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 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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November 23, 2020

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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 169 television stations that collectively reach approximately 24% of U.S. television households in 94 Designated Market Areas, as defined by The Nielsen Company. While Gray owns stations in markets as large as Tampa, Florida (Designated Market Area #12 of 210), its stations are primarily concentrated in small and mid-sized markets across the country, with the majority in markets with fewer than 500,000 television households.

Gray has a substantial interest in this case 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 Gray has advocated for relief from the FCC's outdated ownership rules for a decade.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 it

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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 consented to this filing. Undersigned counsel previously represented Cox Media Group ("CMG"), a broadcaster and an intervenor below and, by default, initially 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.

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 case 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 news and community programming, and then acquire a second station in those markets to obtain greater local scale and spread costs among multiple stations. Gray's experience provides a perspective that will aid the Court's analysis in reviewing the Third Circuit's decision in this case.

SUMMARY OF ARGUMENT

Section 202(h) of the Telecommunications Act of 1996 requires that the FCC review its regulations concerning the ownership of broadcast television stations every four years and repeal or modify any that do not serve the public interest "as the result of competition." Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111–12 (1996), *as amended by* Pub. L. No. 108-199, § 629, 118 Stat. 3, 99–100 (2004), *codified at* 47 U.S.C. § 303 note. As the statute's text, structure, purpose, and history establish, Section 202(h) directs that the effects of "competition" must be the primary consideration for the FCC's review.

The FCC followed that clear mandate to consider competition as the foundational consideration during its 2017 modernization of its decades-old ownership rules. But the Third Circuit vacated those updated rules because it found that the FCC did not sufficiently consider a different policy consideration—namely, diversity in who owns broadcast stations. The Third Circuit's decision below—which reinstates the FCC's outdated rules that are no longer in the public interest as a result of competition—contravenes Section 202(h)'s text, structure, purpose, and history and should not be permitted to stand.

The decision below also harms small and mid-sized communities around the nation by depriving them of the benefits of the FCC's modernized rules. In an era when low-cost digital news sources undercut local journalism, these communities require substantial investment in order to receive high-quality local news and community programming. The FCC's updated rules would facilitate that investment, as Gray's business model and experience in developing and delivering award-winning local news and community programming illustrate. The FCC's much-needed modernized broadcast ownership rules should, at long last, be allowed to take effect.

ARGUMENT

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 and local levels. *See In the Matter of Amendment of Section 73.3613 of the Commission's Rules Regarding Filing of Contracts—Modernization of Media*

Regulation Initiative, 33 FCC Rcd. 10381 (2018). In creating and maintaining these restrictions, the FCC reasoned that structural ownership limitations were necessary to preserve competition, localism, and diversity of ownership in local television 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*, 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.").

Recognizing the FCC's regulations could become outdated as competition affected market conditions, however, Congress directed the FCC to review and update its regulations regularly based on competition. Section 202(h) of the Telecommunications Act of 1996 provides that the FCC "shall" review its ownership rules quadrennially, "shall determine whether any of such rules are necessary in the public interest as the result of competition," and "shall repeal or modify any regulation it determines to be no longer in the public interest." 47 U.S.C. § 303 note.

That statutory command places prime emphasis on updating regulations in light of competition—a consideration that prompted the FCC to take action in the rulemaking at issue here to modernize broadcast ownership restrictions that are no longer warranted based on current market conditions. The Third Circuit's decision vacating the FCC's order and reinstating the prior ownership restrictions frustrates Congress's directive that regulations outmoded "as the result of competition" should not remain in place. *See id.* And the Third Circuit's decision produces harmful consequences by preventing the FCC from implementing a much-needed modernization of its broadcast ownership rules that would permit companies like Gray to continue serving the public interest by offering high quality local news products. The Third Circuit's decision is erroneous and should be reversed.

I. Properly Construed, Section 202(h) Directs The FCC To Modernize Ownership Rules Regularly Based On Competition.

In loosening broadcast ownership restrictions, the FCC took action that was consistent with—and indeed required by—the statute that triggered the rulemaking: Section 202(h) of the Telecommunications Act of 1996. Specifically, the FCC balanced multiple policy goals and found that its 2017 changes were necessary in part to provide media companies "a greater opportunity to compete and thrive in the vibrant and fast-changing media marketplace." *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, 9803, ¶ 1 (2017) ("Reconsideration Order"). Section 202(h)'s text, context, purpose, and legislative history support the FCC's analysis because they demonstrate that Congress enacted the statute to ensure that the FCC regularly modernized its ownership rules and, in doing so, considered "competition" as the principal factor animating its review. 47 U.S.C. § 303 note.

A. Section 202(h)'s Text Requires The FCC To Consider "Competition."

"It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). Section 202(h) requires that the FCC "shall review . . . all of its ownership rules" every four years "and shall determine whether any of such rules are necessary in the public interest as the result of competition." 47 U.S.C. § 303 note. It also mandates that the FCC "shall repeal or modify any regulation it determines to be no longer in the public interest." *Id.*

The most straightforward reading of Section 202(h) is that it commands the FCC to repeal or modify ownership rules that are no longer necessary as a result of competition in the current media marketplace. As the FCC observed, in adopting Section 202(h), "Congress charged [the FCC] to implement policies that create opportunities for greater competition—both among broadcasters and between broadcasters and other outlets—that would lessen the need for prescriptive ownership regulations." *In the Matter of 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules*, 18 FCC Rcd. 13620, 13638, ¶ 56 (2003) ("2002 Biennial Review").

To be sure, Section 202(h)'s reference to the "public interest" encompasses several factors, including the FCC's "policy goals of viewpoint diversity, localism, and competition." Reconsideration Order at 9810, ¶ 15. However, Section 202(h) specifically directs the FCC to consider whether a rule is "in the public interest *as the result of competition*." 47 U.S.C. § 303 note (emphasis added). Congress's express statutory reference to "competition," without calling out any other public interest factor for particular emphasis, elevates that consideration to carry prime importance in the public interest analysis.

That interpretation draws additional force from the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted); *see also*, *e.g.*, *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) ("It is [the Court's] duty to give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)). Prior to Section 202(h)'s enactment, the FCC had authority to regulate in the public interest and considered competition as one key policy goal. *See, e.g.*, *United States v. Storer Broad. Co.*, 351 U.S. 192, 203 (1956) (noting the FCC "deals with the public interest" and regulates "for public protection with careful provision to assure fair opportunity for open competition"); *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940) ("[T]he [Communications] Act [of 1934] recognizes that the field of broadcasting is one of free competition."). Thus, the statutory reference to the "public interest" already included consideration of competition as one factor among several. By additionally and expressly requiring the FCC to evaluate whether ownership restrictions are in the public interest "as the result of competition," 47 U.S.C. § 303 note, Congress placed paramount weight on that factor in the public interest analysis the FCC must perform under Section 202(h).

If Section 202(h) were instead interpreted to encompass the FCC's ordinary public interest analysis, the phrase "as the result of competition" would do no work and be rendered superfluous. *See Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 135 S. Ct. 1338, 1352–53 (2015) (rejecting interpretation of phrase in statute that would add "clarity" because it would also render phrase "superfluous"). To give meaning to each word of Section 202(h), the statute is properly interpreted to require the FCC to review and as necessary revise each of its ownership rules with the effect of competition as the central and mandatory public interest concern.

B. The Statute's Structure and Purpose Reinforce That "Competition" Is Section 202(h)'s Primary Goal.

The other provisions of Section 202 reinforce that Congress prioritized eliminating outdated regulations and promoting competition when it adopted the Telecommunications Act of 1996. Congress itself removed or relaxed a number of broadcast ownership rules with the clear purpose and effect of increasing competition. *See* Pub. L. No. 104-104, §§ 202(a), (b), (c)(1), (e), (f)(1), (i), 110 Stat. 56, 110–12. For example, Section 202(c)(1) addresses "National Ownership Limits" for television stations and requires the FCC to, among other things, "eliminat[e] the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide."

47 U.S.C. § 303 note. Another example is Section 202(f)(1), which addresses the "Elimination of Restrictions" in "Cable Cross Ownership" and orders the FCC to "revise . . . its regulations . . . to permit a person or entity to own or control a network of broadcast stations and a cable system." *Id.* Against the backdrop of these other provisions, Section 202(h) further reflects Congress's goal to increase competition by directing the FCC to review the ownership rules regularly and modify them considering competition on a going-forward basis. Thus, "[t]he broader statutory context points to the same conclusion the immediate text suggests." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071 (2018).

Moreover, reading Section 202(h) in the context of the whole act supports that Congress intended "competition" to be the principal focus of the FCC's quadrennial regulatory review. As stated in its preface, the purpose of the Telecommunications Act of 1996 is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Preamble, Pub. L. No. 104-104, 110 Stat. 56. In light of this "declared purpose of Congress," it would be "unacceptable" to construe Section 202(h) as merely requiring the FCC to perform an ordinary public interest analysis and not to recognize competition as the chief consideration. *United States v. Turkette*, 452 U.S. 576, 589 (1981) (finding statute's "declared purpose" persuasive in determining law's scope).

C. Legislative History Corroborates That Congress Intended Section 202(h) To Focus On Competition.

Congress adopted the Telecommunications Act of 1996 "to provide for a pro-competitive, de-regulatory national policy framework" that would adjust rapidly to the advanced technologies being deployed by private entities by "opening all telecommunications markets to competition." S. Rep. No. 104-230, at 1–2 (1996); H.R. Rep. No. 104-458, at 113 (1996) (same); *see also* H.R. Rep. No. 104-204, at 55 (1995) (choosing "to depart from the traditional notions of broadcast regulation and to rely more on competitive market forces"). As Congress found, "[i]n a competitive environment, arbitrary limitations on broadcast ownership and blanket prohibitions on mergers or joint ventures between distribution outlets are no longer necessary." *Id.*

These statements by Congress as to the "purpose and design" of the Telecommunications Act of 1996 serve to "corroborate" the paramount importance of competition to the quadrennial review required by Section 202(h). *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 777 (2018). Section 202(h)'s "language and the accompanying legislative history reveal a belief that 'opening all telecommunications markets to competition' will best suit a marketplace compris[ing] diverse media platforms and shaped by technological advancement." Pet. App. 49a–50a (quoting H.R. Rep. No. 104-458 at 113) (Scirica, J., concurring in part and dissenting in part).[2] The legislative history thus further confirms that competition functions as the paramount concern in the FCC's quadrennial review under Section 202(h).

II. The Third Circuit's Decision Erroneously Ignores That Competition Is Section 202(h)'s Primary Consideration.

In accordance with Section 202(h), the FCC in the Reconsideration Order analyzed whether the broadcast ownership restrictions remained necessary in the public interest as the result of competition and determined that the restrictions should be modified. The FCC's analysis followed the statutory command to evaluate the need for reform based on the effects of competition and to update and modernize the rules in response to changed market conditions. In vacating the Reconsideration Order, the Third Circuit's decision overturned the FCC's work and contravened Congress's directive that the rules "shall" be modified as competition requires to serve the public interest. That decision is erroneous and should not be permitted to stand.

A. The FCC Correctly Revised Its Broadcast Ownership Duopoly Rule In Light Of Competition.

1. 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.

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[2] References to "Pet. App." are to the petition appendix submitted by Industry Petitioners in docket number 19-1241.

§ 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. 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).[3] 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 Grp. P'ship of Atlanta v. Cmty. Cable Television*, 15 FCC Rcd. 6279, 6279, ¶ 2 (2000).

The Reconsideration Order concerns the FCC's Local Television Ownership Rule, which limits the number of television stations an entity can own on a

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[3] *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, top-ranked New York City has 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.

local basis. *See* 47 C.F.R. § 73.3555.[4] The FCC adopted its first limitation on local television ownership in 1941. Federal Communications Commission, "Part 4—Broadcast Services Other Than Standard Broadcast," 6 Fed. Reg. 2282, 2284–85 (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.*

When the "one to a market" rule was adopted, television was in its infancy and radio was by far the more popular form of broadcast media. 1941 FCC Report at 2284–85; *see also Golden Age of Radio in the US*, Digital Public Library of America.[5] Local television stations, radio stations, and newspapers provided the only sources of information and entertainment for the majority of the population. *See* Steven Waldman, *The Information Needs of Communities*, Federal Communications Commission 59–60 (July 2011) ("Waldman").[6] While television

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[4] 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 was not part of the proceeding that led to the Third Circuit's decision in this case.

[5] Available at https://dp.la/exhibitions/radio-golden-age/radio-tv.

[6] Available at https://www.fcc.gov/sites/default/files/the-information-needs-of-communities-report-july-2011.pdf.

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).[7]

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.

Then, 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 programming. *Id.* at 118, 164. Since 1980, primetime television ratings have declined more than 70%. *See* Letter from Robert M. McDowell, Counsel to Gray Television, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50, *et al.*, at Exhibit A, Slide 9 (June 28, 2017) ("*Ex Parte* Letter"). Because the broadcast television business depends on selling advertising measured by audience size, this decline has irrevocably changed the competitive market in which local television stations operate. *See* U.S.

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

Senate Commerce Committee, *Local Journalism: America's Most Trusted News Sources Threatened* 21 (2020) ("Cantwell Report") ("The rise of digital advertising has also decreased revenue for radio and television media.").[8]

2. The "one to a market rule" remained in place 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."

Under 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 fewer than nine stations, the 1999 Duopoly Rule perpetuated the prohibition on ownership of two full-power stations in most markets outside the top 50 DMAs. *Id.* at 12935, ¶ 70. Although the Duopoly Rule included a waiver process by which

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[8] Available at https://www.cantwell.senate.gov/imo/media/doc/Local%20Journalism%20Report%2010.26.20_430pm.pdf

a station owner could apply for permission from the FCC to acquire a second station in a DMA, the rule restricted waivers to extremely limited circumstances. *Id.* at 12936–41, ¶¶ 71–87.[9] For station owners concentrating their efforts in small and mid-sized markets, the modest changes to the Duopoly Rule in 1999 made no practical difference, effectively leaving the FCC's "one to a market" ownership limitations stalled in their 1941 tracks.

3. The Duopoly Rule remained essentially unchanged until 2017, despite the fact that the marketplace for local television service transformed dramatically during this time. In the Reconsideration Order, the FCC finally revised the Duopoly Rule both to eliminate the Eight-Voices Test and to modify the Top 4 Test to permit station owners to apply for permission to own two Top 4 stations in a market. Reconsideration Order at 9831, ¶ 66. In reversing its 2016 decision to retain the Duopoly Rule, the FCC found that the older Rule failed to respond to

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[9] Specifically, the 1999 Duopoly Rule permitted an owner to buy a second station in a DMA if the target station was a "failed" station that had not been in operation due to financial distress for at least four consecutive months immediately prior to the application, or was 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 could purchase a second station if the acquisition target was a "failing" station that (1) had an all-day audience share of no more than 4%; (2) 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 outweighed any harm to competition and diversity. *Id.* at 12938–40, ¶¶ 78–82.

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 the public interest does not justify regulation of local broadcast station ownership that would be otherwise unnecessary to promote competition, necessitating that the FCC modify its rules under Section 202(h). *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, the FCC found 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." *Id.* at 9835–36, ¶ 77. The FCC consequently "repeal[ed] the Eight-Voices Test." *Id.*

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.*

By making these revisions to the Duopoly Rule in the Reconsideration Order, the FCC implemented Section 202(h)'s mandate to update the ownership rules with a central focus on competition. The Reconsideration Order reflects the FCC's reasoned analysis that marketplace changes had eliminated any justification for the "one to a market" rule in small and mid-sized markets and that it was "in the public interest as the result of competition" to modify that rule. 47 U.S.C. § 303 note.

B. The Third Circuit Erred In Vacating The FCC's Reconsideration Order.

As amply demonstrated in Petitioners' opening briefs, the FCC's 2017 modernization of the Duopoly Rule appropriately placed competition in the media marketplace as the foremost concern, and "determined that 'dramatic changes in the marketplace' had rendered several ownership rules unnecessary or ineffective at promoting the public-interest values of competition, localism, and viewpoint diversity." Industry Petitioners' Br. 35–36 (quoting Pet. App. 67a); *see also* FCC Petitioners' Br. 27–32. Indeed, no party disputes "the FCC's core determination that the ownership rules have ceased to serve the 'public interest'" or "identifies any reason to question the FCC's key competitive findings and judgments." Pet. App. 55a (Scirica, J., concurring in part and dissenting in part). Under the proper construction of Section 202(h), those findings amply suffice to sustain the FCC's rule changes.

The Third Circuit, however, departed from the text, structure, purpose, and legislative history of Section 202(h) to vacate the Reconsideration Order because the court found that the FCC did not "g[i]ve a meaningful evaluation of th[e] effect" of "promoting ownership diversity." *Id.* at 41a.[10] The Third Circuit's decision improperly overrides Section 202(h)'s mandate by raising one of the many agency policy goals over the primary factor—competition—that Congress expressly directed the FCC to consider.

In vacating the FCC's order, the Third Circuit reinstated the older version of the Duopoly Rule containing the Eight-Voices and Top 4 Tests—thus effectively reverting the regulatory landscape to 1941 for small and mid-sized markets. That contradicts Congress's mandate that ownership restrictions no longer necessary as a result of competition "shall" be repealed or modified. This Court should enforce Section 202(h) to permit the FCC's 2017 rule changes to take effect, thus allowing the FCC to comply with Congress's directive that it modify its ownership rules in response to the current competitive marketplace.

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[10] As Petitioners' briefs explain, the Third Circuit improperly substituted its judgment for the FCC's when evaluating ownership diversity. Industry Petitioners' Br. 37–46; FCC Petitioners' Br. 36–43. Gray agrees fully with those arguments and does not repeat them here.

III. The Third Circuit's Decision Harms Companies Like Gray, Which Seek To Improve And Expand Local News Coverage Through Increased Investment Allowed By Economies of Scale.

The Third Circuit's decision hindering the FCC from modernizing its broadcast ownership rules has a serious and negative effect on the development of local news and community programming in small and mid-sized markets. The decision's effect on Gray well illustrates that significant harm and exemplifies the practical problems produced by the Third Circuit's faulty analysis.

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 news and community programming across both stations, Gray elevates the profile of the second station and both stations achieve higher ratings than either could on its own. As a result, both stations are better able to compete for advertising revenue against much larger digital platforms.

Gray has achieved great success with this approach, realizing increased revenue and improving local news coverage across the country. But the FCC's outdated broadcast ownership rules present an enormous obstacle to Gray's ability to compete in the vastly changed modern media landscape. The consequences of the decision on Gray and other companies demonstrate how the Third Circuit's decision runs counter to the public interest and further support reversal here.

A. The Economics of Local Television.

Television station revenue is derived primarily from two sources: (1) local, regional, and national 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) ("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. Reconsideration Order at 9835–36, ¶ 77.

With ever-increasing competition from digital advertising, television advertising revenue is falling. A recent report issued by U.S. Senate Commerce Committee Ranking Member Maria Cantwell (D-Washington) noted that, "[f]rom 2000–2018, local TV stations' advertising revenue fell by 40 percent, after accounting for inflation." Cantwell Report at 21 (citation omitted). And this source of revenue is being further "[w]alloped by COVID-19," with "local TV stations experienc[ing] drops of 40-60 percent" in advertising revenue. *Id.* at 49 (citation omitted). Given these market conditions, purchasing or producing the highest rated programming with the largest number of viewers is crucial to the success of small and mid-sized market television stations.

The second major revenue source, 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. 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. 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. 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) ("Pew Report") ("Local TV stations are turned to most for local news, primarily through the TV set; most other providers have larger digital share.")[11]; 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* Reconsideration Order at 9836, ¶ 77, n.229 ("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.") (citing *Ex Parte* Letter at 3–4, 7–8); *see also* Adam Jacobson, *Retransmission Consent Revenue: An 11% Growth Engine*, Radio+Television Business Report (July 30, 2019).[12] 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

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[11] 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.

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

one of broadcasters' largest operational costs. 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 programing in that market. Often the top-rated station in its market—especially in smaller markets—held that position for decades but, because of intense competition for viewers' attention and advertising dollars from multi-billion-dollar digital platforms, the former owner can no longer afford the investments needed for the station to maintain its position. 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 resources 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 top-ranked in 68 of the 93 markets in which Gray was then operating 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. *See* Cantwell Report at 7 ("The American public trusts local journalism based on its long history of unbiased reporting, factual accuracy, and its connection to and understanding of the communities it covers.").

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 and a reporter for its expanded Marion news bureau, creating new digital executive producer and promotions producer positions, and adding shifts for digital-dedicated producers. WCJB is planning to add one more reporter position 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 allow WCJB to provide a better, more comprehensive local news product, and maintain WCJB's status as a "must-have" 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 had barely achieved any ratings. Gray was only able to acquire WZBJ because the FCC relaxed its local ownership rules in the 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 Cape Girardeau, Missouri—that were recognized for overall excellence in local journalism.[13] In 2019, Gray's stations won 57 Murrow Awards.[14] Also in 2019,

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[13] 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.

[14] Gray Television, Inc., *Gray Television's Stations Awarded for Commitment to Excellence in Local Journalism With 57 Regional*

Gray's WCTV in Tallahassee, Florida won the prestigious National Association of Broadcasters Leadership Foundation Service to America Award for coverage of the devastation wrought by Hurricane Maria in Puerto Rico.[15] 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 weapons storage.[16] Further, Gray's New Orleans station, WVUE, was honored by the Society of Professional Journalists for its documentaries, investigative reporting, and public service

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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.

[15] 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.

[16] 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.

journalism.[17] 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."[18]

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

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[17] 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.

[18] 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/.

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.[19] Gray accordingly can spread its national newsgathering costs across its entire station footprint, significantly reducing costs for each individual station.

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, and the improved quality from these investments

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[19] *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 16 (describing InvestigateTV initiative).

allows Gray's stations to better compete for viewers' attention against much larger digital platforms.

Gray's business strategy advances the significant, recognized public interest in improving local television service, particularly news and public affairs programming. 2002 Biennial Review at 13644, ¶ 79 ("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 socio-economic 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.

Waldman at 79.

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*

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."); Cantwell Report at 8 ("The balance, integrity, and credibility that local journalism uniquely provides is so important to communities and our nation because it is where Americans get their news."). That is especially true, for example, during the ongoing COVID-19 pandemic because "[l]ocal television stations [] are experiencing higher viewership during the pandemic" and "have run hundreds of thousands of COVID-19 public service announcements" that "include critical information on how to help prevent [its] spread." *Id.* at 9.

C. The Effect Of The Third Circuit's Decision On Companies Like Gray.

Gray has replicated its strategy of improving local news based on economies of scale 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, greatly limit Gray's ability to grow the local scale necessary to continue its investments.

Before the Third Circuit vacated the Reconsideration Order, the FCC's modernization of the Duopoly Rule was working as intended. For example, in the window of time between the effective date of the Reconsideration Order and the Third Circuit's decision, Gray completed 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 all of these local station combinations would have violated the older version of the Duopoly Rule that was reinstated by the Third Circuit, and would not have been allowed by the FCC prior to its modernization of that Rule.

The FCC's modernized Duopoly Rule, if permitted to take effect, would allow Gray to implement 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) secured WCJB's status as a ratings giant. The next logical step for Gray would be to acquire a second station to leverage its investments and build up the second station to provide more local news and community programming. The FCC's revisions to the Duopoly Rule would permit Gray to make further acquisitions in DMAs like Gainesville, thus providing viewers in such small and mid-sized markets the benefits of Gray's investments and its proven track record of improving news and other programming in local communities.

The Third Circuit's decision vacating the FCC's modernized ownership rules harms small and mid-sized communities and the companies like Gray that wish to serve them. That result is not justified under a proper application of Section 202(h). This Court should reverse the Third Circuit's decision and, at long last, allow the FCC's modernization of the Duopoly Rule to take effect.

CONCLUSION

The Third Circuit's decision should be reversed.

Respectfully submitted,

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November 23, 2020