ORAL AGUMENT NOT YET SCHEDULED

No. 18-5214

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

UNITED STATES OF AMERICA,
Plaintiff/Appellant,

V.

AT&T INC., DIRECTV GROUP HOLDINGS, LLC,
AND TIME WARNER INC.,
Defendants/Appellees.

On Appeal from the
United States District Court for the District of Columbia
No. 1:17-cv-2511 (Hon. Richard J. Leon)

BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF NEITHER PARTY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

A. Parties and *Amici*

Except for the following *amici,* all parties, intervenors, and *amici* that appeared before the district court and in this Court are listed in the Appellant's and Appellees' briefs: Chamber of Commerce of the United States of America, National Association of Manufacturers, Business Roundtable, Small Business & Entrepreneurship Council, U.S. Black Chambers, Inc., and the Latino Coalition; the States of Wisconsin, Alabama, Georgia, Louisiana, New Mexico, Oklahoma, South Carolina, Utah, and the Commonwealth of Kentucky; and 37 Economists, Antitrust Scholars, and Former Government Antitrust Officials.

B. Rulings Under Review

The rulings under review are listed in the Appellant's brief.

C. Related Cases

Counsel for *amicus* are not aware of any related case pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Reporters Committee for Freedom of the Press certifies that it is an unincorporated association of reporters and editors with no parent corporation and no stock.

RULE 29(a)(4)(E) CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the Reporters Committee for Freedom of the Press certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person – other than *amicus*, its members, or counsel – contributed money that was intended to fund preparing or submitting the brief.

CIRCUIT RULE 29(d) CERTIFICATION

The Reporters Committee for Freedom of the Press certifies that the filing of this brief is necessary because no *amici* have addressed whether the trial court should have ordered discovery further to Appellees' selective enforcement defense.

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Pursuant to Federal Rule of Appellate Procedure 29(a)(2) and Circuit Rule 29(b), *amicus* has filed a motion for leave to file an *amicus curiae* brief out of time.

STATUTES AND REGULATIONS

Pursuant to Circuit Rule 28(a)(5), all applicable statutes and regulations are contained in the Appellant's brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press was founded by leading journalists and media lawyers in 1970 when the First Amendment, and the need for an informed public, were under threat from an unprecedented wave of government subpoenas forcing reporters to name confidential sources. The Reporters Committee has an interest in ensuring that retaliatory motive is not infecting regulatory enforcement decisions that affect the press. This interest is heightened today in light of the president's manifest animus toward journalists and news outlets that he perceives as critical.

Appellant argued in its brief before this Court that the district court "substantially constrained" the government's evidentiary presentations. Appellant's Br. 21. Appellees responded by noting prominently in their brief that the district court denied Appellees' motion for "discovery on whether political animus against CNN unconstitutionally influenced [the government's] decision to sue." Appellees' Br. 20 (citing JA __-__ (District Court's Mem. Op. 45-46)).

In denying the motion, the district court stated that it would be "difficult to even conceptualize how a selective enforcement claim applies in the antitrust context." JA _; *United States v. AT&T*, 290 F. Supp. 3d 1, 4 (D.D.C. 2018). *Amicus* fears the district court thus applied an erroneous standard that would make it exceedingly challenging, if not impossible, for news organizations to obtain

discovery in cases where this administration, or any other, selectively enforces antitrust or other complex regulations or laws to punish negative – or coerce positive – news coverage.[1]

As the Reporters Committee is already before this Court as *amicus* in support of Appellant's motion to release sidebar transcripts, it now also writes on this question, and asks the Court to clarify the standard for discovery in selective enforcement cases that implicate the "suppress[ion of] protected expression." *See United States v. The Irish People, Inc.*, 684 F.2d 928, 956 (D.C. Cir. 1982) (Wald, J., writing separately) [hereinafter *Irish People I*].

[1] The district court's ruling on selective enforcement concerns a legal issue of significant public interest, and *amicus* seeks to provide arguments and "points not made or adequately elaborated upon" in either the Appellant's or Appellees' briefs. *See* D.C. Cir. R. 29. Indeed, *amicus* is in the best position to present this issue, as Appellees seek affirmance of the district court's judgment and Appellant prevailed on the matter below. *Amicus* seeks to file in response to the prominent discussion of the quashing of discovery into selective enforcement in the opening paragraphs of Appellees' brief, and *amicus* submits the issue is properly before this Court. In the alternative, *amicus* notes that the Supreme Court has not hesitated to address matters of particular public import even when raised initially by *amici*. *See Teague v. Lane*, 489 U.S. 288, 300 (1989) (retroactivity on fair cross-section claim); *Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961) (application of exclusionary rule to states). And it is well-settled that appellate courts have "the power not only to correct errors of law in the judgment under review but also to make such disposition of the case as justice requires." *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 678-79 (1940) (citations omitted).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises, like the most consequential First Amendment case in our jurisprudence, "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Since he took office twenty months ago, the president of the United States has repeatedly sought to undermine this commitment by threatening members of the press with retaliation for news coverage he perceives as unfavorable or unfair. While the threats vary in form and substance, they converge around a single censorial theme. That is, the president wants to – and will – use the levers of state power to punish news organizations he sees as adversarial to his interests.

This threatening conduct violates what centuries of experience as a nation have taught us to be the central meaning of the First Amendment: that speech containing sharp criticism or commentary of public officials, even speech that we once may have called seditious, cannot be made the subject of government sanction. *See* Harry Kalven, Jr., *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 205 (1964) ("My point is not a tepid one that there should be leeway for criticism of the government. It is rather that defamation of the government is an impossible notion for a democracy.").

Amicus takes no position on the merits of this merger. But *amicus*, and this Court, cannot ignore both the president's avowed desire to punish news coverage he sees as critical, and his specific threats to this merger and to CNN based on protected First Amendment activity. Nor can correcting the district court's error in denying discovery of selective enforcement be saved for another day.

The president has called CNN "fake news" and an "enemy of the people." He tweeted a video of him body-slamming a man with a CNN logo for a head. He retweeted another image of a train hitting a CNN reporter. *The New York Times* reported that Trump's advisors discussed using the merger as leverage to influence CNN's coverage. Earlier, then-candidate Trump vowed on the stump that he would not approve the AT&T/Time Warner merger. Economic advisor Peter Navarro confirmed that Trump's opposition was related to CNN, saying, "AT&T, the original and abusive 'Ma Bell' telephone monopoly, is now trying to buy Time Warner and thus the *wildly anti-Trump CNN*." Julia Edwards and Diane Bartz, *AT&T-Time Warner Deal Sparks Calls for Scrutiny in Washington*, Reuters, Oct. 23, 2016, https://perma.cc/T3JX-XNBZ (emphasis added).

President Trump also often speaks of influencing enforcement decisions that would typically be left to the discretion of a prosecutor or a relevant agency. For instance, the president has made it very clear to the Justice Department that he believes it should drop the special counsel's Russia investigation. Similarly, and

apropos of this case, the president took the Federal Communications Commission (FCC) to task in July for not approving Sinclair Broadcast Group's acquisition of Tribune Media, calling the decision of the independent agency "[d]isgraceful!"

It is in this context that the Justice Department decided to sue to block the merger, the first time it has litigated a vertical merger challenge to trial, and the first one not approved with conditions, in four decades.

It is also in this context that Appellees sought discovery to determine if evidence existed that the president translated his extraordinary rhetoric around CNN into improper pressure on the Justice Department, pressure that would also serve as a signal to the press as a whole that it exercised its constitutional right to free and independent coverage of this administration upon pain of regulatory harassment, financial cost, and ongoing intimidation.

The district court denied Appellees' motion, finding that Appellees had fallen "far short" of showing that the enforcement decision was selective, as required under *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (requiring "some evidence" of both discriminatory intent and effect to obtain discovery on selective enforcement defense in criminal prosecution).

Crucially, the district court wrote that it is "difficult to even conceptualize how a selective enforcement claim applies in the antitrust context" because of the highly fact-specific nature of a merger challenge. JA _; *AT&T*, 290 F. Supp. 3d at

4. The logical implication of the district court's decision is that a myriad of complex regulatory actions will be immune from discovery to seek direct evidence of selective enforcement – and will, therefore, practically speaking, be immune from that defense. The district court's analysis could preclude discovery even in cases where a chief executive said he would happily selectively enforce the law, such as by revocation of a television network affiliate's license or commencement of an antitrust case against Amazon, for example, whose CEO and founder owns *The Washington Post*, or Salesforce, whose co-CEO and founder just purchased *Time* magazine.

Amicus urges this Court to clarify that in cases like this one, where selective enforcement could chill news reporting in the public interest, and where there is strong evidence of discriminatory intent, courts may order discovery. Additionally, or alternatively, *amicus* urges the Court to clarify that the decision to litigate this case to trial presents "some evidence" of selectivity, and that, in light of copious evidence of discriminatory intent on the part of the president, discovery was warranted under the plain terms of *Armstrong*.

While *Sullivan* recognized that outright seditious libel cannot survive under the First Amendment, more subtle and insidious avenues to accomplish the same end can be found in, for instance, the antitrust laws. It is precisely because of that subtlety and the potential for abuse that *amicus* seeks the Court's guidance.

ARGUMENT

I. The overwhelming hostility to CNN in the public record supports discovery into selective enforcement.

Conclusive evidence exists of discriminatory intent and improper motive on the part of the president, in the form of repeated public statements evincing animosity for CNN, for this merger, and for the press as a whole.[2] *See Branch Ministries, Inc. v. Richardson*, 970 F. Supp. 11, 17 (D.D.C. 1997) (finding discovery necessary because direct evidence is rarely available without it); *see also Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (holding inquiry into discriminatory motive "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available").

A. The president has clearly articulated his antipathy to CNN.

In the past two years, President Trump has repeatedly attacked CNN for coverage that he perceives as critical, calling the network "fake news," "garbage journalism," and the "enemy of the people." *See, e.g.*, Donald J. Trump (@realDonaldTrump), Twitter (Aug. 29, 2018, 7:40 AM), https://perma.cc/N23C-

[2] The president's hostility to the AT&T/Time Warner transaction, to CNN, and to the press as a whole is often expressed in tweets, which the White House has confirmed are official statements. Elizabeth Landers, *White House: Trump's Tweets are 'Official Statements,'* CNN, June 6, 2017, https://perma.cc/UN3E-WVGU. Though they may not be in the record, the Court can take judicial notice of President Trump's tweets and the news stories cited here.

KXAT. The president's attacks on CNN are often laced with violent imagery. For instance, on July 2, 2017, the president tweeted a video of him appearing at WrestleMania, the annual World Wrestling Entertainment event, in which he body-slammed WWE head Vince McMahon and repeatedly punched him the face. The video superimposed the CNN logo over McMahon's head. Michael M. Grynbaum, *Trump Tweets a Video of Him Wrestling 'CNN' to the Ground*, N.Y. Times, July 2, 2017, https://perma.cc/WTU3-T6KJ.

The following month, President Trump retweeted and then quickly deleted an image of an individual, whose head had again been replaced by a CNN logo, being hit by a train. The caption on the image reads: "Fake news can't stop the Trump train." Eileen Sullivan and Maggie Haberman, *Trump Shares, Then Deletes, Twitter Post of Train Hitting Cartoon Person Covered by CNN Logo*, N.Y. Times, Aug. 15, 2017, https://nyti.ms/2i1WjMD.[3]

This manifest animosity has translated into tangible and repeated retaliation against CNN by the White House press office and the president. For example:

[3] Though it did not involve CNN, the president recently appeared to praise Rep. Greg Gianforte's (R-MT) physical assault of the *Guardian* reporter Ben Jacobs. Paige Williams, *Sarah Huckabee Sanders, Trump's Battering Ram*, New Yorker, Sept. 24, 2018, https://bit.ly/2xeEgYM (quoting the president as saying at a Montana rally that Gianforte has "fought – in more ways than one – for your state").

- On January 11, 2017, the president-elect refused to take a question from CNN's lead White House reporter, Jim Acosta, saying, "[Y]our organization is terrible" and "[Y]ou are fake news." Amber Jamieson, *'You are fake news': Trump Attacks CNN and BuzzFeed at Press Conference*, Guardian, Jan. 11, 2017, https://perma.cc/Y77N-9QVN. He did the same again in July 2018. Michael M. Grynbaum, *'Fake News' Goes Global as Trump, in Britain, Rips the Press*, N.Y. Times, July 13, 2018, https://nyti.ms/2PPEiNm;
- In February 2017, then-Press Secretary Sean Spicer barred CNN, *The New York Times*, Politico, the *Los Angeles Times*, and BuzzFeed from a "gaggle" at the White House. *See* David Folkenflik, *Lashing Out Against Critical Reports, White House Bars Outlets from Briefing*, Nat'l Pub. Radio, Feb. 24, 2017, https://n.pr/2MRC1iW;
- In August 2017, President Trump railed against CNN at a rally in Phoenix, saying, "[A]nd then you wonder why CNN is doing relatively poorly in the ratings. Because they're putting like seven people all negative on Trump. And they fired Jeffrey Lord, poor Jeffrey." The president continued: "But for the most part, honestly, these are really, really dishonest people, and they're bad people. And I really think they

don't like our country." Transcript of President Trump's Speech in Phoenix, Time, Aug. 23, 2017, https://ti.me/2worjMQ;

- On December 12, 2017, Press Secretary Sarah Sanders reportedly pulled Acosta aside at a bill signing and "pool spray" (where reporters often ask questions) and suggested that if he asked a question of the president, she could not guarantee that he would be admitted to similar events in the future. Tom Kludt, *Sarah Sanders Warns CNN's Jim Acosta: Ask Trump a Question, It Could Cost You*, CNN, Dec. 12, 2017, https://perma.cc/N27U-Z4RQ;
- On July 27, 2018, *The Washington Post* reported that President Trump had repeatedly tried to get his staff to ban reporters from press events whom he perceived as critical. Staff recently did exactly that by barring CNN reporter Caitlin Collins from a Rose Garden event after she asked the president a question while serving as the pool representative. Philip Rucker et al., *Venting About Press, Trump has Repeatedly Sought to Ban Reporters Over Questions*, Wash. Post, July 27, 2018, https://perma.cc/5H9Q-JBCZ.

B. The president has repeatedly attacked this merger.

The president has also repeatedly expressed opposition to the merger, and his campaign confirmed that this opposition is linked to dislike for coverage at

CNN that President Trump perceives as critical. At a rally on the weekend the merger was made public, then-candidate Trump said that he would not approve the merger if elected. Ted Johnson, *AT&T, Time Warner Chiefs Grilled on Donald Trump's Campaign Promise to Block Merger*, Variety, Dec. 7, 2016, https://perma.cc/CL85-EEKG.

The following Sunday, the campaign's economic advisor, Peter Navarro, released a statement connecting President Trump's opposition to the content on CNN. "AT&T, the original and abusive 'Ma Bell' telephone monopoly, is now trying to buy Time Warner and thus the wildly anti-Trump CNN," Navarro said. Edwards and Bartz, *supra* at 4.

On May 11 of this year, the president revived his public opposition to the merger, tweeting, "Why doesn't the Fake News Media state that the Trump Administration's Anti-Trust Division has been, and is, opposed to the AT&T purchase of Time Warner in a currently ongoing Trial. Such a disgrace in reporting!" Donald J. Trump (@realDonaldTrump), Twitter (May 11, 2018, 4:49 PM), https://perma.cc/89JM-ZCZV.

The president's public statements concerning the AT&T/Time Warner merger stand in contrast to his praise for other media mergers involving outlets that he sees as producing positive coverage about him. For instance, President Trump praised the Sinclair/Tribune merger and criticized the FCC for not approving it.

David Shepardson, *FCC Votes to Refer Sinclair Tribune Merger to Administrative Judge*, Reuters, July 18, 2018, https://perma.cc/82LK-FYJX. Christopher Ruddy, NewsMax chairman and a confidante of the president, said that President Trump favors the deal for reasons relating to coverage of him – because he believes Sinclair could launch a nightly newscast to compete with ABC, CBS, and NBC. Stephen Battaglio, *Trump Slams FCC for Not Embracing Sinclair-Tribune Merger*, L.A. Times, July 25, 2018, https://perma.cc/MU7C-B8DH.

C. There are indications the White House sought to interfere in the decision to sue.

In addition to President Trump's public antipathy to CNN and the AT&T/Time Warner merger, news stories have recounted that the White House discussed using the merger to influence reporting at CNN.

On July 5, 2017, for example, *The New York Times* reported, as part of a story on President Trump's dislike for CNN's president Jeff Zucker, that White House advisors saw the transaction as a "potential point of leverage over their adversary [CNN]." Michael M. Grynbaum, *The Network Against the Leader of the Free World*, N.Y. Times, July 5, 2017, https://nyti.ms/2sIxY3l.

On November 8, 2017, the *Los Angeles Times* reported that the government was pressuring AT&T to divest CNN and that one person "close to the situation" said, "This has all become political. It's all about CNN." Meg James, *AT&T Says*

It Will Not Sell CNN Despite Pressure from Trump's Justice Department, L.A. Times, Nov. 8, 2017, https://perma.cc/94RP-TE7S.

On May 12, 2018, before backtracking, the president's lawyer Rudolph Giuliani suggested that the president personally directed the Justice Department to block the merger. "The president denied the merger," he said. "[AT&T] didn't get the result [it] wanted." John Bowden, *Giuliani Says Trump 'Denied' AT&T-Time Warner Merger After DOJ Insisted on Independent Decision*, Hill, May 12, 2018,https://perma.cc/G8NT-SGR3.

Finally, Assistant Attorney General Delrahim suggested prior to his nomination that the AT&T/Time Warner merger would have an easier route to approval than others, precisely because it is not a horizontal merger. Delrahim, as head of the Antitrust Division, would typically be the one to decide when to take a merger challenge to trial, and his changing views on the merits of the transaction present circumstantial evidence of White House interference. *No Big Worries in AT&T Deal for Time Warner*, BNN Bloomberg, https://perma.cc/SX26-KGNL.

D. The president has asserted the authority and desire to interfere with enforcement decisions at the Justice Department.

The president has repeatedly claimed the authority to direct decisions that would otherwise be at the discretion of the Justice Department and has attempted to pressure Attorney General Sessions on a variety of matters.

For instance, on November 3, 2017, President Trump gave a radio interview where he said, "You know, the saddest thing is that because I'm the president of the United States, I'm not supposed to be involved with the Justice Department. . . . I am not supposed to be involved with the F.B.I. I'm not supposed to be doing the kind of things that I would love to be doing. And I'm very frustrated by it." Peter Baker, *'Very Frustrated' Trump Becomes Top Critic of Law Enforcement*, N.Y. Times, Nov. 3, 2017, https://nyti.ms/2lMXBN8.

The president followed that comment with another interview where he said that while he had "stayed uninvolved" with the investigation into Hillary Clinton's email server, he had an "absolute right to do what [he] want[s] to do with the Justice Department." Michael S. Schmidt, *Excerpts From Trump's Interview With the Times*, N.Y. Times, Dec. 28, 2017, https://nyti.ms/2lfHeWH.

According to *The New York Times*, in March 2017, President Trump directed White House Counsel McGahn to intervene and to lobby Attorney General Sessions not to recuse himself from the investigation into possible Russian interference in the 2016 presidential election. Michael S. Schmidt, *Obstruction Inquiry Shows Trump's Struggle to Keep Grip on Russia Investigation*, N.Y. Times, Jan. 4, 2018, https://nyti.ms/2CBuIuN.

Finally, the president tweeted his disappointment with the FCC for referring the Sinclair/Tribune transaction to an administrative law judge. His tweet makes it

clear that he believes regulatory decisions should punish or reward the viewpoint expressed by the relevant media outlets: "This would have been a great and much needed Conservative voice for and of the People. Liberal Fake News NBC and Comcast get approved, much bigger, but not Sinclair. Disgraceful!"[4] Donald J. Trump (@realDonaldTrump), Twitter (July 24, 2018, 5:39 PM), https://perma.cc/6542-8BN6.

E. This merger challenge is occurring in the context of a broader "war" on the media by the president.

The president's animus toward this merger and CNN is just one part of a larger assault on the independent press. As part of these attacks, the president has unabashedly stated his desire to use economic and regulatory pressure – and offered what could be seen as explicit threats of violence – to coerce favorable news coverage. The possibility that the White House sought to influence the decision to sue in this case should be considered in that context.

[4] The president's efforts to influence other governmental decisions are not limited to the Justice Department, the FCC, or the executive branch as a whole. He has notably offered severe criticism of courts for decisions with which he disagrees, particularly in the immigration context. *See* In His Own Words: The President's Attacks on the Courts, Brennan Ctr. for Just., June 5, 2017, https://bit.ly/2uGRgoE. Likewise, the president has famously called on Congress to change libel laws to relax the "actual malice" standard articulated in *Sullivan*. Donald J. Trump (@realDonaldTrump), Twitter (Sept. 5, 2018, 7:33 AM), https://perma.cc/4N65-VTK6 ("Don't know why Washington politicians don't change libel laws?").

As a candidate, the president mused that he would never go as far as President Vladimir Putin of Russia with respect to killing journalists. "I hate some of these people," he said. But, "I would never kill them." (He then reconsidered: "Uh, let's see, uh? No, I would never do that.") Tina Nguyen, *Donald Trump Hates Journalists But Says He Won't Kill Them*, Vanity Fair, Dec. 22, 2015, https://perma.cc/QT95-LUNH.

President Trump's first full day in office began with, "I have a running war with the media" and journalists "are among the most dishonest human beings on Earth." *Remarks by President Trump and Vice President Pence at CIA Headquarters*, The White House, Jan. 21, 2017, https://perma.cc/K6XS-745W.

The president has repeatedly called news outlets he dislikes the "enemy of the people," a phrase favored by authoritarian Joseph Stalin and denounced in the "secret speech" by his successor Nikita Khrushchev. *See* David Remnick, *Trump and the Enemies of the People*, New Yorker, Aug. 15, 2018, https://perma.cc/6ZBY-6XZQ.

President Trump habitually uses epithets such as "scum" or "sick people" to describe reporters, and repeatedly questions their patriotism. *Id.* In a tweet from July 3, 2017, the president said, with an eye on coercing more favorable coverage in the future, "At some point the Fake News will *be forced* to discuss our great jobs numbers, strong economy, success with ISIS, the border & so much else." Donald

J. Trump (@realDonaldTrump), Twitter (July 3, 2017, 7:10 AM), https://perma.cc/5W28-VHDG (emphasis added).

In addition to personal attacks, the president has often linked his "war" on "fake news" with threats about economic regulation. *Washington Post* owner Jeff Bezos has been a frequent target. For instance, at a rally in February 2016, then-candidate Trump said that Bezos, founder and CEO of Amazon, had purchased *The Washington Post* to have political influence, "[a]nd, believe me, if I become president, oh, do they have problems." Donald J. Trump, Speech in Las Vegas (Feb. 26, 2014), https://perma.cc/3YUW-PX5E.

As president, in addition to invective on Twitter, he has taken concrete action. In April, President Trump suddenly issued an executive order mandating a review of the United States Postal Service's finances in an effort to support his claim that the service is subsidizing Amazon. Michael D. Shear, *Trump Having Denounced Amazon's Shipping Deal, Orders Review of Postal Service*, N.Y. Times, Apr. 12, 2018, https://nyti.ms/2JEywMq. In May, *The Washington Post* reported that President Trump personally asked the postmaster to consider raising rates for Amazon. Damien Paletta and Josh Dawley, *Trump, Personally Pushed Postmaster General to Double Rates on Amazon, Other Firms,* Wash. Post, May 18, 2018, https://perma.cc/7VCG-ELJW.

Additionally, the president has dangled possible antitrust claims against Amazon, linking them directly to *The Washington Post*. In July 2018, for instance, President Trump tweeted, "In my opinion the Washington Post is nothing more than an expensive (the paper loses a fortune) lobbyist for Amazon. Is it used as protection against antitrust claims which many feel should be brought?" Donald J. Trump (@realDonaldTrump), Twitter (July 23, 2018, 6:35 AM), https://perma.cc/YQ8L-LUHB.

Finally, President Trump has explicitly called for the revocation of broadcast licenses in retaliation for news coverage he dislikes. Following a report from NBC that then-Secretary of State Rex Tillerson had disparaged him, President Trump tweeted, "With all of the Fake News coming out of NBC and the Networks, at what point is it appropriate to challenge their License? Bad for country!" Noah Bierman et al., *Trump Threatens NBC's Broadcast Licenses After Critical Stories*, L.A. Times, Oct. 11, 2017, https://perma.cc/X8F4-SJNG.[5]

This array of presidential statements attacking CNN, this specific merger, and the press as a whole can and should constitute evidence of illicit motive supporting a selective enforcement defense.

[5] The president again asked, "Look at [NBC's] license?" in September 2018. John Hendel, *Trump Reignites Threat to News Broadcasters*, Politico, Sept. 4, 2018, https://perma.cc/YG4Y-HEWY.

II. The district court's reasoning in denying the motion for discovery would preclude discovery in a host of complex, fact-specific cases.

The practical implications of the district court's reasoning in denying discovery here are ominous. In denying Appellees' motion, the court wrote that it is "difficult to even conceptualize how a selective enforcement claim applies in the antitrust context, where each merger 'must be functionally viewed' in 'the context of its particular industry' and in light of a 'variety of factors' – including the transaction's size, structure, and potential to generate efficiencies or enable evasion of rate regulation – that 'are relevant in determining whether a transaction is likely to lessen competition.'" JA _; *AT&T*, 290 F. Supp. 3d at 4 (quoting *United States v. Baker Hughes Inc.*, 908 F.2d 981, 985 (D.C. Cir. 1990)).

Put another way, the district court is saying that the more fact-specific a standard, the less the defendant can make out a selective enforcement request for discovery or, consequently, a merits defense. Such an approach, however, would preclude a selective enforcement defense in numerous complex regulatory matters, and not just in the antitrust context. Indeed, it would perversely reward exotic government theories of harm or guilt. The more idiosyncratic the theory, the more bulletproof the decision to pursue the case.

By way of illustration, *amicus* briefly lists an array of fact-specific regulatory enforcement contexts where the court's analysis would similarly preclude discovery to determine the viability of a selective enforcement defense:

- Revoking a broadcast license as not in the "public interest, convenience and necessity";[6]
- Selectively targeting a media entity under the indecency or obscenity laws;
- Auditing the tax status of a nonprofit news organization;
- Filing a pretextual antitrust complaint against a search or social media company in order to apply pressure to give more visibility to political speech the administration favors;[7]
- Launching an unfair or deceptive trade practice investigation under Section 5 of the Federal Trade Commission Act;
- Regulating a common carrier, such as Verizon, in an attempt to influence separate, editorially independent content or news divisions, such as Oath;

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[6] There is historical precedent for a president retaliating for perceived negative coverage by targeting broadcast licenses for revocation. In early 1973, President Nixon's allies challenged two licenses co-owned by *The Washington Post*, which had been reporting on the burgeoning Watergate affair. Aaron Blake, *Trump's Threat to NBC's License is the Very Definition of Nixonian*, Wash. Post, Oct. 11, 2017, https://wapo.st/2OQ2hfh.

[7] *See* Donald J. Trump (@realDonaldTrump), Twitter (Aug. 28, 2018, 8:02 AM), https://perma.cc/2XD8-89SH ("Google & others are suppressing voices of Conservatives and hiding information and news that is good. . . . This is a very serious situation-will be addressed.").

- Initiating retaliatory enforcement actions by, or arbitrarily rejecting filings at, the Securities and Exchange Commission; and
- Issuing "leak" investigation subpoenas to "disloyal" papers publishing embarrassing information but not to "loyal" papers publishing government sanctioned information.

III. The district court erred in denying Appellees discovery to determine the viability of a selective enforcement defense.

Amicus asks for guidance on three points. The first two involve errors at the district court. The third is more forward looking. The overriding theme in all is that the Court should clarify that, in cases where selective enforcement could act to censor the press, discovery must be available, particularly where there is a direct admission of discriminatory purpose.

A. The district court ignored "some evidence" of discriminatory effect.

Appellees need not articulate a prima facie case to obtain discovery on their selective enforcement defense; they need only show a "colorable claim" that they were singled out for enforcement, which is met by "*some evidence* tending to show the existence of the essential elements of the [claim]." *Branch Ministries*, 970 F. Supp. at 16 (emphasis and brackets in original) (quoting *Armstrong*, 517 U.S. at 468).

The ample evidence of presidential animosity toward CNN, this merger, and the press as a whole clearly constitutes "some evidence" of discriminatory intent.

Ironically, were one to take the president at his word that he has "absolute" power over the Justice Department, this would be the rare case where one has *direct* evidence of illicit motive.

With respect to the "effect" prong, Appellees again need only make a "colorable" claim based on "some evidence" of selectivity. The district court first expressed skepticism that an antitrust defendant could show selectivity, because of the factual intensity of the inquiry. The district court then suggested that, alternatively, even if AT&T/Time Warner is similarly situated to other vertical mergers, Appellees could not show selective treatment. Specifically, the district court found that the AT&T/Time Warner merger is a "rare breed of horse" but not a "unicorn" because the Justice Department did in fact challenge the vertical merger of Comcast and NBCUniversal (but settled),[8] and because the government historically has only cleared vertical mergers that raise antitrust concerns by imposing conditions. *AT&T*, 290 F. Supp. 3d at 4-5. Accordingly, the court found, the evidence was consistent with general even-handedness.

There is, however, "some evidence" of selectivity. This is the first merger of non-competitors to be litigated to trial in four decades. It is similar to referring

[8] The district court cited "FCC oversight" in the Comcast matter as a distinguishing factor, without explanation. But the issue is whether there is "some evidence" of selectivity, and the decision to settle versus litigate should be seen as such.

some defendants for federal prosecution and not others for the same crime. If the district court's "rare breed of horse"-"unicorn" analogy means these transactions *are* similarly situated, the differential treatment of this merger vis-à-vis Comcast/NBCUniversal and other vertical mergers that were cleared with conditions does present "some evidence" of unequal treatment. *See, e.g.*, *United States v. Jones*, 159 F.3d 969, 978 (6th Cir. 1998) (finding disparity in referral for federal prosecution for drug activity constitutes "some evidence" of selectivity and permitting discovery). For the sake of future selective enforcement matters, in this administration or any other, the Court should make that clear.

B. *Armstrong* reserved the question of whether a defendant needs to establish discriminatory effect where prosecutors have admitted discriminatory intent.

Armstrong explicitly reserved judgment on whether a movant need show that a similarly situated defendant was treated differently when there are "direct admissions" by the prosecutors of discriminatory intent. *Armstrong*, 517 U.S. at 469 n.3; *see also United States v. Al Jibori*, 90 F.3d 22, 25 (2d Cir. 1996) (recognizing that government admissions suggesting improper motive sometimes justify further inquiry without showing of selectivity).

As noted above, at least on the part of the president, it would be difficult to conceive of a more direct admission of hostility than the raging rhetoric from the White House attacking CNN for coverage that the administration perceives as

unfavorable. *Amicus* asks the Court to confirm that this is precisely the type of case where direct admissions of improper motive by, in this case, the chief executive of the country, justify discovery without a showing of selectivity.

C. Selective enforcement that censors or chills the press raises "special concern[s]" warranting more permissive discovery.

The stakes in enforcement actions – antitrust or otherwise – that implicate the press are higher than in routine matters. An invidiously motivated prosecution or lawsuit could directly censor protected speech, and the threat of such could result in self-censorship. Discovery to uncover selective enforcement is warranted in light of the constitutional rights at issue.

These are fragile rights that are particularly susceptible to pressure from regulators. In *Minneapolis Star and Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983), the Supreme Court invalidated a tax on the cost of paper and ink used to print newspapers not because viewpoint discrimination in enacting the provision was facially evident, but rather because of the "potential for abuse" in any law that singles out a select few in the news media. *Id.* at 591. Even subtle regulatory intimidation on a targeted company can impact the exercise of editorial freedom. As Justice O'Connor wrote, the prospect of "burdensome taxes . . . can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government." *Id.* at 585.

Where the threat of regulatory retaliation is anything but subtle, and the desire to coerce favorable news coverage is well-documented, discovery into improper motive is more than warranted. *See Armstrong*, 517 U.S. at 480 (Stevens, J., dissenting) (arguing that some forms of selective enforcement are so dangerous that they present a "special concern" justifying limited discovery). Clarification from the Court on this point is essential.

IV. Presidents of both parties have misused the antitrust laws.

Although the district court stated that it was difficult to "conceptualize" a selective enforcement defense in antitrust cases, history shows that the practical danger of selective antitrust enforcement is far from hypothetical. The cases below show that, not only is selective enforcement of the antitrust laws possible, it often happens quietly, in a way that would be hard to detect without discovery.

A. LBJ and the *Houston Chronicle*.

In early 1964, President Lyndon B. Johnson demanded and received a letter of fealty from the *Houston Chronicle*, for the entire time Johnson had his "capable hands on the reins of th[e] administration." Robert A. Caro, The Passage of Power 523-27 (2012). Upon receiving the letter, Johnson called the president of the *Chronicle*, John Jones, and exclaimed, "That thing signed this morning. . . . From here on out, we're partners." *Id.* at 527.

That "thing" was Johnson's approval of the merger of the Texas National Bank with Houston's National Bank of Commerce, of which Mr. Jones was also the president. *Id.* at 523-24. The merger had faced intense opposition from both the Federal Reserve and the Justice Department on competition grounds, and only a presidential order could save it. *Id.* at 524. The deal was a success. The *Chronicle* endorsed LBJ in 1964. *Id.* at 527.

B. Nixon and the "big three" primetime programming suit.

In 1971, President Nixon and his aides conspired to use the threat of a pending lawsuit against ABC, CBS, and NBC as a "sword of Damocles" to coerce better coverage from the networks. *See* Walter Pincus and George Lardner, Jr., *Nixon Hoped Antitrust Threat Would Sway Network Coverage*, Wash. Post, Dec. 1, 1997, https://perma.cc/C42R-HKN8.

Both President Nixon and aide Charles Colson were captured on the Nixon tapes in July 1971 discussing how the merits of the suit – concerning the monopolization of primetime programming – mattered less than the political "club" the pendency of the case gave the White House to "get [favorable coverage] out of the networks." *Id.* President Nixon can be heard on the tapes saying, "We don't give a goddam about the economic gain. Our game here is solely political. . . . As far as screwing them is concerned, I'm very glad to do it." *Id.*

The Justice Department would ultimately bring the suit in April 1972, but a federal district court dismissed the case in November 1974 without prejudice after the government refused to comply with discovery demands in support of the networks' political retaliation claims. *United States v. Nat'l Broad. Co. Inc.*, 65 F.R.D. 415, 421-42 (C.D. Cal. 1974). The cases were later revived under the Ford administration and resolved through individual settlements with each network.[9]

CONCLUSION

Writing at the end of another existential era, Alexander Bickel noted that:

> Those freedoms which are neither challenged nor defined are the most secure. In this sense . . . the American press was freer before it won its battle with the government in *New York Times Company v. United States* . . . than after its victory. Before June 15, 1971, through the troubles of 1798, through one civil and two world wars and other wars, there had never been an effort by the federal government to censor a newspaper by attempting to impose a prior restraint prior to publication, directly or in litigation. The *New York Times* won its case . . . but that

[9] There is one other important antitrust abuse case from the Nixon administration. Nixon demanded that the attorney general drop a challenge to IT&T's acquisition of the Hartford Fire Insurance Company in exchange for a $400,000 contribution to the 1972 Republican National Committee convention in San Diego. *See* E.W. Kenworthy, *The Extraordinary I.T.T. Affair*, N.Y. Times, Dec. 16, 1973, https://nyti.ms/2NvK763. Nixon's interference – in a strongly worded phone call – would not have come to light but for the Nixon tapes and the leak to the media of an IT&T memo referring to the bribe. *See* Roger Wilkins, *The Mass of Evidence and What it Portends*, N.Y. Times, July 21, 1974, http://nyti.ms/2NGzsWI (Nixon told Attorney General Kleindienst over the phone that "my order is to drop the God damn thing. Is that clear?").

> spell was broken, and in a sense freedom was thus diminished.

Alexander Bickel, The Morality of Consent 60-61 (1975).

In Bickel's framing, we are living through another time of profound risk of diminished freedom for the American press. While the American public benefits from the significant protections for journalism and free expression in the courts, two bullying years of White House attacks on the media and a stream of threats from the chief executive to use regulatory proceedings to punish news reporting have broken a different kind of spell. It is only natural that to the judiciary the press now returns to clarify its rights. For all the reasons above, *amicus* urges the Court to confirm that when, as here, ample evidence exists of discriminatory motive – and of a conceded censorial appetite on the part of the executive branch – courts can order discovery to gauge the viability of a selective enforcement defense. Additionally, or alternatively, *amicus* asks the Court to confirm that "some evidence" of selectivity exists here, and that discovery was warranted under the plain terms of *Armstrong*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because this brief contains 6451 words, excluding the parts of the brief exempted Federal Rule of Appellate Procedure 32(f).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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