Nos. 11-691, 11-696, 11-698

IN THE

Supreme Court of the United States

MEDIA GENERAL, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

NATIONAL ASSOCIATION OF BROADCASTERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

TRIBUNE COMPANY, *et al*.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

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

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly determined that certain of the Federal Communications Commission's (FCC) ownership rules were consistent with the applicable statutory requirements, and constitutional.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Prometheus Radio Project, Media Alliance, Office of Communications of the United Church of Christ, Inc., and Free Press (jointly "Citizen Petitioners") respectfully submit this corporate disclosure statement. No publicly held company owns 10 percent or more of stock in any of the foregoing entities jointly comprising "Citizen Petitioners," each of which have no parent companies, subsidiaries or affiliates that have issued shares to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Statutes

TABLE OF AUTHORITIES—Continued

Page

Administrative Orders

TABLE OF AUTHORITIES—Continued

Other Authorities

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

REASONS FOR DENYING THE PETITION

I. The Court of Appeals properly rejected calls by some broadcasters to declare the individual restrictions on media ownership ordered by the Federal Communications Commission in its *2008 Order*[1] insufficiently deregulatory to comport with Section 202(h) or the Administrative Procedure Act (APA). In so doing, it did not create any split of authority between the D.C. Circuit and the Third Circuit, because the Third Circuit's interpretation of Section 202 of the Telecommunications Act of 1996, Pub. L. No. 104-104, §202, 101 Stat. 56 ("1996 Act"), was harmonized with the D.C. Circuit's interpretation of the same.

II. Had that not been the case, this case still would be unworthy of this Court's attention. It presents a narrow dispute on a garden-variety, statutory issue that arises once every four years and impacts a relatively small group of companies. Its significance as legal precedent is limited to one sentence in one statute that affects one industry. As mandated by Congress, and illustrated by the various chronicled FCC orders, every segment of the FCC's media ownership rules is constantly under review, and every sup-

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[1] *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*, Report and Order, 23 FCCRcd 2010 (2008) ("*2008 Order*").

porting rationale constantly probed.[2] The Commission continually reassesses the need for the rules, and what shape they need to take in order to effectuate Congressional intent with the 1996 Act. The Court of Appeals scrutinized the most recently concluded proceeding and reached a determination, the reasonableness and legality of which is only underscored by the strained, unsupportable claims constituting the various petitions for *certiorari*. Were this Court to opine on one sentence in one statute, in short order a similar dispute would arise in which the media entities attempted to distinguish that holding, citing the speed with which the media environment changes. Accordingly, this Court should resist media petitioners' siren call.

III. The Court of Appeals properly rejected constitutional challenges to the media ownership rules and refused to revisit the *Red Lion*[3] "scarcity rationale," which justifies subjecting broadcast regulation to a lower level of First

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[2] As an example, in its initiated review of the ownership rules, the Commission has proposed the repeal of the radio/television cross-ownership rule, and relaxation of the NBCO. Notice of Proposed Rulemaking, In the Matter of 2010 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, FCC 11-186, ¶8 (rel. Dec. 22, 2010) ("2010 Quadrennial Review NPRM").

[3] 395 U.S. 367 (1969) ("*Red Lion*").

Amendment scrutiny. The "scarcity" rationale may have even more force today than in 1975, and its justification as rationale for imposing certain service commitments upon broadcasters has not changed. Whether or not "spectrum scarcity" at one time had ceased to be a policy problem, it is certainly one now. Spectrum is more scarce and valuable in the sense this Court earlier contemplated in *Red Lion*. The public still gives broadcasters exclusive use of this finite and valuable resource free of charge, as well as other important privileges, in exchange for certain, reasonable commitments.

IV. This case presents a poor vehicle for revising the "scarcity" rationale, which remains the bedrock for valuable telecommunications policy. Accepting broadcasters' invitation to review this case and cast doubt upon the "scarcity" rationale would wreak havoc on media policy.

V. The media ownership rules do not unfairly single out newspapers for differential treatment but regulate only broadcasters and only with respect to certain markets. Moreover, they allow for waivers that could accommodate any newspaper publisher at risk of genuine harm. In no way do they violate the constitutional rights of newspaper owners.

INTRODUCTION

The mandate of Section 202(h) of the 1996 Act requires the Federal Communications Commission (the "Commission") to frequently review its regulations governing broadcast media ownership. In the *2008 Order*, the Commission

determined that the then long-standing local television ownership rule promotes competition within local television markets. Consistent with this conclusion, the Commission retained that rule. As such, an entity can own two television stations in the same Designated Market Area ("DMA") ("duopoly rule")[4] provided simply that there is not excessive coverage overlap between the commonly owned stations, or at least one of the commonly owned stations is not ranked among the top four stations in the market ("top-four prohibition") and at least eight independently owned television stations remain in the DMA post-merger ("eight-voices test"). The Third Circuit upheld the duopoly rule, finding the Commission's underlying rationale – premised on competition, *2008 Order* ¶100, 101 – to be reasonable.[5] The Third Circuit expressly rejected Petitioner NAB's "assertion that the FCC is conflating diversity and competition," noting that "the benefits of the latter are distinct," and moreover that even if the rule advances both goals this would not make the FCC's competition rationale unreasonable.[6]

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[4] "Duopoly" is a misnomer, since ownership of two stations in a market with more than two stations is not a "duopoly" in the sense that an economist would use the term.

[5] Pet. App. at 53a-54a (*Prometheus Radio Project v. FCC*, 652 F.3d 431, 459 (3d Cir. 2011) ("Prometheus II")).

[6] *Id*. at 51a.

With respect to radio/television cross-ownership, the Court of Appeals rejected requests to mandate deregulation where the Commission found none was warranted. It was not unreasonable for the Commission's to maintain cross-ownership rules because they served its interest in diversity and local ownership because they promote competition, the Court decided, accepting the Commission's underlying findings.[7]

The *2008 Order* also revised the Newspaper/Broadcast Cross-Ownership Rule ("NCBO rule"). Pursuant to that revision, a rule disfavoring cross-ownerships that did not qualify under one of four waiver criteria no longer would be in place. Its replacement would be presumption-based waiver standards that would vary depending on the size of the market involved and the number and market rank of the properties that an entity proposes to own in common. In response to Citizen Petitioners' procedural challenge, the Third Circuit held that the Commission failed to comply with the APA's notice and comment requirements with respect to the NCBO rule's revision, and accordingly vacated the rule adopted in the *2008 Order* and remanded for the Commission to comply with the same in

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[7] *Id*. at 49a. The *2008 Order* had retained the then-existing local radio ownership rule, including the overall numerical limits and the AM/FM subcaps. Media industry parties challenged this decision as insufficiently deregulatory, but, here again, the Third Circuit rejected their challenges. *Id*. at 57a-60a.

the context of its 2010 Quadrennial Review.[8] Thus, because of the Commission's failure to provide adequate opportunity for notice and comment, the original provision governing newspaper/broadcast cross-ownership now remains in place. The Third Circuit reasonably retained jurisdiction over the remanded issues.

The Third Circuit duly considered and rejected several constitutional arguments proffered, including calls to overturn the "scarcity" doctrine, classify the media ownership rules as attempts to manipulate content or single out television stations, and hold that the NBCO rule violates rights to equal protection by treating newspapers differently from other media.[9]

ARGUMENT

I. No Circuit Split Exists Regarding Subsection 202(h).

Contrary to Petitioners' claims, there is no circuit split regarding Section 202(h) of the 1996 Act.[10] It is true that the Commission's decision to

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[8] *Id*. at 79a.

[9] *Id*. at 62a-64a.

[10] This section directs the FCC to conduct frequent reviews of its broadcast concentration rules and "to determine whether any of such rules are necessary in the public interest as the result of competition," and furthermore instructs that pursuant to its determination, "[t]he Commission shall repeal or modify any regulation…no longer in the public interest."

retain the television national ownership cap in 2000[11] was reversed by the D.C. Circuit in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir.) (*Fox I*), *modified on reh'g.*, 293 F.3d 537 (D.C. Cir. 2002) (*Fox II*). However, Petitioners fictionalize the actual events and misfocus on a *Fox I* proposition that the Act embodies a presumption in favor of repealing or modifying media concentration rules.[12] As the Third Circuit observed, that *Fox I* proposition subsequently was deleted from the D.C. Circuit's modified opinion, *Fox II*, which expressly declined to opine on whether "necessary in the public interest" meant essential or something less, 293 F.3d at 540, 541. The D.C. Circuit itself observed the same in *Cellco P'ship v. FCC*, 357 F.3d 88 (D.C. Cir. 2004).[13]

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[11] *1998 Biennial Review Report*, 15 FCCRcd 11,058 (2000).

[12] *Sinclair Broadcast Group v. FCC*, 284 F.3d 148, 149 (D.C. Cir. 2001)(quoting *Fox I*, 280 F.3d at 1048).

[13] In *Cellco*, a different panel of the D.C. Circuit reviewed and endorsed the Commission's interpretation of "necessary" in another periodic review provision of the 1996 Act, observing such interpretation was consistent with many courts that have endorsed "useful" or "appropriate" over "essential" or "indispensable" as interpretations of "necessary." *Id.* at 97 (citing, *inter alia*, *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795-96 (1978) ("*NCCB*"); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413, 4 L.Ed. 579 (1819)). The D.C. Circuit expressly rejected suggestions of inconsistency with *Sinclair* and

Consistent with precedent, the Third Circuit set forth its view that under § 202(h) "no matter what the Commission decides to do to any particular rule – retain, repeal, or modify (whether to make more or less stringent)—it must do so in the public interest and support its decision with a reasoned analysis."[14] It explained how its ruling was harmonious with the D.C. Circuit: "We, along with the Court of Appeals for the D.C. Circuit, have upheld the Commission's interpretation of 'necessary' to mean 'convenient,' 'useful,' or 'helpful,' rather than 'indispensable.'"[15] Thus this case presents no Circuit split.

It is true that in *Sinclair Broadcast Group v. FCC*, 284 F.3d 148 (D.C. Cir. 2001), which was issued during the interval between the original *Fox* opinion and its modification on rehearing, a different panel of the D.C. Circuit reversed the Commission's 1999 TV duopoly decision, *id*. at 152. Rather than construing Section 202(h), however, that panel cited the very language of *Fox I* that *Fox II* disavowed.

Otherwise with respect to the prior rejection of the Commission's TV Duopoly rule in *Sinclair*, the Third Circuit observed:

Fox by noting that *Sinclair* did not expressly adopt any particular definition of "necessary" and *Fox I*'s suggestion of a heightened standard was expressly retracted by *Fox II*. *Id*. at 98.

[14] Pet. App. at 21a (citation omitted).

[15] *Id*. at fn. 15 (citing *Prometheus I*, 373 F.3d at 393-94; *Cellco*, *supra*).

> In that case, the Court held that the FCC had "failed to demonstrate that its exclusion of non-broadcast media from the eight-voices exception is 'necessary in the public interest' under § 202(h) of the 1996 [Telecommunications] Act," and rejected its diversity-of-viewpoint rationale. *Id*. at 165. Here the FCC has offered a new and reasonable rationale for this policy choice – competition.[16]

Against claims by some media entities that the record lacked evidence that mergers or joint operations of top-four stations harmed competition, the Court cited the FCC's related findings, and noted its own earlier opinion in the case: "We must uphold an agency's line-drawing decision when it is supported by the evidence in the record.…Here there is ample evidence in the record to support the Commission's restriction...."[17]

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[16] *Id*. at 53a.

[17] *Id*. at 54a-55a (internal quotations and citations omitted). As per the *2008 Order*, the Commission's gathered studies and reviewed commentary were extensive. Not only did media entities, unions, and various public interest organizations file comments, but many citizens voiced concerns directly to the Commission in Media Ownership hearings in California, Pennsylvania, Florida, Chicago, and Washington state. *See* Pet. App. at 94a. Several of these

NAB claims nevertheless that "there is a direct conflict between the Third Circuit's decision here and the D.C. Circuit's decision in Sinclair [sic]."[18] What accounts for the "conflict," per NAB, is that the Third Circuit credulously accepted the Commission's competition rationale and its supportive findings. As NAB sees it, the Third Circuit fell victim to the Commission's "gamesmanship."[19] What *really* happened, it

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comments bore directly on competition issues, including those "asserting that consolidation increases broadcasters' negotiation leverage with cable operators, allowing them to seek 'inflationary' retransmission consent terms," "stating that media consolidation reduces the availability of children's programming" and "that consolidation results in job losses," *id*. at 213a, fn 315. *See also id*. at 220a, fn. 331-333 (citing "examples of broadcast mergers that led to job losses," and statements by AFL-CIO that failure to retain regulation "would trigger multiple station mergers in local markets, resulting in a loss of newscasts and shared news product," and others informing its conclusion that "competition, and not concentration of market players, leads to better programming."). Related, the Commission detailed its conclusion that competition among local broadcasters was "also necessary to preserve competition for advertising by local businesses....allowing firms to pass the savings on to consumers of the advertised products," *id*. at 216a.

[18] NAB Pet. at 20.

[19] *Id*.

says, was that the Commission initiated a sham notice-and-comment proceeding to facilitate its subsequent "peeling off the 'competition' label from one [regulation] and the 'diversity' label from the other" before the appellate courts.[20] This, NAB urges, "cannot be sufficient to make the **2008** duopoly rule somehow different than the **1999** duopoly rule that has already been adjudged to be arbitrary and inconsistent with § 202(h)." *Id*.

Despite the fertility of imagination otherwise evident in its Petition, apparently unfathomable to NAB is the possibility that a *different* Commission membership regulating media in **2008** could reach a result similar to that reached by an earlier Commission in **1999**, for its own, *different* reasons, supported by a *different* body of evidence submitted during a *different* proceeding involving many, *different* comments. Yet this is precisely what Congress foresaw when mandating §202(h) reviews as an "ongoing mechanism to ensure that the Commission's regulatory framework would keep pace with the competitive changes in the marketplace" resulting from the 1996 Act's provisions, including its relaxation of the broadcast media ownership regulations.[21] Accordingly, it is

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[20] *Id*.

[21] *2002 Biennial Regulatory Review*, 187 FCCRcd 4726, ¶¶16,17 (2003) (citing preamble to the 1996 Act; H.R. Conf. Rep. No. 104-458 (1996)). *See also Prometheus I*, 373 F.3d 372, 391 (3d Cir. 2004) ("Put another way, the periodic review provisions require the Commission to 'monitor the effect of …competition …and make appropriate

not the NAB's opinion but the Third Circuit's that comports both with D.C. Circuit precedent and Congressional intent.

II. The Court of Appeals Properly Refused to Revisit Scarcity.

The Court of Appeals properly rejected calls to use this case as a vehicle for calling to question the *Red Lion* "scarcity rationale," which justifies subjecting broadcast regulation to a lower level of First Amendment scrutiny.[22] The legal underpinnings of the media ownership rules not only have remained relevant, but arguably have grown in legitimacy, with the growing number of competing uses for spectrum. If the growing numbers of companies staking competing claims for spectrum (each painting the public as victims at risk of greatest suffering the longer Congress or the FCC allows others to occupy it) agree on anything, it is that the broadcasters currently occupy a vast swath of "beachfront" spectrum, ever more valuable due to its unique characteristics.[23] Thus

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adjustments' to its regulations.'" (quoting *2002 Biennial Regulatory Review*, *supra,* ¶5)).

[22] Media General calls the scarcity doctrine "obsolete," and *Red Lion* and *NCCB* along with it, touting "dramatic technological and marketplace developments." Med. Gen. Pet. at 16-17.

[23] The broadcasters' band, below 700 MHz, is the most valuable "because of inherent properties that allow it to propagate over long distances and penetrate walls," rendering it ideal for many uses including robust, affordable wireless. *See*, *e.g.*, Marguerite Reardon, "Assessing Success in the

it is less necessary than ever to revisit this Court's holdings bearing on this dispute.

Among the avid spectrum speculators demanding the broadcasters' spectrum is AT&T, whose spokesperson Jim Cicconi recently took jabs at Petitioner NAB for seeking to have its cake and eat it too. Responding to NAB's insistence on both retaining its free "beachfront" (with an option to "volunteer" to profit by selling what was freely obtained) *and* imposing must-carry obligations, Cicconi warned that "one should keep in mind [NAB's] history."[24]

> Broadcasters still benefit from generous, and free, 1950s spectrum allocations . . . Yet despite their claims they still need this massive amount of spectrum for over-the-air broadcasting, they fought for, and still defend, government rules that require competing video providers to

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FCC's 700MHz Auction," CNET News, Mar. 19, 2008, at http://tinyurl.com/26hau27. Moreover, because its signals can transmit farther, the 700 MHz spectrum requires less equipment to build a network, greatly reducing its cost and rendering it ideal to provide rural areas with coverage. Marguerite Reardon, "Public safety bids stir spectrum spat," CNET News, Mar. 2, 2007, at http://cnet.co/zvhOFn.

[24] Jim Cicconi, AT&T's Public Policy Blog, "NAB's March Madness," Mar. 18, 2011, at http://bit.ly/gH51OJ.

> carry their signals . . . And let's not forget that NAB also wants Congress to mandate that wireless companies must include broadcast receivers in the devices we sell. So, in summary, the government provided to NAB's members, at no cost, all the spectrum they now have; the government requires other companies to carry their broadcasts whether they want to or not; and now NAB wants government to mandate that the wireless industry must create a market for their product . . . That's chutzpah.[25]

As suggested by the fact of Mr. Cicconi's engagement against NAB, not to mention its substance, the "scarcity" rationale may have even more force today than in 1975. Spectrum has grown scarcer and more valuable in the sense the *Red Lion* Court contemplated. Yet the public continues to give broadcasters exclusive use of spectrum free of charge, as well as other important privileges, in exchange for which the broadcasters are subject to few and reasonable commitments.

Scarcity is determined by the law of supply and demand: "[b]ecause of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this

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[25] *Id*.

number is far exceeded by the number of persons wishing to broadcast to the public."[26] What the unanimous *Red Lion* Court said in 1969 holds true today: "Scarcity is not entirely a thing of the past"; instead "[a]dvances in technology. . . have led to more efficient utilization . . . but uses for that spectrum have also grown apace."[27]

The demand is especially strong for broadcasters' TV spectrum, since the lower frequency spectrum – below 1000MHz – has propagation qualities that are ideal for mobile wireless devices.[28] To the extent the Internet has produced other competitors with original content, rather than merely news aggregators, those competitors are increasingly accessed exclusively via mobile wireless providers,[29] which increasingly call for

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[26] *NCCB*, 436 U.S. at 799.

[27] *Red Lion*, 395 U.S. at 396-397; *see also id*. at 397 (recognizing "conflicts have emerged [involving] such vital functions as defense preparedness…").

[28] *See supra* n. 23 and accompanying text.

[29] Many Latinos, for example, rely exclusively on mobile phones to access the internet. Kristin Purcell, Roger Entner & Nichole Henderson, "The Rise of Apps Culture," Pew Internet & American Life Project & The Nielsen Company (2010), at 19, *at* http://tinyurl.com/2wzlgyk ("As cell phone use in general increases, wireless internet use is also on the rise, particularly among Hispanic and African-American adults."); *see also* Aaron Smith, "Mobile Access 2010," Pew Internet & American

the "beachfront" spectrum to be wrested away from broadcasters and auctioned off to relieve wireless network congestion and perceived spectrum shortages.

Moreover, the public's reliance on wireless networks to engage in social, civic and professional activities, including to access traditional and new media to those ends, compounds the problem of potential wireless network congestion. In other words, it is not simply new businesses that have crowded the beachfront, but also the growing number of customers lined up outside every storefront. A year and a half ago, ABC News reported that "[i]n this era of smart phones and wireless communications, the country faces a shortage of needed spectrum for wireless communications growing as much as 250 percent a year."[30] Accepting this spectrum crunch argu-

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Life Project (Jul. 7, 2010), at 4, *at* http://tinyurl.com/43q7pjq .

[30] Julie Percha, "The Spectrum Crunch: President Obama Takes on the Shortage of Wireless Capacity," Political Punch, ABC News, Jun. 28, 2010, at http://abcn.ws/x2nNX7. *See also* Larry Downes, "At CES, FCC chair warns of mobile 'spectrum crunch – for the third time,'" Jan. 12, 2012, Cnet.com, at http://cnet.co/xyk1AQ. (Many since then have acknowledged the "spectrum crunch," such that at this year's Consumer Electronics Show, FCC Chairman Julius Genachowski observed wide acknowledgment by all public and private participants in the mobile ecosystem. "[I]n a world of tablets, smartphones, and now machine-to-machine communications, the debate

ment, and hopeful that freeing up sufficient spectrum to alleviate some demand would lead to better quality service for consumers, lower prices and increased access in rural areas, President Obama signed a Presidential memorandum committing the federal government to a sustained effort to make available 500 MHz of federal and commercial spectrum over 10 years.[31]

Broadcasters' reaction was to assert, in essence, squatter's rights.[32] Going back to the 1940s, broadcasters had been awarded the spectrum beachfront – free of charge. As one reporter put it, "[i]t was once thought, local radio and television broadcasters provided a service to the

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has been settled. The plain fact is that aggregate demand is increasing at a very rapid pace, while supply is flat," he continued.).

[31] *Id.* For purposes of comparison, one TV station occupies 6 MHz of bandwidth, *i.e.* 20 channels occupy 120 MHz. And, as discussed, *supra*, spectrum varies by quality; and the 700 MHz band where TV operates is the "best" spectrum available.

[32] Reacting against the FCC's planned incentive auctions, "[t]hey need their remaining spectrum, the NAB argue[d]." *See* David Oxenford, "FCC National Broadband Plan – What It Suggests for TV Broadcasters Spectrum," Broadcast Law Blog, Mar. 16, 2010, at http://tinyurl.com/2avf3dx. Unsurprisingly, NAB is not asking to overturn *Red Lion* in its petition here, but instead seeking to have its cake and eat it too by proffering its far-fetched "relabeling" conspiracy theory.

public…in exchange for their free channel space."[33]

The overwhelming bargain that media entities have received as part of this spectrum-for-public-benefit swap first was underscored in 1994, when the FCC held its first spectrum auction, raising $650 million for ten nationwide cellular licenses, all of them above 1000 MHz.[34] A years' long effort to free up portions of the TV band culminated in the transition to digital transmission, which was completed in 2009. Because digital transmission is more efficient, it was possible to relocate existing TV stations and free up a large block of spectrum for auction to wireless providers. The former TV band was split into blocks (two sets of blocks labeled A, B, C, D, E[35]), and

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[33] Sam Churchill, "Free Television: R.I.P.?," *Daily Wireless*, Dec. 29, 2009, at http://bit.ly/6dTxrJ. Decades later, when demands required, the upper portion of the broadcasters' band was handed over to public safety.

[34] *See* David Fisher, "Lightscrewed: How Washington whipped Phil Falcone," *Forbes*, Jan. 16, 2012, at http://onforb.es/rHVooq. (hereinafter "Fisher").

[35] *See* Andrew Seybold, "The Value of the D Block," Oct. 11, 2011, n. 1, at http://bit.ly/qcY9Uu. As has become relevant to the current debate, *infra*, one of these blocks, the D Block, was set aside for public safety. *See id*.

auctioned off. To date, the government has raised $52 billion via spectrum license sales.[36]

In its statutorily mandated National Broadband Plan, the Commission originally proposed to recapture 120 MHz of television broadcast spectrum, through a voluntary sale by some broadcasters of all or part of their spectrum, followed by a "repacking" (*i.e.*, realignment of stations) for efficiency increases.[37] In other words, as a result of their avowed "need" and resulting demand to retain their spectrum, broadcasters – which expressly waived any ownership right in the spectrum[38] and received the right to use it ***for free*** – will now ***be paid*** to surrender it.

On February 17, 2012, both Houses of Congress enacted legislation authorizing such a voluntary "incentive auction." It was signed into law on February 22, 1012.[39] The NAB successfully lobbied to remove a large amount of spectrum on the northern and southern borders of the United States from the auction, and for a set aside of $1.75 billion of auction proceeds (in excess of amounts to be paid to participants for

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[36] *See* Fisher, *supra* n. 34, at 2 (emphasis added).

[37] Oxenford, *supra* n. 32.

[38] *See* 47 U.S.C. §304.

[39] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156 (2012). The spectrum provisions are in Title VI of the law.

vacating their spectrum) to cover expenses broadcasters would incur as a result of these auctions. The fight over the spectrum auction issue involved various legislators, regulators, and wireless, broadcast and Internet companies, and demonstrated both the high value attached to the spectrum occupied by broadcasters *and* the high value policymakers place on preserving over-the-air broadcasting for localism and public use.

Demand for spectrum – not only from wireless and government interests seeking to free up more spectrum for public use, but also from the broadcasters that insisted that any model for recapturing their beachfront property must rely upon "voluntary," incentive-based relinquishment – also prompted heated battles over public safety legislation and wi-fi networks.

In its new legislation, Congress allocated for public safety concerns the D Block, a small swath of the "beachfront" 700 MHz spectrum vacated as a result of the digital television transition.[40] In mid-2011, the Obama Administration announced its support for the D Block's transfer to first responder agencies to build a nationwide, interoperable wireless public safety network, as recommended by the 9/11 Commission.[41] This announcement pit the White House against wireless companies, which continued to press for

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[40] *Id*., Title VI, Subtitle A.

[41] *See*, *e.g*., Dan Verton, "Battle for Public Safety Airwaves Rages on a Decade After 9/11," AOL Government, Jul. 19, 2011, at http://bit.ly/ AtHiuO.

wider public spectrum auctions. These companies argued that "the spectrum is critical to American competitiveness in an increasingly wireless world and a sale would raise an estimated $28 billion that could be applied to deficit reduction."[42] Those who favored auctioning the D Block also pointed to the fact that auctioning would generate perhaps as much as $3 billion in revenue for the federal government, given that the Congressional Budget Office set the price for that swath at $2.75 billion in its scoring of Senate bill 911.[43]

Another clear demonstration of the demand for spectrum in the TV band is the ongoing debate over "TV white spaces," a term given to unused spectrum sitting between TV channels. One of the most important and successful FCC policies has been the preservation of some portions of the spectrum band for use by anyone on an "unlicensed" basis. This has facilitated the development of wi-fi devices as well as baby monitors, garage door openers, TV remote controls and Bluetooth devices.[44]

With the evolution of digital technology, it has become technologically feasible for spaces be-

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[42] *Id*. (also acknowledging companies' arguments that the private sector could better deploy a modern, public safety network while saving taxpayers money).

[43] *See* Seybold, *supra* n. 35.

[44] Brendan Sasso, "Coalition warns against the sale of 'white spaces' spectrum," Hillicon Valley: THE HILL's Technology Blog, Oct. 10, 2011, at http://bit.ly/rogC5w.

tween TV channels to be put to unlicensed uses. Broadcasters vociferously opposed such authorizations, claiming this would cause interference.[45] In other bands, the Commission has created an unlicensed industry that generates an estimated $30 billion annually for the American economy and made this country the world leader in development of wireless technology.[46] During debate over Pub. L. No. 112-96, various parties debated whether a greater windfall may be had by preserving white spaces or by carving up all white spaces alongside recaptured TV-band spectrum and auctioning it to the wireless companies,[47] but beyond dispute here too is that demand exists for all spectrum in the TV bands, even that which presently is unlicensed.[48]

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[45] *See* Marguerite Reardon, "FCC opens free 'white space' spectrum," CNET, Nov. 4, 2008, at http://cnet.co/wVsWZY.

[46] *See* Reuters, "FCC Sees Support for Incentive Auctions of Wireless Spectrum," Chicago Tribune, Jan. 11, 2012, at http://trib.in/yECdB1 (reporting on Chairman Genachowki's keynote speech at this year's Consumer Electronics Show).

[47] *See* Brendan Sasso, "Senators Blast House Spectrum Bill," Hillicon Valley: The HILL's Technology Blog, Jan. 9, 2012, at http://bit.ly/wPwdYU.

[48] Were more evidence required to underscore the relevance of this Court's "scarcity" rationale, two recent battles demonstrate that the demand for spectrum exceeds even the projected incentive

auction's supply and extends to more encumbered spectrum:

AT&T's vigorously, publicly fought and ultimately failed bid for T-Mobile's spectrum licenses. AT&T agreed to a $39 billion price-tag and spent a reported "$40 million ad campaign and discussions with government officials." Cecilia Kang and Jia Lynn Yang, "How AT&T Fumbled Its $39 Billion Bid to Acquire T-Mobile," WASHINGTON POST, Business, Dec. 9, 2011 at http://wapo.st/t2XnCF. Nevertheless, its bid failed to gain necessary approvals from regulators who concluded the merger would harm competition, saddling AT&T with a "record high break-up fee" obligation - $3 billion in cash and a large package of its AWS spectrum – contracted for by T-Mobile as part of the agreement. *See* Chris Davies, "T-Mobile USA details 'record high break-up fee' from AT&T," *Slashgear*, Dec. 20, 2011, at http://bit.ly/uguuaH.

LightSquared. LightSquared investors paid a similarly hefty price for the opportunity to develop for wholesale purposes a swath of non-beachfront spectrum that presently could not be more landlocked. LightSquared's attempt to win FCC approval to roll out a terrestrial wireless broadband network faces strong opposition from military, aviation and other GPS users/interests concerned that the budding network will interfere with their spectrum. Yet, *Forbes* recently observed LightSquared's spectrum remains highly valuable, because of scarcity and its result – the "strong appetite out there for spectrum," as evidenced by the "$3.6 billion for nationwide wireless licenses" that Verizon recently paid Comcast and

There is also great demand for radio broadcast spectrum.[49] In March 2003, the Commission opened a filing period for a particularly desirable portion of the FM band, attracting an "extraordinary volume" of applications.[50] The Commission received more than 13,000 applications, more than three times the number of applications as the number of prior and existing providers of the type of service implicated.[51] Similarly, in 2007, the Commission opened a filing window for non-commercial educational FM radio stations and received approximately 3,600 applications – over 90% of which were mutually exclusive with other

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two other cable television companies. *See* Fisher, *supra* n. 34.

[49] *See Prometheus*, 373 F.3d at 402 (citing *Ruggiero v. FCC*, 278 F.3d 1323, 1325 (D.C. Cir. 2002), *rev'd en banc,* 317 F.3d 239 (D.C. Cir. 2003)).

[50] Creation of a Low Power Service, 20 FCCRcd 6763, 6777 (2005). Specifically, the Commission sought applications in an auction for FM translators. Translators are a secondary service generally operating to allow broadcasters simultaneously to rebroadcast the signal of a primary AM or FM station on a different frequency. *See* FCC Encyclopedia, "FM Translators and Boosters – General Information," at http://www.fcc.gov/encyclopedia/fm-translators-and-boosters-general-information.

[51] Creation of a Low Power Service, 20 FCCRcd at 6777.

proposals, indicating much greater demand than available spectrum – for far fewer slots.[52]

Last year, Congress enacted the Local Community Radio Act, H.R. 6533, which allowed for the creation of more low-power FM (LPFM) stations by permitting LPFM stations to be placed closer in proximity to existing stations. In 2000, the first time that LPFM stations became available, demand increased spectrum availability by a wide margin. Over 3,300 applications were accepted in 2000-2001, with fewer than a thousand stations eventually licensed and on air.[53] Demand for radio spectrum has only increased in the intervening twelve years; although the filing window for the newly available authorizations has yet to be announced by the Commission, LPFM advocates at the Prometheus Radio Project have already received inquiries from more than 1,600 groups.[54]

Further in evidence of radio spectrum scarcity is the amount of resources the Commission expends, separately, to fight a never-ending war against pirate radio, *i.e.* unlicensed stations, pri-

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[52] *See* Karen Everhart, Nine in 10 FM applicants face conflicts," Current.org, Nov. 19, 2007, at http://bit.ly/AdY2Pt. *See also* Public Notice DA 08-536, Mar. 7, 2008.

[53] FCC Consolidated Database System Application Search, at http://bit.ly/jYMple.

[54] *See* Prometheus Radio, "Get Radio! Mapping Project," at http://bit.ly/yAyA4j.

marily in urban markets where no licenses are available.[55]

These various battles over spectrum, with escalating costs, only add weight to what the *Red Lion* Court observed long ago:

> The rapidity with which technological advances succeed one another to create more efficient use of spectrum space on the one hand, and to create new uses for that space by ever growing numbers of people on the other, makes it unwise to speculate on the future allocation of that space. It is enough to say that the resource is one of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress. Nothing in this record, or in our

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[55] *See, e.g.*, "FCC Shuts down Brooklyn Gospel Pirate #Radio Station – Nationwide Crackdown in Full Effect!!! # Warning," Insight Promotions & Marketing, May 30, 2011, at http://bit.ly/wNnFqc (reporting that FCC shut down station providing 24 hours of gospel programming and prepared for a mass raid to ensure that "airwaves in places like Newark, Brooklyn, Boston, Miami, etc [sic] will have a lot less interference."). *See also* David Oxenford, "Pirates, Pirates Everywhere – Fines Up to $25,000 for Unlicensed Radio Stations," Broadcast Law Blog, Feb. 2, 2012, at http://bit.ly/wv20E0.

> own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential.[56]

The various Petitioner entities provide nothing in *this* record that supports their contention that *Red Lion* is obsolete. Their petitions provide no convincing evidence that the broadcast spectrum is no longer one for which there are more immediate and potential uses than can be accommodated. They do not because they cannot.

III. Revisiting Scarcity Would Throw Media, Internet and Spectrum Policy Into Chaos.

Not only is it unnecessary to revisit scarcity, but it is foolhardy. To use this case as a vehicle to revisit scarcity would cause irreparable collateral damage. *Red Lion* continues to serve as bedrock for valuable telecommunications policy. As a result, casting doubt upon *Red Lion*'s scarcity rationale affects the infrastructure for diverse and informed public debate on issues central to self-governance, and many discourse-promoting regulations.

Beyond imposing ownership limits on TV and radio holdings, *Red Lion* serves as basis for 47 USC §335, which requires direct broadcast satellites to set aside at least four percent of their

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[56] *Red Lion*, 395 U.S. at 399.

channel capacity for noncommercial, educational and informational programming. Separately, *Red Lion* is a principal justification for must-carry statutes, including 47 USC §§532-533, which were upheld in *Turner I*,[57] and lends the rationale for supporting the Satellite Television Extension and Localism Act of 2010, P.L. 111-151, which governs the retransmission of local TV broadcast programming on direct broadcast satellites.[58] Another structural category affected by *Red Lion*

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[57] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

[58] An earlier version of this statute was upheld by the Fourth Circuit in *Satellite Broadcasting and Communications Association v. FCC*, 275 F.3d 337 (4d Cir. 2001). *See id.* at 356 ("Congress enacted the carry one, carry all rule to 'preserve free television for those not served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources.'" (quoting H.R. Conf. Rep. No. 106-464 at 101 (1999)).

involves build-out[59] and universal service mandates effectuated through the licensing process.[60]

Red Lion provides the foundation for laws promoting an informed electorate, including by ensuring political, educational and noncommercial programming.[61] In this respect, *Red Lion*

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[59] Because of *Red Lion*, the FCC can routinely impose build-out requirements on wireless licensees, *see*, *e.g.*, Service Rules for the 698-746, 747-762 And 777-792 Mhz Bands, WT Docket No. 06-150, 23 FCCRcd 8047, 8053-54 (2008), without facing First Amendment challenges like the ones raised by cable operators against similar build-out laws, *see*, *e.g.*, *Century Federal, Inc. v. City of Palo Alto*, 719 F.Supp. 1552, 1554 (N.D. Cal. 1987) (striking down cable build-out rules).

[60] *See FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 360 (1958). *See also* Amendment of Section 3.606 of Comm'n's Rules & Regulations, Sixth Report & Order, 41 FCC 148, 167 (1952) (providing as the first three priorities of allocation: "(1) To provide at least one television service to all parts of the United States. (2) To provide each community with at least one television broadcast station. (3) To provide a choice of at least two television services to all parts of the United States.").

[61] The constitutional vitality of numerous other statutes and other regulations depends on scarcity. These include the Commercial Advertisement Loudness Mitigation ("CALM") Act, Pub. L. No. 111-311, 124 Stat. 3294 (2010) (codified at 47 USC § 621) (limiting the volume of TV commercials); The Twenty-First Century

served as a basis for implementation of campaign disclosure requirements. With *Red Lion* could go the constitutionality of:

- 47 USC §312(a)(7), as upheld in *CBS, Inc. v. FCC*, 453 U.S. 367, 394-397 (1981) affording federal candidates with a right of "reasonable access" to broadcast air time;
- 47 USC §315(a), the so-called "equal time" right for candidates for public office;
- 47 USC §315(b), which gives candidates the right to a discounted rate for air time;
- 47 USC §335(a), which applies the "equal time" and "reasonable access" provisions to direct broadcast satellites; and
- The Children's Television Act of 1990, 47 USC §§ 303a-303b, which mandates the carriage of minimum amounts of informational and educational programming for children.[62]

Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751, §202(b) (2010) (requiring video descriptions to assist the visually impaired); 47 CFR §73.1206 (notice that a telephone conversation is being broadcast); 47 CFR §73.1210 (limiting dual language broadcasts in Puerto Rico); and 47 CFR §73.1216 (regulating licensee-conducted contests).

[62] Children's Television Programming, 11 FCCRcd 10660, 10729-34 (1996) (implementing The Children's Television Act of 1990). An accompanying Senate Report analyzed the constitutional issues and concluded the Act was

The licensing process, including marine, wireless telephony, aviation and other services depends on *Red Lion* and scarcity, as it is *Red Lion* that allows the government to balance competing rights to the radio spectrum to promote First Amendment goals.[63] With respect to spectrum (unlike in parks, print journals or the Internet), the government can license because of *Red Lion* and the "scarcity rationale." Absent that precedent, spectrum would become yet another forum in which the government neither can silence the millions of Americans lacking a license[64] nor license speakers.[65] Without *Red Lion*, every pirate radio station would stand on the same ground from a First Amendment standpoint as every licensed broadcaster.

In fact, questioning *Red Lion* could undermine every spectrum license held by a private or government party, such that it is not only ownership rules that would fly out the window, but licenses

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constitutional under *Red Lion*. S. Rep. No. 227, 101st Cong., 1st Sess. 17 (1989).

[63] *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102-03, 110 (1973).

[64] *Cf. Red Lion*, 395 U.S. at 389 ("[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused.").

[65] *See, e.g., Hague v. CIO*, 307 U.S. 496 (1939); *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992).

or the concept of ownership itself. Without the scarcity rationale, under *Forsyth*,[66] the government would be forced to defend each license under strict scrutiny, and likely would fail most frequently where television broadcasting licenses were concerned, given the greater demand for wireless.

IV. Media Ownership Rules are Content-Neutral, Structural Rules Reasonable for Promoting Substantial Government Interests.

The media ownership rules are content-neutral, structural rules, and still constitute "reasonable means of promoting" the government's "substantial" interests in competition and viewpoint diversity. This Court settled the issue in *NCCB*.[67]

In *NCCB*, this Court gave only minimal scrutiny to, and upheld, the Commission's newspaper-broadcast cross-ownership rule prohibiting, absent a waiver, common ownership of a broadcast station and a daily newspaper in the same community.[68] Then and now, the cross-ownership rule merely constrains the newspaper publisher's choice of the community in which to own a radio

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[66] *Id*.

[67] *NCCB*, 436 U.S. at 801 (unanimously upholding substantial government interests in promoting diversified mass communications and viewpoint diversity).

[68] *NCCB*, 436 U.S. at 779.

or television station; it does not prohibit the publisher from broadcasting altogether.[69]

Since *NCCB*, the Commission has continued to recognize the existence of other major mass media and restrict common ownership of mass media outlets that provide coverage of local issues – specifically, newspapers, broadcast television, and broadcast radio. As many parties complained to the Commission prior to the *2008 Order*,[70] the last several years signified changes in the tele-

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[69] *Id*. at 800 ("Under the regulations ... a newspaper owner need not forfeit anything in order to acquire a license for a station located in another community").

[70] *See, e.g.*, Pet. App. 96a, fn. 19 (noting Communication Workers of America gathered "several surveys and reports showing that most websites merely republish, repackage, and redesign information originated for their newspapers and television stations," as basis for its contention "that the Internet continues to serve primarily as an alternative distribution platform for traditional media outlets."); *id*. at 100a-101a ("Moreover, studies focused on the specifics of Internet usage to obtain news show that cites operated by newspapers and broadcast television stations capture a significant percentage of consumer attention. ... This[] may be due to the fact that traditional media still largely provide the original newsgathering and reporting on which consumers -- and many of the new media outlets such as aggregator sites and bloggers -- rely." (citations omitted)).

communications marketplace which only increased the need for greater competition in traditional media, and thus the importance of the media ownership rules. Preceding the *2008 Order*, for example, an FCC-commissioned survey of media usage by Nielsen Media Research, Inc. found that 89 percent of people said traditional media are their most important source of local news and current affairs.[71] Thus, the evidence before the Commission was that the growth of other media delivery systems did not alter the role of broadcasting and newspapers as the most pervasive of platforms.[72]

Reasonably, the rules then and now also leave owners of newspapers free to own broadcast stations in other markets, but simply place limitations on common ownership only of a newspaper and broadcast station in the same market. As with *NCCB*, the result might be different were the Commission now "to choose among applicants upon the basis of their political, economic or social views," but it has not done so – "[h]ere the regulations are not content related; moreover, their purpose and effect is to promote free speech, not to restrict it," *id*. (internal quotations and citation omitted). Therefore the Third Circuit's holding that "the Commission's continued regulation of the common ownership of newspapers and broad-

[71] Pet. App. 350a, fn. 2 and accompanying text.

[72] *Id*. at 350a.

casters does not violate the First Amendment rights of either" is uncontroversial.[73]

Moreover, waivers are available when circumstances require.[74] Media petitioners cannot disagree that this is the extent of that limitation's impact. Thus in their Petitions, Tribune Co. and Media General opt for a different tack, abusing *NCCB* in differing ways, neither of which makes a case for *certiorari*.

Media General calls for reconsidering *NCCB*, but misplaces its reliance on *Turner*, which would not alter disposition of this matter.[75] The public interest goals that the regulations at issue uphold, regardless of which among competition, diversity and localism informs a given ownership rule, are content-neutral and viewpoint-neutral under the tests set forth under *Turner*. *Turner* defined "content-based" as "laws that by their terms distinguish favored speech from disfavored

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[73] *Id.* at 63a (quoting *Prometheus I*, 373 F.3d at 402).

[74] *See*, *e.g.*, *Kortes Communications, Inc.*, 15 FCCRcd 11846 (2000) (permanent waiver); *Columbia Montour Broadcasting Co., Inc.*, 13 FCCRcd 13007 (1998)(same); *Fox Television Stations Inc.*, 8 FCCRcd 5341 (1993), *aff'd sub nom.*, *Metropolitan Council of NAACP Branches v. FCC* 46 F.3d 1154 (D.C. Cir. 1995)(same); *Field Communications Corp.*, 65 FCC2d 959 (1977)(same). *See also News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988).

[75] *See generally* Med. Gen. Pet. at 24-28.

speech on the basis of the ideas or views expressed," 512 U.S. at 643 (citation omitted). Here, the government is not expressing any agreement or disagreement as to the message or favoring or disfavoring speech based on the ideas or views when distinctions are "based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry."[76] Thus, "heightened scrutiny is unwarranted" because "the differential treatment is 'justified by some special characteristic of' the particular medium being regulated."[77]

In any event, this Court has recognized the First Amendment interest of viewers and listeners in "the widest possible dissemination of information from diverse and antagonistic sources," which the Commission has reasonably determined are best maintained with reasonable measures controlling media market concentration.[78]

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[76] *Turner*, 512 U.S. at 645.

[77] *Id.* at 661 (citation omitted). By contrast, in *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), this Court found it unconstitutional to restrict the amount of independent expenditures supporting political candidates, because in that case, the identity of the speaker was associated with a particular viewpoint.

[78] *NCCB*, 436 U.S. at 785. *See also Prometheus I*, 373 F.3d at 417 (hand-in-hand with media market concentration goes the "reduced incentive to improve programming" for the public.).

VI. The NBCO Rule Does Not Violate the Constitutional Rights of Newspaper Owners.

Tribune Co. concedes that *NCCB* remains valid, but attempts to escape it by claiming that the NBCO rule "singles out newspaper owners for special restrictions on their speech that do not apply to cable television or Internet sites…"[79] This argument can only be based on a misinterpretation of *NCCB*. The cross ownership rule is not intended to diversify all major mass media. Rather, the FCC sought to regulate broadcast cross-ownership to promote viewpoint diversity within *local* communities.[80] Thus, when adopting the original NBCO rule, the FCC excluded, *inter alia*, magazines and other periodicals that "dealt exclusively with regional or national issues."[81] In other words, not only did other major mass media exist but *NCCB* specifically recognized its existence, as had the Commission.

As with *Red Lion*, the factual predicate upon which *NCCB* rests has not evaporated with new media entrants. The media ownership rules otherwise do not unfairly single out newspapers for differential treatment but regulate only broadcasters and only with respect to certain markets, furthermore allowing for waivers that could accommodate any newspaper publisher at risk of genuine harm. Put another way, the NBCO rule

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[79] *See* Pet. at 30.

[80] *NCCB*, 436 U.S. at 786 (citation omitted).

[81] *Id*. at 815.

does not prevent ownership of multiple newspapers and broadcast outlets – it simply limits them, absent a waiver, in a few, select markets.

In any event, even a law that singles out a single medium, or even the press as a whole, "is insufficient by itself to raise First Amendment concerns," under *Turner*, 512 U.S. at 660. As such, *certiorari*, if granted here, only would serve to affirm the continuing relevance of *NCCB*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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