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 THE DISTRICT OF COLUMBIA AND THE STATES OF CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Third Circuit correctly deferred to the Federal Communications Commission's consistent interpretation that ownership diversity is an important aspect of the public interest served by its broadcast ownership rules and correctly held that the Commission acted arbitrarily and capriciously in repealing most of those rules without any reasoned analysis of ownership diversity.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Local news is crucial to the functioning of state and local democracies, and diversity is key to a robust local news system capable of reaching all state residents. Unfortunately, financial pressures, increasing consolidation of news outlets, and misplaced reliance on the Internet have made communities' news less local and less diverse. The District of Columbia and the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington ("*Amici* States") submit this brief as *amici curiae* in support of respondents because the health of their state and local institutions is inextricably linked with the fate of local news.

The current coronavirus pandemic makes plain both the important role of local news and the tremendous economic pressures on the institution. On the one hand, over half of the country has increased its local news intake during the coronavirus pandemic, as Americans seek comfort in trusted personalities and look for information about local restrictions and business closures. Maria Cantwell, Ranking Member, S. Comm. on Com., Sci., and Transp., 116th Cong., *Local Journalism: America's Most Trusted News Sources Threatened* 8 (Oct. 2020).[1] On the other hand, "the pandemic and the ensuing recession have greatly accelerated the loss of local news that has been occurring over the past two decades." Penelope Muse Abernathy, U.N.C. Hussman Sch. of Journalism &

[1] *Available* at https://bit.ly/38fjqKo.

Media, *News Deserts and Ghost Newspapers: Will Local News Survive?* 5 (2020).[2] What is more, the quality of many communities' news has declined as media conglomerates have bought up outlets, fired reporters, cut coverage of local issues, and even broadcast the same content on multiple channels. "The paradox of the coronavirus pandemic and the ensuing economic shutdown is that it has exposed the deep fissures that have stealthily undermined the health of local journalism in recent years, while also reminding us of how important timely and credible local news and information are to our health and that of our community." *Id.* at 5.

The *Amici* States' interest in the preservation of diverse, local media are of the highest order. Local news plays a crucial role in state political systems, prompting enforcement actions and spurring election turnout. Local news outlets cover statehouses, hold state institutions accountable, and provide a channel of communication between state officials and their residents. Truly local news is essential given the diversity of communities that the *Amici* States serve, from dense urban areas like the District of Columbia to rural communities in New Mexico and Vermont. Local news ensures that those diverse voices are heard, particularly for populations that are often underserved.

The Federal Communications Commission's ("FCC" or "Commission") proposed overhaul of local ownership rules threatens to further diminish the important role local news plays in informing, engaging, and connecting the *Amici* States' residents. As respondents ably argue, the Third Circuit was correct to hold

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[2] *Available at* https://bit.ly/34dWx94.

the FCC to its burden of logical, methodical reasoning, and to make the Commission show its work before promulgating rules that might threaten diverse local media.

SUMMARY OF ARGUMENT

1. The Third Circuit correctly insisted that, in its rulemaking pursuant to Section 202(h) of the Telecommunications Act of 1996, the Commission must consider the impacts on media ownership diversity. Diverse local news is critical to healthy state and local governments, as well as the communities they serve. Women and people of color have long been underrepresented in the media, and one reliable method of fostering newsroom diversity is to encourage ownership diversity. And diversity in the newsroom and boardroom matters. The average media outlet is less likely to cover issues affecting communities of color, often underreporting issues like public safety, education, and fair housing. The dearth of trustworthy coverage from sources that look and sound like their local communities can have negative effects on civic engagement and voting, to the detriment of states serving these residents.

Representative and trusted media sources are particularly critical to state and local governments during emergencies. When storms, fires, or floods strike, local news is often the only source of information about whether to evacuate and where to seek shelter. When states lack adequate media outlets—for example, foreign language stations—the consequences can be deadly. And the lack of accessible, in-language information on health and safety can further tax limited state resources.

2. This Court should also reject Industry Petitioners' reading of Section 202(h) that subverts not only diversity but also localism—the idea that local media should serve the "interests and needs of their communities," *Broadcast Localism*, 19 FCC Rcd. 12,425, 12,425 (June 7, 2004). Industry Petitioners argue that "Section 202(h) requires the Commission to assess its ownership rules in light of one factor and one factor only: 'competition,' not the effect of its rules on minority and female ownership." Industry Pet'rs Br. 24-25. This argument ignores the statute's own terms, which mandate that the Commission "shall determine whether any such rules are necessary in the *public interest*" and "shall repeal or modify any regulation it determines to be no longer in the *public interest*." Telecommunications Act of 1996, § 202(h), 47 U.S.C. § 303 note (emphases added). If Congress meant the FCC to regulate on the sole basis of competition—at the exclusion of any other "public interest"—it hardly would have included that term in the statute twice. Moreover, Industry Petitioners' position, if adopted, would not only restrict the Commission's power to consider diversity, it would also prohibit the FCC from seeking to foster localism, which is another key "public interest" factor, and one that is especially important to the *Amici* States.

Local news is an essential component of state and local democracies. Local journalists serve as government watchdogs; local news informs residents of local happenings and stimulates political participation; and local media provides critical channels of communication during crises like the COVID-19 pandemic. The decline in local media outlets and news coverage over the past two decades has already taken a toll on state and local communities. Yet, despite petitioners' and their *amici*'s contention that deregulation is the key to

saving local news, the opposite is true. As the record before the Commission and now this Court makes clear, media consolidation has exacerbated the deterioration of local news and negatively impacted states and localities. And while many have placed hope in the Internet to fill the role of local news it has proved to be an imperfect substitute.

ARGUMENT

I. Diverse Local Media Is Critical To State And Local Governance.

Amici States encompass many diverse communities, both urban and rural, and they rely on local media to communicate key information to their residents. Minority- and female-owned local media companies are uniquely able to speak to audiences that look and sound like their owners, whether catering to Spanish-speakers in rural settings like Mississippi or Black residents in urban areas like the District of Columbia. Representative ownership and leadership are crucial to ensuring that these audiences, whether people of color or women, see and hear themselves on television, on the radio, and in print. States need all residents to listen and understand when public health is threatened, when emergencies strike, and when citizens are called on to vote and hold leadership accountable. Promoting diverse local media helps states achieve those goals. It is, in part, for these reasons that the Third Circuit correctly insisted that the Commission give media ownership diversity serious consideration before promulgating its rules. *See Nat'l Assoc. of Broads. v. FCC*, 939 F.3d 567, 587 (3d Cir. 2019).

A. Diverse ownership and media voices are vital to civic awareness and engagement.

As respondents ably articulate, the FCC has long recognized the importance of, and remains committed to, diversity in broadcast services. Resp'ts Br. 4-7; *see Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1042 (D.C. Cir.), *modified on reh'g,* 293 F.3d 537 (D.C. Cir. 2002) ("In the context of the regulation of broadcasting, 'the public interest' has historically embraced diversity (as well as localism)."). But diversity in media is not easily achieved or maintained. For example, employees of color and women are severely underrepresented at media outlets. Elizabeth Grieco, *Newsroom Employees Are Less Diverse Than U.S. Workers Overall*, Pew Rsch. Ctr. (Nov. 2, 2018).[3] Less than one quarter of newsroom employees are people of color, compared to roughly 45 percent in all occupations and industries combined. *Id.* And about 39 percent of newsroom employees are women, compared to roughly 47 percent of all workers. *Id.*

Fostering ownership diversity promotes diverse media. At present, very few broadcast stations are owned by people of color or women. *See* Press Release, FCC News, Commissioner Starks Statement on Fourth Broadcast Station Ownership Report (Feb. 14, 2020).[4] And yet, the few minority- and women-owned stations that do exist outperform others in employing diverse workforces. Sydney Ember & Nicholas Fandos, *Pillars of Black Media, Once Vibrant, Now Fighting for Survival*, N.Y. Times (July 2, 2016).[5] They also

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[3] *Available at* https://pewrsr.ch/2Kqa9ah.

[4] *Available at* https://bit.ly/3mkXEd4.

[5] *Available at* https://nyti.ms/2WCidYp.

both have better track records in appointing both people of color and women to leadership positions. S. Derek Turner, Free Press, *Off the Dial: Female and Minority Radio Station Ownership in the United States* 5 (June 2007).[6]

Diverse leaders and newsrooms are vital to ensuring that stories in diverse communities receive coverage. "Several studies have indicated that mainstream media do not adequately cover African-American and other minority communities." Steven Waldman, Working Grp. on Info. Needs of Cmtys., FCC, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age* 252 (July 2011).[7] For example, one study found that just 1.9 percent of news stories written in a one year period pertained to Black Americans, in some way, and even that meager coverage tended to paint a "downbeat picture." *Id.* (internal quotation marks omitted). Mainstream media also "often underreports issues such as crimes against minorities." Cantwell, *supra*, at 24. A recent *mea culpa* by the Kansas City Star, the nearly 150-year-old local paper in Missouri, highlights the point. The paper apologized for the "decades of coverage that depicted Black Kansas Citians as criminals living in a crime-laden world," and for giving "short shrift" to the "achievements, aspirations and milestones of an entire population." Mike Fannin, *The Truth in Black and White: An Apology From the Kansas City Star*, Kan. City Star (Dec. 20, 2020).[8] Meanwhile, the Star heralded the work of the local Black press for "chronicl[ing] critical stories [that]

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[6] *Available at* https://bit.ly/3akOxqL.

[7] *Available at* https://bit.ly/37k6Zhb.

[8] *Available at* https://bit.ly/3aCRlzH.

the white dailies ignored." *Id.* The Reverend Jesse Jackson once explained succinctly at an FCC hearing: minority "[r]epresentation is directly tied to ownership." *Localism Public Hearing in Washington, D.C.*, FCC, Tr. 41 (Oct. 31, 2007) (test. of Rev. Jesse L. Jackson, Sr.).[9] "If we don't own our press," Leonard Burnett Jr., the owner of Uptown Magazine told the New York Times, "we don't have a platform to speak." Ember & Fandos, *supra*.

Credible coverage of issues affecting diverse communities is also crucial to good governance. As Wade Henderson, the former President of the Leadership Conference on Civil and Human Rights, has explained, "the way the public looks at issues, indeed whether the public is even aware of issues like fair housing or voting discrimination . . . is directly related to the way these issues are covered by the media." *Localism Public Hearing*, FCC, Tr. 37 (test. of Wade Henderson). Less ownership diversity, Henderson reasoned, means less coverage of "[i]ssues like economic inclusion, the struggle for quality public education, immigration reform and the prevention of violent hate crime." *Id.* at 35. Henderson gave an example of media ownership in the District—an urban, predominantly Black community—where, at the time, "[t]wo companies, News Corporation and NBC GE, together control[led] over half the television revenues," and over half of commercial radio stations were non-locally owned, which resulted in coverage that did not "reflect the diversity of th[e] population." *Id.* at 36. As a result, "there [were] few" media outlets "who [could] speak with authority about their condition in the community." *Id.* at 35. Under these conditions, it may

[9] *Available at* https://bit.ly/3p7WlQM.

be harder for District leaders to reach the residents who are in greatest need of accurate local news, and for residents to hear about the issues and events that affect them most.

Communities of color tend to be even more dependent on local media than the average population. For instance, Black Americans are "more likely to be interested in local news and to trust information from local news organizations more generally." Elisa Shearer, *Local News is Playing an Important Role for Americans During COVID-19 Outbreak*, Pew Rsch. Ctr. (July 2, 2020).[10] In fact, Americans living in communities with particularly high shares of Hispanic and Black residents "are more likely to say [that] most key local news topics are important for their daily lives than those in higher-proportion white areas." Pew Rsch. Ctr., *For Local News, Americans Embrace Digital but Still Want Strong Community Connection* 65 (Mar. 26, 2019).[11] This has been especially apparent during the coronavirus pandemic, in which surveys show that "Black Americans are more likely than other adults to turn to local news organizations and to trust them to get the facts right about COVID-19. Shearer, *supra*. Local news thus provides public health officials a particularly useful channel of communication regarding, among other things, the disproportionate risks posed by the coronavirus for Black Americans. *See* Sherita Hill Golden, *Coronavirus in African Americans and Other People of Color*, Johns Hopkins Med. (Apr. 20, 2020).[12]

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[10] *Available at* https://pewrsr.ch/34bknCr.

[11] *Available at* https://pewrsr.ch/2WeGbsh.

[12] *Available at* https://bit.ly/38192pr.

Moreover, residents of lower-income areas, which strongly correlate with majority-minority communities, *see* John Creamer, *Inequalities Persist Despite Decline in Poverty For All Major Race and Hispanic Origin Groups*, U.S. Census Bureau (Sept. 15, 2020),[13] "are more reliant on TV news and less so on digital [media]," Pew Rsch. Ctr., *For Local News*, *supra*, at 65. And, for Hispanic immigrants living outside of metro areas and Native American populations living on reservations—areas with low broadband penetration—radio has historically offered an important means of communicating news. Abernathy, *supra*, at 44. Traditional media is thus particularly important to reaching these minority communities.

Minority-focused media can also drive minority turnout in elections. For example, researchers found that Spanish-speaking "Hispanics without access to local television news are significantly less likely to participate in elections than Hispanics with access to news in Spanish." Felix Obeholzer-Gee & Joel Waldfogel, *Media Markets and Localism: Does Local News en Español Boost Hispanic Voter Turnout?*, 99 Am. Econ. Rev. 2120, 2127 (2009).[14] Informed and active civic participation, including by minority constituents, is in every state's best interest.

B. Representative local media is particularly important to states and localities during emergencies.

As Reverend Jackson put it, media coverage can be "a life or death issue for communities of color across the country." *Localism Public Hearing*, FCC, Tr. 41

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[13] *Available at* https://bit.ly/34IUPNl.

[14] *Available at* https://bit.ly/3ab0EXi.

(test. of Rev. Jesse L. Jackson, Sr.). That is, in part, because local media is often the best source of information during emergencies. When local media excludes, for example, language minorities, residents suffer. As the U.S. Department of Justice has observed, when individuals who are not proficient in English are unable to understand states' instructions and announcements during emergencies, "the consequences can be deadly." C.R. Div., U.S. Dep't of Just., *Tips and Tools for Reaching Limited English Proficient Communities in Emergency Preparedness, Response, and Recovery*, at i (2016) ["*Tips and Tools*"].[15]

The events surrounding Hurricane Katrina illustrate the point. That storm decimated the city of New Orleans and surrounding areas, leaving thousands stranded and without power, housing, or drinkable water. *A Month After Katrina, A Long Road Ahead*, NBC News (Sept. 28, 2005).[16] The storm also forced New Orleans's sole Spanish-language radio station off the air, depriving Spanish-only speakers of critical instructions as to "where and how to seek shelter, and what precautions to take." Susan S. Kuo, *Speaking in Tongues: Mandating Multilingual Disaster Warnings in the Public Interest*, 14 Wash & Lee J. C.R. & Soc. Just. 3, 5-6 (2007).[17] Many Vietnamese residents of the affected areas were also "injured or killed during the storm and the flooding in its wake because they could not understand the English-only evacuation orders." *Id.* at 4-5. And the lack of information in Spanish and Portuguese has been cited as a contributing factor in the death of dozens of Peruvian and

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[15] *Available at* https://bit.ly/3nmPdzj.

[16] *Available at* https://nbcnews.to/3apIMYB.

[17] *Available at* https://bit.ly/37xCa8V.

Brazilian immigrants in a Gulfport, Mississippi apartment complex. Brenda Muniz, Nat'l Council of La Raza, *In the Eye of the Storm: How the Government and Private Response to Hurricane Katrina Failed Latinos* 5 (2006).[18]

Hurricane Katrina is only one example. The dearth of multilingual communications hindered community responses during wildfires in Southern California in 2007,[19] Hurricane Ike in Houston in 2008,[20] Superstorm Sandy in New York in 2012,[21] and a tornado in Oklahoma City in 2013.[22] Without representative media, the struggle to reach language minorities during crises will likely worsen over time.

In addition to the tragic loss of life, a paucity of multilingual media can strain states' emergency resources. The Department of Justice warns that "[w]hen individuals do not evacuate, find shelter, or understand how to prevent getting a contagious

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[18] *Available at* https://bit.ly/2LFFaYb.

[19] *See* U.S. Dep't of Just. et al., *Guidance to State and Local Governments and Other Federally Assisted Recipients Engaged in Emergency Preparedness, Response, Mitigation, and Recovery Activities on Compliance with Title VI of the Civil Rights Act of 1964*, at 5 (Aug. 16, 2016), https://bit.ly/3raPVCi.

[20] *See* Vishnu P. Nepal et al., Off. of Surveillance & Pub. Health Preparedness, Houston Dep't of Health & Hum. Servs., *Understanding Disaster Preparedness of Linguistically Isolated Groups: Chinese, Somali, Vietnamese and Spanish Speaking Communities* 6 (Nov. 2009), https://bit.ly/3r3rE0H.

[21] *See Timeline of the New York City Housing Authority's Response*, N.Y. Times (Dec. 9, 2012), https://nyti.ms/3aim9Fw.

[22] *See* Juliana Keeping & Hannah Covington, *Oklahoma Storms: Many Spanish-Speaking Families Struggle to Understand Storm Precautions*, Oklahoman (July 14, 2013), https://bit.ly/3gP0V3e.

disease, emergency response personnel and resources are further strained to conduct rescue operations or otherwise remedy avoidable situations." *Tips and Tools*, *supra*, at i. States therefore have a critical interest in diverse media that can reach local communities in times of need. Given the stakes, the Third Circuit justifiably insisted that the FCC examine the issue of ownership diversity carefully before taking action that could damage the local media ecosystem—a system on which states, localities, and citizens alike rely.

II. Industry Petitioners' Interpretation Of Section 202(h) Would Diminish The FCC's Power To Promote Localism, To The Detriment Of State And Local Governments.

A. Industry Petitioners' position threatens localism.

"As with competition and diversity, localism has been a cornerstone of broadcast regulation for decades." *Broadcast Localism*, 19 FCC Rcd. at 12,425. Embracing localism—the idea that licensed broadcast media outlets serve the "interests and needs of their communities of license," *id.*—is critical for the healthy functioning of state democracies. Accordingly, along with diversity, localism has long served as a component of the FCC's interpretation of the "public interest" within the text of Section 202(h). 47 U.S.C § 303 note; *see* FCC Br. 5; *2002 Biennial Regulatory Review*, 18 FCC Rcd. 13,620, 13,627 (July 2, 2003).

Industry Petitioners take the position, however, that "Section 202(h) requires the Commission to assess its ownership rules in light of one factor and one factor only: 'competition,' not the effect of its rules on minority and female ownership." Industry Pet'rs Br.

24-25. Industry Petitioners' reading, if adopted, would not only undermine the Commission's efforts to bolster diversity, but it would also prevent the FCC from "fostering localism," one of the "core missions" that has "driven much of [the Commission's] radio and television broadcast regulation during the last 70 years." *Broadcast Localism*, 19 FCC Rcd. at 12,445 (Statement of FCC Chairman Michael K. Powell).

1. Industry Petitioners' reading of Section 202(h)—which contradicts the Commission's own interpretation, *see* FCC Br. 33—ignores key provisions of the text. Industry Petitioners state that "the FCC's mandate under Section 202(h) is limited to reviewing whether its ownership rules remain necessary in light of competition in the media marketplace." Industry Pet'rs Br. 25. This reading blatantly ignores the term "public interest," which the statute *twice* directs the Commission to consider. Section 202(h) mandates that the Commission "shall determine whether any of such rules are necessary in the public interest as the result of competition" and "shall repeal or modify any regulation it determines to be no longer in the public interest." Telecommunications Act of 1996, § 202(h), 47 U.S.C. § 303 note. The statute's mention of "the public interest" is no accident, as it appears "over 100 times in the communications law." *Public Interest and Localism: Hearing Before the S. Comm. on Com., Sci., and Transp.*, 108th Cong. 7-8 (2003) (statement of FCC Comm'r Michael Copps);[23] *see id.* ("I take Congress seriously when they tell me something once. When they tell me 112 times, I stand at attention.").

As this Court has "stated time and again[,] . . . courts must presume that a legislature says in a stat-

[23] *Available at* https://bit.ly/3oS7KEg.

ute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). And "[i]t is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted). The Court should therefore reject Industry Petitioners' construction, which reads the term "public interest" out of the statute.

2. Beyond being wrong as a matter of statutory construction, Industry Petitioners' position would not only eviscerate the FCC's commitment to diversity, it would also kneecap the Commission's commitment to localism. Like promoting diversity, fostering localism enters the FCC's quadrennial review through the term "public interest." Telecommunications Act of 1996, § 202(h), 47 U.S.C. § 303 note. Without the discretion to consider localism as part of the public interest, the Commission would be unable to enact or maintain ownership regulations to promote and safeguard local news. The Commission would thus be without power to consider the fact that, as described below, robust local news stimulates voter turnout and decreases polarization; that local journalists serve as critical watchdogs over government officials and spending; or that, in times of natural disasters or once-in-a-century pandemics, local broadcasters can literally save lives.

B. Local news plays a crucial role in state and local democracies.

Americans have a unique relationship with local news. For one, local television "remains Americans' most popular source of local news and information." JA 237 (2016 Order, 31 FCC Rcd. 9864 (Aug. 25,

2016)). Survey after survey shows that Americans trust their local news broadcasters and journalists. *See* Cantwell, *supra*, at 7 ("76 percent of Americans have 'a great deal' or 'a fair amount' of trust in their local television news, and 73 percent have confidence in local newspapers."). This remains true during the current pandemic, when Americans from cities, suburbs, and rural areas alike have rated local broadcast TV as the most trustworthy medium for coronavirus coverage. Hadassa Gerber, *2020 Coronavirus Media Usage Study*, Television Bureau of Advert. (Apr. 2020).[24] Most Americans consider their local news unbiased (66 percent, compared to 31 percent who consider national news organizations to report "without bias"), and an overwhelming percentage believe it is at least somewhat important that local journalists be personally tied to the local community. Cantwell, *supra,* at 7. That said, Americans recognize that their local news is often not local—nearly half of Americans report that their local news media covers an area other than where they live. Pew Rsch. Ctr., *For Local News, supra*, at 5. Meanwhile, Americans appear to have little concept of the economic strain faced by their local media outlets: more than two-thirds think that local news media are doing either somewhat or very well financially. *Id.* at 36-37.

As the *Amici* States and their residents have experienced, local news plays an important role in the fabric of our nation's democracy. States and localities rely on local news to inform and engage voters, and to hold public officials accountable. Accordingly, the disappearance of local news media has already begun to take a toll. And, contrary to what Industry

[24] *Available at* https://bit.ly/3mkE3d2.

Petitioners' and their *amici* argue, the increased consolidation of local media has further exacerbated those harms. *See infra*, Subpart C. Meanwhile, although many have expressed hope that the Internet can fill the gaps left by local media outlets, it is clearly failing to do so. *See infra*, Subpart D.

1. Local journalists have long served as the watchdogs of both state and local government. Take the case of the Todd County Standard, a roughly 2,300-circulation paper based in Elkton, Kentucky, which "blew open" the Kentucky Cabinet for Health and Family Services "for the management of its foster care system after a child in its custody was murdered." Mary Ellen Klas, *Less Local News Means Less Democracy*, Nieman Reps. (Sept. 20, 2019).[25] Or WJLA, a local broadcast station in Washington, D.C., which exposed a chain of dental clinics that were performing unnecessary dental operations on children in order to collect money from Medicaid. *See* Roberta Baskin, *Revealing How Dentists Profit by Abusing Children*, Nieman Reps. (Mar. 23, 2009).[26]

Often, news reports lead to government action. For example, in Louisville, Kentucky, local station WHAS investigated allegations of sexual conduct between prison guards and inmates, and the resulting segment led to a new state law. Waldman, *supra*, at 83. In Houston, Texas, KHOU conducted a two-year investigation of the Texas National Guard, which started by looking into allegations of harassment and discrimination against female officers and ended up unearthing corruption and misappropriation of funds. *Id.* The

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[25] *Available at* https://bit.ly/2Wcv8jt.

[26] *Available at* https://bit.ly/382tKFF.

reporting led the Governor to relieve numerous National Guard officers of their command. *Id.*

Local news also stimulates civic engagement and political participation. People who "pay more attention to local news" find themselves "more confident in their knowledge about aspects of their local communities, local politics and engagement." Gallup & Knight Found., *American Views 2020: Trust, Media and Democracy* 43 (Nov. 9, 2020).[27] Those who closely follow local news are also more than twice as likely as those who do not to "always" or "nearly always" vote in local elections. *Id.* at 44 ("75% versus 33%, respectively"). This evidence reinforces the "central tenet of democratic theory . . . that an informed and engaged polity improves representation and lends greater legitimacy to the political system." Danny Hayes & Jennifer L. Lawless, *The Decline of Local News and Its Effects: New Evidence from Longitudinal Data*, 80 J. of Politics 332, 333 (2018);[28] *see* Erin M. Simpson, *Nation Without Place: Does Local News Decline Cause Democratic Dysfunction in the Contemporary United States?* 4, 40-41 (June 2019) (MRes thesis, U. Oxford) (documenting the effect of local media outlet closure on "decreas[ing] political participation" in elections).[29]

As noted above, *supra* Part I.B., local news also provides public officials a critical channel of communication with residents. As the FCC Working Group on Information Needs of Communities once observed, "[d]uring emergencies, the local TV station is often considered to be as vital a part of the local community as the police and fire departments." Waldman, *supra*,

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[27] *Available at* https://kng.ht/2LBRgBK.

[28] *Available at* https://bit.ly/3mhtqYz.

[29] *Available at* https://bit.ly/2WbyiUC.

at 79. Local media has accordingly proven indispensable during the coronavirus pandemic. Local news has helped inform Americans about "community spread and local hot spots," "[b]usiness opening decisions and regulations," "[l]ocal public health directives," "[s]chool health codes" and closures, and "[l]ocal employment opportunities." Cantwell, *supra*, at 10. In fact, the role of local news has been so crucial during the pandemic that nearly 60 percent of Americans have "reported consuming more local news than before the COVID-19 crisis." *Id.* at 8. This is no doubt in part because Americans "see local news outlets as more credible sources of COVID-19 information than the news media in general." Shearer, *supra*.

2. And yet, while the pandemic has pushed many Americans to rely more heavily on local news, the ensuing recession has accelerated the pace at which local media outlets have folded. Abernathy, *supra*, at 5. Already before the pandemic, "[h]undreds of news organizations . . . ha[d] vanished," "leaving residents in thousands of communities . . . living in," what one journalism professor calls "news deserts." *Id.* at 8. These news deserts appear all across the country, but they disproportionately occur in rural areas—68 percent of U.S. counties without a daily or weekly newspaper are rural. Clara Hendrickson, *Critical in a Public Health Crisis, COVID-19 Has Hit Local Newsrooms Hard*, Brookings (Apr. 8, 2020).[30] And those media outlets that remain have been forced to cut personnel and coverage, becoming "mere 'ghosts,' or shells of their former selves." Abernathy, *supra*, at 8; *see, e.g.*, Waldman, *supra*, at 86 ("[T]he amount of in-

[30] *Available at* https://brook.gs/3nnKBJb.

depth accountability journalism on many local TV newscasts has been declining for a while.").

This decline affects reporting on state and local government operations. As state government spending rose from 2003 to 2008, "the number of statehouse reporters dropped by one-third." Waldman, *supra*, at 11; *see id.* ("In New Jersey, the number of statehouse reporters dropped from 35 to 15. In California[,] it fell from 40 to 29; in Texas, from 28 to 18; and in Georgia, from 14 to 5."). In addition to decreased state-level reporting, local government issues have been getting short shrift. A study of Los Angeles newscasts in 2009 "found that stories about local civic issues . . . like transportation, community health, the environment, education, taxes, activism, and fundraisers took up *one minute and 16 seconds* of the monitored half-hour broadcasts." *Id.* at 84. And these local government stories "led the newscasts only 2.5 percent of the time." *Id.*

The reduction in coverage of state and local issues has had a negative effect on the accountability of state and local governments. "[W]hen newspapers close or reduce their news coverage, the loss of government oversight can substantially increase the cost of local government, increase taxes, and reduce government efficiency and civic engagement." Cantwell, *supra*, at 11. Indeed, several finance professors have demonstrated that the closure of local newspapers leads to an increase in the costs of municipal borrowing within a few years, for two primary reasons. Pengjie Gao et al., *Financing Dies in Darkness? The Impact of Newspaper Closures on Public Finance*, 135 J. of Fin. Econ. 445, 446 (2020).[31] First, municipal governments

[31] *Available at* https://bit.ly/3mmrT3o.

become less efficient in the absence of a media watchdog. *Id.* at 447. Second, the higher cost of borrowing compensates for lenders' relative lack of information about localities resulting from the reduction in press coverage. *Id.*

The case of Bell, California illustrates how a reduction in local reporting can lead to exorbitant government spending. Robert Rizzo was hired as the Bell town manager in 1993 with a starting salary of $72,000. *Id.* at 449. By 2010, however, Rizzo owned "a beachfront mansion and a ten-acre horse ranch outside of Seattle." *Id.* Reporters from the Los Angeles Times caught on after 17 years and discovered that Rizzo was earning $787,637 per year, a roughly $42,000 annual increase year-over-year from his starting salary. *Id.* In the end, local prosecutors charged Rizzo and other Bell officials with stealing $5.5 million in public funds, *id.*, but as an FCC working group put it, "if a reporter earning $50,000 had been regularly covering the city council, and salaries of those officials had therefore remained at the level of most other elected officials, taxpayers would have saved millions of dollars," Waldman, *supra*, at 246.

Finally, numerous studies have also demonstrated that "the loss of local news coverage in many areas may be a factor in Americans' current level of political polarization." Gallup & Knight Found., *supra*, at 48. According to one Oxford researcher, "local newspaper closure[s] drive[] polarizing effects—both in terms of concentration of party support and ideology." Simpson, *supra*, at 55. "As newspapers close, other local media are not emerging to fill the information gaps," which are often filled by "more extreme, partisan, and polarizing [national] news." Joshua P. Darr et al., *Newspaper Closures Polarize Voting Behavior*,

68 J. of Commc'n 1007, 1007-08 (2018).[32] Such polarization makes state, local, and national governance more difficult. And it erodes voters' ability to focus on the platforms of state and local officials, which often have more to do with the nuances of local conditions than the politics of national parties.

C. Consolidation of local media ownership has contributed to the deleterious effects of vanishing local news.

Large station owners, including petitioners' *amici*, argue that their strategy of purchasing multiple local news outlets in a single market allows them "to increase efficiency and profitability" and thereby aid local news. Gray Television, Inc. *Amicus* Br. 24 ("Gray *Amicus* Br."). Cooperative arrangements—either through common ownership or contractual agreements—enable stations to share resources and reduce overhead costs. But that is not all that they share. "Increasingly, cooperative news services are not only sharing" production equipment, technical resources, or "footage from official events but also interviews, so stories on three different stations might feature the same newsmaker interview." Waldman, *supra*, at 98. These types of cooperative arrangements, and especially conglomerate ownership, undermine the key qualities of local newsgathering.

One serious problem with consolidation of local news is the lack of transparency. Local news, and quality journalism in general, is built on trust, which requires basic information about who owns, produces, and delivers the news. As large conglomerates consolidate more and more local news outlets, "it has

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[32] *Available at* https://bit.ly/3h7YJ72.

become harder and harder to discern the financial and journalism priorities of local newspapers or to hold them accountable." Abernathy, *supra*, at 36. And, even worse, large station owners often obfuscate that information intentionally. Stations might, for instance, hold out reporters as "local talent," when they are actually delivering news from across the country. At one point, for example, WLTZ in Columbus, Georgia listed anchors as "part of its local news team," even though those individuals broadcast from Iowa as part of a content-sharing agreement to which WLTZ subscribed. Waldman, *supra*, at 97.

Additionally, the "efficien[cies]" that Industry Petitioners and their *amici* tout is code for less competition among news outlets in local markets and, often, lower quality products. Industry Pet'rs 9; ABC Television Affiliates Assoc. *et al. Amici* Br. 12; Gray *Amicus* Br. 24. The "business strategy" of purchasing multiple local stations, Gray *Amicus* Br. 24, simply "allow[s] companies to cut costs by consolidating newsrooms that may have once competed against each other—creating a uniformity of news coverage and, critics fear, diminishing the watchdog power of local media," Paul Farhi et al., *In This Town, You Can Flip the Channel All You Want—The News Is Often the Same*, Wash. Post (June 14, 2018).[33] On the record now before this Court, the FCC previously arrived at the same conclusion: "Competition within a local market motivates a broadcast television station to invest in better programming and to provide programming tailored to the needs and interests of the local community in order to gain market share." JA 123.

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[33] *Available at* https://wapo.st/2LBREAc.

Lack of local competition can have jarring effects. Consider the case of Johnstown, Pennsylvania, where "[n]ews stories broadcast on WJAC, the NBC affiliate in town, have appeared on nearby station WATM, the ABC affiliate. And many of those stories are broadcast on WWCP, the Fox station [t]here, as well." Farhi, *supra*. Inside a single studio, there are different sets equipped with backdrops for the different stations. *Id.* The same cast of anchors and reporters shift over to the appropriate backdrop when it is time to broadcast the news on that channel. Meanwhile, "there is little public acknowledgment of the relationship between the three stations—not even their websites clearly promote the connections to one another." *Id.* Such deception undermines trust in this purportedly local media. That, unfortunately, is the "trend that has spread across the country, as a small number of large holding companies are taking over local TV stations, often more than one in the same market." *Id.*

Consolidation and joint operating agreements also lead to less and less quality local news coverage and more recycled content. Residents of Rapid City, South Dakota noticed this trend when two stations owned by one of petitioners' *amici*, Gray Television, Inc., aired the "same interview with the same real estate agent about a mall's shuttered stores." *Id.* Youngstown, Ohio residents similarly may have noted that two stations owned by Industry Petitioner Nexstar, Inc. "recently aired identical segments about a councilman's outburst." *Id.*

Residents of Honolulu, Hawaii are also aware of this trend. Until 2009, four local television stations each produced their own news and programming. That year, a single production company, Hawaii News Now (currently owned by Gray Television), began airing the

exact same local news programming on two stations and producing content for a third. Suppl. App. at 35-37, *Prometheus Radio Proj. v. FCC*, No. 17-1107 (3d Cir. Apr. 12, 2019) (Decl. of Christopher Conybeare). Honolulu's two daily newspapers then merged to form the Honolulu Star-Advertiser, which entered into an exclusive content-sharing agreement with Hawaii News Now. *Id.* at 36. A study of the 2012 elections found that Hawaii News Now "rarely addressed issues in the races for the state legislature or city or county councils." *Id.* at 37. A local media leader explained in a declaration before the Third Circuit that, "[a]s a result of these transactions, the diversity, coverage, depth and quality of local news in Honolulu has significantly diminished." *Id.* at 36-37. Indeed, states inevitably suffer when quality, local journalism declines.

In a more recent example, Industry Petitioner Sinclair Broadcast Group, Inc., a telecommunications conglomerate, faced immense criticism when it ordered news anchors at dozens of its affiliates to read an identical, ideologically charged script. *See* Timothy Burke, *How America's Largest Local TV Owner Turned Its News Anchors into Soldiers in Trump's War on the Media*, Deadspin (Mar. 31, 2018) (depicting dozens of news anchors delivering the same speech on "the troubling trend of irresponsible, one sided news stories plaguing our country").[34] Political scientists studying newscasts at hundreds of stations have found that "Sinclair typically rolls back coverage of local politics when it buys a station." Farhi et al., *supra*. Local issues then receive short shrift, to states' and residents' detriment.

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[34] *Available at* https://bit.ly/3mgjCOt.

Cooperative newsgathering is not always bad. But where stations repackage the same programming and news stories, often without admitting to doing so, Americans are harmed by the lack of transparency and competition. Such developments mean "fewer sources of independent reporting about government, civic affairs, economic development and crime." *Id.*

D. The Internet has not proved an adequate substitute for declining local media.

Unfortunately, none of the negative effects caused by the loss of local media have been counteracted by the rise in online media outlets. As one researcher put it, "although [Americans] now operate in a high-choice media environment overall, they are simultaneously faced with a low-or-no choice local media environment." Simpson, *supra*, at 1. Although the Internet has facilitated a proliferation of, on the one hand, national news and, on the other, personal content sharing, "[i]t is as if the media system has lost a part of its connective tissue—a middle local layer bridging" the national and the personal—"resulting in a delocalized media ecosystem." *Id.* at 2.

In its 2016 Order, the FCC observed that "[w]hile we recognize the popularity of video programming delivered via . . . the Internet, and mobile devices, we find that competition from such video programming providers remains of limited relevance for the purposes of our analysis." JA 124. This is in part because, "[u]nlike local broadcast stations, [Internet video] providers are not likely to make programming decisions based on conditions or preferences in local markets." JA 124. Also troubling is the fact that around 10 percent of the U.S. population "lack[s] broadband access at speeds sufficient to stream or download video

programming available via the Internet," so local broadcasting remains a critical source of news for these Americans. JA 127-28. Therefore, while online content "may offer [some] consumers additional programming options in general, they do not serve as a meaningful substitute in local markets." JA 124.

Even the online effort to directly replace disappearing local news outlets has fallen flat. *See* JA 236 (Even "local, hyperlocal, and niche websites generally do not fill the role of local television stations or daily newspapers."). Take the example of the DC Business Daily: despite looking like a local business-focused publication covering Washington, D.C., the site actually belongs to a network of "Business Dailies" with nearly identical publications in every state. *See Homepage*, DC Business Daily.[35] The network's various Dailies are so cookie-cutter that the DC Business Daily's "About Us" section declares that its "mission is to be a key source of information about our *state's* business climate" and to "provide important data and facts about the *state's* economy." *About Us Washington D.C. Business Daily*, DC Business Daily (emphases added).[36] Meanwhile, the site's writers are clearly not local, as their articles appear on numerous states' "Business Dailies." *Compare* Trina Thomas, *Equinix Expands to Washington, D.C.*, DC Business Daily (Nov. 24, 2020),[37] *with, e.g.*, Trina Thomas, *Genuine Parts to Launch Lebanon Location*, Tenn.

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[35] *Available at* https://bit.ly/37g99OU (last visited Dec. 22, 2020).

[36] *Available at* https://bit.ly/2JUWpVa (last visited Dec. 22, 2020).

[37] *Available at* https://bit.ly/34nMeiG.

Business Daily (Nov. 26, 2020);[38] Trina Thomas, *POLYWOOD Expands Production Site to Syracuse*, Ind. Business Daily (Nov. 30, 2020).[39]

An investigation by the New York Times unearthed "a fast-growing network of nearly 1,300 websites that aim to fill a void left by vanishing local newspapers across the country." Davey Alba & Jack Nicas, *As Local News Dies, a Pay-for-Play Network Rises in Its Place*, N.Y. Times (Oct. 20, 2020).[40] But these sites hardly substitute for local news. Instead, the network generates "propaganda ordered up by . . . political operatives, corporate executives and public-relations professionals." *Id.* The network's "sites appear as ordinary local-news outlets, with names like Des Moines Sun, Ann Arbor Times and Empire State Today" and they purposefully present "articles about local politics, community happenings and sometimes national issues, much like any local newspaper." *Id.* But the New York Times found that, "behind the scenes, many of the stories are directed by political groups and corporate P.R. firms to promote" certain candidates or companies, or smear rivals. *Id.* That said, the sites hide their partisan financial ties—"[m]ost of the sites declare in their 'About' pages that they aim 'to provide objective, data-driven information without political bias.'" *Id.*

This network has also bought up and ruined existing local news outlets, like the Mount Vernon News, a local paper in Mount Vernon, Ohio. *Id.* After purchasing Mount Vernon News, its new owners fired much of the paper's staff, employed an Atlanta-based writer to

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[38] *Available at* https://bit.ly/2Wgg1p2.

[39] *Available at* https://bit.ly/34eFofv.

[40] *Available at* https://nyti.ms/2JUWmIY.

cover local happenings, and abdicated responsibility for covering local events, like "[w]hen a water line broke . . . , forcing the town's residents to boil their water." *Id.*

The Chicago Tribune's attempt to staff 90 websites and 22 weekly print editions covering small towns around Chicago with just 18 reporters also proved a cautionary tale. Sarah Koenig, *468: Switcheroo, Act II: Forgive Us Our Press Passes*, This Am. Life (June 29, 2012).[41] Under that system, "[m]ajor news stories . . . [were] completely ignored," and many of the sites were populated with nothing but "press releases, computer generated junk, and of course ads." *Id.*

These examples illustrate the point that research has consistently demonstrated: the Internet has not solved the problems caused by the loss of local news. *See* Gao, *supra*, at 447 ("[A]lternative sources of media, such as the internet, are not acting as sufficient substitutes for these local [media]."); Simpson, *supra*, at 2; Waldman, *supra*, at 231.

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Accordingly, states, localities, and their residents must rely on the FCC to continue to promote localism and safeguard diverse media ownership. Industry Petitioners' position, however, would read these public interest obligations out of the statute—and ignores the reality that consolidation and the ever-expanding Internet cannot replace true local media and the civic good it promotes.

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[41] *Available at* https://bit.ly/3qVvklg.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

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