Nos. 08-3078, 08-4454, 08-4455, 08-4456, 08-4457, 08-4458, 04-4459, 08-4460, 08-4461, 08-4462, 08-4463, 08-4464, 08-4465, 08-4466, 08-4467, 08-4468, 08-4469, 08-4470, 08-4471, 04-4472, 08-4473, 08-4474, 08-4475, 08-4476, 08-4477, 08-4478 & 08-4652

In the
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PROMETHEUS RADIO PROJECT, *et al.*,

Petitioners and Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents and Appellee.

On Petition for Review and Appeal of an
Order of the Federal Communications Commission

REPLY BRIEF OF APPELLANTS COX ENTERPRISES, INC., COX RADIO, INC., COX BROADCASTING, INC., AND MIAMI VALLEY BROADCASTING CORPORATIONAND PETITIONER COX ENTERPRISES, INC.

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INTRODUCTION

In its opening brief, Cox demonstrated that the D.C. Circuit has exclusive jurisdiction pursuant to 47 U.S.C. § 402(b) over its appeal of certain licensing-related waiver decisions that the FCC made in the *2008 Order*. The FCC now concedes that those decisions were in fact licensing related. Accordingly, as more fully set forth below, those § 402(b) challenges must be transferred to the D.C. Circuit for resolution.

If this Court nonetheless elects to consider those waiver decisions, the FCC's brief fails even to address Cox's substantive arguments that, by requiring Cox to seek waivers with respect to certain of its existing newspaper/broadcast holdings in Atlanta and Dayton, the FCC improperly rejected the relief Cox sought or modified the terms under which Cox had held those properties. Instead, the FCC attempts to assert several procedural hurdles in an effort to deprive Cox of judicial review. As demonstrated below, this attempt fails because the FCC had ample opportunity over the last decade or so to pass on the issues in Cox's § 402(b) appeal and those issues, having been resolved in the FCC's final *2008 Order*, are ripe for judicial review.

Cox further demonstrated in its opening brief that the NBCO Rule also violates Cox's First and Fifth Amendment rights. Because the NBCO Rule applies uniquely to newspapers, imposing restrictions on their broadcast speech while

restricting the speech of *no* other media, the NBCO Rule is subject to strict scrutiny. Moreover, the FCC's application of its content-laden waiver standards in the *2008 Order* also warrant application of heightened scrutiny. Those standards empower the FCC to determine whether the amount of "local news" produced by a media outlet is sufficient and whether the cross-owned properties would exercise "independent news judgment" when assessing waiver applications.

In response, the FCC does not even suggest that the NBCO Rule can survive strict (or even intermediate) scrutiny. Instead, the FCC again attempts to impose procedural hurdles, arguing that *NCCB* precludes this Court's review of the NBCO Rule's constitutionality. As demonstrated below, this attempt to deprive Cox of judicial review fails. Over the last thirty five years, the "physical scarcity" of the spectrum upon which the scarcity doctrine and *NCCB* are based has evaporated. Indeed, the transition to digital broadcast technology since this Court's 2004 *Prometheus I* decision has expanded broadcast capacity many fold. Moreover, *NCCB* did not consider waiver criteria even remotely similar to those in the *2008 Order*, and therefore it cannot preclude review of those criteria.

Given these serious deficiencies, the NBCO Rule must be vacated. The overwhelming evidence shows that the *2008 Order*'s NBCO Rule is a hopeless cause and should be struck down in its entirety.

ARGUMENT

I. The Appeal of Licensing-Related Decisions Made in the *2008 Order* Must Be Transferred to the D.C. Circuit, Which Has Exclusive Jurisdiction Over Those Appellate Issues.

In its brief, the FCC has finally conceded, as Cox has always maintained, that the 2008 *Order* "contained adjudicatory decisions involving waiver requests" relating to Cox stations in the Atlanta and Dayton markets. FCC Br. 4. The FCC further agrees that parties aggrieved by the licensing decisions in the *2008 Order* must appeal those decisions to the D.C. Circuit. *See* FCC Br. 61-62, 67 n.22. Cox in fact appealed those adjudicatory decisions to the D.C. Circuit pursuant to 47 U.S.C. § 402(b), which as the FCC further concedes, "provides for exclusive jurisdiction over actions" brought pursuant to that section in that Circuit.[1]

Although the FCC previously advised the D.C. Circuit that Cox's § 402(b) claim "*must return* to [the D.C. Circuit] at some point,"[2] the FCC now

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[1] *See also NextWave Personal Commc'ns, Inc. v. FCC*, 254 F.3d 130, 140 (D.C. Cir. 2001) ("'judicial review of all cases involving the exercise of the Commission's radio-licensing power is limited to'" the D.C. Circuit) (citation omitted); *Abbott Lab. v. Celebrezze*, 352 F.2d 286, 289 (3d Cir. 1965) ("Under § 402(b) of [the Communications] Act review of other types of orders are available *only through* an appeal to the Court of Appeals of the District of Columbia") (emphasis added), *overruled on other grounds, Abbott Labs. v. Gardner*, 387 U.S. 136 (1967); *Hubbard Broad., Inc. v. FCC*, 684 F.2d 594, 597 (8th Cir. 1982) ("the clear intent of Congress [is] that judicial review of all cases involving FCC's 'radio-licensing power' be limited to" the D.C. Circuit), *cert. denied*, 459 U.S. 1202 (1983).

[2] FCC's Resp. To Mot. To Deconsolidate at 4, *Newspaper Ass'n of Am. v. FCC*, No. 08-1082 (D.C. Cir. Mar. 27, 2008) (emphasis added).

inconsistently argues that Cox's Section 402(b) appeal could be dismissed "by this Court." FCC Br. 5. The FCC was right the first time. The motion to dismiss Cox's § 402(b) appeal must be heard in the D.C. Circuit. Evaluation of the merits of Cox's § 402(b) appeal by any other court would be contrary to the statute granting the D.C. Circuit exclusive jurisdiction and basic jurisdictional principles.

Under these well-established principles, the court with exclusive jurisdiction must determine the scope of that jurisdiction, a power inherent in the exclusive jurisdictional grant. As the Supreme Court stated:

> For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101-02 (1998); *see also Nugent v. Ashcroft*, 367 F.3d 162, 166 (3d Cir. 2004) (same); *Storino v. Borough of Point Pleasant Beach*, 322 F.3d 293, 300 (3d Cir. 2003) (same). Here, since § 402(b) jurisdiction indisputably exists only in the D.C. Circuit, this Court does not have jurisdiction to resolve the motion to dismiss. For these reasons, Cox's § 402(b) appeal (Case No. 08-4473) should be deconsolidated from the cases challenging the rulemaking decisions in the *2008 Order* and transferred to the D.C. Circuit for adjudication.[3]

[3] Cox has previously moved this Court to deconsolidate the § 402(b) appeal from the § 402(a) petition to review and transfer the appeal to the D.C. Circuit. *See* Joint Motion of the Cox Parties and Media General To Deconsolidate their

II. The Licensing-Related Adjudicatory Decisions Made in the *2008 Order* Relating to Cox Violated the Administrative Procedure Act.

If this Court nonetheless elects to address the FCC's contentions relating to Cox's § 402(b) appeal,[4] those contentions are meritless. As described below, the FCC shies away from directly addressing the core substantive contentions of Cox's challenge to the *2008 Order*: that the FCC acted arbitrarily and capriciously when it made certain licensing-related determinations with respect to Cox's broadcast licenses in the Atlanta and Dayton markets. *See* Cox Br. 26-33. Instead, the FCC makes a number of procedural arguments in an effort to deprive Cox of judicial review of those licensing-related decisions. *See* FCC Br. 65-68. As demonstrated below, the FCC's arguments are misguided.

A. The FCC Acted Arbitrarily and Capriciously in Determining That Cox's Ownership of WSRV(FM) Does Not Comply with the NBCO Rule.

In its opening brief, Cox demonstrated that the FCC acted arbitrarily and capriciously in rejecting Cox's showing that its ownership of WSRV(FM) in Atlanta complied with the NBCO Rule. As previously explained (Cox Br. 29), Cox submitted a "Longley-Rice study" that demonstrated that the relevant

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§ 402(b) Appeals (filed Dec. 8, 2008); Joint Motion of the Cox Parties and Media General, Inc. To Transfer Venue To The District Of Columbia Circuit (filed Nov. 13, 2008). These motions remain pending.

[4] Cox is addressing the § 402(b) issues in its briefs to this Court to comply with this Court's March 23, 2010 Order. *See* Cox Br. 2.

broadcast signal of WSRV(FM) did not encompass the entire city of Atlanta and thus the station was not subject to the NBCO Rule.[5] The *2008 Order* failed to address, let alone explain, why the Longley-Rice methodology should not be applied in this instance to calculate the actual signal contour for WSRV(FM). Instead, the *2008 Order*, without explanation, compelled Cox to seek a waiver with respect to its newspaper/broadcast ownership as to WSRV(FM) in the Atlanta market, thereby arbitrarily and capriciously rejecting Cox's showings that it was in compliance with the NBCO Rule and that a waiver was unnecessary. *2008 Order* ¶ 78 n.257 (JA___).

In its brief, the FCC again (as it did in the *2008 Order*) wholly fails to explain why it rejected Cox's Longley-Rice showing. Indeed, the FCC implicitly concedes that it did not undertake a reasoned analysis for its decision, admitting that "the *2008 Order* did not address the merits of Co[x]'s waiver request." FCC Br. 67. Instead of addressing its failure to provide reasoned review, the FCC attempts to deflect attention from this failure by offering up two non-substantive procedural arguments, each of which is meritless.

[5] Letter of E. McGeary to FCC, FCC File No. *BALH-19991116AAT*, (Oct. 6, 2000) (JA___); *Amended Application of WFOX(FM)*, FCC File No. BRH-20031205ACS, Ex. 1A (June 2, 2005) (JA____) (The call sign for WSRV(FM) was formerly WFOX(FM)).

1. Section 405(a) Does Not Bar Cox's WSRV(FM) Claim.

First, the FCC claims that Section 405(a) of the Communications Act precludes Cox from arguing that the *2008 Order's* licensing decisions were arbitrary and capricious. Section 405(a) states that:

> The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass.

47 U.S.C. § 405(a). The FCC maintains that the arguments Cox made in its brief had not been presented to the FCC. *See* FCC Br. 66.

To satisfy Section 405(a)'s presentation requirement, Cox need only show that the FCC had the applicable contention "before it when it decided this case." *Ranger Cellular v. FCC*, 348 F.3d 1044, 1051 (D.C. Cir. 2003). Thus, the FCC's argument fails because the undisputed evidence establishes that the FCC had Cox's contention that its ownership of WSRV(FM) in Atlanta complied with the NBCO Rule "before it" when it issued the adjudicatory decisions in the *2008 Order*. On two occasions, one in connection with the renewal of Cox's WSRV(FM) license, Cox made submissions to the FCC demonstrating that the relevant broadcast signal of WSRV(FM) did not encompass the entire city of Atlanta and therefore Cox's

ownership of WSRV(FM) complied with the NBCO Rule.[6] Each of those submissions attached the relevant Longley-Rice study demonstrating compliance. *See id.*[7] Thus, the FCC had ample opportunity to pass on the merits of Cox's contention and, indeed, rejected it by compelling Cox to seek a waiver that otherwise would have been unnecessary. *See Ranger Cellular*, 348 F.3d at 1051.[8]

2. Cox's WSRV(FM) Claim Is Not Premature.

Second, the FCC attempts to preclude judicial review by contending that "the Commission has not yet acted on Cox's waiver requests" and that "[j]udicial review of its claims . . . is therefore premature." FCC Br. 66-67. Essentially, the FCC has tried to transform its violation of fundamental APA requirements to provide a rational explanation for its action in rejecting Cox's Longley-Rice

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[6] Letter of E. McGeary to FCC, FCC File No. *BALH-19991116AAT*, (Oct. 6, 2000) (JA___); *Amended Application of WFOX(FM)*, FCC File No. BRH-20031205ACS, Ex. 1A (June 2, 2005) (JA____).

[7] Not only was Cox's contention that it complied with the NBCO Rule before the FCC, but the FCC explicitly acknowledged that it was aware of Cox's currently pending license renewal application in Atlanta (which set forth Cox's assertion that it complied with the NBCO Rule) in the same paragraph of the *2008 Order* requiring Cox to seek a waiver with respect to WSRV(FM). *See 2008 Order* ¶ 78 n.257 (JA____) ("We are aware of the following waiver/renewal applicants with existing combinations that fall into this category [of combinations involving more than a single newspaper and broadcast station]: Cox Enterprises, Inc. (Atlanta, Georgia, and Dayton, Ohio DMAs)").

[8] Moreover, although these facts are dispositive of the FCC's Section 405(a) defense, even if Cox had failed to present its WSRV(FM) claim, that failure would have been excused because it would have been futile for Cox to have asserted it. *See supra* Section B.1.

showing into a legal defense that its adjudicatory decision with respect to WSRV(FM) was insufficiently final for judicial review. This attempt fails.

Contrary to the FCC's contention, the licensing related decision in the *2008 Order* rejecting Cox's Longley-Rice showing with respect to WSRV(FM) is sufficiently final to warrant judicial review. In *Bennett v. Spear*, the Supreme Court set forth the requirements of finality as follows:

> As a general matter, two conditions must be satisfied for agency action to be final: First, the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined or from which legal consequences will flow.

Bennett, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citation omitted); *TSG, Inc. v. EPA*, 53 F.3d 264, 267 (3d Cir. 2008) (same).

Here, both criteria have been satisfied. First, the *2008 Order* consummated the FCC's decision-making process. An agency's statement is "sufficient to meet the first requisite for final agency action" when it "constitutes an 'unequivocal statement of the agency's position.'" *Harris v. FAA*, 353 F.3d 1006, 1010 (D.C. Cir. 2004) (citing *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 734 (D.C. Cir. 2003)). The *2008 Order* unequivocally directed Cox to submit waiver requests for its stations in the Atlanta market, reflecting the FCC's conclusion that Cox's showing that its ownership of

WSRV(FM) complied with the NBCO Rule was insufficient. *See 2008 Order* ¶¶ 78, 159-60 (JA____).[9]

The second *Bennett* factor – whether the order had "legal consequences" – is also met here. Despite the FCC's insistence that the *2008 Order* "simply directed Cox . . . to amend [its] pending application – or to file requests for permanent waivers" (FCC Br. 67), the result was an order with legal consequences subjecting Cox to the waiver standards set forth in the *2008 Order*. The waiver filing would not be necessary if the FCC had agreed with Cox's contention that it complied with the NBCO Rule. The *2008 Order*'s direction to file another waiver request therefore had legal consequences for Cox. Accordingly, Cox's appeal is not premature.

B. The *2008 Order* Impermissibly Modified Cox's License for WALR-FM.

In its opening brief, Cox demonstrated that the *2008 Order* was arbitrary and capricious because it modified Cox's WALR-FM license without presenting any reasoned analysis for this action. As this Court has stated, "an agency that departs from its 'former views' is 'obligated to supply a reasoned analysis for the

[9] The fact that the *2008 Order* contemplates subsequent proceedings does not render it non-final. When an agency has issued a "definitive statement of its position, determining the rights and obligations of the parties," the action is final notwithstanding "[t]he possibility of further proceedings in the agency" on related issues. *Bell v. New Jersey*, 461 U.S. 773, 779-80 (1983).

change.'" *Prometheus Radio Project v. FCC*, 373 F.3d 372, 390 (3d Cir. 2004) ("*Prometheus I*") (quoting *State Farm*, 463 U.S. at 41-42), *cert. denied*, *Media Gen. v. FCC*, 525 U.S. 1123 (2005).

Since 1997, Cox has operated WALR-FM (formerly WJZF) in Atlanta subject to a temporary waiver of the NBCO Rule, which Cox initially received in connection with the FCC's approval of its acquisition of NewCity Communications, Inc. *See NewCity Commc'ns, Inc.*, 12 FCC Rcd 3929, ¶ 72 (1997) ("*NewCity Order*"). The *NewCity Order* awarded Cox a waiver "subject to (1) the *outcome in the pending radio-newspaper cross-ownership waiver proceeding Notice of Inquiry* in MM Docket No. 96-197,[10] 11 FCC Rcd 13003 (1996) . . . ." *NewCity Order*, 12 FCC Rcd 3929, ¶ 72[11] (emphasis added). The FCC granted WALR-FM's license renewal application in 2005, and the temporary waiver remained effective.[12] The *2008 Order* truncated this waiver by requiring

[10] "In 2001, the FCC replaced MM Docket No. 96-197 with MM Docket No. 01-235. Cross-Ownership of Broadcast Stations and Newspapers, 16 FCC Rcd 17283 (2001)." FCC Br. 68. *See 2008 Order* ¶ 161 (JA_____).

[11] In Paragraph 57 of the *NewCity Order*, the FCC found that "we believe the appropriate period for a temporary waiver is six months from the date of a final order in the radio-newspaper docket. . . ." *NewCity Order* ¶57 (JA____). The language in the actual ordering clause, Paragraph 72, directs that the waiver be filed within six months of the "outcome" of the radio-newspaper cross-ownership proceeding. *See id.* ¶ 72.

[12] *See License Renewal Authorization for WALR-FM*, BRH-20031205ADF (Jan. 10, 2005) (JA____).

Cox to apply for a new waiver within "90 days after the effective date of this order" (*2008 Order* ¶ 78 (JA____)), prior to the final outcome of this proceeding. This decision effected a modification of the previous terms under which Cox could operate the station, and was therefore appealable under 47 U.S.C. § 402(b)(5).[13] Cox established in its opening brief that this modification of its broadcast license, without explanation, was arbitrary and capricious. *See* Cox Br. at 31-33.

In its brief, the FCC simply did not address the merits of Cox's contention that the *2008 Order* failed to provide a "'reasoned analysis'" for its modification of the WALR-FM license. *Prometheus I*, 373 F.3d at 390 (quoting *State Farm*, 463 U.S. at 41-42); *see* FCC Br. 68. Instead, the FCC attempted to insert the same procedural hurdles it asserted with respect to Cox's WSRV(FM) claim. The FCC also challenged the premise of Cox's argument that the *2008 Order* modified Cox's WALR-FM license, by arguing that the waiver issued to Cox in 1997 expired by its terms. *See* FCC Br. 68. As demonstrated below, each of these procedural arguments is meritless.

1. Section 405(a) Does Not Bar Cox's WALR-FM Claim.

First, the FCC makes the same misguided Section 405(a) argument with respect to WALR-FM that it did with WSRV(FM), *i.e.*, that no party ever

[13] This provision states that the "holder of any . . . station license which has been modified or revoked by the Commission" is subject to judicial review. *See* 47

presented the WALR-FM claim to the FCC. This assertion fails for at least two reasons. First, the FCC had previously granted Cox a waiver to hold WALR-FM pending the "outcome" in the "radio-newspaper cross-ownership waiver proceeding . . . ." *NewCity Order*, 12 FCC Rcd 3929, ¶ 72 (JA___). The FCC cannot now plead ignorance of its previous waiver grant, as an agency acts with a presumed awareness of the legal impact of its actions. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 174 (1962) ("[T]he Commission must act with a discriminating awareness of the consequences of its action.").[14]

Second, Section 405(a) does not preclude consideration of Cox's WALR-FM claim because, even if it had not been presented to the FCC, it would have been futile for Cox to have asserted it. A well-established exception to Section 405(a) is that a petition for reconsideration is not necessary when it would have been futile.[15] Courts conclude that reconsideration is futile when the agency has

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U.S.C. § 402(b)(5); *see also Reuters, Ltd. v. FCC*, 781 F.2d 946, 947 n.1 (D.C. Cir. 1986) (reviewing FCC decision under § 402(b)(5)).

[14] Moreover, it is also apparent from the *2008 Order* itself that the FCC was aware of the terms of its existing waivers of the NBCO Rule: "Where . . . an entity has been granted a waiver to hold such a combination pending the completion of this rulemaking, we will afford the licensee 90 days after the effective date of this order to either amend its waiver/renewal request or file a request for permanent waiver. *2008 Order* ¶ 78 (JA____) (footnote omitted).

[15] *See Chadmoore Commc'ns, Inc. v. FCC*, 113 F.3d 235, 239 (D.C. Cir. 1997) ("[Section 405], incorporates traditionally recognized exceptions to the exhaustion doctrine, which permits a reviewing court to consider arguments that would have been futile for the petitioner to raise before the agency.") (quoting *Omnipoint*

taken a firm position with respect to an issue. *See Omnipoint*, 78 F.3d at 635 (concluding that "attempting to raise this issue before the [FCC] would have been futile as the [FCC] was rapidly expediting the proceeding and appeared 'wedded to the procedures that it had employed.'") (quoting *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1163 (D.C. Cir. 1987)).

The facts here easily satisfy this standard. Given the FCC's firm decision to proceed with the new waiver process under the new standards, a petition for reconsideration would have been futile. *See Omnipoint*, 78 F.3d at 635 (concluding that reconsideration is futile when the FCC is "wedded" to particular procedure).

2. Cox's WALR-FM Claim Is Not Premature.

The FCC also contends that it "has not yet acted on" Cox's WALR-FM waiver request and that "[j]udicial review of its claims . . . is therefore premature." FCC Br. 66-67. This attempt fails under the two-pronged *Bennett* test. First, the FCC's termination of WALR-FM's preexisting waiver in the *2008 Order* constituted "the consummation of the agency's decisionmaking process . . . ." *Bennett*, 520 U.S. at 177-78. In Paragraph 78 of the *2008 Order*, the FCC articulated the new conditions that would replace the existing WALR-FM waiver.

Corp. v. FCC, 78 F.3d 620, 635 (D.C. Cir. 1996)) (internal punctuation omitted).

Second, the WALR-FM waiver decision contained in the *2008 Order* had "legal consequences." *Id.* The result of the FCC's action was the termination of the WALR-FM existing waiver and a substitute order directing Cox, and others, "to either amend their renewal or waiver requests or file a request for a permanent waiver." *2008 Order* ¶ 160 (JA____). Because the FCC made that legal determination without providing a reasoned explanation, it is arbitrary and capricious.

3. Cox's WALR-FM Waiver Had Not Expired at the Time the FCC Modified It.

Finally, the FCC argues that the temporary waiver granted with respect to Cox's ownership of WALR-FM expired by its own terms, and thus the FCC did not modify it and was not required to explain any such modification. FCC Br. 68. This is simply incorrect.

Contrary to the FCC's assertion, the *2008 Order* explicitly extended the WALR-FM waiver. In Paragraph 78 of the *2008 Order* that directed Cox (and others) to file new waiver requests, the FCC extended Cox's temporary waiver pending the outcome of the new waiver proceedings:

> With respect to current *temporary waivers that have been granted pending the completion of the rulemaking proceeding,* those waivers will be temporarily extended pending our action on requests for permanent waivers filed within the time frame set forth above.

2008 Order ¶ 78 (JA____) (emphasis added).

Moreover, Cox's temporary waiver of the NBCO Rule was to remain in effect "subject to . . . the outcome in the pending radio-newspaper cross-ownership waiver proceeding . . . ." *NewCity Order*, 12 FCC Rcd 3929, ¶ 72 (JA___). As the FCC noted in its brief, it replaced the original radio-newspaper cross-ownership waiver proceeding (MM Docket No. 96-197) with MM Docket No. 01-235, which was one of the dockets addressed in the *2008 Order*. FCC Br. 68. The "outcome" of those proceedings, as specified in the waiver awarded to Cox in the *NewCity Order*, is not resolved until this appeal is completed.

C. The *2008 Order* Impermissibly Directed Cox, in its Waiver Applications, To Address Content-Laden Criteria.

In its opening brief, Cox established that it was arbitrary and capricious for the FCC to direct Cox to file waiver applications addressing the content-laden waiver criteria that the *2008 Order* imposed. *See* Cox Br. 33-34. Under those criteria, the FCC will make waiver determinations based on, among other things, "the extent to which cross-ownership will serve to increase the amount of *local news* disseminated through the affected media outlets in the combination" and "whether each affected media outlet in the combination will exercise its *own independent news judgment* . . . ." *Id.* ¶ 68 (JA____) (emphasis added). As Cox established in its opening brief, Cox Br. 33-34, the potential for abuse of these provisions is very disturbing:

- The FCC has imbued itself with the power to determine what constitutes "local news" and "independent news judgment" and whether Cox's newspapers and the broadcast stations are providing a sufficient amount to satisfy the government.

- These criteria empower the FCC to scrutinize and determine whether Cox newspapers and broadcast stations are providing enough coverage of local politics, such as a particular political campaign, or whether reporting on specific stories is sufficiently independent.

- Taken to its logical conclusion, the FCC could scrutinize whether a news outlet's decision to endorse a particular candidate or bill demonstrates sufficient "independence" from another media outlet.

The chill on First Amendment rights is apparent, because if the FCC does not like a newspaper's or a broadcaster's choice, it can reject a waiver application. Because application of these criteria would impermissibly interject the FCC into the newsgathering operations of both newspapers and broadcast stations, the FCC's decision to impose them was arbitrary and capricious. *See Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 99 (1972) (restricting speech on the basis of its subject matter "slip[s] from the neutrality of time, place, and circumstance into a concern about content.") (internal quotations and citation omitted).

In addition, the threat to traditional media's newsgathering is significantly exacerbated by the vagueness of the terms "local news" and "independent news judgment." As the Second Circuit recently held in a similar context:

> With the FCC's indiscernible standards come the risk that such standards will be enforced in a discriminatory manner. The vagueness doctrine is intended, in part, to avoid that risk. If government officials are permitted to make decisions on an "ad hoc" basis, there is a risk that those decisions will reflect the officials' subjective biases.

> *Grayned*, 408 U.S. at 108-09. Thus, in the licensing context, the Supreme Court has consistently rejected regulations that give government officials too much discretion because "such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (internal quotation marks omitted); *see also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988) (permit scheme facially unconstitutional because "post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression").

Fox Television Stations, Inc. v. FCC, Nos. 06-1760-AG *et al*., 2010 WL 2736937, at *13 (2d Cir. July 13, 2010) (internal citations omitted).

Finally, the content-laden waiver provisions violate the APA because they are "in excess of" the FCC's statutory authority for two reasons. 5 U.S.C. § 706(2)(C). First, the content-laden waiver provisions violate 47 U.S.C. § 326, which provides that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."[16] Here, conditioning waivers on the FCC's determination of what constitutes "local news," and whether Cox's newspapers and Cox's broadcast stations are exercising sufficient "independent news judgment," the FCC

[16] *See also Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002) ("Congress has imposed limitations on regulations implicating program content.") (citing 47 U.S.C. § 326); *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 126-27 (1973) (concluding that broadcasters need not accept paid editorial advertisements because under such a regime the FCC would regulate "far more of the day-to-day operations of broadcasters' conduct").

proposes to interfere directly in Cox's free speech rights, which it lacks the authority to do.

Second, no provision of the Communications Act grants the FCC authority to regulate the content of newspapers or determine whether a newspaper has exercised "independent news judgment." *See 2008 Order* ¶ 68 (JA____). The Supreme Court has been circumspect of FCC attempts to leverage its authority over radio or wire communications to make rules applicable to other media.[17] Because the FCC imposed content-based waiver criteria on newspapers without a grant of authority to do so, the *2008 Order* must be vacated.

The FCC's sole response to these contentions is that the waiver criteria are constitutional. *See* FCC Br. 57. As demonstrated below in Section III.B., this contention is misguided, but in any event is insufficient to demonstrate that the criteria survive arbitrary and capricious review.

[17] *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) (concluding that FCC lacked authority to impose common carrier requirements on cable systems because "[t]hough afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority.").

III. The *2008 Order*'s Decisions Regarding Cox's Licenses Violate Cox's First Amendment Rights.

A. *NCCB* Does Not Bar this Court's Consideration of the Constitutionality of the NBCO Rule As Applied to Cox in the *2008 Order*'s Licensing-Related Decisions.

The FCC's brief does not even address the merits of Cox's contention that the NBCO Rule as applied to Cox in the *2008 Order*'s licensing-related decisions violates Cox's First Amendment rights. Instead, the FCC blithely states that *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) ("*NCCB*"), (as well as its predecessor *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969) ("*Red Lion*")), preclude this Court's consideration of the constitutional issues. FCC Br. 95-96. This contention is misguided for several reasons.

1. *NCCB* Does Not Preclude "As-Applied" Challenges.

As explained in Cox's opening brief, it is well-established that a Supreme Court decision upholding a statute against a facial challenge (as in *NCCB* and *Red Lion*) does not bar a later "as-applied" challenge, such as that asserted by Cox here. *See* Cox Br. 35-36 (citing *Cutter v. Wilkinson*, 544 U.S. 709, 725-26 (2005)). The FCC does not dispute this fact, and thus implicitly concedes that this Court has the responsibility to review Cox's as-applied challenges.

2. In Light of the Changed Media Landscape, *NCCB* Does Not Preclude Strict Scrutiny.

The FCC likewise does not challenge the well-established principle that when a statute's constitutional validity is premised on the existence of particular facts, that statute may be challenged by showing that "those facts have ceased to exist." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938).[18] Indeed, even *Red Lion* acknowledged that technological advances could render the scarcity doctrine obsolete, and therefore rested its holding on "the present state of commercially acceptable technology." *Red Lion*, 395 U.S. at 388.

Here, despite the FCC's cavalier assertion that nothing has really changed since this Court's *Prometheus I* decision in 2004 (FCC Br. 95-96), it is apparent that the *Carolene Products* principle requires rejection of the scarcity doctrine and the application of strict scrutiny.[19] As the Second Circuit recently found:

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[18] *See Jones v. Brown*, 461 F.3d 353, 363 (3d Cir. 2006) (applying *Carolene Prods.*); *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-48 (1924) (Holmes, J.) ("A law depending on the existence of . . . [a] certain state of facts to uphold it may cease to operate if . . . the facts change even though valid when passed."); *Abie State Bank v. Weaver*, 282 U.S. 765, 772 (1931) ("[A] police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation."); Cox Br. 36 & n.51.

[19] The *Carolene Products* principle is even more powerfully applicable here because, as the Supreme Court observed in *Elrod v. Burns*, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." 427 U.S. 347, 373 (1976). Given this irreparable harm, the Supreme Court could not have intended to insulate its opinion in *NCCB* from lower court review despite changes that might occur in the future rendering the predicate for its constitutionality determination no longer true.

> The Networks argue that the world has changed since *Pacifica* and the reasons underlying the decision are no longer valid. Indeed, we face a media landscape that would have been almost unrecognizable in 1978. Cable television was still in its infancy. The Internet was a project run out of the Department of Defense with several hundred users. Not only did Youtube, Facebook, and Twitter not exist, but their founders were either still in diapers or not yet conceived. In this environment, broadcast television undoubtedly possessed a "uniquely pervasive presence in the lives of all Americans." The same cannot be said today.

Fox Television Stations, 2010 WL 2736937, at *7 (internal citations omitted).

In particular, Cox presented persuasive, undisputed evidence in the record below and reiterated that evidence in its opening brief that the present state of the media in the areas to which the FCC's decisions as to Cox in the *2008 Order* relate (Atlanta and Dayton) show that there is no "scarcity" of broadcasters or other sources of diverse information. Cox Br. 36-38. Among other things, Cox showed that Atlanta had media representing approximately 105 different owners, with "at least twenty-nine [full-power] commercial and non-commercial television stations" and "ninety-two radio stations" within the coverage area of WSRV(FM). *Id.* With respect to the Dayton area (looking specifically at Hamilton and Middletown), Hamilton had "media representing approximately 63 different owners" with "at least 15 [full-power] commercial and non-commercial television stations" and "more than 28 radio stations," and Middletown had "[a]pproximately 62 different media owners" with "at least 14 [full-power] commercial and non-commercial television stations" and "[m]ore than 29 radio stations." *Id.*

In *Prometheus I*, this Court found that the lynchpin of the scarcity doctrine was the "physical scarcity" of the spectrum. *Prometheus I*, 373 F.3d at 402. As a result of the digital transition whereby television and radio broadcasters can program multiple programming streams on their allotted spectrum, that "physical scarcity" no longer exists. There are now an astounding number of possible programming streams on broadcast channels available through digital technology in these two markets as follows:[20]

	Number of Possible Television Channels	Number of Possible Radio Channels
Atlanta	430	780
Dayton	130	360

As a result, the application of any restrictions on Cox's speech in those markets based on the scarcity doctrine is insupportable. Cox Br. 37-38. The FCC does not dispute any of this evidence either in the *2008 Order* or its brief. *See generally 2008 Order* (JA____); FCC Br. 95-99.

[20] This data is based on the number of radio and television stations in the Atlanta and Dayton Designated Market Areas as compiled on August 4, 2010 by BIA/Kelsey, adjusted to show that a digital FM channel can transmit up to 8 multicast signals (*Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, 22 FCC Rcd 10344, ¶ 36 n.62 (2007)) and a digital TV channel can transmit up to 10 multicast signals (*see, e.g.*, *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809, ¶ 20 (1997); *Comments of NAB & MSTV*, GN Docket No. 09-51 (Dec. 22, 2009), at 10).

Given that there is no scarcity of media voices in the Atlanta and Dayton markets, the FCC's action burdening Cox's speech in the Atlanta and Dayton markets must be subject to strict scrutiny, requiring that the FCC's action be the least restrictive means of achieving a compelling governmental interest. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). As demonstrated below, the FCC's purported interest in diversity is not compelling, and even if it were, the NBCO Rule and its waiver criteria are far from the least restrictive means available to achieve diversity in media markets such as Atlanta and Dayton.

3. *NCCB* Does Not Preclude Constitutional Review of the FCC's New Content-Laden Waiver Criteria.

Finally, the content-laden waiver criteria the FCC included in its new NBCO Rule have never been the subject of prior review. Thus *NCCB* does not preclude constitutional review of these waiver criteria.

B. The NBCO Rule Violates Cox's First Amendment Rights.

1. Without the Scarcity Doctrine to Support It, the NBCO Rule and Content-Laden Waiver Factors Fail To Withstand Strict Scrutiny.

As Cox demonstrated in its opening brief, the NBCO Rule and its waiver criteria apply solely to newspaper owners, suppressing their speech while imposing no restrictions on other media owners. *See* Cox Br. 39 (citing *Citizens United v. FEC*, 130 S.Ct. 876, 921 (2010) (Alito, J., concurring) ("[R]estricting the speech of some elements of our society in order to enhance the relative voice of others is

wholly foreign to the First Amendment.") (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)).[21] As discussed above, the different media environment that exists today than at the time *NCCB* was decided requires a re-evaluation of the NBCO Rule, and without the scarcity doctrine as a buffer, the Rule and its waiver criteria are subject to strict scrutiny. Thus, they may only be upheld if the restrictions imposed are "the least restrictive means" of achieving a "compelling state interest." *See Sable Commc'ns*, 492 U.S. at 126; *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 754-56 (1996).

As Cox explained in its opening brief (and the FCC does not dispute), the NBCO Rule cannot satisfy either element. Cox Br. 39-43. First, the FCC's goal in adopting the NBCO Rule is to further diversity, but the goal of promoting diverse programming is never a compelling one. *See Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344, 355 (D.C. Cir. 1998). Second, even if there were a compelling state interest supporting the NBCO Rule, the Rule is far from the "least restrictive means" to achieve that interest because it applies broadly to restrict cross-ownership in all geographic markets, regardless of size.

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[21] *Burson v. Freeman*, 504 U.S. 191, 211 (1992) ("[I]t is the rare case in which . . . a law survives strict scrutiny."); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987) (agency has "heavy burden in attempting to defend its . . . differential" treatment).

The NBCO Rule's new waiver criteria fare no better. In the *2008 Order*, the FCC directed Cox to "address the factors considered in this order" in Cox's waiver applications, particularly the amount of "local news" and the extent to which cross-owned properties would exercise "independent news judgment." *2008 Order* ¶ 78 (JA___). The application of these waiver criteria requires "reference to the content of the regulated speech," and therefore is content-based, requiring strict scrutiny. *See* Cox Br. 41 (quoting *Ward v. Rock Against Racism*, 491 U.S. at 791); *United States v. Stevens*, 558 U.S. ___, 130 S.Ct. 1577, 1584 (2010) (content-based regulations "are 'presumptively invalid,' and the Government bears the burden to rebut that presumption.") (quoting *United States v. Playboy Entm't Group*, 529 U.S. 803, 817 (2000)). As noted above, the new NBCO Rule's content-laden waivers have never been the subject of prior judicial review, and therefore neither *NCCB* nor *Prometheus I* precludes constitutional review of those criteria here.

As with the NBCO Rule itself, the FCC's diversity goal in issuing the waiver criteria is not compelling. *See Lutheran Church-Mo. Synod*, 141 F.3d at 355. Nor are the waiver criteria "the least restrictive means" to achieve that interest, *Stevens*, 130 S.Ct. at 1584, because they give the FCC "boundless discretion" to determine what is "local news" and when newsgathering activity of broadcast stations *and* newspapers is sufficiently "independent." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 (1988). Moreover, the

presumptions are more restrictive than necessary because they apply to certain markets based on size, even though the FCC has rejected such market size restrictions because such standards are insufficiently precise.[22] Cox Br. 42.

The FCC does not even attempt to argue that the NBCO Rule or the waiver criteria satisfy strict scrutiny. Nor does it dispute that the waiver criteria are content-based. Instead, the FCC asserts that it may employ the content-based waiver criteria here because its "general power 'to interest itself in the kinds of programs broadcast by licensees has consistently been sustained by the courts against arguments that the supervisory power violates the First Amendment.'" FCC Br. 97 (quoting *Nat'l Ass'n of Indep. Television Producers & Distribs. v. FCC*, 516 F.2d 526, 536 (2d Cir. 1975) ("*NAITPD*")). But that statutorily-conferred "general power" is not limitless, and it cannot grant the FCC authority to impose content-laden waiver criteria that violate a constitutional right. Although the FCC asserts that it has "general power" which has been sustained against First Amendment challenges, it fails to explain *why* that general power should be upheld against Cox's First Amendment challenges in this case.

[22] *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12,903, ¶ 107 (1999) ("*1999 Local Television Order*") ("a market-size restriction is unnecessary for purposes of competition and diversity as long as there are a minimum number of independent sources of news and information available to listeners").

In addition, the FCC points to no specific authority that would authorize it to impose content-laden waiver criteria. "The FCC cannot act in the 'public interest' if the agency does not otherwise have the authority to promulgate the regulations at issue." *Motion Picture Assoc. of Am. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) ("*MPAA*"). Indeed, courts have drawn a stark line: absent a specific grant of authority, the FCC cannot regulate programming content at all. *See id.* at 805 ("To avoid potential First Amendment issues, the very general provisions of § 1 [of the Communications Act] have not been construed to go so far as to authorize the FCC to regulate programming content."). The proscription against exercising the general public interest authority granted in Section 1 of the Communications Act, 47 U.S.C. § 151, to regulate content is sweeping:

> Section 1 does not furnish the authority sought, because the regulations significantly implicate program content and the FCC can cite no authority in which a court has upheld agency action under § 1 where program content was at the core of the regulations at issue. And it does not matter that the disputed rules here are arguably 'content-neutral.' The point is that the rules are *about* program content and therefore can find no authorization in § 1.

MPAA, 309 F.3d at 807 (emphasis added). Here, the FCC does not even suggest that it has specific authority to impose content-based waiver criteria, nor does it challenge that the waiver criteria are about program content. *See* FCC Br. 96-97.

Without a specific grant of authority, the FCC lacks the power to impose this regime.[23]

Finally, the Second Circuit's opinion in *NAITPD*, decided nearly three decades before *MPAA*, offers no support for the serious intrusion into core First Amendment values contemplated in the *2008 Order's* waiver criteria. In *NAITPD*, the Second Circuit considered the FCC's Prime Time Access Rules, which generally required a certain amount of time during the prime time evening hours be available for independently-created (as opposed to network) programming. 516 F.2d at 529-30. These rules governed what categories of programming licensees could broadcast during the portion of the prime-time devoted to non-network programming. *See id.* at 530. The Second Circuit emphasized that while the FCC was assessing the "general program format" offered by broadcasters, it was not directing what content could be shown. *See id.* at 537 ("The [FCC] . . . is not ordering any program or even any type of program to be broadcast in access time."). Instead, a key component of the Court's approval was the flexibility the regulations afforded to licensees to choose what content to broadcast. *See id.*

[23] Indeed, the Supreme Court has observed that the FCC's content-based broadcast regulatory scheme would not pass constitutional muster if applied to newspapers. *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 375-76 (1984) (broadcast regulation banning editorializing "plainly operates to restrict the expression of editorial opinion on matters of public importance . . . . Were a similar ban on editorializing applied to newspapers and magazines, we would not hesitate to strike it down as violative of the First Amendment.").

("The Commission may not take from the licensee the ultimate control . . . for the actual content of particular programs within the broad categories promulgated to serve the public interest.").

The *2008 Order*'s waiver criteria cross well-beyond the line drawn in *NAITPD* and constitute content-based regulations that the First Amendment prohibits.[24] In the *2008 Order*, the FCC did not limit its regulatory reach to determining whether the broadest categories of programming are in the public interest, but has reserved for itself the discretion to make *qualitative* judgments about the independence of viewpoints expressed by particular news outlets and determine content-wise what constitutes "local news" and "independent news judgment."[25] Moreover, the FCC purports to exercise authority over *both* broadcasters and newspapers: "This requirement will help ensure that *each* outlet will make its own independent and separate judgment concerning what news to air and *what news to publish*." *2008 Order* ¶ 71 (JA____) (emphasis added). The opinion in *NAITPD* simply does not stand for the proposition that the FCC's "supervisory power" over broadcast licenses empowers it to regulate the local

[24] Indeed, the FCC's attempt to exert regulatory authority over local news content is particularly suspect. *See NAITPD*, 516 F.2d at 537 (noting higher levels of First Amendment "protection" applied "in broadcasting" when the speech involved "the discussion of public issues.").

[25] *See 2008 Order* ¶ 71 (JA____) ("in evaluating this factor, the Commission will analyze whether applicants have demonstrated that their respective media outlets will exercise independent news and editorial judgment").

news content produced by broadcasters and newspapers. *See NAITPD*, 516 F.2d at 536; *see also FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378, 381 (1984).

2. Even if the Scarcity Doctrine Applies, the NBCO Rule and Its Content-Laden Waiver Criteria Still Fail to Satisfy Intermediate Constitutional Scrutiny.

Even if the scarcity doctrine applies, the NBCO Rule and its content-laden waiver criteria are subject to heightened scrutiny because they are content-based, and they cannot withstand such scrutiny. The Supreme Court in *League of Women Voters* made clear that, despite the existence of the scarcity doctrine, restrictions on broadcasters' speech "have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest." 468 U.S. at 380. That Court rejected the FCC's assertion that the scarcity doctrine mandated a less demanding standard of review for its restrictions on broadcasters' speech, finding that "the Government's argument loses sight of concerns that are important in this area and thus misapprehends the essential meaning of our prior decisions concerning the reach of Congress' authority to regulate broadcast communication." *Id.* at 375-76. The Court found that the broadcast regulation in *League of Women Voters* was content-based and violated the First Amendment. *Id.* at 383-99.

Again, the FCC's sole rebuttal is that it holds "general power" to supervise the types of programming shown by broadcast licensees. FCC Br. 97. But as explained above, any authority the FCC has to regulate broadcasters is necessarily constrained by the First Amendment, as the Supreme Court in *League of Women Voters* found in applying heightened scrutiny. The Court in *League of Women Voters* ultimately struck down the regulation at issue because "the scope of [the] ban [was] defined solely on the basis of the content of the suppressed speech," and the ban interfered with the "balanced presentation of views" envisioned by the First Amendment. 468 U.S. at 378, 381.

Here, as Cox explained in its opening brief, the NBCO Rule and its waiver criteria cannot survive such heightened scrutiny because the FCC cannot show that those restrictions are "narrowly tailored to further a substantial governmental interest." Cox Br. 45. Indeed, far from asserting that the NBCO Rule and its waiver criteria will further its diversity goal, the FCC has admitted that it does not know whether the Rule is necessary to further diversity. *See 2008 Order* ¶ 63 (JA____) ("We are not certain that the degree of media consolidation that the largest, more competitive markets can withstand is yet mirrored in smaller markets . . . ."); Cox Br. 44. This conjecture is insufficient to withstand First Amendment scrutiny. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 379 (2000) ("This

Court has never accepted mere conjecture as adequate to carry a First Amendment burden.").[26]

Moreover, the NBCO Rule and its waiver criteria are far from "narrowly tailored." Cox Br. 45-46. Indeed, the Rule and waiver criteria apply in *all* markets, even top-20 markets. *See 2008 Order* ¶ 53 (JA____). As Cox noted in its opening brief, courts have invalidated similar cross-ownership restrictions that applied broadly.[27]

At their core, the NBCO Rule and its content-laden waiver criteria cannot be enforced because doing so would necessarily interfere with the "balanced presentation of views" contemplated by the First Amendment. *See* Cox Br. 42-43 (quoting *League of Women Voters*, 468 U.S. at 378 (recognizing importance of unrestricted broadcast speech and overturning statute imposing editorial restrictions on broadcasting as violating First Amendment)). Given this principle

[26] The FCC also cannot show "a record that validates the regulation[]" itself. *Time Warner Ent'mt Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001). Here, in fact, the record shows that the NBCO Rule "actually works to inhibit [local news and information] programming," and prevents the increased programming efficiencies and quality that flow from cross-ownership. Cox Br. 44-45 (quoting *2003 Order* ¶ 342 (reaffirmed in *2008 Order* ¶ 39 (JA____))).

[27] Cox Br. 46 n.58 (citing *US West, Inc. v. United States*, 48 F.3d 1092, 1104-06 (9th Cir. 1995), *vacated as moot*, 516 U.S. 1155 (1996); *Chesapeake & Potomac Tel. Co. of Va. v. United States*, 42 F.3d 181, 202 (4th Cir. 1994), *vacated as moot*, 516 U.S. 415 (1996)).

and the long-recognized importance of unrestricted broadcast speech, the NBCO Rule and its waiver criteria are unconstitutional.

IV. The NBCO Rule and the FCC's Decisions in the *2008 Order* Regarding Cox's Licenses Violate Cox's Equal Protection Rights.

A. The FCC's Differential Treatment of Newspaper Owners' Speech from Other Media Owners' Speech is Unconstitutional.

As Cox demonstrated in its opening brief, the NBCO Rule violates Cox's equal protection rights because it limits newspaper owners' speech in order to increase the diversity of viewpoints, which is "presumptively unconstitutional" and requires heightened scrutiny. *See* Cox Br. 46-48. Although the NBCO Rule purports to limit newspaper owners' speech to increase diversity of viewpoints, this is not constitutionally permitted, as the "government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others." *Buckley*, 424 U.S. at 48-49; *Citizens United*, 130 S.Ct. at 904.

The FCC does not refute this analysis. Rather, it asserts that the Supreme Court rejected that argument in *NCCB* and that this Court is bound by that precedent. FCC Br. 97. In *NCCB*, the Supreme Court found the NBCO Rule constitutional because it "treat[s] newspaper owners in essentially the same fashion as other owners of the major media of mass communications were already treated under the Commission's multiple-ownership rules; owners of radio stations,

television stations, and newspapers alike are now restricted in their ability to acquire licenses for co-located broadcast stations." 436 U.S. at 801.

But as explained in Cox's opening brief, the factual basis for the Supreme Court's conclusion in *NCCB* is no longer true, and thus *NCCB* cannot bind this Court when the factual underpinnings for that decision "have ceased to exist." *Carolene Prods.*, 304 U.S. at 153; Cox Br. 48-49 n.63. This is true for two reasons. First, unlike when *NCCB* was decided, the FCC no longer restricts cross-ownership by other media platforms; only newspaper owners continue to have their speech curtailed. *See* Cox Br. 46.

Second, newspapers are no longer the only non-broadcast "major medi[um] of mass communications," as the thirty-two years since *NCCB* have seen the creation and proliferation of many new media platforms: cable television systems, cable networks, new broadcast networks, satellite television systems, satellite radio, programming studios, and the Internet. Cox Br. 48-49 n.63. For example, today most Americans receive their broadcast television programming through cable or satellite subscription services,[28] and approximately 67 percent of

[28] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd 542, 561-62 (¶ 44) & Table 4 (2009).

American households subscribe to broadband Internet service, with an estimated 213,000,000 sites, a service that did not even exist when *NCCB* was decided.[29]

Despite these undisputed facts, the FCC asserts that its differential treatment of newspaper owners is permissible because "[d]aily newspapers remain a much more prominent source of local news than cable television, the Internet, or any other non-broadcast media." FCC Br. 98. This contention is misguided. The Supreme Court did not reject the equal protection challenge in *NCCB* because newspapers were "a much *more prominent* source of local news than . . . any other non-broadcast media." FCC Br. 98 (emphasis added). *NCCB* did not sanction the FCC's differential treatment of *one type* of "major media of mass communications," on the one hand, and *all other types* of "major media of mass communications," on the other hand. Yet that is exactly what the FCC has done: it is treating newspapers, one type of "major media of mass communications," differently than other such types. This is precisely the type of differential treatment that violates the Fifth Amendment. *See, e.g.*, *Turner Broad. System, Inc. v. FCC*, 512 U.S. 622 (1994).

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[29] *See* John B. Horrigan, *Broadband Adoption and Use in America*, Omnibus Broadband Initiative Working Paper Series No. 1 (Feb. 2010), at 13, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-2964421A1.pdf; Netcraft, *August 2010 Web Server Survey*, *available at* http://news.netcraft.com/.

B. The FCC's Rejection of Cox's Longley-Rice Showing When It Has Accepted Such Showings From Other Media Owners Is Unconstitutional.

The FCC also failed to respond to Cox's contention that, even if the NBCO Rule's differential treatment of newspaper owners from other media owners were constitutional, the FCC's rejection of Cox's Longley-Rice study for WSRV(FM) when the FCC has accepted the same studies from television stations violates Cox's equal protection rights. *See* Cox Br. 48-49. The FCC's rejection of Cox's Longley-Rice study is not narrowly tailored to a compelling governmental interest because no such interest can be shown in the FCC's practice of allowing television broadcasters, but not Cox or other radio broadcasters, to use the Longley-Rice model to show compliance with cross-ownership restrictions. Cox Br. 49. Nor is the FCC's outright rejection of Cox's Longley-Rice study in the *2008 Order*'s decision as to WSRV(FM) narrowly tailored. *Id.* The FCC fails to even acknowledge its differential treatment, much less explain it. Accordingly, its rejection of Cox's Longley-Rice study violates Cox's equal protection rights.

V. The NBCO Rule Should Be Vacated.

The FCC asserts that, if the Court concludes a remand is warranted here, it should not vacate the NBCO Rule because doing so would cause disruptive consequences, given that "restrictions on media ownership have been in effect for decades." FCC Br. 103 n.33. But the fact that a restriction has existed for decades

is not a sufficient reason to keep the restriction in place when it has been found unconstitutional or unsupported by law. As the D.C. Circuit found in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), *modified on other grounds*, 293 F.3d 537 (D.C. Cir. 2002) ("*Fox I*") when it vacated the cable/broadcast cross-ownership rule, which had existed since 1970:

> Nor does it appear that vacating the CBCO Rule will be disruptive of the agency's regulatory program. If the agency wants to re-promulgate the Rule and is able to justify doing so, it presumably can require any entity then in violation of the Rule to divest either its broadcast station or its cable system in any market where it owns both. Although viewers may, in the interim, experience some diminution of diversity, the loss would seemingly be no greater than the diminution attendant upon the combination of two broadcast stations in the same market, which combination the Commission recently sanctioned in the TV Ownership Order. In sum, vacating the Rule might cause some disruption, but we hardly think it could be substantial.

280 F.3d at 153. As the *Fox I* court concluded, "[b]ecause the probability that the Commission would be able to justify retaining the [] Rule is low and the disruption that vacatur will create is relatively insubstantial," it was appropriate to vacate the rule. 280 F.3d at 1053.

The same reasoning applies equally here. Since the FCC has spent the past fourteen years revising its newspaper/broadcast cross-ownership restrictions, it is unlikely to develop on remand a sound rationale for this latest iteration of the NBCO Rule. *See* Cox Br. 50-51. Moreover, as Cox explained, all proposed media cross-ownership combinations will continue to be subject to the FCC's public

interest test and the antitrust laws, which will minimize any disruptive consequences from vacatur of the NBCO Rule here. Cox Br. 51. Just as the D.C. Circuit concluded that the rule in *Fox I* was a "hopeless cause" and warranted vacatur, 280 F.3d at 1053, the FCC's sudden reinstatement of the NBCO Rule in the *2008 Order* without explanation even though it is not in the public interest is a "hopeless cause" and must also be vacated. Cox Br. 52.

CONCLUSION

For the foregoing reasons, Cox respectfully requests that the *2008 Order* be reversed and the NBCO Rule reinstated therein be vacated.

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CERTIFICATE OF COMPLIANCE

I hereby certify that (1) this brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) and this Court's July 14, 2010 Order because the brief contains 9,598 words, excluding the parts of the brief exempted by Fed R. App. 32(a)(7)(B)(iii); and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

Pursuant to Third Circuit Rule 31.1(c), I further certify that the text of the electronic brief is identical to the text in the paper copies and that a virus detection program**,** Symantec Endpoint Protection version 11.0.5002.333, has been run on the file and that no virus was detected.

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Pursuant to Third Circuit Rules 28.3(d) and 46.1(e), I certify that I am a member of the bar of this court.

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I hereby certify that on this 16th day of August, 2010, I electronically filed the forgoing Reply Brief of Cox Enterprises, Inc.; Cox Radio, Inc.; Cox Broadcasting, Inc.; and Miami Valley Broadcasting Corporation using this Court's CM/ECF system, which will send notification of such filing to the counsel of record in these matters who are registered on the CM/ECF system and appear on the service list below. Pursuant to this Court's May 3, 2010 Order, I also caused one paper copy of this document to be delivered to the Clerk's Office via overnight delivery service.

I further certify that some of the parties in this case are not CM/ECF users, and I have mailed the foregoing document by First-Class Mail, postage prepaid, to the non-CM/ECF users, each of whom are denoted with an asterisk below.

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