No. 99-17201

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAII,

Plaintiff-Appellee,

v.

GANNETT PACIFIC CORP., et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF AMICUS CURIAE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEE STATE OF HAWAII AND AFFIRMANCE

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STATEMENT OF INTEREST

The United States is principally responsible for both enforcing the federal antitrust laws and administering the Newspaper Preservation Act. This case ultimately may present important questions of the extent of antitrust immunity conferred by the Newspaper Preservation Act and of the reach of the federal antitrust laws. Resolution of these issues may affect both public and private

antitrust enforcement, and the United States accordingly has a strong interest in their proper resolution. More particularly, the Antitrust Division of the United States Department of Justice is currently investigating the transaction at issue here. Although the United States has not yet determined whether, in its view, that transaction violates the federal antitrust laws, we are concerned that a failure to preserve the status quo now will, as a practical matter, make effective relief impossible should there be a violation. We file this brief amicus curiae pursuant to the first sentence of Fed. R. App. P. 29(a).

QUESTION PRESENTED

The United States will address this question:

Whether it would be in the public interest to maintain a preliminary injunction barring implementation of, or payment under, the Termination Agreement dated September 7, 1999, or any other agreement of like intent or effect.

STATEMENT

1. This Court is familiar with the origins of this dispute:

> In 1962, the Honolulu Advertiser was experiencing financial difficulty and was on the verge of failure. In order to prevent the newspaper's demise and preserve its editorial voice, the Advertiser entered into a joint operating agreement ("JOA") with the Honolulu

> Star-Bulletin on May 31, 1962. Under the JOA, the newspapers merged their commercial, circulation, and advertising departments, but maintained separate and independent editorial voices. The newspapers formed the Hawaii Newspaper Agency ("HNA") to carry out the JOA. The effect of the JOA was to cut costs and preserve two independent editorial voices in Honolulu.

Hawaii Newspaper Agency v. Bronster, 103 F.3d 742, 744 (9th Cir. 1996). The district court subsequently held that the JOA was an agreement "entitled to protection" from the federal antitrust laws pursuant to the Newspaper Preservation Act ("NPA"), 15 U.S.C. 1803(a), *Hawaii Newspaper Agency*, 103 F.3d at 745, *citing City and County of Honolulu v. Hawaii Newspaper Agency, Inc.*, 559 F. Supp. 1021 (D. Haw. 1983), enacted eight years after the two newspapers entered into the JOA "to preserve the publication of newspapers" 15 U.S.C. 1801, by protecting such JOAs from antitrust challenge.

The two newspapers have to this day continued to provide two independent editorial voices under the JOA, enjoying the benefit of the protection from the antitrust laws the NPA provides, although there have been changes since 1962. The original JOA would have expired in 1992, Brief for Appellants ("A.Br.") 27; a 1993 amendment changed that to 2012. Order at 8-9. And originally appellant Gannett Pacific ("GPC")

> owned the Star-Bulletin, not the Advertiser. Sometime prior to January 30, 1993, GPC's parent (or subsidiary) stripped the Star-Bulletin of its operating equipment and assets by transferring them to the Advertiser. GPC's parent (or subsidiary) then sold its interest in the Star-Bulletin to Liberty and purchased the Advertiser.

Order Granting the State's Motion for a Preliminary Injunction ("Order") 6-7 (Oct. 15, 1999).[1]

The parties to the JOA have now apparently determined that they would rather not remain linked through the JOA, with its protection from the antitrust laws, while providing two independent editorial voices, as Congress intended in granting an antitrust immunity. Appellant Liberty Newspapers ("Liberty"), publisher of the Star-Bulletin, claims to prefer to trade its right to a stream of fixed payments under (and for the life of) the JOA[2] for a lump sum of $26.5 million, exit from the newspaper business in Honolulu, and invest elsewhere.

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[1]Appellants question the district court's use of the verb "strip," A.Br. 28-29, but nevertheless explain that prior to the events of 1993 the two newspaper parties to the JOA had undivided interests in the JOA's physical assets, and that Liberty bought the Star-Bulletin without acquiring any interest in those assets. *Id.* at 12-13. Whatever the verb, the Star-Bulletin had the assets before those events, but after them did not.

[2]In addition to fixed payments under the JOA, the publisher of the Star-Bulletin has a right to receive a small fixed percentage of "special profits" resulting from JOA operations, but there never have been any such special profits. Order at 9.

Order at 9-10. GPC, publisher of the Advertiser, which as a practical matter receives all the profits of the joint operation (after deducting the fixed payments to Liberty), apparently believes it would be better off without its JOA obligation to maintain two independent editorial voices, even if freedom from that obligation comes at the cost of a sizable lump sum payment to buy out Liberty.

To bring about these ends, GPC and Liberty on September 7, 1999, entered into an agreement styled "Amendment and Termination Agreement" (the "Termination Agreement") that would, if carried out, cause the JOA to terminate no later than October 30, 1999, once GPC paid Liberty $26.5 million. Order at 9-10. Although the Termination Agreement does not by its terms "expressly require the closure of the Star-Bulletin," Order at 15-16, the district court found that it would nevertheless "lead to this outcome because the Star-Bulletin will not have access to the necessary infrastructure . . . to continue publishing." *Id.* There seems to be no dispute that the Star-Bulletin will stop publishing if the Termination Agreement is implemented, no dispute that the parties to the Termination Agreement knew when they entered into the agreement that Liberty intended to stop publishing the Star-Bulletin upon its implementation, and no dispute that GPC wanted to end its major and essential role in putting out

the Star-Bulletin. Plaintiff State of Hawaii alleges that it has been informed, and believes, that Liberty and GPC agreed that the Star-Bulletin will cease publishing. Complaint ¶18. Either way, one of the two independent editorial voices Congress sought to preserve will be silenced.

2. The district court, ruling on the State's motion for preliminary injunction, found that the State had "made a strong showing that it will be irreparably injured if the Termination Agreement is not enjoined." Order at 28. Absent an injunction,

> If . . . the State later prevails, any relief that this Court could afford would be inadequate because the Star-Bulletin would no longer be a viable newspaper. Once closed, the Star-Bulletin is unlikely to be reopened because it will have lost its subscriber and advertiser base. The Court finds that no monetary amount will be able to compensate for the loss of the Star-Bulletin's editorial and reportorial voice, the elimination of a significant forum for the airing of ideas and thoughts, the elimination of an important source of democratic expression, and the removal of a significant facet by which news is disseminated in the community.

Id. at 29. For essentially identical reasons, the court found the State to have "demonstrated that the public interest strongly weighs in favor of granting injunctive relief." *Id.* at 31.[3]

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[3]In making these determinations, the court did not expressly rely on the fact of an Antitrust Division investigation. The court was, however, aware of that (continued...)

After concluding that injunctive relief would not implicate the First Amendment, *id.* at 24-27,[4] the court further concluded that any harm to the defendants from temporary delay in their plans was small and "pale[d]" when weighed against the hardships on the other side of the balance. *Id.* at 31. Thus "the balance of hardships tilts sharply in favor of the state." *Id.* at 30.

The court found that the State had established a sufficient likelihood of success on the merits of three separate Sherman Act claims.[5] It therefore granted the preliminary injunction.

ARGUMENT

In this emergency appeal, the Court faces a stark choice. If it vacates, it will bring about not only the death of one of the independent editorial voices Congress sought to preserve, but also (because a dead newspaper is unlikely to

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[3](...continued)
investigation: it asked counsel for the State about its status, and counsel reported that Civil Investigative Demands had been issued the prior week. October 13 Transcript at 20.

[4]As we explain below, a more narrowly tailored preliminary injunction, limited to paragraph 1 of the district court's injunction, accomplishes the necessary purpose of preliminary relief here while staying far away from the First Amendment concerns addressed below and presented here by appellants.

[5]The court found the same concerning state law antitrust claims but did not address them separately. We do not address them at all.

be resurrected) the end of this lawsuit and our investigation -- and all that on the incomplete factual record assembled within a month of GPC's and Liberty's announcement of their scheme. By affirming, on the other hand, the Court can permit determination of the State of Hawaii's cause in an orderly manner on a more complete record, and an informed evaluation of whether the United States should bring its own cause. The proper choice is clear.[6]

I. With The Equities Shown Here, A Preliminary Injunction Is Proper If There Are Serious Questions For Litigation

The decision whether to grant a preliminary injunction traditionally considers

> (1) the likelihood of the moving party's success on the merits; (2) the possibility of irreparable injury to the moving party if relief is not granted; (3) the extent to which the balance of hardships favors the respective parties; and (4) in certain cases, whether the public interest will be advanced by granting the preliminary relief.

Miller v. California Pacific Medical Ctr., 19 F.3d 449, 456 (9th Cir. 1994).

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[6]We wish to emphasize at the outset that the application of sound antitrust principles in this difficult area ultimately depends on facts that are not adequately developed on this record and that we have not independently ascertained to date. Thus, we do not mean to suggest that we believe appellees will or should ultimately prevail on the merits. Given the balance of the equities, however, we believe that appellees have made a sufficient showing to merit a modified affirmance as outlined below.

The district court's strong finding of irreparable injury if there is no preliminary injunction but the State prevails on the merits is not subject to serious challenge here. The court concluded that "Once closed, the Star-Bulletin is unlikely to be reopened" and "no monetary amount will be able to compensate" for the loss of its editorial voice. Order at 29. Appellants do not claim otherwise; their argument is that the State cannot possibly prevail on the merits, *see, e.g.*, A.Br. 37, 44, a different proposition we address below.

Nor is there any challenge to the district court's finding that "the State has demonstrated that the public interest strongly weighs in favor of granting injunctive relief." Order at 31. This is, after all, not a suit brought by an ordinary commercial actor, concerned solely about the economic impact on itself of defendants' actions. It is rather an action brought by the State "in its sovereign capacity on behalf of its citizens, its economy and its general welfare." Complaint ¶1. Moreover, this brief and our ongoing investigation (the viability of which depends on preliminary relief here) themselves testify to where the public interest lies.[7]

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[7]The United States represents the public interest in antitrust litigation. *See, e.g., United States v. Borden Co.*, 347 U.S. 514, 518 (1955). *Cf. Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 884 (2d Cir. 1981) ("if the court

(continued...)

Appellants argue, however, that "the particular terms of the preliminary injunction violate the First Amendment," A.Br. at 43, so that there is ample irreparable injury and hardship on their side of the ledger and the balance of hardships does not, therefore, tilt towards the State. *Id.* at 44. Without addressing the merits of appellants' First Amendment arguments, we note that should this Court consider those arguments troubling, or should this Court wish to avoid deciding constitutional questions unnecessarily, it could strike paragraphs 2 and 3 of the district court's injunction. Paragraph 1 of that injunction would bar GPC from buying out Liberty and thus shutting down the Star-Bulletin. Without paragraphs 2 and 3, Liberty would be free to cease publishing the Star-Bulletin pursuant to the terms of the JOA as restated in 1993,[8] and so the premise of appellants' constitutional argument (i.e., "the District Court ordered defendants to continue to publish the *Star-Bulletin*,

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[7](...continued)
eventually will have jurisdiction of the substantive claim and an administrative tribunal has preliminary jurisdiction, the court has incidental equity jurisdiction to grant temporary relief to preserve the status quo pending the ripening of the claim for judicial action on its merits"), *citing FTC v. Dean Foods Co.*, 384 U.S. 597 (1966).

[8]"This Agreement shall terminate if and when Star-Bulletin ceases the daily publication of Honolulu Star-Bulletin." Amendment and Restatement of Mutual Publishing Plan Agreement ("1993 Agreement") at V.(A) (Jan. 30, 1993).

notwithstanding their unwillingness to do so," A.Br. 38) would vanish -- as would Liberty's reason to cease publishing (the $26.5 million payment). At least if the injunction is so modified, there is no ground for questioning the district court's conclusion that "the balance of hardships tilts sharply in favor of the State." Order 30.

That conclusion significantly affects the evaluation of the remaining preliminary injunction factor, likelihood of success on the merits, because "[t]he standard for a preliminary injunction balances the plaintiff's likelihood of success against the relative hardships to the parties." *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1119 (9th Cir. 1999). Therefore, "'the greater the relative hardship to the moving party, the less probability of success must be shown.'" *Id.*, *quoting National Ctr. for Immigrants Rights v. INS*, 743 F.2d 1365, 1369 (9th Cir.1984).

Where, as here, the plaintiff faces irreparable harm, the balance of hardships tilts strongly in its favor, and the public interest strongly favors granting preliminary relief, the required showing as to likelihood of success reaches the "irreducible minimum," *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987), and the plaintiff need show only "a fair chance of

success on the merits; or questions serious enough to require litigation." *Id.*[9] Questions serious enough to require litigation are "questions which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo lest one side prevent resolution of the questions or execution of any judgment by altering the status quo." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). While the irreducible minimum is not met if plaintiff has "[n]o chance of success at all," *Benda*, 584 F.2d at 315, it may be that a question cannot be resolved at the hearing because further investigation is needed: "at the preliminary injunction stage, . . . the plaintiff . . . is usually seeking to preserve the status quo while completing discovery." *S.E.C. v. Unifund SAL*, 910 F.2d 1028, 1037 (2d Cir. 1990).

Within these broad parameters, the district court in essence "must balance the equities in the exercise of its discretion." *International Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993). This Court reviews for abuse of discretion, reliance on an erroneous legal standard, or clearly

[9] "The difference between the two formulations is insignificant." *Benda v. Grand Lodge of International Association of Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978).

erroneous findings of fact. *University of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096, 1101 (9th Cir. 1999), and may affirm on the basis of anything presented to the district court in support of the preliminary injunction. *United Food & Commercial Workers Union v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341, 349 n.3 (6th Cir. 1998).

II. The Record Suggests the Possibility of Serious Questions For Litigation

The record, in our view, suggests that there may well be serious questions for litigation, questions not properly resolved against the State at a preliminary injunction hearing.[10] The district court, treating the entire recent agreement between GPC and Liberty as an amendment to the JOA, found not mere serious questions, but that the State had shown a likelihood of success on its federal antitrust claims.

Appellants' attack in essence rests on three propositions: First, every alleged antitrust wrong takes the form of an agreement embodied in an amendment to the JOA. Second, any agreement embodied in what appears to be an amendment to a "grandfathered" JOA is immunized from the antitrust laws

[10]We emphasize that our submission goes no further. We are currently conducting our own investigation and will in due course determine whether to file our own suit or to terminate the investigation.

(subject to two provisos not relevant here). Third, even if the first two propositions are wrong, there can be no harm to competition here, and thus no antitrust violation, because the only competition that could be affected was eliminated completely in 1962. As broad propositions of law, we reject these theories and would urge this Court to do so as well.

Although ultimately more modest forms of these propositions may carry the day for appellants, at this preliminary stage, we submit there remain serious questions for litigation, for further development of fact and argument, that could not properly have been resolved against the State, because these propositions cannot be accepted at face value.

A. There May Be An Agreement Not In The Form Of An Amendment.

The first proposition ignores the State's actual allegation. Paragraph 18 of the Complaint reads:

> Plaintiff is informed and believes that GPC and LIBERTY have entered into an agreement which calls for LIBERTY to cease publishing the Honolulu Star-Bulletin on or before October 30, 1999 in exchange for the payment of a substantial sum of money by GPC to LIBERTY ("Agreement to Terminate").

That allegation is reasonably read to mean that the agreement calls for the continued non-publication of the Star-Bulletin beyond October 30. And that

alleged agreement is central to the State's antitrust claims: it is referred to in all three federal antitrust counts. See Complaint ¶¶26, 29, 34.

The court dealt entirely with the Amendment and Termination Agreement, the formal document signed by the parties, rather than the Agreement to Terminate as defined in the complaint. Indeed, the court described the complaint as seeking to enjoin an agreement "to terminate the JOA and the resultant shutdown of the Star-Bulletin," Order at 5, although the complaint's Prayer for Relief (at ¶¶a-d) plainly addressed the differently defined "Agreement to Terminate," as well as any other agreement involving payment for an agreement to cease publishing the Star-Bulletin.

Appellants emphasize, as the district court found, that their formal written agreement did not by its terms mandate closure of the Star-Bulletin, A.Br. at 6, 29-30, but their argument is not responsive to the continuing agreement alleged in the complaint. Appellants obviously recognize the potential antitrust significance of a continuing agreement between Liberty and GPC that the Star-Bulletin will not publish. And it is hard to see how they could argue that an agreement extending beyond October 30 is merely an amendment to another agreement that terminates on October 30.

The record provides inferential support for the agreement the State alleged, for "Liberty has made no effort to sell the Star-Bulletin as a going concern," Order at 24, and, so far as we are aware, no effort to sell the assets at all. The record to date does not explain why Liberty would forgo the possibility of obtaining compensation for assets it does not intend to use, or why Liberty agreed to carry out the termination process rapidly and in such a way as to minimize the chances that any potential purchaser would be able to continue the Star-Bulletin as a going concern. There may be sound answers to those questions, but in light of the equities a court would be remiss if it permitted the termination agreement to be implemented before there was an opportunity to explore the possibility of a broader anticompetitive agreement.

B. Not All Agreements Purporting To Amend A Grandfathered JOA Are Lawful Under The Antitrust Laws

The Newspaper Preservation Act provides that "[i]t shall not be unlawful under any antitrust law . . . to . . . amend any joint newspaper operating arrangement entered into prior to July 24, 1970," 15 U.S.C. 1803(a), subject to conditions and provisions not relevant here. The Act defines "joint newspaper operating arrangement" so that a JOA must be "for the publication of two or

more newspaper publications," 15 U.S.C. 1802(2).[11] While, the statute provides no express immunity for terminating a JOA, appellants argue that a decision to terminate is an amendment and thus immune. We disagree.

The statute does not define the term "amend," and it hardly seems obvious that a decision to end an agreement should be naturally read as an amendment to that agreement. On the contrary, "amend" most naturally connotes a part of an ongoing agreement. Appellants nonetheless contend that their agreement qualifies as an amendment because it changes the terms of the JOA. But that argument proves too much. Congress obviously did not mean to include within the scope of the statutory immunity any agreement that effectuates any change in a JOA. For example, had GPC and Liberty purported to "amend" their JOA to add language fixing the prices at which they would sell magazines in Alaska, we

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[11] The term "joint newspaper operating arrangement" means any contract, agreement, joint venture . . . or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; [etc.]: *Provided*, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.

15 U.S.C. 1802(2).

doubt anyone would believe that amendment to be lawful under the antitrust laws on account of the Newspaper Preservation Act. Similarly, if the "amendment" had replaced the existing language by a price-fixing agreement for magazines in Alaska, so that the resulting agreement no longer qualified as a JOA under the statutory definition, there would surely be no immunity for that amendment. The NPA is not a shield for whatever agreement the parties style as an amendment to a JOA.

These hypotheticals, of course, go far afield. But like those hypothetical agreements, the Termination Agreement here had a purpose other than preservation of editorial diversity through a JOA, and the resulting amended agreement was not one for "the publication of two or more newspapers." 15 U.S.C. 1802(2). Rather, the Termination Agreement had as its purpose, and will have as its effect if implemented, the cessation of publication of the Star-Bulletin; at a minimum, Liberty wanted to stop publishing it, and GPC wanted to be free of its role in publishing it. In our view, such an agreement is within neither the letter nor the purpose of the NPA immunity provision and therefore is subject to antitrust scrutiny.

The legislative history of the Act supports this view. Congress included amendments within the scope of the immunity for grandfathered JOAs in order to promote their efficient operation. During House debate on the Act, Representative Kastenmeier, the floor manager, explained, "we specifically included the word 'amend' to refer to changes that might take place in the course of ordinary business operations.'" 116 Cong. Rec. H23174 (daily ed. July 8, 1970). This language suggests Congress's concern with changes to an <u>ongoing</u> JOA, not decisions to terminate "ordinary business operations." It is thus unsurprising that Congress made no express provision for immunizing agreements to terminate a JOA. Shutting down a newspaper hardly qualifies as a transaction in the ordinary course of business operations in the sense that Congress appears to have been talking about; i.e., "business operations" under a JOA. By definition, termination ends those "ordinary business operations."[12]

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[12]We do not believe it is necessary to view the district court has having held "that the term of a JOA may not be shortened beyond the longest period at any time agreed by the parties," A.Br. 24. The court explicitly addressed only an "amendment" in which one party "buy[s] out another,"Order at 4, bringing about an essentially immediate cessation of publication by one party to the JOA without making any effort to sell the newspaper or otherwise provide for continuing publication. That, in our view, is a naked termination that differs from an amendment that perpetuates a JOA even as it shortens its duration.

Settled canons of construction also support this view. It is well-established that "exemptions from the antitrust laws are to be narrowly construed." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979). This principle applies with equal force to both implied and express statutory exemptions. *Id.* There is no warrant for the all-encompassing breadth of appellant's construction of the NPA exemption.

C. The Court Should Not Conclude On This Record That Economic Competition Between the Parties to This JOA Cannot Exist

Appellants assert that all competition between GPC and Liberty cognizable under the federal antitrust laws was eliminated in 1962. A.Br. 32, 36.[13] They reason that there can be no such competition because a single entity currently controls non-editorial functions of both newspapers. But the conclusion does not follow, and this Court therefore should not rule as a matter of law that there can never be commercial competition between parties to a JOA.

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[13]Appellants' contention that the preliminary injunction must be reversed because the State has so far failed to "establish the market it alleged" through evidence of record, A.Br. 31, flies in the face of the standards governing the granting of preliminary injunctions in this Circuit. And we would not recommend that this Court abandon its own jurisprudence and adopt the ill-advised rule of *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999).

First, prior to termination of a JOA, newspapers may have an incentive to improve operations and increase circulation in order to position themselves better for possible post-JOA competition. That is, if commercial competition between the newspapers following termination of the JOA were possible, then editorial rivalry between the newspapers prior to termination might be expected to affect both circulation of and the interest of advertisers in buying space in the two newspapers differentially. And circulation and advertising attained during the period of the JOA obviously would affect competition following termination. In this case, for example, the 1993 Agreement plainly contemplated that the Star-Bulletin might in fact publish after termination. Thus, the JOA provides that, following termination, the partnership will restore to the Star-Bulletin copies of contracts with Star-Bulletin subscribers and advertisers, as well as "the unearned portion of any prepaid subscriptions and prepaid advertisers attributable to" the Star-Bulletin, 1993 Agreement at V.(D)(ii),[14] and the Advertiser, on termination,

[14]The 1999 Termination Agreement ,¶5, appears to treat the Advertiser, not the Star-Bulletin, as obligated to perform under these contracts, which we find difficult to reconcile with turning the unearned payments over to the Star-Bulletin, a course of action perhaps no longer contemplated. Our understanding of these matters is as yet undeveloped, and we suggest these are matters that should be explored further before the parties are permitted, by agreement, to kill off the Star-Bulletin.

has certain obligations that continue "for so long as [the Star-Bulletin] remains a continuing daily newspaper after termination of this Agreement." *Id.* at V.(D).

Second, participants in a JOA can and do renegotiate their agreements. Because the relative strength of each newspaper can affect its bargaining leverage in such a renegotiation, JOA participants often retain at least some incentive to maximize their relative contributions to the profitability of the combined venture (as well as their ability to make credible threats to go it alone). Thus the rivalry of parties under a JOA could under at least some circumstances properly be regarded as competition within the meaning of the antitrust laws.

Finally, JOAs need not be structured to deny the participants an immediate profit interest in the relative success of their newspapers. A JOA could, for example, allocate revenues to the participants in proportion to the relative circulation or advertising lineage of their respective JOA newspapers. Although it does not appear that the JOA in this case was so structured, the Court should not assume that such competition is never a possibility.

Congress provided no explicit means in the Newspaper Preservation Act to deal with unreasonable restraints of the remaining competition among newspapers operating under JOAs, or to police the tradeoff it sanctioned. In

these circumstances, it is entirely reasonable to conclude that Congress assumed that to be a proper role for the antitrust laws. That determination, in turn, ultimately depends on the specific facts of any given JOA and thus this Court should be reluctant to accept appellants' broadside proposition on this limited record.[15]

III. The Court Should Modify and Affirm the Preliminary Injunction

We do not suggest that the Honolulu termination agreement presents easy questions. Indeed, we suggest there are difficult and serious questions meriting further investigation and, at least in the matter before the Court, further litigation. As a practical matter, however, a decision by this Court to permit the Termination Agreement to go forward will prevent the ultimate resolution of those questions by removing the possibility of effective relief for those challenging the agreement between GPC and Liberty now or those, including the United States, who might seek to do so in the future.

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[15]Even if there is commercial competition cognizable under the antitrust laws between JOA participants, it does not necessarily follow that terminating the JOA will constitute a violation. If, for example, the result would be that the newspapers would compete independently, the termination might be procompetitive. Moreover, a decision to terminate a newspaper whose incremental costs exceed the incremental revenues attributable to its operation is unlikely to violate the antitrust laws.

In light of the irreparable nature of the harm involved and the considerable impact on the public interest, we urge that the Court affirm the preliminary injunction to permit these serious and difficult questions to be addressed appropriately. On the other hand, we are sensitive to the First Amendment concerns expressed by appellants and their amici. In our view, the Court need not address the constitutional questions they raise, because limiting the preliminary injunction as we suggest above would fully address those concerns without prejudice to the interests we and the State seek to protect through the preliminary injunction. Accordingly, we suggest the Court so modify the injunction before affirming.

CONCLUSION

For the foregoing reasons, the Court should modify the preliminary injunction and otherwise affirm the district court's order.

Respectfully submitted.

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November 3, 1999

Certificate of Compliance Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 99-17201

I certify that: **(check appropriate option(s))**

__1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

☐ Proportionately spaced, has a typeface of 14 points or more and contains __________ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains ________ words or ________ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

__2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

☐ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

☐ This brief complies with a page or size-volume established by separate court order dated ______________ and is

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__3. *Briefs in Capital Cases*

☐ This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 **and is**

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X_4. *Amicus Briefs*

☒ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less,

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☐ **Not** subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

November 3, 1999

_______________________ _______________________

Date David Seidman

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November 1999, I caused copies of the Brief Amicus Curiae of the United States of America In Support of Appellee State of Hawaii And Affirmance to be served upon the following by facsimile and by overnight delivery on:

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