No.

IN THE

Supreme Court of the United States

MEDIA GENERAL, INC.

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should reconsider its decision in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), that broadcast ownership restrictions are subject only to rational-basis review.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner Media General, Inc. states that (i) it has no parent corporation; (ii) GAMCO Investors, Inc., a publicly held company, indirectly owns more than 10% of its stock through its subsidiaries GAMCO Asset Management Inc., Gabelli Funds, LLC, and Gabelli Securities, Inc.; and (iii) no other publicly held company owns 10% or more of its stock.

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INTRODUCTION

This case is about nothing less than the future of journalism in this country. Anyone who has picked up a newspaper in recent years will undoubtedly have noticed that it has shrunk. Indeed, many people no longer pick up a newspaper at all, because they read the news on the internet or watch their favorite print journalists on cable or satellite television. We live today in a world of media convergence, where technology allows access to news from a wide variety of media platforms. Journalism is now about providing content on multiple platforms. Print-only journalism is a relic of old movies like *All the President's Men*.

Unfortunately, the law has not kept pace with technology. In 1975 (the year before *All the President's Men* was released), the Federal Communications Commission (FCC) promulgated a blanket ban on cross-ownership of a daily newspaper and a broadcast station in the same community. This Court subsequently upheld that ban against constitutional challenge by invoking the so-called "scarcity doctrine," which holds that government regulation of broadcasting—including restrictions on broadcast ownership—is subject only to deferential rational-basis review in light of the perceived scarcity of the broadcast spectrum. *See FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 798-802 (1978) (*NCCB*) (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969)).

Whatever the merits of the scarcity doctrine in the technological context of the 1960s and 70s, it is indefensible now. As Justice Thomas recently noted, "[t]he extant facts that drove this Court to subject

broadcasters to unique disfavor under the First Amendment simply do not exist today." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1822 (2009) (concurring opinion). Indeed, the FCC itself concluded almost a quarter-century ago that "the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press." *In re Compl. of Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), *pet. for review denied*, 867 F.2d 654 (D.C. Cir. 1989). And Congress underscored its concern with restrictions on broadcast ownership by taking the unusual step of requiring the FCC to review and justify such restrictions every two (now four) years. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996), amended by Pub. L. No. 108-199, 118 Stat. 3, 100 (2004).

Petitioner Media General, Inc. has now been pursuing this challenge to the constitutionality of the FCC's newspaper/broadcast cross-ownership restrictions for more than a decade. The company owns a variety of different media platforms, including newspapers and broadcast television stations, primarily in the southeastern United States. The company believes that its ability to gather and disseminate the news in a world of media convergence requires the freedom to meld these platforms, and that the Constitution guarantees that freedom. Applying *NCCB*, however, both the FCC and the Third Circuit have squarely rejected the company's constitutional arguments.

The time has come for this Court to reconsider *NCCB* in general and in particular the *Red Lion*

scarcity doctrine on which it is based. *See Fox Television*, 129 S. Ct. at 1822 (Thomas, J., concurring) ("I am open to reconsideration of *Red Lion* … in the proper case."). Only this Court has the prerogative of overruling its own precedents. By overruling *NCCB*, this Court would require the FCC to justify its broadcast ownership restrictions under the same standard applicable to similar restrictions in other contexts: instead of merely showing that the restrictions are rationally related to a legitimate government interest, the Commission would have to show that they are narrowly tailored to a compelling government interest.

This case presents the perfect vehicle for this Court to reconsider *NCCB*; indeed, this case is a poster child for an agency's ability to retain and enforce restrictions that have long since outlived their original justification. Notwithstanding Congress' directive in § 202(h) for the FCC to review and justify its broadcast ownership restrictions every four years, this proceeding has been ongoing for more than a decade. In particular, the proceeding is caught in a loop between an FCC that has sought to retain but relax broadcast ownership restrictions and a Third Circuit panel that openly rejects the deregulatory purpose of the 1996 Act. Meanwhile, the blanket 1975 newspaper/broadcast cross-ownership ban remains in full force, even though the FCC itself has concluded not once but twice that the ban does not serve the public interest. Accordingly, this Court should grant the petition and resolve the threshold constitutional question whether *NCCB*, and the scarcity doctrine on which it is based, remain good law. At the very least, this Court should hold the petition pending its resolution of *FCC v. Fox*

Television Stations, Inc., No. 10-1293, *cert. granted*, 131 S. Ct. 3065 (2011), which also involves the ongoing vitality of the scarcity doctrine, and dispose of the petition in light of its resolution of that case.

OPINIONS BELOW

The Third Circuit's most recent decision in this matter is reported at 652 F.3d 431, and reprinted in the Appendix (App.) at 1-99a. The Third Circuit's prior decision in this matter is reported at 373 F.3d 372, and reprinted at App. 405-629a. The FCC's most recent order in this matter is reported at both 23 F.C.C.R. 2010 and 2008 WL 294635, and reprinted at App. 103-404a. The FCC's prior order in this matter is reported at both 18 F.C.C.R. 13,620 and 2003 WL 21511828, and relevant excerpts from that lengthy order are reprinted at App. 630-707a.

JURISDICTION

The Third Circuit rendered its decision on July 7, 2011, App. 3a, and denied a timely petition for rehearing on September 6, 2011, App. 100-02a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment provides in pertinent part: "Congress shall make no law … abridging the freedom of speech, or of the press …." U.S. Const. amend. I.

The Fifth Amendment provides in pertinent part: "No person shall be … deprived of life, liberty, or property, without due process of law." U.S Const. amend. V.

Section 202(h) of the Telecommunications Act of 1996, as amended, provides in relevant part:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules quadrennially … and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

Pub. L. No. 104-104, 110 Stat. 56 (1996), as amended by Pub. L. No. 108-199, 118 Stat. 100 (2004).

STATEMENT OF THE CASE

A. Background

1. Media Cross-Ownership Restrictions And The Telecommunications Act Of 1996

The origins of this case go back to 1975, when the FCC issued an order prospectively barring the owner of a daily newspaper in a particular community from buying a broadcast station in that community. *See In re Rules Relating to Multiple Ownership of Standard, FM, & Television Broad. Stations*, 50 F.C.C.2d 1046 (1975), *codified* at 47 C.F.R. §§ 73.35, 73.240, 73.636 (1976).

That order was unsuccessfully challenged on both First Amendment and Equal Protection grounds. *See NCCB*, 436 U.S. 775. The *NCCB* Court relied on *Red Lion*'s deferential standard of review of broadcast restrictions in holding that the Commission had "rationally" concluded that "diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints." *Id.* at 786, 796. The Court also

asserted that the cross-ownership ban was "not content related," *id.* at 801, and did not unconstitutionally single out newspaper owners because "the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications," *id.*

The decades following *NCCB* saw sweeping change in communications technology. Congress responded by enacting the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), to implement a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 1 (1996), *reprinted in* 1996 U.S.C.A.A.N. 10. The 1996 Act thus relaxed or abolished several broadcast ownership restrictions, and instructed the FCC to review its remaining restrictions every two (now four) years to "determine whether any of such rules are necessary in the public interest as the result of competition." 1996 Act § 202(h), 110 Stat. at 111-12. The Act further directed the Commission to "repeal or modify any regulation it determines to be no longer in the public interest." *Id.*

2. Media General And Its Convergence Strategy

Media General has an intense interest in the fate of the FCC's broadcast ownership restrictions. The company owns a variety of media outlets, including newspapers, broadcast television stations, and websites and other digital platforms.

As a result of limited FCC waivers of the newspaper/broadcast cross-ownership ban, Media General has been allowed in several markets to practice "convergence," the melding of newspaper, broadcast television, and digital resources. In Media General's experience, ownership of multiple media outlets in a particular market greatly enhances the gathering and dissemination of news. Indeed, Media General believes that cross-ownership is critical to the success of print journalism in a digital age characterized by the proliferation of new media.

B. Proceedings Below

Media General has consistently argued to the FCC that the blanket newspaper/broadcast cross-ownership ban is subject to, and cannot possibly survive, heightened constitutional scrutiny. Just as consistently, that argument has fallen on deaf ears at the Commission and, on review, the Third Circuit.

1. The 2002 Biennial Review

Pursuant to § 202(h) of the 1996 Act, the FCC issued a Notice of Proposed Rulemaking in 2001 regarding the 1975 newspaper/broadcast cross-ownership ban, solicited comments, and compiled a voluminous record. *See In re Cross-Ownership of Broadcast Stations and Newspapers*, 16 F.C.C.R. 17,283 (2001). The Commission then initiated an omnibus proceeding, the 2002 Biennial Review, to consider all broadcast ownership rules, and rolled the newspaper/broadcast cross-ownership proceeding into that docket. *See In re 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 17 F.C.C.R. 18,503 (2002). Interested parties,

including Media General, filed detailed comments explaining that newspaper/broadcast cross-ownership restrictions not only disserve the public interest, but also violate both the First and Fifth Amendments.

In its final order on the 2002 Biennial Review released in 2003, the FCC dismissed Media General's constitutional arguments. According to the Commission, "courts have considered and consistently rejected the arguments for a stricter standard of First Amendment scrutiny of broadcast regulation." App. 644a. "The *NCCB* Court explained that the rational basis test is the appropriate standard to govern our broadcast ownership regulations because spectrum scarcity requires 'Government allocation and regulation of broadcast frequencies,' and because these regulations are not content related." App. 643a (quoting *NCCB*, 436 U.S. at 799, 801). Accordingly, the Commission declared, "[t]he rational basis standard … governs our broadcast ownership regulations." *Id.*

The FCC acknowledged, however, that the blanket 1975 newspaper/broadcast cross-ownership ban is "not in the public interest." App. 455a. Thus, rather than repealing the ban, as Media General contended was required by § 202(h) and the Constitution, the FCC merely relaxed it somewhat. In markets with three or fewer broadcast television stations, the FCC would retain the blanket ban. App. 429a. In markets with nine or more broadcast television stations, the FCC would lift all restrictions. *Id.* And in markets with four to eight broadcast television stations, it would adopt a

graduated approach. *Id.* To draw these lines, the FCC looked to a so-called "Diversity Index." *Id.*

Numerous parties challenged the FCC's decision—some, including Media General, on the ground that it was insufficiently deregulatory, and some on the ground that it was overly deregulatory. A lottery was then held pursuant to the Hobbs Act, 28 U.S.C. § 2112(a), and all of the petitions for review were randomly assigned to the Third Circuit. That court promptly stayed the revised newspaper/broadcast cross-ownership restrictions from taking effect pending a merits decision.

In a merits opinion released in June 2004, the Third Circuit rejected Media General's constitutional arguments as "foreclosed" by *NCCB*. App. 458a; *see also* App. 457a ("We decline [the] invitation to disregard Supreme Court precedent because of changing times."); App. 458a ("[I]t is the Supreme Court's prerogative to change its own precedent.") (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)). Thus, the Third Circuit held, broadcast ownership restrictions are constitutional as long as they are rational. "Due to the 'physical scarcity' of the broadcast spectrum, the [*NCCB*] Court scrutinized the [broadcast ownership] regulation to discern a rational basis." *Id.* (citing *NCCB*, 436 U.S. at 799).

The Third Circuit did not stop there. Rather, the court declared that "[e]ven were we not constrained by Supreme Court precedent, we would not accept the Deregulatory Petitioners' contention that the expansion of media outlets has rendered the broadcast spectrum less scarce." App. 459a. Thus, the court affirmatively endorsed the scarcity doctrine on the ground that "many more people would like

access to [the broadcast spectrum] than can be accommodated." *Id.* (citing *NCCB*, 436 U.S. at 799). In addition, the court asserted, "[t]he abundance of non-broadcast media does not render the broadcast spectrum any less scarce." *Id.*

A majority of the Third Circuit panel then rejected the revised newspaper/broadcast cross-ownership restrictions under the Administrative Procedure Act. While acknowledging that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest," App. 451a, the panel majority held that the Commission had not adequately justified "its approach to setting numerical limits." App. 530a. The panel majority thus remanded the revised newspaper/broadcast cross-ownership restrictions to the Commission, and specified that "[t]he stay currently in effect will continue pending our review of the Commission's action on remand, over which this panel retains jurisdiction." App. 530a. The upshot of that ruling was to leave in place the blanket 1975 newspaper/broadcast cross-ownership ban.

Then-Chief Judge Scirica concurred with the panel's "rejection of the constitutional challenges," but vigorously dissented from "its decision to vacate and remand." *Id.* As he explained, "[a]llowing the biennial (now quadrennial) review process to run its course will give the Commission and Congress the opportunity to monitor and evaluate the effect of the proposed rules on the media marketplace." App. 531a. Indeed, "[u]nder the original implementation schedule, the Commission already would have initiated its assessment of the proposed rules in

preparation for the 2004 Biennial Review." App. 537a. "Vacating and remanding the proposed rules to the Commission will preserve the existing rules in place for months or even years, and the resulting delay will likely leave the public worse off than if these rules were allowed to take effect." App. 537-38a (footnotes omitted).

On the same day it rendered its decision, the Third Circuit entered an order stating that, "[d]ue to recusals, there is not a majority of non-disqualified judges in regular active service available to vote on a petition for rehearing," as required by the rules then in force. Order (6/24/04) (3d Cir. Dkt. No. 03-3388). "Accordingly, it is hereby ordered that any petition for rehearing en banc submitted by any party will not be accepted for filing in this case." *Id.*

Media General then sought this Court's review of the threshold constitutional question whether *NCCB* and the scarcity doctrine on which it was based were still good law. The Government and "public interest" respondents opposed review, arguing that review of that constitutional question was "premature" because the Third Circuit had remanded the proceeding to the FCC. Br. for the Fed. Resps. in Opp., *Media General, Inc. v. FCC* (No. 04-1020), at 12-14; Br. in Opp. of Public Interest Resps., *Media General, Inc. v. FCC* (No. 04-1020), at 2. After relisting the petition, this Court denied it without comment. *See Media General, Inc. v. FCC*, No. 04-1020, *cert. denied*, 545 U.S. 1123 (June 13, 2005).

2. The 2006 Quadrennial Review

Rather than finalizing the 2002 Biennial Review in light of the Third Circuit's remand, the FCC instead rolled the proceeding into its 2006

Quadrennial Review. *See In re 2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Further Notice of Proposed Rulemaking*, 21 F.C.C.R. 8834 (July 24, 2006).

As before, Media General filed extensive comments challenging the FCC's cross-ownership restrictions on both statutory and constitutional grounds. As before, Media General argued that any such restrictions must satisfy strict constitutional scrutiny under both the First and Fifth Amendments. And as before, the Commission did not accept that argument. Indeed, in its final order released in February 2008, the FCC did not even address the constitutional challenges other than to note that, in reviewing the prior order, the Third Circuit had "held that the Commission's continued regulation of cross-ownership was constitutionally sound." App. 128a n.58 (citing App. 457-60a (in turn citing *NCCB*, 436 U.S. at 801-02)).

Once again, however, the FCC did not even try to justify the blanket 1975 newspaper/broadcast cross-ownership ban. Rather, the Commission stated that it would evaluate newspaper/broadcast cross-ownership proposals on a "case-by-case" basis. App. 133a. In the Nation's top twenty television markets (called Designated Market Areas or DMAs), the Commission would presume "that it is not inconsistent with the public interest for an entity to own ... a newspaper and a television station if (1) the television station is not ranked among the top four stations in the DMA, and (2) at least eight independent 'major media voices' remain in the

DMA." App. 123a. (Notwithstanding the explosion of new media, the Commission limited its definition of "major media voices" to "full-power commercial and noncommercial television stations and major newspapers." App. 182a.) In all other markets, the FCC would presume the opposite, although there would be a positive presumption if either "the newspaper or broadcast outlet qualifies as failed or failing" or "a proposed newspaper/broadcast combination … [will] initiate[] local news programming of at least seven hours per week on a broadcast outlet that otherwise was not offering local newscasts prior to the combined operations." App. 196-97a, 199a. Under the new regime, the FCC would reverse a "negative presumption" only where "clear and convincing evidence" showed "that, post-merger, the merged entity will increase the diversity of independent news outlets (e.g., separate editorial and news coverage decisions) and increase competition among independent news sources in the relevant market." App. 200a. This case-by-case analysis would, the FCC declared, "enable the Commission to preserve and potentially increase localism and viewpoint diversity, while also providing the means for newspapers and broadcast stations to achieve the synergies available from cross-ownership." App. 201a.

Numerous parties once again challenged the FCC's decision as both insufficiently and overly deregulatory. And once again, a lottery was held pursuant to the Hobbs Act, 28 U.S.C. § 2112(a). This time, all of the petitions for review were randomly assigned to the Ninth Circuit. That court, however, transferred all of the petitions to the Third Circuit, where they returned to the original panel (which, as

noted above, had purported to "retain[] jurisdiction" over the proceedings, App. 530a).

In a merits decision released in July 2011, the Third Circuit once again rejected Media General's constitutional arguments. The court noted that Media General again "ask[s] us to overturn the 'scarcity' doctrine." App. 75a. Referring to its prior decision, the court stated that "we continue to 'decline [Media General's] invitation to disregard precedent.'" *Id.* (brackets modified; quoting App. 459a); *see also id.* ("[A]s we did in [the first round of this litigation], we hold that the 'Commission's continued regulation of the common ownership of newspapers and broadcasters does not violate the First Amendment rights of either.'") (quoting App. 460a); App. 76a ("The Supreme Court has upheld this treatment [of newspaper owners], as we recognized in [the first round of this litigation], and we are bound by that precedent."). And, once again, the Third Circuit went out of its way to *reaffirm* the scarcity doctrine: "The Supreme Court's justification for the scarcity doctrine remains as true today as it was in 2004—indeed, in 1975—'many more people would like to access the broadcast spectrum than can be accommodated.'" App. 75a (brackets omitted; quoting App. 459a (in turn citing *NCCB*, 436 U.S. at 799)); *see also id.* ("'The abundance of non-broadcast media does not render the broadcast spectrum any less scarce.'") (quoting App. 459a).

Just as in the first round of this litigation, moreover, the panel majority once again rejected the FCC's revised newspaper/broadcast cross-ownership restrictions under the Administrative Procedure Act. This time, the panel majority concluded that the

Commission had failed to provide adequate notice of its revised restrictions. The panel majority thus vacated and remanded the revised cross-ownership restrictions "for the Commission to provide adequate notice and an opportunity to comment in the context of its 2010 Quadrennial Review." App. 93a. As before, the panel majority purported to "retain[] jurisdiction over the remanded issues." *Id.*

Judge Scirica again dissented in part, noting that "[o]n the facts of this case, it is difficult to believe that [the Regulatory] Petitioners, who participated in all prior proceedings, were not fairly apprised" of the issues decided in the Commission's order. App. 98a. As Judge Scirica further noted, the practical effect of the decision to vacate and remand the revised newspaper/broadcast cross-ownership rule was to keep in effect the "outdated and twice-abandoned" blanket 1975 ban. App. 94a. Judge Scirica also dissented from the panel majority's decision "to retain jurisdiction over parts of the ongoing 2010 Quadrennial Review." *Id.*

On September 6, 2011, the Third Circuit denied a petition for rehearing *en banc* by a four-to-three vote. App. 100-02a. This petition follows.

REASON FOR GRANTING THE WRIT

This Court Should Reconsider *NCCB*'s Holding That Broadcast Ownership Restrictions Are Subject Only To Rational-Basis Review.

This case provides the Court with the opportunity to bring its constitutional jurisprudence regarding broadcast media into the twenty-first century. Although broadcasting is an important medium of

speech, government regulation of broadcasting—alone among all media—is currently subject to "a less rigorous standard of First Amendment scrutiny" than government regulation of any other medium. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994). *NCCB* applied that diminished scrutiny to broadcast ownership restrictions targeted solely at newspaper owners for the avowed purpose of achieving a "hoped-for" gain in viewpoint diversity. 436 U.S. at 798-802. That is an aberration in both First Amendment and Equal Protection law, and that aberration cannot now be justified. The time has come for this Court to reconsider, and overrule, *NCCB*.

A. This Court Should Reconsider *NCCB*'s Holding That Broadcast "Scarcity" Justifies Rational-Basis Review Of Broadcast Ownership Restrictions Under The First Amendment.

This Court should grant review, first and foremost, to reconsider and overrule the obsolete and much-maligned scarcity doctrine. Over forty years ago, in *Red Lion*, this Court sharply limited judicial review of broadcast regulation under a theory of broadcast "scarcity." *See* 395 U.S. at 386-90. Under this theory, broadcasting is a "unique medium" because "there are substantially more individuals who want to broadcast than there are frequencies to allocate." *Id.* at 388, 391. And because the broadcast spectrum is a "scarce resource," the *Red Lion* Court held that the government has broad authority, otherwise unknown under the First Amendment, "to put restraints on licensees in favor of others." *Id.* at 389-90.

Nine years later, in *NCCB*, this Court invoked *Red Lion*'s scarcity doctrine in applying mere rational-basis review to a First Amendment challenge to the FCC's ban on newspaper/broadcast cross-ownership. According to *NCCB*, "[t]he physical limitations of the broadcast spectrum are well known," and "[i]n light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential." 436 U.S. at 799 (citing *Red Lion*, 395 U.S. at 375-77, 387-88). Although the *NCCB* Court acknowledged that the evidence was "inconclusive" as to whether the ban would promote the "hoped-for" gain in viewpoint diversity, it accepted the FCC's prediction that "[i]ncreases in diversification of ownership would *possibly* result in enhanced diversity of viewpoints." *Id.* at 786, 796-97 (emphasis added); *see also id.* at 796 (holding that the FCC "acted rationally in finding that diversification of ownership would enhance the *possibility* of achieving greater diversity of viewpoints") (emphasis added).

From the outset, however, the Court recognized that the scarcity doctrine was on a collision course with the future. Indeed, in *Red Lion* itself, the Court acknowledged that technological advances might render the scarcity doctrine obsolete, and carefully rested its holding on "the present state of commercially acceptable technology." 395 U.S. at 388. Soon after, this Court reiterated that warning: "[T]he broadcast industry is dynamic in terms of technological change," and "solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *CBS, Inc. v. DNC*, 412 U.S. 94, 102 (1973); *see also id.* at 158 n.8 (Douglas, J., concurring)

("Scarcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion*. It has been predicted that it may be possible within 10 years to provide television viewers 400 channels through the advances of cable television."); *cf. Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 76 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) (predicting that development of cable would "do away with technical scarcity").

NCCB represents the scarcity doctrine's high-water mark; over the ensuing decades, this Court has pointedly declined to endorse or extend it. By 1984, the Court was forced to acknowledge that "[t]he prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years." *FCC v. League of Women Voters of Calif.*, 468 U.S. 364, 376 n.11 (1984). Rather than trying to defend the doctrine, the Court merely stated that "[w]e are not prepared … to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *Id.*

A decade later, this Court again acknowledged that "courts and commentators have criticized the scarcity rationale since its inception." *Turner*, 512 U.S. at 638 & n.5. The Court noted, however, that it had "no reason" to reconsider the doctrine in that case, which involved regulation of *cable*, not *broadcast*, television. *Id.* at 638. The *Turner* Court declined to extend *Red Lion* to government regulation of cable, and carefully refrained from any endorsement of the scarcity doctrine—even in the

broadcast context. *See id*. at 637 ("[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, *whatever its validity in the cases elaborating it*, does not apply in the context of cable regulation.") (emphasis added). Subsequently, this Court declined to extend *Red Lion* to government regulation of the internet. *See Reno v. ACLU*, 521 U.S. 844, 868 (1997). Thus, "[a]lthough the Supreme Court has not declared the distinction between broadcast and other media a dead one, it has not lately given the distinction an enthusiastic endorsement. In fact, in recent years the Court has only grudgingly upheld the distinction." *Action for Children's Television v. FCC*, 58 F.3d 654, 674 (D.C. Cir. 1995) (*ACT*) (*en banc*) (Edwards, C.J., dissenting).

Justice Thomas recently called upon this Court to re-examine the scarcity doctrine. *See Fox Television*, 129 S. Ct. at 1819-22. As he noted, "the logical weakness of *Red Lion* … has been apparent for some time: 'It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media.'" *Id.* at 1821 (quoting *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) (*TRAC*)). And "even if this Court's disfavored treatment of broadcasters under the First Amendment could have been justified" in the past, "dramatic technological advances have eviscerated the factual assumptions underlying" the scarcity doctrine. *Id.* at 1821. Such "dramatic changes … might well support a departure from precedent under the [Court's] prevailing approach to *stare decisis*." *Id.* at 1822.

By affirmatively endorsing the scarcity doctrine, *see* App. 459a, the Third Circuit decision below departed from the lower courts' consistent critique of that doctrine over the past generation. Respected lower-court judges—especially on the D.C. Circuit, which deals most frequently with broadcast regulation—have long disparaged the doctrine. *See, e.g.*, *Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148, 172 (D.C. Cir. 2002) (Sentelle, J., dissenting); *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998) (Silberman, J.); *Time Warner Entm't Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (Williams, J., joined by Edwards, C.J., and Silberman, D.H. Ginsburg, and Sentelle, JJ., dissenting from denial of rehearing *en banc*); *ACT*, 58 F.3d at 674 (Edwards, C.J., dissenting); *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1443 (8th Cir. 1993) (*en banc*) (Arnold, C.J., concurring); *TRAC*, 801 F.2d at 508 & n.4 (Bork, J., joined by Scalia, J.); *Loveday v. FCC*, 707 F.2d 1443, 1458-59 (D.C. Cir. 1983) (Bork, J., joined by R.B. Ginsburg, J.).

As these judges have pointed out, the rationale underlying the scarcity doctrine was dubious from the outset. "All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. … Since scarcity is a universal fact, it can hardly explain regulation in one context and not another." *TRAC*, 801 F.2d at 508. Just as "many more people would like to access the broadcast spectrum than can be accommodated," App. 75a (brackets omitted; quoting App. 459a (in turn citing *NCCB*, 436 U.S. at 799)), "not everyone who wishes to publish a newspaper, or even a pamphlet, may do so," *TRAC*, 801 F.2d at 508. Thus,

"for years, scholars have argued that the scarcity of the broadcast spectrum is [not] a 'unique characteristic' that should make any difference in terms of First Amendment protection." *ACT*, 58 F.3d at 675 (Edwards, C.J., dissenting); *see also Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 812-13 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part) (noting that "First Amendment distinctions between media [have been] dubious from their infancy.").

In any event, in light of the technological revolution of the past generation, the scarcity doctrine cannot possibly be justified now. For one thing, technology has vastly expanded the available broadcast spectrum. *See, e.g.*, *Fox Television*, 129 S. Ct. at 1821 (Thomas, J., concurring). In addition, the line between broadcast and other media platforms has largely vanished. *See, e.g.*, *id.* at 1822. Most Americans now watch broadcast television not through "rabbit ears," but via cable, satellite, or the internet, *see id.,* none of which is subject to the same disfavored First Amendment status as broadcasting. Given the technological revolution of the past generation, as the FCC has recognized, "the question confronting media companies today is not whether they will be able to dominate the distribution of news and information in any market, but whether they will be able to be heard at all among the cacophony of voices vying for the attention of Americans." App. 563a. In sum, today's "media landscape … would have been almost unrecognizable in 1978. Cable television was still in its infancy. The Internet was a project run out of the Department of Defense with several hundred users. Not only did Youtube, Facebook, and Twitter not exist, but their founders

were either still in diapers or not yet conceived." *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 326 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 3065 (2011); *see also id.* ("The past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus.").

Tellingly, the FCC itself has repudiated the scarcity doctrine: "In response to the question raised by the Supreme Court in *League of Women Voters*, we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press." *Syracuse Peace Council*, 2 F.C.C.R. at 5053; *see also id.* ("We simply believe that, in analyzing the appropriate First Amendment standard to be applied to the electronic press, the concept of scarcity—be it spectrum or numerical—is irrelevant."); *id.* at 5048 ("[T]he extraordinary technological advances that have been made in the electronic media since the 1969 *Red Lion* decision, together with a consideration of fundamental First Amendment principles, provide an ample basis for the Supreme Court to reconsider the premise or approach of its decision in *Red Lion*."); *id.* at 5053 ("[T]he scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press."); *id.* at 5058 ("[T]he dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media."); FCC Media Bureau Staff Research Paper, *The Scarcity Rationale for Regulating Traditional*

Broadcasting: An Idea Whose Time Has Passed 8 (Mar. 2005) (No. 2005–2) ("The Scarcity Rationale Has No Basis in Either Physics or Economics."); Joint Statement of Commissioners Powell & Furchtgott-Roth, *Personal Attack & Political Editorial Rules*, 13 F.C.C.R. 21,929, 21,940 (1998) ("[A]s matters now stand, the Commission has unequivocally repudiated spectrum scarcity as a factual matter.").

Although the FCC provided this requested "signal" almost *twenty-five years ago*, this Court has never since reconsidered the scarcity doctrine. As this case underscores, however, the Commission continues to rely on that doctrine to support its broadcast regulations, *see* App. 128a, 643-44a, and the lower courts continue to rely on that doctrine in analyzing such regulations, *see* App. 75-76a, 458-59a. "[I]t is the Supreme Court's prerogative to change its own precedent." App. 458a (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)); *see also Tribune*, 133 F.3d at 69 ("We are stuck with the scarcity doctrine until the day that the Supreme Court tells us that the *Red Lio*n no longer rules the broadcast jungle.").

In short, the day for this Court to reconsider the scarcity doctrine is long overdue. Over fifteen years have passed since Judge Edwards decried the doctrine as "indefensible," and opined that "it is no longer responsible for courts to apply a reduced level of First Amendment protection for regulations imposed on broadcast." *ACT*, 58 F.3d at 675 (dissenting opinion). Yet *NCCB*, which relied on the scarcity doctrine to justify rational-basis review for the FCC's broadcast ownership restrictions, remains the law of the land.

At the very least, this Court should hold this petition pending its consideration of *Fox Television Stations* (No. 10-1293), which also involves the scarcity doctrine: there, as here, the Government has invoked the doctrine to justify a broadcast regulation, and the regulated parties have challenged the doctrine's ongoing validity. *See, e.g.*, Br. for the U.S., *FCC v. Fox Television Stations* (No. 10-1293), at 43; Br. for Fox Television Stations *et al.*, *FCC v. Fox Television Stations* (No. 10-1293), at 36-37. The resolution and reasoning of that case may shed important light on the proper disposition of this petition.

B. This Court Should Reconsider *NCCB*'s Holding That Broadcast Ownership Restrictions Targeted Solely At Newspaper Owners Are Subject Only To Rational-Basis Equal Protection Review.

This Court should also grant review to reconsider and overrule *NCCB*'s separate and independent holding that the differential treatment of newspaper owners for broadcast cross-ownership purposes is subject only to rational-basis equal protection review. Under settled law, government restrictions that single out the press, or any element thereof (such as newspaper owners), for differential treatment are subject to heightened judicial scrutiny under both the First Amendment and the equal protection component of the Fifth Amendment. "[L]aws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State,' and so are always subject to at least some degree of heightened First Amendment scrutiny." *Turner*, 512 U.S. at 640-41 (quoting

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987)); *cf. Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). "[D]ifferential treatment … suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983). Newspapers are now the *only* non-broadcast medium subject to broadcast cross-ownership restrictions. Thus, for example, the owner of a cable company may buy a broadcast station while the owner of a newspaper may not.

In *NCCB*, however, this Court rejected an equal-protection challenge to this differential treatment of newspaper owners under a rational-basis standard. The newspaper owners there argued that the newspaper/broadcast cross-ownership ban "unfairly 'singled out' newspaper owners for more stringent treatment than other license applicants." 436 U.S. at 801 & n.19. The Court disagreed, holding that the ban "treat[ed] newspaper owners in essentially the same fashion as other owners of the major media of mass communications." *Id.* at 801. Because, in *NCCB*'s day, the only other "major media of mass communications" besides newspapers were broadcast television and radio, applying a broadcast ownership ban to the single non-broadcast medium of newspapers did not unfairly single out the owners of that medium, since similar prohibitions applied to owners of radio and television stations.

That equal-protection holding, like the scarcity-doctrine holding, is completely untenable in light of the subsequent communications revolution. Although newspapers remain the only non-broadcast

medium subject to a broadcast cross-ownership ban, it is no longer true that newspapers are the only non-broadcast "major medi[um] of mass communications." *Id.* Major media outlets now include not only cable television and satellite services, but also the internet, mobile communications, and other (ever-evolving) digital delivery platforms. Indeed, the FCC acknowledged in these proceedings below that "[t]he average American has a far richer and more varied range of media voices from which to choose today than at any time in history." App. 704a.

In the current media landscape, it is fanciful to suggest that newspaper owners have a uniquely powerful voice that might justify a unique limitation. Indeed, newspapers today represent the *exception* to the ongoing proliferation of media platforms. *See* App. 707a ("[T]he types of media and the number of outlets within each media, *except daily newspapers*, have increased dramatically in the past twenty years.") (emphasis added); Pew Research Center, *The State Of News Media* (2011), at http://stateofthemedia.org ("Among the major sectors, only newspapers suffered continued revenue declines last year—an unmistakable sign that the structural economic problems facing newspapers are more severe than those of other media."); Suzanne M. Kirchhoff, Cong. Research Serv., *The U.S. Newspaper Industry In Transition* 1 (2010) ("[M]ore than half of the approximately 1,400 daily newspapers in the country could be out of business by the end of the next decade.") (citation omitted).

The Third Circuit, however, refused to entertain Media General's equal-protection argument, holding

that it was "foreclosed" by *NCCB*. App. 457a; *see also* App. 76a. Because *NCCB* "endorsed the constitutionality of the 1975 newspaper/television cross-ownership ban," the court asserted, "changing times" did not justify revisiting *NCCB*, notwithstanding the emergence of new mass media. App. 457a; *see also* 76a. Again, the court declared that "it is the Supreme Court's prerogative to change its own precedent." App. 458a (citing *State Oil*, 522 U.S. at 20); App. 76a.

For the same reasons that it should reconsider *NCCB*'s reliance on the scarcity doctrine, this Court also should reconsider *NCCB* on this point. Again, absent reconsideration by this Court, *NCCB*'s outdated holding will remain chiseled into constitutional law notwithstanding the erosion of *NCCB*'s factual foundations. Even if *Red Lion* remained the law of the land and the government had a virtually free hand to regulate broadcast media, the government should not be allowed to subject newspaper owners to restrictions that are not imposed on the owners of other non-broadcast media.

C. This Court Should Reconsider *NCCB*'s Holding That Broadcast Ownership Restrictions Specifically Directed At Promoting Viewpoint Diversity Are Content-Neutral And Thus Subject Only To Rational-Basis First Amendment Review.

This Court should also grant review to reconsider and overrule *NCCB*'s holding that broadcast regulations specifically directed at promoting a diversity of viewpoints are content-neutral and thus subject only to rational-basis review under the First

Amendment. Under settled law, regulation is deemed content-neutral if it is "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). And, under equally settled law, content-based restrictions on speech are subject to strict judicial scrutiny: *i.e.*, they must be invalidated unless the regulator proves that they are "narrowly tailored" to promote a "compelling state interest." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 395 (1992).

By definition, regulation aimed at promoting a diversity of viewpoints is not content neutral; such regulation is *expressly* justified by reference to the content of the regulated speech. *See, e.g.*, *Turner*, 512 U.S. at 677-78 (O'Connor, J., joined by Scalia, Thomas, and Ginsburg, JJ., concurring in part and dissenting in part). Broadcast ownership restrictions aimed at promoting viewpoint diversity fall squarely into this category. "Preferences for diversity of viewpoints" *necessarily* "make reference to content." *Id.* at 677. "They may not reflect hostility to particular points of view, or a desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications." *Id.*; *see also id.* at 678 ("The interest in ensuring access to a multiplicity of diverse … sources of information, no matter how praiseworthy, is directly tied to the content of what the speakers will likely say.").

To its credit, the FCC has been candid in acknowledging that its broadcast ownership

restrictions seek to alter the content of broadcast speech by promoting viewpoint diversity. *See* App. 121a ("[A]ll of the ownership rules that we review in this Order are designed to further diversity ...."); App. 653a ("[R]egulating ownership is an appropriate means to promote viewpoint diversity."); App. 692a ("[W]e continue to believe that diversity of ownership can advance our goal of diversity of viewpoint."). Although the Commission has never been able to establish a link between broadcast ownership and the "hoped-for gain" in viewpoint diversity, *NCCB*, 436 U.S. at 786 (internal quotation omitted)—the Commission believes in the *possibility* of such a link, and believes that this *possibility* alone is enough to warrant broadcast ownership restrictions. *See* App. 174a ("We are not in a position to conclude that ownership can *never* influence viewpoint.") (emphasis added).

The *NCCB* Court acknowledged that the FCC's newspaper/broadcast cross-ownership ban sought to "enhance the possibility of achieving greater diversity of viewpoints," 436 U.S. at 796, but asserted—without explanation—that the ban was "not content related," *id.* at 801. It is hardly surprising, thus, that Media General met with no success below in arguing that the FCC's broadcast ownership restrictions *are* content-related, and accordingly subject to strict scrutiny. *See* Br. of Media General at 49-51, *Prometheus Radio Project v. FCC*, 3d Cir. Nos. 08-3078 *et al.*; App. 76a (rejecting argument that broadcast cross-ownership restrictions are content-based on the ground that they "apply regardless of the content of programming"); App. 644a (rejecting argument that broadcast cross-ownership rules as "inherently

content-based," and thus subject to strict scrutiny, based on *NCCB*).

Indeed, the entire rationale of restricting some speech for the avowed purpose of enhancing other speech is fundamentally antithetical to the First Amendment. *See, e.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.30 (1978) (rejecting, as inconsistent with "basic tenets of First Amendment jurisprudence," the notion that the government "may control the volume of expression by the wealthier, more powerful corporate members of the press in order to enhance the relative voices of smaller and less influential members") (internal quotation omitted); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (*per curiam*) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."). The First Amendment, after all, "rests on the premise that it is government power, rather than private power, that is the main threat to free expression; and as a consequence, the Amendment imposes substantial limitations on the Government even when it is trying to serve concededly praiseworthy goals." *Turner*, 512 U.S. at 685 (opinion concurring in part and dissenting in part); *see generally* Kathleen M. Sullivan, *Free Speech & Unfree Markets*, 42 U.C.L.A. L. Rev. 949, 957 (1995).

Because the FCC's cross-ownership restrictions are content-based, they are subject to heightened scrutiny under the First Amendment *regardless* of whether the "scarcity" doctrine survives. *See League of Women Voters*, 468 U.S. at 384 (explaining that "[t]he First Amendment's hostility to content-based

regulation" requires the Court to be "particularly wary" in reviewing a content-based regulation of broadcasting). *NCCB*'s unexplained holding that broadcast ownership restrictions are "not content related" simply cannot be squared with this Court's precedent.

Because this Court resolved this issue in *NCCB*, however, once again only this Court can remedy the situation. *See, e.g.*, *Sinclair*, 284 F.3d at 172 (Sentelle, J., dissenting) ("While there may be merit to petitioner's argument that the 'diversity' rationale is essentially content-based, and that therefore heightened scrutiny should be implicated, that argument has been rejected.") (citing *NCCB*, 436 U.S. at 799-800, and *Red Lion*, 395 U.S. at 389-91). Accordingly, as with respect to the scarcity doctrine and the equal-protection issue, Media General respectfully requests this Court also to reconsider and overrule *NCCB* on this point.

D. Reconsideration of *NCCB* Is Long Overdue.

Finally, there is no reason for this Court to delay reconsideration of *NCCB*; to the contrary, such reconsideration is long overdue. As noted above, that decision's constitutional underpinnings—even assuming that they were ever sound—have been completely eroded. The fact that the Third Circuit has once again remanded these proceedings to the FCC on administrative-law grounds provides no reason for this Court to delay review of the threshold constitutional questions presented here.

This petition, after all, asks this Court to clarify the Commission's burden of justifying broadcast ownership restrictions under the First Amendment

and the Equal Protection Clause. This Court held in *NCCB* that this burden was merely to show that such restrictions were rationally related to a legitimate government interest, 436 U.S. at 798-802, and both the FCC and the Third Circuit relied on that holding to reject Media General's constitutional arguments in this case, *see* App. 75-76a, 128a n.58, 458-60a, 641-44a. The whole point of this petition is that *NCCB*'s burden of justification is insufficiently demanding as a matter of law, and that the Commission can justify restrictions on broadcast ownership, if at all, only by showing that they are narrowly tailored to a compelling governmental interest.

Unless reviewed by this Court, the Third Circuit's constitutional holding regarding the FCC's burden of justification represents the binding law of this case applicable on remand and in future proceedings. *See, e.g.*, *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-18 (1988). And because the Third Circuit resolved a threshold constitutional issue "fundamental to the further conduct of the case," that issue is ripe for this Court's review. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *see also Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964) (same); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (same); *see generally* Eugene Gressman *et al.*, *Supreme Court Practice* § 4.18, at 281-82 (9th ed. 2007). This Court's review is necessary to ensure that proceedings on remand are conducted under the proper constitutional standard.

Indeed, many of this Court's cases, in this Term and others, arise in precisely this procedural posture, where the court of appeals establishes a legal

standard and remands the case for further proceedings in light of that standard. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, No. 10-553, *cert. granted*, 131 S. Ct. 1783 (2011); *FAA v. Cooper*, No. 10-1024, *cert. granted*, 131 S. Ct. 3025 (2011); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 427 (2006); *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 979-80 (2005); *cf. Johnson v. California*, 543 U.S. 499, 515 (2005) ("We do not decide whether the … policy violates the Equal Protection Clause. We hold only that strict scrutiny is the proper standard of review and remand the case to allow the Court of Appeals for the Ninth Circuit, or the District Court, to apply it in the first instance.") (citing *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 557-58 (1994) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031-32 (1992)). *NCCB* itself was such a case: the court of appeals there established the legal standard for justifying broadcast ownership restrictions but remanded the matter to the Commission "for adoption of a rule not inconsistent with this opinion." *See National Citizens Comm. for Broad. v. FCC*, 555 F.2d 938, 966-67 (D.C. Cir. 1977), *aff'd in part, rev'd in part*, 436 U.S. 775 (1978).

The endless tug-of-war between the FCC and the Third Circuit only highlights the need for this Court's intervention. *See, e.g.*, *Christianson*, 486 U.S. at 818-19. The last time this case was here, almost *seven years* ago, both the Government and the "public interest" respondents argued in opposition to Media General's petition for certiorari that this Court's review would be "premature," because the Third Circuit had remanded the proceeding to the

Commission on administrative-law grounds. Br. for the Fed. Resps. in Opp., *Media General, Inc. v. FCC* (No. 04-1020), at 12-14; Br. in Opp. of Public Interest Resps., *Media General, Inc. v. FCC* (No. 04-1020), at 2. Subsequent events only highlight the irony of that argument. On remand, the Commission tinkered with its broadcast ownership restrictions, but did not revisit the threshold constitutional issues decided in the first round of this litigation. *See* App. 128a n.58. And in reviewing the revised restrictions, the Third Circuit not only reaffirmed its resolution of the threshold constitutional issues decided in the first round of this litigation, but again went out of its way to *endorse* the scarcity doctrine. *See* App. 75a. Although the Third Circuit has once again remanded the newspaper/broadcast cross-ownership restrictions on administrative-law grounds, once again (absent this Court's review) the threshold constitutional issues are no longer open.

Meanwhile, because the Third Circuit has vacated the FCC's attempt to relax its blanket 1975 newspaper/broadcast cross-ownership ban, that ban remains in full force today and for the foreseeable future—even though the FCC itself has determined not *once* but *twice* over the past decade that the 36-year-old ban no longer serves the public interest, *see* App. 108a, 129-30a, 635-36a, 663a, and even though the Third Circuit has acknowledged that "reasoned analysis supports [that] determination," App. 451a; *see also* 94a (Scirica, J., dissenting) ("[The panel majority] preserves an outdated and twice-abandoned ban, adopted in 1975, on common ownership of a broadcast station and a daily newspaper in the same market.").

Needless to say, that result utterly frustrates Congress' command that the Commission review and justify its broadcast ownership restrictions every four years. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996), amended by Pub. L. No. 108-199, 118 Stat. 100 (2004). As the D.C. Circuit has recognized (but the Third Circuit has denied), that statutory command reflects a deregulatory purpose. *Compare* App. 443-45a *with Sinclair*, 284 F.3d at 159, and *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002). Indeed, the FCC has not finalized *any* Biennial or Quadrennial Review of its media ownership rules for more than a decade, and no relief is remotely in sight. The Third Circuit expressly directed the Commission to revisit the newspaper/broadcast cross-ownership issue "in the context of its 2010 Quadrennial Review." App. 93a. As of the date this petition is filed—on the eve of 2012—the Commission has not even released a Notice of Proposed Rulemaking for the 2010 Quadrennial Review.

It is high time for this Court to bring order to this dysfunctional process. Congress established the unusual Biennial (now Quadrennial) Review process precisely to ensure that the FCC's broadcast ownership restrictions did not outlive their utility and cause more harm than good. *See* H.R. Conf. Rep. No. 104-458, at 1. But that is precisely what they are doing. As noted above, newspapers in this country have suffered over the past decade as this proceeding has bounced between the FCC and a divided Third Circuit panel that openly rejects the 1996 Act's deregulatory purpose. During the course of this standoff, the venerable Tribune Company,

which (along with Media General) sought this Court's review of the Third Circuit's original decision seven years ago (No. 04-1036), has been forced to file for bankruptcy. This Court should reconsider *NCCB*, and this Court should do so now.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

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