In the
United States Court of Appeals
for the Third Circuit

In Re Prometheus Radio Project	)	
and	)	No. 18-
Media Mobilizing Project	)	

Emergency Petition for Writ of Mandamus to Enforce the Court's Mandates and For Other Relief

Pursuant to the All Writs Act, 28 U.S.C. §1651, and FRAP Rule 21, Prometheus Radio Project, ("Prometheus") and Media Mobilizing Project ("MMP") (collectively, "Citizen Petitioners") respectfully request the Court to issue a writ of mandamus to enforce the mandates in its prior decisions, *Prometheus II* and *Prometheus III*,[1] and to grant other appropriate relief.

Because this petition relates to matters remanded by a panel of this Court which retained jurisdiction, Citizen Petitioners respectfully suggest that this case be referred to that panel, consisting of Senior Judge Scirica, Senior Judge Fuentes and Judge Ambro.

[1] *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*").

Citizen Petitioners ask that the Court act on this Petition by February 7, 2018, the date on which new Federal Communications Commission ("FCC") rules would otherwise become effective, or as soon as practicable thereafter.

Two orders of the FCC are immediately at issue here. Attachment A is its *Second Report & Order* ("*2d R&O*") issued in 2016.[2] This order is under review before this Court in No. 17-1107. Attachment B is its 2017 decision ("*Reconsideration Order*") reconsidering and reversing some aspects of the *2d R&O*.[3]

Citizen Petitioners seek relief in the nature of mandamus because the FCC has failed to comply with the clear directives of this Court when it issued its final decision in completing the 2010 and 2014 Quadrennial Reviews in August 2016 in its *2d R&O*. As a result, Citizen Petitioners sought review in No. 17-1107, which is pending before this Court. Before this case had been briefed to this Court, however, the Commission adopted the *Reconsideration Order* in November 2017.[4] The *Reconsideration Order* reaffirms much of the inadequate response in the *2d R&O*, but goes even further by repealing and relaxing ownership limits to allow

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[2] *2014 Quadrennial Regulatory Review*, *Second Report and Order*, 31 FCCRcd 9864 (2016) ("*2d R&O"*).
[3] *2014 Quadrennial Regulatory Review*, *Order on Reconsideration and Notice of Proposed Rulemaking*, 32 FCCRcd 9802 (2017) ("*Reconsideration Order")*.
[4] *2014 Quadrennial Regulatory Review*, *Order on Reconsideration and Notice of Proposed Rulemaking*, 32 FCCRcd 9802 (2017) ("*Reconsideration Order")*.

massive consolidation in media markets without analyzing the impact of these changes on ownership by women and minorities. It also reopens the definition of "eligible entity" before this Court was able to assess the previous definition of this term in the *2d R&O*. Citizen Petitioners have sought review of the *Reconsideration Order* in this Court in No. 18-1092, and have asked the Court to consolidate the new case with No. 17-1107.

Absent action by this Court, the changes set out in the *Reconsideration Order* will become effective February 7, 2018.[5] These changes will irreparably interfere with the Commission's ability to comply with the earlier remands. Thus, Citizen Petitioners ask for a writ of mandamus 1) directing the FCC to stay implementation of the *Reconsideration Order* until 60 days after the adoption of a final, reviewable order adopting or rejecting an eligible entity definition that will advance ownership by minorities and women, or in the alternative, a stay pending the outcome of the petitions for review in Nos. 17-1107 and 18-1092; 2) appointing a special master to supervise the FCC's compliance with this court's remands with authority to establish performance deadlines, review plans for data collection to assure their adequacy, oversee the implementation of such plans and

[5] The order takes effect 30 days after the decision is published in the Federal Register, which took place on January 8, 2018. *Reconsideration Order*, 83 Fed. Reg. 783 (Jan. 8, 2018).

all other steps necessary to comply with those remands, and issue reports to the Court as necessary with respect to the FCC's performance of the tasks necessary to achieve compliance, 3) enjoining the FCC from approving any broadcast license applications that would be inconsistent with the ownership limits in effect as of this date, and 4) granting all such other relief as may be appropriate to preserve its appellate jurisdiction to insure compliance with this Court's remands.

Standard of Review under the All Writs Act.

The All Writs Act, 28 U.S.C. §1651, authorizes the issuance of all writs necessary or appropriate in aid of the court's jurisdiction. The power of an original panel of a United States Court of Appeals to grant relief enforcing and protecting the terms of its mandate is well established in the Supreme Court, this Circuit and other federal courts of appeal.[6] For example, in *Citibank v. Fullum,* this Court noted that

[6] *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966); *US v. NY Tel. Co*, 434 US 159 (1977); *Cheney v. United States Dist. Court*, 542 U.S. 367, 381 (2004); *Citibank v. Fullum*, 580 F.2d 82 (3d Cir. 1978); *US v. Wexler*, 31 F3d 117 (3d Cir. 1995); *US v. Apple MacPro Computer*, 851 F3d 238 (3d Cir 2017); *City of Cleveland v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977); *ILGWU v. Donovan*, 773 F2d 920 (D.C. Cir. 1984)(per curium); *PEPCO v. ICC*, 702 F.2d 1026 (DC Cir. 1993); *In re People's Mojahedin Organization of Iran*, 680 F.3d 832 (D.C. Cir. 2012); *Iowa Util. Bd v. FCC*, 135 F3d 535 (8th Cir. 1998) vacated on other grounds; *In re FCC*, 217 F.3d

> Despite federal appellate courts' general reluctance to grant writs of mandamus, they have uniformly granted such writs in one situation where the district court has failed to adhere to an order of the court of appeals. The Supreme Court has repeatedly held that an appellate court has jurisdiction under 28 U.S.C. §1651 to issue a writ of mandamus to compel an inferior court to comply with an earlier mandate."[7]

The Court explained the rationale for this authority:

> A federal district court has a clear duty to comply with an order decreed by a panel of this circuit. Where the district court has failed to comply with such an order, we have authority under §1651 to issue a writ of mandamus to compel the district court to follow our previous order. Any other rule would severely jeopardize the supervisory role of the courts of appeals within the federal judicial system.[8]

A court's authority to enforce compliance with its mandate applies to federal agencies as well as district courts.[9] For example, in *City of Cleveland v. Federal Power Commission*, the D.C. Circuit granted the city's motion directing the Federal Power Commission to comply with the court's mandate. The court found:

> The decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority. The latter "is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of (the)

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125 (2d Cir. 2000); *Am. Trucking Assoc. v. ICC*, 669 F2d 957 (5th Cir. 1982); *In re March*, 988 F.2d 498 (4th Cir. 1993).

[7] 580 F.2d at 86-87 (citations omitted).

[8] *Id.* at 87.

[9] *City of Cleveland v. FPC*, 561 F2d 344 (DC Cir. 1977); *ILGWU v. Donovan*, 773 F2d 920 (D.C. Cir. 1984)(per curium).

> court deciding the case," and the higher tribunal is amply armed to rectify any deviation through the process of mandamus. "That approach," we have said, "may appropriately be utilized to correct a misconception of the scope and effect of the appellate decision." These principles, so familiar in operation within the hierarchy of judicial benches, indulge no exception for reviews of administrative agencies.[10]

To obtain a writ of mandamus in the Third Circuit, a party must show "(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."[11]

Issues Presented

1. Whether the FCC's decision to repeal and substantially relax broadcast ownership rules without adopting a final definition of "eligible entity" and without analyzing the impact of this decision on station ownership by minorities and women is a clear abuse of discretion because it fails to comply with prior remands of this panel?
2. Whether Citizen Petitioners lack an alternative avenue for adequate relief?
3. Whether, in the absence of a writ, Petitioners will suffer irreparable harm?

Background

The facts in this case are truly extraordinary. Three times, a panel of this Court remanded FCC decisions, directed the FCC take specific actions to address the lack of racial and gender diversity in broadcast station ownership, and retained

[10] 561 F.2d at 343 (footnotes omitted)(parenthesis in original).
[11] *U.S. v. Wright*, 776 F.3d 134 (3d Cir 2015), citing *United States v. Wexler*, 31 F.3d 117, 128 (3d Cir. 1994)(citations omitted).

jurisdiction over the remanded issues. Three times, the FCC has failed to follow these directives. In the most recent remand, this Court directed the FCC to issue a "final order either adopting an SDB- or ODP-based definition (or something similar) or concluding that it cannot do so" to allow any aggrieved parties to seek judicial review.[12]

Although Citizen Petitioners have sought judicial review of the *2d R&O* in No. 17-1107, the FCC issued a new *Reconsideration Order* before the case was even briefed. The *Reconsideration Order* would repeal many of the ownership limits the *2d R&O* found to serve the public interest, and reverse the FCC's prior decision not to adopt an incubator program. At the same time, the FCC issued an NPRM seeking comment on how to design an incubator program. The NPRM asks yet again about how to define "eligible entities," thus calling into question whether the Commission will modify the definition adopted in the *2d R&O* before this Court has had an opportunity to review that decision.

The *Reconsideration Order* does not assess the impact of its actions on minority and female ownership. The ownership consolidation authorized by the new decision would eliminate purchase opportunities for new entrants and, in

[12] *Prometheus III*, 824 F.3d at 49-50 (footnote omitted).

particular, undermine the effectiveness of the Failing Station Solicitation Rule ("FSSR") considered in *Prometheus II* and *III*,[13] and which remains the only ownership rule that the FCC claims is intended to help minorities and women purchase broadcasting stations. The *Reconsideration Order* also exacerbates the FCC's disregard for previous mandates of this Court by denying Citizen Petitioners the opportunity to seek review of a final decision on the definition of "eligible entities." If not stayed, the FCC's most recent order will result in so much consolidation in local media markets and such dramatic impact on ownership diversity, so as to deny Citizen Petitioners adequate relief.

A. Remand Orders in *Prometheus II* and *III*

When this Court decided *Prometheus III* in May 2016, the FCC had not yet issued a final order on remand from *Prometheus II*.[14] In *Prometheus II*, this panel found that "[d]espite our prior remand requiring the Commission to consider the effect of its rules on minority and female ownership…the Commission has in large

[13] 47 C.F.R. §73.3555 Note 7 (permitting waiver of the Local Television Ownership Rule and the Radio/Television Cross-Ownership Rule for failing statins).

[14] The history of events leading up to this extraordinary action by the Commission are laid out in detail in prior decisions. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 382-86 (3d Cir.2004)("*Prometheus I*"); *Prometheus II*, 652 F.3d at 438-44, 465-72.

part punted yet again on this important issue."[15] The Court found that "ownership diversity is an important aspect of the overall media ownership regulatory framework" and "re-emphasize[d] that the actions required on remand should be completed *within the course of the Commission's 2010 Quadrennial Review* of its media ownership rules."[16] The Court also held that the definition of "eligible entity" as a small business "lack[ed] a sufficient analytical connection to the primary issue that [the] Order intended to address," *i.e.*, broadcast ownership by women and minorities.[17]

This Court observed that "the Commission referenced *no* data on television ownership by minorities or women and *no* data regarding commercial radio ownership by women."[18] The Court found the FCC had "no accurate data to cite" and faced "significant challenges" promoting broadcast ownership by minorities and women.[19] The court stated its expectation that the Commission would "act with diligence to synthesize and release existing data such that studies will be available for public review *in time for the completion of the 2010 Quadrennial Review*."[20]

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[15] *Prometheus II*, 652 F.3d at 471.
[16] *Id.* at 472 (emphasis added).
[17] *Id.* at 471.
[18] *Id.* at 470 (emphasis in original).
[19] *Id.* at 470, 472.
[20] *Id.* at 471 n.42 (emphasis added).

Instead of completing the 2010 Quadrennial Review, however, the Commission combined it with the 2014 Quadrennial Review. Several parties, including Citizen Petitioners, sought review of the Commission's failure to conclude the 2010 Quadrennial Review. In *Prometheus III*, this panel found:

> With 12 years having passed since *Prometheus I*, we conclude that the Commission has had more than enough time to reach a decision on the eligible entity definition. We put it on notice of our concerns five years ago in *Prometheus II*. 652 F.3d at 471. We directed it to take action in the course of the 2010 Quadrennial Review, *id.* and then we returned to that topic again to "re-emphasize" our directive, *id.* at 472. However, the Commission has not complied.[21]

As a result, the Court remanded and ordered the Commission:

> pursuant to APA §706(1), to act promptly to bring the eligible entity definition to a close. It 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.[22]

Because this was the Court's "third go-round with the Commission's broadcast ownership rules and diversity initiatives," and "mindful of the likelihood of further litigation" the panel retained jurisdiction over the remanded issues.[23]

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[21] *Prometheus III*, 824 F.3d at 48.
[22] *Id.* at 49-50 (footnote omitted).
[23] *Id.* at 60.

B. The FCC's August 2016 *Second Report and Order*

The FCC responded by issuing the *2d R&O,* completing both the 2010 and 2014 Quadrennial Reviews. While Citizen Petitioners supported the FCC's conclusion that ownership limits remained necessary in the public interest, they sought judicial review because instead of adopting a new definition for "eligible entity," the FCC reinstated the revenue-based definition that this Court found arbitrary and capricious in *Prometheus II*.[24] The FCC cited no additional evidence showing that a revenue-based definition would promote ownership opportunities by minorities and women, nor had it collected additional data, conducted new studies, or even corrected known deficiencies with its data collection.

C. Petitions for Reconsideration of the *2d R&O*

While Petitions for Review of the *2d R&O* were pending,[25] industry groups filed petitions for reconsideration with the FCC seeking repeal the Local

[24] 31 FCCRcd at 9976-83.

[25] In addition to Citizen Petitioners, petitions for review were filed by News Media Alliance, No. 17-1108, Multicultural Media, Telecom and Internet Council ("MMTC") and National Association of Black Owned Broadcasters ("NABOB"), No. 17-1109, The Scranton Times, L.P., No. 17-1110, and Bonneville International Corp., No. 17-1111. These consolidated cases remain pending before this Court.

Television Rule,[26] the Joint Sales Agreement ("JSA") ownership attribution rule,[27] and the Newspaper-Broadcast Cross-Ownership Rule ("NBCO"). [28] In addition, the National Association of Broadcasters ("NAB") asked the FCC to reconsider its decision not to adopt an incubator program.[29]

On February 15, 2017, the FCC moved this Court to suspend its review of Petitioners' claims until the agency ruled on the NAB petition for reconsideration. It argued that the issues on reconsideration overlapped with those on appeal. It also noted that the FCC's composition and leadership had substantially changed since adopting the *2d R&O*, and that two of the then sitting-three Commissioners had dissented.[30] Citizen Petitioners, along with MMTC, urged this Court to deny

[26] That rule permits ownership of two television stations in the same market if: (1) their service areas do not overlap, or (2) if at least one of the stations is not ranked among the top-four stations in the market and at least eight independently owned television stations would remain in the market. 47 C.F.R. 73.3555(b).
[27] This rule attributes ownership to a station that is contractually committed to sell at least 15% of the weekly advertising time of a same-market station. 47 C.F.R. §73.3555 Note 2(k).
[28] The NBCO Rule prohibits common ownership of a daily print newspaper and a full-power broadcast station (AM, FM, or TV) if in the same market. 47 C.F.R. §73.3555(d).
[29] The *2d R&O* rejected the NAB's incubator proposal, finding that it would allow for more consolidation in local radio markets without providing sufficient offsetting benefits. 31 FCCRcd at 10001-02.
[30] FCC Mot. at 4 (Feb. 15, 2017).

the motion to hold in abeyance, at least with respect to their petitions for review, which raised issues separate from those raised by industry petitioners.[31]

On March 1, 2017, this Court requested the FCC to supplement its motion "by identifying specific areas of overlap, if any, between the pending motion for reconsideration and the female/minority ownership rules on which Petitioners are focused." The FCC responded that

> NAB's proposal goes to the crux of Prometheus's complaint: *i.e.*, whether the FCC has taken sufficient steps to promote diversity in ownership. Prometheus contends that the Commission "must adopt measures to improve the current state of ownership" of broadcast stations by women and minorities. NAB maintains that its incubator program would "provide a practical method for increasing ownership diversity." To be sure, Prometheus disagrees with NAB's assessment. But if the Commission concluded that the incubator program would increase station ownership by women and minorities, and if the program's adoption did indeed have that effect, the agency's action on reconsideration could largely undercut – or even render moot – Prometheus's claims.[32]

Citizens Petitioners disagreed, explaining that even if the FCC ultimately adopted an incubator program, "it would not address Citizen Petitioners' fundamental concerns" with regard to the FCC's analysis and pointing out that it would be impossible to assess the effect of an incubator program unless the FCC

[31] Opp. to FCC Mot. (Feb. 27, 2017).
[32] FCC Supp. at 3 (June 26, 2017).

collected and analyzed the data as directed in the prior remands.[33] Citizen Petitioners argued that the FCC "must comply with the instructions in the two prior remands to collect and analyze data necessary to define 'eligible entities' and to assess the impact of its ownership rules (or changes to the rules) on minority and female ownership in broadcasting, *before* making any further decisions regarding the ownership limits."[34]

D. FCC Order on Reconsideration

The FCC's abeyance motion became moot when it granted reconsideration in November 2017. The *Reconsideration Order,* adopted 3 to 2 over strong dissents by Commissioners Clyburn and Rosenworcel, repeals the NBCO and the Radio/Television Cross-Ownership Rules in their entirety.[35] It virtually eliminates the Local Television Ownership Rule by repealing the requirement that at least eight major media outlets must remain after a merger (8-voices test), by replacing a prohibition against ownership of two top-four stations with case-by-case review, and eliminating the JSA ownership attribution rule.[36] Finally, it adopts an NPRM

[33] Response to FCC Supp. at 2 (July 7, 2017).
[34] *Id.* at 10.
[35] 32 FCCRcd at 9821, 9830. The Radio/Television Cross-Ownership Rule limits the number of jointly owned radio and television stations in the same market on a sliding scale depending on the market's size. 47 CFR §73.3555(c)(2).
[36] 32 FCCRcd at 9832-38, 9848-54.

seeking comment on how the Commission might structure an incubator program and how to define "eligible entities" in the program.[37] The NPRM, however, contains no specific proposal upon which stakeholders might comment; thus, it is quite likely that the Commission will have to solicit additional comments if and when it formulates a specific plan.

Argument

The Court should issue a writ of mandamus because the FCC's repeal and modifications of broadcast ownership limits without adopting a final definition of "eligible entity" and without analyzing the impact on station ownership by minorities and women violates the prior remands of this Court and deprives Citizen Petitioners and this Court of any opportunity to review the agency's decisions in the *2d R&O*. Citizen Petitioners have no reasonable alternative remedy and, in the absence of a writ, Petitioners and the public will suffer irreparable harm.

A. The FCC's Reconsideration Decision Clearly Violates the Prior Remands of this Court

The FCC's *Reconsideration Order* violates the Court's remands in multiple ways. First, it fails to adopt a final definition of eligible entity, and instead, issues an NPRM asking how it might define that term for purposes of an "incubator program" that does not yet exist. Second, the Commission eliminates major

[37] *Id.* at 9859-64.

ownership limits without analyzing how repealing these limits will affect broadcast ownership by minorities and women. Finally, the Commission still has not collected and analyzed the information needed to adopt a final definition of "eligible entity" or analyzed the impact of ownership rule changes on ownership diversity.

1. The Commission violates the mandate that it adopt a final order defining "eligible entity"

In the *2d R&O*, the Commission reinstated its "previous revenue-based eligible entity definition...that [was] vacated and remanded by the Third Circuit in *Prometheus II*."[38] Responding to comments that the revenue-based standard was not an effective means to increase ownership by women and minorities, the FCC insisted that was irrelevant because it would help small businesses and new entrants.[39] Although the FCC acknowledged that the Court had instructed it to consider other definitions "including a proposal based on the SDB definition employed by SBA,"[40] it nonetheless rejected an SDB or any other race- or gender-conscious eligible entity standard. It concluded that "there is no evidence in the record that is sufficient to satisfy the constitutional standards to adopt race- or

[38] 31 FCCRcd at 9979-80.
[39] *Id.* at 9980-81.
[40] *Id.* at 9984.

gender-conscious measures."[41] While this conclusion was disappointing, at least it provided a final decision allowing Citizen Petitioners to seek judicial review, which they promptly did in No. 17-1107.

The *Reconsideration Order,* however, reversed the *2d R&O's* rejection of an incubator program and agreed with NAB that it should adopt one.[42] But the FCC did not actually adopt an incubator program. It merely asked a series of questions including: what activities should qualify; how to ensure that the incubation program was necessary for new entry; whether the costs of the program would exceed the benefits; how to prevent unauthorized transfers; whether waivers should be limited to radio or to certain markets; how to review incubation proposals; and how to monitor compliance.[43] Significantly, it did not propose a definition for "eligible entity" for the incubator program, but sought comment on four options including revenue-based and SDB.[44] Given the number of questions set forth in the NPRM, the FCC is unlikely to adopt an incubator any time soon.

Thus, issuance of the NPRM effectively renders the *2d R&O*'s definition of eligible entity nonfinal and unreviewable in contravention of the Court's intent in

[41] *Id.* at 9987.
[42] 32 FCCRcd at 9858.
[43] *Id.* at 9860-64.
[44] *Id.* at 9861-62 (the other options are new entrant and overcoming disadvantage).

Prometheus III. These actions also violate *Prometheus II's* mandate to adopt a new definition of eligible entity *within the course* of the 2010 Quadrennial Review and *Prometheus III's* mandate "to act promptly to bring the eligible entity definition to a close."[45]

2. The Commission violated the mandate by eliminating ownership limits without analyzing how their repeal will affect broadcast ownership by minorities and women

Prometheus II directed the FCC to "consider the effect of its rules on minority and female ownership."[46] As Commissioner Clyburn's dissent pointed out, that required the FCC to:

> [a]t a minimum, in adopting or modifying its rules, … "examine the relevant data and articulate a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." Here, the Commission flips those instructions on its head by concluding without the benefit of any new data that "we cannot continue to subject broadcast television licensees to aspects of the Local Television Ownership Rule that can no longer be justified based on the unsubstantiated hope that these restrictions will promote minority and female ownership."[47]

The *Reconsideration Order* repeals and modifies broadcast ownership limits without any serious assessment of the impact on minority and female ownership.

[45] 824 F.3d at 49.
[46] *Prometheus II*, 652 F.3d at 471.
[47] 32 FCCRcd at 9892, citing *Prometheus II*, 652 F.3d at 469.

Although the Commission purports to find that repeal of the NBCO and Radio/Television Cross Ownership Rules and modification of the Local Television Rule are not likely to harm minority and female ownership, it largely relies on the flawed reasoning in the *2d R&O.*[48] Yet those are the very finding that Citizen Petitioners sought to challenge in No. 17-1107. Moreover, as Commissioner Clyburn points out in her dissent, the *Reconsideration Order* has *no* analysis of how eliminating the JSA ownership attribution rule harms minority ownership.[49]

3. The Commission still has not complied with the mandate to collect necessary data and has now taken steps that make the agency's data collection even less reliable

Despite specific directions in *Prometheus II* to collect and analyze the necessary data, the FCC acknowledged in the *2010 Quadrennial Review NPRM* that its data on station ownership by women and minorities was insufficient and incomplete. It did commit, however, to improve its ownership data collection using its revised, electronic Form 323, Biennial Ownership Report.[50] It soon became apparent that the FCC could not accurately verify, cross-reference, and aggregate the ownership data because many owners opted to file using a special

[48] *Reconsideration Order*, 32 FCCRcd at 9821-26 (NBCO); 9822-24 (radio-TV), 9830-31 (local TV).
[49] *Id.* at 9892.
[50] 26 FCCRcd 17489, 17550 (2011).

registration number instead of a unique identifier known as the FCC Registration Number. It was not until January 2016 that the FCC finally adopted a "fix" for the problem.[51] But as Citizen Petitioners explained in a filed a letter pursuant to FRAP Rule 28(j), this "fix" would not take effect until December 2017.[52] After these changes were made, this panel directed in *Prometheus III* that if the FCC needed more data to comply with the remand, "it must get it."[53] Despite this directive, the Media Bureau did not release the 2015 Form 323 ownership data until May 2017.[54] Yet, the FCC never sought comment on that report, nor does the *Reconsideration Order* even mention this new data.[55]

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[51] *Promoting Diversification of Ownership in the Broadcasting Services*, 31 FCCRdd 398 (2016).

[52] Letter from Angela J. Campbell to Marcia M. Waldron, Clerk of Court (Feb. 25, 2016). The December 2017 date for filing the next Biennial Ownership Reports has since been extended to March 2018. *Promoting Diversification in the Broadcasting Service*, 32 FCCRcd 6720 (MB 2017).

[53] 824 F.3d at 49.

[54] *Third Report on Ownership of Commercial Broadcast Stations*, 2017 WL2021282 (FCC)(May 2017).

[55] The Report compares the 2015 data with the 2013 data by type of broadcast station, race, ethnicity and gender. In many cases, station ownership by minorities decreased. The number of full power television stations owned by racial minorities, for example, fell from 41 (3%) in 2013 to 36 in 2015 (2.6%). *Id.* at *3. Even when increases occurred, they were modest. The number of stations controlled by women, for example, increased from 87 (6.3%) to 102 (7.4%). *Id*. at *4.

Far from improving its data collection, the FCC has taken steps that undermine the completeness and accuracy of its ownership data. In April 2017, the FCC reversed a prior decision requiring noncommercial stations to file ownership reports using FCC registration numbers.[56] By allowing noncommercial stations to instead use Special Registration Numbers, the accuracy and completeness of the Form 323 data is reduced.

Even worse, in May 2017 FCC requested comment on ways to reduce reporting requirements on broadcasters.[57] Broadcasters urged the Commission to cut back or even eliminate the filing of Form 323 altogether.[58] Evidencing its sympathy with these requests, the FCC granted NAB's request to suspend the December 2017 deadline for filing the 2017 ownership data,[59] and extended the filing deadline until March 2018.[60] These actions demonstrate the need for a

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[56] *Promoting Diversification of Ownership in the Broadcasting Services*, 32 FCCRcd 3440 (2017), *reversing* 31 FCC Rcd 398 (2016).
[57] *Modernization of Media Regulation Initiative*, MB Docket No. 17-105 (Apr. 27, 2017).
[58] For example, NAB asked that stations should only be required to file Form 323 ownership reports when a license is obtained or transferred. NAB Comments, Docket No. 17-105 at 14-17 (July 5, 2017). CBS, Disney, Fox and Univision urged that publicly trade corporations should not have to file biennial reports at all. CBS Comments, Docket No. 17-105, at 3 (July 5, 2017).
[59] Letter from Rick Kaplan to Michelle Carey, Docket No. 07-294 (July 19, 2017).
[60] *Promoting Diversification in the Broadcasting Service*, 32 FCCRcd 6720 (MB 2017).

special master set and supervise a timetable and parameters for the collection and analysis of data to meet the court's mandate.

B. Citizen Petitioners have no alternative remedy

That the FCC still has not complied with three prior remands of this panel demonstrates that seeking judicial review of the *Reconsideration Order* will not provide Citizen Petitioners with meaningful relief. And, as the Third Circuit explained in *Citibank*, a "litigant who...has obtained judgment in this Court after a lengthy process of litigation...should not be required to go through that entire process again to obtain execution of the judgment of this Court."[61]

Here, the Court already determined seven years ago that Citizen Petitioners were entitled to relief. Although Citizens Petitioners have sought review of the *Reconsideration Order* to protect their interests, it would be particularly unfair and unproductive to deny them relief pending the outcome of the new appeal. As this Court is well aware, appeals can go on for years. Without a stay, Citizen Petitioners' efforts to obtain meaningful relief would be futile.

Further, without a special master, Citizen Petitioners cannot obtain relief. In *Prometheus III* the Court directed the parties to mediate on fixing a timetable for

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[61] *Citibank*, 580 F.2d at 90, citing *General Atomic Co. v. Felter*, 436 U.S. 497, 497, 98 S.Ct 1939, 1941 (1978).

agency action, and further concluded that if the parties were not able to agree within 60 days on an appropriate timeline, the Court would promulgate a schedule it deemed appropriate.[62] Prompted by the Court's action, the FCC issued its order within three months of the Court's mandate. Now that the FCC has reversed course, Citizen Petitioners seek appointment of a special master to ensure FCC compliance.

C. Failure to issue a Writ would result in irreparable harm to Petitioners and the Public

If the *Reconsideration Order* is allowed to take effect on February 7, 2018, it will increase media concentration significantly and eliminate the few remaining opportunities for minorities and women to purchase broadcast stations. As Commissioner Rosenworcel put it: "As a result of this decision, wherever you live the FCC is giving the green light for a single company to own the newspaper and multiple television and radio stations in your community."[63]

The FCC's action encourages media consolidation in many ways. First, the *Reconsideration Order* will immediately "moot" a large number of existing temporary waivers of the ownership limits. In many communities where a licensee

[62] *Prometheus III*, 824 F.3d at 50 (citing *Public Citizen Health Research Group*, 314 F.3d 143, 159 (3d Cir. 2002)).
[63] 32 FCCRcd at 9901.

has acquired a second local television station under a Failing Station waiver,[64] a waiver will no longer be necessary. Similarly, temporary waivers of the NBCO rule will also become moot.[65]

Second, by repealing the JSA attribution rule, repealing the 8-voices tests, and granting "case-by-case" waivers of the top-four rule, many television stations with JSAs or other sharing agreements with one or more stations in the same market will be able to purchase those stations outright. As of 2015, 86 of the 210 television markets had one or more JSA.[66] It is standard industry practice for stations with JSAs or other sharing arrangements to also have options to purchase the stations in the event that the FCC rules are changed to allow outright purchase.[67] When these options are exercised and the transferred approved by the

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[64] 47 C.F.R. §35.5553 Note 7.

[65] In the *2006 Quadrennial Review Order*, 23 FCCRcd 2010, 2055-57 (2008), for example, the FCC granted numerous temporary waivers for newspaper-broadcast combinations, and many of the "temporary waivers" have been extended for long periods of time. *See, e.g.*, *Fox Television Stations, Inc*. 29 FCCRcd 9578-99, 9583 (2014).

[66] Government Accountability Office, Local Media Advertising, FCC Should Take Action to Ensure Television Stations Publicly File Advertising Agreement, GAO-16-349 (March 2016).

[67] *See*, *e.g.*, *Malara Broadcasting Group*, 19 FCCRcd 24070, 24070 (MB 2004). The Media Bureau has explained that when "a broadcaster that has entered into a sharing arrangement with another same-market station in which it also has a contingent financial interest, such as an option to purchase the station…may obtain a degree of operational and financial influence that deprives the licensee of the

FCC, the public loses an independent voice and new entrants are deprived of the opportunity to purchase the station.

Fourth, repealing the JSA attribution rule, which attributed ownership if a station sold 15% of the advertising on another in market station, will allow one station in a market to contract to sell all of the advertising on all of the stations in the market. These agreements can take place immediately after the *2d R&O* is effective, without any prior FCC review or approval.

Fifth, modifications of the Local Television Ownership Rule will facilitate Sinclair Broadcast Group's pending acquisition of Tribune Media Co. for $3.9 billion.[68] If approved, Sinclair will become the country's largest station owner with 223 TV stations serving 108 markets, including 39 of the 50 fifty markets.[69] The FCC was close to approving the deal when Sinclair indicated that it might seek

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second station of its economic incentive to control programming." *Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests*, 29 FCCRcd 2647 (MB 2014), rescinded, *Rescission of March 12, 2014, Broad. Processing Guidance Relating to Sharing Arrangements and Contingent Interests*, 32 FCCRcd 1105 (MB 2017).

[68] John D. McKinnon and Joe Flint, FCC Rolls Back Limits on Local Broadcast Ownership, Wall Str. J. (Nov. 16, 2017)("most immediate beneficiary of the relaxed rules will be Sinclair Broadcast Group, as some of the changes could smooth the way for its proposed acquisition of Tribune Media Co.").

[69] Brian Fung, *FCC weakens limits on owning TV stations, easing Sinclair-Tribune deal,* L.A. Times (Nov. 15, 2017).

approval under the new rules to control two top-four stations in 10 major cities where both Sinclair and Tribune own top-four television stations.[70] If Sinclair decides not to amend its application to seek approval to own two top-four stations, the FCC is likely to act quickly and allow the merger to be consummated.

Sixth, as reported by the *Wall Street Journal*, the FCC's actions "are likely to touch off a wave of deal-making, reordering the local-TV landscape." It notes that several "large broadcasting groups, include Nexstar Media Group and Tegna Inc., have previously indicated to Wall Street that they would be looking for opportunities to expand if the current regulations were loosened," and that the Nexstar CEO said it was already in discussion to acquire more stations.[71]

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[70] FCC practice is to act on mergers within 180 days after an application is filed. On January 11, 2018, the FCC stopped the clock on Sinclair's acquisition of Tribune as of January 4 (day 167), to give Sinclair time to evaluate the need for divestures and top-four showings in light of the changes made in the Reconsideration Order. Letter from Michele M. Carey to Miles S. Mason, MB Docket No. 17-179 (Jan. 11, 2018). Todd Shields, *FCC Pauses Its Review of Sinclair Purchase of Tribune Media*, Bloomberg Politics (Jan. 12, 2018).

[71] John D. McKinnon and Joe Flint, *FCC Rolls Back Limits on Local Broadcast Ownership*, Wall Str. J. (Nov. 16, 2017). *See also* Cecilia Kang, *FCC Opens Door to More Consolidation in TV Business*, NY Times (Nov. 16, 2017); Communications Daily, 2017 WLNR 35031392 (Nov. 7, 2017)(Gray Television CEO expects that mergers and acquisitions of stations will pick up "fairly rapidly after the FCC comes to a final conclusion," and his company plans to take advantage of that opportunity).

Commissioner Clyburn, likewise expects massive consolidation as a result of the *Reconsideration Order*:

> [with] today's action, coupled with recent FCC actions, including the reinstatement of the UHF discount…we have paved the way for a new crop of broadcast media empires that will be light years removed from the very local communities they are supposed to serve.[72]

She notes that "[a]s MMTC and NABOB pointed out in a recent joint filing, non-attribution of JSAs coupled with the repeal of the eight voices test could enable a single company to "completely dominat[e] [a] market's television advertising sales and mak[es] new entry impossible."[73]

If not stayed, the few stations controlled by women and minorities are likely be purchased by large group owners. A study commissioned by the FCC found that when the FCC last relaxed the Local Television Rule in 1999, minority ownership decreased, while 25 largest television station owners were able to increase their holdings.[74]

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[72] 32 FCCRcd at 9890.
[73] *Id.* (citations omitted).
[74] Allen S. Hammond, IV, et al. The Impact of the FCC's TV Duopoly Rule Relaxation on Minority and Women Owned Broadcast Stations 1999-2006, available at https://apps.fcc.gov/edocs_public/attachmatch/DA-07-3470A9.pdf.

Moreover, without a stay, opportunities for minorities and women to acquire other stations will be virtually eliminated. The FSSR,[75] which remains the only ownership rule that the FCC claims is intended to help minorities and women purchase stations,[76] will have no effect in the absence of local ownership limits because there will no longer be a need to obtain a waive to acquire a second station in the same market. Yet the FCC failed to even consider how the loss of the FSSR would affect diversity of ownership in the *Reconsideration Order*.

Similarly, the FCC failed to acknowledge the importance of divestitures required by existing ownership rules for creating opportunities for diverse ownership. Commissioner Clyburn explains that "by enforcing the Local Television Ownership Rule, ten new minority and women-owned stations were established."[77] Opportunities for minorities and women to purchase stations may also arise when the Commission requires divestitures in approving large multi-

[75] 47 C.F.R. §73.3555, Note 7 (permitting waiver of the Local Television Ownership Rule and the Radio/Television Cross-Ownership Rule for failing stations).

[76] In *Prometheus I*, the Court found the FCC acted arbitrarily and capriciously in eliminating the FSSR, and the FCC reinstated it in the 2006 Quadrennial Review. 373 F.3d at 420-21.

[77] Clyburn Dissent, 32 FCCRcd at 9891-92, citing Blog Post of FCC Chairman Wheeler and Commissioner Clyburn, *Making Good on the Promise of Independent Minority Ownership of Television Stations* (Dec. 4, 2014).

station transactions.[78] For example, when the FCC approved Nexstar's acquisition of Media General's 67 full power television stations in January 2017, it required the applicants to divest seven television stations to comply with the Local Television Ownership Rule and five more stations to comply with the national TV cap.[79] If the *Reconsideration Order* is not stayed, many large acquisitions can be approved without requiring divestitures, thus eliminating opportunities for minorities and women to purchase these divested stations.

Once massive consolidation occurs, it will be impossible to undo. Citizen Petitioners will be unable to obtain relief once the Commission approves previously impermissible transactions. The public will be irreparably harmed by the loss of diversity and competition, especially in local news.[80]

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[78] *See, e.g., Consent to Transfer Control of Licensees by Shareholders of Media General*, 29 FCCRcd 14798, 14800 (2014).

[79] *Consent to Transfer of Control of License Subsidiaries of Media General, Inc.*, 32 FCCRcd 183, 186 (2017).

[80] Even if the FCC were to condition transfers on the outcome of this appeal, experience demonstrates that the Commission repeatedly fails to enforce such conditions. *E.g, Fox Television Stations, Inc*. 29 FCCRcd 9578-99, 9583 (2014)(granted repeated "temporary waivers" from 2001 through the present); *2006 Quadrennial Review*, 26 FCCRcd 11149, n.5 (2011) (17 successive extensions of divestiture requirement)*; Counterpoint Communications Inc*., 20 FCCRcd 8582 (2005)(describing history of repeated extensions of divestiture requirement). Moreover, it is hard to imagine how once the operations of two or more local television stations are combined, with a single studio, tower, and staff, that one license could be divested in a viable manner.

In these circumstances, this Court has clear authority to prevent any mergers that would violate the current rules pending resolution of this appeal.[81] Indeed, the situation here is similar to that faced by this Court in 2003 when it stayed the effectiveness of the FCC's *2002 Biennial Review Order*. There, as here, Petitioners "alleged harms from industry consolidation contending they would be widespread and irreversible if they occurred" and that the "harm to petitioners absent a stay would be the likely loss of an adequate remedy should the new ownership rules be declared invalid in whole or in part."[82] Concluding that these harms could outweigh the effect of a stay on the other parties, the Court granted a stay to maintain the status quo pending appellate review.

Request for Relief

In sum, Citizen Petitioners respectfully ask the Court to issue a writ of mandamus to

1. stay the effectiveness of the *Reconsideration Order* until 60 days after the adoption of a final, reviewable order adopting or rejecting an eligible entity definition for the promotion of ownership diversity or alternatively,

[81] *FTC v. Dean Foods Co.*, 384 U.S. at 605 (finding ample precedent to support jurisdiction of the Court of Appeals to issue a preliminary injunction preventing the consummation of a merger, when enforcement of any final decree of divestiture would be rendered futile); *FTC v. Penn State Hershey Medical Center*, 838 F.3d 327, 352-53 (2016)(granting a preliminary injunction preventing a merger "since it is extraordinarily difficult to 'unscramble the egg,'" once the merger is consummated).

[82] *Prometheus Radio Project v. FCC*, 2002 WL 22052896 (2003).

pending the outcome of the petition for review in Nos. 17-1107 and 18-1092;

2. appoint a special master to supervise the FCC's compliance with this court's remands with authority to establish performance deadlines, review plans for data collection to assure their adequacy, oversee the implementation of such plans and all other steps necessary to comply with those remands, and issue reports to the Court as necessary with respect to the FCC's performance of the tasks necessary to achieve compliance,

3. enjoin the FCC from approving any broadcast license applications that would be inconsistent with the ownership limits in effect as of this date, and

4. grant all such other relief as may be appropriate to preserve its appellate jurisdiction and to insure compliance with this Court's remands.

Respectfully submitted,

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January 25, 2018

CERTIFICATE OF SERVICE

I, Andrew Jay Schwartzman, hereby certify that on January 25, 2018, I filed the foregoing Emergency Petition for Writ of Mandamus to Enforce the Court's Mandates and For Other Relief with the Clerk of the United States Court of Appeals for the Third Circuit by U.S. mail and by email to

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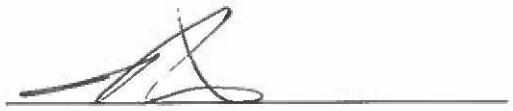

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