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*“We Interrupt This Program: Media Ownership in the Digital Age”
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Chairman Cruz, Ranking Member Cantwell, and Members of the Committee, thank you for the invitation to testify today. I am grateful for the opportunity to discuss the important topic of media ownership in the digital age, and in particular, why it is both lawful and in the public interest for the Federal Communications Commission to repeal an obsolete ownership limit on local broadcast television stations that has limited their ability to compete in a media environment increasingly dominated by Big Tech social media platforms, national programmers, and other media giants who are not subject to the same regulatory constraints.

Consumers trust their local broadcasters to provide them with unbiased local news, weather, sports, and other programming reflective of the communities they serve, and indeed, these FCC licensees have a public interest obligation to serve their local communities. Given that, it is imperative that broadcasters not be subject to prescriptive, artificial limits on their ability to scale effectively to continue performing their important public mission and to act as a check on national programmers whose content does not always reflect the views of everyday Americans across the country.

My Background Promoting Media Ownership Reform

To provide the Committee with some context on my history with these issues: I am currently the Co-Chair of the Issues and Appeals practice at Wiley Rein LLP, and before that, in the first Trump administration, I served as General Counsel of the FCC under Chairman Ajit Pai and then-Commissioner (now Chairman) Brendan Carr.

During my tenure, the Office of General Counsel took seriously its obligation to stay within the limits of the authority that Congress delegated to the Commission while vigorously pursuing the public interest. I am proud that during my time at the FCC nearly all the Commission’s orders were upheld in court. Relevant here, that record includes a unanimous Supreme Court decision in *FCC v. Prometheus Radio Project* that affirmed our landmark media-ownership reforms repealing long-outdated rules on media cross-ownership that had been held up in litigation in the courts of appeals for decades.

As GC under Chairman Pai, I also defended the Commission’s authority to eliminate or modify an agency rule that restricts broadcasters from owning television stations that reach more than 39 percent of our national audience. This position is consistent with the agency’s longstanding bipartisan consensus that—in the words of three former Democratic permanent or acting FCC Chairs (Tom Wheeler, Mignon Clyburn, and Jessica Rosenworcel)—the FCC retains “authority to modify the national audience reach cap” under the Commission’s statutory mandate to “revisit its own rules and revise or eliminate them when it concludes such action is appropriate.” I continue to hold this view today.

The FCC Has the Legal Authority to Eliminate the National Cap

The reason why is simple. As Justice Thomas and the late Justice Scalia would advise us, to discern the scope of FCC authority, we must start with the text of the statute. And that text here is straightforward.

As the former FCC Chairs understood, Congress gave the Commission broad authority, “as public convenience, interest, or necessity requires,” to “[m]ake such rules and regulations . . . as may be necessary to carry out the provisions of” the Communications Act. Pursuant to this authority, the FCC starting in the 1940s enacted and subsequently modified several media ownership rules—including a version of the national ownership cap.

Congress has never disputed the agency’s authority to adopt those rules. Rather, on two occasions, Congress has modified the agency’s judgment on specific ownership limits while preserving the FCC’s authority to change those limits as competitive circumstances require.

In the Telecommunications Act of 1996, the most comprehensive reform to date of the Communications Act, Congress directed that the agency “modify its rules” governing media ownership in several respects, including by adjusting the national cap at the time from 25 percent to 35 percent. That “modify its rules” formulation is critical. As the D.C. Circuit held in 2002, that language preserved the FCC’s discretion to change or repeal the national cap, and if Congress intended to eliminate that discretion, “it need only have enshrined the 35% cap in the statute itself.”

Two years after that decision, and presumably aware of the court’s construction of the 1996 Act, Congress in an appropriations measure again directed the Commission to change its rule-based national ownership limit—which the FCC had by then modified to 45 percent—this time requiring the Commission to lower the limit to 39 percent. But in doing so, Congress did not enshrine the new cap in the statute, as the D.C. Circuit suggested it might do. Congress merely substituted the number “39” for “35” while keeping the “modify its rules” formulation in place.

In other words, Congress preserved the exact same language—“modify its rules”—that the D.C. Circuit had just determined was “only the starting point from which the Commission was to assess the need for further change.” And that was no accident. When Congress passed that provision, it already had before it two bills in the House and Senate that would have expressly codified the national cap, but it ultimately adopted neither of those proposals.

Congress knows how to remove Commission discretion over broadcast policy when it wants to. In the Radio Broadcasting Preservation Act of 2000, for example, Congress directed certain minimum distance separations between broadcast channels and told the FCC it “may not . . . eliminate or reduce” those distances, except “as expressly authorized by an Act of Congress enacted after the date of the enactment of this Act.” That could not be clearer. But Congress has never used any such express restrictive language in connection with broadcast ownership limits—not in 1934, 1996, 2004, or today. And there is a longstanding presumption against implied repeals of preexisting laws, especially in connection with appropriations bills.

Now, as a former FCC General Counsel, I am aware of how agencies under the old *Chevron* deference regime would try to drive trucks through any statutory ambiguity to enhance their power. To cite one example, prior administrations relied on *Chevron* to attempt to impose utility-style mandates designed for telephone monopolies on broadband Internet providers under the mantle of “net neutrality”—an effort that the FCC successfully reversed while I was GC. But *Loper Bright*, the case that overturned *Chevron*, recognized that there will be cases where Congress expressly delegates authority over a policy decision to a federal agency. And the same Court that decided *Loper Bright* also decided *Consumers Research v. FCC* one year later—which expressly reaffirmed that Congress delegated “significant discretion” to the FCC in the Communications Act to adopt rules “in the ‘public interest.’”

Ultimately, under *Loper Bright*, the search must be for the best reading of the statute. And here, there’s one best reading by a mile: Congress provided the FCC with the authority to adopt ownership rules, repeatedly ratified that authority, and consciously used a “modify its rules” formulation that preserves that authority for the future.

While critics of the FCC’s authority to modify the cap purport to invoke “textualism,” their arguments are oddly unmoored from the text. They argue that a provision removing the cap from mandatory review every four years means that the FCC cannot modify the cap at all. But Congress did not say that. They argue that a provision prohibiting the FCC from exercising its separate forbearance authority means that Congress cannot exercise its rulemaking or waiver authorities. But Congress did not say that. They argue that a provision requiring companies in certain cases to divest enough stations to come into compliance with the cap within two years means the FCC cannot further modify the cap. But Congress did not say that either.

To quote Justice Alito, these arguments amount to “pirate ship” textualism—a method of interpretation that “sails under a textualist flag” but seeks to “update” a statute rather than interpret it. That is impermissible. Especially after *Loper Bright*, neither the FCC nor the courts may draw strained inferences from neighboring provisions in a statute to reach a policy outcome preferred by certain parties. To the contrary, the best reading of the text Congress actually adopted must prevail. Here, that means affirming the FCC’s longstanding authority to modify the national ownership cap.

Eliminating The Cap Will Enhance Competition In The Media Marketplace

The FCC not only *can* modify the national television ownership cap—it *should* do so.

When I was at the FCC, I saw firsthand how antiquated rules based on outdated assumptions can harm innovation, investment, and competition in an ever-evolving technological landscape. Take “net neutrality,” for example. Proponents of the Obama-era “net neutrality” rules argued that we should apply the Communications Act’s Title II framework—designed for the age of rotary phones and one major long-distance telephone network—to the modern broadband Internet economy. As we explained to the D.C. Circuit, those rules “hampered broadband innovation, investment, and deployment” and were unnecessary given that “transparency, market forces, and enforcement of existing antitrust and consumer protection laws” adequately protected

against anticompetitive or other harmful conduct in the broadband industry.

Much the same could be said for the national cap today. When the FCC first adopted a similar rule in the 1940s, and even under the modern incarnation of the rule adopted in 1985, most Americans still got their news and other programming from one of the so-called “Big Three” broadcast networks—CBS, NBC, and ABC. The FCC intended that limits on national audience reach would help protect viewpoint diversity and constrain economic concentration by ensuring that then-dominant media voices could not monopolize the marketplace.

But advances in technology have now turned that original rationale on its head. Those networks increasingly distribute programming through their own streaming platforms online, none of which are subject to the FCC’s audience reach limitation, rather than through their affiliated broadcast stations. Ironically, then, a rule originally intended to constrain the power of large networks now provides them with a competitive advantage over local stations that cannot scale as effectively or have the same bargaining power to distribute content via major online platforms.

Moreover, beyond the major networks, today’s media landscape is littered with options for eyeballs and clicks that the FCC could not have imagined when it first started adopting ownership rules. First, there are the cable and satellite providers who offer pay-TV packages. Then, for the increasing number of cord-cutting Americans, there is an ever-expanding array of streaming services, social media networks, and virtual MVPDs like YouTube TV. Indeed, for the first time last year, streaming viewership surpassed both broadcast- and cable-television viewership combined. Meanwhile, social media recently overtook television as the principal place where more than half of Americans obtain their news.

These other media outlets face no similar arbitrary “audience reach limitation” like local broadcasters do. Imagine a rule that required Hulu or Netflix to limit subscribers to 39% of the public, or that cut off Facebook users at 39% of the nation’s population. According to recent Pew surveys, those services are currently used by 52%, 72%, and 68% of Americans, respectively. A similar ownership cap for digital media would require each of those services to divest consumers today. Yet local broadcast stations have operated under an equivalent cap for decades.

Broadcast stations do have one advantage—they remain the source of news and information that Americans trust the most. Local newsrooms continue to employ investigative journalists and content creators whose mission is to provide unbiased reporting on the day’s events—freed from the algorithmic biases and politicized environments that infect much modern online social media. As Trinity Broadcasting Network, a Christian television broadcast licensee, put it in a comment submitted to the FCC supporting repeal of the national cap, “free, over-the-air television remains one of the few distribution platforms where religious expression can reach audiences without gatekeepers, paywalls, or platform bias.”

Indeed, as FCC licensees using public airwaves, local broadcasters have a public interest obligation to serve their local communities. Precisely because of their special obligations and the unique place they occupy in the media ecosystem, broadcasters should not be encumbered by additional, arbitrary limits on their ability to compete with less regulated alternatives.

Eliminating the national ownership cap would provide stations with the flexibility to infuse additional capital into their operations and take advantage of economies of scale that could help them compete more effectively with today's modern media behemoths. While critics claim that additional station consolidation would threaten broadcast's local focus and mission, history tells a different story. The FCC has repeatedly concluded in record-based proceedings that stronger group ownership can benefit local programming. Indeed, to cite one recent example, when Nexstar acquired Tribune, the post-merger entity produced *more* local content than before, not less.

In any event, the alternative if the status quo continues is not a vibrant, thriving local news economy. The alternative is that broadcast remains an endangered species heading toward extinction. Local newspapers have already shuttered at exponential rates. Eliminating artificial media ownership rules imposed by the government—including the national cap—at least gives broadcast stations a chance to adapt and thrive in the new media environment under the same competition rules that apply to everyone else. The public interest, which the FCC is charged to protect by altering or repealing its rules as appropriate when competition evolves, demands no less.

Repeal Would Enhance Viewpoint Diversity—Including Conservative Voices

Some proponents of retaining the national cap argue that empowering local broadcasters would somehow hurt conservative voices in media. These arguments rely primarily on daisy-chain reasoning about how particular station groups might exert greater influence in persuading cable operators to carry certain programming affiliated with the station group. To the extent that occurs, the FCC has deemed such practices presumptively reasonable and there would be no political valence to them. But in any event, repealing the cap would benefit viewpoint diversity, including for conservatives.

Eliminating the national cap would empower station groups by enabling them to scale up and bargain more effectively with national programmers. That means affiliate groups that represent a broad cross-section of Americans would have more leverage to demand network programming that reflects conservative and moderate values—not the predominantly progressive politics of content creators from large coastal cities. Similarly, affiliate groups could bargain for more rights to “preempt” national programming in favor of local content, or more local control over what syndicated programming to air in what time slots. This too could exercise a gravitational pull on networks, which may be more inclined to offer programming that appeals to a broader audience.

A similar dynamic would play out on streaming media. Right now, the national broadcast networks use their leverage to obtain unfavorable terms from local stations for carriage rights on streaming services and virtual TV platforms. If station groups were allowed to expand unencumbered by the national cap, local broadcasters would be better positioned to obtain fair compensation for their content and bargain for retransmission rights on virtual platforms.

By contrast, who benefits from maintaining the status quo? It's the Big Tech and Big Media companies who dominate social media and other online platforms and whose politics lean decidedly liberal. If the content these companies produce turns a profit, it should be because it resonates with Americans, not because arbitrary government mandates crowd out potentially more popular options or allows these companies to acquire local content for pennies on the dollar.

As a case in point, consider the history of the FCC's Fairness Doctrine. Originally conceived as a way to ensure broadcasters would present balanced points of view on scarce public airwaves, it ultimately became weaponized in the 1960s as a means to silence conservative voices in radio. Following widespread public criticism, the rule's repeal in the 1980s led to an explosion in conservative talk show programs, led by Rush Limbaugh, that set the model for the conservative voices in cable news and online influencers that we have today.

The national television ownership cap has followed a similar trajectory. While conceived as a means to constrain the major networks, it now empowers them to the detriment of voices in local broadcasting. Repeal could help level the playing field and restore more balance in how television reports on the critical political and cultural issues of the day.

Any Concerns About Competition Or Localism Can Be Addressed Case-by-Case

Even if one believed that larger station groups would present competition or localism concerns in certain cases, it is quite an inferential leap—over a yawning chasm—to think that the solution is a prescriptive, across-the-board ownership limit pegged to 39 percent (a number that reflects a snapshot of decades-old market realities). One searches in vain for plausible defenses of ossifying for all time this precise Delphic ownership limit.

Eliminating the cap would simply level the playing field so that broadcasters are subject to the same competitive constraints as other companies throughout the media ecosystem. That does not mean no oversight over future broadcast deals. To the contrary, the Antitrust Division of the Department of Justice would still scrutinize deals that meet certain economic thresholds for compliance with competition laws—just as it does in every other sector of the economy. The Federal Trade Commission and related state authorities would continue to police unfair and deceptive practices. Any deals or business practices that are anticompetitive could still be enjoined, either by the government or in private lawsuits.

Indeed, because broadcasters are FCC licensees charged with operating in the public interest, any broadcast deals would have to undergo an additional independent review at the Commission. No other private companies to my knowledge undergo two layers of federal competition review, but that will continue to happen for FCC licensees, regardless of whether prescriptive ownership rules remain in place. That is all the more reason why they shouldn't. And because the FCC's Congressional public interest mandate sweeps broader than concerns about competition, the FCC could continue to examine the effects of proposed transactions on localism and viewpoint diversity, two other areas of concern for national-cap proponents.

In short, good deals that would otherwise be blocked by the 39 percent cap could get approved, although only after vigorous review, while bad deals could still be blocked. Or as President Trump said this past weekend, “[l]etting Good Deals get done” will result in “more competition, and at a higher and more sophisticated level,” with the large national networks that currently dominate the landscape for TV programming.

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In closing, I want to thank you again Chairman Cruz, Ranking Member Cantwell, and Members of the Committee, for holding this important hearing and for the opportunity to testify. I look forward to answering your questions.