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 AMICUS CURIAE ON BEHALF OF MEDIA LAW AND POLICY SCHOLARS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Media Law and Policy Scholars are an ad hoc group of university professors whose research includes analysis of whether the Federal Communications Commission ("FCC") has compiled data that support its decisions to relax, eliminate, modify, or maintain ownership restrictions on broadcast licensees. As part of our research, teaching and scholarship, the Media Law and Policy Scholars assess legislative, regulatory and judicial matters affecting whether and how communications media in the United States has achieved longstanding policy objectives such as promoting diversity, localism, and competition, while fully complying with statutory mandates. Signatory Media Law and Policy Scholars are identified in the Appendix.

The Media Law and Policy Scholars have a particular academic interest in the questions presented by this case, because the FCC's market assessments, as well as the assertions made by some Parties in this case, do not accurately reflect marketplace conditions and the impact of recent and prospective reductions in regulatory safeguards. As scholars committed to generating research that stands up to rigorous peer review, we take particular issue with serious defects in the manner by which regulatory agencies and

[1] All parties have consented to the filing of this brief. No counsel for a Party authored this brief in whole or in part, or made a monetary contribution to fund the preparation or filing of this brief. This brief has been prepared and filed *pro bono* by counsel in concert with *amici* Scholars.

reviewing courts use market and statistical analysis in reaching decisions having substantial impacts on the marketplace of ideas.

SUMMARY OF ARGUMENT

The Third Circuit, in four opinions spanning almost twenty years, has identified defects, deficiencies, and analytical gaps in the FCC's Congressionally-mandated review of its broadcast ownership rules. This Court should affirm, because the FCC's proposed regulations rely on assumptions belied by the reality of how the broadcasting marketplace currently functions and, often, the FCC's own conclusions.

First, video-on-demand services offered over the Internet are not functional equivalents and competitive alternatives to content transmitted by local broadcasters using FCC-licensed spectrum. They are more expensive, typically do not disseminate emergency announcements and news quickly and widely, and generally offer different types of content. Consumers still want access to broadcast content that video-on-demand services do not provide. The FCC has acknowledged all of these fundamental truths, yet it has proposed substantial changes in its rules based on unsupported assumptions that video-on-demand market entrants

have generated competitive alternatives that obviate the need for most broadcast industry ownership restrictions.

Second, mergers and acquisitions do not serve core statutory goals including diversity, localism, and competition. Consolidation increases profits for providers without stimulating new investment in technology or local content, as broadcasters themselves admit in regulatory filings. To the contrary, as FCC data show, broadcast television station owners invest in new technologies and adapt to changing marketplace conditions successfully even without ownership consolidation into a small number of hands. Broadcast media remains on stable footing despite challenges to advertising revenue in a changing climate. Consolidation only increases brinksmanship that harms consumers.

Finally, competitive and diverse media remain essential to our polity, as the ongoing pandemic underscores. Demand for high quality live news is higher than ever, and consolidation will harm access to that essential content. The FCC ignored readily-available data that demonstrate how ownership concentration reduces volume and quality of news, public affairs programming and other local content.

The Third Circuit's direction for the FCC to use its subject-matter expertise and lawful authority to collect essential data about marketplace conditions, and to make decisions based on empirical data rather than unsupported assumptions, is not error. The FCC has ignored reduced competition and its effects for two

decades and seeks to further deregulate without justifying its proposal. The Media Law and Policy Scholars urge this Court to affirm, and to apply its long line of precedent requiring administrative agencies to engage in reasoned analysis that promotes the public interest, as directed by statute.

ARGUMENT

I. Video-on-demand services are not functional equivalents and competitive alternatives to local broadcast content, and the FCC's proposed deregulation does not reckon with that absence.

Despite proliferating new video-on-demand programming sources, over the air reception of "live" broadcast programming remains essential in American life. Broadcast content serves many key and irreplaceable functions. It reaches more Americans, including those who cannot afford video-on-demand and broadband internet. It disseminates news, including emergency announcements, quickly and widely. And it offers local and live content rather than recorded content that does not differ across the country or world. While acknowledging that video-on-demand content offered over the Internet does not serve as a functional equivalent or alternative to local broadcasting, the FCC nevertheless ignored its statutory mandate and prior direction from the Third Circuit in proposing poorly-justified deregulation.

A. Video-on-demand programming does not serve as a functional equivalent or comparable alternative to local broadcast content.

Video-on-demand[2] programming substantially differs from live broadcast content. Several aspects of service delivery illustrate why such content is not a functional equivalent to local broadcasting. First, video-on-demand content costs consumers substantially more to access than broadcast content. Second, video-on-demand programmers do not disseminate vital news quickly and widely, particularly concerning emergencies. And third, the content itself targets different consumer tastes and uses different technologies for delivery.

First, video-on-demand content costs substantially more than local broadcast television. The former offers premium, "on-demand" access to content for subscribers willing and able to pay a monthly fee for broadband access, plus, in most instances, an additional monthly subscription for the content. The latter requires no direct payment from viewers, because advertisers pay for the opportunity to make commercial pitches to large audiences. This price difference matters, because a

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[2] "Linear channels offer specific video programs at a specific time of day in a manner akin to broadcast television. VOD programs are stored electronically by the provider and can be viewed by the consumer at any time, i.e., on demand." *In re* Communications Marketplace Report, GN Docket No. 18-231, 2018 WL 6839365, at *19 n.130 (rel. Dec. 26, 2018), https://docs.fcc.gov/public/attachments/FCC-18-181A1.pdf [hereinafter 2018 Communications Marketplace Report].

significant portion of United States households cannot readily budget a monthly subscription payment for premium programming offered primarily by cable and satellite television operators.[3] The average monthly broadband access subscription rate in the United States, based on a dataset comprising 290 different service plans, is reported to be $62.17 per month for short term promotional plans and $83.41 per month thereafter.[4] Some broadband-delivered video programming is advertiser-supported service with no additional out-of-pocket monthly payments for content, but most options, such as Disney, HBO Max, and Netflix, have monthly subscription rates between $9 and $15. Subscribers must pay a monthly broadband subscription

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[3] The FCC reports that the inflation-adjusted price of multichannel video programming distribution service primarily from cable and satellite television MVPD video service increased 74%, from an average of $698.30 per year in 2000 to $1,211.58 in 2017. 2018 Communications Marketplace Report at *39 ¶117 (citations omitted).

[4] New America Foundation, *Focus on the United States*, THE COST OF CONNECTIVITY 2020 (2020), https://www.newamerica.org/oti/reports/cost-connectivity-2020/focus-on-the-united-states (last visited Dec. 17, 2020). Out-of-pocket monthly broadband payments will increase for many households with multiple occupants. Major national broadband access providers, such as Comcast, have begun to impose a limit on the amount of content subscribers can use without paying a surcharge. *See, e.g.*, *All Internet Is Powered by Data*, XFINITY, https://www.xfinity.com/learn/internet-service/data (last visited Dec. 17, 2020). The COVID-19 pandemic, with households participating in work-from-home and remote learning, has increased the need for data and illustrated the effect of caps.

plus additional monthly payments for each content subscription.

Second, video-on-demand alternatives do not replicate one of the most important functions of broadcast television. Despite market entry by a variety of Internet sources for news, local broadcasting remains the preeminent provider of both local programming and vital emergency notifications that people must receive immediately. The FCC explicitly acknowledges that the more things change in the media marketplace, some dynamics remain rock solid, including the essential lifeline extended to the public by local broadcasters:

> Many broadcast television stations differentiate themselves from both other stations and cable channels by offering local news, exclusive news stories, investigative reporting, regional and local sports, and coverage of community events. . . . Although local news is becoming more available from other sources, local broadcast television stations remain the most viewed source and the most preferred source for emergency news.[5]

Broadcasting remains vital for disseminating news and emergency information in part because of the irreplaceable role it plays for many Americans who do not have, or cannot afford, broadband internet and

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[5] 2018 Communications Marketplace Report at *36 ¶104 (citations omitted). *See also* KNIGHT FOUNDATION, LOCAL TV NEWS AND THE NEW MEDIA LANDSCAPE: PART 1, THE STATE OF THE INDUSTRY (Apr. 5, 2018), https://knightfoundation.org/wp-content/uploads/2020/03/TVNews_bundle-v5.pdf.

video-on-demand services. As of 2018, the FCC reported that an estimated 16.6 million households in the United States, representing 13.9% of the total with televisions, solely relied on over-the-air reception of broadcast television signals.[6] This represents a 48% increase in the last eight years, despite the proliferation of new video entertainment options available via a broadband connection to the Internet.[7] Those households rely solely on broadcast television to receive news and emergency notifications, and video-on-demand cannot substitute that role.[8] Moreover, studies show that Internet news sources often replicate, but do not compete with, locally-produced news on broadcast television and in newspapers.[9]

Third, video-on-demand and broadcast services differ substantially in content and delivery. Live

[6] 2018 Communications Marketplace Report at *37 ¶109 (citations omitted). Using data collected by the Nielsen audience ratings firm, the FCC reported that 15.7 million TV households (13.2%) in 2017, and 13.3 million TV households (11%) in 2016 relied solely on off air reception. *Id.*

[7] Sarah Perez, *Nielsen: 16M U.S. Homes Now Get TV Over-the-Air, a 48% Increase Over Past 8 Years*, TechCrunch (Jan. 15, 2019, 7:51 AM PST), https://techcrunch.com/2019/01/15/nielsen-16m-u-s-homes-now-get-tv-over-the-air-a-48-increase-over-past-8-years/.

[8] The COVID-19 pandemic has accelerated these trends with cable and satellite subscriptions declining as consumers look for ways to save money. *See, e.g.*, Karl Bode, *Wall Street: Traditional Cable TV Sector 'Unraveling' in Wake of Covid*, TechDirt (Oct. 26, 2020, 6:26 AM), https://www.techdirt.com/articles/20201005/07244645443/wall-street-traditional-cable-tv-sector-unraveling-wake-covid.shtml.

[9] Pew Res. Ctr., *How News Happens: A Study of the News Ecosystem of One American City* (Jan. 11, 2010), https://www.journalism.org/2010/01/11/how-news-happens/.

broadcast television offers advertiser- or government-supported programming transmitted to audiences via FCC-licensed spectrum for immediate reception, including local content created by local affiliates of national networks, such as ABC, CBS, Fox and NBC. Most video-on-demand content, available via a broadband Internet connection, offers consumers access to a variety of non-local content, including movies and multi-episode entertainment, as well as the content only available via national cable and satellite television networks. Subscribers can watch such content immediately, as it "streams" through broadband conduits onward to their television and computer screens, or in some instances, they can store it for later viewing.

The FCC itself explicitly recognizes that local television broadcasters and video programmers delivering content via the Internet typically target different audiences:

> [C]onsumers may view video services as substitutes when they offer the same or similar content, but consumers may view video services as supplements when they offer exclusive or dissimilar content. Consumers frequently subscribe to multiple OVDs [online video distributors] (Netflix, HBO, Hulu), but typically to only one MVPD [multichannel video programming distributor] (cable, DBS, or telco). Some consumers supplement OTA [over the air] television viewing with one or more OVDs. Consumer views on the competitive nature or substitutability of video programming providers depends on factors such as available

> content, prices, the number of advertisements, the ability to watch content on different devices in different locations, user interfaces, and the need for and cost of broadband access at sufficient speeds for video delivery. Whether consumers view video services as substitutes or supplements depends on the relative values they assign to these and other features.[10]

The FCC also acknowledges that, despite the proliferation of online options, consumers still want access to live, "must see" broadcast television programming, such as local news, sports and weather, as well as the sporting events exclusively offered by the four major broadcast television networks:

> Despite new technologies competing for viewers' attention, the amount of video Americans watch has actually been on the rise—approaching six hours a day in 2018—with a majority continuing to consist of live or time-shifted traditional television viewing. Similarly, more than 90 percent of Americans still listen to the radio each week. Total broadcast industry revenues have appeared fairly stable in recent years. Moreover, television remains a common place for Americans to get their news, and some evidence suggests that broadcast television outlets produce a significant

[10] 2018 Communications Marketplace Report at *38 ¶114.

> portion of the video news content published on websites and social media platforms.[11]

Caselaw and administrative proceedings confirm the content and the conduit used for delivery are simply not equivalent. Both the FCC and this Court have observed that video services delivered via the Internet are not functional equivalents to what existing video programmers offer via cable and satellite networks. In *American Broadcasting Cos., Inc. v. Aereo, Inc.*, 573 U.S. 431 (2014), this Court held that retransmission of copyrighted video content streamed via the Internet did not qualify Aereo to be classified as a cable system by the FCC, thereby disqualifying the company from the opportunity to secure an inexpensive, compulsory copyright license for the content delivered to subscribers.

The FCC, similarly, has tentatively determined that most broadband-delivered, video-on-demand content does not constitute a functional equivalent to the services provided by incumbent cable and satellite television providers.[12] Without an FCC finding that broadband providers furnish a similar conduit for live video programming, most new broadband entertainment

[11] *2018 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*, MB Docket No. 18-349, Notice of Proposed Rulemaking, 33 FCC Rcd. 12111, 12113 (2018) (citations omitted).

[12] *In the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, Notice of Proposed Rulemaking, 29 FCC Rcd. 15995 (2014).

ventures will not qualify for the low-cost compulsory copyright license and other regulatory advantages available to cable and satellite television operators.[13]

B. Deregulation of the type proposed by the FCC will harm access to important broadcast content without providing for a functional equivalent or comparable alternative.

Because of those differences, this Court should not allow the FCC to use the growing availability of video-on-demand content to support a deregulatory campaign that will limit local content. Indeed, the Commission's own findings and conclusions undermine its proposed rules. The FCC acknowledges the importance of local programming to consumers and continues to find that preserving competition promotes ubiquitous access. Nevertheless, it also continues to propose relaxed regulations that would undermine competition and access to important local content, without promoting access via a functional equivalent or comparable alternative.

As the FCC acknowledges, "must see" broadcast television remains a core consumer requirement not

[13] The FCC tentatively concluded that "Internet-based distributors of video programming" not offering live programming like that offered by cable and satellite television operators should not qualify for functional equivalents, because they do not "(1) make programming available for free, and not 'for purchase' as required by the definition of an MVPD, or (2) do not provide prescheduled programming that is comparable to programming provided by a television broadcast channel." *Id*. at 16002.

available from nearly all new video programming ventures offering on-demand access to previously recorded content. Its own review describes the uniqueness and singular importance of local broadcasting:

> While the video marketplace has changed substantially since the current television ownership limits were adopted in 1999 and since the last Commission review of these rules concluded in 2008, broadcast television stations still play a unique and important role in their local communities. As such, we believe that, on the current record, a rule focused on preserving competition among local broadcast television stations is still warranted.[14]

Even as the FCC acknowledges the importance and uniqueness of local broadcasting, it seeks to relax ownership caps and restrictions on local broadcasting acquisitions. Its initiatives would eliminate two baseline requirements for proof of market robustness before the Commission considers mergers and acquisitions generating further concentration. The Commission concludes that proposed ownership relaxation will have only positive effects, without any harm to its

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[14] *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 et al.*, MB Docket No. 14-50, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd. 9802, 9833 (2017) [hereinafter 2014 Quadrennial Regulatory Review Order on Reconsideration], *vacated and remanded*, *Prometheus Radio Project v. FCC*, 939 F.3d 567 (3d Cir. 2019), *cert. granted*, *Nat'l Ass'n of Broad. v. Prometheus Radio Project*, No. 19-1241, 2020 WL 5847133 (Oct. 02, 2020).

longstanding mission of promoting localism, diversity, competition and market entry by women, minorities and small businesses:

> [W]e reconsider the Local Television Ownership Rule and adopt common sense modifications that will help local television broadcasters achieve economies of scale and improve their ability to serve their local markets in the face of an evolving video marketplace.[15]

The FCC's proposed rulemaking, however, will cause exactly the harm it seeks to avoid. The Commission justifies abandonment of its requirement that local markets have a minimum of eight voices and its greater willingness to allow mergers of top four broadcast network affiliates on the mistaken proposition that video-on-demand programming can serve as a substitute for local broadcast television. The FCC appears to treat consumer access to more Internet-delivered, on-demand video entertainment as competition offering directly substitutable options, despite having recognized the unique role of local broadcasting.[16] The FCC's failure to reconcile contradictory analysis constitutes arbitrary and capricious decision-making under the APA—as identified by the Third Circuit's decision below.

The Third Circuit understandably doubts the FCC's justifications. The FCC supports its functional

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[15] 2014 Quadrennial Regulatory Review Order on Reconsideration, 32 FCC Rcd. at 9834.

[16] *See id.* at 9833.

equivalency assumption in a single footnote.[17] The footnote starts with reference to the availability of award-winning, video entertainment available via the Internet. The footnote continues with a demonstrably incorrect assertion that "live online streaming services continue to grow," citing the availability of local broadcast stations via Hulu, AT&T, and Sony PlayStation Vue.[18]

In fact, fewer online options for simulcasted local broadcasting exist now, or will exist in the near term, than the FCC identified in 2017. Sony PlayStation Vue will shut down on January 30, 2021 due to "expensive content and network deals . . . [that have] been slower to change than we expected."[19] The remaining options now match the cost of cable and satellite television services, despite requiring a paid broadband subscription and offering fewer channels. Rather than offer a much cheaper, "skinny bundle" of broadcast and on-demand content, Hulu charges $64.99, plus taxes and fees, as of December 18, 2020.[20] AT&T now concentrates on offering subscribers a premium service bundle, at a

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[17] *See id*. at 9834 n.219.

[18] *Id*.

[19] John Kodera, *Sony Interactive Entertainment to Shut Down PlayStation Vue*, PLAYSTATION: BLOG (Oct. 29, 2019), https://blog.playstation.com/2019/10/29/sony-interactive-entertainment-to-shut-down-playstation-vue/#:~:text=Today%20we%20are%20announcing%20that,on%20our%20core%20gaming%20business.

[20] *See Pay Less for Your TV*, HULU, https://www.hulu.com/live-tv (last visited Dec. 17, 2020).

monthly cost far exceeding $64.99, that combines broadband access and video content.[21]

The FCC's overemphasis on the availability of broadband-delivered video entertainment as a competitive alterative to local broadcast television does not represent a minor flaw in its predictive judgments about marketplace conditions. Rather, it provides clear evidence that the Commission did not rationally analyze the available evidence presented to it by interested parties, nor did it augment the record with empirical data in several proceedings following the Commission's reconsideration of its 2014 Quadrennial Regulatory Review.

The Court may not supply a reasoned basis for a regulatory agency's action that the agency itself failed to generate. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Accordingly, the Court should reject the arguments made by the FCC and other Parties that the Third Circuit insufficiently considered changed marketplace conditions that now favor eliminating or easing ownership restrictions on broadcasters. On the contrary, the Third Circuit correctly faulted the FCC for failing to articulate reasoned analysis to support its actions, in violation of the APA.

[21] *See AT&T Internet + TV*, AT&T, https://www.att.com/bundles/ (last visited Dec. 17, 2020).

II. Mergers and acquisitions offer limited, if any, enhancement of core statutory goals, including diversity, localism and competition.

The FCC has approved numerous mergers and acquisitions in the telecommunications marketplace based on the conclusion that larger companies will have the necessary financial wherewithal to survive increasing marketplace competition, invest in new technology and manage extreme market volatility.[22] The Commission supports this conclusion with an extraordinary circular argument: incumbent broadcasters cannot acquire the scale needed to compete effectively without first increasing market share.[23]

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[22] *See, e.g.*, *In the Matter of the Applications of Tribune Media Company (Transferor) and Nexstar Media Group, Inc. (Transferee) et al., for Transfer of Control of Tribune Media Company to Nexstar Media Group, Inc., and Assignment of Certain Broadcast Licenses and Transfer of Control of Certain Entities Holding Broadcast Licenses*, MB Docket No. 19-30, Memorandum Opinion and Order, 2019 WL 4440126 (2019).

[23] "[T]elevision broadcasters' important role makes it critical for the Commission to ensure that its rules do not unnecessarily restrict their ability to serve their local markets in the face of ever-growing video programming options. Consumers are increasingly accessing video programming delivered via MVPDs, the Internet, and mobile devices. Moreover, the online video distributor (OVD) industry—which includes entities such as Netflix and Hulu—continues to grow and evolve. In addition to providing on-demand access to vast content libraries, many OVDs are now offering original programming and/or live television offerings similar to traditional MVPD offerings. The Second Report and Order [*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 et al.*, Second Report and Order, 31 FCC Rcd. 9864 (2016)] acknowledged the popularity of these services but failed to properly

Rather than generate data and statistics providing empirical evidence that a consolidating broadcast industry promotes competition and consumers, the Commission simply asserts that the market requires large ventures that attain maximum possible efficiency through economies of scale, and simultaneously serve longstanding legislative and regulatory policy goals.

In the absence of thorough analysis, the FCC has persistently failed to recognize that mergers and acquisitions increase profits without any corresponding increase in consumer welfare. The FCC similarly ignores evidence that existing market conditions support profits, innovation, and investment in new technology even without the need for deregulatory relief that would eliminate competitive safeguards, including limits on incumbent companies' ability to acquire insurgent and innovative competitors.

A. The broadcast industry uses mergers and acquisitions to increase profits, without any evidence that those mergers and acquisitions increase diversity, localism, and competition.

Blockbuster mergers and acquisitions accrue limited if any enhancements to competition. Acquiring

account for this in its analysis. Accordingly, we reconsider the Local Television Ownership Rule and adopt common sense modifications that will help local television broadcasters achieve economies of scale and improve their ability to serve their local markets in the face of an evolving video marketplace." 2014 Quadrennial Regulatory Review Order on Reconsideration, 32 FCC Rcd. at 9834.

firms seek regulatory approval by framing the transaction as serving the public interest, arguing that merged ventures can better achieve legislative and public policy goals through economies of scale, enhanced competitiveness and more innovation. Acquiring companies also claim they will become more inclined to achieve legislative and regulatory goals if the FCC permits further industry consolidation. Those claims do not match reality.

Ventures get bigger, but they rarely get better—and they particularly do not quantifiably increase competition, diversity and access to local programming.[24] Incumbent broadcasters pursue acquisitions primarily to extract larger profits and drive stock prices higher, gains that reflect "synergies" from reductions in staff and original programming. "Economies of scale" does not mean more and better local content, but rather, acquiring firms better able to spread existing or lower programming costs across a larger group of affiliated stations and via the Internet.

Firms do not pursue broadcast mergers and acquisitions with altruistic goals. For example, Gray

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[24] *See, e.g.*, Danilo Yanich, *Duopoly Light? Service Agreements and Local TV*, 91 JOURNALISM & MASS COMM. Q. 159, 168 (2014) (two stations under common ownership duplicated new story scripts 73% of the time and video/graphics, 80% of the time in 8 metropolitan areas), http://jmq.sagepub.com/content/91/1/159; Danilo Yanich, *Local TV News Content & Shared Services Agreements: The Honolulu Case*, 57 J. BROAD. & ELEC. MEDIA 242, 254 (2013) (merger of broadcast stations in Honolulu generated substantial duplication of news and public affairs content instead of net increase), http://dx.doi.org/10.1080/08838151.2013.787074.

Broadcasting recently withdrew an offer to acquire another national station owner, TEGNA, based on a decline in the targeted firm's projected revenues, due in large part to depressed advertising sales caused, *inter alia*, by the COVID-19 pandemic.[25] Despite touting its ability to revitalize lagging local broadcasters in medium and small markets in this proceeding, Gray Broadcasting withdrew its TEGNA bid based on forecasts that the company would not generate the profits warranting the original $8.5 billion offer.

Acquisition strategies of incumbent broadcast ownership firms belie any assertion that only more ownership concentration can revive a struggling industry whose incumbents lack the financial wherewithal and expertise to survive changing marketplace conditions. The FCC did not support its assessment that broadcast ownership rules should be changed to enable even more ownership concentration.

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[25] *See, e.g.*, Joe Cornell, *Gray Television Withdraw Bid For Tegna*, Forbes (Mar. 19, 2020), https://www.forbes.com/sites/joecornell/2020/03/19/gray-television-withdraw-bid-for-tegna; Krystal Hu & Greg Roumeliotis, *Gray Television Withdraws Tegna Offer Amid Coronavirus Rout: Sources*, Reuters (Mar 17, 2020), https://www.reuters.com/article/us-tegna-m-a-gray-television/gray-television-withdraws-tegna-offer-amid-coronavirus-rout-sources-idUSKBN2143D1.

B. To the contrary, local broadcast television is profitable, invests in new technologies, and adapts to changing marketplace conditions without needing further industry consolidation.

Despite a global pandemic and declining advertising revenues, the local broadcast industry remains vibrant, vital, and profitable. The FCC reports that the number of broadcast licensees remains stable,[26] verifiable empirical evidence that market changes have not so adversely harmed local broadcasters that they can no longer serve the public interest and must shut down. If economic conditions had become so adverse, stations lacking top four network affiliation, generating low audience ratings, and serving small markets would have exited the market by now. FCC-compiled data evidence no such decline. In fact, the FCC's count for 2020 shows an increase in the total number of local broadcast stations: 375 commercial VHF stations, up from 359 in 2018, and 993 commercial UHF stations, up from 990 in 2018.[27]

FCC data also show that local television broadcasting remains profitable. The Commission reported that in 2016 total television broadcasting industry revenues amounted to $30.835 billion, an increase of

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[26] The FCC reports that 990 commercial UHF broadcast television stations and 359 VHF stations operated in 2018. 2018 Communications Marketplace Report at *33 ¶93, Fig. B-4.

[27] *Id*. *See also* FCC, Broadcast Station Totals as of September 30, 2020, Press Release (Oct. 2, 2020), https://docs.fcc.gov/public/attachments/DOC-367270A1.docx.

12.9% from the prior year. In 2017, total television broadcasting industry revenues declined by one-half of one percent to $30.676,[28] far from an alarming decline signaling the demise of broadcasting absent substantial regulatory relief.[29] A recent survey for 2020 reports that only 4.2% of respondents anticipate a loss in advertising revenues generated during news broadcasts.[30] Firms themselves report the same. A senior executive at Sinclair Broadcasting observed in a 2019 earnings conference call, "In 2020 we are not going to be able to get out of the way of the money. It's literally going to be hand over fist."[31]

Statistics on the number of broadcast news employees provide another measure of industry stability. The Pew Research Center reports that employment remained stable throughout the period from 2004 to

[28] 2018 Communications Marketplace Report at *35 ¶101, Fig. B-5

[29] The nature and scope of current regulatory oversight remains essential to prevent misrepresentations made by broadcast licensees during FCC investigations. *See, e.g.*, FCC News, *Sinclair Agrees to Pay $48 Million Civil Penalty, FCC Penalty Will Be Largest Ever Paid by a Broadcaster* (May 6, 2020); retrieved from: https://docs.fcc.gov/public/attachments/DOC-364198A1.docx.

[30] Bob Papper, *RTDNA/Newhouse School at Syracuse University Survey* (2020); retrieved from: https://www.rtdna.org/uploads/files/2020%20RTDNA%20Survey%20-%20TV%20profit-budget.pdf. *See also*, Danilo Yanich, *Buying Reality Political Ads, Money, and Local Television News* (2020).

[31] Rick Edmonds, *As Print and Digital Newsrooms Struggle, Local Broadcast Stations Are Making Money 'Hand Over Fist'*, Poynter: Business and Work (Dec. 11, 2019), https://www.poynter.org/business-work/2019/the-rich-get-richer-local-broadcast-readies-for-a-3-2-billion-political-ad-bonanza-in-2020/.

2018,[32] contrasting starkly with substantial declines occurring contemporaneously at newspapers.[33] Pew's independent research provides additional statistics on audience ratings and on advertising revenues separating period spikes generated by political campaigns. Pew also reports an increase in the number of hours dedicated to local news, which supports the conclusion that video consumers still demand local broadcasting, despite the availability of new Internet-delivered options.[34]

Firms also have sufficient stability to make investments in new technologies to serve consumers and maintain profitability. Station owners continue to make investments in news dissemination via broadband, for example.[35] As consumers adopt new technologies for

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[32] Pew Res. Ctr., *Local TV News Fact Sheet*, *Newsroom Investment* (June 25, 2019), https://www.journalism.org/fact-sheet/local-tv-news/.

[33] *See, e.g.*, Elizabeth Grieco, *U.S. Newspapers Have Shed Half of their Newsroom Employees Since 2008*, Pew Res. Ctr.: FactTank (April 20, 2020), https://www.pewresearch.org/fact-tank/2020/04/20/u-s-newsroom-employment-has-dropped-by-a-quarter-since-2008/; Elizabeth Grieco, *10 Charts About America's Newsrooms*, Pew Res. Ctr.: FactTank (Apr. 28, 2020), https://www.pewresearch.org/fact-tank/2020/04/28/10-charts-about-americas-newsrooms/.

[34] *For Local News, Americans Embrace Digital But Still Want Strong Community Connection*, Pew Res. Ctr.: Reports (Mar. 26, 2019), https://www.journalism.org/2019/03/26/for-local-news-americans-embrace-digital-but-still-want-strong-community-connection/.

[35] *See, e.g.*, Brad Adgate, *Local TV Broadcasters Launching Streaming Video to Reach a Broader Audience*, Forbes (Sep. 18, 2020), https://www.forbes.com/sites/bradadgate/2020/09/18/local-tv-broadcasters-launching-streaming-video-to-reach-a-broader-audience/;

accessing news and public affairs, broadcasters have responded by making their content available online, thereby maintaining market share.

C. Firms will remain on stable footing going forward because rising retransmission consent revenues amply offset declines in advertising revenue, but negotiations for those fees underscore the stakes for consumers.

Even acknowledging the possibility of reductions in future advertising revenue, the broadcast industry can remain profitable because of reliable offsetting new revenue. In addition to their compulsory copyright licensing revenues with cable and satellite operators, local television broadcasters also receive compensation for allowing the retransmission of their signals via these networks. Retransmission fee negotiations not only provide vital revenue for broadcasters, but also underscore the stakes of deregulation for consumers. Consolidation increases brinksmanship in those negotiations, and brinksmanship harms consumers through blackouts when broadcasters cut off cable and satellite subscribers' access to their content.

Jon Lafayette, *200 Stations Jump into New Streaming Venture*, Next TV (Sep. 1, 2020), https://www.nexttv.com/news/200-stations-jump-into-new-streaming-venture.

i. Retransmission fees offset declines in advertising revenue.

Retransmission fee revenues provide broadcasters with substantial revenues that offset declines elsewhere. Despite a reduction in viewership, local television broadcasters still have superior negotiation leverage in retransmission consent negotiations, because their live content remains a major component of what most consumers consider "must see" programming:

> Broadcasters are making up for their ad revenue shortfalls, in part, by placing more emphasis on the fees paid by cable, satellite, and streaming platforms to retransmit local TV broadcast signals to their platforms. These fees, which are calculated based on viewership, have overtaken traditional TV advertising as a broadcast revenue source. In fact, just ten years ago this revenue was virtually nil for most broadcasting companies. Today, retransmission fees are expected . . . to grow at a compounded rate of 15% each year. . . ."[36]

The importance of that programming bolsters its value and insulates it from revenue declines. In 2019, local television broadcasters received approximately $11.89 billion in retransmission consent compensation,

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[36] Victor Kao, *Retransmission Fees Give Lift to TV Broadcast Revenue As Advertising Declines*, RSM: The Real Economy Blog (Sep. 11, 2019), https://realeconomy.rsmus.com/retransmission-fees-give-lift-to-tv-broadcast-revenue-as-advertising-declines/.

with a 2020 estimate of $12.17 billion[37] and a 2024 estimate of $16.26 billion.[38]

ii. Retransmission negotiations among large consolidated entities harm consumers because of brinksmanship and leverage.

Increased market concentration further raises the financial stakes in retransmission negotiations, and underscores the risk posed by deregulation-facilitated consolidation to consumers. The combination of greater reliance by broadcasters on retransmission consent revenues and the concentration of the industry prompts harder bargaining with tougher tactics, and brinksmanship by large entities. When broadcasters cannot close deals with retransmitting operators, consumers experience blackouts, the elimination of access to broadcast television channels until the parties reach an agreement. And the number of blackouts and their duration have increased significantly in recent years.[39]

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[37] Atif Zubair, *Economics of Broadcast TV Retransmission Revenue 2020*, S&P Global: Market Intelligence (Aug. 24, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/blog/economics-of-broadcast-tv-retransmission-revenue-2020.

[38] Justin Nielson, *Retrans Projections Update: Sub Rates Continue to Rise*, S&P Global: Market Intelligence (July 25, 2019), https://www.spglobal.com/marketintelligence/en/news-insights/research/retrans-projections-update-sub-rates-continue-to-rise.

[39] Rob Frieden, Krishna Jayakar, & Eun-A Park, *There's Probably a Blackout in Your Television Future: Tracking New Carriage Negotiation Strategies Between Video Content Programmers and Distributors*, 43 COLUM. J.L. & ARTS 487, 515 (2020), https://

Courts have struggled to identify these stakes and the resulting harm to consumers. In *United States v. AT&T, Inc*., 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019), Judge Leon summarily concluded that mergers and industry concentration have no effect on the likelihood of local broadcast signal blackouts due to failed retransmission consent negotiations. Empirical evidence shows the opposite, however, with AT&T involved in many high visibility disputes that have triggered more blackouts that last longer. The Court focused on whether and how AT&T might attempt to demand higher payments and trigger blackouts in its capacity as a provider of content such as HBO Max and CNN.[40] The Court largely ignored AT&T's greater incentives to trigger blackouts in its capacity as a satellite and cable television operator and broadband service provider.

Both broadcast stations and retransmitting ventures can trigger blackouts, based on internal assessments of which side has greater negotiating leverage. The FCC rightly prefers that the negotiating parties reach closure without regulatory intervention. However,

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journals.library.columbia.edu/index.php/lawandarts/article/view/6128; Brad Adgate, *TV Station Blackouts Are Accelerating; Here's Why*, Forbes (Nov. 12, 2019), https://www.forbes.com/sites/bradadgate/2019/11/12/tv-station-blackouts-are-accelerating-heres-why/?sh=5a2b582c7f6c; In Your Area, American Television Alliance, https://www.americantelevisionalliance.org/in-your-area/ (last visited Dec. 17, 2020).

[40] *See, e.g.*, Michael Balderston, *Tegna Stations Blackout for DirecTV Customers*, TV Technology (Dec. 2, 2020), https://www.tvtechnology.com/news/tegna-stations-blackout-for-directv-customers.

the Commission has a Congressionally-mandated duty to ensure that the parties negotiate in good faith,[41] and it recently fined 18 broadcasters the maximum permissible amount[42] for failing to participate in productive negotiations with AT&T.[43]

Broadcasters already have other legal preferences that give them economic leverage and contribute to the blackout problem. A provision in the *Television Viewer Protection Act of 2019*, Pub. L. No. 116-94, 133 Stat. 2534, 3198 (2019) (amendments codified at 47 U.S.C. § 325), requires the FCC to permit negotiations by some groups of unaffiliated cable operators with owners of multiple broadcast stations.[44] As part of its longstanding efforts to promote the financial viability of broadcast television and to promote more timely and efficient retransmission consent negotiations, Congress helped reduce the total number of retransmission consent negotiations. However, that reduction has increased the financial stakes of each remaining negotiation, as the parties involved represent more

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[41] 47 U.S.C. § 325(b)(3)(C). *See also* 47 C.F.R. § 76.65.

[42] Section 503(b)(2)(A) of the Communications Act, as amended, authorizes the FCC to assess a forfeiture of up to $51,222 per violation or day of a continuing violation, up to a statutory maximum of $512,228 for a single act or failure to act. 47 U.S.C. § 503(b)(2)(A).

[43] *DIRECTV, LLC v. Deerfield Media, Inc.*, MB Docket No. 19-168, F.C.C. 20-122 (rel. Sept. 15, 2020), https://docs.fcc.gov/public/attachments/FCC-20-122A1.docx.

[44] *Implementation of Section 1003 of the Television Viewer Protection Act of 2019*, MB Docket No. 20-31, Notice of Proposed Rulemaking, F.C.C. 20-10 (rel. Jan. 31, 2020), https://docs.fcc.gov/public/attachments/FCC-20-10A1.docx.

stations and retransmitting ventures, typically covering more localities. In its 2018 Notice of Proposed Rulemaking, initiating a new quadrennial review of broadcast ownership rules, the FCC noted the potential concerns about "undue bargaining leverage for stations if commonly owned top-four stations are able to negotiate . . . [retransmission] fees jointly as a result of the[ir] combination" should the Commission allow mergers of local television broadcasters holding a top four market share.[45]

III. Robustly competitive and diverse media remains essential, particularly during the COVID-19 pandemic and our post-pandemic recovery.

Our need for competitive media that serves the goals of localism and diversity has not lapsed, and the pandemic and its fallout only confirm the ongoing vitality of broadcast media. Numbers during the pandemic confirm voracious appetite for quality content about matters of public concern, and the ability of existing providers to meet that need. Relaxing regulations at such a key juncture, without considered and reasoned justification, will eliminate exactly that sort of content when we need it the most and illustrates the potential impact of the proposed regulations.

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[45] *In the Matter of 2018 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*, Notice of Proposed Rulemaking, 33 FCC Rcd. 12111, 12135-36.

A. Broadcast media has thrived during the pandemic.

During the COVID-19 pandemic, local broadcast radio and television ratings have increased significantly.[46] Such success in the marketplace provides concrete, empirical evidence that consumers continue to view competitive and diverse local broadcasting as essential:

> As concerns and restrictions around the novel coronavirus (COVID-19) heighten in the U.S., consumers are gravitating to local news outlets to stay informed about the impact of the pandemic on their communities. While the U.S. began to experience the impact later than other parts of the world, a recent Nielsen analysis highlights a notable spike in local news viewing between early February and early March.[47]

Despite the lack of a commensurate increase in advertising revenues, local television broadcasters have

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[46] *Local TV Sees Audience Boost, Reaching Younger and More Diverse Audiences*, Nat'l Assn. of Broads. (Nov. 20, 2020), https://blog.nab.org/2020/11/13/local-tv-sees-audience-boost-reaching-younger-and-more-diverse-audiences/.

[47] *In The 'New Normal' of Covid-19, Local TV News Proves to be the Medium of Choice for News and Information*, Nielson: Insights (Mar. 24, 2020), https://www.nielsen.com/us/en/insights/article/2020/in-the-new-normal-of-covid-19-local-tv-news-proves-to-be-the-medium-of-choice-for-news-and-information/. *See also* Lillian Rizzo, *Local TV Sees Spike in Viewers, Drop in Ads in Coronavirus Crisis*, Wall St. J. (Apr. 3, 2020), https://www.wsj.com/articles/local-tv-sees-spike-in-viewers-drop-in-ads-in-coronavirus-crisis-11585915203.

demonstrated commitments to serve the public interest, as documented by the FCC.[48]

B. Consolidation will harm the volume and quality of news, public affairs, and local content, and the FCC ignored readily-available data to assume otherwise.

Despite the demand for quality content, the FCC proposes regulations that would reduce access to it. In this appeal, multiple-station owners have argued that consolidation will increase volume and quality of news and public affairs programming. In support, they offer this Court anecdotal evidence purportedly showing improved performance of acquired stations, in specific, single markets.[49] But these briefs provided no comprehensive evidence to bolster the FCC's contradictory reasoning, and even if they had, they cannot substitute for the agency's own failure to articulate reasoned analysis. Their post-hoc appellate examples of bolstered news and public affairs programming from newly acquired media properties are akin to real estate speculators asserting that successfully-rehabbed homes prove that deregulation guarantees more affordable housing.

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[48] *Broadcasters Serving Their Communities in Response to COVID-19 Pandemic*, FCC (July 8, 2020), https://www.fcc.gov/broadcasters-serving-their-communities-response-covid-19-pandemic.

[49] Brief of Gray Television, Inc. as Amicus Curiae Supporting Petitioners, Nos. 19-1231 & 19-1241 (filed Nov. 23, 2020), https://www.supremecourt.gov/docket/docketfiles/html/public/19-1231.html.

The multiple-station owners making these arguments also have enormous incentives to overemphasize the benefits of scale, their journalism expertise, and purported increases in news and public affairs programming. They have long overstated the net benefit to diversity, localism, and competition while centrally producing news and public affairs programming broadcast in multiple markets, or on multiple stations in the same market.[50] This particular economy of scale does not assure that owners of multiple stations will produce more news and public affairs programming, or higher quality content.[51] The Pew Research Center found that owners of a small number of stations outperformed larger, presumably better-funded station groups on those measures.[52] And in fact, some

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[50] A 2018 review of news broadcasts from all commercial broadcast television stations in the United States identified that 34% of news content was created by external sources. Bob Papper, 2018 RTNDA/Hofstra University Newsroom Survey: Local News by the Numbers, Radio Television News Digit. News Assoc. (2018), https://www.rtdna.org/article/research_2018_local_news_by_the_numbers.

[51] *See, e.g.*, Danilo Yanich, *Does Ownership Matter? Localism, Content, and the Federal Communications Commission*, 23 J. MEDIA ECON. 51, 51 (2010), https://doi.org/10.1080/08997764.2010.485537 (independent stations broadcast more local content on their newscasts than those stations that were either owned-and-operated by a national network or had the same owner in a locality).

[52] Journalism & Media Staff, *Which Ownership Produces the Best "Quality" News?*, PEW RES. CTR. (Apr. 29, 2003), https://www.journalism.org/2003/04/29/which-ownership-produces-the-best-quality-news/. "Racial and ethnic minority owners are more likely to produce minority targeted content, and more than eight out of ten owners providing minority programming are operating six or

multiple-station owners deliberately mislead viewers into thinking that news and public affairs programming have been locally produced when in fact identical content was transmitted, or lightly edited to include local broadcaster staff.

The FCC's failure to engage with these realities dooms its proposed regulation. An agency bears the "affirmative burden" of "examin[ing] a key assumption" when "promulgating and explaining a non-arbitrary, non-capricious rule," and "must justify [a key] assumption" underlying its regulation "even if no one objects during the comment period." *Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 389 (D.C. Cir. 2018) (citing *Okla. Dept. of Env't Quality v. EPA*, 740 F.3d 185, 192 (D.C. Cir. 2014)). The FCC did not consider its underlying assumptions despite empirical research by the Pew Research Center, the Knight Foundation, *and data collected by the FCC itself*.[53] This information not

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fewer stations. While larger station groups are providing some minority programming, an approach premised on the internal competition theory far underperforms simple diversification of ownership to smaller groups of stations." Christopher Terry & Caitlin Ring Carlson, *Hatching Some Empirical Evidence: Minority Ownership Policy and the FCC's Incubator Program*, 24 COMM. L. & POL'Y 403, 428 (2019), https://doi.org/10.1080/10811680.2019.1627810.

[53] The FCC candidly acknowledges that it has not "systematically managed" collected data by ensuring that data are "easily accessible and sufficiently understood" by all personnel including "economists or policymakers outside" the Bureaus initially collecting the data. Wayne Leighton, et al., FCC, Plan for Office of Economics and Analytics (OEA) Recommendations and Report to Chairman Ajit Pai (Jan. 9, 2018), https://docs.fcc.gov/public/attachments/DOC-348640A1.pdf. *See also In the Matter of Establishment of*

only undermines the FCC's assumptions, but also demonstrates that researchers have readily available empirical data for helpful research even without the need for lavish funding or new staffing. It simply requires a conscientious commitment to seek the truth, rather than ignore, or even fail to compile, readily available data.

The Third Circuit has insisted that the Commission use best practices in compiling a complete evidentiary record before relaxing previously required broadcast ownership caps and safeguards.[54] In particular, it expected the FCC to comply with applicable law, acquire data from broadcaster licensees, and analyze statistical information about current marketplace conditions. The decision below concluded that "the reasoned explanation given by the Commission rested on faulty and insubstantial data" with the FCC attributing its "reasoning to an insubstantial statistical analysis of unreliable data."[55]

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the Office of Economics and Analytics, Order, 33 FCC Rcd. 1539 (2018).

[54] When the FCC fails to compile a complete evidentiary record, appellate courts have reversed on the basis of that shortcoming and required the Commission to do a better job. *See* Rob Frieden, *Case Studies in Abandoned Empiricism and the Lack of Peer Review at the Federal Communications Commission*, 8 J. TELECOMM. & HIGH TECH. L. 277, 300 (2010), http://jthtl.org/content/articles/V8I2/JTHTLv8i2_Frieden.PDF.

[55] *Prometheus Radio Project v. FCC*, 939 F.3d 567, 587 (3d Cir. 2019), *cert. granted sub nom. Nat'l Ass'n of Broadcasters v. Prometheus Radio Project*, Nos. 19-1231 & 19-1241, 2020 WL 5847134 & 5847133 (Oct. 2, 2020).

Courts regularly remand FCC cases for record supplementation and further proceedings "if limitations in the administrative record make it impossible to conclude the action was the product of reasoned decision-making." *Qwest Corp v. FCC*, 258 F.3d 1191, 1198-99 (10th Cir. 2001). Ample precedent supports the Third Circuit's call for reasoned analysis under the APA. "[A regulatory] agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

CONCLUSION

For the reasons discussed, this Court should affirm the judgment below.

Respectfully submitted,

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