Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of	)	
	)	
Applications of Tribune Media Company	)	
and Sinclair Broadcast Group	)	MB Docket No. 17-179
For Consent to Transfer Control of	)	
Licenses and Authorizations	)	

COMMENTS OF THE AMERICAN CIVIL LIBERTIES UNION

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I. Introduction

The Federal Communications Commission should deny the assignment of licenses from Tribune Media Company to Sinclair Broadcasting Group. Under Section 310(d) of the Communications Act, the Commission must determine whether a proposed license transfer will serve the public interest, convenience, and necessity, which the Applicants for the proposed license transfer bear the burden of proving.[1] Sinclair and Tribune have failed to meet their burden. This proposed merger, which would create the largest television broadcasting company in history, is anticompetitive to its core, in direct contradiction of the Commission's public interest requirement.

Exposure to a diversity of viewpoints is a cornerstone of the First Amendment. Such diversity is advanced by a competitive marketplace of ideas, where power is not consolidated in the hands of a few speakers—in this case, a few television broadcasting companies. By contrast, the proposed merger not only consolidates an unprecedented amount of market power into one corporate entity, it does so deceptively, purporting to divest Sinclair of control over several stations while simultaneously forming pacts for Sinclair to operate these stations for the new owners. The proposed merger would also violate the FCC's rules on competition in local markets, and would have violated the FCC's ownership cap had the Commission not reinstated an outdated exception to the cap, just in time for Sinclair to qualify for this exception. The consequence of such unprecedented consolidation will be a less equal playing field for local and independent broadcasters who regularly negotiate with this media giant. As a result, consumers of smaller broadcasters—especially those in rural, low-income, and nonwhite communities—will bear the brunt of increased prices and more blackouts. And for consumers of any Sinclair-owned

[1] 47 U.S.C. §§ 214(a), 310(d).

station, the merger's result will be more uniform content, controlled from a distant corporate office.

This last feature of the proposed merger—a corporate headquarters instructing local stations how to report the news—is particularly concerning in Sinclair's case. Sinclair has a well-documented practice of forcing local broadcasters to read ideological scripts, take positions on partisan issues, and play pre-taped segments featuring talking points from White House surrogates. Such a pattern of content control is deeply concerning, no matter where on the ideological spectrum it falls. Overall, Sinclair has failed to explain how any public interest benefits from its proposal outweigh the clear harms that will flow from it. The Commission should deny this proposal.

II. Statement of Interest

The American Civil Liberties Union is a nationwide, non-profit, nonpartisan 26 U.S.C. § 501(c)(4) organization with nearly two million members dedicated to the constitutional principles of liberty and equality. Since its founding in 1920, the ACLU has advocated robust First Amendment protections through litigation and advocacy. The ACLU's interest in the Sinclair-Tribune proposed merger derives from the First Amendment's guarantee of freedom of expression, a guarantee designed to assure citizens a diversity of viewpoints. While the ACLU primarily defends civil liberties against governmental imposition, it also believes that the functions of government include responsibility for restraining private agencies from interfering with those liberties. Thus, even if the government is not itself censoring particular viewpoints, it should restrain private, monopolistic actors from blocking such ideas from the marketplace. In light of these longstanding policies, the ACLU has an interest in ensuring that the Commission

does not approve the creation of a company whose size and established practices would restrict viewpoint diversity.

III. Consolidation in the telecommunications industry harms viewpoint diversity, conflicting with First Amendment principles.

Viewpoint diversity has long been an animating goal of the right to speak freely. Over the course of the twentieth century, the Supreme Court codified this value into U.S. constitutional law. In *Whitney v. California*, Justice Louis Brandeis echoed the Founding Fathers' belief that expansive, wide-ranging debate offers "protection against the dissemination of noxious doctrine."[2] And Justice Oliver Wendell Holmes famously articulated the First Amendment's commitment to the "free trade in ideas," noting that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[3] By the 1960s, the Court had forcefully articulated "a profound national commitment" to "uninhibited, robust, and wide-open" expression of diverse viewpoints.[4]

The Court's application of these principles to regulation of media industries has confirmed that the government not only can but *should* prevent the creation of communications monopolies in its efforts to promote viewpoint diversity. For example, when considering whether the Associated Press violated federal antitrust law, the Court wrote that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[5] First Amendment

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[2] *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
[3] *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
[4] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).
[5] *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

values thus support robust governmental scrutiny of attempts by private actors to repress the free exchange of ideas.[6]

The Supreme Court has extended this logic to the regulation of broadcast media. For example, in *Red Lion Broadcasting Co. v. FCC*, the Court responded to the argument that the First Amendment prohibited the government from taking certain regulatory actions against a radio broadcasting company by stating: "There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."[7] Several decades later, in the context of television broadcasting, the Court in *Turner Broadcasting System, Inc. v. FCC* stated that the "First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."[8]

Indeed, the Supreme Court has repeatedly recognized that longstanding First Amendment values support reasonable government regulation of broadcast companies. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*, the Court explained that the Telecommunication Act's mandate that the FCC "repeal or modify any regulation it determines to be no longer in the public interest"[9] presented a "standard [that] necessarily invites reference

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[6] *Id.*
[7] *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 389 (1969).
[8] *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 657 (1994).
[9] Telecommunications Act of 1996, Pub. L. No. 104-104 § 202(h) (1996).

to First Amendment principles."[10] In fact, the Court has held that the very "purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market."[11] And because "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences," it necessarily follows that this "right may not constitutionally be abridged either by Congress or by the FCC."[12] These statements from the Supreme Court support the idea that the government should act to preserve and promote viewpoint diversity in the broadcasting marketplace.

An uninhibited marketplace of ideas is particularly important in the television broadcasting context, where many Americans form opinions on matters of public debate. Television news, and specifically *local* television news, remains the most widely used news platform in the country: 46 percent of U.S. adults get their news from local television, surpassing print newspapers (20 percent) and the Internet (38 percent).[13] In other words, the stakes for the marketplace of ideas are high. News content conveyed on local television stations, and who controls these stations, play a critical role in determining how our democracy functions.

IV. The proposed merger would create a television broadcast company with unprecedented control over the marketplace, undermining broadcast localism and viewpoint diversity.

The proposed merger runs directly contrary to the above principles. First, the proposed merger's market reach, which has been widely documented,[14] would give Sinclair unprecedented

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[10] *Columbia Broad. Sys., Inc. v. D.N.C.*, 412 U.S. 94, 121–22 (1973); *see also United States v. Midwest Video Corp.*, 406 U.S. 649, 667–69 (1972); *F.C.C. v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 795–96 (1978).
[11] *Red Lion*, 395 U.S. at 390.
[12] *Id.*
[13] Amy Mitchell et al., *The Modern News Consumer*, Pew Research Center (July 7, 2016), http://www.journalism.org/2016/07/07/pathways-to-news.
[14] *See* Comments of Allied Progress in Opposition to the Sinclair-Tribune Merger at 1, 5–14, MB Docket No. 17-179 (Nov. 2, 2017); Reply Comments in Opposition to the Merger by the Att'ys. Gen. of the States of Ill., Md., Mass., and R.I. at 5, MB Docket No. 17-179 (Nov. 2, 2017); Petition to Deny of American Cable Association at 1, 6,

control over television broadcasting. It would make Sinclair the nation's largest television broadcasting company, with its content reaching far more than the 39 percent of American households allowed by the FCC. In the face of FCC pushback and public backlash to the proposal, Sinclair has sought to evade this requirement by 1) selling its biggest acquisitions from Tribune, but forming agreements to operate many of these stations for their new owners,[15] keeping the details of these agreements largely hidden both from regulators and the public;[16] and 2) relying on a recently reinstated yet long discredited FCC rule—known as the UHF discount—that allows media companies to own a greater number of stations while still falling within ownership limits.[17] (At the time of this filing, the FCC was defending the reinstatement of this rule against legal challenge in the D.C. Circuit.[18]) The resulting company will either own or operate some 200 television stations across the country, bringing Sinclair closer to what

10–11, 13–16, 18, MB Docket No. 17-179 (Aug. 7, 2017); Petition to Dismiss or Deny of Dish Network L.L.C. at 1–2, MB Docket No. 17-179 (Aug. 7, 2017); Comments of Free Press at 4–5, MB Docket 17-179 (Nov. 2, 2017); Comments of the National Cable Television Cooperative (NCTC) at 6, MB Docket 17-179 (Nov. 2, 2017); Petition to Dismiss or Deny of Newsmax Media at 2–3, 5, MB Docket No. 17-179 (Aug. 7, 2017); Comments of NTCA–The Rural Broadband Association at 3–4, MB Docket 17-179 (Nov. 2, 2017); Petition to Deny of Public Knowledge, Common Cause, and United Church of Christ, OC Inc. at 5–6, MB Docket No. 17-179 (Aug. 7, 2017); Reply of Public Knowledge at 5, MB Docket No. 17-179 (Aug. 29, 2017).

[15] Stephen Battaglio, *Sinclair Agrees to Sell 23 TV Stations to Gain Approval for Tribune Deal*, L.A. Times (Apr. 24, 2018), http://www.latimes.com/business/hollywood/la-fi-ct-sinclair-tribune-20180424-story.html. The Coalition to Save Local Media, in a letter to the Secretary of the F.C.C, calls this an "extraordinarily distorted view" of what qualifies as a station divestiture. *Letter Regarding Sinclair Amendment*, Coalition to Save Local Media (Feb. 28, 2018).

[16] *See* Letter from American Cable Association at 1, MB Docket No. 17-179 (May 24, 2018) ("Earlier this week, Sinclair submitted its most recent amendment to its proposed merger with Tribune, along with two dozen or so divestiture applications. Yet Sinclair withheld more than 250 agreements, schedules, exhibits, and related documents, including materials that appear to contemplate ongoing relationships between Sinclair and the parties to whom it will putatively divest stations.").

[17] *See* Margaret Harding McGill & John Hendel, *How Trump's FCC Aided Sinclair's Expansion*, Politico (Aug. 6, 2017), https://www.politico.com/story/2017/08/06/trump-fcc-sinclair-broadcast-expansion-241337; Ted Johnson, *Appeals Court Questions Why FCC Revived UHF Discount Rule*, Variety (Apr. 20, 2018), http://variety.com/2018/politics/news/fcc-sinclair-uhf-discount-ajit-pai-1202776761/.

[18] *Free Press v. F.C.C.*, No. 17-1129 (D.C. Cir. filed Nov. 7, 2018).

company founder David Smith has aptly called "an instantaneous final consolidation of the industry."[19]

The effect of such conglomeration will be a crowding out of local ownership of broadcasting stations and reduced viewpoint diversity in the television news market. First, in multiple instances, the new company will violate the FCC's duopoly rule, under which no broadcasting company can own more than one of the top four television stations in any local market. In the past, the FCC has stated that "the public would be exposed to wide variety of viewpoints if ownership of media outlets were diffused among more rather than fewer firms."[20] The Sinclair merger would consolidate the same ownership, and the same viewpoints, among multiple stations in the same local market.

Second, and relatedly, the merger would give Sinclair sufficient market power to drive smaller broadcasters out of business, hitting rural consumers especially hard. With such consolidated ownership, Sinclair will step up its "take it or leave it" retransmission offers to small cable stations, which will result in higher prices passed on to consumers and a crowding out of stations that do not or cannot afford to submit to strong-arm negotiating tactics.[21] Consumers of these small cable stations will also be more likely to experience blackouts.[22] This process will disproportionately harm rural consumers, many of whom rely exclusively on small cable stations for their television broadcasting.[23] Moreover, with a focus on large metropolitan markets as opportunities for growth, Sinclair has offered no plans to expand local news

[19] Price Colman, *David Smith: Sinclair's Singular Visionary*, TVNewsCheck (Feb. 21, 2014), http://www.tvnewscheck.com/article/74320/david-smith-sinclairs-singular-visionary.
[20] Allied Progress Comments at 15, *quoting In Re Echo Star Commc'ns Corp.*, 17 F.C.C. Rcd. 20,559 20,581 (2002).
[21] NCTC Comments at 4.
[22] Petition to Deny of NTCA at 6, MB Docket No. 17-179 (Aug. 7, 2017).
[23] The Rural Broadcasting Association reports that many small cable stations—multichannel video programming distributors, or "MVPDs"—provide rural consumers' *only* access to television broadcasts, as they cannot receive *any* over-the-air signals due to their location. *Id.* at 6.

coverage.[24] Fewer small, independent broadcasters means fewer voices with a dedicated connection to covering local community issues.

If Sinclair's evasive tactics in meeting the FCC's loosened restrictions are successful, the resulting merger will create the largest television broadcasting company in history. In violation of historical FCC principles, this company will exercise monopoly-like control of the market.

V. The proposed merger would be especially harmful to viewpoint diversity given Sinclair's track record of forcing local stations to run or omit ideological content.

Apart from the general concern with a broadcasting company of this size, there are compelling reasons specific to Sinclair Media to deny this proposal. In particular, there is extensive evidence of Sinclair's ideological control of local news broadcasters' content. Examples include:

- In 2004, Sinclair removed an edition of ABC News' *Nightline* from local affiliates because it claimed the edition, which would have read the names of troops killed in Iraq, was intended to hurt President Bush.[25]

- After 9/11, the company required station anchors, including weather forecasters, to read editorials explicitly supporting the Bush administration's "War on Terror."[26]

- Sinclair produced and aired two infomercials coinciding with the 2010 and 2012 elections that accused President Obama of raising campaign money from Hamas.[27]

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[24] Free Press Comments at 6–7. For a discussion of the proposed merger's likely impact on rural consumers, see Comments of NTCA–The Rural Broadband Association.
[25] *Partisan Pablum: How Sinclair's Political Agenda Threats the Quality Local Journalism Consumers Trust*, Allied Progress 6 (2017), https://www.scribd.com/document/356476829/Partisan-Pablum-How-Sinclair-s-Political-Agenda-Threatens-the-Quality-Local-Journalism-Consumers-Trust.
[26] Allied Progress Comments at 17.
[27] *Partisan Pablum*, 9.

- A Sinclair-owned local broadcasting station in Seattle was given an "unusual request" to report on the purported recruiting of paid protestors at President Trump's 2017 inauguration, a story that was later proven false.[28]

- Under Sinclair's "Central Casting" initiative, newscasters at Sinclair-owned television broadcasting stations nationwide are required to read a script which laments "one-sided news stories plaguing our country" and the "sharing of biased and false news," echoing President Trump's criticism of "fake news."[29]

- As many as nine times a week, Sinclair features a "must-run" segment on its local stations across the country entitled "Bottom Line With Boris," a brief, pro-Trump message from former Trump White House official and media surrogate Boris Epshteyn.[30] A veteran broadcaster of the Baltimore Sun calls Epshteyn's segments "as close to classic propaganda as anything I have seen in broadcasting television in the last 30 years."[31]

While such political content may be common on national cable news stations, such as Fox News and MSNBC, local news stations typically avoid opinion punditry on divisive, national politics and emphasize local current events, building community trust in their reporting.[32] In cases where local stations use their discretion to cover political topics, they do so in response to local interest in these topics—not in response to marching orders from a national

[28] Allied Progress Comments at 19.
[29] Melanie Schmitz, *Local TV Forced to Denounce 'One-Sided News' by America's Largest Media Company*, ThinkProgress (Mar. 30, 2018), https://thinkprogress.org/sinclair-forces-reporters-to-read-script-about-fake-news-63ae6fcea30e/.
[30] Hadas Gold, *Sinclair Increases 'Must-Run' Boris Epshteyn Segments*, Politico (Jul. 10, 2017), https://www.politico.com/blogs/on-media/2017/07/10/boris-epshteyn-sinclair-broadcasting-240359.
[31] David Zurawik, *Sinclair Taking Perilous Political Path With Boris Epshteyn*, Baltimore Sun (Jul. 14, 2017), http://www.baltimoresun.com/entertainment/tv/z-on-tv-blog/bs-fe-zontv-sinclair-epshteyn-20170711-story.html.
[32] Allied Progress Comments at 20.

corporate headquarters. This reflects longstanding FCC policy favoring broadcast licenses that relate "to the principal community or other political subdivision which it primarily serves."[33] A top-down requirement that local stations run ideological content detached from local interests runs against this principle.

It is worth emphasizing that the specific, political ideology Sinclair promotes is immaterial to the problem of a national broadcasting company mandating content for local stations.[34] While the similarity between White House talking points and Sinclair's mandated content is concerning, Sinclair's must-run practices would be equally troubling if the required content reflected a different political ideology. The fact that commenters from across the political spectrum have opposed the merger demonstrates that Sinclair's content control is a general problem, not one specific to its conservative politics.[35]

VI. The proposed merger would have negative racial justice implications, based on the disproportionate rate at which people of color rely on local news, on Sinclair's history of airing racially offensive commentary, and on decreased opportunities for minority-owned outlets.

In addition to these broad issues at stake in media conglomeration, the Sinclair merger's impact on local news would disproportionately affect communities of color in at least three ways. First, these communities rely heavily on local news. According to a Pew Research Center study, 41 percent of nonwhite consumers often get news from local television, compared to 35

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[33] *See* 47 C.F.R. § 73.1120. *See also* Petition of Public Knowledge et al. at 3–5.

[34] John Nichols, *The Real Problem With Sinclair*, The Nation (Apr. 2, 2018), https://www.thenation.com/article/the-real-problem-with-sinclair/ ("The mistake that many pundits and partisans will make is to imagine that the controversy regarding Sinclair has to do with conservatism versus liberalism. . . . The real problem is with the amplification of [political] messaging by a media conglomerate that is now the largest owner and operator of local television stations nationwide.").

[35] *See, e.g.*, Petition of Newsmax Media (petition in opposition to Sinclair merger from conservative news commentator); Petition of BMore Indivisible, MB Docket No. 17-179 (Nov. 2, 2017) (petition in opposition to Sinclair merger from group "dedicated to protecting our communities and our values by resisting the Trump agenda" (https://indivisiblebaltimore.org/)).

percent of white consumers. [36] In some cities, the gap is greater: 60 percent of Hispanic consumers in Denver, CO follow local and neighborhood news compared with 43 percent of their white neighbors, and 70 percent of Black consumers in Macon, GA follow local and neighborhood news compared with 43 percent of white consumers.[37] This disparity suggests that people of color rely more heavily on local news and are therefore likely to be disproportionately affected by any manipulation of local news media. Given clear evidence of Sinclair's willingness to tinker with content presented by local news media, communities of color are especially likely to be affected by Sinclair's actions.

Second, Sinclair has not shied away from airing content that is disparaging towards minority groups. As a coalition of civil rights organizations wrote in a letter to FCC Chairman Ajit Pai, Sinclair's must-run stories have regularly included racist content, such as the must-run segment "Terrorism Alert Desk," which "has repeatedly targeted Muslim-Americans and conflated Islam with terror."[38] In 2010, Sinclair aired the documentary, *Breaking Point: 25 Minutes That Will Change America*, which suggested that Barack Obama had once said in a speech, "You want freedom? You're gonna have to kill some crackers! You're gonna have to kill some of those babies."[39] It has also featured on its "must-run" segments former presidential

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[36] *Fewer Americans Rely on TV News; What Type They Watch Varies By Who They Are*, Pew Research Center (Jan. 5, 2018), http://www.pewresearch.org/fact-tank/2018/01/05/fewer-americans-rely-on-tv-news-what-type-they-watch-varies-by-who-they-are/.

[37] *Local News in a Digital Age*, Pew Research Center (Mar. 5, 2015), http://www.journalism.org/2015/03/05/local-news-in-a-digital-age/.

[38] *Letter Regarding Proposed Sinclair-Tribune Merger*, Latino Victory Fund Coalition (2017), https://savelocalmedia.com/files/2017-08-28-lvp-coalition-letter.pdf.

[39] Michael Harriot, *Trump's Favorite News Outlet Is Not Who You Think...and You Should Be Worried*, The Root (Aug. 3, 2017), https://www.theroot.com/trumps-favorite-news-outlet-is-not-who-you-think-and-1797479368.

adviser Sebastian Gorka, who notoriously warned on a Sinclair-produced town hall event that "black Africans" were "murdering each other by the bushel" in Chicago.[40]

Third, the proposed merger would fail to advance the FCC's longstanding goal of adequately representing minorities in broadcast ownership. Since 1978, the FCC has recognized that inadequate representation in minority broadcast ownership is "detrimental not only to the minority audience but to all of the viewing and listening public."[41] And as recently as 2016, a federal appeals court reaffirmed the FCC's "statutory obligation to promote minority and female broadcast ownership."[42] Greater consolidation of the television broadcasting industry will make it more difficult for new licensees to enter this industry.[43] Sinclair's acquisition of Tribune Media only serves to consolidate the industry further, without taking meaningful steps to diversify an already racially stratified market.

VII. Conclusion: The FCC should deny the proposed Sinclair-Tribune merger.

The combination of Sinclair's overwhelmingly dominant market share and its existing practices of mandating ideological content for local television newscasters make the proposed merger a dangerous one for viewpoint diversity in television news broadcasting. The proposed merger's racial justice implications are similarly concerning. For these reasons, the FCC should deny the proposed Sinclair-Tribune merger.

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[40] Rebecca Savransky, *Gorka: 'Black Africans' Are Murdering Each Other 'By the Bushel'*, The Hill (Oct. 24, 2017), http://thehill.com/homenews/news/356867-gorka-black-africans-murdering-each-other-by-the-bushel.
[41] *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C. 2d 979, 980–81 (1978).
[42] *Prometheus Radio Project v. F.C.C.*, 824 F.3d 33, 40 (3d Cir. 2016).
[43] Declaration of Alex Nogales, National Hispanic Media Coalition, *in* Declarations in Support of Supplemental Brief for Petitioners at 13, *Free Press v. F.C.C.*, No. 17-1129 (D.C. Cir. 2018) ("When local television stations are owned by a small number of large corporations such as Sinclair, it 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.").

In accordance with the Commission's rules, we will file a copy of this letter electronically in the docket listed above.

Sincerely,

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