No. 19-1241

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF BROADCASTERS, ET AL.,

v. *Petitioners*,

PROMETHEUS RADIO PROJECT, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE INTERNATIONAL CENTER FOR LAW & ECONOMICS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The International Center for Law & Economics ("ICLE") is a nonprofit, non-partisan global research and policy center. ICLE works with more than 50 affiliated scholars and research centers around the world to promote good governance rooted in the rule of law and the development of sensible, economically grounded policies that will promote consumer welfare. ICLE scholars have studied and written extensively on telecommunications law and regulation and on the economics of telecommunications markets.

For these reasons, ICLE supports the petition for certiorari filed by the National Association of Broadcasters ("NAB"), *et al.* seeking this Court's review of the order issued by the U.S. Court of Appeals for the Third Circuit in *Prometheus Radio Project v. FCC*, 939 F.3d 567 (3d Cir. 2019) ("*Prometheus IV*").[1]

In its order, the Third Circuit vacated an order of the Federal Communications Commission ("FCC") adopted pursuant to Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"). *In the Matter of 2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 32 FCC Rcd. 9802 (2017) (*"2017 Reconsideration Order"*).

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[1] No counsel for any party authored this brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to the brief's preparation and submission. Each counsel of record received timely notice of ICLE's intent to file this brief per S. Ct. R. 37.2(a) and has granted consent.

That FCC order would have relaxed long-outdated media ownership rules the FCC had properly determined were no longer necessary because of increased competition in media markets and were no longer in the public interest because they limited the ability of local media outlets to compete in the current competitive landscape. ICLE agrees with the economic and legal analysis underpinning the FCC's order and believes that overturning the Third Circuit's order is important to ICLE's goal of encouraging the development of sensible, economically grounded policies that will promote consumer welfare.

SUMMARY OF ARGUMENT

This proceeding is fast becoming the *Jarndyce v. Jarndyce* of administrative law.[2] For nearly two decades, a three-judge panel in the Third Circuit has blocked the FCC's efforts to comply with its statutory obligation under the 1996 Act to review its media ownership rules periodically and repeal or modify any rules that are no longer necessary because of increased competition in local media markets.

The order in *Prometheus IV* is the most recent and extreme example of the Third Circuit panel's improper interference with the FCC's efforts to comply with this statutory obligation. In it, the panel vacated an FCC order that would have repealed or modified media ownership regulations that even the panel did not dispute are no longer needed to achieve their original purpose of promoting competition, localism, and diversity of viewpoints. *See Prometheus IV*, 939 F.3d at 584-588 (disputing the FCC's analysis

[2] An interminable court case in Charles Dickens' *Bleak House*.

and conclusions as to female and minority ownership diversity, but not as to promotion of competition, localism or diversity of viewpoints).

The Third Circuit panel instead vacated the FCC's order because two judges on the panel believed those regulations might serve another, altogether different objective—promoting minority and female ownership—that is nowhere mentioned in either the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, or the 1996 Act. *See Prometheus IV*, 939 F.3d at 584-588. In so doing, the panel exceeded the limits of judicial review authorized by the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, by substituting its judgment for that of the agency to which Congress had expressly delegated authority to determine whether these media ownership regulations were still both necessary and in the public interest, and by placing burdens on the agency beyond those established by Congress.

In overstepping these limits, the Third Circuit panel will further delay the elimination of regulations that are not only no longer necessary, but that are also limiting the ability of local newspapers and broadcasters to compete with increasingly important digital media platforms. These outdated regulations have already contributed to an "extinction-level crisis" in the newspaper industry, and the spread of that crisis to local broadcasters in smaller markets is imminent. Consequently, the panel's order will cause serious and immediate injury to the public's First Amendment interest in preserving a strong local free press. *See Associated Press v. United States*, 326 U.S. 1, 28 (1945) (a "free press is indispensable to the workings of our democratic society") (Frankfurter, J., concurring).

ARGUMENT

I. The *Prometheus IV* Order Frustrates the Deregulatory Purposes of the 1996 Telecommunications Act.

Using "unmistakably mandatory language," *Prometheus Radio Project v. FCC*, 824 F.3d 33, 50 (3d Cir. 2016) ("*Prometheus III*"), Section 202(h) of the 1996 Act, as amended, commands that,

> The Commission *shall* review . . . all of its ownership rules quadrennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and *shall* determine whether any of such rules are necessary in the public interest as the result of competition. The Commission *shall* 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), as amended by Pub. L. No. 108-199, §629, 118 Stat. 3, 99-100 (2004) (emphases added).[3]

These commands were part of an effort by Congress in the 1996 Act to establish "a procompetitive, de-regulatory national policy framework" for the

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[3] Section 11 is a new section in Chapter 5, Wire or Radio Communication, of the Communications Act, which was added by the 1996 Act and codified at 47 U.S.C. § 161. Section 11, which is entitled "Regulatory Reform," requires the FCC to conduct biennial assessments of all rules issued under Chapter 5. In these reviews, "The Commission shall determine whether any such regulation is no longer *necessary in the public interest* as the result of meaningful economic competition between providers of such service." 47 U.S.C. § 161(a)(2) (emphasis added). Section 11 further orders that, "The Commission shall repeal or modify any regulation it determines to be no longer *necessary in the public interest*." 47 U.S.C. § 161(b) (emphasis added).

telecommunications and media industries. S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996). By requiring that the FCC conduct its reviews under Section 202(h) every two years (later amended to every four years), Congress made clear that it expected the FCC to act promptly to eliminate or modify any local media ownership rules that were no longer necessary due to growing competition and therefore no longer in the public interest. *See Fox Television Stations, Inc. v. FCC* ("*Fox I*"), 280 F.3d 1027, 1044 (D.C. Cir. 2002) (Ginsburg, J.) (likening Section 202(h) to Farragut's order at the battle of Mobile Bay ("Damn the torpedoes! Full speed ahead.")).

In the quarter century since the 1996 Act was enacted, competition from digital media has grown exponentially. Today, Americans have access to video and audio programming over hundreds of channels from both cable and satellite distributors.[4] Americans also now have access to thousands of websites from which they can and do get whatever information they need—be it news, sports, or entertainment.[5] And

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[4] *See* In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighteenth Report, 32 FCC Rcd. 568, 573-574, (Jan. 17, 2017) (reporting that "major MVPDs offer hundreds of linear television channels, thousands of non-linear VOD programs, as well as pay-per-view (PPV) programs") (hereinafter "18th FCC AVC Report").

[5] On average, US adults use their smartphones 58 times each day and spend approximately 3.5 hours per day on the mobile internet. Nearly one-third of Americans say they are online "almost constantly." *See* Rani Molla, *Tech companies tried to help us spend less time on our phones. It didn't work.*, VOX (Jan. 6, 2020), https://www.vox.com/recode/2020/1/6/21048116/tech-companies-time-well-spent-mobile-phone-usage-data.

unlike in 1996, Americans can now enjoy video and audio programming and obtain a wide range of information from online websites either on a smart TV in their home or office or on a smartphone or tablet they can carry with them wherever they are.[6]

Unfortunately, despite the abundance of media sources now available to all Americans, little, if any, progress has been made in carrying out the 1996 Act's mandate for a procompetitive approach to media ownership embodied in Section 202(h). This lack of progress is due in large part to the Third Circuit blocking nearly every effort by the FCC to modify or repeal its media ownership regulations in response to changing competitive realities as Congress ordered it to do.

In its first biennial review in 1998, the FCC decided to retain its national television station ownership ("NTSO") and cable/broadcast cross-ownership ("CBCO") rules, but to relax its local television rule for TV stations in the same market. *See Fox I*, 280 F.3d at 1035-1036.

In reviewing the two cable-related rules the FCC sought to retain, the D.C. Circuit held that "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules." *Id.* at

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[6] "About 74% of U.S. TV households have at least one Internet-connected TV device." Erik Gruenwedel, *Report: U.S. Households With at Least One Internet-Connected TV Device Remains Unchanged*, MEDIA PLAY NEWS, (Jun. 3, 2019), https://www.mediaplaynews.com/report-u-s-households-with-at-least-one-internet-connected-tv-device-remains-unchanged/.
81% of Americans own smartphones. Pew Research Center, *Mobile Fact Sheet*, (Jun. 12, 2019), https://www.pewresearch.org/internet/fact-sheet/mobile/.

1048. It ruled, therefore, that, "Under § 202(h) the Commission may retain a rule only if it reasonably determines that the rule is 'necessary in the public interest.'" *Id.* Finding the reasons the FCC had given for retaining those two rules insufficient, the D.C. Circuit vacated the FCC's order, directing the FCC to repeal one of those rules and to consider further whether it should repeal the other rule. *See id.* at 1053.

The D.C. Circuit applied the same standard in reviewing the changes the FCC had made to its local television rule. The FCC had relaxed its prohibition on common ownership of two or more stations in the same market by adopting an "8-voices test," requiring that at least eight independent stations remain in that market. In reviewing the FCC's action, the court upheld its relaxation of the rule, but directed the agency to consider whether to relax the rule further in its next biennial review by including other media in its count of the number of "voices." *See Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148, 162-163 (D.C. Cir. 2002).

When the FCC completed its second biennial review in 2003, it sought to further reduce the number of TV stations needed in a market to permit common ownership by requiring only six voices rather than eight. The FCC also sought to relax its cross-ownership rules—one prohibiting common ownership of a newspaper and a broadcast station in the same market and the other prohibiting common ownership of a radio and television station in the same market—by limiting those prohibitions to markets in which media ownership was too concentrated.

The Third Circuit, rather than the D.C. Circuit, reviewed the FCC's second effort to comply with its statutory mandate to repeal or modify any media ownership rules that were no longer in the public interest. In a 2-1 decision, with Judge Anthony Scirica concurring in part and dissenting in part, the Third Circuit panel departed sharply from the approach taken by the D.C. Circuit. *See Prometheus Radio Project v. FCC,* 373 F.3d 372 (3d Cir. 2004) ("*Prometheus I*").

First, the panel read Section 202(h)'s direction to the FCC to determine whether any of its local media ownership rules were still "necessary" more loosely than the D.C. Circuit had. The panel read the section to mean that the FCC could not repeal or modify a rule so long as it was still "useful," even if not literally necessary. *See id.* at 394.

Second, the panel held that, in applying this test, the FCC would have "to justify affirmatively a rule's repeal or modification." *Id.* at 395. The D.C. Circuit in *Fox I* and *Sinclair* had held, to the contrary, that the FCC could "retain a rule only if it reasonably determines that the rule is 'necessary in the public interest.'" *See Fox I*, 280 F.3d at 1048; *accord*, *Sinclair*, 284 F.3d at 159.

Having substantially weakened the deregulatory mandate of Section 202(h), the Third Circuit panel went on to reject the FCC's relaxation of its cross-ownership and local television rules. *See Prometheus I*, 373 F.3d at 435. This decision left in place rules the FCC had determined were an impediment to competition and thus no longer in the public interest. In each case, the panel did so without questioning the FCC's determinations that those regulations were

overbroad, instead vacating the FCC's decision to relax those rules only because two of the judges did not agree with how the FCC proposed to measure concentration in adopting and applying the modified rules. *See id.* at 397-412, 418-20.

Ever since, the same Third Circuit panel has retained jurisdiction over all further efforts by the FCC to fulfill its statutory mandate to repeal or modify media ownership rules that are no longer "necessary in the public interest as the result of competition." 1996 Act, §202(h). Exercising its retained jurisdiction, the panel has twice more rejected FCC attempts to relax the media ownership rules, again in 2-1 split decisions. *See Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) ("*Prometheus II*"); *Prometheus III*, 824 F.3d 33. Consequently, daily newspapers and local broadcast stations remain shackled by regulations that were first adopted long before the 1996 Act, two of which have not been amended since they were adopted in 1975.[7]

By doing so again in *Prometheus IV*, the Third Circuit panel will continue to frustrate the plain will of Congress. As the D.C. Circuit has recognized, the 1996 Act's directive in Section 202(h) is not optional; rather, it imposes on the FCC an "*obligation* … to repeal or modify such regulations it determines are no longer necessary in the public interest as a result of current *competitive* conditions." *Cellco P'ship v. FCC*, 357 F.3d 88, 99 (D.C. Cir. 2004) (emphases added).

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[7] *See 2017 Reconsideration Order*, 32 FCC Rcd. at 9806, n. 19 (observing that the newspaper/broadcast cross-ownership ("NBCO") rules applicable to television stations and radio stations have not been modified since 1975).

The Third Circuit has prevented the FCC from complying with that statutory "obligation."

A. The *2017 Reconsideration Order* Made Long Overdue Changes to the FCC's Media Ownership Rules to Promote Competition.

In its *2017 Reconsideration Order*, the FCC sought to comply with its congressional mandate by adopting deregulatory rule changes it determined were needed because of the explosion of new competition since those rules were first adopted and last amended. Because of that increased competition, the FCC determined that its current media ownership rules were no longer "necessary in the public interest," and were affirmatively harmful to the public interest because they impaired the ability of newspapers and radio and TV broadcast stations to perform their First Amendment function of keeping the public well informed. *See 2017 Reconsideration Order*, 32 FCC Rcd. at 9807.

In making these changes, the FCC relied on a voluminous rulemaking record assembled through two successive quadrennial reviews over a period of nearly eight years. Based on that record, the FCC gave a carefully reasoned explanation for its determination that each of the rules it was eliminating were no longer "necessary as the result of competition" or "in the public interest." *Id.* at 9810-9824, 9826-9831, & 9832-9840.

In the case of the newspaper-broadcast cross-ownership rule, the FCC determined that "prohibiting newspaper/broadcast combinations is no longer necessary to serve the Commission's goal of promoting viewpoint diversity in light of the multiplicity of

sources of news and information in the current media marketplace and the diminished voice of daily print newspapers." *Id.* at 9807.[8] The FCC determined, therefore, that the "limited benefits for viewpoint diversity" that might result from retaining the rule were "outweighed by the costs of preventing traditional news providers from pursuing cross-ownership investment opportunities to provide news and information in a manner that is likely to ensure a more informed electorate." *Id.*

In the case of its local television rule, the FCC determined that the 8-voices test was no longer necessary given the increased competition TV stations now face from cable and online video streaming. As the FCC explained, "[c]onsumers are increasingly accessing video programming delivered via [multichannel video programming distributors ("MVPDs")], the Internet, and mobile devices." *Id.* at 9834. The FCC further determined that eliminating the 8-voices test would benefit the public interest because it would "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." *Id.*

B. The Third Circuit Exceeded Its Limited Role Under the APA by Blocking Needed Reforms Based on Mere Speculation That They Might Hinder Minority and Female Ownership.

Under the APA, an agency's determination to promulgate, repeal, or modify a rule in an informal

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[8] The FCC repealed the radio/television cross-ownership rule for similar reasons. *See id.* at 9824-9831.

rulemaking may be set aside only if it were found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983). As the Court explained,

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the 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."

Id. at 43, quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

Here, the Third Circuit panel did not question the FCC's determination that the cross-ownership and local television rules were no longer necessary to the public interest objectives for which they had originally been adopted. *See 2017 Reconsideration Order*, 32 FCC Rcd. at 9808 (noting that "the Commission's primary intent in adopting the NBCO rule in 1975 was to preserve and promote a diversity of viewpoints at the local level"); *see also Prometheus IV*, 939 F.3d at 573-574 (recognizing that "competition, diversity, and localism" have long been interests protected under the Communications Act of 1934).

Instead, the panel focused exclusively on what two of the judges viewed as a failure by the FCC to "adequately consider the effect its new rules would have on ownership of broadcast media by women and racial minorities." *Id.* at 573. The panel's order should be overturned because it used this extraneous

objective to supersede the FCC's considered determination that repealing or modifying the rules was necessary to protect the public interests for which they had first been adopted.

Compounding its error, the panel vacated these vital reforms based on mere speculation that they would hinder minority and female ownership, rather than grounding its action on any record evidence of such an effect. In fact, the *2017 Reconsideration Order* makes clear that the FCC found no evidence in the record supporting the court's speculative concern.

- With respect to the cross-ownership rules, the FCC noted that "record evidence demonstrates that previous relaxations of other ownership rules have not resulted in an overall decline in minority and female ownership of broadcast stations," and that it had found "no evidence to suggest eliminating the NBCO Rule will produce a different result and precipitate such a decline." *2017 Reconsideration Order,* 32 FCC Rcd. at 9823.
- Similarly, with respect to the local television rule, the FCC found that "the record does not support a causal connection between modifications to the Local Television Ownership Rule and minority and female ownership levels;" and therefore concluded that the modifications it was adopting "are not likely to harm minority and female ownership." *2017 Reconsideration Order*, 32 FCC Rcd. at 9839.

In rejecting the FCC's stated reasons for repealing or modifying the rules, absent any evidence in the record to the contrary, the panel substituted its own speculative concerns for the judgment of the FCC, notwithstanding the FCC's decades of experience regulating the broadcast and newspaper industries.

By so doing, the panel exceeded the bounds of its judicial review powers under the APA. *See State Farm*, 463 U.S. at 43 (describing the "narrow" scope of the arbitrary-and-capricious standard of review).

C. The Third Circuit Exceeded Its Limited Role Under the APA by Imposing an Affirmative Burden on the FCC To Conduct Further Empirical Research.

The *2017 Reconsideration Order* shows that the FCC gave proponents of retaining the cross-ownership and local television rules every opportunity to come forward with empirical evidence showing that retaining the rules was necessary for advancing minority and female ownership—and that those proponents failed to do so. With respect to the cross-ownership rules, the FCC explained that,

> After seeking public comment on this topic a number of times, the Commission expressed its view that the rule does not promote or protect minority and female ownership. Not only have past debates on this issue not persuaded the Commission that the ban on newspaper/broadcast combinations is necessary to protect or promote minority and female ownership, no arguments were made in this reconsideration proceeding that would lead us to conclude otherwise.

2017 Reconsideration Order, 32 FCC Rcd. at 9822 (footnotes omitted).

Similarly, with respect to the local television rule, the FCC noted that,

> [D]ata in the record demonstrate that relaxation of the Local Television Ownership Rule in 1999 did not have a negative impact on overall minority

> ownership levels. In this lengthy proceeding, no party has presented contrary evidence or a compelling argument demonstrating why relaxing this rule will have a different impact.

Id. at 9839 (footnotes omitted).

As these excerpts show, the proponents of retaining the cross-ownership and local television rules failed to come forward with any evidence showing that these rules were necessary to promote minority and female ownership. Because the proponents failed to meet their burden of proof on the record, it was reasonable for the FCC to exercise its own expert judgment as to whether it needed to conduct additional research. *Cf.* 5 U.S.C. §556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.").

The FCC exercised its judgment responsibly. Drawing on decades of experience with these issues, it concluded that "any attempt to conduct an empirical study of the relationship between cross-ownership restrictions and minority and female ownership would face obstacles that likely would make such study impractical and unreliable." *In the Matter of 2014 Quadrennial Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 29 FCC Rcd. 4371, 4460 n.595 (2014). The obstacles cited by the FCC included the fact that "both cross-ownership and minority and female ownership levels show very little variation [over long periods of time], making empirical study of the relationship between these multiple variables extremely difficult." *Id.*

Thus, having appropriately concluded that further empirical research was unlikely to yield meaningful additional data on the potential effect of its action on minority and female ownership, the FCC was also fully justified in relying on its own experience and on the data it had available to conclude that relaxing these rules was unlikely to harm minority and female ownership.

By instead imposing an affirmative burden on the FCC to conduct further empirical research on this issue, the Third Circuit panel failed to heed this Court's admonition that "[t]here are some propositions for which scant empirical evidence can be marshaled," and courts should not "insist upon obtaining the unobtainable." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009).

And in so doing, the panel acted in a manner directly contrary to this Court's directive that in reviewing the actions of a regulatory agency, "a court may not impose additional procedural requirements upon an agency." *State Farm*, 463 U.S. at 50-51 (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 541 (1978) (noting that "it is improper for a reviewing court to prescribe the procedural format an agency must follow")); *see also Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.) (holding that the APA "imposes no general obligation on agencies to produce empirical evidence"). Consequently, the Third Circuit panel exceeded the bounds of its judicial review powers under the APA. *See State Farm*, 463 U.S. at 52 (holding that when "the available data do not settle a regulatory issue," a court should respect the agency's

"exercise [of] its judgment in moving from the facts and probabilities on the record to a policy conclusion").

II. The Third Circuit Decision Threatens Grave and Immediate Harm to the Public's First Amendment Interest in Preserving a Strong Local Free Press.

In the 24 years since the 1996 Act was enacted, the FCC has made repeated, good faith efforts to comply with its statutory mandate to repeal or modify regulations that are no longer necessary because of the competition local newspapers and broadcast stations now face from new digital media.

But for most of that period, a single panel of judges on the Third Circuit has blocked those congressionally mandated regulatory reform efforts. In so doing, that panel of three judges has caused serious harm to "the industry's ability to compete effectively in a multichannel media market," the very harm Congress sought to prevent when it passed the 1996 Act. *See* H.R. Rep. No. 104-204, at 55 (1995).

A. Newspapers Face an "Extinction-Level Crisis" Due to Growing Competition From Digital Media

The American newspaper industry has suffered enormously since the Third Circuit panel's first decision in *Prometheus I* in 2004 blocking the FCC's effort to narrow the application of its newspaper-broadcast cross-ownership rules. Since then, U.S. daily newspaper circulation has fallen by nearly half—dropping from more than 54.6 million newspapers in 2004 to 28.6 million in 2018, its lowest

level since before World War II.[9] Advertising revenue has declined even more, falling 70 percent from $48.2 billion in 2004 to $14.3 billion in 2018.[10]

Due to these dramatic drops in circulation and advertising revenue, nearly all newspapers have had to cut costs drastically in order to stay in business. As part of this effort, they have had to lay off nearly half their newsroom employees between 2004 and 2018.[11] Yet, despite these severe cost-cutting measures, it is estimated that over 2,000 newspapers—more than one-fifth of all newspapers in the United States—have ceased publication over that period, 70 of them dailies.[12] More than 200 counties nationwide now no longer have a local newspaper,[13] and the daily newspapers that have survived generally have many fewer journalists to cover local news.[14] Minority

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[9] *See* Pew Research Center, *Newspaper Fact Sheet*, July 9, 2019, https://www.journalism.org/fact-sheet/newspapers/.

[10] *Id.*

[11] *Id.*

[12] *See* Jonathan O'Connell, *Ghost papers and news deserts: Will America ever get its local news back?*, WASH. POST (Dec. 26, 2019), https://www.washingtonpost.com/business/economy/ghost-papers-and-news-deserts-will-america-ever-get-its-local-news-back/2019/12/25/2f57c7d4-1ddd-11ea-9ddd-3e0321c180e7_story.html.

[13] Penelope Muse Abernathy, THE EXPANDING NEWS DESERT 8 (2018), https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf.

[14] *See* O'Connell, *supra* n. 12, (referencing Penelope Muse Abernathy's description of surviving local newspapers as "'ghost papers' because of their painfully thin staffs and reporting").

communities in rural areas have been particularly hard-hit by the loss of local newspapers.[15]

Repealing the cross-ownership rule now may not bring back the newspapers that have already closed, but it may help the many struggling newspapers that remain. As the FCC recognized in the *2017 Reconsideration Order*, repealing those rules would help create "cross-ownership investment opportunities" that would better enable newspapers "to provide news and information in a manner that is likely to ensure a more informed electorate." *2017 Reconsideration Order*, 32 FCC Rcd. at 9807.

B. Unless this Court Grants Review and Overturns the Third Circuit's Order, Local Television Stations in Many Smaller Markets May Suffer a Similar Fate.

Since the first cable network (HBO) launched in 1972,[16] broadcast TV stations have lost nearly two-thirds of their audience to cable networks.[17] Because of this dramatic shift of viewership, local TV stations

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[15] *See, e.g.,* Charles Bethea, *What Happens When the News is Gone?*, THE NEW YORKER, (Jan. 27, 2020), https://www.newyorker.com/news/the-future-of-democracy/what-happens-when-the-news-is-gone (describing impact of loss of newspaper reporting on local government actions, especially the impact on African-American residents).

[16] *See* National Cable & Telecommunications Association, *History of Cable Television*, https://web.archive.org/web/20100905133543/http://www.ncta.com/About/About/HistoryofCableTelevision.aspx.

[17] *See* 18th FCC AVC Report, *supra* n. 4, at 48 (showing broadcast TV stations with a 35% share of the total TV audience (excluding online streaming) and cable TV networks with a 60% share in Table III.B.3).

have also lost a significant share of their advertising revenue to cable and satellite distributors.[18]

Further, beginning a decade ago, broadcast and cable TV both began losing viewers to online video streaming services like Netflix and Amazon Prime at an ever-accelerating rate. Since 2010, the time spent watching broadcast and cable TV has fallen dramatically in every age group under 50, ranging from a 19 percent decline for adults aged 35-49 to 51 percent declines for teenagers aged 12-17 and for young adults aged 18-24, while the time spent streaming video has grown exponentially.[19] As a result, the advertising revenues of local broadcast TV stations, which have been virtually flat since 2010, are now also beginning to fall and are forecast to decline substantially over the next five years.[20]

The loss of viewers first to cable and now to video streaming, and the resulting decline in advertising revenue as ratings drop, has put increasing pressure on local TV stations to cut costs. Because local news is the only significant variable cost over which they have

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[18] *See* BIA Advisory Services, 2019 U.S. Local Advertising Forecast, Q1 Client Briefing (Jan. 2019), slide 9 (showing that broadcast TV captures 11.5% of local advertising revenues nationwide, compared to 4.0% for cable), http://www.biakelsey.com/wp-content/uploads/2019/01/BIA-Briefing-Q1-2019.pdf.

[19] Derek Thompson, *Everybody Should Be Very Afraid of the Disney Death Star*, THE ATLANTIC (Dec. 15, 2017), https://www.theatlantic.com/business/archive/2017/12/disney-21st-century-fox/548492/.

[20] *See* Erik Olson, *Traditional vs. Digital Advertising: What's Best for Your Business*, ARRAY DIGITAL (Sept. 27, 2019), https://thisisarray.com/traditional-vs-digital-advertising/.

direct control, it is often the first to be cut as revenues decline and budgets tighten.[21]

As the FCC recognized in the *2017 Reconsideration Order*, mergers or other joint operating arrangements with other stations in the same local market, such as joint service agreements ("JSAs"), can provide significant economies of scale. *See* 32 FCC Rcd. at 9852. These economies of scale often enable TV stations to broadcast more and better local news to their viewers. *See id.* These types of joint operating arrangements can also help promote minority ownership. *See id.* at 9848 (noting that evidence shows that television JSAs have "helped … support women- and minority-owned stations").

CONCLUSION

Congress enacted Section 202(h) of the 1996 Act to promote competition and economic efficiency by requiring the FCC to modify or repeal regulations made unnecessary by increased competition. The Third Circuit has repeatedly frustrated the Act's procompetitive purposes by vacating the FCC's deregulatory orders under Section 202(h), and has done so again in *Prometheus IV.* As a result, local television stations in smaller markets may suffer an "extinction-level crisis." For these reasons, the NAB

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[21] For example, after regulatory barriers prevented Gray Television from capturing the efficiencies of acquiring a second station in the Casper, Wyoming market, the company had to stop producing local news in Casper. *See* Harry A. Jessell, *Gray Blames Feds For Local News Cuts In Casper*, TVNewsCheck (Jan. 23, 2019), https://tvnewscheck.com/article/229026/gray-blames-feds-local-news-cuts-casper/.

petition for a writ of certiorari should be granted and the Third Circuit order reversed.

Respectfully submitted.

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