No. 19-1241

In The
Supreme Court of the United States

♦

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

v.

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

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae the 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 throughout the country that are affiliated with each Association's respective broadcast television network. Collectively, the Affiliates Associations represent more than 600 local television stations in markets across the United States.

The Associations have a strong interest in the question presented by the Petition, because their station-members are subject to the Federal Communications Commission's ("FCC") local media ownership rules and significantly impacted by the constraints they impose. The Third Circuit's decision requires television broadcasters to structure their businesses to comply with decades-old ownership rules that are completely out of sync with today's

[1] Pursuant to this Court's Rule 37.2, counsel of record for all parties listed on the docket were provided at least ten days' notice of the intent of *amici curiae* to file this brief and have consented to its filing. Pursuant to Rule 37.6, counsel for *amici curiae* confirms 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.

media marketplace. The FCC's anachronistic ownership rules place local broadcasters at a decided disadvantage against other competitors in the complex, fast-evolving, highly competitive video marketplace.

The issue is one of national importance, and prompt relief is critical. The way must be cleared for the FCC to discharge its statutory responsibility to modernize its local media ownership rules, without further delay, in order to allow television stations to achieve efficiencies and economies of scale made possible by consolidation. If it is not, many broadcasters—particularly those in smaller media markets—will be unable to maintain competitively viable businesses. Many will suffer the same fate as local newspapers, and the losses will be felt by viewers in communities across the country who rely on local television to provide essential news, weather, sports, public affairs, and emergency programming.

INTRODUCTION AND SUMMARY OF ARGUMENT

Local television broadcasters provide a vital public service in communities across the country. Through free, over-the-air broadcast signals, viewers in markets from the largest urban areas to the most remote rural communities receive national, state, and local news, weather, public affairs, sports, and entertainment programming, as well as essential public health and emergency information. The worldwide coronavirus pandemic has only accentuated the critical importance of reliable access to local and national news and emergency information via local broadcast television.

Television stations cannot fulfill that critical role, though, if their businesses are unable to survive in today's fast-paced, 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 are competing against far more than the handful of other local television and radio stations and print newspapers that populated the competitive landscape years ago. It is no exaggeration to say that today's video marketplace is the most competitive the world has ever seen, and it only grows more competitive by the day. Competitors to broadcast television are now too numerous to count: cable programmers, satellite services, Internet-based programming providers, and subscription video-on-demand platforms, not to mention online news publishers, video programming websites, and many more. And the competitors on that list share a key attribute: In marked contrast to television broadcasters, most of those competitors are largely unregulated, and all operate in local markets unconstrained by ownership limits implemented by the FCC.

While the media marketplace has undergone remarkable, even transformative, change in recent years, the FCC's local media ownership rules have not kept pace.[2] The Commission has made repeated

[2] This despite the fact that Congress directed the Commission to keep pace by enacting Section 202(h) nearly a quarter century ago—and that a federal appellate court found fault with the Commission's failure to do so not long thereafter. *See Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148, 171 (D.C. Cir. 2002) (Sentelle, J., concurring and dissenting in part) (describing Congress's deregulatory mandate in Section 202(h) as "better . . .

efforts to update the rules; in fact, the first challenges to the FCC's attempts to update its local media ownership rules reached the court system nearly two decades ago. Since that time, though, the same divided panel of the Third Circuit Court of Appeals has retained jurisdiction over all challenges to the Commission's local ownership rules—and has stymied the Commission's attempts to modernize its rules as Congress directed.

With the Third Circuit's rejection of the Commission's most recent efforts, the issue has now reached a critical juncture. Without this Court's immediate intervention to overcome the Third Circuit panel's single-handed barrier to regulatory relief from anachronistic ownership restrictions that have not made sense in the modern media marketplace for many years, local broadcasters—particularly those in smaller markets—face very real threats to their businesses. And without healthy, economically viable television stations, there will be *no* opportunities for women or racial minorities to own, operate, or invest in local broadcast businesses at all.

The need for this Court's immediate intervention is acute, so that essential broadcast outlets for local news, weather, sports, public affairs, and emergency programming are, at least, given relatively equal footing on which to do business as they work to remain viable in today's highly competitive video marketplace.

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likened to Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.') than to the wait-and-see attitude of the Commission" and concluding that the Commission "failed to justify affirmatively the need for *any* duopoly rule, with or without an eight voices exception") (emphasis added; citation and internal quotation marks omitted)).

ARGUMENT

I. CONGRESS RECOGNIZED THAT THE LOCAL VIDEO ECOSYSTEM MUST BE GOVERNED BY OWNERSHIP RULES THAT REFLECT THE REALITIES OF THE MODERN VIDEO MARKETPLACE

A. The local video marketplace has undergone dramatic change in recent decades, but broadcast programming remains vital to local communities.

To say that the modern video marketplace is dynamic, diverse, and highly competitive is an understatement. Today's video marketplace looks little if anything like it did when the 1996 Telecommunications Act ushered in the FCC's statutory obligation to ensure that its rules governing ownership of local media outlets are periodically amended or eliminated to reflect the realities of the competitive marketplace. Since then, not only have the number and variety of sources of video programming, including news and information programming, expanded exponentially; so too have the platforms and devices available to viewers for accessing the vast array of video programming options.

No longer must viewers gather around the living room television set at a predetermined hour to watch the local evening news. Digital technologies have transformed the ways in which television stations deliver, and viewers consume, video content (and the ways in which advertisers reach audiences). Today, numerous sources provide a wealth of video programming, including abundant non-broadcast content. These programming choices are available to

viewers not only on traditional over-the-air broadcast television stations but also via cable and satellite providers, telcos, social media sites, direct-to-consumer subscription platforms, and a rapidly growing number of online video services and so-called virtual multichannel video programming distributors.[3] Subscription service Netflix has more than 180 million subscribers[4]; Hulu has more than 32 million; and Disney+ has over 54 million.[5] And viewers can watch that programming anywhere—on traditional television sets and so-called smart TVs, via Internet-

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[3] By 2018, more than 200 over-the-top or "OTT" services—media services that offer programming to subscribers over the Internet—were available in the United States. *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*, at 4 (Jan. 2019), http://go.ooyala.com/rs/447-EQK-225/images/Ooyala-State-Of-The-Broadcast-Industry-2019.pdf (observing that "[s]ubscription and ad-supported OTT services are steadily replacing traditional content delivery"). Never in the history of video programming has there been such rich and abundant competition. And none of those OTT competitors even existed in 1996—at which point Congress already had concluded that the Commission's local television ownership rules should be reviewed regularly to determine whether they remained "'necessary in the public interest as a result of competition.'" *Sinclair Broad. Grp.*, 284 F.3d at 154 (quoting Section 202(h)).

[4] *See* Edmund Lee, *Everyone You Know Just Signed Up for Netflix*, NEW YORK TIMES (Apr. 21, 2020), https://www.nytimes.com/2020/04/21/business/media/netflix-q1-2020-earnings-nflx.html.

[5] *See* Jessica Bursztynsky, *Disney says it now has 54.5 million Disney+ subscribers* (May 5, 2020), https://www.cnbc.com/2020/05/05/disney-reports-33point5-million-disney-plus-subscribers-at-end-of-q2.html.

connected devices (like Roku and Apple TV), and on smartphones, tablets, computers, and more.

In short, viewers in today's programming marketplace can choose from an almost unlimited universe of live and on-demand video content, made available by a vast array of service providers and platforms, and they can access that content any time they wish to watch it on any number of devices of their choosing. This is not the video marketplace of 1996 or 2006. Or, frankly, 2016.

The advertising marketplace has evolved in tandem. Advertising has long provided a primary, essential revenue stream for local broadcasters, which is used to fund the production of locally-focused programming.[6] 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. Among other things, the growing prominence of digital platforms has prompted advertisers to shift dollars away from traditional broadcast television to cable and satellite providers, Internet-based digital platforms, and mobile outlets.[7] As a result, local

[6] A 2010 Report prepared by the Congressional Research Service determined that broadcasters "traditionally have relied upon advertising for more than 90% of their revenues." Congressional Research Service, *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) ("CRS Report"), at 2, https://www.everycrsreport.com/files/20101020_R41458_6c055f8400515c31a556c677d13466063c684b24.pdf.

[7] As one example, in 2018, Google earned **$116.3 billion** in advertising revenues. *See* Alphabet Inc. Form 10-K for fiscal year ended Dec. 31, 2018, p. 27, https://www.sec.gov/Archives/edgar/data/1652044/000165204419000004/goog10-kq42018.htm.

stations' advertising revenues are stressed as never before.

Marketplace changes and increased competition have placed enormous financial and operational pressure on local broadcasters, but they have not lessened the value and importance of local broadcast television.[8] Broadcasters supply unique, locally-focused news, weather, public affairs, sports, and emergency programming targeted toward their local communities that no other video programming providers replicate. Netflix and Hulu may offer abundant libraries of on-demand content and increasing amounts of original programming; but a Birmingham resident who seeks live, local weather coverage about approaching tornados or a viewer in Phoenix hoping to learn about the city's mayoral candidates will turn to his or her local broadcast station for that information.

The global coronavirus pandemic has underscored the importance of broadcast television and the trust viewers place in their local stations. Viewers across the country have tuned in to local broadcast stations in even greater numbers than usual for timely, reliable, and fact-based news and information about

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For that same time period, the broadcast industry as a whole expected to earn just a fraction of that amount—**$19.3 billion** in over-the-air advertising and digital revenues. *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.

[8] 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." CRS Report at 5-6 (footnotes omitted).

the COVID-19 crisis specific to their communities. Recent viewership data confirms the point: In March 2020, viewership of live, local news increased significantly over the same time period in prior years.[9] The importance of local broadcast programming is indisputable, and it is particularly acute in times of crisis—regardless of whether the crisis deals with public safety (*e.g.*, a tornado, hurricane, or mass shooting) or, as recent events highlight, public health.[10]

B. Despite dramatic changes in the video marketplace, FCC rules governing local media ownership have not kept pace, contrary to congressional intent.

Even though the modern video marketplace looks nothing like the marketplace of the late 1990s, the

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[9] *See* Lillian Rizzo, *Local TV Sees Spike in Viewers, Drop in Ads in Coronavirus Crisis*, THE WALL STREET JOURNAL (Apr. 3, 2020); *see also* 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").

[10] At the same time, the pandemic has created severe financial challenges for local broadcasters. Like virtually every business in local markets across the country, local television 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 (noting that "some 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.").

rules that govern ownership of local television outlets have not been modernized to reflect marketplace changes. The FCC rules currently in place that limit ownership of media outlets in local markets—television stations, radio stations, and newspapers—and cap the number of stations a broadcaster can own in a single market date back *decades*. The current Local Television Ownership Rule[11] is more than twenty years old, and the Newspaper/Broadcast Cross-Ownership Rule[12] was enacted in 1975, decades before anyone had ever heard of Google, Facebook, or Netflix.

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[11] The Local Television Ownership Rule permits an entity to own up to two television stations in a single Designated Market Area ("DMA") 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 Nielsen Media Research or by any comparable professional, accepted 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). The D.C. Circuit found the rule arbitrary and capricious in 2002. *See Sinclair Broad. Grp.*, 284 F.3d at 165 (concluding that "the Commission has failed to demonstrate that its exclusion of non-broadcast media from the eight voices exception is 'necessary in the public interest' under § 202(h) of the 1996 Act").

[12] Generally, the Newspaper/Broadcast Cross-Ownership Rule prohibits the owner of television broadcast station from directly or indirectly owning, operating, or controlling a daily newspaper in the same community. *See* 47 CFR § 73.3555(d). The Third Circuit found the rule to be unnecessary *in 2004. See Prometheus Radio Project v. FCC*, 373 F.3d 372, 397-400 (3d Cir. 2004).

Broadcasters have long recognized that the Commission's rules governing ownership of media outlets are ill-suited to the modern media marketplace. In regulatory (and judicial) proceedings over nearly two decades, broadcasters have pressed for sorely needed updates to those rules. *See Sinclair Broad. Grp.*, 284 F.3d at 165. And to its credit, over those years, the Commission has made efforts to identify and modify outdated ownership restrictions that no longer reflect the competitive realities of the media marketplace, as Congress directed. *See* Pet. 8-12.

In its most recent Order seeking to modernize the local multiple ownership rules, the FCC once again acknowledged that broadcasters' ability to consolidate, share costs, and achieve economies of scale can mean the difference between economically sustainable local-news-producing broadcast operations and wholly unworkable newsrooms, particularly in smaller markets:

> [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. In particular, the record suggests that local news programming is typically one of the largest operational costs for

> broadcasters; accordingly, stations may find that common ownership enables them to provide more high-quality local programming, especially in revenue-scarce small and mid-sized markets.[13]

Several years now have passed since that acknowledgement, yet many of the same rules the Commission found outdated in 2017 (and, indeed, in 2002 and 2006) remain in place, because at every turn, a single panel of the Third Circuit Court of Appeals has blocked the Commission's attempts to modernize the media ownership rules—and has foreclosed any other federal appellate court from considering the Commission's multiple ownership rulemaking.

Today, broadcasters' businesses remain subject to limits on ownership that originated years before the Internet became widely available, before Facebook, YouTube, 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. The incongruity between today's video landscape and the marketplace envisioned by the ownership rules in 1975, 1999, or even 2006 is staggering, and the consequences of that discrepancy will prove dire for local television broadcasters if the path is not cleared for the FCC to make much-needed updates to its ownership rules.

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[13] Pet. App. 152a-153a (footnote omitted). At the same time, and for many of the same reasons, the Commission modified the prohibition on "Top-Four" combinations "to allow for more flexibility," concluding that "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. *Id*. at 156a.

C. Ownership rules that no longer reflect the realities of today's hyper-competitive video marketplace pose obstacles to the production of local news programming and even threaten the viability of local television stations.

Broadcast television stations are businesses, and like any other business, their continued operation depends on economic viability. Simply put, local television broadcasters cannot remain in business if they cannot compete in an increasingly crowded and fast-growing marketplace that offers viewers a multitude of sources of news, information, and entertainment programming. They certainly cannot compete in an environment where the outdated local media ownership rules put back in place by the Third Circuit's decision effectively force them to fight with one hand tied behind their back, as rival video content and distribution services grow their businesses without regulatory constraints on the size and reach of their market presence.

In today's environment, economies of scale and scope are more important than ever to the viability of local television stations.[14] If not for the regulatory restrictions on ownership of multiple media outlets in a single market, broadcasters could address financial

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[14] *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 (May 29, 2019) at 60-61 & n.237 (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.

and operational challenges and generate efficiencies and cost savings through, for example, common ownership of more than a single top-four-rated television station in a given market. Combined ownership of multiple television stations, like television-newspaper combinations, can facilitate investment in and upgrades of newsgathering equipment and other aspects of a station's physical operation, 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.

Those latter points are critical. Local news and information programming is the backbone of local television stations' businesses, but it is exceedingly expensive to produce.[15] It requires news directors,

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[15] *See* Pet. App. 152a-153a ("local news programming is typically one of the largest operational costs for broadcasters; accordingly, stations may find that common ownership enables them to provide more high-quality local programming, especially in revenue-scarce small and mid-sized markets"). *See also, e.g.*, *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) ("TEGNA Reply Comments") at 9 ("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; *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) at

editors, fact-checkers, researchers, writers, producers, videographers, reporters, anchors, meteorologists, and engineers, as well as news sets and studios, street-level Doppler weather radar systems, cameras, editing systems, remote news trucks, transmission systems, and much more. Even in smaller markets, broadcasters spend upwards of $1 million annually to produce local news programming; in the larger markets, that figure can be as high as $15 million.[16]

Those expenses are significant, and for many stations, they are increasingly impossible for a single station to shoulder.[17] This is particularly true in smaller markets with fewer viewers, where broadcasters compete for a smaller pot of advertising revenues. 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 stations (or other media outlets). The co-

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2 (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.

[16] *See* National Association of Broadcasters, *Television Financial Report: 2016 Industry Business Report, Station Revenue, Expenses and Profit*, Tables 54, 60 & 81 (2016).

[17] The infrastructure and equipment necessary to operate a local television station and to produce local news costs the same amount in Glendive, Montana as it does in New York City. Broadcasters in New York, though, can reach nearly seven million television households; Glendive—the smallest of the 210 markets—has only 3,590. *See Nielsen DMA Rankings 2020*, https://mediatracks.com/resources/nielsen-dma-rankings-2019/. With the ability to reach fewer than 4,000 television households, a broadcaster in Glendive must have more sources of revenue than those offered by operating a single television station. The FCC's current one-size-fits-all ownership construct simply does not fit television broadcasters in smaller markets.

ownership of multiple television stations in a market, or of a television station and a local newspaper or radio station, that the Commission sought to allow (and the Third Circuit subsequently disallowed) permits cost-sharing, generates efficiencies, and ultimately enables the production of a greater quantity and quality of local news programming. Operating two television stations in the same market does not cost twice as much as operating one, and advertising revenues generated by local news programming aired on a second in-market station can turn an unprofitable operation into an economically viable one.

If a local station is struggling to marshal the significant resources needed to produce local news programming, the direct, tangible benefits of economies of scale and scope along with the sharing of costs could make the difference between the production of local news or the elimination of that valuable local programming; in some cases, it could determine whether the station remains viable and on-air at all. Take, for example, MyNetworkTV-affiliated station KTVD in Denver, Colorado. When broadcast company TEGNA acquired that station more than a decade ago, it offered no local news; today, KTVD airs three hours of news every weekday, thanks to common ownership and coordination with sister station KUSA, an NBC television affiliate.[18] The consolidated operations, efficiencies, and cost savings that enabled KTVD to air local news programming were possible only because the station is not among the four highest-rated stations in the Denver market; had KTVD been a "top-four" station, TEGNA would have been barred from purchasing

[18] *See* TEGNA Reply Comments at 10.

KTVD by the FCC's rule prohibiting ownership of two top-four-rated stations in the same market.

KTVD is a success story that occurred in spite of the Commission's restrictive local multiple ownership rules. The story of KCWY(TV), Gray Television's NBC-affiliated station in Casper, Wyoming, on the other hand, demonstrates how those rules can force a company to choose between producing news or turning a profit. KCWY is the only Big Four Network-affiliated station owned by Gray in the Casper-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. The station had recently invested in upgraded news equipment, including a new news set and state-of-the-art weather and newsroom systems.[19] Despite its ratings success, though, the station was not profitable, because the advertising base in the station's market is simply too small to support a stand-alone local television station in producing its own local newscast.[20]

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

[20] KCWY is located in the Casper-Riverton DMA, which is 198th of the country's 210 markets, with fewer than 50,000 households. For 2018, the 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 amount of advertising revenue in only a matter of weeks. *See* Gray Comments at 5 (citing BIA's Media Access Pro database).

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 the Cheyenne market several hours' drive away, in which Gray owns a station.[21]

The comparison between the Denver and Casper situations also illustrates a larger point about the outdated constraints imposed by the ownership rules that the Third Circuit decision reinstated. Among the assumptions underlying the local media ownership rules are that "Big Four" affiliates in every market are necessarily strong stations that contribute news and other valuable programming to the local market, that healthy media markets 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 on the whole. 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

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[21] Not coincidentally, Gray controls two Big Four Network affiliations in the Cheyenne market: KGWN-TV has a CBS affiliation on its primary channel and NBC 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.

viable.[22] Recognizing this and other market-based realities, the Commission has attempted to loosen its local multiple ownership rules. Unfortunately, the Third Circuit substituted (as it has for nearly twenty years) its judgment for that of the expert agency, maintaining archaic rules that competition long ago rendered unnecessary.

D. The Third Circuit's reasoning overlooks the detrimental effect of its decision on ownership of broadcast outlets by women and racial minorities.

The Third Circuit panel's majority rooted its decision in the need for additional data and analysis to support the Commission's conclusions about the impact of its ownership rules on women and racial minorities. *See* Pet App. 34a-42a. But that analysis overlooks a very real, pragmatic, and imminently predictable consequence of requiring local media outlets to continue to labor under long-outdated ownership constraints: The outdated ownership rules that the Third Circuit reinstated will make it exceedingly difficult for local broadcasters—and perhaps impossible for those in smaller markets—to remain competitive and viable in today's increasingly crowded media marketplace, where the competition for viewers and advertising dollars is growing more

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[22] In fact, some stations affiliated with the Big Four Networks have failed in recent years. *See Withers Broadcasting Co.*, 32 FCC Rcd 3179, 3182 (2017) (order granting a 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 a failing station waiver allowing Blackhawk Broadcasting to acquire station KSWT(TV) in the Yuma-El Centro DMA, a CBS Affiliate, despite the absence of eight independent "voices" in the market).

intense year after year. Many, like Gray's station in Casper, will not be able to support local news programming operations; others may fail altogether. And if local broadcast businesses fail, 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.[23] Multiple broadcaster groups sponsor the NAB Leadership Training Program and also offer outreach initiatives to promote and encourage diversity in hiring, training, and opportunity within their own organizations. But those commitments to diversity will be for naught if broadcasters' businesses cannot succeed.

Without healthy, economically viable broadcast businesses, *no* opportunities for women or racial minorities to own, operate, or invest in local broadcast businesses will exist at all. Whatever the data reflecting ownership of local broadcast stations by women and minorities, the Commission's ownership rules inevitably disserve female and racial minority ownership if local stations cannot provide successful career opportunities—to women, minorities, or anyone else—because their businesses can no longer remain competitive. The Third Circuit panel's repeated blocking of the Commission's attempts to

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[23] *See* https://www.nabfoundation.org/programs/broadcast-leadership/.

update its ownership rules ensures that *all* local broadcasters, including women and minorities, remain at a competitive disadvantage in a fast-changing marketplace.

Unless the Commission is allowed to make predictive judgments and critically needed updates to its local media ownership rules without judicial second-guessing of the agency's expert judgments, it is only a matter of time before many local television stations go the way of local newspapers.[24] No opportunities for women, minorities, or anyone else will be available if local media outlets are non-existent.

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[24] Subscriptions to weekly print newspapers reached their peak in 1984, with approximately 63.3 million in total circulation, and declined to less than 31 million in 2017. Similarly, newspaper advertising revenues peaked in 2005 at $49.4 billion and declined to $16.5 billion by 2017. *See* Pew Research Center Newspapers Fact Sheet, State of the News Media (June 13, 2018), https://www.journalism.org/fact-sheet/newspapers/. Yet the local media ownership rules currently in place prohibit cross-ownership of a local television station and a newspaper—a rule that even the Third Circuit itself found outdated more than fifteen years ago. *See Prometheus Radio Project*, 373 F.3d at 398 ("reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest"). The Third Circuit's decision in the instant case reinstated that 1975 rule banning newspaper-broadcast cross-ownership.

II. THIS COURT'S IMMEDIATE REVIEW IS ESSENTIAL TO ENSURE THAT OBSOLETE OWNERSHIP CONSTRAINTS DO NOT IRREPARABLY HARM THE LOCAL VIDEO ECOSYSTEM

Whether local television stations can achieve critical operational efficiencies and cost savings is directly, meaningfully, and substantially dictated by the FCC's local broadcast ownership rules. Today, in light of the Third Circuit panel's most recent decision, local television stations find themselves right back where they were decades ago, prohibited from combining two or more news-producing facilities because they would run afoul of the local media ownership rules, which the FCC has been attempting, unsuccessfully, to modernize for years.[25]

The rules now in place, following the Third Circuit panel's September 2019 decision, are relics of a media marketplace that has not existed in decades, and the Commission has already found that they are no longer necessary in the public interest as a result of increased competition. Those rules do not afford local broadcasters the opportunities to consolidate, maximize efficiency, and coordinate operations and the production of news programming that experience teaches will be essential to their survival. And broadcasters simply cannot endure another years-long process in front of the agency, followed by another appellate process, in order to see long-

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[25] As just one illustration of the point, local television stations would be the most logical acquirers of the journalistic assets of local newspapers. The local ownership rules currently in place, though, prohibit precisely those sorts of efficient combinations.

overdue and sorely-needed updates to the media ownership rules.

If this Court does not intervene now, the Third Circuit's remand will send the matter back to the Commission for still more years of fact-finding, data gathering, and analysis, in an attempt to satisfy the appellate court's extra-textual command to gather and analyze data reflecting the potential effects of its rule changes on ownership of broadcast outlets by women and minorities (which command assumes, without evidence, that such data exists and can be collected in the first place). That process will be followed by another round of agency rulemaking, and what is almost certain to be further litigation before the same Third Circuit panel that has invalidated every attempt by the FCC to update its ownership rules since 2002. The issue raised by the Petition will not return to this Court until that process has concluded, so that once again, it will likely be years before any possible loosening of the constraints imposed by the outdated media ownership rules. In the meantime, the multitude of competing digital outlets and platforms (like Netflix, YouTube, and Facebook) will continue to operate (largely unregulated), consolidate, and draw advertising revenues away from local broadcast outlets.

In the decades since Congress mandated that the Commission undertake the process of reviewing its local media ownership rules, the ability of traditional broadcast outlets to survive in the highly competitive modern marketplace while anachronistic local media ownership rules remain in place has become an issue of indisputable national importance and significant practical urgency, particularly for broadcasters in smaller markets. Outdated ownership rules place

increasing competitive strains on their businesses with every passing day. The need for this Court's immediate intervention is acute, and the time is now. A single panel of the Third Circuit has for many years maintained a stranglehold over challenges to the FCC's efforts to modernize the local media ownership rules, thwarting the unambiguous will of Congress and flouting the expert agency's predictive judgments about appropriate regulation of the fast-changing marketplace. That judicial obstruction has already taken a substantial toll on local broadcasters, and without this Court's intervention at this stage, that toll may well be fatal, especially for broadcasters in smaller markets, where economically efficient operations are particularly crucial, and particularly challenging.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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