

ORAL ARGUMENT HELD ON APRIL 20, 2018

No. 17-1129

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FREE PRESS, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

**ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION**

SUPPLEMENTAL BRIEF FOR PETITIONERS

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May 9, 2018

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GLOSSARY

Bonten	Bonten Media Group
Cunningham	Cunningham Broadcasting Corporation
DMA	Designated Market Area
FCC	Federal Communications Commission
Fox	21st Century Fox
HSB	Howard Stirk Holdings
Sinclair	Sinclair Broadcast Group, Inc.
Tribune	Tribune Media Company
UHF	Ultra High Frequency
VHF	Very High Frequency

Petitioners appreciate the opportunity to supplement their factual showing in support of standing by submitting declarations from members of each organization.

I. Petitioners reasonably believed the administrative record supplemented by a declaration satisfied the standing requirement

Petitioners reasonably, if mistakenly, believed that the administrative record and cases supported their standing. Petitioners' Reply Brief at 6-8, describes harms that their member/viewers face from reinstatement of the UHF discount as documented in the administrative record.¹ The declaration of Matthew F. Wood, Policy Director at Free Press, Pet. Br., Attach. A, supplements the administrative record.²

Based on *Llerandi v. FCC*'s holding that individual viewers are "by definition 'injured'" by actions that undermine FCC ownership rules,³ and *NAACP v. FCC*'s finding that "a group of citizens interested in diverse programming," had standing,⁴ Petitioners believed that they had established standing for their viewer-members.

¹ For example, Petitioners' Reply Comments explained that viewers are harmed when owners acquire multiple stations and seek economies of scale by putting the same news programs on multiple stations and replacing costly programming with programming that is cheap to produce. [JA201-203].

² Wood states that many Free Press "members are regular television viewers" and viewers "are adversely affected by concentration of control in broadcast ownership."

³ 863 F.3d 79, 85 (D.C. Cir. 1988).

⁴ 682 F.2d 993, 999 n.5 (D.C. Cir. 1982).

Petitioners' belief was reasonable, given that this Court has long recognized viewer standing. Neither this nor any other Court has held that organizations must identify particular viewer-members to obtain standing to review an FCC ownership rulemaking. While standing claims can be raised at any time, Petitioners' reasonable belief was reinforced because after the 2009 *Summers* decision, similar standing claims have gone unchallenged in this Court and the Third Circuit,⁵ and neither Respondents nor Intervenors filed dispositive motions to dismiss here.

II. Petitioners' declarations establish standing

Part A of the supplement has declarations for each organization describing its membership and goals. Part B has declarations for 24 member-viewers from 14 different DMAs showing how they are harmed by reinstatement of the UHF discount. Their showings are particularized because they have different reasons for joining a petitioning organization. The harms also differ by location.

As explained below, the declarations are based on the activities of Sinclair.

In some markets Sinclair seeks to acquire its first station, while acquiring a second

⁵ On November 24, 2015, after briefs were filed in No. 14-1090, this Court transferred the case to the Third Circuit. At no time did any party or either Court raise any issue as to standing. *Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016). Nor was standing disputed in *Prometheus Radio Project v. FCC*, 652 F.3d 411 (3d Cir. 2011). When Fox sought review of the *2016 Repeal Order*, Fox and government respondents consented to intervention by some of the same Petitioners here. *Unopposed Contingent Motion to Intervene*, No. 16-1375 (Nov. 22, 2016).

or third in others. In some, Sinclair plans to divest stations as “side cars,” to nominally independent buyers, and then operate them under contract. In seven markets, Sinclair plans to sell stations to Fox, which would increase Fox’s actual reach to 45.9%, 30.4% with the discount.⁶ Finally, some declarants, who live in locations where Sinclair acquired stations last year after reinstatement of the discount, describe how they have been harmed.

Part C includes a recent study of local news by a Professor at Emory University showing harmful effects from increased national reach. Finally, Part D consists of declarations showing harm to members that accompanied Free Press’ Petition to Deny the Sinclair/Tribune application.

A. Representational standing

Petitioner’s organizational declarations show that seeking repeal of the discount is germane to the purposes of the organizations. For example, Free Press advocates for “diverse and independent ownership of media platforms, and journalism that hold leaders accountable and tells people what’s actually happening in their communities.” (A1;Aaron) Media Alliance is a media resource and advocacy center for media workers, non-profit organizations and social justice activists. (A5;Rosenberg).

⁶ Mark K. Miller, *Fox Buying 7 Sinclair Spinoffs for \$910M*, TVNewsCheck (May 9, 2018).

The member declarations show they would have standing to sue in their own right because they establish injury-in-fact, causation and redressability. Moreover, neither the claims asserted nor the relief requested require the participation of individual members.

B. Members' standing

Members meet all requirements for standing.

1. Injury-in-fact

Summers requires “injury-in-fact” that is “concrete and particularized” and “actual and imminent.”⁷

2. Particularization

Members' injuries are particularized because each Petitioner has specific purposes and their viewer-members are affected differently depending on where they reside.

While their purposes overlap, each Petitioner has different interests. For example, Common Cause is concerned about media concentration because it “narrows the available perspectives and stifles the investigation journalism that our democracy depends upon.” (A7;Getachew). UCC is “a faith community...that recognizes the unique power of the media to shape public understanding and thus society.” (A2;Williams). For example, one member states that locally produced

⁷ 555 U.S. 488, 493 (2009).

news “help[s her] understand the concerns of the local immigrant community and the many persons of color who have moved to Northern Virginia.” And UCC members have long sought to promote ownership by women and people of color. (B3c;Fitzgerald).

Petitioners’ standing need not be tied to pending or past transactions relying on the UHF discount. Since both Sinclair’s 2017 Bonten acquisition and its proposed Tribune acquisition depend on the discount, the declarations primarily address the concrete and particularized injuries presented by these transactions.

New York and Los Angeles members will be harmed if Sinclair can acquire its first television station there, vastly extending its reach in the national marketplace for ideas, advertising and programming. (B1;Kim, B2;Kaplan) In fact, KTLA, was a powerful VHF station in Los Angeles before it moved to UHF due to the digital transition. Switching to a UHF frequency had little effect on KTLA’s actual reach, but cut its calculated reach in half.

In markets like Washington, D.C. and Seattle, Sinclair and Tribune already have stations. (B3a;Coppes, B6a;Hovda) Sinclair’s acquisition of additional stations harms members because “large broadcast companies replace locally-produced programming with nationally-produced programming to advantage of supposed ‘efficiencies.’” (B3a;Coppes at 29) Declarants specifically state they are

harméd when Sinclair displaces local news with corporate “must-run” segments or requires local news anchors to read identical scripts. (B4a;Bame, B6c;Denton)

Where FCC local rules preclude Sinclair’s ownership of an acquired station, Sinclair seeks to evade those limits by transferring a station to Cunningham (B5;Westen at 49-51) or HSH (B14a;Hunt). However, Sinclair will actually operate the stations under contract, thus, depriving viewers of additional programming choices. (B5;Westen, B6a;Hovda)

Sinclair plans to sell stations in Seattle, Denver, Cleveland, and four other cities to Fox. If approved, members will be harmed because Fox’s acquisition would lessen competition in both local and national markets and reduce the stations’ incentives to be response to local concerns.

3. Members’ injuries are concrete.

Three declarants have already experienced concrete injuries from Sinclair’s acquisition of the Bonten stations. Sinclair announced its purchase one day after the FCC voted to reinstate the discount. (B13;McLaughlin) Upon acquiring Chico’s KRRCR-TV, Sinclair replaced a long-time local news anchor with someone not familiar the community, required the station run political commentaries on national issues, and required local anchors to read scripted “news stories” such as one on the dangers of airing fake news. (B12b;Comacho).

The harm from Sinclair's Bonten acquisition of is also documented in Declaration C from Professor Martin, who analyzed content and viewership of 743 stations during the latter part of 2017, after Sinclair acquired Bonten. Comparing the Sinclair-acquired stations to other stations in the same markets, he found "acquisition of local television stations produces more ideologically-slanted content that can be distributed in multiple markets, rather than locally-focused content."

Member-viewers are also harmed because concentrated ownership "makes it more difficult for Latinos to find jobs in the television industry as producers, writers, actors, journalists and editors, and to become owners of television stations." (A6;Nogales) It allows big corporations to bid up the price of stations, leaving fewer opportunities for entry by new owners," (B3a;Copps) and undermines efforts "to create open, honest and accountable government" and "empower all people to make their voices heard in the political process." (A7;Getachew).

4. Actual and Imminent

This Court need go no further than Sinclair's purchase of Bonten to find members have incurred and are continuing to incur actual injury. The FCC approved Sinclair's purchase, which without the discount would exceed 39%, just weeks after Petitioners sought review or the *Reinstatement Order* on May 12,

2017.⁸ Members in these markets describe specific and actual harm incurred since Sinclair began operating the stations. For example, stations in Redding “began airing political commentaries produced by Sinclair known as ‘must-runs’ for inclusion in the local newscasts, including the ‘dangers of Fake News’ promotion that was required to be read verbatim by the news anchors on both KRCR and KCVU.” (B12a;Camacho)

For acquisitions that have not yet taken place, the members’ harm is imminent. In particular, the Sinclair/Tribune transaction likely will be approved within weeks or, at most, a few months.⁹ And, as former FCC Commissioners Copps and Tristani explain: “whenever the FCC raises the limits on how many broadcasting stations one company may own, broadcasters quickly seek to exploit those changes.” (B3aCopps, B3bTristani)

C. Members’ Injuries are caused by the FCC’s actions

The harms to members discussed above are undeniably traceable to the FCC’s decision to reinstate the obsolete UHF discount.

⁸ *Bonten Media Group LCC*, 32 FCCRcd 5133 (June 30, 2017); Application for Transfer of Control, File BTCCDT-20170505ABL, Section IV, Question 8 (acknowledging noncompliance with cap).

⁹ The FCC paused its self-imposed voluntary 180-day “shot clock” at day 167, *Sinclair and Tribune*, MB Docket 17-179, <https://www.fcc.gov/transaction/sinclair-tribune>, but Sinclair’s April 24, 2018 amendment likely means that processing will resume within days or weeks. Harry A. Jessell, *Suddenly, Time Is Of Essence For Sinclair/Trib*, TVNewsCheck (Apr. 27, 2018) (approval likely in July or August).

D. Reversing the FCC's decision will redress Petitioners' harms

Reversing the FCC reinstatement of the UHF discount will prevent future acquisitions of television stations that exceed the maximum audience reach, possibly including Sinclair's proposed acquisition of Tribune, depending upon how quickly the FCC acts. Moreover, Sinclair would have to divest the Bonten stations because purchases made after September 2013 were not grandfathered.¹⁰ Members will also benefit when grandfathered station groups are sold because buyers must comply with the national audience reach cap in existence at the time of the purchase.¹¹

WHEREFORE, Petitioners ask that this Court find that Petitioners have standing, reverse and vacate the *2017 Reconsideration Order*, and direct the FCC to remove the last sentence of 47 CFR 73.3555(2).

¹⁰ *Repeal Order*, 31 FCCRcd 10213, 10234 (2016).

¹¹ *Id.*

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This supplemental brief complies with the type volume limitations of 1800 words specified by this Court's April 25, 2018 order because this supplemental brief contains 1780 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

Dated: May 9, 2018

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CERTIFICATE OF SERVICE

I certify that the foregoing brief was filed with the Court by hand and via the Court's ECF system on May 9, 2018, and a copy of the brief was served on all counsel of record by operation of the ECF system on the same date.

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