the Voice of America, in the  
10 United States?

11 MR. WOOCHEER: Because that is a governmental  
12 entity.

13 QUESTION: Yes.

14 MR. WOOCHEER: And it is a very different  
15 situation than we have here. These are not governmental  
16 entities. The noncommercial broadcaster --

17 QUESTION: But they could not exist, in the  
18 hypothetical that Justice White gave you, some of them  
19 at least could not exist without the government's  
20 support, is that not true?

21 MR. WOOCHEER: That is the case. A welfare  
22 recipient might not be able to exist without the  
23 government's support. There are a lot of people in  
24 society and a lot of institutions in society that cannot  
25 exist without the governmental support.

1 QUESTION: Wel, would the station which get  
2 100 percent of its funds from the federal government not  
3 be a governmental entity?

4 MR. WOOCHEER: It could not -- it might not be  
5 a governmental entity. It would depend very much on the  
6 way it was set up.

7 QUESTION: What would it be?

8 MR. WOOCHEER: It would be a 100 percent  
9 government funded private entity. A welfare recipient  
10 is not a governmental entity, even though he may -- he  
11 or she may receive all their funds from the government,  
12 and under the current regulatory structure, no  
13 noncommercial station is a federal governmental entity.

14 And that is a very important distinction  
15 because while the government may with certain limits  
16 impose restrictions on the use of its funds, and the  
17 effect may be that if a station is 100 percent  
18 government funded, the effect would be to prohibit  
19 editorializing -- they cannot use the leverage of their  
20 government funds to suppress speech to support it wholly  
21 with private funds.

22 QUESTION: Do you think that the statute  
23 forbidding the use of Voice of America broadcasts within  
24 the United States is unconstitutional?

25 MR. WOOCHEER: I don't believe that it's

1 unconstitutional. I believe the federal government  
2 probably has an opportunity to speak as well. There are  
3 certain restrictions, as Mr. Alito pointed out, that the  
4 federal government should not be allowed to drown out  
5 all opposing voices. But I don't think the First  
6 Amendment applies to the federal government in terms of  
7 restricting what it wants to do in terms of its own  
8 speech. But it does restrict what a private entity can  
9 do with their speech and can do with their own private  
10 funded speech, and that is the essence of this case.

11 Now, the government --

12 QUESTION: Let me just interrupt you, if I  
13 may.

14 You say that the First Amendment poses no  
15 restriction on what the government may do with its own  
16 speech. So if the government decided to spend billions  
17 of dollars advancing the interests of the Republican  
18 Party, that would be permissible?

19 MR. WOOCHEER: No, there may be limits --

20 QUESTION: May be limits.

21 MR. WOOCHEER: I misstated it. There are  
22 limits on what the government might do, but the First  
23 Amendment applies in the context of the entire spectrum  
24 of --

25 QUESTION: Well, aren't they limits imposed by

1 the First Amendment?

2 MR. WOOCHEER: I beg your pardon?

3 QUESTION: Are they not limits imposed by the  
4 First Amendment?

5 MR. WOOCHEER: There may be limits imposed on  
6 the governmental speech by the First Amendment, but they  
7 are certainly not at issue in this case.

8 QUESTION: You don't say it categorically.  
9 You just think there may be?

10 QUESTION: Well you wouldn't say that if the  
11 government gave this money to these stations and said  
12 provided you put on editorials that we will send you in  
13 the mail, now, you know that wouldn't be permitted,  
14 would it?

15 MR. WOOCHEER: Of course not, because the  
16 government would be coercing --

17 QUESTION: That's one answer to Justice  
18 Stevens.

19 QUESTION: Yes, you were arguing before that  
20 it would be permitted, if I heard you correctly.

21 MR. WOOCHEER: I'm sorry. I misspoke myself.

22 QUESTION: Okay.

23 MR. WOOCHEER: Now, the government, when  
24 confronted with the difficulties in their government  
25 funding argument and the fact that in fact it is not



1 simply a limitation placed on the use of federal funds,  
2 but is a limitation placed on the use of wholly private  
3 funds -- and I might add that Pacifica Foundation could  
4 go out, solicit contributions solely for its  
5 editorializing, and that would be prohibited by this  
6 statute as well, but then the government shifts grounds  
7 and points to the scarcity rationale as a justification  
8 for imposing the restriction here that they concede  
9 could not be imposed on other recipients of government  
10 funds.

11 But the scarcity rationale gets them no  
12 further either.

13 QUESTION: Well, isn't the scarcity rationale  
14 the distinction between the government's ability to  
15 regulate broadcasting and the government's ability to  
16 regulate a newspaper?

17 MR. WOOCHE: That is the justification that  
18 would be used --

19 QUESTION: Because there is no limit on how  
20 many pieces of paper you can print or distribute.

21 MR. WOOCHE: That's correct. That's exactly  
22 right, and I thought until this day, until Mr. Alito  
23 suggested that perhaps you could place similar  
24 restrictions on newspapers to the extent they were  
25 government funded, that there was no permissible

1 restriction like that. And the only justification,  
2 therefore, for applying it to noncommercial broadcasters  
3 who receive government funds and not applying it to  
4 other written press that receive government funds must  
5 rest on the scarcity rationale.

6 But the whole notion of the scarcity rationale  
7 is to maximize the number and diversity of views that  
8 are heard over the airwaves. That's why the fairness  
9 doctrine is a constitutional doctrine, because it  
10 doesn't prohibit the broadcaster from expressing its own  
11 views; it simply says that if you express your views, to  
12 make sure that the paramount right of the public to hear  
13 a diverse number of views, you have to give an  
14 opportunity for the presentation of other views.

15 But this statute --

16 QUESTION: Mr. Woocher, are there any -- does  
17 the record have any facts in it about your client, this  
18 station, its economics and how important the government  
19 funding is to it?

20 MR. WOOCHEER: It does. The record reveals, I  
21 believe, that there is -- that Pacific received  
22 approximately 20 1/2 percent, 20.5 percent of its funds  
23 from federal sources.

24 QUESTION: And is that about all there is? Is  
25 that about the only fact about like that?

1 MR. WOOCHEER: I believe that's the case.

2 QUESTION: And no basis for knowing that if  
3 the government funding was removed, that it would or  
4 wouldn't stay in existence. It was in existence before  
5 it received any money, wasn't it?

6 MR. WOOCHEER: That's precise -- that's exactly  
7 true. It was founded in 1949. It subsisted for over 20  
8 years without a penny of federal aid.

9 QUESTION: Right.

10 MR. WOOCHEER: Which shows that perhaps the  
11 federal aid is not necessary to their survival.

12 QUESTION: Well, I am just wondering if the  
13 facts are in the record about Pacifica.

14 MR. WOOCHEER: The facts about Pacifica are  
15 known.

16 QUESTION: In your view, would it be any  
17 different, would the rule of law you are advocating be  
18 any different if it is 80 percent funding instead of 20  
19 percent?

20 MR. WOOCHEER: Not at all. The only difference  
21 would be that it might be permissible to impose a  
22 restriction on the 80 percent, but on the 20 percent  
23 that would be still private funds, no.

24 QUESTION: Well you would rather that there  
25 was such a difference than to lose this case, wouldn't

1 you?

2 MR. WOOCHEER: I beg your pardon?

3 QUESTION: You would rather have such a  
4 difference recognized than to lose this case for our  
5 client, I suppose.

6 MR. WOOCHEER: I suppose I would rather win  
7 this case for the client, but I think it would be a very  
8 equally poor precedent if it were to rely on the amount  
9 of the federal --

10 QUESTION: That would be true, in your view.

11 MR. WOOCHEER: That's correct.

12 I might add that Pacifica is by no means  
13 atypical in that regard, and there are many stations --  
14 it is not the case, as Mr. Alito said, that we do not  
15 know that there are some noncommercial broadcasters that  
16 don't receive federal funds. There are approximately  
17 over 1000 radio stations out there that don't receive  
18 any funds from CPB, and many, many of them don't receive  
19 any federal funds at all.

20 Now, getting --

21 QUESTION: Mr. Woocher, do you regard 399 as a  
22 content-based regulation?

23 MR. WOOCHEER: It is certainly a content-based  
24 regulation, and I am mystified by the government  
25 suggesting that it is not content-based.

1 I think what they may be doing is  
2 confusing --

3 QUESTION: That bears on the standard, the  
4 appropriate standard of review of which types do they  
5 gather, does it?

6 MR. WOOCHEER: That's correct.

7 They may be confusing the notion of  
8 content-related or content-based with content  
9 neutrality. All that the NCCB opinion, for example,  
10 stated was that was not a content-related statute at all  
11 because in that situation it was merely a structural  
12 regulation, a precondition about newspapers being able  
13 to own stations, collocation, issues like that. In  
14 fact, the effect of that restriction there was to  
15 enhance the diversity of views that the public would be  
16 exposed to.

17 Speiser, on the other hand, talked about  
18 content neutrality, but this Court has recognized that a  
19 content neutral statute is very different from one that  
20 is content based.

21 QUESTION: Does Pacifica publish commercial  
22 advertising?

23 MR. WOOCHEER: Pacifica does not publish  
24 commercial advertising?

25 QUESTION: Is it because it is forbidden to?

1 MR. WOOCHEER: That is correct. The only  
2 restriction that is placed on the content of the  
3 noncommercial broadcaster's programming.

4 QUESTION: Well, only its program is  
5 restricted.

6 MR. WOOCHEER: Well, it's a very --

7 QUESTION: It sounds to me like that is a --  
8 if editorializing is content based, so is that.

9 MR. WOOCHEER: It is a very different sort of  
10 restriction, because as this court has recognized, first  
11 of all, commercial speech has always been entitled to  
12 less than full protection under the First Amendment.  
13 Here we have speech that is being prohibited that is at  
14 the core of the First Amendment.

15 And second, the restriction on commercial  
16 advertising in fact does not prevent them from  
17 expressing those views over the air. The only thing it  
18 prevents is them -- prevents them from doing is  
19 receiving payment --

20 QUESTION: What other kind of program  
21 restrictions are there besides forbidding commercial  
22 advertising?

23 MR. WOOCHEER: That's it. That is the only  
24 other kind of program restriction, and even that, as I  
25 say, is not a programming restriction.



1 QUESTION: Except what might be imposed by the  
2 fairness doctrine.

3 MR. WOOCHEER: That's correct.

4 QUESTION: Whatever those are.

5 MR. WOOCHEER: What would be imposed upon all  
6 broadcasters.

7 QUESTION: Mr. Woocher, in reading Judge  
8 Lucas' opinion, I didn't get a clear idea of just what  
9 it was that Pacifica wanted to do by way of  
10 editorializing that it can't do under 399. I mean, is  
11 it a 30 second thing once a day or a five minute thing  
12 every hour? Does the record show?

13 MR. WOOCHEER: The record doesn't show how it  
14 would exercise that right.

15 QUESTION: Does it show that it has exercised  
16 it in the past?

17 MR. WOOCHEER: The record does not show whether  
18 or not it has exercised it in the past, but as I say,  
19 that is really not relevant. The issue is that this  
20 statute --

21 QUESTION: If Pacifica was not going to do  
22 anything that would be barred by the statute, presumably  
23 there is no dispute.

24 MR. WOOCHEER: Pacifica -- there is in the  
25 record a statement by Pacifica that it fully intends to

1 exercise its right to editorialize if Section 399 were  
2 declared unconstitutional. That is very clear in the  
3 record. And I think --

4 QUESTION: But it has not editorialized up to  
5 now?

6 MR. WOOCHEER: It has been prohibited from  
7 editorializing up to now.

8 QUESTION: Well, yes. I wasn't asking you why  
9 it hadn't. I was just asking whether or not it had.

10 MR. WOOCHEER: That's correct. It has not.

11 QUESTION: And how long has it refrained from  
12 editorializing?

13 MR. WOOCHEER: The record doesn't reveal that,  
14 and I don't know. It is at least since 1967 when the  
15 statute was enacted.

16 QUESTION: So it has been not editorializing  
17 for 16 years.

18 MR. WOOCHEER: That's correct. It has been  
19 under this --

20 QUESTION: And thriving?

21 And thriving?

22 MR. WOOCHEER: Financially, perhaps. I don't  
23 think it has been thriving. The -- in fact --

24 QUESTION: Well it is hard to thrive if you  
25 can't make any profit, isn't it?

1           MR. WOOCHEER: That's correct. It brought this  
2 case because it did not consider itself able to provide  
3 the services to its community that it wished to provide,  
4 and one of those services was editorials. And I think  
5 the question of what type of editorial would it be  
6 likely to air is a relevant one.

7           QUESTION: If it hasn't done it for 16 years,  
8 it probably doesn't know itself.

9           MR. WOOCHEER: It is probably the case that it  
10 doesn't. But it does know that it wants to get involved  
11 in public affairs, and it does know that the right to  
12 editorialize is a very important privilege to the  
13 journalist, and it has had a very meaningful effect  
14 throughout the course of history.

15           Now, Pacifica, for example, may well wish to  
16 air an editorial in connection with a drug abuse program  
17 and say they wanted to say we do not think -- we think  
18 that people should be very careful about getting started  
19 in drug abuse, they should be very careful about taking  
20 one step down that path, and they have some programming  
21 which this is done in connection with, but their  
22 editorial says we strongly urge our listeners not to get  
23 involved in any use of drugs.

24           Now, what conceivable threat does this pose to  
25 the government in this case?

1           QUESTION: Mr. Woocher, I suppose your client  
2 could use the government money to produce its own  
3 program about drug abuse.

4           MR. WOOCHEER: At this point I believe that's  
5 the case, that the grants are not restricted.

6           QUESTION: And have 20 or 30 people who are  
7 hired as part of that production to express views about  
8 drug abuse.

9           MR. WOOCHEER: That's right, but that is very  
10 different from Pacifica itself --

11          QUESTION: I understand it is different, but  
12 nevertheless, you can -- you are not forbidden from  
13 influencing -- exerting your influence in this area  
14 through producing your own shows, for example.

15          MR. WOOCHEER: That's correct, except for the  
16 fairness doctrine obligations.

17          QUESTION: Yes.

18          QUESTION: Suppose it had a series of  
19 documentaries, alleged documentaries, saying that after  
20 all these years of experiments with segregation,  
21 desegregation, that the conclusion had been reached that  
22 it was better for the races to be segregated, with the  
23 advent of new Asiatics coming in, the Asiatics should go  
24 to one school, and so forth?

25          What about that? Do you think that would be

1 all right?

2 MR. WOOCHEER: Certainly it would be all  
3 right. I don't believe the government has any right to  
4 prevent anyone from speaking those views. What the  
5 fairness doctrine requires is that there be an  
6 opportunity presented for the expression of a contrary  
7 viewpoint.

8 Now, the government --

9 QUESTION: The only way they could deal with  
10 the fellow that advocated reversing the desegregation  
11 program in this country would be to have someone present  
12 the other side, the other point of view.

13 MR. WOOCHEER: Or the FCC could determine in  
14 its regulatory framework, that if that broadcaster had  
15 somehow continually either violated the fairness  
16 doctrine or exposed this one view and was using its  
17 station for those purposes, they would be subject to the  
18 same licensing restrictions and same possibility of  
19 license revocation as a commercial station.

20 QUESTION: Under the United Church of Christ  
21 case.

22 MR. WOOCHEER: I'm not familiar with the case,  
23 but under their power in granting licenses.

24 QUESTION: Mr. Wooccher, the government  
25 contends that there is some real danger that if a

1 station is editorializing, that the government might be  
2 blamed for the views expressed. They want to avoid that  
3 possibility.

4 How are these monies -- what is the route that  
5 is followed in passing out these monies to these  
6 stations? Who -- nobody in the administration hands it  
7 out, does it?

8 MR. WOOCHER: That's correct. The money is  
9 appropriated by Congress to the Corporation for Public  
10 Broadcasting. At that point the Corporation --

11 QUESTION: And who is that?

12 MR. WOOCHER: That is a nonpartisan, private  
13 entity. It is not a governmental entity. It is a  
14 nonprofit corporation. Its members are appointed in a  
15 nonpartisan fashion I believe by the President.

16 QUESTION: And who else? Who else has a hand  
17 in it, do you know?

18 MR. WOOCHER: Congress may have a hand, but  
19 Congress I believe may have the right of -- yes,  
20 Congress does have the right of confirmation. So they  
21 are appointed --

22 QUESTION: But it is the President who  
23 appoints them?

24 MR. WOOCHER: Yes, I believe so.

25 QUESTION: And are they staggered terms?



1 MR. WOOCHEER: They are a staggered term,  
2 that's correct. And there are requirements as to the  
3 number of each person's -- it can be any political  
4 party. CPB then takes that money and combines it with  
5 private donations that they receive. For example, last  
6 year they received \$150 million from the --

7 QUESTION: Who makes the decisions in PBS?

8 MR. WOOCHEER: Well, there's a very important  
9 difference between PBS and CPB.

10 QUESTION: All right, CPB, that's what I  
11 meant.

12 MR. WOOCHEER: CPB has statutory structures as  
13 to how much of their money they can allocate. The  
14 best --

15 QUESTION: How do they decide who does it  
16 inside?

17 MR. WOOCHEER: The CPB Board.

18 QUESTION: You mean the entire Board votes on  
19 every grant?

20 MR. WOOCHEER: No, no, no. As I say, Congress  
21 sets up structures. It is a very much an objective,  
22 nondiscretionary process.

23 QUESTION: Yes, but who is -- if the public --  
24 if your client gets some money, who makes the decision  
25 whether it is going to get it? I mean, what people?

1 MR. WOOCHEER: The amount of money that they  
2 get is established in terms of a proportionate amount by  
3 Congress. CPB then puts it through an objective,  
4 nondiscretionary formula that trickles the money out to  
5 the stations. It is an automatic process. If the  
6 station editorialized, it couldn't possibly affect the  
7 amount of money they get.

8 QUESTION: Well, how do you ever get on the  
9 list, just by being a public broadcasting company?

10 MR. WOOCHEER: That's right. There are some  
11 certain basic requirements, the CPB eligibility  
12 requirements.

13 QUESTION: So nobody can -- you don't have to  
14 be admitted to a favorite group. You are there already,  
15 and it is just -- and you are going to be there until  
16 you get thrown out.

17 MR. WOOCHEER: That's correct, by the fact that  
18 you are a nonprofit organization of a certain size with  
19 a certain capacity, certain power, in terms of --

20 QUESTION: And so I suppose part of your  
21 argument, as I understand it, there is very little  
22 chance of being influenced anyway.

23 MR. WOOCHEER: As far as I can tell, there is  
24 absolutely no chance of being influenced in terms of any  
25 individual funding decisions.

1 QUESTION: You don't think editorials  
2 criticizing funding decisions could ever have an impact on  
3 funding decisions?

4 MR. WOOCHEER: Not under the -- there is no way  
5 that that could happen.

6 QUESTION: No, not possible.

7 MR. WOOCHEER: Not to any particular station.

8 QUESTON: Even persuasive editorials having  
9 such --

10 MR. WOOCHEER: Unfortunately not.

11 Now, the government has suggested that there  
12 is something special about an editorial which  
13 distinguishes it from, for example, the other programs  
14 that they might put out on drug abuse that you were  
15 referring to, Mr. Chief Justice. They contended that it  
16 somehow lends itself especially to abuses, but the FCC  
17 rejected that argument, and for the past 40, 35 years,  
18 they have in fact stated just the opposite and have  
19 encouraged editorializing because they feel, and rightly  
20 so, that an editorial is the most straightforward and  
21 open expression of a station's viewpoint and doesn't  
22 lend itself to any kind of abuses that might be inherent  
23 in the programming aspect of it.

24 So not only do we have a situation where they  
25 are prohibited from expressing their views in a

1 straightforward fashion, but that prohibition itself  
2 runs counter to the very principle that the government  
3 seeks to achieve by funding noncommercial broadcasting  
4 stations.

5 QUESTION: And your client, I take it,  
6 wouldn't object to, if it is going to editorialize, to  
7 give people an opportunity to state the contrary view.

8 MR. WOOCHEER: Not at all, not at all.

9 QUESTION: In the hypothetical example, that  
10 means you would give time to somebody advocating drug  
11 abuse.

12 (General laughter.)

13 MR. WOOCHEER: If they could find someone  
14 responsible, yes.

15 QUESTION: Isn't that a possible problem?

16 MR. WOOCHEER: Well, they have to have a  
17 responsible spokesperson for that viewpoint.

18 I think in conclusion I would just like to  
19 point out that this case really does involve more than  
20 just the rights of Pacifica Foundation and more than  
21 just the rights of noncommercial broadcasters because the  
22 government's argument does extend well beyond the  
23 confines of that context. Indeed, it extends beyond the  
24 confines of commercial broadcasting.

25 What they are saying, the essence of what they

1 are saying they can do is prescribe institutional  
2 neutrality. They concede that it might be a different  
3 case if they were prohibiting one view or another, but  
4 they think that they can prescribe institutional  
5 neutrality on the theory that expressions of the  
6 institution's viewpoints are somehow incompatible with  
7 the intended mission in society of that institution.

8 I believe that that truly has alarming  
9 implications in this day and age where it is no longer  
10 the case that the single individual's voice can  
11 effectively provide a counterweight to government  
12 action. It is increasingly the case that people have to  
13 rely on groups of individuals, on institutions, on  
14 educational institutions, on state and local governments  
15 to provide a voice in contrast to that of the federal  
16 government, and if the federal government through the  
17 coercive use of its funding which, as I say, is more and  
18 more pervasive, can require those institutions to give  
19 up the right to speak, even if it is not directed at a  
20 specific viewpoint, it would mean that there would be no  
21 effective voices left to counteract the government's  
22 voice if and when such a counteracting voice is needed.

23 And I believe that is the true implications of  
24 what is happening in this case.

25 Thank you.

1 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
2 The case is submitted.  
3 We will hear arguments next in Hoover v.  
4 Ronwin.

5 (Whereupon, at 1:48 p.m., the case in the  
6 above-entitled matter was submitted.)  
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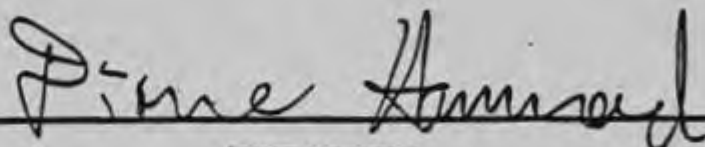


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#82-912 - FEDERAL COMMUNICATIONS COMMISSION, Appellant v.  
LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "Pina Amis", written over a horizontal line.

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