Nos. 11-691 and 11-696

In the Supreme Court of the United States

MEDIA GENERAL, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

TRIBUNE COMPANY, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

SRI SRINIVASAN
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

AUSTIN C. SCHLICK
General Counsel

PETER KARANJIA
Deputy General Counsel

JACOB M. LEWIS
Associate General Counsel

C. GREY PASH, JR.
Counsel
Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

Whether the Federal Communications Commission's broadcast ownership rules violate the First and Fifth Amendments to the Constitution.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statement 2
Discussion 15
Conclusion 30

TABLE OF AUTHORITIES

Cases:

American Family Ass'n v. *FCC*, 365 F.3d 1156 (D.C. Cir.), cert. denied, 543 U.S. 1004 (2004) 17

Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 26

Buckley v. *Valeo*, 424 U.S. 1 (1976) 25

City of Cleburne v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985) 28

FCC v. *League of Women Voters*, 468 U.S. 364 (1984) 16, 25

FCC v. *National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) . . . . *passim*

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) 12, 17, 18, 24

Media Gen., Inc. v. *FCC*, 545 U.S. 1123 (2005) 6

Minneapolis Star & Tribune Co. v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) 27

National Broad. Co. v. *United States*, 319 U.S. 190 (1943) 4, 16, 18, 19, 24

Cases—Continued: Page

Prometheus Radio Project v. *FCC*, 373 F.3d 372 (3d Cir. 2004), cert. denied, 545 U.S. 1123 (2005) 5, 6, 14, 19, 28

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 18, 20, 21

Reno v. *ACLU*, 521 U.S. 844 (1997) 19, 20

Sinclair Broad. Group v. *FCC*, 284 F.3d 148 (D.C. Cir. 2002) 14, 17

Spector Motor Serv., Inc. v. *McLaughlin*, 323 U.S. 101 (1944) 26

Syracuse Peace Council, 2 F.C.C.R. 5043 (1987), aff'd, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990) 22, 23

Telecommunications Research & Action Ctr. v. *FCC*, 801 F.2d 501 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987) 17

Turner Broad. Sys., Inc. v. *FCC*, 512 U.S. 622 (1994) 3, 18, 19, 20, 24, 27

United States v. *IBM Corp.*, 517 U.S. 843 (1996) 18

United States v. *Storer Broad. Co.*, 351 U.S. 192 (1956) 3, 4

Ward v. *Rock Against Racism*, 491 U.S. 781 (1989) 24

Constitution, statutes and regulations:

U.S. Const.:

Amend. I . . . . *passim*

Amend. V 5, 6, 11, 14, 16, 28

Administrative Procedure Act, 5 U.S.C. 553 11

Communications Act of 1934, 47 U.S.C. 151 *et seq.* 2

Statutes and regulations—Continued: Page

47 U.S.C. 301 . . . . . 2, 19, 21
47 U.S.C. 307(a) 21
47 U.S.C. 309(a) 2, 16, 19
47 U.S.C. 309(h) 2
47 U.S.C. 309(j)(6)(B) 21
47 U.S.C. 309(k) 2
47 U.S.C. 310(d) 2, 19, 21
47 U.S.C. 336(c) 22
Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2004 (2004 Act), Pub. L. No. 108-199, Div. B, 118 Stat. 46:
§ 629, 118 Stat. 99 24
§ 629(3), 118 Stat. 100 4
Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, 126 Stat. 156 28
§ 6403, 126 Stat. 225 . . . . . 22, 28
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 4
§ 202(a)-(f), 110 Stat. 110-111 4
§ 202(b), 110 Stat. 110-111 24
§ 202(h), 110 Stat. 111 . . . . . 4, 14
28 U.S.C. 2112(a)(3) 4
47 C.F.R.:
Section 73.658(g) 10
Section 73.3555(a) (2009) 10
Section 73.3555(b) (2009) 10
Section 73.3555(c) (2002) 9

Regulations—Continued: Page

Section 73.3555(c)(2) (2002) 9
Section 73.3555(c)(2)(i) (2002) 9
Section 73.3555(c)(2)(ii) (2002) 9

Miscellaneous:

Congressional Budget Office, *S. 911 Public Safety Spectrum and Wireless Innovation Act* (July 20, 2011) 22

FCC, *Connecting America: The National Broadband Plan* (2010) 22

Implementation of Section 309(j) of the Communications Act, 13 F.C.C.R. 15920 (1998), amended on recons., 14 F.C.C.R. 8724 (1999), aff'd, *Orion Commc'ns, Ltd.* v. *FCC,* 213 F.3d 761 (D.C. Cir. 2000) 21

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965) 23

Public Notice DA 10-1084, 25 F.C.C.R. 7514 (2010) 14

2002 Biennial Regulatory Review:

17 F.C.C.R. 18,503 (2002) 4
18 F.C.C.R. 13,620 (2003) 4, 27

2006 Quadrennial Regulatory Review, 21 F.C.C.R. 8834 (2006) 6

2010 Quadrennial Regulatory Review,

25 F.C.C.R. 6086 (2010) 14

77 Fed. Reg. (Jan. 19, 2012):

p. 2868 15
p. 2869 15

In the Supreme Court of the United States

No. 11-691

MEDIA GENERAL, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 11-696

TRIBUNE COMPANY, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-84a[1]) is reported at 652 F.3d 431. The report and order of the Federal Communications Commission (Pet. App. 85a-375a) is reported at 23 F.C.C.R. 2010.

[1] All "Pet. App." citations are to the appendix to the petition for a writ of certiorari in No. 11-696.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2011. A petition for rehearing was denied on September 6, 2011 (Pet. App. 376a-378a). The petition for a writ of certiorari was filed on December 5, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Communications Act of 1934 (Communications Act or Act), 47 U.S.C. 151 *et seq.*, establishes a comprehensive framework for federal regulation of the transmission and use of radio signals in the United States. The Act establishes a federal policy of "maintain[ing] the control of the United States over all the channels of radio transmission" and "provid[ing] for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. 301. The Act requires persons seeking to engage in radio or television broadcasting to obtain a broadcast license for a limited, but renewable, period of time from the Federal Communications Commission (FCC or Commission), *ibid.*, and prohibits the assignment or transfer of any such license without the Commission's prior approval, 47 U.S.C. 309(h), 310(d).

Before it may grant, renew, or approve the assignment or transfer of a broadcast license, the Commission must conclude that such action would serve the "public interest, convenience, and necessity." 47 U.S.C. 309(a), 310(d); see 47 U.S.C. 309(k). Among the policies the Commission has sought to advance in exercising its broadcast-licensing responsibilities is a policy favoring diversification of mass media ownership. In the Commis-

sion's view, such diversification serves the public interest "by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978) (*NCCB*); see also *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 663 (1994) (*Turner*) ("[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment. Indeed, it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.") (internal quotation marks and citation omitted).

To facilitate even-handed implementation of its policies and to provide certainty to the broadcast industry, the Commission has adopted generally applicable regulations that reflect its judgments about the circumstances in which the issuance, assignment, or transfer of a broadcast license would serve the public interest. See, *e.g.*, *United States* v. *Storer Broad. Co.*, 351 U.S. 192, 202-205 (1956). Those regulations have long imposed limits on the number of radio or television stations a single party may own, either nationally or in a local market, as well as limits on cross-ownership of broadcast stations and other media in the same market. See, *e.g.*, *ibid.* (upholding ownership limits on radio and television stations); *NCCB*, 436 U.S. at 793-802 (upholding prohibition on cross-ownership of daily newspapers and broadcast stations). Absent a showing that waiver of a rule is warranted in a particular case, the Commission has found proposed broadcast combinations that violate its ownership limits to be inconsistent with the public inter-

est. See *id.* at 793; *Storer Broad. Co.*, 351 U.S. at 205; *National Broad. Co.* v. *United States*, 319 U.S. 190, 225 (1943) (*NBC*).

2. The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, directed the Commission to make a number of changes to its broadcast ownership rules. See *id.* § 202(a)-(f), 110 Stat. 110-111. In addition, Section 202(h) of the 1996 Act required the Commission to review its ownership rules periodically and to "repeal or modify any regulation it determines to be no longer in the public interest." 110 Stat. 112. Section 202(h) originally directed the Commission to review its ownership rules biennially. 110 Stat. 111. In 2004, however, Congress amended the statute to provide for Commission review every four years. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2004 (2004 Act), Pub. L. No. 108-199, Div. B, § 629(3), 118 Stat. 100.

3. In September 2002, the Commission initiated its third biennial proceeding under Section 202(h) to review its broadcast ownership rules. *2002 Biennial Regulatory Review*, 17 F.C.C.R. 18,503. On July 2, 2003, the Commission released a report and order that, as relevant here, (a) established a single new cross-media rule to govern cross-ownership of daily newspapers, television stations, and radio stations, and (b) modified two other rules that limit common ownership of multiple radio and multiple television stations in a local market. *2002 Biennial Regulatory Review*, 18 F.C.C.R. 13,620 (*2003 Order*).

4. Petitions for review were filed in several circuits, triggering a judicial lottery under 28 U.S.C. 2112(a)(3). The Third Circuit was selected to review the Commission's decision. In 2004, that court ruled that the Com-

mission's limits on broadcast ownership do not violate the First and Fifth Amendment rights of newspaper owners and broadcasters. *Prometheus Radio Project* v. *FCC*, 373 F.3d 372 (3d Cir. 2004), cert. denied, 545 U.S. 1123 (2005) (*Prometheus I*). The court explained that petitioners' First Amendment arguments were foreclosed by *NCCB*, in which this Court upheld the ban on newspaper-broadcast cross-ownership as "a reasonable means of promoting the public interest in diversified mass communications." *Id.* at 401 (quoting *NCCB*, 436 U.S. at 802).

The court of appeals also stated that, even if *NCCB* did not control, it would assess petitioners' First Amendment challenge under rational-basis review in light of the continuing physical scarcity of broadcast spectrum. *Prometheus I*, 373 F.3d at 402 (noting that "many more people would like access to [broadcast spectrum] than can be accommodated"). Similarly, the court concluded that petitioners' equal protection claims were foreclosed by this Court's rejection in *NCCB* of an identical equal protection challenge to the newspaper-broadcast cross-ownership restriction. *Id.* at 401-402. The court added that the development of more media outlets since *NCCB* was not a basis for reaching a different result because it could not be "assumed that these media outlets contribute significantly to viewpoint diversity as sources of *local* news and information." *Id.* at 401.

After rejecting the constitutional challenges, the court of appeals concluded on administrative-law grounds that the Commission's cross-media rule and local television and radio rules should be remanded for "additional justification or modification." *Prometheus I*, 373 F.3d at 382. The court emphasized that it was not

finally determining whether the particular ownership limits imposed by the Commission were permissible. Instead, the court stated that the Commission would "get[] another chance to justify its actions." *Id.* at 382 n.3.[2]

5. Media General, Inc., the National Association of Broadcasters, Tribune Company, the Newspaper Association of America, and other parties filed petitions for a writ of certiorari from the court of appeals' decision in *Prometheus I*. In addition, Sinclair Broadcast Group, Inc. filed a cross-petition for certiorari. The petitions argued, *inter alia,* that the Commission's broadcast ownership rules violate the First and Fifth Amendment rights of newspaper owners and broadcast station licensees. This Court denied all of those petitions. *Media Gen., Inc.* v. *FCC*, 545 U.S. 1123 (2005).

6. In July 2006, the Commission initiated its 2006 Quadrennial Review proceeding with a Further Notice of Proposed Rule Making. *2006 Quadrennial Regulatory Review*, 21 F.C.C.R. 8834. In addition to receiving voluminous comments in response and holding hearings around the country, the Commission conducted or commissioned ten studies and received numerous other studies in the record of the proceeding.

In February 2008, the Commission issued an order concluding the quadrennial review. Pet. App. 85a-375a (*2008 Order*). In that order, the agency determined that it should "modify the newspaper/broadcast cross-ownership rule, and * * * generally retain the other broadcast ownership rules currently in effect." *Id.* at 90a. The Commission explained:

---

[2] Chief Judge Scirica dissented from the court of appeals' decision to remand the FCC's ownership rules. *Prometheus I*, 373 F.3d at 435.

> By modestly loosening the 32-year prohibition on newspaper/broadcast cross-ownership, our approach balances the concerns of many commenters that we not permit excessive consolidation with concerns of other commenters that we afford some relief to assure continued diversity and investment in local news programming. We believe that the decisions we adopt today serve our public interest goals, appropriately take account of the current media marketplace, and comply with our statutory responsibilities.

Id. at 94a-95a.

The Commission's decisions on its various ownership rules are described below.

Newspaper/Broadcast Cross-Ownership Rule. The Commission reaffirmed its decision in the *2003 Order* to eliminate its longstanding blanket ban on newspaper/broadcast cross-ownership. The Commission explained that "[e]vidence in the record" of the 2006 proceeding, including information documenting recent turmoil in the media marketplace, "continues to support [our] earlier decision that retention of a complete ban is not necessary in the public interest as a result of competition, diversity, or localism." Pet. App. 113a; see *id*. at 120a-139a. That record also persuaded the Commission that the rule could be modified to provide benefits to consumers and industry without impairing viewpoint diversity. The Commission stated that its "new rule lifts the complete ban but does so in a modest manner in order to ensure both that our goals of competition, localism, and diversity are not compromised and that we may achieve the economic benefits of allowing certain combinations." *Id.* at 115a.

The revised newspaper/broadcast cross-ownership rule adopted by the Commission established "a presumption that generally will permit certain newspaper/broadcast station combinations in the largest 20 markets, and generally will preclude them in all other markets." Pet. App. 115a. Specifically, the Commission established a presumption that waiver of the newspaper/broadcast cross-ownership ban would be in the public interest (and thus permissible under the Commission's media ownership rules) when a daily newspaper seeks to combine with a television station in one of the largest 20 markets and (1) the television station is not among the top four ranked stations in the market, and (2) at least eight "major media voices" would remain in the market after the combination. *Id*. at 115a-116a. The Commission explained that, with two exceptions, it would "presume that all other proposed newspaper/broadcast station combinations are not in the public interest." *Id.* at 116a.[3]

Radio/Television Cross-Ownership Rule. The Commission retained its then-current radio/television cross-ownership rule, which limits the number of commercial radio and television stations an entity may own in the same market. See Pet. App. 199a-206a. Specifically, the rule allows a party to own up to two television stations (so long as permitted under the local television owner-

[3] Under the first exception, the negative presumption would be reversed if a newspaper or broadcast station is "failed" or "failing," as determined by various criteria stated in the *2008 Order*. See Pet. App. 175a-176a. Under the second, the negative presumption would be reversed when a proposed combination "initiates local news programming of at least seven hours per week on a broadcast outlet that otherwise was not offering local newscasts prior to the combined operations." *Id.* at 178a.

ship rule) and up to six radio stations (to the extent permitted by the local radio ownership rule) in a market where at least 20 independently owned media "voices" would remain following a merger. 47 C.F.R. 73.3555(c) (2002). In a market where parties may own a combination of two television stations and six radio stations, the rule allows a party alternatively to own one television station and seven radio stations. 47 C.F.R. 73.3555(c)(2)(i) (2002). A party may own up to two television stations (as permitted under the current local television ownership rule) and up to four radio stations (as permitted under the local radio ownership rule) in markets where, post-merger, at least ten independently owned media voices would remain. 47 C.F.R. 73.3555(c)(2)(ii) (2002). A combination of two television stations (as permitted under the local television ownership rule) and one radio station is allowed regardless of the number of voices remaining in the market. 47 C.F.R. 73.3555(c)(2) (2002).

Local Television Ownership Rule. The Commission also found that its restrictions on common ownership of television stations in local markets continue to be necessary "in order to preserve adequate levels of competition within local television markets." Pet. App. 207a; see generally Gov't Br. in Opp., *National Ass'n of Broadcasters* v. *FCC*, No. 11-698 (Gov't 11-698 Opp.). Under that rule, an entity may own two television stations in the same television market if: (1) certain specified signal coverage areas, known as the "Grade B contours," of the stations do not overlap; or (2) at least one of the stations in the combination is not ranked among the top four stations in terms of audience share, *and* at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations

would remain in the market after the combination. 47 C.F.R. 73.3555(b) (2009).

Local Radio Ownership Rule. The Commission also concluded that its local radio ownership rule remains necessary in the public interest to protect competition in local radio markets. Pet. App. 227a. Under that rule, an entity may own, operate, or control (1) up to eight commercial radio stations, not more than five of which are in the same service (*i.e.*, AM or FM), in a radio market with 45 or more full-power, commercial and noncommercial radio stations; (2) up to seven commercial radio stations, not more than four of which are in the same service, in a radio market with between 30 and 44 (inclusive) full-power, commercial and noncommercial radio stations; (3) up to six commercial radio stations, not more than four of which are in the same service, in a radio market with between 15 and 29 (inclusive) full-power, commercial and noncommercial radio stations; and (4) up to five commercial radio stations, not more than three of which are in the same service, in a radio market with 14 or fewer full-power, commercial and noncommercial radio stations, except that an entity may not own, operate, or control more than 50% of the stations in such a market. See 47 C.F.R. 73.3555(a) (2009).

Dual Network Rule. Finally, the Commission retained the "dual network" rule, 47 C.F.R. 73.658(g), which "permits common ownership of multiple broadcast networks, but prohibits a merger between or among the 'top four' networks," *i.e.*, ABC, CBS, Fox, and NBC. Pet. App. 258a.

7. Multiple parties challenged the *2008 Order* in several courts of appeals. Those petitions for review ultimately were consolidated in the Third Circuit. On July 7, 2011, that court affirmed the *2008 Order*, with

the exception of the newspaper/broadcast cross-ownership rule. Pet. App. 1a-84a (*Prometheus II*).[4]

The court of appeals' rulings on the various ownership rules are described below.

Newspaper/Broadcast Cross-ownership Rule. Parties challenging the newspaper/broadcast cross-ownership rule contended that the Commission had erred in not relaxing the rule further, that the rule violated the First and Fifth Amendments, and that the record compiled in the proceeding below did not support the FCC's revised rule. Other parties argued that the Commission had failed to provide adequate notice and opportunity to comment on its revision of the rule. Because the court concluded that the FCC had failed to satisfy the notice-and-comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553, it did not reach any of the nonconstitutional challenges to the substance of the rule. Pet. App. 22a.

The court of appeals found that the language in the Commission's Notice of Proposed Rulemaking was "too general and open-ended to have fairly apprised the public of the Commission's new approach to cross-ownership." Pet. App. 39a. The court indicated that the Commission could "fulfill[] its obligations on remand in the course of [its] ongoing review" of media ownership rules in the 2010 Quadrennial Review proceeding. *Id.* at 40a n.26.

Radio/Television Cross-ownership Rule. The court of appeals found that the Commission had "provided a reasoned explanation of its decision" to retain its ra-

[4] The Court also remanded the Commission's action in a separate order dealing with broadcast ownership by minorities and women. Pet. App. 64a-79a. The petitions do not raise any issue concerning that aspect of the court's decision.

dio/television cross-ownership rule. Pet. App. 46a. The court explained that, based on the administrative record compiled in the proceeding, the Commission had "plausibly justified its position that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints." *Id.* at 47a (internal quotation marks and citation omitted). The court also rejected arguments that the rule was no longer in the public interest in light of the growth of diversity and competitiveness of the media market. The court noted that the FCC had acknowledged this trend, but had found that "traditional media * * * are the most frequently used and most important sources of local and national news." *Ibid.* (quoting *id.* at 163a).

The court of appeals held that the Commission had reasonably concluded, based on the record evidence, that "new media such as the Internet and cable still do not outrank newspapers and broadcast stations as sources of local news." Pet. App. 48a. The court found that the FCC "was justified in treating broadcasters differently than cable operators (which face no cross-ownership restrictions but must comply with local ownership rules) because 'cable television is not nearly as significant a source of local news as the broadcast media,' and therefore 'mergers involving [those] systems do not pose a serious threat to viewpoint diversity.'" *Ibid.* (citation omitted). Finally, the court rejected the argument that the radio/television cross-ownership rule is akin to the cable/broadcast cross-ownership rule invalidated in *Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027, 1049 (D.C. Cir.), modified on reh'g, 293 F.3d 537 (D.C. Cir. 2002) (*Fox*). The court explained that the rule at issue here is distinguishable because it "permits cross-ownership within limits." Pet. App. 48a. In *Fox*,

by contrast, "cross-ownership was banned entirely," and it was this across-the-board prohibition that the *Fox* court found arbitrary and capricious. *Ibid.*

Local Television Ownership Rule. The court of appeals affirmed the Commission's decision to retain the pre-2003 local television ownership rule, which permits an entity to own two television stations in the same market in certain circumstances. Pet. App. 49a-56a. This represented a change of position from the Commission's 2003 determination to relax that rule. See generally Gov't 11-698 Opp. The court found that the Commission had adequately explained its change of position, noting that the agency had not "ignore[d] the 'explosion' of media outlets in the industry; it simply concluded that, despite these changes, the rule remained 'necessary in the public interest to protect competition for viewers and in local television advertising markets.'" Pet. App. 51a (citation omitted).[5]

Local Radio Ownership Rule. In the 1996 Act, Congress had set initial limits on the number of commercial radio stations that a single entity could own, operate, or control. The Commission retained those limits in the *2008 Order*. The Court upheld, as reasonable, the Commission's explanation that relaxing the rule and permitting further ownership consolidation would be inconsistent with its "public interest objectives of ensuring that the benefits of competition and diversity are realized in local radio markets." Pet. App. 57a (quoting *id.* at 234a).

Constitutionality of Media Ownership Rules. The court of appeals rejected petitioners' contentions that all

[5] In a separate petition for a writ of certiorari, the National Association of Broadcasters seeks review of only this portion of the court of appeals' decision. The government is today filing a separate brief in opposition to that petition.

of the Commission's media ownership rules are unconstitutional. The court adhered to its prior conclusion in *Prometheus I* that the "abundance of non-broadcast media does not render the broadcast spectrum any less scarce." Pet. App. 62a (quoting *Prometheus I*, 373 F.3d at 402). The court reiterated that the "Supreme Court's justification for the scarcity doctrine remains as true today as it was in 2004—indeed, in 1975—'many more people would like to access the [broadcast spectrum] than can be accommodated.'" *Id.* at 62a-63a (brackets in original) (quoting *Prometheus I*, 373 F.3d at 402).

The court of appeals agreed with the Commission that the media ownership rules "do not violate the First Amendment because they are rationally related to substantial government interests in promoting competition and protecting viewpoint diversity." Pet. App. 63a. The court explained that "[t]hese rules apply regardless of the content of programming." *Ibid.* The court also rejected the contention that the local television ownership rule violates the First Amendment because it singles out broadcast television stations. *Ibid.* (citing *Sinclair Broad. Group* v. *FCC*, 284 F.3d 148, 168 (D.C. Cir. 2002)). The court similarly rejected the argument that the newspaper/broadcast cross-ownership rule violates newspaper owners' right to equal protection under the Fifth Amendment by treating newspapers differently from other media. *Ibid.* The court explained that this Court in *NCCB* had rejected essentially the same equal protection argument. *Id.* at 63a-64a.

8. Pursuant to Section 202(h), the Commission has continued to examine its media ownership rules quadrennially. On May 25, 2010, the Commission issued a Notice of Inquiry for its fifth such review. *2010 Quadrennial Regulatory Review*, 25 F.C.C.R. 6086. In sup-

port of its current proceeding, the Commission has commissioned several economic studies to evaluate the current marketplace and the state of the media industry, see Public Notice DA 10-1084, 25 F.C.C.R. 7514 (2010), and hundreds of parties have filed comments. The Commission recently issued a Notice of Proposed Rulemaking (NPRM), proposing a number of changes to its ownership rules in order "to take account of new technologies and changing marketplace conditions while ensuring that [the] rules continue to serve [our] public interest goals of competition, localism and diversity." *2010 Quadrennial Regulatory Review*, 77 Fed. Reg. 2868 (Jan. 19, 2012). In that NPRM, the Commission proposed to eliminate the radio/television cross-ownership rule and to retain other rules discussed above, with some modifications. *Id.* at 2869.

DISCUSSION

Petitioners ask the Court to overrule a number of its precedents and radically alter longstanding communications policy. Petitioners' sweeping contentions lack merit, and there is no conflict in the circuits on any of the claims petitioners press. In 2005, the Court denied multiple petitions raising essentially the same arguments (see p. 6, *supra*), and there is no reason for a different result here.

Moreover, because the court of appeals vacated and remanded the newspaper/broadcast cross-ownership rule (the focus of most of petitioners' attention), petitioners' First and Fifth Amendment challenges to that rule are premature. The Commission is currently engaged in a rulemaking to respond to the court's remand. In that proceeding, the Commission can take account of market and technological developments that have occurred since

the order at issue here was issued in 2008. In light of that new proceeding and the staleness of the record in this case, this Court's review is not warranted. Rather, this Court should hold these petitions pending its decision in *FCC* v. *Fox Television Stations, Inc.*, No. 10-1293 (argued Jan. 10, 2012), and then dispose of them as appropriate.

1. The court of appeals applied settled law when it concluded that the FCC's broadcast ownership rules must be upheld under the First Amendment if they are "rationally related to substantial governmental interests." Pet. App. 63a. Congress "has power to regulate the use of [broadcast spectrum as] a scarce and valuable national resource," and to "ensure through the regulatory oversight of the FCC that only those who satisfy the 'public interest, convenience, and necessity' are granted a license to use radio and television broadcast frequencies." *FCC* v. *League of Women Voters*, 468 U.S. 364, 376 (1984) (quoting 47 U.S.C. 309(a)). As this Court stated in *NCCB*, "nothing in the First Amendment * * * prevent[s] the Commission from allocating licenses so as to promote the 'public interest' in diversification of the mass communications media." *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 799 (1978). "Denial of a station license" on public interest grounds, "if valid under the Act, is not a denial of free speech." *National Broad. Co.* v. *United States*, 319 U.S. 190, 227 (1943) (*NBC*).

Contrary to the Tribune Company petitioners' assertion, the Third Circuit's decision is not in "disagreement with the D.C. Circuit" (11-696 Pet. 19) regarding the First Amendment analysis applicable to the FCC's ownership regulations. Although petitioners cite (11-696 Pet. 17-19) dicta and dissenting opinions of individual

judges, who have expressed a range of views on the proper First Amendment analysis of broadcast regulation, the critical views cited by petitioners were generally directed at content regulation, not ownership regulations like those at issue here.[6] Both the Third and D.C. Circuits have applied the same, established standard when reviewing the FCC's broadcast ownership regulations. See *Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002) ("the deferential review undertaken by the Supreme Court in *NCCB* and *NBC* is also appropriate here"); *Sinclair Broad. Group, Inc.* v. *FCC*, 284 F.3d 148, 168 (D.C. Cir. 2002) ("Sinclair does not have a First Amendment right to hold a broadcast license where it would not [under the Commission's ownership regulations] satisfy the public interest."); see also *American Family Ass'n* v. *FCC*, 365 F.3d 1156, 1168 (D.C. Cir.) ("It is well established that content-neutral 'structural' regulation of the radio and television broadcast spectrum * * * is generally subject only to rational basis scrutiny.") (citation omitted), cert. denied, 543 U.S. 1004 (2004). There is no conflict in the circuits on the constitutional issues petitioners present.

The Third Circuit held (Pet. App. 63a), and petitioner Media General effectively concedes (11-691 Pet. 16), that petitioners' constitutional challenges are foreclosed by this Court's decision in *NCCB*. Petitioners nonetheless contend (11-691 Pet. 16-24; 11-696 Pet. 20-21) that the growth in the number of licensed broadcast stations

[6] The only court of appeals decision cited by the Tribune Company petitioners concerned whether the FCC could engage in "political content regulation" of broadcasting speech, see *Telecommunications Research & Action Ctr.* v. *FCC*, 801 F.2d 501, 506 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987), and the court's discussion focused on that issue.

since *NCCB*, and the development of non-broadcast media outlets, justify overruling *NCCB* and mandating heightened First Amendment scrutiny of the FCC's ownership regulations. "[E]ven in constitutional cases," however, stare decisis "carries such persuasive force" that the Court has "always required a departure from precedent to be supported by some 'special justification.'" *United States* v. *IBM Corp.*, 517 U.S. 843, 856 (1996) (brackets in original; citation omitted). That principle is especially pertinent here because petitioners seek the overruling of not just one precedent, but several. "[T]he 'scarcity' rationale associated with *Red Lion Broadcasting Co.* v. *FCC*," 395 U.S. 367 (1969), and *NCCB* was "in fact * * * first set forth" in *NBC*, *supra*, nearly 70 years ago. *Fox*, 280 F.3d at 1045. Petitioners fail to provide a "special justification," *IBM Corp.*, 517 U.S. at 856 (citation omitted), for overruling multiple decisions of this Court.

The Third Circuit correctly rejected the contention that changed market conditions have undermined the reasoning of *NCCB*. Pet. App. 62a-63a. Deference to the FCC's licensing policies arises from the bedrock principle that broadcasting over radio frequencies, "unlike other modes of expression, * * * is [necessarily] subject to governmental regulation" because there is a "fixed natural limitation upon the number of stations that can operate without interfering with one another." *NBC*, 319 U.S. at 213, 226; see *NCCB*, 436 U.S. at 799 ("Because of problems of interference between broadcast signals," only "a finite number of frequencies"—"far exceeded by the number of persons wishing to broadcast"—"can be used productively."); *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 637 (1994) ("The justification for our distinct approach to broadcast regu-

lation rests upon the unique physical limitations of the broadcast medium."). In the Communications Act, Congress addressed those physical limits by exercising federal "control * * * over all the channels of radio transmission," 47 U.S.C. 301, and by vesting in the Commission the responsibility for ensuring that access to broadcast spectrum is provided only in accordance with the "public interest." 47 U.S.C. 301, 309(a), 310(d); see *NBC*, 319 U.S. at 214-215, 226.

The Commission's lawful exercise of its licensing authority does not violate the constitutional rights of newspaper owners or others who may be denied broadcast licenses because the "right of free speech does not include * * * the right to use the facilities of radio without a license." *NBC*, 319 U.S. at 226-227; see *NCCB*, 436 U.S. at 799. Although there are today more broadcast and non-broadcast outlets than there were when the Court decided *NBC* and *NCCB*, it remains the case that "many more people would like to access the [broadcast spectrum] than can be accommodated." Pet. App. 62a-63a (brackets in original) (quoting *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 402 (3d Cir. 2004), cert. denied, 545 U.S. 1123 (2005)); see *Turner*, 512 U.S. at 637 (noting that there are "more would-be broadcasters than frequencies available in the electromagnetic spectrum"). The core reason for deferential review of the Commission's licensing policies therefore continues to apply with full force.[7]

---

[7] Contrary to petitioner Media General's contention (11-691 Pet. 18-19), this Court's settled analysis of broadcast regulation is entirely consistent with the Court's determinations in *Turner* and *Reno* v. *ACLU*, 521 U.S. 844 (1997), not to apply the analytical framework of *NBC* and *NCCB* to regulation of cable television and the Internet. As the Court explained, those other media do not present the same

To be sure, the Commission in its administration of communications policy may treat the growth in media outlets as relevant to the choice of appropriate limits on common ownership. For instance, the Commission concluded in this case that changes in marketplace conditions, including the fact that "the largest markets contain a robust number of diverse media sources," justified relaxation of the prior blanket ban on newspaper-broadcast combinations. Pet. App. 114a-115a; see *id.* at 116a-139a (discussing marketplace developments). The growth of alternative media outlets does not logically imply, however, that this Court should overturn its settled constitutional framework for analyzing the regulation of scarce broadcast spectrum.

2. Instead of grappling with this Court's controlling decisions in *NCCB* and *NBC*, petitioners focus much of their attack on the Court's decision in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) (*Red Lion*). In *Red Lion*, this Court considered a First Amendment challenge to the FCC's former "fairness doctrine," which required broadcasters to "give adequate coverage to public issues" that "accurately reflects * * * opposing views." *Id*. at 377. The Court recognized that the fairness doctrine imposed on broadcasters a duty to air views and opinions with which they may not have

---

physical scarcity and interference concerns that necessitate governmental licensing of broadcast spectrum. See *Turner*, 512 U.S. at 639 ("given the rapid advances in fiber optics and digital compression technology," cable does not suffer from broadcasting's "inherent limitations," and there is no "danger of physical interference between two cable speakers attempting to share the same channel."); *Reno*, 521 U.S. at 870 (noting that the Internet "can hardly be considered a 'scarce' expressive commodity" because "[i]t provides relatively unlimited, low-cost capacity for communications of all kinds").

agreed. *Id.* at 392. The Court concluded, however, that "licensees given the privilege of using scarce radio frequencies" may be required "to share [their] frequenc[ies] with others" and to act as "prox[ies] or fiduciar[ies] with obligations to present those views and voices which are representative of [their] communit[ies]." *Id.* at 389, 394.

The Tribune Company petitioners assert (11-696 Pet. 22) that, in light of Congress' adoption in 1993 of statutory provisions providing for auctions to allocate new licenses, "the time for a new constitutional regime has arrived." *Ibid.* That is so, petitioners contend, because Congress has "displac[ed] the FCC's role in choosing among applicants for the same facilities, a role that underpinned the FCC's authority to impose ownership restrictions." *Ibid.* (internal quotation marks and citation omitted). That argument lacks merit. The provisions that authorize the auctioning of licenses do not "limit or otherwise affect the requirements of subsection (h) of this section, section 301, 304, 307, 310, or 606 of this title, or any other provisions of this [Act]." 47 U.S.C. 309(j)(6)(B). The cited provisions specifically address the Commission's duty to grant broadcast station applications only after a determination that the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. 307(a); see 47 U.S.C. 301, 310(d). In addition to that clear statutory language, procedures adopted by the FCC to implement the statute show that auctions have not displaced the FCC's role in choosing applicants. See *Implementation of Section 309(j) of the Communications Act,* 13 F.C.C.R. 15920 (1998), amended on recons., at 14 F.C.C.R. 8724 (1999), aff'd, *Orion Commc'ns, Ltd.* v. *FCC,* 213 F.3d 761 (D.C. Cir. 2000) (per curiam).

Equally unavailing is petitioners' related argument (11-696 Pet. 22-23) that Congress "does not believe that spectrum remains 'scarce' within the meaning of *Red Lion* because it ordered the FCC to reclaim spectrum that had been allocated predominantly for broadcast uses." *Ibid.* Congress's directive that the FCC "reclaim" spectrum made available as a result of the transition to digital television, see 47 U.S.C. 336(c), demonstrates exactly the opposite—that demand for radio spectrum outstrips supply. See, *e.g.*, FCC, *Connecting America: The National Broadband Plan* 81-82 (2010). The continuing high demand for broadcast spectrum is also reflected in recent legislation authorizing the Commission to establish incentive auctions for television broadcasting spectrum that would allow television licensees to return their spectrum assignments to the agency, which can then auction the spectrum rights for other uses and share the auction proceeds with the former licensee. See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6403, 126 Stat. 225; see pp. 28-29, *infra*. The Congressional Budget Office (CBO) estimated that such auctions would produce approximately $24.5 billion. See CBO, *S. 911 Public Safety Spectrum and Wireless Innovation Act* (July 20, 2011).

In questioning the deferential review that courts have traditionally accorded the FCC's broadcast ownership rules, petitioners also rely on the FCC's own determination in 1987 that the scarcity of broadcast frequencies no longer justified retention of the fairness doctrine, see *Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), aff'd, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990). 11-691 Pet. 22-23; 11-696 Pet. 21-22. Petitioners' reliance on that FCC decision is mis-

placed. In repealing its fairness doctrine, the Commission determined that, in light of the development of new media outlets, spectrum scarcity no longer justified the "intrusive type of content-based regulation" that the fairness doctrine imposed. *Syracuse Peace Council*, 2 F.C.C.R. at 5054 (¶ 76); see *id.* at 5054 (¶ 72), 5068 nn.201-202. The Commission stressed, however, that "technological advancements * * * have not eliminated spectrum scarcity," *id.* at 5055 (¶ 78), and that its analysis of the constitutionality of the fairness doctrine had no "relevance to the Commission's allocational and licensing function." *Id.* at 5069 n.204.[8]

Contrary to petitioners' contentions (11-691 Pet. 18, 23; 11-696 Pet. 21, 22), Congress has not sent any "signal" that the FCC's ownership regulations should be subject to a higher level of scrutiny under the First Amendment. Congress has neither repealed, nor amended in any relevant respect, the Communications Act provisions that authorize the Commission to regu-

---

[8] The Tribune Company petitioners also rely (11-696 Pet. 23-24) on the Commission's determination that relaxation of the prior newspaper-broadcast cross-ownership prohibition can produce public-interest benefits in connection with local news coverage. This Court recognized in *NCCB*, however, that the Commission must balance the goal of promoting diversity of ownership with the "sometimes conflicting" public-interest goal of ensuring "the best practicable service to the public." 436 U.S. at 782 (quoting *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965)). The Communications Act does not require the Commission to give either policy "controlling weight in all circumstances," but leaves that "weighing of policies" under the public-interest standard to the Commission's judgment "in the first instance." *Id.* at 810. In this case, the Commission balanced the public-interest benefits from broadcaster/newspaper combinations in larger markets against the threat to diversity that can result from such combinations in smaller markets. Pet. App. 139a-143a, 153a-156a.

late the distribution of broadcast licenses in the public interest. See p. 2, *supra*. Nor has it enacted any statute that directs reviewing courts to apply heightened scrutiny to the FCC's ownership regulations. To the contrary, Congress has itself enacted national limitations on ownership of both radio and television stations. See 1996 Act § 202(b), 110 Stat. 110 (establishing local radio ownership limits); 2004 Act § 629, 118 Stat. 99 (establishing national television ownership limit).

3. There is likewise no merit to petitioners' arguments (11-691 Pet. 27-31; 11-696 Pet. 24-25) that the FCC's broadcast ownership rules should be subject to heightened scrutiny as content-based restrictions on speech. The "principal inquiry in determining content neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); cf. *Turner*, 512 U.S. at 643 ("[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."). This Court and lower courts have consistently and correctly treated the Commission's broadcast ownership regulations as content-neutral because the regulations do not turn on the content of any message an applicant for a broadcast license may seek to convey. *NCCB*, 436 U.S. at 801 (holding that newspaper/television cross-ownership regulations "are not content related"); *Fox*, 280 F.3d at 1046 (ownership regulations are "structur[al]," not "content-based"); see *NBC*, 319 U.S. at 226.

Because the FCC's structural ownership regulations are not content-based, the Tribune Company petitioners are also wrong in contending (11-696 Pet. 26) that the court of appeals' decision as to the appropriate standard

of review conflicts with this Court's decision in *League of Women Voters*. That decision involved a statutory ban on a specific type of broadcast programming—editorials broadcast by non-commercial educational stations that received grant funds from the Corporation for Public Broadcasting. "[T]he scope of [the statute's] ban [was] defined solely on the basis of the content of the suppressed speech." 468 U.S. at 383. The decision in *League of Women Voters* therefore does not apply to the purely structural and content-neutral regulations at issue here.

The Tribune Company petitioners also contend that the Commission's ownership rules "are unconstitutional attempts * * * to stage-manage the public debate by suppressing the speech of some speakers in order to enhance the speech of others." 11-696 Pet. 25-26 (citing *Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam)). This Court rejected the same argument in *NCCB*, explaining that the denial of "a station license because 'the public interest' requires it 'is not a denial of free speech.'" *NCCB*, 436 U.S. at 800 (citation omitted). The language in *Buckley* on which petitioners rely pertained to "the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections." 424 U.S. at 48. The Commission's media ownership regulations do not involve core political speech, are not content-based, and have been upheld repeatedly by this Court against First Amendment challenge.

4. Petitioners contend (11-691 Pet. 24-27; 11-696 Pet. 30-32) that the newspaper/broadcast cross-ownership rule violates equal protection principles because it limits combinations among daily newspapers, television stations, and radio stations, but not among

cable systems, Internet websites, and other information-delivery technologies. Those contentions lack merit and do not warrant this Court's review.

a. As an initial matter, because this case is in an interlocutory posture with respect to the newspaper-broadcast cross-ownership rule, it does not provide an appropriate vehicle for addressing petitioners' equal protection (or First Amendment) claims regarding that rule. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam). Based on its conclusion that the Commission had violated the notice requirements of the APA, the court of appeals vacated the newspaper/broadcast cross-ownership rule and remanded for further FCC proceedings. Pet. App. 22a-40a. As this Court has long emphasized, prudential considerations strongly counsel against unnecessary pronouncements on constitutional matters. See, *e.g.*, *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable."). Until those remand proceedings have been completed, review by this Court would be premature.[9]

---

[9] Nor does this case squarely present the question whether the prior newspaper/ broadcast cross-ownership rule would satisfy the new, more stringent constitutional standard petitioners advocate. The old rule was not directly challenged in this proceeding. Although that rule is temporarily back in force due to the Third Circuit's vacatur of the revised rule, the current cross-ownership rule may be modified as a result of the remand proceeding that is currently underway. Indeed, the Commission has proposed such a modification in the 2010 Quadrennial Notice of Proposed Rulemaking. See p. 15, *supra*. Petitioners' constitutional challenges are thus in effect directed to a future rule—as yet

b. In any event, "the fact that a law singles out a certain medium" for different treatment does not by itself establish a constitutional concern. *Turner*, 512 U.S. at 660. Such distinctions are permitted when they are "'justified by some special characteristic of' the particular medium being regulated." *Id.* at 660-661 (quoting *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983)). The Commission determined that because daily newspapers and broadcast stations are the media platforms that Americans turn to most often for local news and information, the public-interest goal of promoting diversity of ownership and viewpoint is more affected by consolidation among broadcast stations and newspapers than by combinations involving other media. See Pet. App. 163a (noting "relatively unanimous support" for the conclusion that "consumers continue predominantly to get their local news and information from daily newspapers and broadcast television"); see also *2003 Order*, 18 F.C.C.R. at 13,797 (¶ 452) (reaching same conclusion based on record in prior media ownership review proceeding).

Petitioners contend (11-691 Pet. 26; 11-696 Pet. 31) that Fifth Amendment equal protection principles required the Commission to apply the newspaper/broadcast cross-ownership rule to cable systems and Internet websites. The court of appeals in *Prometheus I* correctly rejected that argument, which ignores the particular characteristics of those media and the record before the Commission. While recognizing that "there are more media outlets today * * * than there were in

---

unadopted—that the Commission may or may not choose to promulgate on remand.

1978 when *NCCB* was decided," the court was not persuaded that these new non-broadcast media "contribute significantly to viewpoint diversity as sources of *local* news and information." 373 F.3d at 401. The court of appeals reached the same conclusion in this case. Pet. App. 63a-64a. The record before the Commission indicates that daily newspapers remain a much more prominent source of local news than cable television, the Internet, or any other non-broadcast media. See *id.* at 162a-167a. Because other non-broadcast media are "not similarly situated" to newspapers, petitioners' equal protection claim fails. See *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

5. Finally, plenary review is unwarranted in light of newly enacted legislation that has the potential to alter the television marketplace in ways that could affect future regulation. The Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, which became law on February 22, 2012, authorizes the Commission to allow television licensees to return their spectrum assignments to the agency, which can then auction the spectrum rights for other uses, such as wireless telecommunications services, and share the auction proceeds with the former licensee. See, *e.g., id.* § 6403, 126 Stat. 225. Although the new statute is unlikely to have an immediate impact on the television marketplace, any reclamation of spectrum in the longer term could reduce the number of broadcast television stations across the country and affect how consumers access media in those markets. The option to return a license in exchange for money may also alter the economics of television markets. While it is too early to predict any particular effect of the new legislation, the possibility of

future changes in the television industry also weighs against further review here.

6. Although plenary review of these petitions is not warranted, the Court should hold them pending its decision in *FCC* v. *Fox Television Stations, Inc.*, No. 10-1293 (argued Jan. 10, 2012), and then dispose of them as appropriate. See 11-691 Pet. 24; 11-696 Pet. 30 n.8, 33 (suggesting hold for *Fox* if the Court does not grant plenary review). Some respondents in *Fox* have argued that "the scarcity doctrine has no continuing validity, if it ever did." Br. of Fox Television Stations 36, *Fox*, *supra* (No. 10-1293); see Br. of ABC, Inc. 50-51 n.24, *Fox*, *supra* (No. 10-1293) (suggesting that *Red Lion* be overruled). The Court's decision in *Fox* therefore may shed light on the proper analysis of petitioners' constitutional claims.

CONCLUSION

The petitions for a writ of certiorari should be held pending this Court's decision in *FCC* v. *Fox Television Stations, Inc.*, No. 10-1293 (argued Jan. 10, 2012), and then disposed of as appropriate.

Respectfully submitted.[*]

SRI SRINIVASAN[*]
Acting Solicitor General

AUSTIN C. SCHLICK
General Counsel

PETER KARANJIA
Deputy General Counsel

JACOB M. LEWIS
Associate General Counsel

C. GREY PASH, JR.
Counsel
Federal Communications Commission

MARCH 2012

[*] The Solicitor General is recused in this case.