No. 11-

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, CLEAR CHANNEL COMMUNICATIONS, INC., 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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the scarcity doctrine of *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), should be overruled, thereby invalidating the Federal Communications Commission's media ownership rules.

2. Whether the FCC's continued restriction on the cross-ownership of newspapers and broadcast stations in the same market violates the First and Fifth Amendments because it singles out newspapers among all forms of mass communication for unequal treatment.

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENTS

Petitioners are Tribune Company, Fox Television Stations, Inc., Sinclair Broadcast Group, Inc., Bonneville International Corp., The Scranton Times, L.P., Morris Communications Company, LLC, Clear Channel Communications, Inc., and Newspaper Association of America.

Respondents who were petitioners in the lower court are Prometheus Radio Project, Media Alliance, Free Press, Cox Enterprises, Inc., Belo Corp., Gannett Company, Inc., CBS Corp., Office of Communications of the United Church of Christ, Inc., National Association of Broadcasters, CBS Broadcasting, Inc., Media General Inc., Coalition of Smaller Market Television Stations, and Raycom Media Inc.

Respondents who were respondents in the lower court are the Federal Communications Commission and the United States of America.

Pursuant to Supreme Court Rule 29.6, Petitioners state as follows:

Tribune Company ("Tribune") has no parent company, and no publicly-held corporation owns ten percent or more of Tribune's stock. On Dec. 20, 2007, Tribune became wholly owned by its employee stock ownership plan. On Dec. 8, 2008, Tribune and 110 of its direct and indirect wholly-owned subsidiaries, filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the District of Delaware.

The parent companies of Fox Television Stations, Inc. are Fox Television Holdings, Inc., Fox Entertainment Group, Inc., and News Corporation Ltd.

News Corporation, a publicly held company, owns an interest of 10% or more in Fox Television Stations, Inc.

Sinclair Broadcast Group, Inc. is a publicly-traded company.

Bonneville International Corporation ("Bonneville") is a privately held Utah corporation whose sole shareholder is Deseret Management Corporation ("DMC") which, in turn, is privately held. Bonneville is ultimately controlled by The First Presidency of The Church of Jesus Christ of Latter-day Saints. No publicly held company has a 10% or greater ownership interest in Bonneville or DMC.

The Scranton Times, L.P. ("The Scranton Times") is a Pennsylvania limited partnership and is controlled by its sole general partner, The Times Partner, LLC, whose membership interests are held by four individuals. There are also various limited and preferred partnership interests in The Scranton Times held by individuals and various estate planning trusts. Other than The Times Partner, LLC, The Scranton Times does not have any parent companies. No publicly-held company has a 10% or greater interest in The Scranton Times.

Morris Communications Company, LLC is a privately-held media company with diversified holdings, including radio broadcasting. Morris is wholly owned by its sole member, Morris Communications Holding Company, LLC ("Morris Holding"), which, in turn, is wholly owned by Pesto, Inc. ("Pesto"), which in turn is wholly owned by Questo, Inc. ("Questo"). Neither Morris, Morris Holding, Pesto, nor Questo is publicly owned. No publicly-owned company owns more than 10% of the stock of Morris, Morris Holding, Pesto, or Questo.

The parent companies of Clear Channel Communications, Inc. are Clear Channel Capital I, LLC; Clear Channel Capital II, LLC; and CC Media Holdings, Inc. CC Media Holdings, Inc. indirectly owns 100% of Clear Channel Communications, Inc., and shares of the Class A Common Stock of CC Media Holdings, Inc. are publicly traded.

Newspaper Association of America is a non-profit organization representing the newspaper industry and nearly 2,000 newspapers in the United States and Canada. NAA has no parent company. No publicly-owned company owns 10% or more of NAA's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Tribune Company, Fox Television Stations, Inc., Sinclair Broadcast Group, Inc., Bonneville International Corp., The Scranton Times, L.P., Morris Communications Company, LLC, Clear Channel Communications, Inc., and Newspaper Association of America respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The decision of the Third Circuit (Pet. App. 1a-84a) is reported at 652 F.3d 431. The order of the Federal Communications Commission ("FCC") under review (Pet. App. 85a-375a) is reported at 23 FCC Rcd. 2010.

JURISDICTION

The Third Circuit entered judgment in this case on July 7, 2011, Pet. App. 2a, and denied petitions for rehearing or rehearing en banc on September 6, 2011, *id.* at 376a-78a. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the First and Fifth Amendments to the United States Constitution and 47 U.S.C. § 303 note (codifying as amended Telecommunications Act of 1996, Pub. L. No. 104-104, tit. II, § 202(h), 110 Stat. 56, 110-11). They are set forth in the appendix to this petition at 379a-80a.

STATEMENT OF THE CASE

For almost 50 years, there has been a distortion in this Court's First Amendment jurisprudence flowing from the so-called "scarcity doctrine" of *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). Under *Red Lion* and its progeny, broadcasting alone among all other media—such as cable television or the Internet—receives diminished First Amendment protection. This rationale has allowed the FCC to impose rules and restrictions on ownership of broadcast stations—including a ban on cross-ownership of a broadcast station and a newspaper—that would be prohibited in any other context. The FCC continues to apply these rules despite the fact that lower courts and commentators have recognized for decades that the scarcity doctrine has long since been discredited, invalidated, or eroded by revolutions in the media marketplace. Indeed, this Court has acknowledged the widespread and intense criticism of the scarcity doctrine and the indisputable fact that dramatic changes have undermined its factual premises. See, *e.g.*, *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 638 & n.5; *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1821 (2009) (Thomas, J., concurring). Because the scarcity doctrine has been enshrined in a decision of this Court, however, only this Court—not the lower courts or the FCC—can correct course. Thus, certiorari is necessary to address a decision of this Court that is ripe for reexamination and should be overruled. See*, e.g.*, *Lingle* v. *Chevron, U.S.A. Inc.*, 544 U.S. 528 (2005); *Harris* v. *United States*, 536 U.S. 545 (2002); *State Oil Co.* v. *Khan*, 522 U.S. 3 (1997).

It is critical that this Court review this precedent now. The disconnect between the outdated assumptions of *Red Lion* and the competitive realities of today's media marketplace has become too large to ig-

nore. Although Congress has commanded the FCC to "repeal or modify any regulation it determines to be no longer in the public interest" through periodic deregulatory reviews, Telecommunications Act of 1996, Pub. L. No. 104-104, tit. II, § 202(h), 110 Stat. 56, 110-11 (codified at 47 U.S.C. § 303 note), the same Third Circuit panel has now twice reversed the FCC's every attempt to relax its restrictions and, citing *Red Lion*, has rejected all constitutional challenges to the rules. As a result, the FCC's media ownership rules remain unchanged since the 1990s (and in some cases even longer).

Moreover, this same Third Circuit panel has purported to "retain" jurisdiction over successive FCC reviews—in effect, continually calling "dibs" on the next media ownership case. With all judicial review funneled through this one appellate panel, Congress's mandate that the FCC's ownership rules be regularly scrutinized and repealed when they are no longer necessary has been nullified. Instead, it has become a farcical, decade-long, and endless administrative proceeding, with each attempt at repeal reversed and each remand rolled into the next periodic review. The effect is to keep the broadcast industry trapped in the legal equivalent of "Groundhog Day."

Without this Court's intervention, Petitioners are destined to engage in further rounds of litigation lasting years (not months) before the FCC and the same Third Circuit panel, which can only result in the panel reaffirming its erroneous constitutional rulings under *Red Lion* a third time. This saga has dragged on for over a decade. The time has come for the Court to intercede and restore the full protections of the First Amendment to broadcasters.

This Court recognized that *Red Lion* was a precedent with a limited shelf life, and the Court has

previously identified three conditions that would prompt reexamination of the scarcity doctrine. All three conditions have long been satisfied. *First*, the growth of alternative channels of communication have rendered "[s]carcity … a constraint of the past, thus obviating the concerns expressed in *Red Lion*." *CBS, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 158 n.8 (1973) (Douglas, J., concurring). *Second*, both Congress and the FCC have sent this Court a "signal … that technological developments have advanced so far that some revision of the system of broadcast regulation [is] required." *FCC* v. *League of Women Voters*, 468 U.S. 364, 376 n.11 (1984). *Third*, *Red Lion* itself indicated that the decision should be reevaluated if there is the "net effect of reducing rather than enhancing the volume and quality of coverage" from its application, and the FCC has now found that at least one of the sweeping ownership rules perpetuated by the Third Circuit have had just this effect. In short, the scarcity doctrine expired long ago. Only this Court can reconsider its own precedent, and it is critical that it do so now by granting certiorari in this case.

A. Early Broadcast Media Ownership Regulation.

1. The constitutional justifications for the FCC's restrictions on media ownership were adopted in the earliest days of radio broadcasting. Even while recognizing that networks like NBC and CBS "had played and [were] continuing to play an important part in the development of radio," the FCC in 1941 prohibited networks from owning more than one broadcast station within a single service area. *NBC* v. *United States*, 319 U.S. 190, 198, 206-08 (1943); see also *FCC* v. *Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 780 & n.1 (1978) ("*NCCB*") (discussing early his-

tory of FCC media ownership regulations). This Court rejected a First Amendment challenge to these rules by focusing on what the Court viewed as the "unique characteristic" of radio—the scarcity of the broadcast medium. *NBC*, 319 U.S. at 226.

The Court in *NBC* reasoned that "[u]nlike other modes of expression, radio inherently is not available to all" because there are "limited facilities of radio." *Id.* At that time, the broadcast media consisted of 660 commercial radio stations nationwide. *Id.* at 197. This limited availability, according to the Court, meant that radio, "unlike other modes of expression, … [can be] subject to governmental regulation." *Id.* at 226. The FCC promulgated other ownership restrictions in the early days of broadcasting, including restrictions on the number of radio and television broadcast stations that a licensee could own, see *United States* v. *Storer Broad. Co.*, 351 U.S. 192, 193-94 (1956), and the common ownership or control of two or more television stations with overlapping signal contours (the "Duopoly Rule"), see *Sinclair Broad. Group, Inc.* v. *FCC*, 284 F.3d 148, 152 (D.C. Cir. 2002).

The denial of First Amendment rights to broadcasters was enshrined in *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367 (1969). At issue was the "fairness doctrine," through which the FCC required broadcasters to present programming covering all sides of controversial issues. *Id.* at 369-70. Acknowledging that "broadcasting is clearly a medium affected by a First Amendment interest," the Court nonetheless held that "the characteristics of new media justify differences in First Amendment standards applied to them." *Id.* at 386. Drawing on *NBC*, the Court again focused on the "limited … number" of "frequencies reserved for public broadcasting" and concluded that it

is "idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.* at 388. Based on this "scarcity doctrine," the Court upheld the fairness doctrine's content-based restrictions and obligations. *Id.* at 400-01.

2. Shortly after *Red Lion*, the FCC expanded its media ownership rules to prohibit first cross-ownership of radio and television stations in the same market, *Multiple Ownership of Standard, FM, & Television Broad. Stations*, 22 F.C.C.2d 306, 307 ¶ 5 (1970), and then cross-ownership of a broadcast station and a daily newspaper (the "1975 Newspaper Ban"), *Multiple Ownership of Standard, FM, & Television Broad. Stations*, 50 F.C.C.2d 1046, 1074-78, ¶¶ 100-107 (1975) ("*1975 Order*").

Before 1975, the FCC "allowed, and even encouraged" newspapers to own broadcast stations in their home cities. *NCCB*, 436 U.S. at 797. Notwithstanding this history of cross-ownership, the FCC did an about-face in 1975, prohibiting all future newspaper-broadcast combinations within the same community. *1975 Order*, 50 F.C.C.2d at 1074-75, ¶¶ 100-102. As the FCC admitted, this prospective ban was not based on evidence that existing combinations created undue market power or restricted viewpoint diversity. See *NCCB*, 436 U.S. at 786. Rather, it rested purely on a predictive judgment—"'a mere hoped-for gain in diversity.'" *Id.* (quoting *1975 Order*, 50 F.C.C.2d at 1078, ¶ 109). Given the limited number of available licenses, and the FCC's perception that the broadcast industry as of 1975 had "matured," the FCC adopted a policy that diversification of ownership trumped all other considerations. *1975 Order*, 50 F.C.C.2d at 1074-75, 1080, ¶¶ 100-02, 112 n.30.

The Court in *NCCB* upheld the 1975 Newspaper Ban against constitutional attack. Relying on the scarcity doctrine, the Court reiterated that "[i]n light of th[e] physical scarcity" of the broadcast spectrum, "Government allocation and regulation of broadcast frequencies are essential." *NCCB*, 436 U.S. at 799 (citing *Red Lion*, 395 U.S. at 375-77, 387-88, and *NBC*, 319 U.S. at 210-18). Accordingly, the Court saw "nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the 'public interest' in diversification" that the FCC *hoped for* by imposing the ban, *id.*—that is, "that diversification of ownership would enhance the *possibility* of achieving greater diversity of viewpoints," *id.* at 796 (emphasis added).

The Court also rejected the argument that the 1975 Newspaper Ban violated principles of equal protection because it "unfairly 'singled out' newspaper owners for more stringent treatment than other license applicants." *Id.* at 801. The Court held that "the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communication," i.e., the owners of radio and television stations, which also faced ownership restrictions. *Id.*

B. Modern Broadcast Media Ownership Regulation.

1. The media landscape has been revolutionized since the 1970s. There are twice as many broadcast stations today as in 1975, see *Fox Television Stations*, 129 S. Ct. at 1821 (Thomas, J., concurring), and cable and satellite television and the Internet have brought about a vast increase in the number of media voices available. In response to some of these changes, the FCC began, as early as the 1980s, repealing or scaling back numerous ownership restrictions that had

been justified under the scarcity doctrine.[1] The FCC even abandoned the fairness doctrine at issue in *Red Lion* itself in light of the explosion of media sources. *Syracuse Peace Council*, 2 FCC Rcd. 5043, 5048, 5051, ¶¶ 37 n.106, 55 (1987), *petition denied*, *Syracuse Peace Council* v. *FCC*, 867 F.2d 654, 661-62 (D.C. Cir. 1989). Courts similarly rejected various rules as unsupportable in the existing media environment or unconstitutional under the First Amendment. See, *e.g.*, *Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002) (vacating ban on cable/broadcast cross-ownership); *Chesapeake & Potomac Tel. Co.* v. *United States*, 42 F.3d 181 (4th Cir. 1994) (invalidating statutory prohibition on cable/telephone cross-ownership under First Amendment); *US WEST, Inc.* v. *United States*, 48 F.3d 1092 (9th Cir. 1994) (same); *Schurz Commc'ns Inc.* v. *FCC*, 982 F.2d 1043 (7th Cir. 1992) (finding financial interest and syndication rules unreasonable and unsupported).

Notwithstanding its actions on other rules, the FCC did not reconsider the 1975 Newspaper Ban. *Capital Cities/ABC, Inc.*, 11 FCC Rcd. 5841, 5887-88, ¶¶ 86-88 (1996). Although a majority of FCC Commissioners believed as early as 1996 that the 1975 Newspaper Ban should be reconsidered, *id.* at 5888, 5895, ¶¶ 87, 99, the FCC took no action.

2. Recognizing the dramatic transformation that had taken place in the media industry, Congress di-

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[1] *See, e.g.*, *Amendment of the Broad. Multiple Ownership Rules*, 4 FCC Rcd. 1741 (1989) (relaxing policy for waivers permitting radio/television cross-ownership); *Revision of Radio Rules & Policies*, 7 FCC Rcd. 2755 (1992) (relaxing limit on local ownership of AM and FM stations and raising national radio cap); *Review of the Prime Time Access Rule*, 11 FCC Rcd. 546 (1995).

rected the FCC to repeal or relax several limitations on media ownership in the Telecommunications Act of 1996. See Pub. L. No. 104-104, tit. II, § 202(a)-(g), 110 Stat. 56, 110-11 (1996) (codified at 47 U.S.C. § 303 note (2006)). Under Section 202(h) of the Act, Congress also required the FCC "to continue the process of deregulation," *Fox*, 280 F.3d at 1033, by requiring the FCC to review "all of its ownership rules," originally on a biennial basis and now on a quadrennial basis, to "determine whether any of such rules are necessary in the public interest as the result of competition," Telecommunications Act of 1996, § 202(h), 110 Stat. at 111-12 (codified at 47 U.S.C. § 303 note).[2] Congress further commanded that the "Commission *shall* repeal or modify any regulation it determines to be no longer in the public interest." *Id.* (emphasis added).

The first two biennial reviews (in 1998 and 2000) under the Telecommunications Act of 1996 produced only marginal additional deregulation,[3] and the FCC's refusal further to relax its media ownership rules resulted in two judicial reversals. In *Fox*, the D.C. Circuit remanded the FCC's decision to retain the national television ownership rule, which capped the percentage of the national television audience an entity could reach. *Fox*, 280 F.3d at 1040-50. It also vacated the ban on cable/broadcast cross-ownership, explaining that any attempt to justify such a rule

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[2] Congress amended Section 202 in 2004 to make the reviews quadrennial. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 100.

[3] In the 1998 Biennial Review, the FCC retained the 1975 Newspaper Ban but concluded that a blanket ban "may not be necessary to achieve the rule's public interest benefits" and indicated that it would initiate a rulemaking. *1998 Biennial Regulatory Review*, 15 FCC Rcd. 11,058, 11,102, ¶ 83 (2000).

would have been a "hopeless cause." *Id.* at 1050-53. Separately, the D.C. Circuit held in *Sinclair Broadcasting Co.* v. *FCC*, 284 F.3d at 158-65, that the FCC had not justified the Duopoly Rule (which prohibited an entity from owning more than one television station in a market unless, *inter alia*, at least eight independent stations would remain (the "8-voices test")) and remanded that rule to the FCC as well.

3. Although it had promised to initiate a rulemaking on the 1975 Newspaper Ban as early as 1996, the FCC did not do so until 2001. *Cross-Ownership of Broad. Stations & Newspapers*, 16 FCC Rcd. 17,283 (2001). But in the wake of *Fox* and *Sinclair*, the FCC used the 2002 Biennial Review to evaluate all of its media ownership rules, collapsing the separate 1975 Newspaper Ban rulemaking (and its voluminous record) and the multiple remands into a single proceeding. In this biennial review, which the FCC described as "the most extensive review" it had conducted of its ownership rules, *2002 Biennial Regulatory Review*, 18 FCC Rcd. 13,620, 13,621, ¶ 1 (2003), the FCC documented the exponential growth in competition in the media industry, see *infra*, 22 (highlighting the transformation of the media marketplace). The FCC, however, did not squarely address whether this transformation had undermined the scarcity doctrine, *2002 Biennial Regulatory Review*, 18 FCC Rcd. at 13,625-27, ¶¶ 13-16.

This explosion of new media outlets led the FCC to modify its ownership rules. First, the FCC found that the 1975 Newspaper Ban was no longer "necessary in the public interest," concluding that the ban is not justified by competitive concerns, that it in fact harms the provision of local news and information, and that it is not necessary to ensure viewpoint diversity given the various media that have arisen

since the ban. *Id.* at 13,748-54, 13,760-61, ¶¶ 330-342, 356-367. Instead of simply eliminating the rule however, the FCC adopted new rules that based the permissibility of cross-ownership on the number of television stations in the market and permitted at least some cross-ownership in the majority of markets throughout the United States. *Id.* at 13,790-13,807, ¶¶ 432-481. The FCC also responded to the remand in *Sinclair* by concluding that it could not justify the 8-voices test and by modifying the Duopoly Rule to permit ownership of more than one television station in additional markets. *Id.* at 13,668-13,711, ¶¶ 132-234. Further, the FCC relaxed the national television ownership cap and modified the local radio ownership rule. *Id.* at 13,721, 13,843, ¶¶ 263, 580.

4. Various parties petitioned for review of the FCC's Order. Following a lottery under 28 U.S.C. § 2112, the court selected to hear the challenges was the Third Circuit, which refused to transfer the matter to the D.C. Circuit despite that court having decided both *Fox* and *Sinclair*. The Third Circuit stayed the entire Order pending appeal. See *Prometheus Radio Project* v. *FCC*, No. 03-3388 (3d. Cir. Sept. 3, 2003) (order).

The court reversed all of the FCC's attempts to relax its rules. With respect to the 1975 Newspaper Ban, the court upheld the FCC's decision to repeal the 1975 ban but remanded the new rules to the FCC because it found that the particular lines drawn by the FCC were arbitrary and capricious. *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 434-35 (3d Cir. 2004) ("*Prometheus I*"). Similarly, the court upheld aspects of the local television ownership rule and local radio ownership rule—including changes that made the radio rule more restrictive—but remanded these rules because the FCC had not properly justi-

fied the numerical limits it had retained or adopted. *Id.* at 412, 418-20, 430-35.

The Third Circuit also rejected Petitioners' constitutional challenges to the FCC's continued regulation of media ownership. It agreed that "[s]urely there are more media outlets today (such as cable, the Internet, and satellite broadcast) than there were in 1978 when *NCCB* was decided," *id.* at 401, but it held that the "expansion of media outlets" did not undermine the scarcity doctrine and thus refused to "rethink[] … the scarcity rationale and the lower level of constitutional review it entails," *id.* It also did not believe that the rise of other mass media outlets undermined the Court's decision in *NCCB* that newspapers were not unfairly singled out for differing treatment. *Id.*

In remanding the case, the court announced that the "stay currently in effect will continue pending our review of the Commission's action on remand, over which this panel retains jurisdiction." *Id.* at 435. The court's decision thus effectively reinstated all the ownership rules that the FCC had just repealed or relaxed, including the 1975 Newspaper Ban.[4]

C. The Most Recent Procedural Background.

1. The FCC took almost four years to respond to the Third Circuit's remand, waiting two years to issue even a notice of proposed rulemaking, and then rolling all of the remanded issues into its new 2006 Quadrennial Review. Joint Appendix at 228, 1941-

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[4] The panel subsequently lifted the stay as to the local radio ownership rule, which increased its restrictiveness. *See Prometheus Radio Project* v. *FCC*, No. 03-3388 (3d Cir. Sept. 3, 2004) (order).

42, *Prometheus Radio Project* v. *FCC*, Nos. 08-3078 et al. (3d Cir. Sept. 7, 2010). After extensive proceedings, the FCC issued the Order under review in February 2008. Pet. App. 86a.

In that Order, the FCC again confirmed that the 1975 Newspaper Ban "is not necessary in the public interest as a result of competition, diversity, or localism." Pet. App. 113a. The FCC observed that the "media marketplace today is profoundly different" than it was in 1975, "when two mature industries—daily newspapers and broadcasting—constituted the only 'mass media' providing local news and information to most American communities." *Id.* at 116a, 120a. The FCC retained the blanket ban, however, and required waivers to be granted in case-by-case review of all proposed newspaper-broadcast combinations. *Id.* at 155a. The FCC's new scheme was based on certain presumptions for or against newspaper-broadcast combinations depending on the size of the market. *Id.* at 115a. These could be overcome only by a series of factors that required the FCC to make expressly content-based determinations about the effect of the combination on the sufficiency of local news reporting, the amount of informational programming broadcast by the new combination, and the relationship between the editorial boards of the combined entities. *Id.* at 156a-57a, 179a-80a.

In this Order, the FCC did not attempt to repair the numerical limits in its Duopoly Rule and, instead, simply readopted the 1999 version of this rule—the same rule, including the 8-voices test, that the D.C. Circuit found arbitrary in *Sinclair* (and that the FCC had found unjustified a few years earlier). Pet. App. 214a-24a. The FCC also retained the local radio rule intact, including the numerical limits remanded by the Third Circuit, but attempted to justify those lim-

its on the current record. *Id.* at 231a-32a. It also retained in their then-current forms the radio-television cross-ownership rule and the dual network rule. *Id.* at 199a-200a, 258a. The FCC determined that no changes were warranted, notwithstanding its separate finding that the media marketplace had changed dramatically. *E.g.*, *id.* at 116a.

2. Petitioners and numerous other parties petitioned for review of the FCC's Order before numerous circuit courts of appeals. Following the lottery process, the petitions were transferred to the same Third Circuit panel from *Prometheus I*, apparently because that prior Third Circuit panel had purported to retain jurisdiction over any remand.

The panel again rejected Petitioners' constitutional challenges to the FCC's continued regulation of broadcast ownership. Relying on its decision in *Prometheus I*, the court refused to revisit the scarcity doctrine, concluding that the "Supreme Court's justification for the scarcity doctrine remains as true today as it was in 2004—indeed, in 1975." Pet. App. 62a. Applying a rational basis standard, the court agreed "with the FCC that the rules do not violate the First Amendment because they are rationally related to substantial governmental interests in promoting competition and protecting viewpoint diversity." *Id.* at 63a. The Third Circuit also re-adopted its conclusion from *Prometheus I* that the FCC's treatment of newspapers as part of its newspaper-broadcast cross-ownership rules does not violate equal protection principles. *Id.* at 63a-64a.

Ultimately, the Third Circuit affirmed the FCC's Order "with the exception of the newspaper/broadcast cross-ownership rule, for which the Commission failed to meet the notice and comments requirements" of the APA. Pet. App. 6a. The affirmance in-

cluded the FCC's rejections of proposals to make even modest changes to the local radio ownership rule, *id.* at 57a-60a, as well as its decision to re-adopt the 1999 Duopoly Rule struck down by the D.C. Circuit, which itself "represent[ed] a reversal from [the FCC's] 2003 determination that the rule was no longer necessary," *id.* at 50a, 51a-54a.

In vacating and remanding the 2008 newspaper-broadcast cross-ownership rule,[5] the court made clear that the 1975 Newspaper Ban "in existence prior to that order will remain in effect until the FCC promulgates new cross-ownership regulations," *id.* at 39a & n.25, and that the FCC was expected to comply with its remand "in the context of its ongoing 2010 Quadrennial Review," *id.* at 40a. Again, the two-judge majority asserted that "[t]his panel retains jurisdiction over the remanded issues." *Id.* at 79a.

Judge Scirica dissented from the court's APA holding and explained that the FCC's notice and the history of these proceedings provided sufficient notice of the FCC's new rule. Pet. App. 79a-84a. He also objected that the panel's "decision to vacate and remand the 2008 newspaper/broadcast cross-ownership rule … preserves an outdated and twice-abandoned ban, adopted in 1975." *Id.* at 79-80a (footnote omitted). And he "dissent[ed] from the decision to retain jurisdiction over parts of the ongoing 2010 Quadrennial Review." *Id.* at 80a. Three of the seven non-recused judges voted to grant rehearing en banc. *Id.* at 377a-78a.

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[5] Because the court vacated the newspaper-broadcast cross-ownership rule for failure to provide adequate notice under the APA, it did not reach the merits of Petitioners' specific challenges to the rule. *See* Pet. App. 22a.

REASONS FOR GRANTING THE PETITION

Today, broadcasters compete in a mass media marketplace that operates at the speed of light. They must respond to constantly changing technology and consumer demands. But the regulatory calcified environment in which they operate was adopted by the FCC in the 1960s and 1970s and approved by this Court long before technologies like the Internet were even imagined. Thus, broadcasters remain severely hampered and singularly constrained by outdated restrictions that prevent them from joining forces with newspaper publishers or other broadcasters to complete and improve the quality of service to consumers.

More than 15 years ago, Congress mandated change in the media-ownership rules unless the FCC could show what it has not been able to demonstrate, viz., that continued restrictions are necessary in the public interest in light of competition. But the regulatory regime that was outdated in the early 1990s remains unchanged in 2011. Sadly, if this Court does not act now, that regime will remain in effect for the foreseeable future, burdening both broadcasters and newspapers, punishing consumers, and in the process pushing more print media to and beyond the brink of insolvency.

What makes the FCC's actions here particularly unacceptable is that the agency is regulating speech clearly protected by the First Amendment. Broadcasters are being limited in how and what they can broadcast out of government concern that their voices when merged could become too loud and influential; newspapers are singled out as the only mass medium precluded from merging with broadcasters to enhance the quality of the informational offerings of both. Only this Court can correct this unconstitutional restraint on speech and the press. The Court recog-

nized in *League of Women Voters* almost 30 years ago that the foundation for these restrictions was flawed but asked for a sign from other branches of government before correcting it. Those branches have provided that sign, and the Constitution demands that this Court act now and declare an end to archaic regulation that has plagued broadcasters and newspapers for far too long. Certiorari should be granted.

I. CERTIORARI IS WARRANTED TO RESOLVE WHETHER BROADCAST SPEECH SHOULD RECEIVE FULL FIRST AMENDMENT PROTECTION.

Whether ownership restrictions that limit broadcast speech are to be reviewed under a lesser standard based on the scarcity doctrine or under the First Amendment standard applicable to all other mass media is an issue that courts of appeals have long urged this Court to review and one that only this Court can resolve. Over the past 30 years, this Court and others repeatedly have acknowledged that the dramatic technological and competitive developments reshaping the nation's media have made reexamination of the scarcity doctrine not only ripe but long overdue. The Third Circuit's decision squarely presents the issue, which warrants immediate review by this Court.

A. *Red Lion* And The Scarcity Doctrine Are Ripe For Reexamination And Should Be Overruled By This Court.

1. For decades, courts and commentators have recognized that the justifications for the scarcity doctrine are no longer valid, if they ever were. The D.C. Circuit has maintained for almost 30 years that technological and marketplace developments have thoroughly undermined the scarcity doctrine, and that,

even assuming that the doctrine was defensible at its inception, there is no basis today for applying a lesser standard of First Amendment protection to broadcast speech. See, *e.g.*, *Telecomms. Research & Action Ctr.* v. *FCC*, 801 F.2d 501, 507-09 (D.C. Cir. 1986). Although the D.C. Circuit has recognized that it is bound by *Red Lion* and its progeny, the court has subjected the scarcity doctrine to "intense criticism." *Radio-Television News Directors Ass'n* v. *FCC*, 184 F.3d 872, 877 n.3 (D.C. Cir. 1999) (internal quotation marks omitted). These criticisms have been based partly on the view that the scarcity doctrine "never made sense," and partly on the undeniably large increase in the number of broadcast stations and other media outlets. See, *e.g.*, *Time Warner Entm't Co.* v. *FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (per curiam) (Williams, J., joined by Edwards, C.J., Silberman, Ginsburg, and Sentelle, JJ., dissenting from denial of rehearing *en banc*). And the criticisms have come from a wide range of circuit judges. *Action for Children's Television* v. *FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) (en banc) (Edwards, C.J., dissenting) ("it is no longer responsible for courts to apply a reduced level of First Amendment protection … on the indefensible notion of spectrum scarcity"); *Syracuse Peace Council* v. *FCC*, 867 F.2d 654, 682-83 (D.C. Cir. 1989) (Starr, J., concurring). Members of other courts of appeals have reached similar conclusions. See, *e.g.*, *Ark. AFL-CIO* v. *FCC*, 11 F.3d 1430, 1443 (8th Cir. 1993) (en banc) (Arnold, R., C.J., concurring in judgment) ("the legal landscape has changed enough since that time to produce a different result.").

Moreover, Justices of this Court have repeatedly questioned the "dubious" foundations of the scarcity doctrine and noted the withering criticism of it. See, e.g., *Turner*, 512 U.S. at 638 & n.5 (noting that

"courts and commentators have criticized the scarcity rationale since its inception"); *Denver Area Educ. Telecomms. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 813 (1996) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring and dissenting in part) (explaining that the scarcity doctrine was "dubious from [its] infancy"). Indeed, just three Terms ago, Justice Thomas reiterated that the "dramatic changes in factual circumstances might well support a departure from precedent under the prevailing approach to *stare decisis*" and welcomed "reconsideration of *Red Lion*." *Fox Television Stations*, 129 S. Ct. at 1822 (Thomas, J., concurring).

In contrast to the weight of these views, the Third Circuit stands alone in the belief that the scarcity doctrine is still justified. Reaffirming its decision in *Prometheus I*, the Third Circuit held that the "Supreme Court's justification for the scarcity doctrine remains as true today as it was in … 1975," because it is still the case that "'many more people would like to access the [broadcast spectrum] than can be accommodated.'" Pet. App. 62a-63a. In the Third Circuit's view, "'[t]he abundance of non-broadcast media does not render the broadcast spectrum any less scarce.'" *Id.* at 62a (quoting *Prometheus I*, 373 F.3d at 402).

This Court should grant certiorari because the Third Circuit's judgment is "based upon a Supreme Court decision that is ripe for reexamination and possible overruling." Eugene Gressman et al., *Supreme Court Practice* 252 (9th ed. 2007) (collecting cases). Indeed, the Third Circuit's disagreement with the D.C. Circuit over the soundness of the scarcity doctrine makes this an especially worthy candidate for certiorari. See *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 47-49 (1977) (explaining that

"reconsideration" of prior precedent was justified because that precedent had "been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts"); cf. *State Oil Co.*, 522 U.S. at 9 (granting certiorari when court of appeals was constrained by Supreme Court precedent but questioned the soundness of that precedent).

2. In addition, this Court's review is warranted because all three circumstances that this Court previously identified as necessary to warrant reexamination of the scarcity doctrine have come to pass.

First, this Court long ago recognized that the scarcity doctrine could become obsolete due to the growth of alternative channels of communication. *League of Women Voters*, 468 U.S. at 376 & n.11; see also *CBS, Inc.*, 412 U.S. at 158 n.8 (Douglas, J., concurring) ("It has been predicted that it may be possible within 10 years to provide television viewers 400 channels through the advances of cable television."). The Court's prediction was fulfilled decades ago. In the order under review, the FCC explained in detail that the "media marketplace today is profoundly different" than it was in the 1970s. Pet. App. 120a. Since 1975 "the number of radio stations increased by approximately 76 percent, while there has been an 83.5 percent growth in the number of television stations over the same period." *Id.* at 121a; see also *Fox Television Stations*, 129 S. Ct. at 1821 (Thomas, J., concurring). The FCC has found that "approximately 86 percent of U.S. households subscribe to video service provided by [cable or satellite systems] that either did not exist or existed only in limited form in 1975." Pet. App. 121a. The "dawning of the Internet as a major distribution channel for content has [also] accelerated … audience fragmentation" among different forms of communication. *Id.* In addition, today "there are

currently approximately 11.6 million subscribers to satellite radio, a service which did not exist in 1975." *Id.* at 120a. "Many of the media outlets now vigorously competing for audiences simply did not exist" when many of the initial ownership rules were adopted. *Id.*

In short, as Justice Thomas recently explained, "dramatic technological advances have eviscerated the factual assumptions underlying" *Red Lion* since it was decided in 1969. *Fox Television Stations*, 129 S. Ct. at 1821 (Thomas, J., concurring). And, as noted, several Members of this Court have acknowledged the "dubious" foundations and intense criticism of the scarcity doctrine. See, e.g., *Turner*, 512 U.S. at 638 & n.5; *Denver Area*, 518 U.S. at 813 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring and dissenting in part). In light of explosive growth in competing media over the last three decades, there is no longer any reason to apply a different First Amendment standard to broadcasters, and a reconsideration of the scarcity doctrine is long overdue.

Second, this Court more than 25 years ago acknowledged the "increasing criticism" of the scarcity doctrine and stated that the rationale could be reexamined upon "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *League of Women Voters*, 468 U.S. at 376 n.11. Both entities have repeatedly acknowledged those changes.

The FCC in the 1985 Fairness Report "sought to respond to the Supreme Court's invitation to send it a 'signal'" and "found that the 'scarcity rationale,' … is no longer valid." *Meredith Corp.* v. *FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987) (citations omitted); *id.* ("In addition, the Commission found that the explosive

growth of information sources … made the fairness doctrine no longer necessary ….”); see *Syracuse Peace Council*, 2 FCC Rcd. at 5053, ¶ 65 (“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”). Others have noted that “the FCC has given the ‘signal’ referred to in *League of Women Voters, supra*. The Commission has indicated … that the problem of spectrum scarcity is rapidly disappearing.” *Ark. AFL-CIO*, 11 F.3d at 1443 (Arnold, R., C.J., concurring in judgment) (citing *Syracuse Peace Council*, 2 FCC Rcd. 5043); *Fairness Doctrine Obligations of Broad. Licensees*, 102 F.C.C.2d 143, 156, 246, ¶¶ 19, 175 (1985), *vacated*, *Radio-Television News Directors Ass’n* v. *FCC*, 831 F.2d 1148 (D.C. Cir. 1987).

Both Congress and the FCC could hardly have done more to show that the time for a new constitutional regime has arrived. The Telecommunications Act of 1996 itself recognized the technological and competitive changes that have transformed the nation’s media, and it requires the FCC to conduct an aggressively deregulatory quadrennial review of all of its media ownership rules and to “repeal or modify any regulation it determines to be no longer in the public interest.” Pub. L. No. 104-104, § 202(h), 110 Stat. at 112.

Congress has sent another signal by displacing the FCC’s role in “‘choos[ing] among applicants for the same facilities,’” a role that underpinned the FCC’s authority to impose ownership restrictions, see, *e.g.*, *NCCB*, 436 U.S. at 802, by increasingly relying upon the auction process to allocate new licenses, see, *e.g.*, Balanced Budget Act of 1997, Pub. L. No. 105-33, tit. III, 111 Stat. 251, 258. Moreover, Congress has indicated that it clearly does not believe that spectrum remains “scarce” within the meaning of *Red Lion* be-

cause it ordered the FCC to reclaim spectrum that had been allocated predominantly for broadcast uses (including television channels 52-69) and either to auction or re-allocate it to other uses (*e.g.*, first responders and wireless services) at the conclusion of the digital transition. See *Second Periodic Review of the Comm'n's Rules & Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd. 18,279, 18,284, ¶ 11 (2004); *Advanced Television Sys. & Their Impact Upon the Existing Television Broad. Serv.*, 22 FCC Rcd. 15,581, 15,584-85, ¶¶ 6-7 & n.8 (2007); 47 U.S.C. § 336(c); see also *Fox Television Stations*, 129 S. Ct. at 1821 (Thomas, J., concurring) (quoting *Consumer Elecs. Ass'n* v. *FCC*, 347 F.3d 291, 294 (D.C. Cir. 2003)).

Third, in *Red Lion* itself, this Court stated that "if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." *Red Lion*, 390 U.S. at 393. Unfortunately, the pace of regulatory change has been ridiculously slow, despite findings that the rules reduce the diversity of information available to consumers. The FCC explained that in its 2002 biennial review it had "concluded that efficiencies from the common ownership of two media outlets may *increase* the amount of diverse, competitive news and local information available to the public." Pet. App. 139a (emphasis added). And according to the FCC, the evidence continues to support that conclusion. *Id.* at 140a; *id.* at 144a ("evidence suggests that … combinations can enhance localism"); *id.* at 152a ("the weight of evidence indicates that cross-ownership can promote localism by increasing the amount of news and information transmitted by the co-owned out-

lets."); see also *id.* at 216a-17a (discussing speech-enhancing benefits from common ownership of local television stations). The Third Circuit has upheld the FCC's reasoning on these points, even as the court's orders keep these ownership restrictions in place. See *Prometheus I*, 373 F.3d at 398-400, 414-15, 435; Pet. App. 39a & n.25. These rules thus have exactly the deleterious effect that this Court has indicated should require reexamining the weaker First Amendment protections of broadcast speech.

B. Resolution Of The Question Presented Is Outcome Determinative.

Given that the scarcity doctrine no longer has any validity, this Court should apply strict scrutiny to these ownership restrictions. Whatever the original justification was for these rules decades ago, the FCC's reasons for retaining these rules today are expressly *content-based*, and in the absence of the scarcity doctrine, strict scrutiny is therefore warranted. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). Accordingly, resolution of the question presented is likely to be outcome determinative for most of the rules evaluated in the FCC's quadrennial reviews.

This is clearly true with respect to the newspaper-broadcast cross-ownership restrictions. The FCC has expressly found that there is no competition-related rationale for that rule, because "newspaper/broadcast combinations cannot adversely affect competition in any relevant product market." Pet. App. 139a n.131. In addition, the FCC has found that such combinations "enhance localism," *id.* at 144a, and the Third Circuit already upheld that finding, *Prometheus I*, 373 F.3d at 398. Accordingly, the *only* rationale for the newspaper-broadcast rule today is the continued promotion of "'hoped-for'" gains in viewpoint "'diversi-

ty.'" See *NCCB*, 436 U.S. at 786 (quoting *1975 Order*, 50 F.C.C.2d at 1078, ¶ 109); Pet. App. 205a (goal is to "ensure a diversity of editorial content").[6] In the absence of the scarcity doctrine, however, such measures are blatantly unconstitutional, because it is well-settled that the "government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others." *Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam); *First Nat'l Bank of Bos.* v. *Bellotti*, 435 U.S. 765, 791 n.30 (1978).

The FCC's justifications for its other ownership rules are also content based. For example, the FCC has made clear that its aim in adopting the radio-television cross-ownership limits is to "ensure a diversity of editorial content." Pet. App. 205a. Other rules have the goal of fostering "more innovative programming" and "programming responsive to *local* needs and interests," *id.* at 217a-18a (local television ownership rule), or ensuring program diversity, *id.* at 217a (same); see also *id.* at 258a-59a (dual network rule). The local radio ownership rule also rests explicitly on content-based considerations, such as the amount of news programming versus advertising, an attempt to minimize "homogenized programming," and efforts to increase local programming. *Id.* at 242a-49a & n.403. Accordingly, the FCC's various rules are unconstitutional attempts by the FCC to stage-manage the public debate by suppressing the speech of some speakers in order to enhance the

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[6] The FCC's 2008 version of the rule starkly confirms the content-based nature of the restrictions, because under that rule the FCC would have evaluated each transaction with respect to the amount of local news coverage the combination would broadcast and the makeup of the editorial boards of *both* the newspaper and the broadcast station (among other expressly content-related criteria). Pet. App. 178a-93a.

speech of others. *Buckley*, 424 U.S. at 48-49. The First Amendment forbids "[s]peech restrictions based on the identity of the speaker" that are designed as "a means to control content." *Citizens United* v. *FEC*, 130 S. Ct. 876, 899 (2010).

Even under the scarcity doctrine, the proper standard of review for these content-based restrictions would be at least intermediate scrutiny, not the rational basis standard that the Third Circuit applied. See *Prometheus I*, 373 F.3d at 402; Pet. App. 63a. The Third Circuit's decision conflicts with this Court's decision in *League of Women Voters*, 468 U.S. at 380, in which the Court undertook the task of clarifying the "appropriate standard of review …. for broadcast regulation" under the scarcity doctrine. *Id.* at 374-75. Explicitly interpreting *Red Lion* and *NCCB*, the Court explained that it has upheld restrictions on broadcasters under the scarcity doctrine "only when [it is] satisfied that the restriction is narrowly tailored to further a substantial governmental interest." *Id.* at 380; see also *id.* at 376 n.11. The Third Circuit's determination that the appropriate standard is rational basis thus flatly conflicts with this Court's conclusion that FCC regulations of broadcast speech are subject at least to intermediate scrutiny under *Red Lion* and *NCCB*. At a minimum, the Court should grant certiorari to resolve that conflict.

C. This Court Should Grant Certiorari Now Rather Than Permit Another Multi-Year Cycle Of Review Under Unconstitutional Standards.

Finally, this Court's immediate intervention is warranted. The Third Circuit's decisions in this case are not only inconsistent with the First Amendment, they have thwarted Congress's intent in establishing qua-

drennial reviews of the FCC's media ownership rules and have made it impossible for those rules to keep pace with the profound and rapid changes in the media marketplace. Review of rules critical to the broadcast and print media should not continue under an improper constitutional standard, with yet another round of litigation lasting several years before the agency and the same Third Circuit panel. The First Amendment question is ripe for review, and this Court should decide it now.

Section 202(h) directs the FCC to respond to the dramatic changes in the media marketplace by aggressively eliminating outdated restrictions. Cf. *Fox*, 280 F.3d at 1044 (Section 202(h)'s deregulatory mandate can be "likened to Farragut's Order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.')"). Notwithstanding this congressional command, this Third Circuit panel has interpreted this provision to require only a public interest analysis and has reversed or vacated every FCC attempt to relax its media ownership restrictions over the last decade. As a result, all of the FCC's media ownership rules remain essentially unchanged since the 1990s (and the ban on newspaper-broadcast cross-ownership remains unchanged since 1975). Indeed, even though the FCC has twice held (in 2003 and 2008) that the 1975 Newspaper Ban should be repealed, and the Third Circuit has even upheld the FCC's findings on that score, *Prometheus I*, 373 F.3d at 398, the panel has either stayed or vacated the FCC's attempts to change the rule, and the 1975 ban remains in effect. Similarly, the D.C. Circuit held in 2002 that the FCC's Duopoly Rule, with its 8-voices test, is arbitrary and capricious, *Sinclair*, 284 F.3d at 162-65, but the Third Circuit has reversed the FCC's attempts to respond to the D.C. Circuit's remand and

the same arbitrary rule remains in effect a decade later.

Exacerbating these problems, this Third Circuit panel has purported to retain jurisdiction after each remand. Its practice of keeping long outdated rules in effect while repeatedly remanding the FCC's determinations to be reconsidered in the next quadrennial review has the industry trapped in the legal equivalent of "Groundhog Day." In essence, the panel's actions have turned Congress's scheme of iterative, deregulatory reviews into a single, endless, and inconclusive review that has now lasted more than ten years—with no end in sight.[7]

Under these circumstances, this Court should grant certiorari now, rather than allow this burdensome process to continue under unconstitutional standards. This Court denied petitions for the writ of certiorari in *Prometheus I* in 2005, and the result has been six more years of litigation before the FCC and this same

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[7] The panel's repeated efforts to retain appellate jurisdiction over successive quadrennial review orders are improper. Under the Hobbs Act, each new FCC rulemaking order gives rise to a new review proceeding, and venue, when there are multiple petitioners, is to be determined according to a random selection process ("lottery"). *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2342 ("Hobbs Act"); *id.* § 2112. Although parties may then seek a transfer, the court selected by the lottery must apply the standards of 28 U.S.C. § 2112(a)(5) and may transfer the case in its discretion. It is inappropriate for any court—and certainly not two judges of a single panel—to short-circuit this congressionally prescribed process by continually calling "dibs" on the next case years in advance. Although the Hobbs Act implicitly rejects "a concept of specialized circuits and panels for certain types of cases," *Am. Pub. Gas Ass'n* v. *FPC*, 555 F.2d 852, 857-58 (D.C. Cir. 1976) (per curiam), the Third Circuit panel here has in effect improperly turned itself into the United States Court of Appeals for Media Ownership.

Third Circuit panel, with no progress. If the Court denies certiorari again, the industry will lose several more years as the same issues are re-litigated yet again before the agency and the Third Circuit. There is nothing to be gained, and much to be lost, by allowing this litigation to continue for a third round without this Court's review. The process is guaranteed to be slow: as of this writing, the FCC has not even issued a notice of proposed rulemaking in the 2010 Quadrennial Review despite the fact that the end of 2011 is near, and in the last review *five years* passed between the issuance of a notice and a decision by the Third Circuit.

Nor will additional litigation further sharpen the issues: this panel of the Third Circuit has retained jurisdiction, which means that the panel will simply apply its own prior precedents to reaffirm its erroneous constitutional ruling a third time. And, the inconclusiveness of these proceedings has been extremely costly: the entire industry has already been suspended in an intolerable regulatory limbo for a decade as the FCC has struggled to respond to the Third Circuit's stays and remands, and the prospect of another several years of this uncertainty would inflict severe costs on the media industry and freedom of speech. Indeed, all media companies, and especially the newspaper industry, are undergoing profound and at times fatal changes, and the Third Circuit's decisions are frustrating Congress's intent and preventing media companies from responding to these competitive realities.

The constitutional issues are squarely presented and ripe. This Court is the only court that can revisit its First Amendment rulings in *Red Lion*. After three decades of intense judicial criticism and more than ten years of extensive proceedings before the FCC

and the Third Circuit, the First Amendment issues are long overdue for reconsideration by this Court, and the Court should grant certiorari and provide needed guidance for any future proceedings involving these rules.[8]

II. THE NEWSPAPER-BROADCAST CROSS-OWNERSHIP BAN IS UNCONSTITUTIONAL UNDER *NCCB*.

A. The Ban Against Newspaper-Broadcast Cross-Ownership Violates The Equal Protection Rights Of Newspaper Publishers.

Petitioners argued below that the 1975 Newspaper Ban singles out newspaper owners for special restrictions on their speech that do not apply to cable television systems or Internet sites in violation of the equal protection component of the Fifth Amendment. This Court should grant certiorari to review the Third Circuit's rejection of that argument.

The Third Circuit claimed that this Court's decision in *NCCB* mandates its conclusion, Pet. App. 63a-64a, but *NCCB* in fact requires a contrary result in the context of today's media environment. In *NCCB*, this Court rejected the equal protection challenge because "the regulations treat newspaper owners *in essentially the same fashion as other owners of the major media of mass communications*" and did not "'limit the circulation of information to which the public is entitled.'" 436 U.S. at 801 (emphasis added).

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[8] At a minimum, the Court should hold this petition pending its resolution of *FCC* v. *Fox Television Stations*, No. 10-1293 (granted June 27, 2011), in which the government has placed the scarcity doctrine at issue.

This Court's conclusion *in 1978* that all "major media" were treated alike compels exactly the opposite result *today*. The Third Circuit's contrary construction and application of *NCCB* precluded it from undertaking precisely the inquiry mandated by this Court: to determine whether there actually is differential treatment giving rise to equal protection concerns. In 1978, this Court held that the equivalent treatment of major media barred an equal protection challenge. In 2011, the limitation on the speech of newspaper owners—but not owners of other major media such as cable television or satellite systems, or Internet websites, which serve the same informative function as daily newspapers—gives rise to an equal protection violation through a simple and direct application of *NCCB*. Indeed, newspapers are the only non-broadcast medium today that are subject to blanket prohibitions on the co-ownership of broadcast stations. Cf. *Fox*, 280 F.3d at 1050-53.

Nor, contrary to the Third Circuit's holding, can there be any doubt that media unregulated by the FCC's rule—such as cable systems or Internet websites—are "major media" and have developed as such in this Court's cases since 1978. See *Turner*, 512 U.S. at 628-29; *Reno* v. *ACLU*, 521 U.S. 844, 849-54 (1997). As the FCC found more than a decade ago, there were 68.5 million cable subscribers in 2000; the substantial majority of Americans today watch TV delivered by cable and direct broadcast satellite systems, not through over-the-air reception. See Pet. App. 120a-21a. Similarly, the Internet's development as a "major medium" was many years away in 1978. The FCC found that 42.5 million households subscribed to an Internet service provider in 2000, acquiring access to over 30 million websites in that year—totals which have grown dramatically in the

intervening period. See *id.* at 116a-23a. The differential treatment of newspapers is particularly anomalous in light of this Court's determinations that speech of cable television operators and Internet communications are entitled to heightened First Amendment protections. See *Turner*, 512 U.S. at 636-44; *Reno*, 521 U.S. at 849-53. The existing disparate treatment of newspapers cannot be squared with *NCCB*.

B. Continued Application Of The 1975 Newspaper Ban Is Unconstitutional.

Even apart from the scarcity doctrine, the 1975 Newspaper Ban is unconstitutional under the standards applied in *NCCB*. In that case, this Court upheld the 1975 Newspaper Ban as an appropriate means "to promote the 'public interest' in diversification of the mass communications media," 436 U.S. at 799, because the FCC had predicted that "diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints," *id.* at 796. The FCC has interpreted this "public interest" in diversification to involve three components—encouraging competition, viewpoint diversity, and local news and public affairs programming. However, the FCC has now specifically found—twice—that the 1975 Newspaper Ban serves none of these interests. Pet. App. 113a ("retention of a complete ban is not necessary in the public interest as a result of competition, diversity, or localism."); *Prometheus I*, 373 F.3d at 398. In other words, the FCC has found that the constitutional basis for the 1975 Newspaper Ban under *NCCB* no longer exists. Thus, even under *NCCB*, the FCC's ban cannot be constitutionally maintained until such time as the FCC adopts a rule that is both supported by the record and consistent with current First Amendment analysis of the media marketplace.

CONCLUSION

For these reasons, this Court should grant the petition for a writ of certiorari or, at a minimum, hold it until resolution of *FCC* v. *Fox Television Stations, Inc.*, No. 10-1293.

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