Nos. 19-1231 & 19-1241

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,
v.
PROMETHEUS RADIO PROJECT, ET AL.,
Respondents.

NATIONAL ASSOCIATION OF BROADCASTERS, ET AL.,
Petitioners,
v.
PROMETHEUS RADIO PROJECT, ET AL.,
Respondents.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF GRAY TELEVISION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Gray Television, Inc. ("Gray") is a national television broadcast company headquartered in Atlanta, Georgia. Gray owns or operates 162 television stations that collectively reach approximately 24% of U.S. television households in 93 Designated Market Areas ("DMAs"), as defined by The Nielsen Company.[2] While Gray owns stations in markets as large as Tampa, Florida (DMA #12 of 210), its stations are primarily concentrated in small and mid-sized markets across the country, with the

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to this brief's preparation and submission. All parties were provided notice of this filing 10 days before its due date and have consented to this filing. Undersigned counsel previously represented Cox Media Group ("CMG"), a broadcaster and an intervenor below and, by default, a respondent here. CMG did not participate on the merits below and informed this Court and all counsel of record that it will not participate in this case. Undersigned counsel does not currently represent CMG in this case.

[2] *See* The Nielsen Company, *Local Television Market Universe Estimates* (2019–2020), https://www.nielsen.com/wp-content/uploads/sites/3/2019/09/2019-20-dma-ranker.pdf. For reference, the top ranked DMA is New York City, with 6,824,120 television households. The tenth ranked DMA is Atlanta, with 2,269,270 households. The top 27 DMAs have more than 1,000,000 households each. DMAs 28–59 have between 500,000 and 1,000,000 households each. DMAs 60–105 have between 250,000 and 499,999 households each. DMAs 106–164 have between 100,000 and 249,999 households each. And DMAs 165–210 have fewer than 100,000 households each, with Glendive, Montana ranked DMA #210, with 3,630 households.

majority in markets with fewer than 500,000 television households.

Gray has a substantial interest in the two petitions because, as a national broadcast company, its business is governed by the media ownership regulations promulgated by the Federal Communications Commission ("FCC"). Gray has advocated for relief from the FCC's outdated ownership rules for a decade. In comments and *ex parte* letters, Gray has repeatedly explained to the FCC why permitting duopolies in small and mid-sized markets would improve service to the public and help stations maintain their financial health in an environment of accelerating competition. Gray raised these same points in comments that it submitted in the FCC proceeding that generated the 2017 revisions to station ownership rules, which were reversed by the decision of the U.S. Court of Appeals for the Third Circuit below.

Gray also has an interest in the petitions because it is directly affected by the decades-old ownership rules that the FCC seeks to modernize, but that were effectively reinstated by the Third Circuit's decision. Those obsolete rules directly impede Gray's business strategy for competing in today's media environment, which is to acquire leading television stations in small and mid-sized markets, improve and expand their local programming, and then acquire a second station in those markets to obtain greater local scale and spread costs among multiple stations.

SUMMARY OF ARGUMENT

Local television stations were once at the center of broadcast media and entertainment in the United States, but recent decades brought a proliferation of competition from the Internet and other modern forms of media and programming. With Americans able to consume media from so many new sources unavailable in past eras, television audiences in small and mid-sized markets have fragmented while the costs of producing local news have exploded, saddling television stations with more expenses and less revenue. New business models—like the strategy adopted by Gray—leverage national and local economies of scale to re-invigorate local television in small and mid-sized markets, along with the stations' local news operations, all of which benefits the public interest. But the FCC's long-outdated ownership rules, adopted at a different time to regulate a different broadcast market, prevent these new business models from achieving their full promise.

The FCC recognized that the time had come to update those regulations and took critical steps to do so in the 2017 regulations. But the Third Circuit, which has repeatedly stood in the way of the FCC's modernization efforts, once again invalidated the FCC's new rules. The Third Circuit's ruling significantly hinders further investment and expansion of local news production in small and mid-sized markets to the detriment of the millions of Americans who live in those cities and towns. The Court should grant the petitions and reverse the Third Circuit's decision.

ARGUMENT

Petitioners explain how the Third Circuit's decision in this case conflicts with Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56 111-12 (1996). Gray agrees with those arguments and will not repeat them here. Instead, Gray submits this brief to explain the real-world harms that result from the Third Circuit's decision, which demonstrate the urgent need for this Court's review.

I. Gray's Business Model Is To Improve And Expand Local News Coverage Through Increased Investment Allowed By Economies of Scale.

Gray's core business strategy depends on leveraging its national scope to acquire leading local television stations in small and mid-sized markets, and then invest in, expand, and modernize those stations' newsgathering and reporting capabilities. When possible, Gray also seeks to acquire a second television station in each local market to take advantage of economies of scale and spread its high fixed costs across two stations. Moreover, by associating the local brand of the leading station in the market with the second-acquired station and promoting Gray's programming across both stations, Gray elevates the profile of the second station and both stations achieve higher ratings than either could on its own.

Gray has achieved great success with this approach, realizing increased revenue and improving local news coverage across the country. But the FCC's outdated rules regulating ownership of television stations—originally adopted in 1941—present an enormous obstacle to Gray's ability to compete in the vastly changed modern media landscape. The Third Circuit's decision preventing the FCC from modernizing those rules has a serious and negative effect on Gray's model, with harmful consequences for the development of local news programming in small and mid-sized markets.

A. The Economics of Local Television.

Federal law provides the FCC the power to grant broadcast licenses to television stations, with only a limited number of licenses available in any one geographic area. *See* 47 U.S.C. §§ 308, 309; 47 C.F.R. § 73.622. Each commercial television station in the United States is assigned to a community located in one of 210 Designated Market Areas ("DMAs") defined by The Nielsen Company.[3] These markets are ranked by size according to the number of television households they contain, with the market having the most ranked 1 (New York City) and the market having the fewest ranked 210 (Glendive, Montana).[4] Each DMA is an exclusive geographic area consisting of all counties (and in some cases, portions of counties) in which the home-market commercial television stations receive the greatest percentage of total viewing hours. *See USA Station Group Partnership of Atlanta v. Community Cable Television*, 15 FCC Rcd. 6279, 6279, ¶ 2 (2000).

Television station revenue is derived primarily from two sources: (1) local, regional, and national

[3] *See* The Nielsen Company, *supra* note 2.

[4] *See* The Nielsen Company, *supra* note 2.

advertising and (2) retransmission consent fees. *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 32 FCC Rcd. 568, 609, ¶ 103 (2017) ("2017 Video Competition Report"). First, advertising revenue mainly consists of payments for advertisements broadcast by television stations. *See id.* at 616, ¶¶ 120–21. Advertising rates are generally based on the size of the audience generated by a particular program aired on a particular station. *See id.* at 609, ¶ 103. With smaller populations and therefore fewer viewers, smaller markets necessarily generate less advertising revenue than larger markets. *In the Matter of 2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 32 FCC Rcd. 9802, 9835–36, ¶ 77 (2017) ("2017 Reconsideration Order"). Thus, purchasing or producing the highest rated programming with the largest number of viewers is crucial to the success of small-market television stations.

The second major source of revenue, retransmission consent fees, consists of payments by multichannel video programming distributors ("MVPDs")—*e.g.*, cable and satellite television companies—in exchange for a television station's permission for an MVPD to retransmit the station's signal to its paying subscribers. 2017 Video Competition Report at 618, ¶ 124. Retransmission consent rates are largely driven by affiliation with one of the "Big 4" television networks (ABC, CBS, FOX, and NBC) and, to a lesser extent, the local ratings of an individual television station. 2017 Reconsideration Order at 9836, ¶ 77. Because retransmission consent rates are paid on a per-subscriber basis, smaller markets necessarily generate less retransmission consent revenue than larger markets.

The two types of programming most likely to drive a station's audience ratings higher, and thus increase station revenues, are affiliation with a Big 4 network and building a strong local news brand. 2017 Video Competition Report at 614, ¶ 117 (comparing ratings of network-affiliated stations to independent stations); Pew Research Center, *For Local News, Americans Embrace Digital But Still Want Strong Community Connection* 4 (Mar. 26, 2019) ("2019 Pew Report") ("Local TV stations are turned to most for local news, primarily through the TV set; most other providers have larger digital share");[5] U.S. Gov't Accountability Office, *GAO-10-369, Media Programming: Factors Influencing the Availability of Independent Programming in Television and Programming Decisions in Radio* 19–20 (2010).

At the same time, it is resource intensive to purchase Big 4 network programming and to produce local news, requiring substantial capital investment and ongoing operating expenses. *See* 2017 Reconsideration Order at 9836, ¶ 77, n.229 ("In

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[5] Available at https://www.journalism.org/2019/03/26/for-local-news-americans-embrace-digital-but-still-want-strong-community-connection/. While this Pew publication shows declining ratings for local television news in the past year, local news remains more highly rated than non-network, non-news programming.

particular, the record suggests that local news programming is typically one of the largest operational costs for broadcasters; accordingly, stations may find that common ownership enables them to provide more high-quality local programming, especially in revenue-scarce small and mid-sized markets." (citing Letter from Robert M. McDowell, Counsel to Gray Television, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50, *et al.*, at 3–4, 7–8 (June 28, 2017) ("2017 *Ex Parte* Letter")); *see also* Adam Jacobson, *Retransmission Consent Revenue: An 11% Growth Engine*, Radio+Television Business Report (July 30, 2019).[6] Networks charge local stations substantial programming fees for network affiliation. *Id.* And local news production requires capital spending for facilities and equipment and continued expenses for talent and news production, making such production one of broadcasters' largest operational costs. 2017 Reconsideration Order at 9836, ¶ 77.

The challenge of operating a profitable television station in small and mid-sized markets is that the station owner must find a way to afford the expenses of operating a top-rated station despite the fact that the station will necessarily generate smaller revenues than its larger-market counterparts.

B. Gray's Business Strategy.

Gray's business strategy is to acquire the leading station in a small or mid-sized market and, through heavy investment, expand and improve local news

[6] Available at https://www.rbr.com/retransmission-consent-revenue-an-11-growth-engine/.

programing in that market. Often the top-rated station in its market—especially in smaller markets—has held that position for decades, and the former owner has ceased investing in that station. Once Gray acquires the station, it purchases new, state-of-the-art broadcast equipment and modernizes the workforce to increase efficiency and profitability. Gray also expands the station's local news programming, which typically includes hiring more journalists and news producers. With that leading station as a beachhead, Gray acquires a second station in the same market—usually one that is undervalued and underperforming—and invests the resources necessary to transform it into another top station.

Often the second station airs little or no local news programming before Gray acquires it. In these situations, Gray's top station will share its news programming with the second station, expanding local news available in the market. Gray's top-rated station will heavily promote the availability of expanded news programming on both stations to drive higher ratings. Through this strategy, Gray acquires and converts stations that were providing limited or no news and public affairs programming into local-market news leaders. Gray thereby both improves the stations' profitability and creates an important community resource that was previously lacking.

Gray's strategy has been extremely successful. In 2019, Gray's stations were the top-ranked stations in 68 of Gray's 93 markets and claimed one of the top two spots in 86 of those markets. At a time when local newspapers and radio stations continue to shrink the amount of local news they provide—particularly in small markets—the public services that Gray's stations provide are increasingly critical to viewers' ability to stay informed.

An example of Gray's substantial investments in smaller markets is WCJB TV20, which provides coverage to the Gainesville, Florida DMA and to Marion and Columbia Counties in North Central Florida, located in the Orlando and Jacksonville DMAs, respectively. Gray acquired WCJB in 2017. For decades WCJB has been the dominant market leader in Gainesville, yet soon after acquiring it, Gray invested more than half a million dollars in improving and expanding the station's local news coverage. As a direct result of those investments, WCJB has (among other things) enlarged its Marion news bureau from 300 to 2,000 square feet, built a state-of-the-art news set with a nine-screen video array behind the anchor desk, and acquired new studio cameras and live-broadcast equipment (including four transmitters, two receivers, and several remote workstations), and an upgraded weather system with new local weather cameras. Gray immediately more than doubled WCJB's ability to conduct live broadcasts, allowing the station to broadcast four live shots in four different locations in one show. WCJB also invested in its staff, hiring an additional live reporter to its morning show team, creating new digital executive producer and promotions producer positions, and adding shifts for digital-dedicated producers. WCJB is planning to add additional reporter positions in the near future. With Gray's resources, WCJB raised its employees' salaries across the board, including a 20% higher starting pay for new reporters. These improvements have allowed

WCJB to provide a better, more comprehensive local news product, and made WCJB a must-carry on cable and satellite providers because of increased ratings.

Of the many local news operations that Gray has launched or vastly improved following station acquisitions, other examples also stand out:

- Gray acquired two local television stations in Roanoke, Virginia: WDBJ in 2016 and WZBJ in 2018. WDBJ has been the clear market leader for most of its history. In contrast, WZBJ was an afterthought and barely achieved any ratings. Gray was only able to acquire WZBJ because the FCC relaxed its local ownership rules in the 2017 Reconsideration Order. Since those purchases, Gray has added 15 hours per week of local news on WDBJ and 18.5 hours per week on WZBJ, which has turned WZBJ into a true market competitor.
- In 2016, Gray acquired KWCH and KSCW in Wichita, Kansas. KWCH was the unquestioned market leader in Wichita. Meanwhile, Gray was able to acquire KSCW pursuant to a special FCC failing station waiver. Since then, Gray has added 17.5 hours of local news per week to both stations. The stations have further grown their viewership since Gray purchased them.

Gray's television stations do not just cover the news, they excel in the effort. In 2020, Gray's stations won 49 Regional Edward R. Murrow Awards for excellence in journalism, including two stations—WVLT in Knoxville, Tennessee and KFVS in Paducah, Kentucky—that were recognized for overall excellence in local journalism.[7] In 2019, Gray's stations won 57 Murrow Awards.[8] Also in 2019, Gray's WCTV in Tallahassee, Florida won the prestigious NAB Leadership Foundation Service to America Award for coverage of the devastation wrought by Hurricane Maria in Puerto Rico.[9] Gray's investigative journalism initiative, InvestigateTV—in which each of Gray's stations participates—was awarded two national Headliner Awards in 2019, one for reporting on the opioid crisis and another for investigative reporting on the health and environmental effects of nuclear

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[7] Gray Television, Inc., *RTDNA Awards 4 Regional Edward R. Murrow Awards to 21 Gray Television* Stations, 1–2 (May 13, 2020), https://graytv.gcs-web.com/static-files/effff5ea-2162-4755-b44a-a072c808c4f6.

[8] Gray Television, Inc., *Gray Television's Stations Awarded for Commitment to Excellence in Local Journalism With 57 Regional Edward R. Murrow Awards in 23 Gray Markets*, GlobeNewswire (April 24, 2019), https://www.globenewswire.com/news-release/2019/04/24/1808611/0/en/Gray-Television-s-Stations-Awarded-for-Commitment-to-Excellence-in-Local-Journalism-With-57-Regional-Edward-R-Murrow-Awards-in-23-Gray-Markets.html.

[9] Gray Washington News Bureau., *Gray Stations Honored at Service to America Awards in DC (*June 12, 2019), https://www.graydc.com/content/news/Gray-stations-honored-at-Service-to-America-awards-in-DC-511195281.html.

weapons storage.[10] Further, Gray's New Orleans station, WVUE, was honored by the Society of Professional Journalists for its documentaries, investigative reporting, and public service journalism.[11] The list of accolades grows annually as Gray continues to invest in and improve local news programming all over the nation.

Gray's commitment to top-flight journalism is recognized by local leaders. For example, on April 15, 2020, Governor Asa Hutchinson of Arkansas wrote to the staff of KAIT-TV in Jonesboro, Arkansas to thank the station for its coverage of a recent tornado. Governor Hutchinson's letter stated, "[b]ecause of your keen understanding of Arkansas' weather patterns and knowledge of your community, you undoubtedly saved lives during last month's tornado that was a direct hit to the City of Jonesboro."[12]

Gray's investments in increasing and improving local news programming are made possible through

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[10] Gray Television, Inc., *Gray's InvestigateTV Receives Two First Place National Headliner Awards*, GlobeNewswire (April 22, 2019), https://www.globenewswire.com/news-release/2019/04/22/1807332/0/en/Gray-s-InvestigateTV-Receives-Two-First-Place-National-Headliner-Awards.html.

[11] Gray Television, Inc., *WVUE Receives Three Sigma Delta Chi Awards from The Society of Professional Journalists*, 1 (April 29, 2019), https://gray.tv/uploads/documents/pressreleases/Press%20Release%20re%20SPJ%20Awards.pdf.

[12] Glen Hale, *Gov. Hutchinson Thanks Region 8 News for Tornado Coverage*, KAIT8 (May 18, 2020), https://www.kait8.com/2020/05/18/gov-hutchinson-thanks-region-news-tornado-coverage/.

the economies of scale and scope that come from operating a television business that is far larger than any single market. Given the limited revenue potential of the small and mid-sized markets where Gray operates, the company can support such high-quality local journalism only if it is permitted to build scale on both a national and a local basis.

Gray builds national scale by acquiring a large number of stations in a large number of markets. The revenue enables Gray to invest in its stations. As newly acquired stations improve their performance, they fund additional acquisitions, resulting in additional opportunities for Gray to acquire and improve stations across the country. Gray also builds national news scale through maintenance of its Washington News Bureau, which provides relevant national news content to all Gray stations, and InvestigateTV, which produces in-depth investigative journalism addressing matters of national importance and is distributed by Gray stations nationwide.[13] Gray accordingly can spread its national newsgathering costs across its entire station footprint, significantly reducing costs for each individual station.

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[13] *See* Gray Television, Inc., *Gray Announces Opening of Washington, D.C. News Bureau to Deliver Hyper-Local Coverage and Analysis of National Issues*, Cision PR Newswire (Feb. 2, 2015), https://www.prnewswire.com/news-releases/gray-announces-opening-of-washington-dc-news-bureau-to-deliver-hyper-local-coverage-and-analysis-of-national-issues-300028654.html; Gray Television, Inc., *supra* note 10 (describing InvestigateTV initiative).

Gray builds local scale by, where possible, buying more than one television station in a given market. This allows Gray to fund its investment in local service using two or more local or regional revenue streams. Gray also builds local scale by buying stations in adjacent markets and creating regional news bureaus to create content for local stations in multiple markets. Spreading these costs among multiple stations reduces the allocated cost for each station.

Gray's business strategy advances the significant, recognized public interest in improving local television service, particularly news and public affairs programming. *See, e.g.*, *In the Matter of 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules*, 18 FCC Rcd. 13620, 13644, ¶ 79 (2003) ("We agree that the airing of local news and public affairs programming by local television stations can serve as a useful measure of a station's effectiveness in serving the needs of its community."). For example, an industry expert appointed by the FCC noted that:

> Despite the industry's problems, the best of the local TV stations are still producing high-quality broadcast journalism of tremendous value to the community—while reaching a far broader audience than newspapers in terms of size, diversity, and socioeconomic status. It is hard to overstate the importance and value of these broadcasts. During emergencies, the local TV station is often considered to be as vital a part of the local community

> as the police and fire departments, and despite cutbacks most local TV reporters and managers believe they still are able to excel in the midst of a crisis.

Steven Waldman, *The Information Needs of Communities*, Federal Communications Commission 79 (July 2011) ("Waldman").[14] Local news continues to provide the important public service of informing the American citizenry of critical current events, and it remains the most popular way for individuals to access the news. *See* 2019 Pew Report at 4 ("Even as the preference for digital delivery creeps up on that for news via TV, local television stations retain a strong hold in the local news ecosystem. They top the list of nine types of local news providers, with 38% of U.S. adults saying they often get news from a local television station.").

Gray has replicated this strategy in dozens of markets across the United States and is eager to execute it in additional markets. Unfortunately, the FCC's outdated ownership rules, now reinstated by the Third Circuit's decision below, substantially limits Gray's ability to grow the local scale necessary to continue its investments.

C. The FCC's Duopoly Rule.

Since the dawn of broadcasting in the 1930s, the FCC has sought to limit the ownership of television stations that broadcasters can own on the national

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[14] Available at https://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf.

and local levels. *See In the Matter of Amendment of Section 73.3613 of the Commission's Rules Regarding Filing of Contracts*, 33 FCC Rcd. 10381 (2018). In creating and maintaining these restrictions, the FCC reasoned that structural ownership limitations were necessary to preserve localism, diversity of ownership, and competition in local television markets. *See In the 2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 29 FCC Rcd. 4371, 4377, ¶ 14 (2014) ("The media ownership rules have consistently been found to be necessary to further the Commission's longstanding policy goals of fostering competition, localism, and diversity.").

On a local basis, the FCC maintains a Local Television Ownership Rule that limits the number of television stations that an entity can own. *See* 47 C.F.R. § 73.3555.[15] Although the FCC has repeatedly attempted to modernize that rule, the Third Circuit has consistently rejected the agency's efforts, to the substantial detriment of the local communities affected by the Third Circuit's decisions.

The FCC adopted its first limitation on local television ownership in 1941. Federal Communications Commission, "Part 4—Broadcast

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[15] In addition, on a national basis, the FCC maintains a cap on the percentage of national television households any single owner of television stations can reach. That rule does not significantly affect Gray's efforts to acquire television stations in small and mid-sized markets, and it was not part of the proceeding that led to the Third Circuit's decision in this case.

Services Other Than Standard Broadcast," 6 Fed. Reg. 2282, 2284–2285 (May 6, 1941) ("1941 FCC Report"). Dubbed the "one to a market" rule, it prohibited a single owner from acquiring more than one full-power television station in any television market. *Id.* That remained the rule for nearly sixty years, until 1999, when the FCC modestly relaxed the rule to allow an entity to own a second television station in a market if: (1) at least one of the stations was not ranked in the top four (the "Top 4 Test"), and (2) at least eight "independent voices"—*i.e.*, independently-owned full-power television stations—remained in the DMA after consummation of the transaction (the "Eight Voices Test"). *In the Matter of Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd. 12903, 12932–33, ¶ 64 (1999). Unless prospective station owners could satisfy these two tests, they were generally prohibited from acquiring a second station in a DMA, a regulatory hurdle that became known as the "Duopoly Rule."

The Duopoly Rule included a waiver process by which a station owner could apply for permission from the FCC to acquire a second station in a DMA under limited circumstances. *Id.* at 12936–41, ¶¶ 71–87. Specifically, an owner may buy a second station in a DMA if the target station is a "failed" station that has not been in operation due to financial distress for at least four consecutive months immediately prior to the application, or is a debtor in an involuntary bankruptcy or insolvency proceeding at the time of the application. *Id.* at 12936–38, ¶¶ 71–77. In addition, an owner can purchase a second station if the acquisition target is a "failing" station that (1) has an all-day audience share of no more than 4%; (2) has had negative cash flow for three consecutive years immediately prior to the application; and (3) consolidation of the two stations would result in tangible and verifiable public interest benefits that outweigh any harm to competition and diversity. *Id.* at 12938–40, ¶¶ 78–82.

Under this 1999 version of the Duopoly Rule, ownership of more than one station in a television market was limited to markets with at least nine full-power television stations. Because the vast majority of small and mid-sized markets have eight or fewer stations, the 1999 Duopoly Rule still prohibited the ownership of two full-power stations in most markets outside the top 50 DMAs. *Id.* at 12935, ¶ 70. For station owners like Gray that concentrate their efforts in small and rural local markets, the modest changes to the Duopoly Rule in 1999 effectively made no difference. Except for the limited instances when a failing station waiver allowed Gray to acquire a second station in a few markets, the FCC's ownership limitations remained stalled in their 1941 form.[16]

When the "one to a market" rule was adopted, television was in its infancy and radio was by far the

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[16] Since 2013, Gray has acquired seven stations under a failing station waiver, despite a lack of eight independently owned stations in those markets following the transaction. Before the

more popular form of broadcast media. 1941 FCC Report at 2284–2285; *see also Golden Age of Radio in the US*, Digital Public Library of America.[17] Local television stations, radio stations, and newspapers provided the only sources of information and entertainment for the majority of the population. *See* Waldman at 59–60. While television eventually eclipsed radio in audience and influence, this market structure persisted well into the 1980s. *See Radio News Surpassed by TV in Survey*, N.Y. Times (Sept. 1, 1984).[18] Since the 1980s, local broadcast television stations have faced an ever-growing onslaught of new competitors. First cable operators introduced video services that offered dozens, and later hundreds, of new video channels. These niche channels—offering 24/7 sports, movies or national news programming—began to fragment a video audience that had previously belonged exclusively to broadcasters. Waldman at 105.

Beginning in the late 1990s with the advent of high-speed service connections, the Internet began delivering countless channels of information to an increasing number of households. *Id.* at 116. "Surfing the Net" further diminished the pull of local television and, as the Internet matured, websites like YouTube began offering an endless supply of competitive video

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2017 Reconsideration Order, the FCC never granted a waiver allowing the purchase of a second Top 4 rated station in a market.

[17] Available at https://dp.la/exhibitions/radio-golden-age/radio-tv (last visited on May 18, 2020).

[18] Available at https://www.nytimes.com/1984/09/01/arts/radio-news-surpassed-by-tv-in-survey.html.

programming. *Id.* at 118, 164. Since 1980, primetime television ratings have declined more than 70%. *See* 2017 *Ex Parte* Letter, at Exhibit A, Slide 9. For a business that depends on selling advertising measured by audience size, this decline has irrevocably changed the competitive market in which local television stations operate. Nonetheless, the "one to a market" rule remained until the FCC adopted the reforms under review in this case.

The Duopoly Rule remained essentially unchanged until 2017, despite the fact that the marketplace for local television service changed dramatically during this time. In its 2017 Reconsideration Order, the FCC revised the Duopoly Rule both to eliminate the Eight Voices Test and to permit station owners to apply for permission to own two Top 4 stations in a market. 2017 Reconsideration Order at 9831, ¶ 66. In reversing its 2016 decision to retain the older version of the Duopoly Rule, the FCC found that the older Rule failed to respond to marketplace changes and failed properly to credit the "importance of broadcast television stations in their local markets." *Id.* at 9832, ¶ 69. In particular, the FCC found that marketplace changes and increasing competition justified relaxing the rules to ensure that broadcasters can compete fairly. *Id.* at 9833–34, ¶¶ 71–72. While broadcast television retains a central place in the local video market, the FCC recognized that local broadcast station ownership does not justify regulation that is otherwise unnecessary to promote competition. *Id.*

With respect to the Eight Voices Test, the FCC reasoned that retaining the rule was arbitrary because there is nothing magic about the number eight and because prohibiting duopolies in markets with fewer stations "prevents combinations that would likely produce significant public interest benefits." *Id.* at 9876, ¶ 8 (Appendix B). Moreover:

> In multiple instances, the Commission acknowledged the potential public interest benefits of common ownership, which potentially allow a local broadcast station to invest more resources in news or other public interest programming that meets the needs of its local community. We find that the Eight Voices Test denies the public interest benefits produced by common ownership without any evidence of countervailing benefits to competition from preserving the requirement. Furthermore, these markets—including many small and mid-sized markets that have less advertising revenue to fund local programming—are the places where the efficiencies of common ownership can often yield the greatest benefits. Our action in repealing the Eight-Voices Test will enable local television broadcasters to realize these benefits and better serve their local markets. In particular, the record suggests that local news programming is typically one of the largest operational costs for broadcasters; accordingly, stations may find that common ownership enables

> them to provide more high-quality local programming, especially in revenue-scarce small and mid-sized markets.

Id. at 9835–36, ¶ 77.

With respect to the Top 4 Test, the FCC found that the potential competitive harms it was originally intended to prevent would not occur in all markets and that "the rule may prohibit combinations that do not present public interest harms or that offer potential public interest benefits that outweigh any potential harms." *Id.* at 9837, ¶ 79. Accordingly, the FCC replaced the Top 4 Test with a case-by-case review of proposed transactions to determine whether a Top 4 combination is in the public interest. *Id.*

The FCC enacted these revisions to the Duopoly Rule in November 2017, finally recognizing that marketplace changes had eliminated any justification for the "one to a market" rule in small and mid-sized markets. Unfortunately, in September 2019, the Third Circuit reinstated the older version of the Rule containing the Eight Voices and Top 4 Tests, and thus effectively reverted the regulatory landscape to its 1941 form for small and mid-sized markets.

II. The Court Should Grant The Petitions Because The Third Circuit's Decision Creates Uncertainty For Businesses Like Gray's And Forestalls Further Improvements To Local News Production In Small And Mid-Sized Markets.

By repeatedly rejecting the FCC's attempts to modernize its ownership rules and effectively freezing the Duopoly Rule in its 1941 form, the Third Circuit has significantly impeded further expansion and improvements in local news production by companies like Gray. For example, following the FCC's 2017 modernization of the Duopoly Rule, but before the Third Circuit's decision reversing those changes, Gray was able to complete three transactions:

- In 2018, Gray acquired WFFP-TV (now WZBJ) from Morning Star Broadcasting, LLC. This was Gray's second full-power station in the Roanoke-Lynchburg DMA, which has fewer than eight independently owned stations.
- As part of Gray's merger with Raycom Media in early 2019, the FCC approved Gray's ownership of two Top 4 combinations, in Honolulu, Hawaii and Amarillo, Texas, and the creation of a station combination in Richmond, Virginia, which lacks eight independently owned stations.
- In 2019, Gray acquired Top 4 station KDLT(TV) from Red River Broadcasting in Sioux Falls, South Dakota, Gray's second Top 4 station in that DMA, which was acquired pursuant to the FCC's now-suspended case-by-case review process for Top 4 combinations.

Gray has made substantial investments in those stations, providing viewers in those DMAs with comprehensive local news and public interest coverage. But each of these local station combinations would have violated the older version of the Duopoly Rule that was reinstated by the Third Circuit, and thus would not have been permitted by the FCC prior to its modernization of that rule or under the Third Circuit's current ruling.

The Third Circuit's decision calls into question the viability of these acquisitions. While the FCC has not yet suggested that it would force Gray to unwind any of the three transactions it completed under the modernized Duopoly Rule, as long as the 1941 form of the Rule remains effectively reinstated in small and mid-sized markets, Gray's ability to continue owning and operating these stations will be in doubt. Further, Gray must obtain FCC approval of these combinations when it seeks to renew its license to own each station, and the FCC would need to approve any attempt by Gray to sell these stations to another party as a combination. These risks make investment in these stations more difficult and uncertain, and undermine the ability of Gray and companies like it to continue investing in and expanding local news service.

The Third Circuit's decision not only creates uncertainty for Gray, but also prevents Gray from implementing its business strategy in additional small and mid-sized markets. For example, Gray's acquisition of WCJB in Gainesville and subsequent investments in that station (as discussed above) have made WCJB into a ratings giant. The next logical step for Gray would be to acquire a second station to leverage its investments and take advantage of economies of scale. The Third Circuit's ruling, however, locks in place FCC rules that generally prohibit Gray from further acquisitions in Gainesville. Viewers in such small and mid-sized markets will thus be deprived of the benefits of Gray's investments and its proven track record of improving news and public service in local communities.

For the foregoing reasons, it is imperative that the Court grant the petitions and reverse the Third Circuit's decision so that the FCC's modernized Duopoly Rule can take effect.

CONCLUSION

The Court should grant the petitions for writs of *certiorari*.

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