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 MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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December 23, 2020

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INTEREST OF *AMICI CURIAE*[1]

Amici are members of Congress, many of whom served when the Telecommunications Act of 1996, including provisions pertinent to these cases, were drafted, debated, and passed, and two of whom served as conferees on the Act. The Telecommunications Act requires the Federal Communications Commission (FCC) to review its rules governing broadcast media ownership every four years and to "repeal or modify any regulation it determines to be no longer in the public interest." Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996). Based on their experiences serving in Congress, *amici* understand that a diversity of broadcast sources is essential to the public interest and that the Telecommunications Act requires the FCC to meaningfully consider the effect regulatory changes would have on minority and female ownership of broadcast media. *Amici* have a substantial interest in ensuring that the FCC complies with this statutory mandate.

A full listing of *amici* appears in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 202(h) of the Telecommunications Act of 1996 directs the FCC to review its rules governing broadcast media ownership every four years to

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[1] The parties have consented to the filing of this brief, and their letters of consent have all been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

determine whether those rules "are necessary in the public interest as the result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest." Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996). Engaging in that review, the FCC has taken different approaches over time, at some points affirming or tightening its existing rules, and at other points attempting to relax its rules limiting common ownership of broadcast stations within the same market, purportedly to accommodate changed market conditions.

Prometheus Radio Project and others, including members of the broadcast industry, have challenged various of these FCC attempts to change its regulations, and each time, the Third Circuit has agreed that the FCC's rule changes are unlawful. *See, e.g.*, NAB Pet. App. 44a. Most recently, the Third Circuit determined that the FCC's changes were arbitrary and capricious in violation of the Administrative Procedure Act because, in modifying its regulations, the Commission did not sufficiently consider the effects the changes would have on broadcast ownership diversity—a mandatory aspect of the statutory public interest analysis, as the FCC has repeatedly acknowledged. *Id.* at 34a. Recognizing the Commission's stated goal of fostering ownership diversity, the Third Circuit explained that the FCC's review "must 'include a determination about the effect of the rules on minority and female ownership.'" *Id.* (quoting *Prometheus Radio Project v. FCC*, 824 F.3d 33, 54 n.13 (3d Cir. 2016)). Although the FCC purported to make such a determination, it "cited no evidence whatsoever regarding gender diversity," *id.* at 37a, and it conducted an analysis of racial diversity in broadcast ownership that was "so

insubstantial that it would receive a failing grade in any introductory statistics class," *id.* at 38a.

The Third Circuit was right. Both Congress and this Court have long recognized the importance of broadcast media and that maintaining diversity in broadcast media ownership is essential to serving the public interest. For instance, in the Cable Television Consumer Protection and Competition Act of 1992, Congress recognized that "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 676 (1994) (*Turner I*) (O'Connor, J., concurring in part and dissenting in part) (quoting Pub. L. No. 102-385, § 2(a)(6), 106 Stat. 1460 (1992)). Likewise, this Court has repeatedly affirmed that diverse ownership of broadcast media is essential to the public interest. Indeed, the Court has recognized that "it has long been a basic tenet of national communications policy that 'the widest possible dissemination of information from *diverse* and antagonistic sources *is essential to the welfare of the public*.'" *Id.* at 663 (emphases added) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality opinion)).

Accordingly, the FCC itself has "long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power," *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978) (*NCCB*), and it has maintained three "longstanding policy goals of competition, localism, and diversity," *2014 Quadrennial Regulatory Review, Second Report and Order*, 31 FCC Rcd. 9864, 9870 (2016).

Because of the importance of diversity in broadcast media ownership, Congress has required the FCC to meaningfully consider the impact on diversity in determining whether to repeal or modify a regulation because it is no longer in the public interest, as the text, structure, and history of the Telecommunications Act all demonstrate. The plain language of the Act broadly requires the FCC to "determine" whether its media ownership rules "are necessary in the public interest as the result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest." Pub. L. No. 104-104, § 202(h). This mandate requires the FCC to determine whether a regulation promotes diversity in broadcast media ownership because, as both Congress and this Court have recognized, the maintenance of a wide array of media sources is essential to the public interest. In other words, the statute's "public interest" language is broad and "'*necessarily* invites reference to First Amendment principles,' and, in particular, to the First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources,'" *NCCB*, 436 U.S. at 795 (emphasis added) (citation omitted) (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973), and *Associated Press v. United States*, 326 U.S. 1, 20 (1945)), while requiring consideration of competition and localism as well.

Critically, Industry Petitioners' argument that the Telecommunications Act mandates only a narrow "competition analysis," NAB Pet'rs Br. 24, is wrong. According to Industry Petitioners, the Telecommunications Act requires the FCC to repeal only rules that are not "necessary in the public interest as the result of competition." *See id.* at i, 3. But that is not what

§ 202(h) says. Instead, § 202(h) is split into two sentences: It first provides that the FCC "shall review . . . all of its ownership rules . . . and shall determine whether any of such rules are necessary in the public interest as the result of competition." Pub. L. No. 104-104, § 202(h). In the subsequent sentence, it separately states that the FCC "shall repeal or modify any regulation it determines to be no longer in the public interest." *Id.* In other words, this second sentence requires the FCC to engage in a broader consideration of what is in the "public interest" that extends beyond competition concerns. Thus, Industry Petitioners' argument that any consideration of ownership diversity is "atextual," NAB Pet'rs Br. 4, is unpersuasive—and is itself atextual.

Moreover, the broader structure of the Telecommunications Act demonstrates that when Congress referred to the "public interest," it did not require consideration of competition alone. That Congress referenced "competition" alongside "public interest" in other provisions of the Telecommunications Act demonstrates that the two terms bear distinct meanings and that competition is but one factor the FCC must consider in its public interest review.

The history of Congress's regulation of broadcast and other media further reflects that Congress expected the FCC to consider all components of the public interest standard in its § 202(h) review, including broadcast ownership diversity. Throughout the twentieth century, Congress consistently recognized that diversity in media ownership is essential to the public interest, and nothing in the Telecommunications Act of 1996 indicates a retreat from that policy. To the contrary, the congressional record confirms that Congress passed § 202(h) to ensure that the FCC's

broadcast ownership rules would continue to serve the public interest, including by preserving ownership diversity as well as competition and localism.

ARGUMENT

I. BOTH CONGRESS AND THE SUPREME COURT HAVE LONG RECOGNIZED THE IMPORTANCE OF BROADCAST MEDIA AND THAT MAINTAINING DIVERSITY IN BROADCAST MEDIA OWNERSHIP IS ESSENTIAL TO THE PUBLIC INTEREST.

Congress and this Court have long recognized that diversity in broadcast media ownership is vital to the public interest. As this Court has explained, "[b]roadcast television is an important source of information to many Americans." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 194 (1997) (*Turner II*). "Though it is but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression." *Id.*

Broadcasting is also a "unique medium," *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969), because "[u]nlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants." *Columbia Broad. Sys.*, 412 U.S. at 101; *accord Turner I*, 512 U.S. at 637-38. This Court has therefore recognized that the federal government has a "special interest . . . in regulation of the broadcast media," *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983), because "the broadcast media utilize a valuable and limited public resource," *Columbia*

Broad. Sys., 412 U.S. at 101, and serve as "public trustee[s]," *id.* at 111.

In light of the unique constraints on broadcasting and its historically significant role in American discourse, Congress has repeatedly sought to ensure the maintenance of a diverse array of broadcast media sources for the benefit of the public. *See, e.g.*, *Prometheus Radio Project v. FCC*, 373 F.3d 372, 382-83 (3d Cir. 2004) (as amended June 3, 2016) ("Recognizing that the finite radio frequency spectrum inherently limits the number of broadcast stations that can operate without interfering with one another, Congress required [in the Communications Act of 1934] that broadcast licensees serve the public interest, convenience, and necessity." (citing 47 U.S.C. § 309(a))). As early as the 1920s, when Congress was debating passage of the Radio Act of 1927, Representative Luther Johnson foretold that "American thought and American politics will be largely at the mercy of those who operate [broadcast] stations." 67 Cong. Rec. 5558 (1926). He cautioned that if broadcast ownership were "placed in the hands of one, or a single selfish group is permitted to . . . acquire ownership and dominate those broadcasting stations throughout the country, then woe be to those who dare to differ with them. It will be impossible to compete with them in reaching the ears of the American people." *Id.* The Radio Act of 1927 that Congress subsequently passed required those applying for a broadcast license or seeking to renew or modify a broadcast license to show that granting their request would serve the "public interest, convenience, or necessity," Pub. L. No. 69-632, § 11, 44 Stat. 1162, 1167 (1926); *see id.* § 9.

In subsequent legislation, Congress expressly recognized the importance of maintaining diverse

broadcast media sources for the public interest. For instance, in the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act), Congress explained that "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." *Turner I*, 512 U.S. at 676 (O'Connor, J., concurring in part and dissenting in part) (quoting Pub. L. No. 102-385, § 2(a)(6), 106 Stat. 1460 (1992)). Indeed, the "purpose" of the 1992 Cable Act was "to prevent any significant reduction in the multiplicity of broadcast programming sources available to noncable households," *Turner II*, 520 U.S. at 193, and this Court has noted that "Congress has an independent interest in preserving a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable," *id.* at 194.

Likewise, this Court has repeatedly affirmed that diverse ownership of broadcast media is essential to the public interest. Indeed, the Court has recognized that "it has long been a basic tenet of national communications policy that 'the widest possible dissemination of information from *diverse* and antagonistic sources *is essential to the welfare of the public*.'" *Turner I*, 512 U.S. at 663 (emphases added) (quoting *Midwest Video Corp.*, 406 U.S. at 668 n.27 (plurality opinion)); *id.* at 669 (Stevens, J., concurring in part and concurring in the judgment) ("The public interests in protecting access to [broadcast] television for the millions of homes without cable and in assuring the availability of 'a multiplicity of information sources' are unquestionably substantial." (quoting *id.* at 663)); *accord Associated Press*, 326 U.S. at 20. The Court has explained that "assuring that the public has access to

a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner I*, 512 U.S. at 663; *accord Turner II*, 520 U.S. at 189-90.

Consistent with this longstanding recognition of the importance of diversity in broadcast media, the FCC itself has "long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power," *NCCB*, 436 U.S. at 780, and it has maintained three "longstanding policy goals of competition, localism, and diversity," *2014 Quadrennial Regulatory Review, Second Report and Order*, 31 FCC Rcd. 9864, 9870 (2016). This agency interpretation is consistent with the text, structure, and history of the Telecommunications Act, as the next Section explains.

II. THE TEXT, STRUCTURE, AND HISTORY OF THE TELECOMMUNICATIONS ACT REQUIRE THE FCC TO MEANINGFULLY CONSIDER OWNERSHIP DIVERSITY IN DETERMINING WHETHER A REGULATION IS IN THE PUBLIC INTEREST.

A. The Act's Text and Structure Demonstrate that the FCC Must Consider Ownership Diversity in Its Public Interest Analysis.

The plain language of the Telecommunications Act broadly requires the FCC to assess whether to "repeal or modify" a regulation because it is "no longer in the public interest." Pub. L. No. 104-104, § 202(h). Such an assessment necessarily requires the FCC to determine whether a regulation promotes diversity in

broadcast media ownership because, as explained above, the existence of a diverse array of media sources is essential to the public interest.

1. "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) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). Here, Congress used broad language in instructing the FCC to "repeal or modify any regulation it determines to be no longer in the public interest." Pub. L. No. 104-104, § 202(h); *cf. Red Lion Broad. Co.*, 395 U.S. at 380 (concluding that an analogous provision that "mandate[d] . . . the FCC to assure that broadcasters operate in the public interest is a broad one" that grants the Commission "'expansive'" authority (quoting *NBC v. United States*, 319 U.S. 190 (1943))). This broad mandate reflected Congress's plan that the FCC consider all three of the factors it has traditionally taken into account in assessing whether its regulations serve the public interest: diversity, competition, and localism. Indeed, as this Court has recognized, "'[T]he "public interest" standard [in the Communications Act] *necessarily* invites reference to First Amendment principles,' and, in particular, to the First Amendment goal of achieving the 'widest possible dissemination of information from diverse and antagonistic sources.'" *NCCB*, 436 U.S. at 795 (emphasis added) (citation omitted) (quoting *Columbia Broad. Sys.*, 412 U.S. at 122, and *Associated Press*, 326 U.S. at 20).

Contrary to the statute's mandate requiring the FCC to repeal rules that are not in the "public interest," Industry Petitioners argue that the law requires the FCC to repeal only rules that are not "necessary in

the public interest as the result of competition." *See* NAB Pet'rs Br. i, 3. This is wrong. To start, this argument is at odds with the plain text of the statute. Notably, § 202(h) of the Act is split into two parts: It first provides that the FCC "shall review . . . all of its ownership rules . . . and shall determine whether any of such rules are necessary in the public interest as the result of competition." Pub. L. No. 104-104, § 202(h). In the subsequent sentence, it states that the FCC "shall repeal or modify any regulation it determines to be no longer in the public interest." *Id.*; *see Prometheus Radio Project*, 373 F.3d at 391 ("[T]he first sentence of § 202(h) requires the Commission to 'determine' whether media concentration rules are 'necessary in the public interest as the result of competition.' The second sentence contains a separate instruction to the Commission: to 'repeal or modify' those rules 'no longer in the public interest." (quoting 110 Stat. 111-12)).

Thus, nothing in the statute tethers the FCC's responsibility to repeal or modify a regulation that is no longer in the public interest solely to its determination of whether that regulation is necessary for "competition." Instead, as the FCC itself has previously asserted, "competition is but one element of a determination of the public interest." *United States v. FCC*, 652 F.2d 72, 82 (D.C. Cir. 1980) (quoting an FCC decision); *cf. id.* at 86 (explaining that in *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944), "the [Supreme] Court held that the [Interstate Commerce Commission's] responsibility to enforce the antitrust laws is but one part of its overall public interest determination"). In other words, the competition assessment that the first sentence of § 202(h) requires the FCC to complete *informs* the action the FCC must take under

the second sentence (repealing or modifying regulations), but it is not the only relevant factor; the FCC must also consider diversity and localism as part of its public interest analysis. *See* U.S. Pet'rs Br. 18 (noting that "the agency has traditionally treated . . . broadcast diversity" based on "minority or female ownership" "as an element in its multi-factor public-interest analysis" under § 202(h)).[2]

That Congress intended the two sentences in § 202(h) to operate differently is evident from the two sentences' divergent text. This Court has held that when Congress uses different words within the same statutory provision, the distinction must be afforded significance. *See, e.g.*, *Citizens & S. Nat. Bank v. Bougas*, 434 U.S. 35, 43-44 (1977) (rejecting the argument that the words "established" and "located" convey identical meanings in a single statutory provision because "[w]hatever the reason behind the distinction in the words, it does exist, and we recognize it"). Critically, Industry Petitioners' interpretation would read the words "public interest" out of the statutory text, treating the phrase as a synonym for "competition." But the Telecommunications Act does not provide that the FCC "shall repeal or modify any regulation that it

[2] Understanding § 202(h) to require a consideration of ownership diversity does not implicate the nondelegation doctrine, despite what Industry Petitioners appear to suggest for the first time in their merits brief in this Court. *See* NAB Pet'rs Br. 31-32. As explained above, and as the FCC has recognized for years, the text of the Telecommunications Act, along with its history and Congress's plan in passing it, demonstrates that the FCC must consider certain factors as part of its public interest analysis—namely, diversity, localism, and competition. The Act does not give the FCC "unguided" or "unchecked" license to exercise authority that rightfully belongs to Congress. *Cf. Gundy v. United States*, 139 S. Ct. 2116, 2123-24, *reh'g denied*, 140 S. Ct. 579 (2019).

determines to be no longer *necessary as the result of competition*," as Industry Petitioners would have it. Instead, it states that the FCC "shall repeal or modify any regulation it determines to be no longer *in the public interest*." Pub. L. No. 104-104, § 202(h) (emphasis added). This instruction, understood in context, plainly requires the FCC to perform a broader analysis that takes into account more than just market forces.

In sum, Industry Petitioners' argument that the Telecommunications Act mandates only a narrow "competition analysis," NAB Pet'rs Br. 24, focused on "changes in the media marketplace," *id.* at i, and that any consideration of ownership diversity is "atextual," *id.* at 4, is unpersuasive—and is itself atextual.

2. The broader structure of the Telecommunications Act further demonstrates that when Congress referred to the "public interest" in § 202(h), it did not require the FCC to consider competition or market forces alone. The Act uses the phrase "public interest" approximately forty-five separate times, but nowhere does it indicate that that phrase promotes consideration of competition above diversity or localism, let alone requires consideration of competition in lieu of those other factors. In fact, Congress referred to "competition" alongside "public interest" in other provisions of the Telecommunications Act, reflecting that the two terms bear distinct meanings.

For example, in § 629 of the Act, which, among other things, directs the FCC to "assure the commercial availability to consumers of multichannel video programming and other services," the statute instructs that "[t]he regulations adopted under this section shall cease to apply when the Commission determines that . . . elimination of the regulations would

promote *competition and the public interest*." Pub. L. No. 104-104, § 629(e)(3) (emphasis added). If the phrase "public interest" referred only to competition in § 202(h), then the identical phrase would have to bear an entirely distinct meaning when used in § 629 to avoid being duplicative of the word "competition" in that provision. This Court has long held that "identical words used in different parts of the same act are intended to have the same meaning," *Dep't of Rev. of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) (quoting *Sorenson v. Sec'y of Treasury,* 475 U.S. 851, 860 (1986)), and that "[a] statute should be construed so that effect is given to all its provisions," *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

In a similar vein, another provision of the Act states that "[t]he regulations prescribed by the Commission pursuant to this section shall . . . not require a local exchange carrier . . . to take any action that is economically unreasonable or that is contrary to the public interest." *See* Pub. L. No. 104-104, § 259(b)(1). If consideration of the public interest accounted only for economic and market forces, then the reference in this provision to action that is "economically unreasonable or that is contrary to the public interest" would seemingly be duplicative. Again, this Court should not assume that Congress intended such a result. *Cf. Hibbs*, 542 U.S. at 101 (rejecting a construction of the tax code that would render the words "levy" or "collection" superfluous).

B. The History of the Telecommunications Act Reflects Congress's Plan for the FCC to Consider Ownership Diversity in Its Public Interest Analysis.

The history of Congress's regulation of broadcast and other media further demonstrates that the FCC

must meaningfully consider all three components of the public interest standard in its § 202(h) review, including broadcast ownership diversity.

As discussed above, Congress first authorized the FCC to grant licenses to private parties for the exclusive use of broadcast frequencies through the Communications Act of 1934. *See* Pub. L. No. 73-416, 48 Stat. 1064 (1934). "The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States." *NBC*, 319 U.S. at 217. Recognizing "the physical scarcity of broadcast frequencies, as well as problems of interference between broadcast signals," Congress delegated "broad authority to the Commission to allocate broadcast licenses in the 'public interest.'" *NCCB*, 436 U.S. 795.

Consistent with this statutory scheme and Congress's instruction, the FCC determined early on that "the maximum benefit to the 'public interest' would follow from allocation of broadcast licenses so as to promote diversification of the mass media as a whole." *Id.* Since the 1934 Act, the FCC has consistently identified minority and female ownership diversity as a core element of "diversification of the mass media as a whole" and a vital component of its mandate to further the public interest. *See, e.g.*, *2002 Biennial Regulatory Review*, 18 FCC Rcd. 13,620, 13,634 (2003) ("Encouraging minority and female ownership historically has been an important Commission objective, and we reaffirm that goal here."); *2014 Quadrennial Regulatory Review*, *Reconsideration Order*, 32 FCC Rcd. 9802, 9822 (2017) (identifying "promot[ion] or protect[ion of] minority and female ownership" as a fundamental aspect of the public interest). Congress, in turn, has consistently endorsed this approach, as discussed above.

Indeed, Congress reaffirmed its commitment to female and minority ownership diversity in media as a core aspect of the "public interest" in the Cable Act of 1992. *See* Pub. L. No. 102-385, 106 Stat. 1460 (1992). In the text of the Cable Act, Congress declared that "increased numbers of females and minorities in positions of management authority in the cable and broadcast television industries advances the Nation's policy favoring diversity in the expression of views in the electronic media." *Id.* § 22(a)(2). Through the Act, Congress directed the FCC to level the playing field and create new opportunities for broadcasters, in furtherance of the "substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." *Id.* § 2(a)(6).

The Telecommunications Act of 1996 neither expressly nor impliedly retreated from that policy. *See* Pub. L. No. 104-104, 110 Stat. 56; *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1042 (D.C. Cir. 2002) ("[I]n the context of the regulation of broadcasting, 'the public interest' has historically embraced diversity (as well as localism), and nothing in § 202(h) signals a departure from that historic scope." (citing *NCCB*, 436 U.S. at 795)). The 1996 Act responded to the deregulatory trend of the 1980s by repealing certain provisions of the 1934 Act restricting broadcast ownership and, through § 202(h), creating a mechanism for the FCC to periodically review its ownership rules to ensure that they continue to serve the public interest values embedded in the statutory scheme. To be sure, Congress put the "competition" aspect of the tripartite "public interest" standard front-and-center in the stated intent of the Act. *See* H.R. Rep. No. 104-458, at 1 (1996) (Conf. Rep.). However, as the FCC itself has recognized, *see, e.g.*, *2002 Biennial Regulatory Review*,

18 FCC Rcd. at 4733, nothing in the 1996 Act supplanted the existing mandate of the 1934 Act that all broadcast regulation must serve the public interest—including the public interest value of ownership diversity. *See* 47 U.S.C. § 303(r) (delegating authority to the FCC to "make such rules and regulations and prescribe such restrictions and conditions" to serve "public convenience, [public] interest, or necessity"). Congress's plan was thus for § 202(h) to implement, rather than supplant, the historically broad public interest mandate.

The congressional record confirms that Congress passed § 202(h) to ensure that the FCC's broadcast ownership rules continue to serve the public interest as a whole, including by continuing to promote ownership diversity. The Commerce Committee Report accompanying one version of the Senate bill reflects the Committee's intent that the FCC consider all three prongs of the public interest mandate—diversity, competition, and localism—in its § 202(h) review. As the Committee Report explained, "[b]roadcasters and television networks should not continue to be subject to regulations which are outmoded or simply inappropriate to the new competitive environment which this legislation is attempting to facilitate." S. Rep. No. 103-367, at 99 (1994). "At the same time," the Committee noted that it had "concerns about the *diversity* of programming and need for *locally* oriented programs. Accordingly, the Committee intends that the FCC review carefully and comprehensively these various regulations and *make such changes as are consistent with the public interest.*" *Id.* (emphases added).

The use of the phrase "make such changes as are consistent with the public interest" conveys the Senate's understanding that changes to rules evaluated pursuant to § 202(h) might not be strictly deregulatory

or in service of market forces—the FCC's mandated review process might reveal that an ownership regulation must be *strengthened*, as opposed to repealed, in order to serve the coordinate public interest value of ownership diversity. *See id.* A later Commerce Committee Report confirms that the Senate expected the FCC to conduct a broad public interest review pursuant to § 202(h), without any special solicitude for "competition" over the other public interest values, including diversity. *See* S. Rep. No. 104-23, at 42 (1995) (referring to the ownership rule review mandated by § 202(h) as simply "part of [the FCC's] overall regulatory review"); Peter DiCola, Note, *Choosing Between the Necessity and Public Interest Standards in FCC Review of Media Ownership Rules*, 106 Mich. L. Rev. 101, 114 (2007) (describing the language in the Senate report as "neutral" and designed to permit the FCC to "continue to foster the goals of diversity and localism with regulation").

While the corresponding House bill took a different approach, mandating a one-time review within three years of the date of enactment through which the FCC would "report to the Congress on the development of competition in the television marketplace and the need for any revisions to or elimination of this paragraph," *see* H.R. Rep. No. 104-204, at 41 (1995), the Senate's view won out. As the conference report accompanying the enacted version of the bill explains, "[i]n its review" conducted pursuant to § 202(h), "the Commission shall determine whether any of its ownership rules . . . are necessary in the public interest as the result of competition," and "the Commission is directed to repeal or modify any regulation it determines is no longer in the public interest." H.R. Rep. No. 104-458, at 163-64. Although the report's language, which closely tracks the text of the statute, does mention "competition"

specifically, the operative provision discusses only the "public interest" and permits the FCC to "repeal *or modify*" any regulation in service of those broad public interest values. *See id.* (emphasis added). The "modify" language of the conference report—much like the "make such changes" language used in the Senate Commerce Committee report—makes clear that § 202(h) review is not supposed to operate in an exclusively deregulatory fashion. In other words, Congress determined that deregulation in the interest of competition should be pursued under § 202(h) only if it could be achieved in a manner consistent with the coordinate public interest values of diversity and localism.[3]

Statements of senators and representatives during the post-conference debate on the Telecommunications Act also demonstrate that no part of the Act was intended to permit the FCC to abandon its commitment to ownership diversity. Senator Hollings explained that he "share[d] the concerns of the Clinton administration and others that excessive media concentration could harm the diversity of voices in the communications marketplace" and that he would vote in favor of the post-conference bill because it "strikes a balance between competition and regulation." 142 Cong. Rec.

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[3] Industry Petitioners argue that the fact that the 1996 Act began the process of media ownership deregulation suggests that Congress intended § 202(h) to operate as a strictly deregulatory, competition-driven mechanism. NAB Pet'rs Br. 26. But where Congress did engage in its own deregulation, it specifically considered the public interest value of diversity. For example, § 202(d) of the statute extended the FCC's waiver policy with respect to its one-per-market ownership rules to any of the top fifty markets. *See* Pub. L. No. 104-104, § 202(d). The Conference Report, in justifying that statutory provision, explained that the extension of the waiver policy was designed to expand "the potential for public interest benefits of such combinations when *bedrock diversity interest[s]* are not threatened." H.R. Rep. No. 104-458, at 163 (emphasis added).

pt. 2, at 2010-11 (1996) (statement of Sen. Ernest F. Hollings).

Then-Representative Markey expressed similar concerns regarding the earlier House bill, but stated his approval of the post-conference bill, which "preserves the concepts of *localism* and *diversity* which are so critical in our telecommunications marketplace so that we will have many voices in each marketplace." *Id.* at 2212 (statement of Rep. Edward Markey) (emphasis added); *see id.* at 2232 (stating that "[t]he conference report on S. 652 is most improved in its treatment of mass media ownership issues [as compared to the earlier House bill]," primarily because it does a better of job of "protect[ing] important values such as localism and diversity"). Finally, Representative Collins explicitly applauded the post-conference bill's commitment to ownership diversity, specifically along lines of race and gender. *See id.* at 2239 (statement of Rep. Cardiss Collins) ("I am very pleased to see that Representative Rush's amendment to help to advance diversity of ownership in the telecommunications marketplace . . . was retained in conference. It requires the [FCC] to identify and work to eliminate barriers to market entry that continue to constrain all small businesses, including minority and women-owned firms, in their attempts to take part in all telecommunications industries.").

* * *

In sum, Congress has long viewed diversity in broadcast media as essential to the public interest. The text, structure, and history of the Telecommunications Act all make clear that the FCC is required to meaningfully consider ownership diversity in conducting its regular review of its broadcast regulations.

CONCLUSION

For the foregoing reasons, the judgments of the court below should be affirmed.

Respectfully submitted,

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