IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN re PROMETHEUS RADIO PROJECT and MEDIA MOBILIZING PROJECT,	)	**No. 18-1167**
***Petitioners*.**	)	

JOINT MOTION OF MOVANT-INTERVENORS NATIONAL ASSOCIATION OF BROADCASTERS AND SINCLAIR BROADCAST GROUP, INC. FOR LEAVE TO FILE AN ANSWER TO EMERGENCY PETITION FOR MANDAMUS

Movant-Intervenors National Association of Broadcasters ("NAB") and Sinclair Broadcast Group, Inc. ("Sinclair") (collectively, "Movant-Intervenors") hereby respectfully move for leave to file the attached answer in opposition to the Emergency Petition for Writ of Mandamus to Enforce the Court's Mandates and For Other Relief ("Petition") in the above-captioned case.[1]

Movant-Intervenors filed motions for leave to intervene in this case,[2] in which Petitioners seek a stay of a recent order of the Federal Communications Commission

[1] *See* Emergency Petition for Writ of Mandamus to Enforce the Court's Mandates and For Other Relief, *In re Prometheus Radio Project*, No. 18-1167, Doc. No. 003112836759 (3d Cir. filed Jan. 25, 2018).

[2] Motion for Leave to Intervene of Nat'l Ass'n of Broadcasters, *In re Prometheus Radio Project*, No. 18-1167, Doc. 003112837139 (3d Cir. filed Jan. 25, 2018); Motion for Leave to Intervene of Nat'l Ass'n of Broadcasters, *In re Prometheus Radio Project*, No. 18-1167, Doc. 003112838987 (3d Cir. filed Jan. 29, 2018) (corrected motion); Motion for Leave to Intervene of Sinclair Broadcast Grp.,

("Commission"), among other things.[3] As of the date of this filing, the Court has not acted on those motions. In light of the imminent deadline for filing an answer to the Petition, Movant-Intervenors file this motion for leave to file concurrently with the lodging of their brief. This Motion is timely. The Court's Order of January 26, 2018, requires the Commission to file a response to the emergency petition by 3:00 p.m. on Friday, February 2, 2018.[4] This motion and the attached opposition brief are filed in accordance with that deadline. The Commission has consented to this motion for leave to file. Petitioners have refused to consent.

The Court should permit Movant-Intervenors to file their answer for four reasons. *First*, Movant-Intervenors are respondents under Rule 21. Both NAB and Sinclair participated in the proceeding below, and Rule 21(a)(1) provides that "[a]ll

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Inc., *In re Prometheus Radio Project*, No. 18-1167, Doc. 003112838310 (3d Cir. filed Jan. 26, 2018).

[3] Order on Reconsideration and Notice of Proposed Rulemaking, *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership In the Broadcasting Services; Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, *Rules and Policies to Promote New Entry and Ownership in the Broadcasting Services*, MB Docket Nos. 14-50, 09-182, 07-294, 04-256, 17-289, FCC No. 17-156, 32 FCC Rcd. 9802 (2017).

[4] *See* Order, *In re Prometheus Radio Project*, No. 18-1167, Doc. No. 003112838290 (3d Cir. Jan. 26, 2018).

parties to the proceeding in the trial court other than the petitioner are respondents for all purposes."[5] In the context of a petition for review of an agency order, the agency is the "trial court" for purposes of Rule 21. *See* Fed. R. App. P. 20 (providing that Rule 21 "appl[ies] to the review or enforcement of an agency order").

Second, even if Movant-Intervenors are not respondents under Rule 21, they are "part[ies] in interest" entitled to intervene as a matter of right under 28 U.S.C. § 2348 because they have a direct and palpable stake in the *Reconsideration Order*, as explained in Movant-Intervenors' respective motions to intervene.

Third, if Petitioners had followed the appropriate procedure for a stay, Movant-Intervenors would have been entitled to file an opposition to the request for a stay. Petitioners' failure to comply with Federal Rule of Appellate Procedure 18(a) should not prejudice Movant-Intervenors.

Finally, the Court should give the entities who would be most affected by a stay of the Commission's new ownership rules an opportunity to be heard. Movant-Intervenors are the entities directly regulated by the Commission and thus will provide a unique and important perspective on the issues.

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[5] *See* Petition of the National Association of Broadcasters for Reconsideration of the 2010/2014 Quadrennial Review Second Report and Order, MB Docket Nos. 14-50 et al. (Dec. 1, 2016); Reply of the National Association of Broadcasters, MB Docket Nos. 14-50 et al. (Feb. 3, 2017); Reply of Sinclair Broadcast Group, Inc., MB Docket Nos. 14-50 et al. (Feb. 3, 2017).

For the foregoing reasons, Movant-Intervenors' motion for leave to file an answer to Petitioners' emergency petition for mandamus should be granted.

February 2, 2018

Respectfully submitted,

/s/ Helgi C. Walker

Helgi C. Walker
Counsel of Record
Andrew G.I. Kilberg
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
hwalker@gibsondunn.com
akilberg@gibsondunn.com

Rebekah Perry Ricketts
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Dallas, TX 75201
Telephone: (214) 698-3365
rricketts@gibsondunn.com

Counsel for Movant-Intervenor National Association of Broadcasters

Rick Kaplan
Jerianne Timmerman
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 429-5430
rkaplan@nab.org
jtimmerman@nab.org

Counsel for Movant-Intervenor National Association of Broadcasters

Miles Mason
Jeetander T. Dulani
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
Telephone: (202) 663-8000
miles.mason@pillsburylaw.com
jetander.dulani@pillsburylaw.com

Counsel for Movant-Intervenor Sinclair Broadcast Group, Inc.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because it contains 724 words. I further certify that (1) this Motion complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman and 14-point font; (2) the electronic submission is an exact copy of the paper document pursuant to this Court's Rule 31.1(c); and (3) the document has been scanned with Symantec Endpoint Protection Version 14 (14.0MP1) Build 2349 and is free of viruses.

/s/ Helgi C. Walker

Helgi C. Walker
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

Counsel for Movant-Intervenor National Association of Broadcasters

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2018, I electronically filed the foregoing Joint Motion for Leave to File Answer to Emergency Petition for Mandamus with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the Court's CM/ECF system. I further certify that service was accomplished on all parties via the Court's CM/ECF system.

/s/ Helgi C. Walker
Helgi C. Walker
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

Counsel for Movant-Intervenor National Association of Broadcasters

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Rick Kaplan
Jerianne Timmerman
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 429-5430
rkaplan@nab.org
jtimmerman@nab.org

Counsel for Movant-Intervenor National Association of Broadcasters

Miles Mason
Jeetander T. Dulani
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
Telephone: (202) 663-8000
miles.mason@pillsburylaw.com
jetander.dulani@pillsburylaw.com

Counsel for Movant-Intervenor Sinclair Broadcast Group, Inc.

Helgi C. Walker
Counsel of Record
Andrew G.I. Kilberg
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
hwalker@gibsondunn.com
akilberg@gibsondunn.com

Rebekah Perry Ricketts
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Dallas, TX 75201
Telephone: (214) 698-3365
rricketts@gibsondunn.com

Counsel for Movant-Intervenor National Association of Broadcasters

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INTRODUCTION

In a thinly veiled attempt to prevent other parties from opposing a request for a stay pending appeal of the Federal Communications Commission ("Commission") order on review in case No. 18-1092 and to avoid the requirements of Federal Rule of Appellate Procedure 18, Petitioners Prometheus Radio Project and Media Mobilizing Project ("Petitioners") have invoked the All Writs Act, 28 U.S.C. § 1651(a), instead. They ask this Court to take the extraordinary step of issuing an emergency writ of mandamus ordering the Commission not to implement its new media ownership rules. Unfortunately for Petitioners, their "right to issuance of the writ [must be] clear and indisputable." *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) (internal quotation omitted). Because Petitioners' procedurally improper and novel request fails to satisfy any of the requirements for a writ of mandamus, the only clear and indisputable conclusion here is that mandamus is inappropriate. Petitioners could easily have sought a stay and know how to do so; they should not be allowed to sidestep that process or box directly affected parties out of the discussion.

BACKGROUND

The Court is familiar with the long history of this case.[1] Under Section 202(h) of the Telecommunications Act of 1996, the Commission must determine every four years whether its broadcast ownership rules remain "necessary in the public interest as the result of competition." Pub. L. No. 104-104, 110 Stat. 56.

In August 2016, the Commission released its *Second Report and Order* ("*Second Order*") with respect to the combined 2010 and 2014 Quadrennial Regulatory Review.[2] As relevant here, the *Second Order*: (1) retained various ownership restrictions limiting the number of TV stations, radio stations, and newspapers a single entity may own; (2) re-adopted the TV Joint Sales Agreement ("JSA") Attribution Rule, which treated two stations' joint sale of advertising time as equivalent to common ownership, and which this Court set aside in *Prometheus III*; and (3) re-adopted a revenue-based definition of "eligible entity," which is used

[1] *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (*Prometheus I*); *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) (*Prometheus II*); *Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016) (*Prometheus III*).

[2] *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership In the Broadcasting Services; Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, MB Docket Nos. 14-50, 09-182, 07-294, 04-256, FCC No. 16-107, 31 FCC Rcd. 9864 (2016).

to define eligibility for measures promoting ownership diversity, and which this Court set aside in *Prometheus II*. *See* 31 FCC Rcd. at 9865–66, para. 3–4.

Several entities, including Petitioners here, filed petitions for review of the *Second Order*, and the cases were consolidated in this Court. *See Prometheus Radio Project v. FCC*, no. 17-1107 (docketed Jan. 18, 2017). Movant-Intervenor National Association of Broadcasters ("NAB") intervened in that appeal and petitioned the Commission for reconsideration of the *Second Order*, as did two other entities. Both NAB and Movant-Intervenor Sinclair Broadcast Group, Inc. ("Sinclair") participated in the reconsideration proceedings (collectively, "Movant-Intervenors").[3] In light of the reconsideration petitions, the Commission moved to hold the appeal in abeyance; Petitioners opposed. The Court has yet to rule on the motion.

In November 2017, the Commission granted NAB's and other parties' petitions for reconsideration in substantial part.[4] As relevant here, the

[3] *See* Joint Motion of Movant Intervenors Nat'l Ass'n of Broadcasters and Sinclair Broadcast Grp., Inc. for Leave to File an Answer to Emergency Petition for Mandamus, *In re Prometheus Radio Project*, No. 18-1167, at 2 (3d Cir. filed Feb. 2, 2018).

[4] Order on Reconsideration and Notice of Proposed Rulemaking, *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996;*

Reconsideration Order: (1) eliminated some of the ownership rules and modified another, finding that those rules were no longer in the public interest due to substantial changes in the media market; (2) repealed the TV JSA Attribution Rule; and (3) decided to adopt an "incubator" program that seeks to promote ownership diversity. *See* 32 FCC Rcd. at 9803–04, para. 2–3. The Commission did *not* reevaluate or otherwise disturb the *Second Order*'s eligible-entity definition.

A synopsis of the *Reconsideration Order* was published in the Federal Register on January 8, 2018, triggering the statutory period for petitions for review. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2342; 47 C.F.R. § 1.4(b).[5] On January 16, Petitioners filed a petition for review in this Court,[6] then moved to consolidate their new petition (No. 18-1092) with the petition for review of the *Second Order* (No. 17-1107). Petitioners did not petition the Commission for reconsideration of the *Reconsideration Order*. *See* 47 C.F.R. § 1.429(i). Nor did they seek a stay from the Commission itself. *See* Fed. R. App. P. 18(a) ("A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order.").

Promoting Diversification of Ownership In the Broadcasting Services; Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets, *Rules and Policies to Promote New Entry and Ownership in the Broadcasting Services*, MB Docket Nos. 14-50, 09-182, 07-294, 04-256, 17-289, FCC No. 17-156, 32 FCC Rcd. 9802 (2017) ("*Reconsideration Order*").

[5] *2014 Quadrennial Regulatory Review*, 83 Fed. Reg. 733.

[6] *Prometheus Radio Project v. FCC*, No. 18-1092 (filed Jan. 16, 2018).

Instead, Petitioners waited until January 25—a mere thirteen days before the new rules are scheduled to take effect—and then filed an "Emergency Petition for Writ of Mandamus to Enforce the Court's Mandates and For Other Relief" (the "Petition"). The Petition requests a stay of the *Reconsideration Order*, an order enjoining the Commission from granting license applications that could be approved under the *Reconsideration Order*, and the appointment of a special master with the authority and responsibility to manage the Commission's collection and analysis of ownership data—something that, as far Movant-Intervenors can tell, has never occurred *in the history of the Commission or any other administrative agency*. *See* Pet'n 30–31. Petitioners claim that the *Reconsideration Order*'s modification of the ownership rules will prompt "massive consolidation," which in turn will cause irreparable harm to the public. *Id.* at 27, 29. "Without a stay," Petitioners claim, "Citizen Petitioners' efforts [in No. 18-1092] to obtain meaningful relief would be futile." *Id.* at 22. In other words: According to Petitioners, irreparable harm can be prevented only by a stay of the *Reconsideration Order*.

Movant-Intervenors promptly moved to intervene in both No. 18-1092 (the petition for review of the *Reconsideration Order*) and No. 18-1167 (this mandamus action) to defend the Commission's order. Petitioners apparently believe that filing

a mandamus petition allows them to preclude participation by Movant-Intervenors and others interested in defending the *Reconsideration Order*.[7]

ARGUMENT

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 402 (1976). As such, "only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." *Will v. United States*, 389 U.S. 90, 95 (1967) (internal quotation omitted). A writ of mandamus may be granted "only upon a showing of (1) a clear abuse of discretion or clear error of law; (2) a lack of an alternate avenue for adequate relief; and (3) a likelihood of irreparable injury." *United States v. Wright*, 776 F.3d 134, 146 (3d Cir. 2015). Petitioners fail to satisfy any of those conditions.[8]

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[7] *See* Joint Motion of Movant Intervenors Nat'l Ass'n of Broadcasters and Sinclair Broadcast Grp., Inc. for Leave to File an Answer to Emergency Petition for Mandamus, *In re Prometheus Radio Project*, No. 18-1167, at 2 (3d Cir. filed Feb. 2, 2018). Petitioners, however, are wrong. Movant-Intervenors are entitled to participate in this mandamus action because they qualify as "respondents" on account of their participation in the proceedings below. *See* Fed. R. App. P. 21(a)(1) ("All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes."). In any event, as explained in the concurrently filed motion for leave to file an answer, Movants-Intervenors meet the standard for intervention as a matter of right. *See* Joint Motion of Movant Intervenors Nat'l Ass'n of Broadcasters and Sinclair Broadcast Grp., Inc. for Leave to File an Answer to Emergency Petition for Mandamus, at 3.

[8] And "[e]ven when these requirements are met, [the Court] may, in the exercise of [its] discretion, decline to issue a writ of mandamus when it is not appropriate

I. Petitioners Have Not Shown A Likelihood Of Irreparable Injury.

Petitioners must show that, absent the requested relief, they will suffer an injury "both certain and great, actual and not theoretical, beyond remediation, and of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (emphasis in original) (internal quotation omitted); *see also Holiday Inns of Am., Inc. v. B & B Corp.*, 409 F.2d 614, 618 (3d Cir. 1969) ("The dramatic and drastic power of injunctive force may be unleashed only against conditions generating a presently existing actual threat; it may not be used simply to eliminate a possibility of a remote future injury."). Establishing a mere "risk of irreparable harm is not enough." *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91–92 (3d Cir. 1992) (quoting *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987). Instead, Petitioners have the "burden of proving a clear showing of immediate irreparable injury," *id.*, and they fail to carry that burden.

A. The Petition Fails to Allege Irreparable Harm to Petitioners.

As a threshold matter, Petitioners make no showing that *they* will suffer irreparable harm absent a writ of mandamus. Instead, Petitioners assert only that "*[t]he public* will be irreparably harmed by the loss of diversity and competition"

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under the circumstances." *In re Howmedica Osteonics Corp.*, 867 F.3d 390, 401 (3d Cir. 2017) (internal quotation omitted).

presumed to result from the marketplace consolidation they allege will occur. Pet'n 29 (emphasis added). That generalized grievance cannot support standing to bring suit, much less provide the basis for issuing a writ of mandamus to a federal agency. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (explaining requirement that a plaintiff or petitioner have "a personal stake in the outcome of the controversy"); *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 487 (3d Cir. 2000) (movant must show "that it specifically and personally risks irreparable harm"). Indeed, under Petitioners' logic, an automatic stay would be justified *every time* the Commission adopted a new ownership or attribution rule permitting transactions to occur that would have been prohibited under the prior rule. That is flatly inconsistent with the well-established standards for a stay.

Petitioners also suggest in passing that the *Reconsideration Order* "will irreparably interfere with *the Commission's* ability to comply with the earlier remands." Pet'n 3 (emphasis added). But the relevant question is whether *Petitioners* will be irreparably harmed, not whether the Commission's work will be impeded. The Commission itself undoubtedly has a different view of how best to effectuate its work and can speak directly to that question. Even if the Court could somehow infer that the Commission's further work will somehow injure Petitioners, the Petition offers no explanation of how the *Reconsideration Order* will interfere with the Commission's ability to comply with the Court's orders.

B. Petitioners Have Failed to Show That The Reconsideration Order Will Cause Irreparable Harm To Anyone.

Petitioners' theory of irreparable harm flows from their claim that the *Reconsideration Order* will touch off "massive consolidation" of media ownership. Pet'n 27. Even setting aside the complete lack of irreparable harm to *Petitioners*, these allegations are woefully insufficient.

First, the purported harm is not certain to occur. To begin, it is entirely speculative whether the "massive consolidation" Petitioners predict will come to pass. Petitioners fail even to clearly identify whether the consolidation they fear is limited to the local TV market, or whether it encompasses radio stations and newspapers as well.

In fact, the extent of future consolidation is highly uncertain in any market. Eliminating the remainder of the Radio/TV Cross-Ownership Rule is unlikely to have a significant impact because that rule had been significantly loosened in 1999. *See* 32 FCC Rcd. at 9829–30, para. 62 (explaining that "because the rule already permits significant cross-ownership in local markets, eliminating it will have only a minimal impact on common ownership," especially given the constraints of the local radio and the local TV ownership rules). Eliminating the Newspaper/Broadcast Cross-Ownership Rule is unlikely to result in significant consolidation due to lackluster demand for struggling newspapers. Indeed, the trend has been the reverse, with broadcast companies selling print interests or spinning off their publishing

divisions.[9] The modified Local TV Ownership Rule is also unlikely to result in significant consolidation because the rule retains the basic "Top-Four" restriction, which prohibits any entity from owning two of the top four stations in any market. The Commission will consider waivers of the "Top-Four" rule on a case-by-case basis, but only for those combinations that the Commission, the expert in this area, finds to be in the public interest. *See id.* at 9836–39, para. 78–82. And any combination cannot violate the antitrust laws, which serve as a separate check on consolidation. *See id.* at 9807, 9852 para. 8, 109 n.322 (noting that the Commission's rules do not supersede antitrust laws).

Similarly, the repeal of the TV JSA Attribution Rule could have only a limited impact. That rule, which was re-adopted in the *Second Order*, grandfathered existing JSAs through September 30, 2025. *See Reconsideration Order*, 32 FCC Rcd. at 9848, para. 99 n.293. Thus, repeal of this short-lived rule merely reinstates the status quo ante with respect to TV JSAs. Regardless, given the "lack of evidence" that TV JSAs should be "treat[ed] . . . as attributable ownership interests," the Commission explained that "the existence of television JSAs in the marketplace

[9] *See Broadcast Ownership in the 21st Century: Hearing Before Subcomm. on Communications and Technology, H. Comm. on Energy & Commerce*, 114th Cong. 21 (2015) (statement of Paul Boyle, Senior Vice President of Public Policy, Newspaper Association of America) ("In the space of only a few years, Gannett, Dispatch Printing Company, E.W. Scripps, Fox, Journal Communications, Media General and Tribune all spun off their publishing divisions or sold their newspaper interests.").

does not have an impact" on its analysis of the local TV rules, which includes consideration of competition and consolidation in ownership. *Id.* at 9851, 9853–54, para. 107, 111–12 (also finding record evidence that TV JSAs "have produced and can produce meaningful public interest benefits" and no evidence that they cause "public interest harm").

Petitioners offer no reputable evidence to support their remarkable claim that "the few stations controlled by women and minorities are likely [to] be purchased by large group owners" as a result of the assumed future consolidation. Pet'n 27. Petitioners cite a study purporting to show that a prior relaxation of the Local TV Rule resulted in decreased minority ownership and increased ownership by the largest station owners. But the Commission's peer review of that study concluded that it was "fatally flawed by a fundamental logical error that pervades every aspect of the analysis."[10] The Commission thus has never relied on this study, and for good reason. In fact, the Commission's own data (and third-party data provided by Free Press) confirms that minority ownership of TV stations *increased* after the Local TV

[10] B. D. McCullough, "Peer-Review Report on 'The Impact of the FCC's TV Duopoly Rule Relaxation on Minority and Women Owned Broadcast Stations 1999-2006' by Hammond, *et al.*," at 1, available at http://transition.fcc.gov/mb/peer_review/prstudy8.pdf.

Rule was relaxed in 1999. *Second Order*, 31 FCC Rcd. at 9895, para. 77.[11] The ownership rules, moreover, do not even address the real barrier to increased female and minority ownership: "difficulty in accessing capital investment."[12] In all events, whether the purchases alleged by Petitioners will ultimately occur is up to current women and minority owners, who can and will make up their own minds about any opportunities presented to them.

The Communications Act also provides extensive opportunities for any party claiming injury from a proposed transaction to challenge that transaction and thereby prevent the allegedly harmful consolidation. Specifically, the Act requires any party

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[11] Nor do Petitioners cite any evidence to support their contention that loosening of the ownership rules will harm women and minorities by undermining the Failed Station Solicitation Rule. *See* Pet'n 8, 23–24, 28. That rule merely requires an in-market buyer of a failed station to show that "it is the only entity ready, willing, and able to operate" the failed station, that sale to an out-of-market buyer "would result in an artificially depressed price," and that the in-market buyer does not already own two stations in the relevant market. *See* 47 C.F.R. § 73.3555, Note 7.

[12] *See* Report and Order and Third Further Notice of Proposed Rulemaking, *Promoting Diversification of Ownership In the Broadcasting Services; 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Ways to Further Section 257 Mandate and To Build on Earlier Studies*, MB Docket Nos. 07-294, 06-121, 02-277, 01-235, 01-317, 00-244, 04-228, FCC No. 07-217, 23 FCC Rcd. 5922, 5937, para. 34 (2008).

seeking to acquire radio or TV stations to file an application with the Commission and obtain the agency's consent before completing the transaction. 47 U.S.C. § 310(d). The Act further requires that public notice be given for each of these applications, *id*. § 309(b), and permits any interested party to file a petition to deny the application and submit facts showing that the transaction would be inconsistent with the public interest, *see id.* §§ 309(a), 309(d), § 310(d). Any party aggrieved by the Commission's denial of its petition may seek judicial redress by filing an appeal in the D.C. Circuit, which has the power to ensure that the Commission has acted within the bounds of its statutory authority to determine the public interest in approving the transaction. 47 U.S.C. § 402(b)(6). Thus, even if Petitioners could show that harm would flow from a specific proposed transaction—and they cannot—any such injury would be far from certain to ultimately occur.

Second, even assuming additional consolidation—whether "massive" or limited—were to occur due to the *Reconsideration Order*, Petitioners have not shown that this consolidation will actually cause harm. Petitioners simply assume that any increased common ownership will automatically lead to public harm. They cite no evidence to support their assumption, which, as shown by the record below, is inaccurate. *See* 32 FCC Rcd. at 9816–18, 9830, 9835–36, para. 26–30, 63, 77 (discussing public interest and localism benefits of common ownership).

Third, Petitioners have failed to show that either consolidation or the harm that will allegedly result is imminent. There is no basis to conclude that the alleged consolidation will occur imminently, or that it will adversely affect Petitioners—or, indeed, anyone else—before this Court has an opportunity to resolve the issues in the pending appeal of the *Reconsideration Order*. The approval process for broadcast transactions often takes many months.[13] Generic, unsupported objections to media consolidation simply cannot demonstrate that the challenged ownership rules will cause Petitioners imminent injury in the absence of a stay. *See Campbell Soup*, 977 F.2d at 91–92; *Cont'l Grp., Inc. v. Amoco Chems. Corp*., 614 F.2d 351, 358–59 (3d Cir. 1980).

Finally, Petitioners have not shown that any consolidation that does occur during the appeal of the *Reconsideration Order* is irreparable. Petitioners' entirely unsupported assertion (at 29) that station combinations cannot be undone after the

[13] For example, the Commission took 11 months to approve the transfer of control of Media General, Inc. to Nexstar Broadcasting Group, Inc., and close to a year to approve the transfer of Allbritton Communications Co. to Sinclair Television Group, Inc. *Applications for Consent to Transfer of Control of License Subsidiaries of Media Gen., Inc. from Shareholders of Media Gen., Inc. to Nexstar Media Grp., Inc.*, MB Docket No. 16-57, DA 17-23, 32 FCC Rcd. 183 (2017); *Applications for Consent to Transfer of Control from License Subsidiaries of Allbritton Commc'ns Co. to Sinclair Television Grp., Inc.*, 29 FCC Rcd. 9156 (2014). The Commission's policy of acting on mergers within 180 days has been honored more in the breach than the observance, as the Commission frequently "stops the clock."

transaction is consummated is simply wrong. The Commission has clear authority to require divestiture to ensure compliance with its ownership rules, and it has exercised that authority in the past. *See, e.g.*, *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1053 (D.C. Cir. 2002). Thus, if this Court were to set aside the *Reconsideration Order* at some future date, any alleged harm is not irreparable since administrative tools exist to address any unwarranted consolidation that occurred in the interim.

II. Petitioners Have Multiple Alternate Avenues For Adequate Relief.

Petitioners also fail to demonstrate that they "have *no* other adequate means to attain the relief [they] desire[]." *Kerr*, 426 U.S. at 403 (emphasis added).[14] In fact, Petitioners have several avenues open to them other than a writ of mandamus.

First, the proper course to avoid any irreparable harm during the adjudication of an existing appeal is to seek a stay pending review through the usual and appropriate process. *See* Fed. R. App. P. 18. Petitioners and their counsel have filed motions for a stay pending appeal numerous other times in ownership litigation, so

[14] Petitioners complain that they have "no reasonable alternative remedy" other than a writ of mandamus. Pet'n 15. That assertion—which is demonstrably untrue—substitutes a lower standard. The question for the Court is whether Petitioners have *any* alternative avenue for relief, not whether that avenue is a "reasonable" one for Petitioners to pursue.

they know how to do so.[15] Tellingly, Petitioners chose *not* to avail themselves of that remedy here—perhaps to try and preclude the parties to the appeal of the *Reconsideration Order* from having a say on the issue of a stay. Or perhaps to avoid Rule 18(a)'s requirement that "[a] petitioner must ordinarily move first before the agency for a stay pending review of its decision or order," which they failed to do. If Petitioners can avoid Rule 18(a) here, nothing would prevent any other litigant from doing the same. *Cf.* Charles Alan Wright & Charles H. Koch, Jr., 33 Federal Practice & Procedure: Judicial Review § 8299 (2006) ("Mandamus cannot be used as a prohibitory or preventive order."). Either way, there is no reason to believe that a motion for a stay was unavailable or otherwise an inadequate avenue for relief. Petitioners' failure to seek a stay through the proper procedures is thus fatal. *See Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir. 1985) (Scalia, J.) ("[A]n Emergency Petition will not lie where a stay pending appeal (which might be termed the 'normal' means of obtaining extraordinary relief) will suffice to prevent the alleged harm. Thus, an All Writs petition filed after the agency order in question is already final and appealable will be summarily dismissed.").

Even if the Court were inclined to construe the petition as a motion for a stay and to excuse Petitioners' failure to request a stay first from the Commission,

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[15] *See, e.g.*, Emergency Mot. for Stay Pending Review, *Free Press v. FCC*, No. 17-1129 (D.C. Cir. May 26, 2017); Mot. for Stay Pending Review, *Prometheus I*, No. 03-3388 (Aug. 13, 2003).

Petitioners have made no attempt to show that "the balance of harms" favors a stay. *See In re Revel AC, Inc.*, 802 F.3d 558, 568–69 (3d Cir. 2015) (Ambro, J.) (explaining the interplay of the four-factor test for a stay). Petitioners nowhere consider the major harm that would befall broadcasters if the *Reconsideration Order* were stayed. Movant-Intervenors, including NAB's members, have labored under the heavy burdens of the ownership rules for decades; because of the *Reconsideration Order*, "broadcasters and local newspapers will at last be given a greater opportunity to compete and thrive in the vibrant and fast-changing media marketplace." 32 FCC Rcd. at 9803, para. 1. The uncertainty caused by a delay in the effectiveness of the new rules would also harm the employees and shareholders of the companies involved, and detrimentally impact investments in new services. By failing to consider the balance of the harms, Petitioners have ignored a critical piece of the "interconnected" four-factor test. *Id.* at 571.[16]

Second, Petitioners have failed to show that they will suffer irreparable harm prior to full briefing and oral argument anyway. There is thus no reason to believe that Petitioners could not obtain adequate relief from a favorable ruling by this Court in the already-docketed appeals of the *Reconsideration Order* and the *Second Order*.

[16] Petitioners also fail to address the final stay factor: that a stay would be in "the public interest." *See Nken v. Holder*, 556 U.S. 418, 435–36 (2009). Although Petitioners assert, in the course of arguing irreparable harm, that the public will suffer injury if the *Reconsideration Order* goes into effect, they never squarely argue that a stay would be in the public interest.

See Cheney v. U.S. Dist. Court for the Dist. of Columbia, 542 U.S. 367, 380–81 (2004) ("[T]he writ [may] not be used as a substitute for the regular appeals process."). As discussed above, Petitioners have not shown that any injury they might suffer is certain, imminent, or irreparable. *Supra* 9–15. If Petitioners truly believed that injury would occur before this Court is likely to issue a decision, they could have requested expedited consideration within 14 days of filing their petition for review, which they failed to do. *See* 3d Cir. Local R. 4.1.

Moreover, as discussed more fully below, Petitioners' primary *legal* challenge is to the *Second Order*'s definition of "eligible entity," which was not raised by the reconsideration petitions and not disturbed by the *Reconsideration Order*. Petitioners fail to explain why judicial review in the ordinary course cannot provide adequate relief with respect to the eligible-entity definition. Instead, they attempt to leverage the *Second Order*'s decision to reinstate the eligible-entity definition to obtain an immediate stay of the *Reconsideration Order*. Thus, Petitioners treat the *Second Order* as the source of the alleged error and the *Reconsideration Order* as the source of the alleged irreparable harm. But they offer no authority—because there is none—to support their attempt to mix and match sources of error and irreparable harm to manufacture the basis for a stay. *See Aerosource, Inc. v. Slater*, 142 F.3d 572, 582 (3d Cir. 1998) ("[T]he petitioner generally must show irreparable injury caused by the error.").

In so doing, Petitioners invite the Court to order a vastly overbroad stay of the entire *Reconsideration Order*. Petitioners request an injunction against grants of "*any* broadcast license applications that would be *inconsistent with* the ownership limits in effect as of this date." Pet'n 31 (emphasis added). Such an injunction could prohibit the Commission even from granting waivers of existing limits, even based on waiver rules not at issue here, *i.e.* the Failed Station Solicitation Rule. A stay would also, for example, put a hold on the narrow change the Commission made to its policies for analyzing a few "embedded" radio markets, which neither Petitioners nor any other party even opposed in the reconsideration proceedings. *See* 32 FCC Rcd. at 9843–46, para. 91–95. There is no justification for a stay that broad.

Third, Petitioners could have sought reconsideration of the *Reconsideration Order* itself. The Commission's regulations make clear that "[a]ny order addressing a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order." 47 C.F.R. § 1.429(i). Thus, Petitioners could have sought reconsideration of the *Reconsideration Order* (which modified the ownership rules) while maintaining their pending action challenging the *Second Order*'s eligible-entity definition. Petitioners make no attempt to explain why a petition for reconsideration was unavailable or inadequate.

Finally, Petitioners make no effort to explain how, "without a special master, [they] cannot obtain relief." Pet'n 22. Petitioners claim that they will be harmed by the *Reconsideration Order* itself—*not* by a purported lack of data or untimeliness in the Commission's rulemakings. *See* Pet'n 23 (arguing that irreparable harm would occur "[i]f the *Reconsideration Order* is allowed to take effect"). Thus, even if Petitioners could show irreparable harm from the *Reconsideration Order*, the appointment of a special master would do nothing to prevent that harm.[17]

Moreover, there is *no precedent* for appointing a special master to actively oversee and manage the activities of a federal agency. Petitioners cite no such case, and Movant-Intervenors have found none. That is unsurprising, because such an appointment would be unconstitutional. Petitioners contemplate a special master that would not just monitor and report to the Court, but would actively engage in data collection and analysis. *See* Pet'n 21–22 (claiming that a special master is needed to "set . . . parameters for the collection and analysis of data"). In essence, Petitioners ask this Court to install a "Super Chairman" at the top of the Commission's organizational chart.

[17] Petitioners undermine their own assertion that only a special master can keep the Commission on schedule by pointing out that this Court has previously ordered quick action by the agency *and the Commission complied*. *See* Pet'n 23 (citing *Prometheus III*, 824 F.3d at 50).

Such an act would clearly violate the separation of powers. *See Cobell v. Norton*, 334 F.3d 1128, 1143 (D.C. Cir. 2003) ("[T]he district court's appointment of the Monitor entailed a license to intrude into the internal affairs of the Department, which simply is not permissible under our adversarial system of justice and our constitutional system of separated powers."); *Nat'l Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 545 (9th Cir. 1987) ("Masters may not be placed in *control* of governmental defendants for the purpose of forcing them to comply with court orders."). Unlike, for example, the delegation of rulemaking power over issues traditionally decided within the judicial branch, the Court's installation of Petitioners' requested judicial adjunct would amount to an "encroachment or aggrandizement of one branch at the expense of the other." *Mistretta v. United States*, 488 U.S. 361, 382, 395 (1989).[18]

In sum, Petitioners have numerous alternate avenues for adequate relief. Clearly, a writ of mandamus is not "the *only* way of protecting" Petitioners' interests. *Campbell Soup*, 977 F.2d at 91 (emphasis in original) (quoting *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989).

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[18] Federal Rule of Appellate Procedure 48, which Petitioners nowhere cite, provides for the appointment of special masters, but only for the purpose of "recommend[ing] factual findings and disposition[s] in matters ancillary to proceedings in the court." *See also* 3d Cir. Local R. 48.1 ("The court may appoint a master to hold hearings, if necessary, and make recommendations as to any auxiliary matter *requiring a factual determination* in the court of appeals." (emphasis added)).

III. Petitioners Have Not Demonstrated A Clear Abuse Of Discretion Or Clear Error Of Law.

A writ of mandamus may issue only if Petitioners have demonstrated a "clear abuse of discretion or clear error of law." *Wright*, 776 F.3d at 146. Petitioners' "right to issuance of the writ [must be] clear and indisputable." *Bankers Life & Cas. Co.*, 346 U.S. at 384. That is a decidedly heavy burden. And it is another hurdle that Petitioners cannot clear.

A. The Commission Did Not Violate This Court's Mandate.

Contrary to Petitioners' contention, the Commission did not violate the Court's mandate with respect to the eligible-entity definition. In *Prometheus III*, this Court told the Commission that "[i]t must make a final determination as to whether to adopt a new definition. If it needs more data to do so, it must get it. We do not intend to prejudge the outcome of this analysis; we only order that it must be completed." 824 F.3d at 49. The Commission fully complied with the Court's directive.

Petitioners first claim that the *Second Order* adopted an eligible-entity definition, but that the *Reconsideration Order*'s decision to adopt an incubator program "effectively" makes the *Second Order*'s definition "nonfinal and unreviewable." Pet'n 17. Not so. The *Reconsideration Order* seeks comment on the eligible-entity definition *for the incubator program*; it does not *alter* the revenue-based eligibility definition for *other programs or policies*. *See* 32 FCC Rcd. at 9861,

para. 131. The petitions for reconsideration did not ask the Commission to revisit the *Second Order*'s decision on the general eligible-entity definition, and the *Reconsideration Order* did not disturb that decision. In fact, the Commission expressly acknowledged that the *Second Order* "re-adopted a revenue-based eligible entity standard to identify those qualified to take advantage of certain preferential regulatory policies." *Id.*

Petitioners next complain that the Commission's data-collection efforts have been inadequate. *See* Pet'n 19–22. But the Court's directive regarding data collection was with respect to the eligible-entity definition issue, which was resolved by the *Second Order* back *in 2016*. The *Second Order* explained that "[b]y evaluating the feasibility of implementing a race- or gender-conscious eligibility standard based on an extensive analysis of the available evidence, we have followed the Third Circuit's direction." 31 FCC Rcd. at 9999, para. 313; *see also id.* at 9999–10001, para. 315–16 (explaining that it has "taken a number of steps to improve the quality of its broadcaster ownership data," and that it has been unable to "produce[] additional study designs that we expect would develop the evidence necessary to support race- and/or gender-conscious measures"). Petitioners do not explain why they waited *seventeen months* after the *Second Order* was released to file a petition for a writ of mandamus. That failure to request mandamus "with reasonable

dispatch" provides yet another reason to deny the Petition. *See United States v. Olds*, 426 F.2d 562, 565–66 (3d Cir. 1970).

Petitioners appear preoccupied with the Commission's Biennial Ownership Reports, but they fail to explain what this data shows with respect to a race- or gender-conscious eligible-entity definition. Moreover, all of the alleged deficiencies with the Reports and the associated reporting requirements predate the *Reconsideration Order*. Petitioners suggest that the Commission is angling to "cut back or even eliminate" the reporting requirement altogether, Pet'n 21, but the evidence they cite for that proposition shows nothing of the sort. The Commission modestly extended the deadline to file 2017 ownership data because it was changing its electronic filing system and wanted to ensure both that the new system was functional and that broadcasters had "sufficient time to complete and submit their reports."[19] Nothing about that extension runs afoul of *Prometheus III*.

B. The Commission Considered The Effect Of Repeal Or Modification Of The Media Ownership Rules On Minority Ownership.

Petitioners further accuse the Commission of "repeal[ing] and modif[ying] broadcast ownership limits without any serious assessment of the impact on minority and female ownership." Pet'n 18. That is incorrect.

[19] *Promoting Diversification in the Broadcasting Services*, MB Docket No. 07-294, DA 17-813, 32 FCC Rcd. 6720, 6721 (2017).

The Commission carefully considered minority and female ownership for each of the ownership rules. *See* 32 FCC Rcd. at 9822–24, para. 44–48 (Newspaper/Broadcast Cross-Ownership Rule); *id.* at 9830–31, para. 64–65 (Radio/TV Cross-Ownership Rule); *id.* at 9839–40, para. 83–84 (Local TV Ownership Rule). To be sure, the Commission incorporated and commented on the *Second Order*'s analysis of minority and female ownership. But if anything, that fact cuts *against* Petitioners' belated petition for mandamus: If the *Reconsideration Order*'s conclusions with respect to minority and female ownership "are the very finding[s] that Citizen Petitioners sought to challenge in No. 17-1107," Pet'n 19, there is no reason why they cannot raise those issues in the new appeal.

Nor is it true that the *Reconsideration Order* does not discuss minority ownership with respect to the TV JSA Attribution Rule. *See* Pet'n 19. To the contrary, the *Reconsideration Order* explained that "certain JSAs have helped spur minority ownership." 32 FCC Rcd. at 9852, para. 108. That evidence is at least as strong as the "anecdotal evidence" cited in the *Second Order* for the proposition that "attribution of television JSAs has helped promote minority and female ownership opportunities." 31 FCC Rcd. at 9889, para. 62. Nothing in the Commission's analysis in the *Reconsideration Order* on this issue—or any other—amounts to a clear error of law or abuse of discretion.

CONCLUSION

For the reasons given above, Movant-Intervenors respectfully submit that the Court should deny the Petition.

February 2, 2018

Respectfully submitted,

/s/ Helgi C. Walker

Rick Kaplan
Jerianne Timmerman
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 429-5430
rkaplan@nab.org
jtimmerman@nab.org

Counsel for Movant-Intervenor National Association of Broadcasters

Miles Mason
Jeetander T. Dulani
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
Telephone: (202) 663-8000
miles.mason@pillsburylaw.com
jetander.dulani@pillsburylaw.com

Counsel for Movant-Intervenor Sinclair Broadcast Group, Inc

Helgi C. Walker
Counsel of Record
Andrew G.I. Kilberg
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
hwalker@gibsondunn.com
akilberg@gibsondunn.com

Rebekah Perry Ricketts
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Dallas, TX 75201
Telephone: (214) 698-3365
rricketts@gibsondunn.com

Counsel for Movant-Intervenor National Association of Broadcasters

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Answer complies with the type-volume limitations of Federal Rule of Appellate Procedure 21(d)(1) because it contains 6,270 words. I further certify that (1) this Answer complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman and 14-point font; (2) the electronic submission is an exact copy of the paper document pursuant to this Court's Rule 31.1(c); and (3) the document has been scanned with Symantec Endpoint Protection Version 14 (14.0MP1) Build 2349 and is free of viruses.

/s/ Helgi C. Walker

Helgi C. Walker
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

Counsel for Movant-Intervenor National Association of Broadcasters

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2018, I electronically filed the foregoing Joint Answer to Emergency Petition for Mandamus with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the Court's CM/ECF system. I further certify that service was accomplished on all parties via the Court's CM/ECF system.

/s/ Helgi C. Walker
Helgi C. Walker
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

Counsel for Movant-Intervenor National Association of Broadcasters