Nos. 19-1231 & 19-1241

In The
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,
Petitioners,
v.

PROMETHEUS RADIO PROJECT, *ET AL.*,
Respondents.

NATIONAL ASSOCIATION OF BROADCASTERS, *ET AL.*,
Petitioners,
v.

PROMETHEUS RADIO PROJECT, *ET AL.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* THE ABC TELEVISION AFFILIATES ASSOCIATION, THE CBS TELEVISION NETWORK AFFILIATES ASSOCIATION, THE FBC TELEVISION AFFILIATES ASSOCIATION, AND THE NBC TELEVISION AFFILIATES IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. LOCAL MEDIA OWNERSHIP RULES MUST REFLECT THE REALITIES OF THE MODERN MEDIA MARKETPLACE 5

II. ANACHRONISTIC OWNERSHIP RULES POSE OBSTACLES TO THE PRODUCTION OF LOCAL NEWS PROGRAMMING AND EVEN THREATEN THE VIABILITY OF LOCAL TELEVISION STATIONS 12

A. Outdated ownership rules impede broadcasters from achieving the scale and scope necessary to succeed in increasingly competitive markets 13

B. Advertising revenues are declining even as the costs of producing local news programming increase 17

C. The ownership rule modifications the Commission attempted to make would have supported local broadcasters' attempts to remain competitive in local media markets 20

D. Real-world examples underscore the importance of ownership rules that facilitate, rather than impede, economies of scale and scope 27

III. THE THIRD CIRCUIT IGNORED THE DETRIMENTAL EFFECT OF ITS DECISION ON OWNERSHIP OF BROADCAST OUTLETS BY WOMEN AND MINORITIES...................................... 31

CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

CASES AND AGENCY DECISIONS

2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Order on Reconsideration and Notice of Proposed Rulemaking,
32 FCC Rcd. 9802 (2017)............................ *passim*

Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations,
50 F.C.C.2d 1046 (1975)....................................... 7

Consent to Assign Certain Licenses from Red River Broadcast Co, LLC to Gray Television Licensee, LLC,
34 FCC Rcd. 8590 (2019)..................................... 27

FCC v. WNCN Listeners Guild,
450 U.S. 582 (1981) 32

Pappas Arizona License, LLC,
28 FCC Rcd. 17048 (2013).................................. 30

Withers Broadcasting Co.,
32 FCC Rcd. 3179 (2017).................................... 30

STATUTE

Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996) 2, 3, 5, 7

RULES

Sup. Ct. R. 37.3 1

Sup. Ct. R. 37.6 1

REGULATIONS

47 C.F.R. § 73.622 6

47 C.F.R. § 73.3555 6

OTHER AUTHORITIES

2010 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. 09-182, Comments of Lin Television Corporation (July 12, 2010), https://ecfsapi.fcc.gov/file/7020522175.pdf 15

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, Comments of Gray Television, Inc. (Apr. 29, 2019), https://ecfsapi.fcc.gov/file/10430725728587/Comments%20of%20Gray%20Television%20in%202019%20Quadrennial%20Review.pdf 29

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, Reply Comments of TEGNA Inc. (May 29, 2019), https://ecfsapi.fcc.gov/file/10529034256265/TEGNA%202018%20Quadrennial%20Review%20Reply%20Comments%20(5-29-2019).pdf 15, 28

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, Comments of the National Association of Broadcasters (May 29, 2019), https://ecfsapi.fcc.gov/file/10429077016730/2018%20NAB%20Quadrennial%20Comments%20and%20Attachments.pdf 14

2020 Coronavirus Media Usage Study, TVB (Apr. 2020), https://www.tvb.org/Public/Research/2020CoronavirusMediaUsageStudy.aspx 11

Alphabet Inc., Form 10-K for Fiscal Year Ended Dec. 31, 2018 (Feb. 4, 2019), https://www.sec.gov/Archives/edgar/data/1652044/000165204419000004/goog10-kq42018.htm 18

BIA Advisory Services, BIA's Media Access Pro Database, *available at* http://www.biakelsey.com/data-platforms/media-access-pro/ 29

Chris O'Dell, *Over 200 OTT Services Now Available in U.S. Market Alone*, Parks Associates (Aug. 13, 2018), https://www.parksassociates.com/newsletter/article/ca-aug2018... 8

Claudia Kienzle, *BIA: 2018 TV Station Revenue to Reach $27.68B*, TVTechnology (Apr. 30, 2018), https://www.tvtechnology.com/news/bia-2018-tv-station-revenue-to-reach-27-68b 18

Congressional Research Service, R41458, *How Changes in the Economics of Broadcast Television are Affecting News and Sports Programming and the Policy Goals of Localism, Diversity of Voices, and Competition* (Oct. 20, 2010), https://www.everycrsreport.com/files/20101020_R41458_6c055f8400515c31a556c677d13466063c684b24.pdf 9-10, 17

Disney+'s Number of Subscribers Worldwide from 1st Quarter 2020 to 4th Quarter 2020, Statista (Nov. 2020), https://www.statista.com/statistics/1095372/disney-plus-number-of-subscribers-us/#:~:text=Disney%2B%20subscriber%20numbers%20worldwide%202020&text=The%20Walt%20Disney%20Company%20reported,start%20of%20the%20fiscal%20year 9

J.A. Eisenach & K.W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting* (2011) 14

Lillian Rizzo, *Local TV Sees Spike in Viewers, Drop in Ads in Coronavirus Crisis*, The Wall Street Journal (Apr. 3, 2020).................... 11

Mark R. Fratrik, Ph.D., BIA Advisory Services, *The Economic Irrationality of the Top-4 Restriction* (Mar. 15, 2019) 19

National Association of Broadcasters Leadership Foundation, https://www.nabfoundation.org/programs/broadcast-leadership/ (last visited Nov. 23, 2020).......... 33

National Association of Broadcasters, *Television Financial Report: 2016 Industry Business Report, Station Revenue, Expenses and Profit* (2016) 15

Nielsen DMA Rankings 2020 (2020), https://mediatracks.com/resources/nielsen-dma-rankings-2020/ 16

Number of Hulu's Paying Subscribers in the United States From 1st Quarter 2019 to 4th Quarter 2020, Statista (Nov. 2020), https://www.statista.com/statistics/258014/number-of-hulus-paying-subscribers/ 9

Number of Netflix Paid Subscribers Worldwide from 3rd Quarter 2011 to 3rd Quarter 2020, Statista (Oct. 2020), https://www.statista.com/statistics/250934/quarterly-number-of-netflix-streaming-subscribers-worldwide/ 8

Ooyala, *State of the Broadcast Industry 2019* (Jan. 2019) 8

Penelope Muse Abernathy, University of North Carolina Hussman School of Journalism and Media, *The Expanding News Desert* (2020), https://www.usnewsdeserts.com/ 21

Pew Research Center, *For Local News, Americans Embrace Digital But Still Want Strong Community Connection* (Mar. 26, 2019), https://www.journalism.org/2019/03/26/for-local-news-americans-embrace-digital-but-still-want-strong-community-connection/ 10, 23

Pew Research Center, *How News Happens* (Jan. 11, 2010).. 22

Pew Research Center, *Local News Is Playing an Important Role for Americans During COVID-19 Outbreak* (July 20, 2020), https://www.pewresearch.org/fact-tank/2020/07/02/local-news-is-playing-an-important-role-for-americans-during-covid-19-outbreak/ 11

Pew Research Center, *Newspapers Fact Sheet* (July 9, 2019), https://www.journalism.org/fact-sheet/newspapers/ 21

Sen. Maria Cantwell, U.S. Senate Committee on Commerce, Science, and Transportation, *Local Journalism: America's Most Trusted News Sources Threatened* (Oct. 2020), https://www.cantwell.senate.gov/imo/media/doc/Local%20Journalism%20Report%2010.26.20_430pm.pdf .... *passim*

Steven Waldman, Federal Communications Commission, *The Information Needs of Communities* (July 2011), https://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf..................................... 18, 23, 24, 26

US Senate Votes Financial Support for Local Newspapers and Broadcast Outlets, MercoPress (May 14, 2020), https://en.mercopress.com/2020/05/14/us-senate-votes-financial-support-for-local-newspapers-and-broadcast-outlets 12

INTERESTS OF AMICI CURIAE[1]

Amici Curiae ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates (the "Affiliates Associations") are non-profit trade associations whose members consist of local television broadcast stations affiliated with each Association's respective broadcast television network. Collectively, the Affiliates Associations represent more than 600 local television stations in markets across the country. The Affiliates Associations' members are the backbone of local television news production, making a substantial contribution to educating and informing viewers across the United States.

The Affiliates Associations have a strong interest in the issues before the Court, because the Federal Communications Commission's local media ownership regulations significantly constrain their members' ability to compete fairly with numerous unregulated new market entrants. The Commission has long

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[1] Pursuant to Rule 37.3, counsel of record for all parties listed on the dockets have consented to the filing of this *amici curiae* brief. Pursuant to Rule 37.6, counsel for *amici curiae* confirm that no counsel for any party authored this brief in whole or in part, and no one other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

Undersigned counsel at Cooley LLP previously represented Cox Media Group ("CMG"), a broadcaster and an intervenor below and, by default, a Respondent here. CMG did not participate on the merits below and informed this Court and all counsel of record that it will not participate in this case. Undersigned counsel does not currently represent CMG in this case.

recognized that its rules are out of step with the modern media landscape. It has attempted repeatedly, over many years, to modernize or repeal outdated rules that no longer reflect competitive marketplace conditions, as Section 202(h) of the Telecommunications Act of 1996 directs. And for years, the decisions of a single, divided panel of the Third Circuit Court of Appeals have stymied the Commission's efforts and prevented implementation of its rule changes.

Consequently, local television broadcasters today must structure their business operations to comply with archaic ownership rules that are completely out of sync with today's vibrant, highly-competitive video programming marketplace—rules that preclude, for example, common ownership of a local television station and a local newspaper in the same market. Those anachronistic ownership rules place local broadcasters at a decided competitive disadvantage against other, largely unregulated providers of video programming that are quickly coming to dominate today's complex, fast-evolving, highly competitive media marketplace.

Outdated ownership constraints hamstring broadcasters in their efforts to build viable, efficient, and competitive local broadcasting businesses, particularly in smaller markets. And these rules ultimately constrain news production by the Affiliates Associations' member stations, depriving Americans of one of the chief benefits of the FCC's licensed television broadcasting system. Unless the way is cleared for the Commission to modernize the local ownership rules as contemplated by Congress and allow broadcasters to achieve efficiencies and economies of scale made possible by consolidation,

many local broadcasters will suffer the same fate as local newspapers, and citizens across the country will lose access to local, trusted, objective news, weather, emergency, and information programming.

INTRODUCTION AND SUMMARY OF ARGUMENT

Back in 1975, the Commission forbade ownership of a local newspaper and a local television station in the same market, in order to promote competition. How things have changed. Today, the newspaper industry is all but dead; the video marketplace looks nothing like it did in 1975; and the media landscape would be unrecognizable to the Congress that, in 1996, directed the FCC to ensure that its local media ownership rules reflect changing competitive realities. The marketplace looks wildly different than it did nearly seventeen years ago, too, when a panel of the Third Circuit first rejected the Commission's attempts to modernize the ownership rules, as Section 202(h) of the Telecommunications Act directs the agency to do.

Despite that sea change, the FCC regulations that govern ownership of media outlets in local markets remain stuck exactly where they were decades ago. Today, the Affiliates Associations' members operate under a newspaper/broadcast cross-ownership prohibition that is essentially unchanged since 1975 and a local multiple ownership restriction that originated in 1941. Those rules are relics of a bygone era of limited local media competition, when there were only three national broadcast networks and just a handful of broadcast TV stations in most markets. Back then, the Commission believed that competition,

localism, and viewpoint diversity were best served by constraining common ownership of the relatively limited number of local media outlets. Today's media marketplace is vastly different: There are hundreds, maybe thousands, of video programming options, and multiple platforms deliver video programming via cable, satellite, and the Internet. Viewers can access an almost infinite library of video programming virtually whenever and wherever they choose.

Although the marketplace has transformed in recent decades, local broadcasters' essential, public-service role has not changed: Through free, over-the-air broadcasts, from the largest urban areas to the most remote rural communities, stations create and distribute national, state, and local news, weather, public affairs, sports, and entertainment programming, as well as essential public health and emergency information. The coronavirus pandemic has reinforced the critical importance of reliable access to local and national news and information programming via local broadcast television.

Television stations cannot fulfill that critical role, though, if their businesses are unable to survive in today's rapidly changing, increasingly diverse, and exceedingly competitive media marketplace. Like every other business, the survival of local television depends on economic viability. Stations that cannot compete cannot survive, and broadcasters today face competitors too numerous to count: cable programmers, satellite services, online news and programming providers, subscription video-on-demand platforms, video programming websites, and many more. And the competitors on that list share a key attribute: In marked contrast to television broadcasters, most are free to operate in local markets

unconstrained by the FCC's decades-old ownership limits.

It is long past time for regulatory relief from anachronistic ownership restrictions that make no sense today. It is no exaggeration to say that the modern video marketplace is the most vibrant the world has ever seen, and it grows more competitive by the day. Local television broadcasters cannot maintain healthy, economically viable businesses in that hyper-competitive marketplace if a single panel of the Third Circuit is allowed to continue to unfairly hamstring local journalism and freeze in place ownership rules that, by its own admission, have not reflected competitive marketplace conditions for years.

ARGUMENT

I. LOCAL MEDIA OWNERSHIP RULES MUST REFLECT THE REALITIES OF THE MODERN MEDIA MARKETPLACE

Decades ago, Congress recognized that, in order to ensure that local broadcasters can remain competitive, and to promote localism and viewpoint diversity, the rules governing local media ownership must develop in sync with the changing media marketplace. To that end, Section 202(h) of the Telecommunications Act of 1996 directs the FCC to review its local media ownership regulations periodically to ensure that they reflect current competitive conditions and to modify or repeal those no longer in step with evolving marketplace realities.

For years, the Commission has attempted to do just that. Its most recent effort, the 2017 *Reconsideration Order*,[2] would have modified or eliminated a host of long-outdated ownership constraints: It would have repealed the Newspaper/Broadcast[3] and Radio/Television Cross-Ownership restrictions and modified the Local Television Ownership Rule by doing away with the "Eight Voices Test" and revising the "Top Four Prohibition" to account for circumstances in which rigid application of the prohibition is not in the public interest.[4] The Commission concluded that its 2017 rule changes would give local broadcasters and local newspapers alike "a greater opportunity to compete

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[2] *2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd. 9802 (2017) (Pet. App. (No. 19-241) 64a-310a).

[3] Generally, the Newspaper/Broadcast Cross-Ownership Rule prohibits the owner of a local television or radio station from directly or indirectly owning, operating, or controlling a daily newspaper in the same community. *See* 47 CFR § 73.3555(d).

[4] Pet. App. 154a-161a. That Rule permits an entity to own two television stations in a single Designated Market Area ("DMA") only if: (1) the digital noise limited service contours of the stations (as determined by Section 73.622(e) of the FCC's rules) do not overlap; *or* (2) (i) at the time the application to acquire or construct the station(s) is filed, at least one of the two stations is not ranked among the top four stations in the market, based on the most recent all-day (9 a.m. to midnight) audience share, as measured by a qualifying audience ratings service; *and* (ii) at least eight independently owned and operating, full-power commercial and noncommercial TV stations would remain post-merger in the DMA. *See* 47 C.F.R. § 73.3555(b).

and thrive in the vibrant and fast-changing media marketplace."[5]

Several years have passed since the Commission, after examining the changing marketplace, called for significant changes to its local media ownership rules. (In fact, the Commission determined those rules were outdated not only in 2017, but also in 2006 and even 2002.) Yet the same rules remain in place today, despite dating back decades: The current Local Television Ownership Rule is more than twenty years old, and the Newspaper/Broadcast Cross-Ownership Rule was enacted *45 years ago*.[6] The Third Circuit's decision subjects local television stations to ownership limits that originated years before the Internet became widely available, before Facebook, Google, and Netflix formed part of the media landscape, and before Apple's iPhone allowed tens of millions of viewers to access video programming on demand on handheld screens. Local broadcasters remain relegated to a regulatory landscape calibrated to a 1970s-era media marketplace that bears no resemblance to today's media environment.

In the nearly quarter-century since Congress enacted Section 202(h), the video marketplace has undergone significant, even transformative, change. To say that the modern video marketplace is dynamic,

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[5] Pet App. 67a. Indeed, in markets with fewer than nine television stations, the Local Television Ownership Rule is little changed from the old "one-to-a-market" rule originally adopted for radio stations in 1941.

[6] *See Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 50 F.C.C.2d 1046, 1075 (1975).

diverse, and highly competitive is a vast understatement. No longer must viewers gather around the living room television set at a predetermined hour to watch the local evening news or a favorite network prime-time show. Sources of video programming have proliferated, and digital technologies have transformed the ways in which broadcasters and other video programming providers deliver, and viewers consume, video content, as well as the ways advertisers reach audiences. Today, video programming is available from sources almost too numerous to count, including traditional over-the-air broadcast television stations, cable networks, social media sites, direct-to-consumer subscription platforms, and a rapidly growing number of other online video providers. Programming reaches viewers over the air, via traditional cable and satellite providers, and, increasingly, through so-called virtual multichannel video programming distributors and other Internet-based delivery platforms and services.[7] Netflix has more than 195 million subscribers;[8] Hulu

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[7] By 2018, more than 200 over-the-top services, which offer programming to subscribers over the Internet, were available in the U.S. *See* Chris O'Dell, *Over 200 OTT Services Now Available in U.S. Market Alone*, Parks Associates (Aug. 13, 2018), https://www.parksassociates.com/newsletter/article/ca-aug2018; *see also, e.g.*, Ooyala, *State of the Broadcast Industry 2019* 4 (Jan. 2019) (observing that "[s]ubscription and ad-supported OTT services are steadily replacing traditional content delivery"). None of those OTT competitors even existed in 1996, let alone in 1975.

[8] *Number of Netflix Paid Subscribers Worldwide from 3rd Quarter 2011 to 3rd Quarter 2020*, Statista (Oct. 2020), https://www.statista.com/statistics/250934/quarterly-number-of-netflix-streaming-subscribers-worldwide/.

has more than 36 million;[9] and Disney+ has nearly 74 million.[10] Each of those platforms offers viewers an almost unlimited menu of programming choices.

Never before has there been such an abundance of video programming options for consumers, so many screens on which to watch that programming, and such flexibility in when and where to view it. Today, viewers can watch their preferred programming live or on demand, on the couch, in the car, on an airplane, on traditional television sets and so-called smart TVs, via Internet-connected devices like Roku and Apple TV, and on smartphones, tablets, laptop computers, and more. This is emphatically *not* the video marketplace of 1975 or 1996—or even 2017.

Marketplace changes and increased competition have placed enormous financial and operational pressure on local broadcasters, but they have not lessened the value of local television stations to their communities.[11] Broadcasters supply unique, trusted,

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[9] *Number of Hulu's Paying Subscribers in the United States From 1st Quarter 2019 to 4th Quarter 2020*, Statista (Nov. 2020), https://www.statista.com/statistics/258014/number-of-hulus-paying-subscribers/.

[10] *Disney+'s Number of Subscribers Worldwide from 1st Quarter 2020 to 4th Quarter 2020*, Statista (Nov. 2020), https://www.statista.com/statistics/1095372/disney-plus-number-of-subscribers-us/#:~:text=Disney%2B%20subscriber%20numbers%20worldwide%202020&text=The%20Walt%20Disney%20Company%20reported,start%20of%20the%20fiscal%20year.

[11] Even ten years ago, "[a]lthough viewership of local television news programming continue[d] to decline, Americans still rel[ied] more on broadcast television than any other media source for local news and public affairs information." Congressional Research Service, R41458, *How Changes in the Economics of Broadcast Television Are Affecting News and Sports Programming and the Policy Goals of Localism, Diversity*

objective, locally-focused news, information, public affairs, weather, traffic, sports, and emergency programming targeted toward their local communities that other video programming providers simply do not and cannot replicate. Netflix and Hulu may offer abundant libraries of on-demand content and original entertainment programming, but Birmingham residents who seek live coverage of approaching tornados, parents in Greensboro who need updated information about school closures or rush-hour traffic delays, and viewers in Baltimore hoping to learn about the city's mayoral candidates will turn to their local TV stations. And that is unsurprising, given the close connection between local broadcasters and the communities they serve: "Perhaps the most basic function of local journalism is to provide residents with news across a range of topics in a way that helps them live their daily lives and take part in the community." Pew Research Center, *For Local News, Americans Embrace Digital But Still Want Strong Community Connection* 1 (Mar. 26, 2019) [hereinafter *2019 Pew Report*].[12]

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of Voices, and Competition 5-6 (Oct. 20, 2010) [hereinafter CRS Report] (footnotes omitted), https://www.everycrsreport.com/files/20101020_R41458_6c055f8400515c31a556c677d13466063c684b24.pdf.

[12] https://www.journalism.org/2019/03/26/for-local-news-americans-embrace-digital-but-still-want-strong-community-connection/. To be sure, digital sources of local news exist, but local broadcast television remains an essential, if not predominant, source for local news, public affairs, and emergency information. *See 2019 Pew Report*, *supra* note 12, at 1 ("Even as the preference for digital delivery creeps up on that for news via TV, local television stations retain a strong hold in the local news ecosystem. They top the list of nine types of local news providers, with 38% of U.S. adults saying they often get news from a local television station.").

That locally-focused programming has never been more important or valuable than during the coronavirus pandemic. From updates on the virus' spread to school re-openings to indoor gathering limits, viewers nationwide have tuned in to local broadcast stations in even greater numbers for timely, reliable, and fact-based news and information about the COVID-19 crisis specific to their communities. In a survey conducted in April 2020, "nearly half of U.S. adults . . . named local news outlets as a major source for COVID-19 news," and respondents reported "see[ing] local news outlets as more credible sources of COVID-19 information than the news media in general." *See* Pew Research Center, *Local News Is Playing an Important Role for Americans During COVID-19 Outbreak* (July 20, 2020).[13]

In short, the importance of local programming is indisputable, and it is particularly acute in times of crisis—whether the crisis deals with public safety or,

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[13] https://www.pewresearch.org/fact-tank/2020/07/02/local-news-is-playing-an-important-role-for-americans-during-covid-19-outbreak/. 2020 viewership data confirm the point. In March 2020, viewership of live, local news increased significantly compared to the same time period in prior years. *See* Lillian Rizzo, *Local TV Sees Spike in Viewers, Drop in Ads in Coronavirus Crisis*, The Wall Street Journal (Apr. 3, 2020); *see also 2020 Coronavirus Media Usage Study*, TVB (Apr. 2020), https://www.tvb.org/Public/Research/2020CoronavirusMediaUsageStudy.aspx (reporting that "[l]ocal broadcast TV is #1 for trust among" multiple demographics and that study respondents "felt that broadcast TV news gave them the best information & updates pertaining to the Coronavirus").

as recent events highlight, public health.[14] But the ongoing availability of that programming is tied directly and meaningfully to the viability of local broadcast businesses. And that viability, in turn, is tied, in today's highly competitive marketplace, to regulatory limits on ownership of local media outlets.

II. ANACHRONISTIC OWNERSHIP RULES POSE OBSTACLES TO THE PRODUCTION OF LOCAL NEWS PROGRAMMING AND EVEN THREATEN THE VIABILITY OF LOCAL TELEVISION STATIONS

More than three years have passed since the *Reconsideration Order* concluded that outdated ownership rules do not afford local TV stations necessary competitive flexibility—including opportunities to consolidate, maximize efficiency, and coordinate operations and the production of news programming that both data and experience show are essential to broadcasters' survival. Today, those antiquated rules continue to govern the structure of local television business operations. If the way is not

[14] At the same time, the pandemic has created severe financial challenges for local broadcasters. Like virtually every business across the country, local broadcasters have felt the economic impact of the coronavirus crisis. Local advertising is the lifeblood of the local television business, but as local economies have been devastated by the pandemic, those advertising revenues have dwindled. *See, e.g.*, *US Senate Votes Financial Support for Local Newspapers and Broadcast Outlets*, MercoPress (May 14, 2020), https://en.mercopress.com/2020/05/14/us-senate-votes-financial-support-for-local-newspapers-and-broadcast-outlets ("[S]ome local broadcasters have reported as much as a 90% loss in advertising revenues. This year, NAB estimates advertising losses for local TV and radio broadcasters will reach at least US $3 billion.").

cleared for modernized local ownership rules, local broadcast journalism will almost certainly go the way of local newspapers, and viewers in communities across the country who rely on local television for news, emergency, weather, traffic, and other locally-rooted and -produced programming will suffer.

A. Outdated ownership rules impede broadcasters from achieving the scale and scope necessary to succeed in increasingly competitive markets.

Broadcast television stations are critical sources of news and information geared toward their local communities, but they operate as businesses—and like any other business, their continued operation depends on economic viability. Simply put, local TV stations cannot remain in business if they cannot compete in today's increasingly crowded and fast-changing marketplace that offers viewers nearly unlimited news, information, and entertainment programming, available on demand from myriad sources, broadcast and non-broadcast alike. They certainly cannot compete in an environment where long-outdated ownership rules effectively force them to fight with one hand tied behind their backs, as rival video content providers and distribution services grow their businesses without regulatory constraints on the size and reach of their market presence.

Modernized ownership rules that fairly and accurately reflect current marketplace dynamics, on the other hand, would translate directly into operational efficiencies that facilitate the production of local news, public interest, emergency, and other programming of greater quantity and quality. In today's hyper-competitive environment, economies of

scale and scope are more important than ever to the viability of local television stations generally and their local news operations in particular.[15]

If the regulatory updates adopted by the *Reconsideration Order* remained in effect today, broadcasters would be able to address financial and operational challenges and generate efficiencies and cost savings through, for example, consolidated ownership and operation of multiple television stations in a market, or a television station and a local newspaper. The costs of investigating, creating, and distributing local news could be amortized across more than a single station in a given market. In turn, such combined operations would position a broadcaster to invest in and upgrade a station's staff, physical facilities, newsgathering equipment, and more; can allow the production or expansion of local news and information programming; and can support faster and more accurate reporting on breaking news and more in-depth reporting on significant public events and issues, among other savings and efficiencies.

Such operational efficiencies are vital to localism and the continued production of high-quality local news. Local news and information programming is the

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[15] *See 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, Comments of the National Association of Broadcasters, at 60-61 & n.237 (May 29, 2019) (citing J.A. Eisenach & K.W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting*, at 1-2 (2011)), https://ecfsapi.fcc.gov/file/10429077016730/2018%20NAB%20Quadrennial%20Comments%20and%20Attachments.pdf.

backbone of local television stations' businesses; it is also exceedingly expensive to produce.[16] It requires substantial news personnel (researchers, writers, fact-checkers, producers, news directors, editors, videographers, reporters, anchors, meteorologists, and engineers), costly equipment (street-level Doppler weather radar systems, cameras, editing systems, remote news trucks, and transmission systems), physical facilities (including production studios and news sets), and much more. Even in smaller markets, broadcasters spend upwards of $1 million annually to produce local news programming; in larger markets, that figure can be as high as $15 million.[17]

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[16] *See, e.g.*, Pet. App. 152a-153a ("[L]ocal news programming is typically one of the largest operational costs for broadcasters; accordingly, stations may find that common ownership enables them to provide more high-quality local programming, especially in revenue-scarce small and mid-sized markets."); National Association of Broadcasters, *Television Financial Report: 2016 Industry Business Report, Station Revenue, Expenses and Profit*, tbls. 54, 60 & 81 (2016).

[17] *See, e.g.*, *2010 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. 09-182, Comments of Lin Television Corporation, at 2 (July 12, 2010) (estimating that "a station's robust local news operation costs between $1.3 million (small market) to $8.2 million (midsize market) per year"), https://ecfsapi.fcc.gov/file/7020522175.pdf; *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, Reply Comments of TEGNA Inc., at 9 (May 29, 2019) [hereinafter TEGNA Reply Comments] ("Since 2016, TEGNA has spent an average of more than $245 million a year on the production of news and other local content (including related digital operations)."), https://ecfsapi.fcc.gov/file/10529034256265/TEGNA%202018%20Quadrennial%20Review%20Reply%20Comments%20(5-29-2019).pdf.

In smaller markets in particular, where there are fewer revenue-generating opportunities, those expenses are increasingly impossible for a single station to shoulder. While broadcasters—and their advertisers—in the nation's largest market (New York City) can reach nearly 7,000,000 television households with their programming, a broadcaster in the nation's smallest market (Glendive, Montana) reaches only 3,630.[18] The import for local news operations in smaller markets is obvious. To remain viable, a station in Glendive that reaches fewer than 4,000 television households needs more sources of revenue than a single television station can possibly generate. The one-size-fits-all ownership construct currently in place ignores the disproportionately heavy financial and operational costs of providing local news (and other) programming shouldered by smaller market stations.

The obvious and straightforward solution would be ownership of more than a single media outlet in a market—a reality the Commission has acknowledged. *See, e.g.*, Pet. App. 146a-147a (concluding that "common sense modifications" to the Local Television Ownership Rule "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"). Incurring the significant costs of producing local news programming in many cases makes business sense only if those costs can be spread across two or more TV stations (or a television station and a newspaper,

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[18] *See Nielsen DMA Rankings 2020* (2020), https://mediatracks.com/resources/nielsen-dma-rankings-2020/. The country is divided into 210 local media markets, called "Designated Market Areas," by The Nielsen Company.

or a television station and radio station). Common ownership of multiple local media outlets permits cost-sharing, generates efficiencies (from, for example, shared physical facilities and personnel), and ultimately enables the production of a greater quantity and quality of local programming, including local news.

Because the Third Circuit has for years blocked much-needed updates to the ownership rules, though, that straightforward solution remains prohibited by regulation that is out of step with today's media environment.

B. Advertising revenues are declining even as the costs of producing local news programming increase.

As the costs of producing and distributing local news and other local programming continue to climb, local broadcasters are simultaneously required to navigate a media marketplace populated with abundant other sources of programming that compete with broadcast television for viewers—and for advertising dollars.

Advertising has long provided the most significant revenue stream used to fund the creation and distribution of locally-focused programming.[19] But here too, the last twenty-five years have brought remarkable changes, and the increasingly complex and competitive video landscape has taken a toll on local television stations, particularly those in smaller

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[19] A 2010 Report prepared by the Congressional Research Service determined that broadcasters "traditionally have relied upon advertising for more than 90% of their revenues." CRS Report, *supra* note 11, at 2.

markets. *See, e.g.*, Steven Waldman, Federal Communications Commission, *The Information Needs of Communities* 74 (July 2011) [hereinafter *Information Needs*] (noting that declines in local television revenues have been "even sharper . . . in smaller cities").[20]

The growing prominence of online digital platforms has prompted advertisers to shift dollars away from traditional broadcast television to Internet-based digital platforms and mobile outlets (and cable and satellite providers). In fact, in 2018, Google earned $116.3 billion in advertising revenues;[21] for that same time period, the broadcast industry *as a whole* expected to earn a fraction of that amount—$19.3 billion in over-the-air advertising and digital revenues.[22] More recent analyses confirm this trend: "[T]he ad revenues that Google is projected to earn this year will exceed the combined ad revenues of *all TV and radio stations in the country*." Sen. Maria Cantwell, U.S. Senate Committee on Commerce, Science, and Transportation, *Local Journalism: America's Most Trusted News Sources Threatened* 3 (Oct. 2020) [hereinafter *Cantwell*

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[20] https://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf.

[21] *See* Alphabet Inc. Form 10-K for fiscal year ended Dec. 31, 2018, at 27 (Feb. 4, 2019), https://www.sec.gov/Archives/edgar/data/1652044/000165204419000004/goog10-kq42018.htm.

[22] *See* Claudia Kienzle, *BIA: 2018 TV Station Revenue to Reach $27.68B*, TVTechnology (Apr. 30, 2018), https://www.tvtechnology.com/news/bia-2018-tv-station-revenue-to-reach-27-68b.

Report] (emphasis added).[23] In fact, the *Cantwell Report* found that local broadcasters' advertising revenues are down *more than 40 percent* since 2000.[24] Local stations' advertising revenues are stressed as never before.

Those challenges are particularly acute in smaller markets where there are fewer viewers and local broadcasters compete for a smaller pot of available advertising revenues. Especially in those markets, the *Reconsideration Order*'s deregulation would have helped. Consider the Commission's adjustment to the Top-Four Prohibition, ostensibly aimed at facilitating ownership of two highly rated stations in the same market. Operating two television stations in a market does not cost twice as much as operating one; thus, the additional advertising revenues generated by local news programming aired on a second in-market station (or shared across another commonly owned local media outlet) can turn an unprofitable operation into an economically viable one. The Third Circuit panel majority, however, foreclosed such consolidation, despite the Commission's, and even the panel's own, years-long recognition that updates to the local ownership rules are overdue.

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

[24] *Id.* at 2; *see also* Mark R. Fratrik, Ph.D., BIA Advisory Services, *The Economic Irrationality of the Top-4 Restriction* 16 & fig. 10 (Mar. 15, 2019) (data underlying finding).

C. The ownership rule modifications the Commission attempted to make would have supported local broadcasters' attempts to remain competitive in local media markets.

1. If not for the Third Circuit panel's second-guessing, local broadcast stations would have been able to structure their businesses to leverage efficiencies and cost savings generated by consolidation over the last few years—years that have seen the amount, variety, and sources of video programming continue to proliferate, as local TV broadcasters face ever greater challenges from largely unregulated competitors. Lost opportunities for television/newspaper combinations illustrate the point. Had the Third Circuit properly affirmed the *Reconsideration Order*, the long-outdated Newspaper/Broadcast Cross-Ownership Rule would have been eliminated, clearing the way for efficient combinations of broadcast television stations and often-struggling local newspaper businesses.

The decline of local newspapers is by now a familiar fact, driven at least in part by the prevalence of multiple other sources of news and information, including cable news networks, Internet-based news publications and platforms, and social media-based news outlets, as well as classified advertising competitors like Craigslist. Subscriptions to daily newspapers peaked in 1984, with approximately 63.3 million in total circulation nationally, and declined precipitously, to less than 28.6 million, in

2018.[25] In many markets, local print newspapers have all but disappeared. Just last month, the *Cantwell Report* found that "200 counties nationwide have no newspapers covering their communities;" "half of all U.S. counties are down to just one" local newspaper; and newspapers in multiple states have lost more than seventy-five percent of their newsroom jobs since 2005.[26] If current predictions hold, at the end of 2020 there will only be approximately "30,000 [newspaper] newsroom jobs left nationwide." *Cantwell Report*, *supra* note 23, at 3. Those operational and news-generating declines are unsurprising given the rapid decline in newspapers' advertising and other revenues: Newspaper advertising revenues peaked in 2005 at $49.4 billion and declined to just $14.3 billion in 2018.[27]

If not for the prohibition on ownership of both a newspaper and a broadcast station in a single market—a prohibition that dates back *more than four decades*—local television broadcasters would have been the logical acquirers of the journalistic assets of print newspaper businesses that struggled to remain

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

[26] *See Cantwell Report*, *supra* note 23, at 3, 17-19, 23 (citing *Pew Fact Sheet*, *supra* note 25, and Penelope Muse Abernathy, University of North Carolina Hussman School of Journalism and Media, *The Expanding News Desert* (2020), https://www.usnewsdeserts.com/).

[27] *See Pew Fact Sheet*, *supra* note 25. The *Cantwell Report*'s findings are consistent: "[O]ver the past two decades, the local newspaper industry has lost around 70 percent of its total revenue." *Cantwell Report*, *supra* note 23, at 3.

afloat amidst increased competition from other news outlets. After all, local television broadcasters share strong ties and meaningful relationships with the same communities served by local newspapers, aligning purposes across media and in favor of robust production of local news, public affairs, emergency, and other locally-directed content. Those synergies have been in place, and recognized, for years, even as the Commission's cross-ownership rule prohibited broadcasters from building on them.[28]

Instead of seeing local broadcast station-newspaper combinations and a resulting buoying of localism, hedge funds with no ties to local communities have acquired those local newsroom assets, only to immediately "gut[] content for the sake of short-term profits." *Cantwell Report*, *supra* note 23, at 4. Many local newspapers have gone out of business, and the broadcasters in those markets who were the most obvious purchasers or partners of those endangered newspapers have lost the chance to consolidate local news operations. Newspapers have folded, many local television stations continue to struggle, and viewers in those communities have been, and continue to be, deprived of multiple potential sources of genuinely locally-focused news and information.

All is not lost, though, if the way is cleared for the Commission's 2017 rule updates to take effect.

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[28] As just one example, data developed more than a decade ago by the Pew Research Center in a case study in Baltimore showed that 95 percent of news stories containing new information came from traditional local media outlets—i.e., print, local TV, or radio. *See* Pew Research Center, *How News Happens* (Jan. 11, 2010); *see also Cantwell Report*, *supra* note 23, at 8 (discussing same).

Despite sustained dire straits across the newspaper industry, local newspapers (where they survive) have remained the primary generators of original local news reporting in many communities. *See Cantwell Report*, *supra* note 23, at 8. In those markets where local newspapers continue to produce and distribute local news, combining operations with in-market television stations could generate significant—potentially business-rescuing—cost savings and operational efficiencies, as broadcast television remains "the most popular source for local news." *Information Needs*, *supra* note 20, at 76.[29] In turn, combined newsrooms, particularly in smaller markets, would better position local news producers to combat the growing market dominance of unregulated online competitors. *See Cantwell Report*, *supra* note 23, at 3; *see also Information Needs*, *supra* note 20, at 82, 272–73 (noting several examples of beneficial partnerships between local television stations and newspapers and stating the "obvious" conclusion that combining reach of local television stations with newspapers' reporting teams and content "could vastly improve [television] service to the[] community"). Viewers in those local communities would be the ultimate beneficiaries of those sorts of logical, efficient, and fruitful broadcast/newspaper combinations, if they are allowed to take effect before it's too late—for the local newspaper, the local television broadcaster, or both.

Nearly a decade ago, it was already anticipated that the decline in local newspaper revenue would

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[29] *See also 2019 Pew Report*, *supra* note 12, at 2 (reporting that 41 percent of U.S. adults prefer to get local news through a television set).

"ripple through the entire local news economy, prompting recalibrations among all media." *Information Needs*, *supra* note 20, at 11. Local television broadcasters could have responded to those marketplace challenges by building new businesses around local newspaper assets, filling the informational and journalistic hole left when those newspapers failed. But the antiquated prohibition on newspaper/broadcast cross-ownership has foreclosed the most commonsense marketplace recalibrations in the face of steadily increasing competition in local media markets. Local newspapers, local television stations, and the communities they serve are the worse for it.

2. Broadcast-newspaper combinations are not the only potential sources of operational efficiency that the Third Circuit panel's series of decisions have foreclosed for far too long. The *Reconsideration Order* also would have eliminated the anachronistic Eight Voices Test, recognizing that it stands in the way of broadcast combinations, particularly in smaller markets, that would generate operational efficiencies that correlate directly with increased production of local news programming:

> [T]he Eight-Voices Test denies the public interest benefits produced by common ownership without any evidence of countervailing benefits to competition from preserving the requirement. Furthermore, these markets—including many small and mid-sized markets that have less advertising revenue to fund local programming—are the places where the efficiencies of common ownership can often yield the greatest

> benefits. Our action in repealing the Eight-Voices Test will enable local television broadcasters to realize these benefits and better serve their local markets.

Pet. App. 152a (footnote omitted).

As the *Reconsideration Order* recognized, the Eight Voices Test has long outgrown whatever utility it might have had in promoting a multiplicity of "voices"—that is, sources of news and information content—available to viewers in local media markets. Today, the Eight Voices Test constrains consolidation of broadcast outlets in local markets based on the number of *pure broadcast* "voices" that would remain, wholly ignoring the proliferation of *non-broadcast* sources of news and information readily available to viewers in even the smallest of media markets.

Perhaps worse, the Eight Voices Test ignores the fact that there are fewer than eight "independent," broadcast voices in many smaller markets across the country as an initial matter. It goes without saying that television stations operating in the largest market (New York City) face very different competitive conditions, and their viewers have access to vastly more outlets for receiving local broadcast news and other programming, as compared to stations operating in the smallest market (Glendive, Montana). The number of independent "voices" varies dramatically between market 1 and market 210, yet the Eight Voices Test reinstated by the Third Circuit applies across the board, foreclosing local media combinations in markets that might not have eight "independent" broadcast voices to begin with—the very markets where, as discussed above, consolidated ownership of local media outlets is particularly

critical to preserving viable local broadcast operations.[30]

3. Finally, the *Reconsideration Order* would have relaxed the (effectively unqualified) prohibition on common ownership of two or more top-four-rated stations in a market, concluding that the current "rule may prohibit combinations that do not present public interest harms or that offer potential public interest benefits that outweigh any potential harms," particularly in smaller markets. Pet. App. 156a. The *Reconsideration Order*'s rejection of a rigid "Top Four" rule acknowledged the reality that "Big Four"-affiliated broadcast stations are not necessarily strong, viable stations in every market—particularly in smaller markets, where the pool of available advertising revenues is small and the costs of producing original local news can be unsustainable even for a stand-alone "Big Four" affiliate.

The Commission cited the benefits of consolidation when it approved Gray Television's request to acquire NBC-affiliated KDLT-TV in Sioux Falls, South Dakota, despite its ownership of ABC-affiliated KSFY-TV in the same market. Applying the *Reconsideration Order*'s now-vacated rule assessing

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[30] The Eight Voices Test wrongly presumes that anything less than eight independent sources of programming in a single market would disserve the core values of competition, viewpoint diversity, and localism. That arbitrary number does not inevitably ensure that viewers in any given market will have access to more and higher-quality local programming. As an FCC working group observed nearly a decade ago, "[m]ore is not necessarily better," because "consolidation [can] lead[] . . . stations to be economically healthier and therefore more able to invest in local journalism." *Information Needs*, *supra* note 20, at 25.

top-four duopolies on a case-by-case basis, the Commission concluded that Gray's ownership of these same-market stations would "produce definite, verifiable, and transaction-specific public interest benefits," including the addition of "at least 28 hours per week of local news programming" across both stations, which is "more local news programming than either station currently airs in an average week."[31]

In place of the Commission's willingness to analyze "Top Four" mergers on the unique circumstances of each case, the Third Circuit panel reinstated the rigid Top Four Prohibition. That rule is out of step with today's marketplace realities; it forecloses consolidation of top-rated stations across the board—i.e., even in markets where such consolidation would further the provision of robust, diverse, locally-focused broadcast programming.

D. Real-world examples underscore the importance of ownership rules that facilitate, rather than impede, economies of scale and scope.

If a local station in a small or mid-sized market is struggling to marshal the significant resources needed to produce original local news programming, the direct, tangible benefits of economies of scale and

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[31] *Consent to Assign Certain Licenses from Red River Broadcast Co, LLC to Gray Television Licensee, LLC*, 34 FCC Rcd. 8590, 8594 (2019). The Commission identified other benefits of the top-four combination, including Gray's plans to open a news bureau in the state capitol "to provide better coverage of state government" and to "install a state-of-the-art weather radar that will enable it to provide more accurate information about severe weather in the Sioux Falls market." *Id.*

scope and operational cost-sharing could make the difference between the production of valuable local news programming or its complete elimination. In some cases, achieving those economic and operational efficiencies could determine whether the station remains viable and on-air at all.

Take, for example, KTVD(TV), a MyNetworkTV-affiliated station in Denver. When broadcaster TEGNA acquired the station more than a decade ago, it produced no local news. Today, KTVD airs three hours of local news every weekday, because of TEGNA'S common ownership of station KUSA(TV), the broadcaster's NBC-affiliated station in Denver.[32] TEGNA's ability to own both KTVD and KUSA—and to therefore consolidate operations (including a shared studio) and recognize efficiencies and cost savings, enabling KTVD to air local news programming—was possible *only* because KTVD is not among the four highest-rated stations in the Denver market. Had KTVD been a "top-four" station, the rule prohibiting ownership of two top-four-rated stations in the same market would have barred TEGNA from purchasing KTVD.

KTVD is a success story that occurred in spite of the restrictive local ownership rules. The story of a different station—KCWY(TV), Gray Television's NBC-affiliated station in Casper, Wyoming—highlights the very different outcome that occurs when current media ownership rules force a broadcaster to choose between producing news or turning a profit. KCWY is the only Big Four Network-affiliated station owned by Gray in the Casper-

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[32] *See* TEGNA Reply Comments, *supra* note 17, at 10.

Riverton television market. In 2018, the station was the top-rated and highest-grossing station in its market, producing the market's highest-rated newscast and earning between 40 and 50 percent of the market's total advertising revenue. KCWY had recently invested in upgraded news equipment, including a new set and state-of-the-art weather and newsroom systems.[33] Despite its ratings success, though, the station was not profitable, because the advertising base in the station's market—currently ranked 199 of the country's 210 television markets, with only 43,760 television households—is simply too small to support a stand-alone local television station that produces its own local newscasts.[34]

Because the FCC's local media ownership rules precluded Gray's consolidation and coordination with a second station (or newspaper) in the market to share the costs of local news production, KCWY was forced to eliminate its local news programming in January 2019. KCWY now imports "local" news from

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[33] *See 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, Comments of Gray Television, Inc., at 4-5 (Apr. 29, 2019), https://ecfsapi.fcc.gov/file/10430725728587/Comments%20of%20Gray%20Television%20in%202019%20Quadrennial%20Review.pdf.

[34] In 2018, total over-the-air advertising revenue was only $4.4 million *for the entire market*. Network-affiliated stations in some of the country's larger markets can generate that much advertising revenue in only a matter of weeks. *See id.* at 5 (citing BIA's Media Access Pro database).

the Cheyenne market, several hours' drive away, where Gray owns a station.[35]

The comparison between the Denver and Casper outcomes illustrates a larger point about the outdated constraints imposed by the "one-size-fits-all" ownership rules. Among the faulty assumptions underlying the local media ownership rules are that "Big Four" affiliates in every market are necessarily strong, profitable stations that contribute news and other valuable programming to the local market, that healthy media markets of all sizes can support at least eight independent "voices," and that every combination of stations or other media outlets would mean less, rather than more, valuable local programming being made available in each market. In many cases, though, particularly in smaller markets, even Big Four Network affiliates struggle to produce original local news programming and, in some cases, even to remain viable.[36]

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[35] Not coincidentally, Gray controls two Big Four Network affiliations in the Cheyenne market: KGWN-TV has a CBS affiliation on its primary channel and an NBC affiliation on a multicast channel. Gray was able to add a network-affiliated channel as a multicast stream—and benefit from the efficiencies and cost savings of shared operations and program production—only because the Cheyenne market did not have four full-power, network-affiliated television stations.

[36] Indeed, stations affiliated with one of the Big Four Networks have begun failing in recent years. *See Withers Broadcasting Co.*, 32 FCC Rcd. 3179 (2017) (order granting failing station waiver allowing Gray to acquire station WVFX(TV) in the Clarksburg-Weston DMA, a FOX affiliate); *Pappas Arizona License, LLC*, 28 FCC Rcd. 17048 (2013) (granting failing station waiver allowing Blackhawk Broadcasting to acquire station KSWT(TV) in the Yuma-El Centro DMA, a CBS affiliate, despite absence of eight independent "voices" in the market).

In recognition of this and other market-based financial realities, the FCC in the *Reconsideration Order* sought to change the local ownership rules to better reflect the dynamic, highly competitive, and fast-changing media marketplace. The Commission recognized that local broadcasters' ability to remain viable participants in that ecosystem—and their ability to continue to provide valuable local news and other programming—turns on their ability to compete against a growing array of largely unregulated video programming providers. This is precisely the result Congress desired. Nevertheless, the Third Circuit, as it has for more than 15 years, prevented these long-overdue updates from taking root, substituting its judgment for that of the expert agency and maintaining archaic rules that competition long ago rendered unnecessary.

III. THE THIRD CIRCUIT IGNORED THE DETRIMENTAL EFFECT OF ITS DECISION ON OWNERSHIP OF BROADCAST OUTLETS BY WOMEN AND MINORITIES

The Third Circuit panel did not question the Commission's assessment of the dramatic changes in the local media landscape over the last several years, nor did it find fault with the agency's conclusion that the ownership rules should be updated in response to those changes.[37] Instead, the panel majority rooted its wholesale rejection of the *Reconsideration Order* in what it viewed as inadequate data and analysis about the impact of the rule changes on ownership of local

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[37] *See, e.g.*, Opening Brief of the Industry Petitioners at 24, *FCC v. Prometheus Radio Project*, No. 19-1231, *National Association of Broadcasters v. Prometheus Radio Project*, No. 19-1241 (Nov. 16, 2020).

media outlets by women and minorities. *See* Pet App. 34a-42a. The panel's substitution of its policy preferences for the experience-based determinations and predictive judgments of the expert agency is legally erroneous. *See, e.g.*, *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) ("[T]he Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference" because "the weighing of policies under the public interest standard is a task that Congress has delegated to the Commission in the first instance") (citations and internal quotation marks omitted).

Equally important, the Third Circuit's single-minded focus on minority and female ownership overlooks a very real, pragmatic, and imminently predictable consequence of its decision: The rigid, anachronistic rules now in place make it exceedingly difficult for local broadcasters—and perhaps impossible for those in smaller markets—to remain competitive and even viable in today's increasingly crowded media marketplace, where the competition for viewers and advertising dollars intensifies almost by the day. Many, like Gray's station in Casper, will not be able to support local news programming operations; other stations may fail altogether. And if local broadcast businesses collapse and disappear under the weight of competition from unregulated market participants, so too do opportunities for women and minorities to own those stations.

To be clear, local broadcasters are committed to diversity. For two decades, the National Association of Broadcasters Leadership Foundation has operated its Broadcast Leadership Training Program, a ten-month executive MBA-style program that educates women and minorities about the fundamentals of

purchasing, owning, and operating successful radio and television stations.[38] Multiple broadcaster groups sponsor that program and also offer outreach initiatives to promote and encourage diversity in hiring, training, and opportunity within their own organizations. But industry efforts to promote diversity in broadcast ownership and leadership will be for naught if local television stations cannot succeed because they cannot remain competitive.

Whatever data reflecting media ownership by women and minorities might be available, and however that data might be analyzed as the Commission reassesses its local media ownership rules every four years, the rules in place *today*—attributable to the Third Circuit's repeated second-guessing of the Commission's expert assessment of the competitive landscape—inevitably disserve female and minority ownership, because local stations cannot provide successful career opportunities—to women, minorities, or anyone else—if their businesses can no longer remain healthy and economically viable. *All* local broadcasters, including women and minorities, remain at a competitive disadvantage in today's evolving marketplace.

Unless the Commission is allowed to make predictive judgments and critically needed updates to its local media ownership rules, as Congress directed, without judicial second-guessing, it is only a matter of time before many local television stations go the way of local newspapers. No ownership opportunities for

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[38] *See* National Association of Broadcasters Leadership Foundation, https://www.nabfoundation.org/programs/broadcast-leadership/ (last visited Nov. 23, 2020).

women, minorities, or anyone else will be available if local media outlets cease to exist.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Third Circuit should be reversed.

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