WRITTEN TESTIMONY OF CHRIS RUDDY
CEO, NEWSMAX MEDIA
BEFORE THE SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

Mr. Chairman, Ranking Member Cantwell, and Members of the Committee:

My name is Chris Ruddy. I am the founder and Chief Executive Officer of Newsmax Media, Inc. Thank you for inviting me to testify today on the important issue of broadcast media ownership.

Newsmax reaches more than 50 million Americans on a regular basis through our television channels, websites, social media, and other platforms. *Forbes* has described Newsmax as a "news powerhouse," and the Reuters Institute recently ranked Newsmax among the top 12 news brands in the United States.

We have also become a significant—and to many, surprising—player in cable television. When we launched the Newsmax cable channel in 2014, few predicted our success, and many predicted our failure.

Yet today, I appear before you as the CEO of the nation's fourth-highest-rated cable news channel. In 2025, Newsmax ranked # 7 among all cable channels, according to Nielsen.

Our success is remarkable precisely because the current regulatory framework at the FCC and across the federal government overwhelmingly favors large media conglomerates and effectively blocks independent media voices—whether from the right or the left.

Of the top 50 cable channels, Newsmax is the only one that is owned and operated by an independent media company. Every other channel in the top 50 is owned by, created by, or affiliated with a major media conglomerate or broadcast network.

Think about that. In the greatest country in the world, there is only one independently owned media company in the top 50 cable channels—and that company is Newsmax.

Newsmax's singular success does not prove the system works. It proves the system is broken—and that this broken system poses serious risks to free enterprise, competition, and ultimately our democracy.

Newsmax owns a cable network and does not hold any broadcast television licenses. Yet we are directly affected by broadcast ownership consolidation because large station groups wield enormous leverage over cable and pay-TV operators through retransmission consent fees—commonly known as retrans fees. These station groups have the power to dictate what cable channels are carried on cable systems.

We see this clearly with Nexstar, which owns an enormous number of ABC, CBS, and NBC stations. If cable operators want access to those local stations, they must pay Nexstar high retrans fees. If they refuse, Nexstar can—and does—pull its stations, leaving viewers in the dark.

Nexstar also insists that cable operators carry its little-watched cable news channel, NewsNation. Last year, Newsmax delivered at least five times the ratings of NewsNation, yet cable operators were forced not only to carry NewsNation, but to pay license fees significantly higher than those paid to Newsmax.

We hear a great deal about the free market. But this is not the free market. This is market leverage and manipulation used to harm consumers and suppress competition—specifically competition from independent voices like Newsmax.

The Committee is now reviewing the national television ownership cap, a rule that remains one of the last meaningful protections for competition and diversity in the broadcast and cable ecosystem.

Congress established the national ownership cap in Section 202(c)(1)(B) of the Telecommunications Act of 1996. When the FCC later attempted to raise that cap, Congress responded decisively. In the Consolidated Appropriations Act of 2004,

Congress set the cap at 39% and explicitly stripped the FCC of any authority to alter the cap. Only Congress—not the FCC—has the authority to change it.[iii]

Nevertheless, the FCC subverted congressional intent by reviving the so-called UHF discount, claiming UHF stations reach only half the households in a market. In reality, UHF stations today reach 100 percent of households.

This regulatory sleight of hand allowed Nexstar, in 2019, to acquire Tribune Media's stations and expand its national reach to approximately 70 percent of the U.S. television market—in clear violation of the law.

The broadcast industry has watched Nexstar's success and now seeks to replicate it in a relentless pursuit of power and profit, to the detriment of the public interest.

The national ownership cap was first instituted at the FCC under President Ronald Reagan, who understood the danger of allowing major networks—ABC, CBS, and NBC—to own stations in every market. At that time, the cap was set at 25 percent.

Over the years, under pressure from the broadcast industry—not the public—the cap was gradually raised to 39 percent, where it remains today.

President Reagan intuitively understood that if major networks controlled stations in every market—especially in swing states—they could easily influence political outcomes. That would not be good for the country, and it certainly would not be good for Republicans.

Over time, Democrats and Republicans alike reached a bipartisan consensus that the public interest is best served by limiting national ownership and preserving competitive, locally owned television markets.

That principle remains valid today. Despite the rise of Big Tech and other media platforms, local television stations continue to play a critical role in providing community news.

With the collapse of local newspapers and the gutting of local radio due to prior consolidation, television now stands largely alone as the primary source of local news.

Multiple studies confirm this reality:

- A TVB study found that local broadcast news is the number-one source of news overall, with 9 out of 10 Americans watching at least once a week.
- A Knight Foundation study reached the same conclusion.
- A Pew Research study found that 66 percent of Americans closely follow local television news.

Some argue that Big Tech fills the local news void. It does not. Big Tech does not generally produce original local reporting. Most of the local news stories appearing in my online news feeds originate with local television stations.

When you raise the national ownership cap, you are effectively saying that two or three corporations should eventually own most or all television stations in America—and by extension, control local news. That is what consolidation truly means.

Lifting the cap is also about big money.

No one on Main Street walks up to a Senator and says, “Please lift the cap so ABC can make a few more billion dollars this year.”

Make no mistake: a single broadcast television license is a license to mint money. Even today, stations can be enormously valuable without airing much programming at all, because businesses will pay fortunes simply to acquire the license.

It is understandable that license holders want to own more licenses. More licenses mean more leverage, more retrans fees, and higher profits.

By cutting costs—especially local news operations—and syndicating programming across multiple markets, large station groups can further boost profits. Less competition also allows them to raise advertising rates, both locally and nationally.

Then there is the real windfall: retransmission fees. Today, retrans fees account for more than 50 percent of broadcast television revenues on average, and for some large groups, as much as 70 percent.

The more highly-rated network affiliates a company owns, the more leverage it has to demand higher retrans fees from cable operators.

Nexstar is again instructive. In 2010, it was a modest Texas-based station group. After the FCC opened the door to consolidation through waivers and the UHF discount, Nexstar embarked on a massive acquisition spree. Today, it owns over 200 stations across 116 markets.

Since 2010, retrans fees across the television industry have risen by over 2,000 percent. If the price of a gallon of milk had increased at the same rate, it would cost more than $69 today.

This consolidation has been extraordinarily profitable. In 2015, Nexstar reported EBITDA of $302 million. By 2024, EBITDA had grown to $1.8 billion—an increase of nearly 500 percent.[iii]

Despite frequent claims of financial distress, major broadcasters' financial results tell a different story. Sinclair, Scripps, and Tegna have all recorded double-digit profit gains over the past decade and all show healthy EBITDA profits.[iv]

I have no personal animus toward Nexstar or other broadcasters. Nexstar's CEO, Perry Sook, is clearly a talented businessman who has delivered strong returns for shareholders.

My concern is that the FCC has allowed an excessive concentration of media power over a limited number of public broadcast licenses—licenses that are supposed to be operated in the public interest, with an emphasis on competition, localism, and diversity of viewpoints.

By failing to uphold its mandate and by ignoring clear congressional law, the FCC has harmed consumers and the public.

Cable bills have risen by approximately 100 percent over the past decade, driven largely by soaring retrans fees and forced bundling. If the FCC continues to undermine the law, consumers will pay the price.

You will hear claims that broadcasters are suffering and need relief through consolidation. The truth is that these companies are quite profitable—but they took on massive debt betting that the cap would be eliminated.

Now, as they refinance that debt at higher interest rates, they seek regulatory relief to protect their margins.

We have seen this movie before with radio consolidation following the Telecommunications Act of 1996. Today, three conglomerates control most major radio licenses, local programming has been hollowed out, and those companies are burdened by unsustainable debt.

The television industry's messaging has become extreme—claiming consolidation somehow saves local news by cutting it, branding critics as radicals, and insisting that allowing two or three companies to own most stations is "deregulation" and "competition."

We know that after Nexstar merged with Tribune, profits surged while employment dropped from 16,193 employees to 12,142 – a 25% decrease – in just one year. In 14 markets, Nexstar now operates two highly rated stations but has combined their local newsrooms to cut costs.

In its proposed merger with Tegna, Nexstar projects more than $300 million in immediate cost savings, including $135 million from increased retrans fees and $165 million from local station savings—typically that's achieved through newsroom consolidation.

I am a common-sense conservative and a believer in free markets. But when the government grants a limited number of licenses in every market that marketplace is a closed one. That's why the public has a right—and a duty—to ensure those licenses serve the public interest.

Newsmax is not alone. CPAC and the National Religious Broadcasters have both filed objections with the FCC, warning that lifting the cap would harm consumers and suppress diversity of viewpoints.

It is a mistake for conservatives to claim allegiance to free markets while endorsing consolidation that destroys competition, stifles innovation, and drives consumer prices higher.

Just last week, the Senate Judiciary Committee—Republicans and Democrats alike—recognized that allowing Netflix to merge with Warner Bros. would stifle competition and harm consumers.

There is room for reasonable accommodation: targeted waivers, limited consolidation in small markets, and a review of whether TV affiliates are receiving fair retrans fees from the big networks.

But Congress should insist that any decisions on consolidation or cap waivers be voted on by the full Commission, not quietly approved at the bureau level.

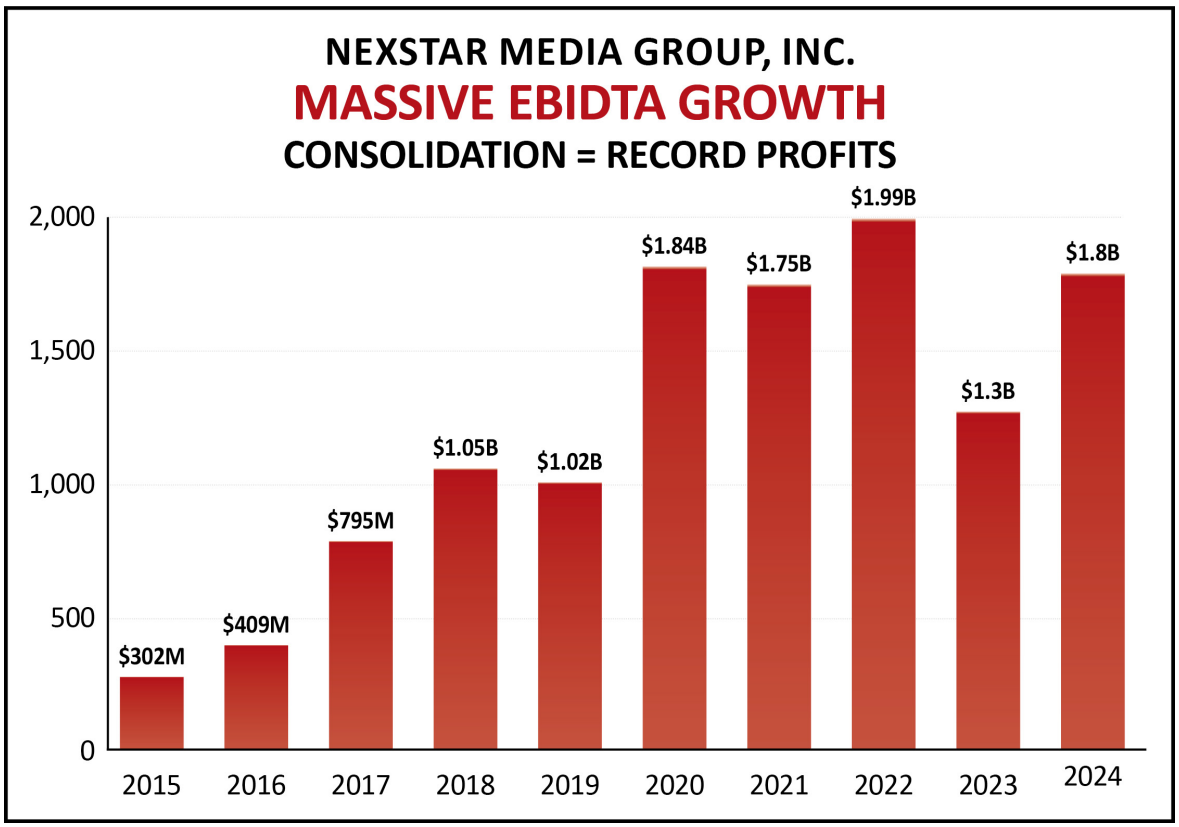
Let me be absolutely clear: the television industry is far too valuable to be handed over to a small number of conglomerates that are unaccountable to the public.

Congress set the cap. Only Congress should change it—after careful review. Newsmax stands ready to participate constructively in that process.

---

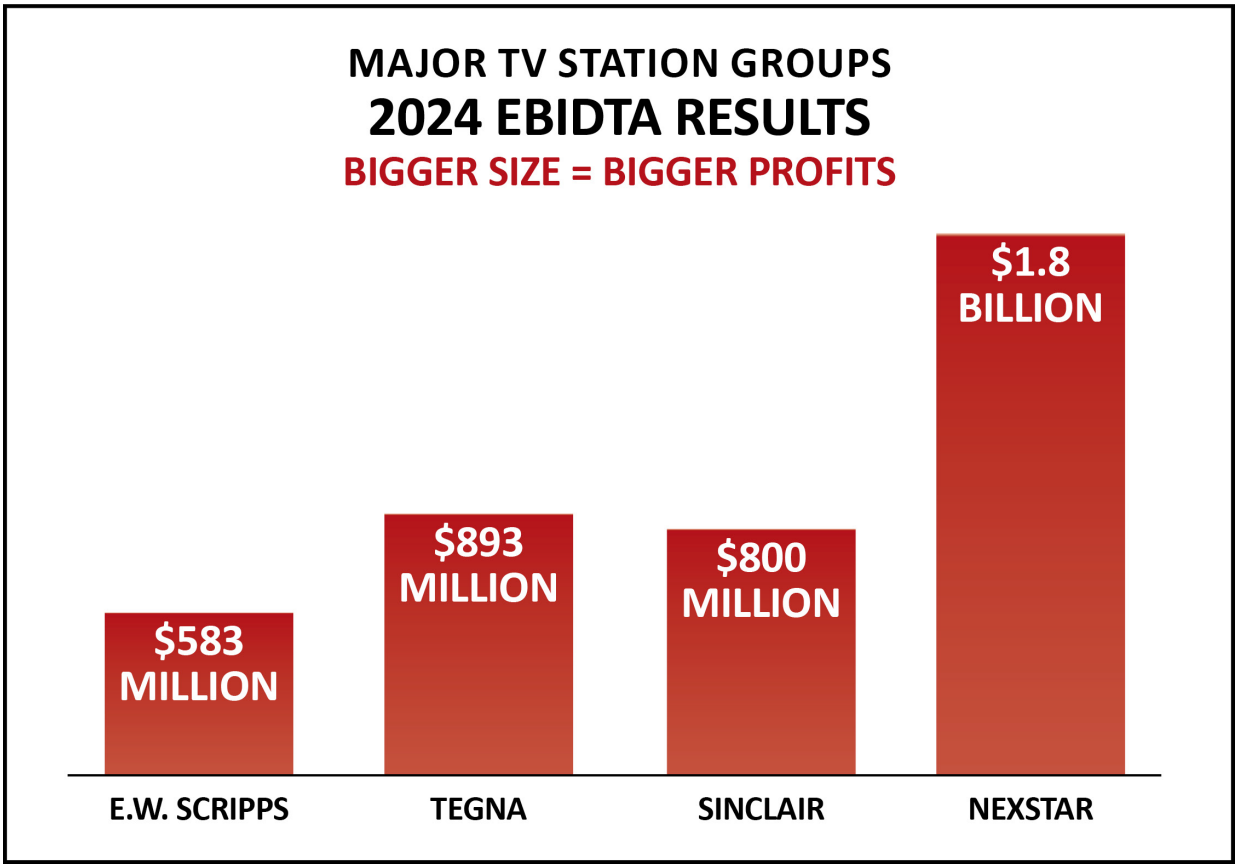
[i] https://acrobat.adobe.com/id/urn:aaid:sc:US:ae417844-f51a-4992-a4f8-4f84f51347c5

[ii] https://www.fcc.gov/ecfs/document/1103066222175/1


NEXSTAR MEDIA GROUP, INC.
MASSIVE EBIDTA GROWTH
CONSOLIDATION = RECORD PROFITS
2,000
1,500
1,000
500
0
$302M
$409M
$795M
$1.05B
$1.02B
$1.84B
$1.75B
$1.99B
$1.3B
$1.8B
2015
2016
2017
2018
2019
2020
2021
2022
2023
2024

iii

iv


MAJOR TV STATION GROUPS
2024 EBIDTA RESULTS
BIGGER SIZE = BIGGER PROFITS
$583 MILLION
$893 MILLION
$800 MILLION
$1.8 BILLION
E.W. SCRIPPS
TEGNA
SINCLAIR
NEXSTAR

Local TV News Critical for Conservatives

Keep TV Ownership Cap, Protect Against Big Networks

FACT SHEET

TVB Study:

- Local broadcast TV news is **the #1 source for news**, not only for local news, but for all news in general.
- **9 out of 10 watch local broadcast TV** news at least once a week with most of these watching daily.
- Local broadcast TV assets are the **most trusted news source among all platforms** measured. Social media is the least trusted.

Knight Foundation Study:

- TV News local affiliates is **the #1 source for local news for Americans** [broadcast news affiliates (33%), local radio (15%), and local newspapers (14%) digital media (13%)]
- **Republicans** are more likely to **trust local news (29%) t**o national news (5%).
- More voters use local news to make informed **voting decisions (44%)** than those who use national sources (22%)

Pew Study 2024:

- **66% of Americans watch local news** closely or very closely.
- **85% view local news** outlets as "at least somewhat important" to their community's well-being.

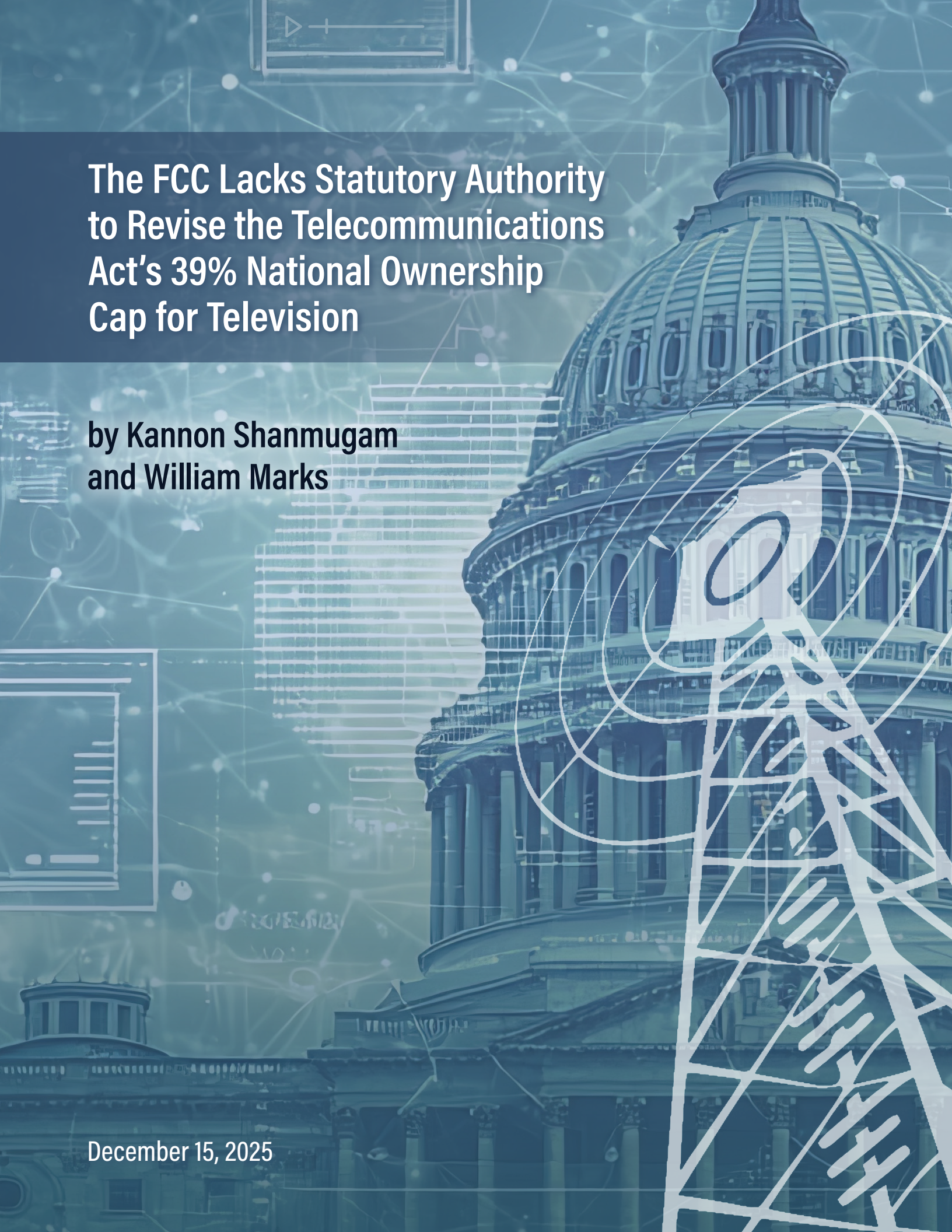
See Sources:

https://www.tvb.org/research-measurement-analytics/research/2024-local-broadcast-tv-news-study/

https://www.pewresearch.org/journalism/2024/05/07/attention-to-local-news/

https://www.pewresearch.org/journalism/2024/05/07/americans-changing-relationship-with-local-news/

https://knightfoundation.org/articles/local-news-most-trusted-in-keeping-americans-informed-about-their-communities/



The FCC Lacks Statutory Authority to Revise the Telecommunications Act's 39% National Ownership Cap for Television

by Kannon Shanmugam
and William Marks

December 15, 2025

The FCC Lacks Statutory Authority to Revise the Telecommunications Act's 39% National Ownership Cap for Television

by Kannon Shanmugam and William Marks[1]

1 Kannon Shanmugam is chair of the Supreme Court & Appellate Litigation Practice at Paul, Weiss, Rifkind, Wharton & Garrison LLP. He served as Assistant to the Solicitor General of the United States from 2004 to 2008 and as a law clerk to Supreme Court Justice Antonin Scalia. William Marks is a partner in the Supreme Court & Appellate Litigation Practice at Paul, Weiss, Rifkind, Wharton & Garrison LLP. The authors gratefully acknowledge the support of several media entities and trade associations in developing this legal analysis, including State Cable & Broadband Associations of Colorado, Florida, Indiana, Louisiana, Michigan, Minnesota, New England, Pennsylvania, Virginia, and Washington; Newsmax TV; The American Television Alliance (whose members include ACA Connects, DIRECTV, DISH Network, and Optimum); and NTCA–The Rural Broadband Association. All views expressed in this paper are our own.

Table of Contents

I. Introduction

The Federal Communications Commission (FCC) is considering whether to raise or eliminate the National Television Multiple Ownership Rule.[2] Congress initially mandated the rule in the Telecommunications Act of 1996, as amended by the Consolidated Appropriations Act of 2004. The Act now provides that the FCC "shall modify its rules for multiple ownership" to ensure that no single entity owns television stations reaching more than 39% of households in the United States.[3] Consistent with that statutory directive, the FCC's current rule provides that "[n]o license for a commercial television broadcast station shall be granted, transferred or assigned to any party" if doing so would result in an entity having "an aggregate national audience reach exceeding thirty-nine (39) percent."[4]

> **"We conclude in this paper that the FCC lacks authority to revise, eliminate, or waive the 39% cap."**

Various stakeholders have made serious policy arguments about why the FCC should or should not revise, eliminate, or waive the 39% cap. But there is a threshold legal question: whether the FCC has the legal authority to do so. We take no position on whether revising or eliminating the 39% cap is good or bad policy. We consider only whether the Telecommunications Act of 1996, as amended in 2004, deprives the FCC of authority to modify the 39% cap set by Congress.

We conclude in this paper that the FCC lacks authority to revise, eliminate, or waive the 39% cap. There are several reasons why. To begin with, that conclusion follows from the statute's text. In the 2004 amendments to the Telecommunications Act, Congress directed the FCC to impose the 39% cap on national audience reach and removed that cap from the FCC's periodic review of ownership rules. In addition, Congress vested the FCC with express discretion to alter other ownership rules but omitted the discretion-conferring language with respect to the national-ownership limitation. The revised Telecommunications Act also expressly refers to "the 39 percent national audience reach limitation" no less than four times. Each textual signal points in the same direction—and together, overwhelmingly so: Congress intentionally set the cap at 39% and made clear the FCC

2 *See* National Television Multiple Ownership Rule, 90 Fed. Reg. 30032 (July 8, 2025).

3 *See* 47 U.S.C. § 303 note.

4 47 C.F.R. § 73.3555(e)(1).

has no authority to alter that cap. The Supreme Court's recent cases concerning the major-questions doctrine confirm that conclusion, strongly suggesting that Congress would have spoken more clearly if it intended to vest the FCC with unbridled authority over the national-ownership cap in a manner that fundamentally reshapes the nationwide broadcasting market.

The structure of the Telecommunications Act reinforces our interpretation. In addition to imposing and repeatedly referring to a 39% cap, the 2004 amendments to the Act prohibit the FCC from forbearing enforcement of that cap; give entities two years to come into compliance before requiring divestiture; and, as noted, remove the 39% cap from the FCC's periodic review. Those provisions make sense only if the 39% cap is permanent. The statutory and regulatory history against which the 2004 amendments were enacted further demonstrate that Congress sought to provide regulatory stability by permanently enshrining a 39% cap.

Finally, fundamental principles of administrative law cast substantial doubt on the FCC's claimed authority to revise, eliminate, or waive the 39% cap. As a preliminary matter, following the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, the agency's interpretation of the Act will receive no judicial deference.[5] In fact, courts may be skeptical of the FCC's current assertion of discretion to alter the 39% cap in light of the FCC's previous representations about the cap's nondiscretionary nature. And the FCC cannot resort to its general rulemaking authority, or its regulations allowing it to waive its own rules, to revise, eliminate, or waive the 39% cap because Congress enacted legislation specifically depriving the FCC of any authority to do so.

Opponents of the current 39% cap offer various arguments in favor of reform, including that the 2004 amendments retained certain language from the 1996 Act; that the FCC may rely on its general rulemaking authority to revise, eliminate, or waive the cap; and that the statute should not be read impliedly to repeal the FCC's pre-2004 authority to review the cap. But as we explain, each of those arguments contravenes the language and structure of the statute.

5 603 U.S. 369 (2024).

II. Background

We begin with an overview of the history of the FCC's efforts to regulate national broadcast ownership and Congress's repeated interventions to limit the agency's discretion in this area. The Communications Act of 1934 established the FCC and vested it with broad authority to "regulat[e] interstate and foreign commerce in communication by wire and radio" "as public convenience, interest, or necessity requires."[6] Seven years later, in 1941, the FCC asserted statutory authority to regulate and to license commercial television broadcasting.[7] In extending its regulatory authority, the FCC not only licensed stations but also decided to regulate, among other things, multiple ownership: a person or entity's ability to "own, operate, or control more than one television broadcast station."[8] The agency justified an ownership cap as necessary to "foster competition," provide "distinct and separate" viewpoints from different parts of the nation, and avoid "concentration of control."[9] Initially, the FCC prohibited any "person or group" from operating more than "one television station in a given area" and three "scattered" television stations "for the main television band."[10] But by 1944, the FCC raised the cap, limiting any entity from controlling more than five television stations in common ownership.[11]

> **"... the FCC decided to raise the ownership cap to 12 television stations but to phase out the limitation altogether within six years. Congress quickly blocked the FCC from implementing this change that same year."**

In the decades that followed, the FCC continued to regulate ownership through a numerical cap set by rule.[12] In 1954, the FCC raised the numerical cap to prohibit any entity from controlling more than seven broadcast television stations.[13] The so-called "Seven Station Rule" remained in force for approximately three decades. In 1984, out of a recognition of the evolving broadcast landscape, the FCC decided to raise the ownership cap

6 Pub. L. No. 73-416, §§ 1, 303, 48 Stat. 1064, 1064, 1082 (1934).

7 *See* Broadcast Services Other Than Standard Broadcast, 6 Fed. Reg. 2282, 2282 (Apr. 30, 1941); Federal Communications Commission, Seventh Annual Report 29 (1941) ("Seventh Annual Report").

8 6 Fed. Reg. at 2284-2285.

9 *Id.* at 2285.

10 Seventh Annual Report 34.

11 *See* Rules Governing Broadcast Services Other Than Standard Broadcast, 9 Fed. Reg. 5442, 5442 (May 23, 1944).

12 *See* Dana A. Scherer, Congressional Research Service, R45338, Federal Communications Commission (FCC) Media Ownership Rules 30 (July 1, 2021).

13 *See* Multiple Ownership of Television Broadcast Stations, 19 Fed. Reg. 6099, 6102 (Sept. 17, 1954); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

to 12 television stations but to phase out the limitation altogether within six years.[14] Congress quickly blocked the FCC from implementing this change that same year.[15]

Following Congress's intervention, the FCC took "a more cautious approach."[16] It retained the 12-station numerical limit on national multiple ownership and eliminated the sunset provision.[17] And, for the first time, the FCC promulgated a percentage cap prohibiting any entity from "acquir[ing] cognizable interests in TV stations" reaching more than "25 percent of the national audience," *i.e.*, 25% of American households containing a television.[18]

In the Telecommunications Act of 1996, Congress eliminated the FCC's numerical limit on station ownership.[19] As to the percentage cap, Congress provided that the FCC "shall modify its rules for multiple ownership … by increasing the national audience reach limitation for television stations to 35 percent."[20] Congress also directed the FCC to "review" "all of its ownership rules biennially" and "determine" whether to "repeal or modify any regulation it determines to be no longer in the public interest."[21]

Consistent with Congress's directive, the FCC eliminated the numerical limitation and raised the national-ownership cap from 25% to 35%.[22] Several years later (and after instruction from Congress to complete its review[23]) the FCC issued its first biennial review, deciding to retain without modification the 35% ownership cap.[24] The FCC concluded that it should take additional time to observe the effects of Congress's changes before making additional changes of its own.[25]

Media organizations petitioned for review to challenge, among other things, the FCC's decision to retain the 35% cap. In a decision captioned *Fox Television Stations, Inc. v. FCC*, the D.C. Circuit granted the petitions, held that the FCC's decision to retain the 35% cap was invalid, and remanded to the agency for further

14 *See* Amendment of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 49 Fed. Reg. 31877, 31891 (Aug. 9, 1984).

15 *See* Second Supplemental Appropriations Act, Pub. L. No. 98-396, § 304, 98 Stat. 1369, 1423 (1984).

16 Multiple Ownership of AM, FM and Television Broadcast Stations, 50 Fed. Reg. 4666, 4672 (1985).

17 *See id.* at 4667.

18 *Id.* at 4666. Although it is beyond the scope of this white paper, the FCC's 1984 rule also adopted a 50% discount for owners of stations broadcasting in the Ultra-High Frequency (UHF) spectrum for purposes of calculating this audience reach cap. *Id.* The UHF discount continues to be in effect.

19 *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(c)(1)(A), 110 Stat. 56, 111 (1996).

20 § 202(c)(1)(B), 110 Stat. at 111.

21 § 202(h), 110 Stat. at 111-112.

22 *See* Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations), 61 Fed. Reg. 10691, 10691 (Mar. 14, 1996).

23 *See* Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 5003, 113 Stat. 1501, 1501A-593 (1999).

24 *In re* 1998 Biennial Regulatory Review, Biennial Review Report, 15 F.C.C. Rcd. 11058, 11073 (2000).

25 *Id.* at 11072-11075.

consideration.[26] Specifically, the D.C. Circuit held that the FCC's "wait-and-see approach" was improper.[27] The court reasoned that the Telecommunications Act expressly required the FCC to review "all of its ownership rules" biennially, and it observed that Congress did not "enshrine[] the 35% cap in the statute itself."[28] The FCC was thus required to assess whether the 35% ownership cap was "necessary in the public interest" either "to safeguard competition or to enhance diversity."[29] Because the FCC had not done so, the decision to retain the 35% cap was invalid.[30]

On reconsideration and as part of its 2002 biennial review, the FCC announced its intention to increase the ownership cap from 35% to 45%.[31] The FCC's decision to raise the cap sparked significant public debate about how such a change would affect localism, competition, and consolidation.[32] Numerous stakeholders petitioned for review to challenge the new 45% cap in federal court, and after the consolidation of their petitions, the Third Circuit stayed implementation of the 45% cap.[33]

As these developments unfolded, Congress considered potential reforms to the FCC's ownership rules.[34] Those efforts culminated in the enactment of amendments to the Telecommunications Act of 1996 in the 2004 Consolidated Appropriations Act.[35] Congress enacted four changes related to the national-ownership cap[36]:

- *First*, Congress directed that "[t]he Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations … by increasing the national audience reach limitation for television stations to 39 percent."[37]

- *Second*, Congress required any person or entity that "exceeds the 39 percent national audience reach limitation" through the acquisition of additional broadcast licenses to divest the excess audience reach in order "to come into compliance with such limitation" within two years.[38]

---

26 *See* 280 F.3d 1027, 1033 (D.C. Cir.), *modified*, 293 F.3d 537 (D.C. Cir. 2002).

27 *Id.* at 1042.

28 *Id.* at 1033-1034; *Fox Television Stations*, 293 F.3d at 540 (modified opinion).

29 *Fox Television Stations*, 280 F.3d at 1043 (original opinion).

30 *See id.*

31 *See* Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, 68 Fed. Reg. 46286, 46328 (Aug. 5, 2003).

32 *See* Charles B. Goldfarb, Congressional Research Service, RL1925, FCC Media Ownership Rules: Current Status and Issues for Congress, at CRS-25 to CRS-27 (2007); *see also* U.S. Government Accountability Office, GAO-09-330R, Telecommunications: Preliminary Information on Media Ownership 1 (2007) (noting the FCC's order increasing the cap to 45% generated more than 500,000 public comments).

33 *See Prometheus Radio Project v. FCC*, No. 03-88, 2003 WL 22052896 (3d Cir. Sept. 3, 2003).

34 *See, e.g., Media Ownership Rules: Hearing Before the S. Comm. on Com., Sci., & Transp.,* 108th Cong. (2003).

35 Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3.

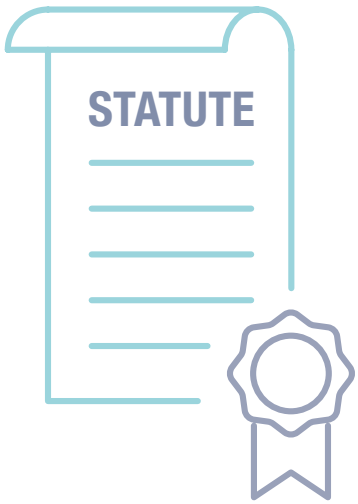
36 After an initial full citation of each new provision, we cite to the relevant portion of § 202 of the revised Telecommunications Act for brevity's sake.

37 § 629, 118 Stat. 99 (amending § 202(c)(1)(B), 110 Stat. 111) (current version at 47 U.S.C. § 303 note).

38 § 629, 118 Stat. 99 (amending § 202(c), 110 Stat. 111, by adding § 202(c)(3)) (current version at 47 U.S.C. § 303 note).

- *Third*, Congress stated that "[s]ection 10 of the Communications Act of 1934 (47 U.S.C. § 160) shall not apply to any person or entity that exceeds the 39 percent national audience reach limitation for television stations."[39] Under section 10, the FCC has authority to otherwise forbear from "applying any regulation or any provision" upon making various findings, including that forbearance is "consistent with the public interest."[40]

- *Fourth*, whereas the 1996 Act required the FCC to review all ownership rules without exception, Congress expressly provided in the 2004 amendments that the periodic-review requirement "does not apply to any rules relating to the 39 percent national audience reach limitation."[41]



The 39% ownership cap has remained in force since 2004. But in 2017, the FCC published a notice of proposed rulemaking seeking comment on whether it should retain, modify, or eliminate the 39% cap.[42] The FCC sought comment on whether, among other things, it has statutory "authority to modify or eliminate the national cap" in the first place.[43] The comment period closed in April 2018, but the FCC did not take further action.

In July 2025, however, the FCC opened a new comment window soliciting public input on the 39% cap and the agency's statutory authority to revise it.[44]

39 § 629, 118 Stat. 100 (amending § 202(c), 110 Stat. 111, by adding § 202(c)(4)) (current version at 47 U.S.C. § 303 note).

40 47 U.S.C. § 160(a).

41 *Id.*

42 *See* National Television Multiple Ownership Rule, 83 Fed. Reg. 3661, 3667 (Jan. 26, 2018).

43 *Id.* at 3662.

44 *See* National Television Multiple Ownership Rule, 90 Fed. Reg. 30032, 30033 (July 8, 2025).

III. The Text, Structure, and History of the Telecommunications Act Demonstrate that the FCC Lacks the Authority to Revise, Eliminate, or Waive the 39% Cap

A. Under the Plain Text of the Telecommunications Act, the FCC Lacks the Authority to Revise, Eliminate, or Waive the 39% Cap

Statutory interpretation "begin[s] with the text,"[45] and when a statute is unambiguous it "ends there as well."[46] In the wake of the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*,[47] that basic precept of statutory interpretation applies with equal force when interpreting statutes administered by federal agencies. Courts must therefore "exercise their independent judgment in deciding whether an agency has acted within its statutory authority" without deferring to an agency's interpretation of its statutory authority.[48]

> **"Together, Congress's use of this mandatory language and its specification of a precise "39 percent national audience reach limitation" settle that the 2004 amendments required the FCC to impose the 39% cap without granting authority to deviate from it."**

The text of the Telecommunications Act, as amended in 2004, states that the FCC "shall modify its rules for multiple ownership" by "increasing the national audience reach limitation for television stations to 39 percent."[49] "[T]he word 'shall' generally signals a mandatory duty," such that the statutory phrase "shall modify" signals a congressional mandate that the FCC must impose the specified cap.[50] Indeed, as one federal court of appeals said shortly after the 2004 amendments, Congress issued a "statutory directive" to the FCC to impose "a precise 39% cap," without any express suggestion of discretion to change it.[51] Together, Congress's use of this mandatory language and its specification of a precise "39 percent national audience reach limitation"

45 *Lackey v. Stinnie*, 604 U.S. 192, 199 (2025).

46 *National Association of Manufacturers v. Department of Defense*, 583 U.S. 109, 127 (2018) (citation omitted).

47 603 U.S. 369 (2024).

48 *Id.* at 412.

49 § 202(c)(1)(B).

50 *See Bridgeport Hospital v. Becerra*, 108 F.4th 882, 887 (D.C. Cir. 2024).

51 *Prometheus Radio Project v. FCC*, 373 F.3d 372, 396 (3d Cir. 2004) (as amended).

settle that the 2004 amendments required the FCC to impose the 39% cap without granting authority to deviate from it.[52]

A plain reading of the Telecommunications Act's periodic-review provision confirms that conclusion. Before the 2004 amendments, the statute required the FCC to review "all of its ownership rules," including the national-ownership cap, at a regular interval, and to decide whether the "repeal," "modif[ication]," or retention of each rule would serve "the public interest."[53] But Congress revised this provision in 2004 expressly to exclude the 39% cap from periodic review.[54] Congress thus instructed the FCC *not* to review or revise periodically the 39% cap, despite continuing to authorize periodic reviews of *other* broadcast-ownership rules. "When Congress acts to amend a statute," courts "presume it intends its amendment to have real and substantial effect."[55]

Additional canons of statutory interpretation reinforce the conclusion that the FCC lacks authority to deviate from the congressionally imposed 39% cap. To begin with, "differences in language … convey differences in meaning,"[56] and "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[57] In a neighboring provision concerning local broadcast ownership, Congress directed the FCC to "conduct a rulemaking proceeding to determine whether to *retain, modify, or eliminate* its limitations on the number of television stations that a person or entity may own, operate or control" within a single television market.[58] By contrast, the national-ownership provision specifies a precise 39% cap the FCC must adopt; states that the FCC "shall modify" its rules to reflect that precise cap; and entirely omits the words "retain" and "eliminate."[59] Congress's inclusion of discretion-conferring language in the local-ownership provision indicates that the omission of any such language from the national-ownership provision was deliberate.

Further support for this interpretation can be drawn from the Telecommunications Act's provisions concerning local radio diversity. Those sections provide that the FCC "shall revise" its regulations to cap the number of radio stations an entity may own, operate, or control in a particular radio market.[60] Notably, the local-radio-diversity provision also allows the FCC to permit a person or entity to own, operate, or control radio stations beyond the statutorily imposed cap "if the Commission determines" that it "will result in an

52 § 202(c)(3), (c)(4), (h).
53 § 202(h) (1996 version).
54 § 202(h) (amended 2004 version).
55 *Intel Corp. Investment Policy Committee v. Sulyma*, 589 U.S. 178, 189 (2020) (citation omitted).
56 *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 86 (2017).
57 *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991).
58 § 202(c)(2) (emphasis added).
59 § 202(c)(1)(B).
60 § 202(b)(1).

increase in the number of radio broadcast stations in operation."[61] Yet again, however, Congress omitted any such discretion-conferring language from the national-ownership provision.[62] The contrast between those provisions reinforces the conclusion that Congress intended for the 39% cap to be fixed absent further congressional action.

With all of the statute's textual indicia pointing toward a mandatory 39% cap—to say nothing of the statute's structure addressed below—an interpretation that would allow the FCC to revise, eliminate, or waive the 39% cap would also fly in the face of the major-questions doctrine. Under that doctrine, when an agency asserts a wide "breadth of … authority" with "economic and political significance," courts should "'hesitate before concluding that Congress meant to confer such authority."[63] Overcoming the presumption requires a court to identify "clear congressional authorization" for the power the agency seeks to exercise, not a "merely plausible textual basis" for it.[64]

Here, the major-questions doctrine powerfully underscores what the text makes clear: Congress did not intend for the FCC to modify the 39% cap. The FCC's assertion of authority to revise, eliminate, or waive the 39% cap would clearly have economic and political significance. As the FCC has acknowledged, "[s]ince its infancy, broadcasting has operated under some form of national ownership restriction," and national-ownership limitations "play[] a fundamental and vital role in creating the industrial infrastructure of broadcasting by affecting basic economic decisions relating to the development of the medium."[65] When adopting the initial percentage-based cap in 1984, the FCC described its approach as "proceed[ing] cautiously in order to avoid rapid and immediate restructuring of the broadcasting industry."[66] Congress has also intervened repeatedly—in 1984, 1996, and 2004—to impose guardrails on the FCC's authority to set appropriate restrictions on national ownership.

Under the major-questions doctrine, the Telecommunications Act must be interpreted in light of the history of congressional action to rein in FCC discretion over national audience reach and the FCC's own pronouncements on the importance of such restrictions. Reading Congress's directive in the Telecommunications Act that the FCC "shall modify" the national-ownership cap to 39% instead to authorize the FCC to revise, eliminate, or waive

61 § 202(b)(2).

62 § 202(c)(1)(B).

63 *West Virginia v. EPA*, 597 U.S. 697, 721 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000)).

64 *Id.* at 723 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

65 Multiple Ownership of AM, FM and Television Broadcast Stations, 50 Fed. Reg. 4666, 4672 (Feb. 1, 1985).

66 *Id.* at 4671-4672.

that cap would work "basic and fundamental changes" inconsistent with this history of deliberate and gradual national-ownership restrictions dating back to the 1940s.[67]

The lessons from the Supreme Court's decisions elaborating on the major-questions doctrine apply with particular force to the 39% cap. Here, unlike a "vague statutory grant" in a "previously little-used backwater" of a statute that might provide an agency at least "a colorable textual basis" for claiming authority,[68] Congress prescribed a numerically fixed percentage cap that the agency must adopt and referred to it in several different places throughout the statute. "It is hard to imagine a statutory term less ambiguous than … precise numerical thresholds."[69] Accordingly, unlike the typical major-questions case, there is a clear statement from Congress here *depriving* the FCC of the relevant authority.[70] If an agency cannot exercise novel and expansive power under an ambiguous statute, it certainly cannot exercise such power under a statute that clearly deprives the agency of that authority.

> **"If an agency cannot exercise novel and expansive power under an ambiguous statute, it certainly cannot exercise such power under a statute that clearly deprives the agency of that authority."**

B. The Structure of the Telecommunications Act Reinforces the Conclusion that the FCC Lacks Authority to Revise, Eliminate, or Waive the 39% Cap

The structure of the revised Telecommunications Act further reveals that the 39% national-ownership cap is not subject to revision by the FCC. That is because the revised Act makes sense "as a symmetrical and coherent regulatory scheme" only if the 39% cap is understood as a permanent mandate on the FCC.[71] There are three principal reasons why:

- *First*, the provisions of the Act concerning the 39% cap reflect the *removal* of delegated authority to the FCC. Specifically, the three implementation provisions in which Congress referred to the 39% cap (1) removed the FCC's discretion to "repeal or modify" "any rules relating to the 39

67 *Biden v. Nebraska*, 600 U.S. 477, 494 (2023) (quoting *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 225 (1994)).

68 *West Virginia*, 597 U.S. at 722, 730, 732.

69 *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 326 (2014).

70 *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 250-251, 267-268 (2006); *Alabama Association of Realtors v. Department of Health & Human Services*, 594 U.S. 758, 761, 764-765 (2021) (per curiam); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126-127, 159-160 (2000).

71 *Brown & Williamson*, 529 U.S. at 133 (citation omitted).

percent national audience reach limitation" as part of the periodic review otherwise mandated by the Act;[72] (2) prohibited the FCC from forbearing enforcement against any person or entity that exceeds the 39% cap;[73] and (3) imposed a new requirement of divestiture within two years for any person or entity that exceeds the cap.[74] As such, all three provisions seek to constrain the FCC's discretion in implementing the 39% cap. Courts are thus likely to conclude from those implementation provisions that, when Congress directed the FCC to set the 39% cap, it similarly sought to constrain, rather than enlarge, the FCC's discretion.

- *Second*, allowing the FCC to revise, let alone eliminate, "the 39 percent national audience reach limitation" would render the divestiture and forbearance provisions illogical, if not entirely superfluous. No sunset provisions apply to the revised Telecommunications Act's requirement of divestiture for parties after exceeding the 39% cap and stripping of forbearance authority. Nor did Congress express any intention in the statute that those provisions should lack effect if the FCC were to revise, eliminate, or waive the 39% cap. Yet that would be the result of positions taken by opponents of the cap. "Proper respect for Congress cautions courts against lightly assuming that any of the statutory terms it has chosen to employ are 'superfluous' or 'void' of significance."[75]

- *Third*, Congress hard-coded the 39% cap into the revised Telecommunications Act. Not only does the Act itself direct the establishment of the "39 percent cap," but all of the Act's provisions related to implementation of the national-ownership restriction also refer specifically to the "39 percent cap."[76] Together, those repeated references to a precise percentage cap indicate Congress's intention that the numerical figure remain fixed; if Congress had instead intended for 39% to constitute a starting point subject to the FCC's future revision, it would have used different language referring to the cap more generically, rather than specifically referring to the "39 percent cap."

---

72 § 202(h).

73 § 202(c)(4). The FCC may "suspend[], revoke[], amend[], or waive[] for good cause shown, in whole or in part, at any time" any of its own rules, "subject to the provisions of the Administrative Procedure Act and the provisions of this chapter." 47 C.F.R. § 1.3. That waiver authority is, of course, subordinate to the Administrative Procedure Act and the requirement that the agency may not act contrary to or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C). That means the FCC's waiver authority may not serve as an end run to Congress's statutory commands in the 2004 amendments, including the prohibition on FCC forbearance from the 39% cap.

74 § 202(c)(3).

75 *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, 601 U.S. 42, 53 (2024) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

76 *See* § 202(c)(3) ("A person or entity that exceeds the *39 percent* national audience reach limitation for television stations "); § 202(c)(4) ("Section 10 of the Communications Act of 1934 … shall not apply to any person or entity that exceeds the *39 percent* national audience reach limitation for television stations"); § 202(h) ("This subsection does not apply to any rules relating to the *39 percent* national audience reach limitation").

In sum, treatment of the 39% cap as mandatory is the only interpretation that avoids making a hash of the revised Telecommunications Act, in addition to being the interpretation best supported by the plain meaning of the statutory text.

> **In sum, treatment of the 39% cap as mandatory is the only interpretation that avoids making a hash of the revised Telecommunications Act, in addition to being the interpretation best supported by the plain meaning of the statutory text.**

C. Principles of Administrative Law Confirm the Conclusion that the FCC Cannot Revise, Eliminate, or Waive the 39% Cap

If the FCC were to assert authority under the Telecommunications Act to revise, eliminate, or waive the 39% cap, that approach would also defy basic principles of administrative law.

First, a congressional command that an agency must adopt a particular rule carries the force of law and does not authorize an agency to repeal, alter, or ignore that rule absent permission. Congressional delegations of authority to an agency "may be shown in a variety of ways," such as an express delegation of rulemaking power "or by some other indication of a comparable congressional intent."[77] By the same token, Congress can also, within constitutional limits, withhold authority from an agency or direct an agency to act in a particular manner. So "[w]hen Congress enacts legislation that directs an agency to issue a particular rule, 'Congress has amended the law,'" and the agency must comply.[78] Under those circumstances, an agency is not free to disobey Congress's command by, for example, repealing the rule Congress commanded it to adopt.[79] So too here.

Second, the FCC's previous treatment of the 39% cap as mandatory counsels against its future assertion of authority to revise the 39% cap. Following the Supreme Court's decision in *Loper Bright*, federal courts may not defer to reasonable agency interpretations of statutes merely because those statutes are ambiguous. Courts must instead "exercise their independent judgment in deciding whether an agency has acted within its statutory

77 *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

78 *Center for Biological Diversity v. Bernhardt*, 946 F.3d 553, 562 (9th Cir. 2019) (quoting *Alliance for the Wild Rockies v. Salazar*, 672 F.3d 1170, 1174 (9th Cir. 2012)).

79 *See United States v. Osorto*, 995 F.3d 801, 815 (11th Cir. 2021) ("[O]nce an agency promulgates such a required rule, the agency is not free to scrap the rule in the absence of congressional or executive direction.").

authority."[80] But in *Loper Bright*, the Supreme Court left untouched its decision in *Skidmore v. Swift & Co.*,[81] and instead cited that decision favorably.[82] *Skidmore* provides that the "interpretations and opinions" of an agency "made in pursuance of official duty" and based on the agency's "specialized experience" can provide "guidance" to "courts and litigants" on issues of statutory interpretation.[83] Federal courts thus remain free to give "weight" to an agency's judgment based "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[84]

Applying *Skidmore*, a federal court would be skeptical of an assertion of FCC authority to alter the 39% cap, because of the agency's inconsistency on that issue. In implementing the 2004 amendments to the Telecommunications Act, the FCC bypassed notice-and-comment procedures and instead issued the rule implementing the 39% cap under the "good cause" exception for situations where those procedures are "impracticable, unnecessary, or contrary to the public interest."[85] In so doing, the FCC cited a decision holding that "good cause" exists when an agency order is a "nondiscretionary ministerial action[] issued in conformity with statute."[86] In the FCC's view at that time, Congress's command to implement a 39% cap on national ownership did not involve any "discretionary action."[87] The FCC reasoned that the 2004 amendments "direct[ed] the Commission to revise its rules according to specific terms set forth in those laws."[88]

By contrast, in a 2013 notice of proposed rulemaking regarding the UHF discount, the FCC "tentatively conclude[d]" that it had "authority to modify the national ownership rule."[89] It also stated that it "retains authority under the Communications Act to review any aspect of the national audience reach cap" when seeking to eliminate the UHF discount,[90] and it noted that its view was "undisturbed" when it then reinstated the UHF discount.[91] But that view was the subject of internal division, with then-Commissioner O'Rielly repeatedly writing separately to "reject the assertion that the Commission has authority to modify the National Television

80 *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024).

81 323 U.S. 134 (1944).

82 *See Loper Bright*, 603 U.S. at 402.

83 *Skidmore*, 323 U.S. at 139-140.

84 *Loper Bright*, 603 U.S. at 388 (quoting *Skidmore*, 323 U.S. at 140).

85 National Broadcast Television Ownership Rules, 72 Fed. Reg. 16283, 16284 n.7 (Apr. 4, 2007) (quoting 5 U.S.C. § 553(b)(B)).

86 *Id.* (citing *Metzenbaum v. FERC*, 675 F.2d 1282, 1291 (D.C. Cir. 1982)).

87 *Id.* at 16284.

88 *Id.*

89 In the Matter of Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, 28 F.C.C. Rcd. 14324, 14329 (Sept. 26, 2013).

90 In the Matter of Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, 31 F.C.C. Rcd. 10213, 10222-10223 (Aug. 24, 2016).

91 In the Matter of Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, 32 F.C.C. Rcd. 3390, 3394, 3398 n.60 (Apr. 20, 2017).

Ownership Rule in any way," particularly because the 2004 amendments were "heavily negotiated and painstakingly crafted in order to settle a recurring and particularly contentious media ownership issue."[92] Under *Skidmore*, the FCC's changes in position undermine the persuasive force of any decision to revise, eliminate, or waive the 39% cap.[93]

D. The History of the 2004 Amendments Underscores Congress's Intention to Strip the FCC of Authority to Revise, Eliminate, or Waive the 39% Cap

The statutory and regulatory history of the 39% cap underscores its mandatory nature. Starting with the statutory history, Congress's 2004 amendments to the Telecommunications Act reflect a desire to bring stability to national-ownership limitations. As previously discussed, the D.C. Circuit's decision in *Fox Television* held that the Telecommunications Act required the FCC to review all ownership limitations, including the initial 35% ownership cap, at a regular two-year interval.[94] The FCC's first biennial review of the 35% cap in 1998, and its decision to retain the cap, were remanded by the D.C. Circuit in 2002.[95] The FCC then reconsidered the issue in its 2002 biennial review and decided to raise the cap to 45%.[96] But that decision was quickly challenged and stayed by a federal court.[97] Against that pattern of repeated litigation and judicial scrutiny of the FCC's decisions under the periodic-review provision, Congress enacted the 2004 amendments.

Courts presume that Congress is aware of such judicial interpretations of a statute when it later amends the statute.[98] The 2004 amendments followed closely on the heels of the D.C. Circuit's decision in *Fox Television*. Although the 2004 amendments retained the periodic-review provision for "all of [the FCC's] ownership rules," Congress expressly excluded the 39% cap from that requirement, thereby removing the FCC's authority to reevaluate the cap as it was required to do under the 1996 Act. Aware of the history behind the 2004 amendments, a reviewing court would likely hold that Congress sought to exempt the revised 39% cap from

92 31 F.C.C. Rcd. at 10251 (Dissenting Statement of Commissioner Michael O'Rielly). Although Commissioner O'Rielly later voted to commence a process to review that rule, he reiterated his view that he "d[id] not believe that the Commission has the authority to modify the national audience reach cap." In the Matter of Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, 32 F.C.C. Rcd. 10785, 10808 (Dec. 14, 2017) (Statement of Commissioner Michael O'Rielly).

93 *Skidmore*, 323 U.S. at 140.

94 *See* Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-112 (1996).

95 *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002).

96 *See* Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, 68 Fed. Reg. 46286, 46328 (Aug. 5, 2003).

97 *See Prometheus Radio Project v. FCC*, No. 03-3388, 2003 WL 22052896 (3d Cir. Sept. 3, 2003).

98 *See Forest Grove School District v. T.A.*, 557 U.S. 230, 239-240 (2009) (citation omitted).

agency alteration, both as a response to the D.C. Circuit's decision and to spare both the FCC and the market from the destabilizing force of continual litigation over the cap.

Although some courts give legislative history less weight under contemporary approaches to statutory interpretation, the legislative history of the 2004 amendments is of a piece with the statutory text and structure. In the aftermath of the D.C. Circuit's adverse ruling in 2002 on the 1998 biennial review, all five FCC commissioners testified before Congress. Senator Hollings placed the D.C. Circuit's decision in the record,[99] and the commissioners testified that the Telecommunications Act's mandatory periodic review proved "very destabilizing to the market" and created "an extraordinary amount of pressure on resources in the Commission."[100] Several commissioners recommended that Congress should impose a permanent national-ownership cap to stave off any further instability and save the FCC the onerous burden of periodic review.[101] Indeed, when Senator Wyden asked directly whether "Congress [should] step in and set the cap," the FCC Chairman stated that the proposal "bears merit"; another commissioner responded that he thought "it would be ideal"; and none of the other commissioners objected to the concept of a mandatory cap.[102] Unsurprisingly, then, when the 2004 amendments containing the 39% cap reached the floor for debate, legislators characterized the cap as permanent and immune from FCC revision.[103]

From that statutory and regulatory background, courts are likely to glean that Congress's purpose in enacting the 2004 amendments was to codify a permanent 39% cap in order to increase regulatory stability. Any assertion that the FCC may revise, eliminate, or waive the cap is thus inconsistent with both the text of the Telecommunications Act and Congress's apparent purpose in enacting it.

---

99 *FCC Oversight: Media Ownership and FCC Reauthorization: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 108th Cong. 5-20 (2003).

100 *Id.* at 101 (statement of Michael K. Powell, Chairman, Federal Communications Commission); *see also id.* at 102 (statement of Jonathan S. Adelstein, Commissioner, Federal Communications Commission) ("I think it is somewhat destabilizing to have [periodic review] every 2 years."); *id.* (statement of Kathleen Q. Abernathy, Commissioner, Federal Communications Commission) ("I agree with the Chairman" about "the 2-year review cycle, particularly when … we don't have the ability to simply say there's no change to circumstances … and some of the rules can continue."); *id.* at 103 (statement of Michael J. Copps, Commissioner, Federal Communications Commission) (noting biennial review "does impose an undue burden on the Commission").

101 *See id.* at 102 (statement of Jonathan S. Adelstein, Commissioner, Federal Communications Commission) ("I think that the Congress could consider codifying the national cap at 35 percent."); *id.* at 103 (statement of Michael J. Copps, Commissioner, Federal Communications Commission) ("Codifying the cap would be good.").

102 *Id.* at 104.

103 *See* 149 Cong. Rec. H12838 (2003) (statement of Rep. Billy Tauzin) ("[T]his bill will forbid the FCC from raising or lowering the 39 percent limit … Eliminating the FCC's discretion over the national audience-reach limit in this manner is unwise."); 150 Cong. Rec. S148 (2004) (statement of Sen. Diane E. Feinstein quoting Sen. Robert Byrd) ("[T]he one-year limitation on the FCC media ownership rule was turned into a permanent cap at 39 percent."); 150 Cong. Rec. S141 (2004) (statement of Sen. Patrick J. Leahy) ("[T]he White House successfully lobbied for last-minute increase of a permanent cap at 39%.").

IV. The Arguments Supporting the FCC's Authority to Eliminate, Revise, or Waive the 39% Cap Lack Merit

Opponents of the 39% cap have argued that the FCC does have the authority to revise, eliminate, or waive it. In particular, opponents make three related arguments based on the premise that the 2004 amendments did nothing to alter the FCC's discretion under the Communications Act of 1934 and the 1996 version of the Telecommunications Act to revise the national-ownership cap. Those arguments, however, misunderstand the text, structure, and history of the Telecommunications Act.

A. The 2004 Amendments Do Not Preserve Any Discretion to Revise the Ownership Cap that the FCC Might Otherwise Have Had

As already discussed, the D.C. Circuit held in *Fox Television* that the 1996 version of the Telecommunications Act gave the FCC discretion to modify the previous 35% cap as part of its periodic review.[104] Some have argued that Congress's use of similar cap-setting language in the 2004 amendments preserved the FCC's discretion to modify the mandated ownership cap. For example, the FCC has suggested that it retains authority to modify the 39% cap because "Congress elected to use the same language in the 2004 [amendments], instructing the Commission to 'modify its rules,' as it did when it instructed the Commission to change the cap from 25 to 35 percent as part of the 1996 Act."[105]

> "The 2004 amendments clearly eliminated the FCC's discretion under the 1996 version of the Act."

The 2004 amendments clearly eliminated the FCC's discretion under the 1996 version of the Act. As discussed above, several other provisions in the 2004 amendments removed the FCC's discretion to modify the 39% cap, including enshrining a "39 percent national audience reach limitation" throughout the statutory text; removing that cap from the FCC's periodic review of broadcast ownership rules;[106] eliminating the FCC's ability to forbear from enforcement of the cap;[107] and directing entities that exceed

104 *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537, 540 (D.C. Cir. 2002).
105 National Television Multiple Ownership Rule, 83 Fed. Reg. 3661, 3662 (Jan. 26, 2018).
106 *See* § 202(h).
107 *See* § 202(c)(4).

the cap to divest within two years.[108] That precise numerical cap, alongside the discretion-removing provisions, leave no ambiguity that the 39% is mandatory.

Even if there were any ambiguity in the 2004 amendments, the Supreme Court has cautioned that courts, agencies, and litigants alike should not "presum[e] that statutory ambiguities are implicit delegations to agencies."[109] That is especially true here. Congress did not employ the phrase "modify its rules" in a vacuum; rather, the phrase must be "read in [its] context and with a view to [its] place in the overall statutory scheme."[110] And that broader context—including the implementation provisions in the 2004 amendments which specifically refer to the 39% cap—compels the conclusion that Congress's use of similar cap-setting language in the 2004 amendments does not authorize the FCC to deviate from that cap.

B. The FCC's Residual Rulemaking Authority Cannot Overcome a Specific Congressional Command

Opponents of the 39% cap also argue that the FCC can revise that cap based on the agency's residual rulemaking authority under the Communications Act of 1934. They first cite 47 U.S.C. § 303(r), which vests the FCC with authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter." Opponents also cite 47 U.S.C. § 154(i), which authorizes the FCC to "make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." That language, opponents suggest, is broad enough to allow the FCC to revise, eliminate, or waive the 39% cap.

That argument fails on two counts. *First*, it misses a key caveat in Congress's grant of residual rulemaking authority: namely, that the FCC may issue only rules that are not "inconsistent with law."[111] As explained above, the 2004 amendments expressly stripped the FCC of authority to alter the 39% cap. If the FCC were to overstep that prohibition, its action would be invalid.[112]

Second, the argument that the grants of residual authority in the Communications Act give the FCC discretion to change the 39% cap cannot be reconciled with the "commonplace of statutory construction that the specific

108 *See* § 202(c)(3).

109 *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 399 (2024).

110 *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 320 (2014) (internal quotation marks and citation omitted).

111 47 U.S.C. § 303(r); *see also id.* § 154(i) ("not inconsistent with this chapter").

112 *See* 5 U.S.C. § 706(2)(A), (C).

governs the general."[113] The principle that specific statutory language controls over general provisions is applicable especially when "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions."[114] And that canon applies with particular force in statutes that grant or constrain authority to agencies: "an agency may not circumvent specific statutory limits on its actions by relying on separate, general rulemaking authority."[115]

The FCC's residual, general authority to modify its rules cannot "displace the clear, specific text" of the revised Telecommunications Act, which extinguishes the FCC's authority over the 39% cap, whether through rulemaking, waiver, or otherwise.[116] Indeed, the D.C. Circuit has already rejected a similar argument raised by the FCC. In *National Association of Broadcasters v. FCC*, the FCC argued that its "general authority to 'prescribe appropriate rules and regulations to carry out the provisions'" of another portion of the Communications Act authorized it to require broadcasters to conduct actions that were not expressly prescribed by the statute.[117] The court held that the "generic grant of rulemaking authority to fill gaps … does not allow the FCC to alter the specific choices Congress made."[118] Here, too, "the FCC cannot alter Congress's choice."[119]

"The FCC's residual, general authority to modify its rules cannot "displace the clear, specific text" of the revised Telecommunications Act, which extinguishes the FCC's authority over the 39% cap"

113 *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

114 *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (internal quotation marks and citation omitted).

115 *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1061 (D.C. Cir. 2018).

116 *Murray Energy Corp. v. EPA*, 936 F.3d 597, 627 (D.C. Cir. 2019).

117 39 F.4th 817, 820 (D.C. Cir. 2022) (citing 47 U.S.C. § 317(e)).

118 *Id.*

119 *Id.*

C. Interpreting the 39% Cap to Be Mandatory Is Not an Implied Repeal of Preexisting FCC Discretion

In a similar vein to the previous arguments, opponents of the 39% cap argue that Congress would not have impliedly repealed the FCC's discretion under the 1996 version of the Act to modify the national-ownership cap. As opponents of the cap see it, the periodic-review provision in the 1996 Act required the FCC to revisit the national-ownership cap every two years but did not otherwise limit the FCC's discretion to alter the cap outside that review window. Opponents thus suggest that, because the 2004 amendments excluded the cap only from the periodic-review provision, Congress merely relieved the FCC from the *obligation* to review the cap at a regular interval but did not otherwise limit the FCC's discretion to modify the cap under its general authority over broadcasting. To read the 2004 amendments otherwise, they contend, would constitute a "disfavored" implied repeal of the 1996 Act's provisions.[120]

> **"The statutory scheme would … make little sense if the FCC *could* alter the cap."**

That argument fails because there is nothing implied about the nature of Congress's repeal in this context. As the D.C. Circuit held in *Fox Television*, the FCC had authority to revise the cap under the 1996 Act. But, in the 2004 amendments, Congress made a "clear and manifest" decision to remove any such authority.[121] By requiring divestiture for entities that exceed the 39% cap and prohibiting the FCC from forbearing enforcement of the 39% cap, Congress gave the FCC no ability to deviate from the cap. Congress thus knowingly and expressly changed the scope of its delegation to the FCC.

The statutory scheme would also make little sense if the FCC could alter the cap. Suppose the FCC eliminated the 39% cap, as opponents of the cap argue is within the FCC's discretion. Opponents offer no answer for what would then happen to the additional statutory requirements that entities "exceed[ing] the 39 percent" cap "shall" have two years to divest and that the FCC "shall not" forbear from taking enforcement action against any entity "exceed[ing] the 39 percent" cap.[122] Both provisions are framed as clear prohibitions, and

120 *Epic Systems Corp. v. Lewis*, 584 U.S. 497, 510 (2018) (quoting *United States v. Fausto*, 484 U.S. 439, 452 (1988)).
121 *Id.* at 510 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).
122 § 202(c)(3), (4).

neither contains any language suggesting that it can be modified (let alone made without effect) by the FCC. Indeed, the divestiture provision is not time limited; rather, it applies at any point "after" an entity "exceed[s] such limitation."[123]

Put differently, the 39% cap is built into those provisions. As such, even if the FCC revised or eliminated the 39% cap in its rules, a regulated entity would still be subject to the statutory divestiture provision if it exceeded the 39% limit, and the FCC would still be required to take enforcement action without the option of forbearance. Those provisions—all of which serve to remove the FCC's authority to deviate from a 39% cap—constitute a "clear and manifest" indication that Congress intended to remove whatever discretion the FCC previously enjoyed to revise the national-ownership cap.

In short, recognizing that the 39% cap removes discretion from the FCC to alter the cap does not amount to an implied repeal of the provisions in the 1996 Act. It simply acknowledges that, in the 2004 amendments, Congress "specifically address[ed] language on the statute books that it wishe[d] to change.[124] Those amendments "enshrined" the 39% cap through a series of provisions that specify that a congressionally determined 39% cap applies throughout the statute.[125]

V. Conclusion

Regardless of the policy merits of the proposals to revise, eliminate, or waive the 39% cap on national television ownership, the Telecommunications Act of 1996, as amended in 2004, stripped the FCC of authority to adopt such a change. The text, structure, and history of the revised Act leave the FCC no room to revise, eliminate, or waive the 39% cap. Should the FCC nevertheless attempt to do so, a challenge in federal court would be strongly supported by principles of statutory interpretation and administrative law. Congress has spoken clearly that the public debate over the cap must be resolved by the people's elected representatives in Congress and not by the unelected leaders of an administrative agency.

123 § 202(c)(3); *see* Brian T. Fitzpatrick, Ex Parte Submission In the Matter of National Television Multiple Ownership Rule (Nov. 3, 2025) <www.fcc.gov/ecfs/document/1103066222175/1>.

124 *Fausto*, 484 U.S. at 452.

125 In fact, when considering the 2004 amendments, the Senate Committee on Commerce, Science, and Transportation expressly considered and discussed the *Fox Television* decision and included it in the record. *See FCC Oversight: Media Ownership and FCC Reauthorization: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 108th Cong. 5-20 (2003).

November 3, 2025

Ms. Marlene H. Dortch
Secretary, Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: Ex Parte Submission - In the Matter of National Television Multiple Ownership Rule
MB Docket No. 17-318

Dear Ms. Dortch:

I am the Milton R. Underwood Chair in Free Enterprise and Professor of Law at Vanderbilt Law School in Nashville, Tennessee. Before I joined the Vanderbilt faculty, I was a law clerk to Supreme Court Justice Antonin Scalia and served as Special Counsel to U.S. Senator John Cornyn. I have been a member of the Federalist Society for Law & Public Policy Studies for nearly 30 years. In short, I have been a textualist my entire adult life. I am writing today because I read recently that the Commission is contemplating doing something that would be anathema to textualism: lifting the 39% nationwide television ownership cap despite a clear textual command from Congress otherwise.

Let me state at the outset that there may or may not be good policy reasons for lifting the ownership cap. I do not know the answer to that question because I am not a scholar of policy. But I am a scholar of law and I know that even the best policy reasons cannot override textual commands from Congress. Statutes should be changed by the democratic process, not by administrative fiat.

Prior to 1996, the Commission had plenary power to decide whether and how to cap television station ownership. The Communications Act of 1934 empowered the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions" of the Act.[1] Under this statutory authority, the Commission adopted various rules to cap television ownership over the years, including a cap of 25% of the nationwide audience in 1985.[2]

In the Telecommunications Act of 1996, however, Congress took away the Commission's plenary authority over television ownership. In particular, it instructed the FCC to lift its 25% nationwide cap to 35%[3] and to consider lifting that number even further as part of a new periodic review

[1] 47 U.S.C. § 303(r).
[2] *See* Appendix to Congressional Research Service, Federal Communications Commission (FCC) Media Ownership Rules (June 1, 2021) (Table A-1).
[3] *See* Pub. L. No 104-104, tit. II, § 202(c)(1)(B), 110 Stat. 111 (1996) ("The Commission shall modify its rules for multiple ownership . . . by increasing the national audience reach limitation for television stations to 35 percent.").

required of all its ownership rules.[4] In 2002, the D.C. Circuit held that the Commission failed to follow this periodic reconsideration.[5] Shortly thereafter, the Commission decided to lift the cap to 45%.[6]

But times had changed by then and Congress overruled the Commission: in 2004, it amended the Telecommunications Act of 1996 by instructing the Commission to lower the 45% nationwide ownership cap to 39%[7] and by removing the cap altogether from the Commission's periodic review of its ownership rules.[8] It further required any entity that goes above the 39% cap to come into compliance with the cap within two years.[9]

Textualists agree that statutes can only be understood from their evolution over time.[10] Now that *Chevron* has been overruled, the only question is what is the best reading of the above history of the Telecommunications Act of 1996.[11] The best reading is clear. In 1996, Congress said the Commission's cap is *too low*, it should be *increased*, and the Commission should periodically consider whether it should be *even higher*. In 2004, Congress flipped: it said the Commission's cap is *too high*, it should be *lower*, and the Commission should *not* periodically consider whether it should be higher. We are still living under the 2004 regime. As such, the Commission is foreclosed from considering whether Congress's 39% cap should be higher.

Indeed, it is hard to see how the Commission could raise Congress's 39% cap without running afoul of Congress's 2004 provision requiring any entity to divest when they exceed 39%: this

---

[4] *See id*. at § 202(h) ("The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially . . . and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.").

[5] *See Fox Television Stations, Inc. v. Federal Communications Commission*, 280 F.3d 1027 (D.C. 2002), *modified on reh'g,* 293 F.3d 537 (D.C. 2002).

[6] *See* 2002 Biennial Regulatory Review, Report & Order, 18 FCC Rcd 13620, 13847 (2003).

[7] *See* Pub. L. No. 108-199, div. B, tit. VI, § 629(1), 118 Stat. 99 (2004) (amending § 202(c)(1)(B) by striking "35 percent" and inserting "39 percent").

[8] *See id*. at § 629(3), 118 Stat. 100 (adding the following sentence at the end of § 202 (h): "This subsection does not apply to any rules relating to the 39 percent national audience reach limitation . . .."). This provision also changed the otherwise required biennial review to a required quadrennial review. *See id*.

[9] *See id*. at § 629(2) (adding the following new paragraph at the end of § 202(c): "A person or entity that exceeds the 39 percent national audience reach limitation . . . through grant, transfer, or assignment . . . shall have not more than 2 years after exceeding such limitation to come into compliance . . . . This divestiture requirement shall not apply to persons or entities that exceed the 39 percent . . . through population growth.").

[10] *See*, *e.g.*, Antonin Scalia & Bryan Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 256 (2012) ("We oppose the use of legislative history, which consists of the hearings, committee reports, and debate leading up to the enactment in question . . . But quite separate from legislative history is *statutory* history—the statutes repealed or amended by the statute under consideration. These form part of the context of the statute, and (unlike legislative history) can properly be presumed to have been before all the members of the legislature when they voted."); *see also* Anita S. Krishnakumar, *Statutory History*, 108 Va. L. Rev. 263, 299, 306 (2022) (tbl. 7) (finding widespread use among textualist Supreme Court Justices of the "override" canon: "the Court points out that Congress revised a statute in an effort to repudiate, or override, an earlier judicial decision and reasons that the revised statute should be construed to honor that reversal"). Textualists use statutory history in juxtaposition to administrative decisions just as well as to judicial decisions. *See*, *e.g.*, Scalia & Garner, SUPRA, at 322-25.

[11] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

provision clearly applies to future growth, not just to those entities that were too big on the date the 2004 amendments came into law.[12]

During the Obama Administration, the Commission opined that, whatever the 2004 amendments did to the Telecommunications Act of 1996, they did not touch the Commission's preexisting authority under the Communications Act of 1934 to make whatever rules and regulations it deems necessary.[13] But this can't be right. The entire point of the 1996 Act was to take this authority away from the Commission for television ownership. Indeed, the 1934 Act itself says the Commission's authority can only be exercised in a way that is "not inconsistent with law."[14] Is the Telecommunications Act of 1996, as amended in 2004, not a "law"? Of course it is.

I have also heard it said that the Commission can waive the cap on a case-by-case basis even if it cannot raise the cap altogether. The purported authority for this is a Commission regulation that permits the Commission to waive its other regulations. *See* 47 C.F.R. § 1.3. Although the Commission may be able to give itself permission to waive regulations that it is under no obligation to promulgate in the first place, it cannot give itself permission to waive regulations that Congress requires it to maintain. As I explained, Congress forced the Commission to adopt the 39% ownership cap in the 2004 amendments to the Telecommunications Act and further commanded that any entity that grew beyond that number must divest in a timely manner. The Commission cannot "waive" these statutory commands. Nor can it circumvent them by manipulating the UHF discount or permitting sidecar deals.[15] Agencies are subordinate to Congress, not the other way around.

The bottom line is this: the Commission should not repeat the freewheeling, law-by-administrative-fiat approach of the Obama Administration. If the Commission doesn't like what Congress did in 2004, it should ask Congress to change it, not try to evade it. That's what it means to live in a democracy rather than in a bureaucracy.

Sincerely,

Brian T. Fitzpatrick
Milton R. Underwood Chair in Free Enterprise
and Professor of Law
Vanderbilt Law School

---

[12] *See* Pub. L. No. 108-199, div. B, tit. VI, § 629(2), 118 Stat. 99 (2004) (declaring that entities must comply with the 39% limitation within two years "after exceeding such limitation" and that the provision does not apply if entities come to exceed the 39% limitation by reason of "population growth").

[13] *See* Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, MB Docket No. 13-236, Notice of Proposed Rulemaking (released Sept. 26, 2013).

[14] 47 U.S.C. § 303(r).

[15] *See, e.g.*, *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 396 (3d Cir. 2004) ("[B]ecause reducing or eliminating the discount for UHF station audiences would effectively raise the audience reach limit, we cannot entertain challenges to the Commission's decision to retain the 50% UHF discount. Any relief we granted on these claims would undermine Congress's specification of a precise 39% cap.").