No. 11-691

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

REPLY TO BRIEFS IN OPPOSITION

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INTRODUCTION

The various briefs in opposition to the petition advance two contradictory themes. According to respondents, it is both too late and too early for this Court to review the issues presented here: they assert that the law in this area is already "settled," but that review now would be "premature." Contrary to those assertions, the time is just right for review. This Court's decision in *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (*NCCB*), holds that broadcast-ownership restrictions need only be rational to be constitutional. Such rational-basis review has always been an anomaly in First Amendment law, and the justification for that anomaly has long since evaporated. Unless and until this Court reconsiders *NCCB*, however, that decision remains the law of the land, and continues to set the legal standard for the FCC to justify, and the courts to review, broadcast-ownership restrictions. If, as is widely recognized, the legal standard applied in *NCCB* is obsolete, further proceedings in the FCC and the lower courts under that standard are just a waste of time. The time is ripe for this Court to reconsider *NCCB*.

I. This Court Should Reconsider *NCCB*.

The parties here agree that *NCCB* holds that broadcast-ownership restrictions pass constitutional muster if rationally related to a legitimate government interest, and that both the FCC and the Third Circuit applied that highly deferential standard in this case. Where the parties part company is on the question whether this Court should reconsider *NCCB*. While respondents offer a full-throated defense of that decision, Media General

respectfully submits that such reconsideration is not only warranted but overdue.

A. The "Scarcity" Doctrine

Respondents first argue that, notwithstanding the technological revolution of the past generation, the so-called "scarcity" doctrine continues to justify rational-basis review of broadcast-ownership restrictions under the First Amendment. *See* Br. for Fed. Resps. (FCC Opp.) 16-20; Br. for Resp. Consumer Fed. of Am. (CFA Opp.) 4-12, 18-21; Br. of Resp. Prometheus Radio Project *et al.* (Prometheus Opp.) 12-32. In particular, respondents embrace the Third Circuit's assertion that "'[t]he abundance of non-broadcast media does not render the broadcast spectrum any less scarce.'" CFA Opp. 8 (quoting Pet. App. 75a, 459a); *see also* Prometheus Opp. 12-27.

Respondents thereby miss the point: the abundance of non-broadcast media wholly undermines the rationale for "subject[ing] broadcasters to unique disfavor under the First Amendment." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1822 (2009) (Thomas, J., concurring). Broadcasting now is just one of many modes of transmitting news and entertainment to a mass audience. In an era when most Americans watch broadcast television over cable, satellite, the internet, or mobile, *see id.*, there is no reason to apply lesser First Amendment scrutiny to government restrictions on the ownership of broadcast stations than, for example, cable systems. The relevant constitutional denominator, in other words, is not broadcasting, but the entire panoply of modes of transmission of the signals that previously could be transmitted only on the broadcast spectrum.

Viewed in this light, the scarcity doctrine is as much an outmoded vestige of the 1970s as leisure suits and bell-bottoms.

Respondents thus attack a straw man by insisting that a challenge to the scarcity doctrine is a challenge to broadcast licensing. *See* FCC Opp. 18-19; CFA Opp. 18-21; Prometheus Opp. 31-32. No one doubts that a licensing regime is necessary to allow meaningful use of the broadcast spectrum and avoid a "cacophony of competing voices." *Fox Television*, 129 S. Ct. at 1820 (Thomas, J., concurring) (internal quotation omitted). But that does not mean that government restrictions on broadcast ownership should be subject only to rational-basis review under the First Amendment. Thus, for example, the government is certainly allowed to establish rules to govern speakers in a public park, but could not possibly deny access on the ground that a would-be speaker owned a newspaper in the community. *See, e.g.*, *CBS, Inc. v. DNC*, 412 U.S. 94, 162 (1973) (Douglas, J., concurring). The need for a licensing regime, in other words, does not give the government free rein to discriminate among speakers. *See, e.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988). Indeed, cable transmission is subject to franchising and licensing of supplemental frequencies that support the transmission, but is not thereby subject to the "less rigorous standard of First Amendment scrutiny" now applicable only to broadcasting. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994).

Respondents' assertion that Media General "fail[s] to provide a 'special justification'" for reconsidering the scarcity doctrine, FCC Opp. 18, is

mystifying. As Media General pointed out in its petition, that doctrine is based on "'the present state of commercially acceptable technology'" circa 1970, and the ensuing decades have witnessed a technological revolution. Pet. 17 (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969)). In light of that revolution, the scarcity doctrine, which has been "criticized … since its inception," *Turner*, 512 U.S. at 638, has been rendered "indefensible," *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) (*ACT*) (*en banc*) (Edwards, C.J., dissenting); *see also Fox Television*, 129 S. Ct. at 1821 (Thomas, J., concurring) (noting that "the logical weakness" of the scarcity doctrine "has been apparent for some time"); *Leflore Broad. Co. v. FCC*, 636 F.2d 454, 458 (D.C. Cir. 1980) (Bazelon, J.) ("In the not too distant future, new technologies presumably will increase the number of broadcasting avenues, thereby eliminating a major part of the justification for the special constitutional regime applied to broadcast speech."); Laurence H. Tribe, *American Constitutional Law* § 12–25, at 1005-06 (2d ed. 1988) ("[S]ince the scarcity argument made little sense as a basis for distinguishing newspapers from television even in the late 1960's and early 1970's, ... reconsideration [of that argument] seems long overdue.") (footnotes omitted). Because "it is the Supreme Court's prerogative to change its own precedent," Pet. App. 458a, however, the scarcity doctrine remains the law of the land long after it has ceased to make any sense.

Indeed, as Media General noted in its petition, the FCC itself concluded a quarter-century ago 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." *In re Compl. of Syracuse Peace Council*, 2 F.C.C.R. 5053 (1987), *pet. for review denied*, 867 F.2d 654 (D.C. Cir. 1989). Although that decision on its face provided the "signal" that this Court had requested in *FCC v. League of Women Voters of Calif.*, 468 U.S. 364, 376 n.11 (1984), this Court has never heeded that signal. In light of *Syracuse Peace Council*'s repudiation of the scarcity doctrine, *see* Pet. 22, the FCC's current attempt to limit that decision to the context of the fairness doctrine, *see* FCC Opp. 23, can only be described as disingenuous.

At the very least, as respondents recognize, the Court should hold this petition pending its resolution of *FCC v. Fox Television Stations, Inc.*, No. 10-1293, *cert. granted*, 131 S. Ct. 3065 (2011). *See* FCC Opp. 29. There, as here, the scarcity doctrine has been challenged, and accordingly this Court's decision in that case "may shed light on the proper analysis of petitioners' constitutional claims." *Id.*

B. Equal Protection

Respondents also defend *NCCB*'s holding that broadcast-ownership restrictions targeted solely at newspapers are subject only to rational-basis review under the Equal Protection Clause. *See* FCC Opp. 27-28; Prometheus Opp. 37-38. Once again, their arguments are based on outmoded assumptions.

Respondents do not dispute the general rule that "laws 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

(internal quotation omitted). Rather, respondents make the unremarkable observation that such laws are not invariably unconstitutional, and may be "'justified by some special characteristic of' the medium being regulated." FCC Opp. 27 (quoting *Turner*, 512 U.S. at 660).

As noted in the petition, *NCCB* applied rational-basis review in holding that differential treatment of newspaper owners does not violate equal protection. Pet. 25. By its terms, however, that holding is based on the premise that newspapers are the *only* "major media of mass communications" other than broadcast stations. 436 U.S. at 801. Needless to say, that premise is untenable today in light of the explosion of non-broadcast mass media, including cable, satellite, the internet, and mobile.

Respondents thus miss the point by insisting that "daily newspapers and broadcast stations are the media platforms that Americans turn to most often for local news and information." FCC Opp. 27. As a result of the technological revolution of the past generation, most Americans now receive those broadcast stations not through over-the-air broadcast transmission, but instead through cable, satellite, the internet, and mobile. Accordingly, there is no justification for relying on the rational-basis standard in evaluating the differential treatment of newspapers and other non-broadcast mass media.

Unless and until this Court reconsiders *NCCB*, however, its outmoded equal-protection holding remains the law of the land. Indeed, the Third Circuit refused even to consider Media General's equal-protection argument on the ground that it was "foreclosed" by *NCCB*. Pet. App. 457a; *see also* Pet.

App. 76a. Accordingly, reconsideration of *NCCB* on this score is also warranted.

C. Content Neutrality

Finally, respondents defend *NCCB*'s holding that the FCC's broadcast-ownership restrictions are content-neutral and thus subject only to rational-basis First Amendment review. FCC Opp. 24-25; Prometheus Opp. 32-36. The proffered defense, however, only highlights the constitutional infirmity.

Respondents characterize the FCC's ownership restrictions as "structural," and hence unrelated to content. FCC Opp. 24; CFA Opp. 3, 12-18; Prometheus Opp. 32. That characterization, however, is manifestly incorrect: the justification for those restrictions is, and always has been, to promote a diversity of viewpoints in broadcast speech. *See NCCB*, 436 U.S. at 780 ("[T]he Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints."); *id.* at 786 ("The [newspaper-broadcast cross-ownership restrictions] were justified … by reference to the Commission's policy of promoting diversification of ownership: Increases in diversification of ownership would possibly result in enhanced diversity of viewpoints."); *id.* at 796 ("[T]he Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints."). Indeed, the FCC specifically acknowledged this point in the proceedings below. *See* Pet. App. 121a ("[A]ll of the ownership rules that we review in this Order are designed to further diversity."); Pet. App. 653a ("[R]egulating ownership

is an appropriate means to promote viewpoint diversity."); Pet. App. 692a ("[W]e continue to believe that diversity of ownership can advance our goal of diversity of viewpoint.").

Given that the *avowed purpose* of the FCC's broadcast-ownership restrictions is to affect the content of broadcast speech (by ostensibly promoting a greater diversity of viewpoints), those restrictions cannot possibly be characterized as content-neutral. *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). A desire to promote viewpoint diversity may be "benign," but assuredly is not "content-neutral." *Id.* at 678.

It follows that the FCC's broadcast-ownership restrictions should be subject to the same strict scrutiny as any other content-based restrictions on speech. *See, e.g.*, *Brown v. Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 395 (1992). They are not now subject to such scrutiny, however, in light of *NCCB*'s anomalous (and unexplained) holding that broadcast-ownership restrictions expressly aimed at promoting viewpoint diversity are "not content related." 436 U.S. at 801. Unless and until this Court reconsiders *NCCB* on this ground too, the law governing broadcast-ownership restrictions will remain a First Amendment aberration.

II. This Case Presents The Perfect Vehicle To Reconsider *NCCB*.

In addition to arguing that reconsideration of *NCCB* is unwarranted, respondents argue that such reconsideration is "premature." FCC Opp. 15, 26. That is so, respondents assert, because the Third

Circuit vacated the FCC's proposed newspaper-broadcast cross-ownership restrictions on administrative-law grounds, and remanded the proceeding to the Commission to start all over again. FCC Opp. 26 & n.9. According to respondents, "[p]etitioners' constitutional challenges are thus in effect directed to a future rule—as yet unadopted—that the Commission may or may not choose to promulgate on remand." FCC Opp. 26-27 n.9.

That argument misperceives the nature of the constitutional challenge presented here. The petition is not directed at the specifics of any particular broadcast-ownership restriction, but instead at the entire constitutional framework governing such restrictions. Right now, the FCC and the lower courts are operating within the framework established by *NCCB*. Only this Court—not the FCC or the lower courts—can reconsider that framework. And if that framework is to be reconsidered, it should be reconsidered now.

This case, in which both the FCC and the Third Circuit considered, and rejected, petitioners' constitutional challenges under *NCCB*, *see* Pet. App. 75-76a, 128a n.58, 458-60a, 641-44a, presents a perfect vehicle for reconsidering that decision. Indeed, the fact that this proceeding has dragged on for more than a decade, and that no end is remotely in sight, only underscores that this Court's review is, if anything, overdue. The quadrennial review program established by Congress has descended into an abyss of dysfunction as this proceeding has bounced back and forth between the Commission and the Third Circuit. The time has come for this Court to break this vicious circle, and to clarify the

constitutional standard governing further proceedings.

Respondents' invocation of the canon of constitutional avoidance, *see* FCC Opp. 26, is thus misplaced. That canon has no application where, as here, both the FCC and the Third Circuit specifically rejected petitioners' constitutional challenges under *NCCB*. *See* Pet. App. 75-76a, 128a n.58, 458-60a, 641-44a. In the absence of review by this Court, those constitutional holdings establish the law of the case binding in further proceedings on remand. *See, e.g.*, *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-18 (1988). What respondents are seeking, in other words, is not constitutional avoidance, but constitutional abdication.

Because *NCCB* squarely considered, and rejected, the constitutional arguments presented here, respondents similarly miss the mark by insisting that "[t]here is no conflict in the circuits on the constitutional issues petitioners present." FCC Opp. 17; *see also* Prometheus Opp. 1, 6-12. By definition, there can be no circuit conflict on a constitutional question previously decided by this Court. But that does not mean that review of such a question is unwarranted; to the contrary, it is not at all unusual for this Court to grant review to reconsider one of its precedents. *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 900-01 (2007); *United States v. Hatter*, 532 U.S. 557, 567 (2001); *State Oil Co. v. Khan*, 522 U.S. 3, 20-21 (1997).

Respondents also err by asserting that the recent enactment of the Middle Class Tax Relief & Job Creation Act of 2012, Pub. L. No. 11-96, 126 Stat. 156 (2012), provides a reason for this Court to deny

review. *See* FCC Opp. 28-29. As respondents note, that statute simply "allow[s] television licensees to return their spectrum assignments" to the Commission in exchange for money. *Id.* at 28. The statute has nothing to do with the appropriate constitutional standard for analyzing government restrictions on broadcast ownership, and indeed respondents do not contend otherwise. Rather, respondents merely suggest that the statute "*may* … alter the economics of television markets," although they quickly acknowledge that "the new statute is unlikely to have an immediate impact on the television marketplace," and "it is too early to predict any particular effect of the new legislation." *Id.* (emphasis added). Given that *NCCB* is distorting broadcast-ownership law here and now, such amorphous speculation about "future changes in the television industry," *id.* at 29, provides no reason for this Court to decline review.

At bottom, there are few issues of greater importance to a free society than the degree of government control over the media of mass communications. This Court, however, has not addressed the constitutional standard governing broadcast-ownership restrictions since 1978. The time has come for this Court to reconsider *NCCB*.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, this Court should grant a writ of certiorari.

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