No. 11-696

IN THE

Supreme Court of the United States

TRIBUNE COMPANY, FOX TELEVISION STATIONS, INC., SINCLAIR BROADCAST GROUP, INC., BONNEVILLE INT'L CORP., THE SCRANTON TIMES, L.P., MORRIS COMMUNICATIONS CO., LLC, AND NEWSPAPER ASSOCIATION OF AMERICA,

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

REPLY BRIEF

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The scarcity doctrine is a long outdated concept that has survived even though its two essential premises—the uniqueness of broadcasting as a medium of mass communication, and the scarcity of the spectrum over which broadcasters operate—are no longer valid. Today, broadcasting is not the predominant mass medium; cable, satellite, the Internet, and other means of communication now crowd the media marketplace. And spectrum is no longer a scarce resource for broadcasting, as demonstrated by the increase in broadcast stations and the fact that Congress and the FCC have begun reclaiming and repurposing broadcast spectrum for other uses. A technological revolution has thoroughly undermined the scarcity doctrine, and with it the anomalous degradation of broadcasters' First Amendment protections. Because the scarcity doctrine was accepted by this Court, however, this Court alone can declare the doctrine outdated and restore to broadcasters their full First Amendment rights.

The FCC continues to impose rules against media ownership that hinder the ability of broadcasters and newspapers to respond to competition, despite crushing economic realities and an industry-wide transformation. Worse, the FCC's media-ownership regime includes content-based restrictions that, absent the scarcity doctrine, would be abhorrent to the First Amendment. The FCC's contention that review by this Court should await further proceedings—when sixteen years and four such proceedings have produced no material changes in the media ownership restrictions—is meritless. The industry is trapped in a cycle of lengthy and costly litigation between the FCC and a panel of the Third Circuit, both of which

blindly cling to the outdated scarcity doctrine. Only this Court can break the cycle, and after more than a decade of inconclusive and repetitive litigation with no end in sight, it should do so *now*.[1]

DISCUSSION

Respondents claim that the scarcity doctrine, a relic of the mid-20th Century, continues to justify a lower standard of First Amendment scrutiny for broadcast regulation even in this age of cable and satellite television and the Internet. They also argue that review is unwarranted because there is no circuit split, because applying standard First Amendment scrutiny to broadcast regulation would have radical consequences, and because yet another periodic review is underway. None of these claims has merit.

1. Petitioners demonstrated that this Court should reexamine the scarcity doctrine because broadcast spectrum is no longer "scarce" and because the growth of alternative channels of communication has rendered the doctrine obsolete. Pet. 18-21. The government concedes that "there are today more broadcast and non-broadcast outlets than there were when the Court" established the scarcity doctrine. Gov't Opp. 19. Indeed, by 1986 courts had noted that "[b]roadcast frequencies are much less scarce now than when the scarcity rationale first arose in [*NBC* v. *United States*, 319 U.S. 190 (1943)]," and that "'the number of broadcast stations … rivals and perhaps surpasses the number of newspapers and magazines.'" *Telecomms. Research & Action Ctr.* v. *FCC*,

[1] The government agrees that because the validity of the scarcity doctrine has been put at issue in *FCC* v. *Fox Television Stations, Inc.*, No. 10-1293 (argued Jan. 10, 2012), the Court should hold the Petition pending the Court's decision in that case. Gov't Opp. 29.

801 F.2d 501, 509 n.4 (D.C. Cir. 1986) (omission in original). The increase in the number of channels has continued substantially since. See *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1821 (2009) (Thomas, J., concurring).[2]

Respondents nonetheless erroneously argue that because "'more people would like to access the [broadcast spectrum] than can be accommodated,'" the "core reason" for the doctrine remains intact, and that the "growth of alternative media outlets does not logically" affect the validity of the scarcity doctrine. Gov't Opp. 19-20 (alteration in original); Consumer Federation Opp. 5; Media Access Opp. 15.

First, respondents' claim that continued demand for spectrum that outstrips availability supports maintenance of the scarcity doctrine is nonsensical because that claim is based on demand from entities *other than* broadcasters. They acknowledge that the demand for spectrum today arises from "the astonishing growth in wireless communication," because "mobile service providers are increasingly calling for 'beachfront' high-quality spectrum to be wrested *away* from broadcasters." Consumer Federation Opp. 10 (emphasis added); Media Access Opp. 12-27. The fact that Congress is *taking away* spectrum from broadcasters and redirecting it to wireless broadband providers dramatically refutes, rather than affirms, the fundamental basis for the scarcity doctrine. *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 388 (1969) ("there are substantially more individuals *who want*

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[2] Even respondent Consumer Federation recognizes that it "'is simply not the case that the broadcast media are more scarce than the print media.'" Consumer Federation Opp. 8 n.7 (citation omitted).

to broadcast than there are frequencies to allocate" (emphasis added)).

Respondents' second claim, that the growth of alternative channels of communications does not logically affect the continued validity of the scarcity doctrine, misapprehends the true basis of the doctrine. Motivating the scarcity doctrine was the Court's concern that monopolization of a primary means of mass communication could threaten an "uninhibited marketplace of ideas." *Red Lion*, 395 U.S. at 390; see also Consumer Federation Opp. 7 (discussing "extremely powerful speakers"). But as Members of this Court have recognized, the dramatic rise of alternative forms of mass communication—including the Internet, cable, and satellite television, none of which are subject to broadcasting's inherent limitations, Gov't Opp. 19 n.9—eviscerate this central concern. Pet. 20. No longer is there a danger of broadcasting—with its "incomparably greater … voice," *Red Lion*, 395 U.S. at 387-88—monopolizing the marketplace of ideas. With the explosion of other competing media over the last three decades, Pet. 20-21, applying a different First Amendment standard to broadcasters is unjustifiable.

The government contends that the FCC's "lawful exercise of its licensing authority does not violate the constitutional rights of newspaper owners or others," Gov't Opp. 19, but this is a non sequitur. The mere need for some licensing regime does not logically imply reduced First Amendment scrutiny. All media have licenses to do business somewhere, but no one would seriously contend that such licenses trigger reduced First Amendment protections. As lower courts and Members of this Court have explained, "[a]ll economic goods are scarce," and "[s]ince scarcity is a universal fact, it can hardly explain regulation in one

context and not another." *Telcomms. Research & Action Ctr.*, 801 F.2d at 508; *Fox*, 129 S. Ct. at 1821 (Thomas, J., concurring). Respondents fail to distinguish between the need for spectrum allocation and the policies the government applies in awarding licenses. In all other First Amendment contexts, the government cannot adopt policies designed to suppress the speech of some for the purpose of enhancing the speech of others, see *Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam), and the dramatic changes in the marketplace have eliminated any reason to make an exception for broadcasting.

The pernicious effect of the scarcity doctrine is especially apparent here because these ostensibly "structural" regulations are really content-based restrictions on speech that would otherwise be subject to the strictest scrutiny. Pet. 24-26. The government contends that these regulations are content neutral because the FCC did not "'adopt[] a regulation of speech because of disagreement with the message it conveys.'" Gov't Opp. 24 (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)); see Media Access Opp. 35-36. But this is an incomplete articulation of the test for whether a speech restriction is content based. The Court in *Turner Broadcasting System, Inc.* v. *FCC*, explained (1) that speech restrictions may also be content based if they "distinguish between speakers" as "a subtle means of exercising a content preference" and (2) that "even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys." 512 U.S. 622, 645 (1994). As Petitioners showed, the FCC's ownership rules satisfy both tests. These rules distinguish between speakers for the express purpose of exercising a content preference, *viz*, to enhance a diversity of viewpoints or lo-

calism. Pet. 24-26. "Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content." *Turner*, 512 U.S. at 677 (O'Connor, J., concurring and dissenting in part with Scalia, Ginsburg, and Thomas, JJ.). Indeed, this Court recognized that making decisions based on "'local news and informational needs'" "appears to single out … broadcasters … on the basis of content." *Id.* at 643 n.6.[3]

Moreover, even if the FCC's ownership regulations are facially neutral, they still manifestly seek to regulate speech according to the message conveyed. The FCC has forthrightly acknowledged that "all of the ownership rules that [it] review[ed] in this Order are designed to further diversity." App. 105a; see also Pet. 25. This "interest in ensuring access to a multiplicity of diverse and antagonistic sources of information, no matter how praiseworthy, is directly tied to the content of what the speakers will likely say." *Turner*, 512 U.S. at 678 (O'Connor, J., concurring and dissenting in part). The newspaper-broadcast cross-ownership rule, for instance, requires many content-related inquiries, including FCC evaluations of each newspaper-broadcast combination to determine the amount of local news coverage that the combination would produce and how the combination intends to enhance the news operations of both outlets. Pet.

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[3] The dispute between the Majority and Justice O'Connor in *Turner* did not fundamentally turn on the standard for content-based speech restrictions; rather, they differed on the predominant purpose of the must-carry regulations at issue. The Majority correctly held that the overwhelming purpose of those regulations was to preserve competition. 512 U.S. at 627, 633, 646-47, 661 ("the bottleneck monopoly power exercised by cable operators" justifies regulations).

App. 178a-93a. These regulations should be subject to strict scrutiny.

Further, Petitioners demonstrated that because these rules are content based, the Third Circuit's decision to apply rational-basis scrutiny conflicts with this Court's decision in *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984). See Pet. 26. The government responds only that these regulations are content neutral. See Gov't Opp. 24-25. As explained, that argument is erroneous. Accordingly, certiorari is warranted.

2. The government's insistence that there is no circuit split is convenient, Gov't Opp. 15, 17, but cannot be a reason to deny review. Lower courts cannot ignore this Court's holding in *Red Lion* and related cases, and so there will never be a conflict among the circuits. See *Tribune Co.* v. *FCC*, 133 F.3d 61, 69 (D.C. Cir. 1998) (lower courts are "stuck with the scarcity doctrine until the day that the Supreme Court tells [them] that the *Red Lion* no longer rules the broadcast jungle"). Nonetheless, dramatic changes in the media marketplace since the 1970s have completely eroded the foundations of the scarcity doctrine, which has accordingly been subjected to withering criticism for decades. Pet. 17-24. The time is long overdue for this Court to reconsider the scarcity doctrine, which is "ripe for reexamination and possible overruling." Eugene Gressman et al., *Supreme Court Practice* 252 (9th ed. 2007); Pet. 2, 17-20.

Moreover, both Congress and the FCC have signaled to this Court that technological developments have advanced far enough that reconsideration of the scarcity doctrine is warranted. Pet. 21-23. The government asserts (at 23) that the Telecommunications Act of 1996 cannot be a signal from Congress to reconsider the scarcity doctrine because Congress did

not specifically direct the Court to apply heightened scrutiny. But the Court only asked for a "signal" of sufficient "technological developments," not a command to apply a particular constitutional test. *League of Women Voters*, 468 U.S. at 377 n.11. The Telecommunications Act provides that signal. Pet. 22. The government tries to diminish the Act's importance by noting that Congress imposed "national limitations on ownership of both radio and television stations." Gov't Opp. 24. But that mischaracterizes what Congress did—it directed *elimination* of most national limits and *relaxation* of local rules, confirming that the Act embodies Congress's view that technological changes have transformed the nation's media. And as Petitioners demonstrated, the command that the FCC reclaim spectrum after the digital transition plainly reveals Congress's view that media technology has advanced past the constraints found when *NBC*, *Red Lion*, and *NCCB* were decided, Pet. 22-23—especially because the reclaimed spectrum is intended for entities that receive full First Amendment protection, see Gov't Opp. 23.

The government also argues that "Petitioners' reliance on [the] FCC decision" in *Syracuse Peace Council* as a signal to this Court "is mistaken." Gov't Opp. 22-23. But that FCC decision was more like a beacon than a signal:

> We further believe 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. Therefore, 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 FCC Rcd. 5043, 5053, ¶ 65 (1987), *petition denied*, 867 F.2d 654 (D.C. Cir. 1989).

In short, this Court should grant certiorari rather than require broadcasters and newspaper publishers to endure another quadrennial review process followed by another multi-year round of pre-ordained rulings. Pet. 26-30. Because the FCC must regularly review these rules, the government will always be able to claim that this Court should defer review for the latest ongoing quadrennial review. But the Third Circuit has already ruled on the constitutional issue here twice (and will affirm it again upon return to that court), and thus there is nothing to be gained by permitting these proceedings to continue under a plainly unconstitutional standard. *Id.* Moreover, after almost four FCC review cycles and a decade of litigation, the FCC has not put into effect a single significant deregulatory measure and has failed to "repeal or modify" regulations that even it has found are "no longer in the public interest." Telecommunications Act of 1996, Pub. L. No. 104-104, tit. II, § 202(h), 110 Stat. 56, 111-12 (codified at 47 U.S.C. § 303 note); Pet. 27-30. The retention of outdated regulations that are permitted only because of the scarcity doctrine prevents media companies from responding to the realities of the 21st Century. This Court's intervention is necessary to stop this endless Bleak House nightmare.

3. The Media Access respondents march out a parade of horribles that would supposedly result from overruling *Red Lion*, but their arguments miss the mark. Media Access Opp. 28-32. First, the claim that "*Red Lion* is a principal justification for must-carry statutes, … which were upheld in *Turner*" is

wrong. *Id.* at 28. In *Turner*, the Court expressly declined to apply the scarcity doctrine to cable, stating that "the more relaxed standard of scrutiny in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation," 512 U.S. at 639, and found the must-carry regulations constitutional under "heightened First Amendment scrutiny," *id.* at 641. These respondents also claim that overruling the scarcity doctrine will eliminate everything from the flag to apple pie, but many of the items they list—including the licensing regime and "the concept of ownership itself," Media Access Opp. 32—are unrelated to the scarcity doctrine and are based instead upon the public interest obligations of Section 309 and other provisions of the Act. Without the scarcity doctrine, broadcast regulations would merely be tested against normal First Amendment standards (including regulations that are overtly content based).

4. Finally, Petitioners demonstrated that this Court's review is warranted because, even under *NCCB*, the explosion of alternative channels of mass communication means that newspapers are unconstitutionally singled out for unfavorable treatment. Pet. 30-32.

The government argues that because the newspaper-broadcast cross-ownership rule was remanded by the Third Circuit, the case stands in "an interlocutory posture" and the Court should avoid "unnecessary pronouncements on constitutional matters." Gov't Opp. 26. To the contrary, the persistence of this Court's outdated precedents has resulted in over a decade of litigation concerning these ownership rules with no end in sight. Pet. 27-30. Further litigation will do nothing to sharpen the issues. Rather, this is the prototypical case in which "there is [an] impor-

tant and clear-cut issue of law that is fundamental to the further conduct of the case," and thus certiorari is warranted no matter the stage of litigation. Gressman et al., *supra* at 281 (collecting cases).[4]

On the merits, the government argues that the unequal treatment of newspapers is justified by the FCC's "rational" judgment that newspapers and broadcast media contribute more than other forms of mass media to viewpoint diversity. Gov't Opp. 28. But Petitioners' challenge is a constitutional, not an administrative, one—the reasonableness of the FCC's judgment is not at issue here. The Court in *NCCB* found that the newspaper-broadcast cross-ownership rule did not violate newspapers' equal protection rights only because newspapers were treated "in essentially the same fashion as other owners of the major media of mass communications," such as "owners of radio stations [and] television stations." *FCC* v. *NCCB*, 436 U.S. 775, 801 (1978). As Petitioners explained, that is no longer the case because newspapers are subject to ownership restrictions when Internet, cable, and satellite providers are not.

CONCLUSION

For these reasons and those stated in the Petition, this Court should grant the Petition or, at a mini-

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[4] The government contends that the 1975 Newspaper ban cannot be challenged in this case because that "old rule was not directly challenged in this proceeding." Gov't Opp. 26 n.9. That is wrong. *See* Joint Appendix at 2611, *Prometheus Radio Project* v. *FCC*, Nos. 08-3078 et al. (3d Cir.) ("The 1975 Rule cannot survive such scrutiny, whether strict or intermediate."); *see also id.* at 2597-2621, 3253-59; Final Br. of Petitioners Tribune Co. & Fox Television Stations, Inc. at 47-51, Nos. 08-3078 et al. (3d Cir.).

mum, hold it until resolution of *FCC* v. *Fox Television Stations, Inc.*, No. 10-1293.

Respectfully submitted,

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