No. 22-14274

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GRAY TELEVISION, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

Respondents.

On Petition for Review of an Order
of the Federal Communications Commission

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF PETITIONER AND REVERSAL

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May 31, 2023

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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29. Tupelo Media Group, LLC, *Subsidiary of Gray Media Group, Inc.*
30. United States of America, *Respondent*
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To the best of the current knowledge of *Amicus Curiae*, no other persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this case or appeal.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

FCC Rulemaking

Statutes

47 U.S.C.

Regulations

47 C.F.R.

Other Authorities

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The National Association of Broadcasters ("NAB") is a non-profit trade association representing broadcasters across the United States. NAB advocates for its membership before Congress, the courts, the Federal Communications Commission ("FCC" or "Commission"), and other governmental entities.

NAB has an interest in this matter because its mission includes protecting its members from *ultra vires* and unconstitutional actions of the Commission. The regulation in question, 47 C.F.R. § 73.3555 Note 11 ("the network-affiliation regulation"), as interpreted and applied by the Commission, exceeds the Commission's statutory authority and is unconstitutional. The Commission has the power to regulate the licensing of broadcast stations (including the transfer or assignment of licenses) in the public interest, but has no power to regulate a broadcaster's programming decisions. Therefore, it cannot restrict private parties' network affiliation agreements that enable a station to broadcast network programming, even if the Commission believes such a restriction serves the public interest. Moreover, Section 326 of the Communications Act of 1934 ("Act") bars interference with a broadcaster's free speech rights, and thus bars the network-

[1] NAB certifies that no party's counsel authored the brief in whole or part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than NAB, its members, or counsel contributed money intended to fund its preparation or submission.

affiliation regulation as applied by the Commission. The regulation also contravenes the First Amendment because this restriction on network programming is a content-based regulation subject to strict scrutiny. The rule fails strict scrutiny because the Commission has not established that the regulation serves a compelling governmental interest or is the least restrictive means of doing so.

Preserving broadcast stations' rights to create, acquire, and air the programming of their choice free from government restriction is of surpassing importance to NAB members. This issue has importance to the broadcasting industry beyond the specific network-affiliation regulation at issue, as the Commission is contemplating additional restrictions on the ability of broadcasters to air network programming.

NAB leaves the case-specific issues to Petitioner, but provides the industry perspective on the statutory and constitutional issues to aid this Court in its resolution of the case.

All parties have consented to the filing of this brief.

STATEMENT OF THE ISSUES

1. Whether the Commission lacks statutory authority to regulate a broadcasting station's purchase of a network affiliation agreement that permits it to air network programming.

2. Whether regulation of a broadcasting station's purchase of a network affiliation agreement is impermissible under Section 326 of the Communications Act and the First Amendment.

SUMMARY OF ARGUMENT

The Commission's network-affiliation regulation, as applied and interpreted by the Commission, is *ultra vires*. The Commission has the power to regulate the licensing of radio and television stations in the public interest, but that power has never extended to regulating broadcast programming. The Commission's invocation of that regulation to punish Gray Television, Inc. ("Gray") for acquiring network programming rights through an affiliation agreement exceeds the Commission's authority.

In addition, Section 326 of the Communications Act bars the Commission from interfering with the free speech rights of broadcasters, and forecloses the Commission from using its licensing power to regulate broadcaster program choices. The network-affiliation regulation also violates the First Amendment because it is content-based; it applies to a specific type of speech (network programming) and only to a specific type of speaker (top-four rated local television stations). The regulation cannot survive strict scrutiny. The Commission has not identified a compelling interest that the regulation serves. The Commission allows television stations to achieve the same result so long as they secure programming

rights directly from the network, rather than from another station; in any event, operating two top-four rated stations in the same market does not equate to market power. Nor has the Commission shown that the regulation is the least restrictive means of achieving its interest. Courts have permitted the Commission to regulate transactions involving the sale of licensed broadcast stations to avoid market concentration, but the Commission cannot restrict a broadcaster's editorial rights to choose the programming it airs.

ARGUMENT

I. The Commission Has No Statutory Authority to Regulate Programming Agreements That Enable Stations to Air Network, Syndicated, or Other Programming.

In the order on review, the Commission assessed a maximum statutory forfeiture of $518,283 against Gray, the indirect parent of the licensees of KYES-TV and KTUU-TV, two top-four rated television stations in the same Nielsen Designated Market Area ("DMA") in Anchorage, Alaska. Forfeiture Order, *In the Matter of Gray Television, Inc.*, FCC 22-83 ¶ 1 (Nov. 1, 2022) ("Order"). The Commission found that Gray, by purchasing the network affiliation agreement of another station and airing the "same program schedule on KYES-TV," Order ¶ 3, had willfully violated 47 C.F.R. § 73.3555 Note 11. *Id.* ¶ 8. That regulation prohibits an entity from owning or operating two stations in the same DMA "through the execution of" a network affiliation agreement, if the affiliation change

would result in the entity owning, operating, or controlling two of the top-four rated television stations in the DMA at the time of the agreement. 47 C.F.R. § 73.3555 Note 11. The Commission's network-affiliation regulation—if interpreted to apply to any agreement to transfer network-affiliation rights, even when it does not involve a transfer of a license and license assets—exceeds its statutory authority.

The Commission does not have a freestanding power to regulate broadcaster programming contracts, including network affiliation agreements, regardless of their effects on concentration or rankings in local broadcast markets. Rather, as relevant here, the Commission has the power to "grant construction permits and station licenses." 47 U.S.C. § 308(a). "[T]he Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." *Id.* § 307(b). Congress authorized the Commission to promulgate regulations to prescribe what information license applications must provide, including

> the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; [and] the purposes for which the station is to be used.

Id. § 308(b). When the Commission receives an application for a station license, or for transfer of a license, it must determine "whether the public interest, convenience, and necessity will be served by the granting of such application." *Id.* § 309(a); *accord id.* §§ 307(a), 310(d).

Congress granted the Commission its licensing power to deal with the problems of limited radio spectrum and signal interference among stations. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 212-14 (1943) ("*NBC*"); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 116 (1973) ("*CBS*"). "The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States." *NBC*, 319 U.S. at 217. Under its public-interest authority, "the FCC has historically maintained several strict ownership rules." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1155 (2021); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 793-97 (1978). Although the Commission has modified its rules to abandon certain ownership limits, *Prometheus*, 141 S. Ct. at 1157-59, restrictions still apply to radio and television ownership based on the number of stations owned in local markets and, for television, on national audience reach. *See* 47 C.F.R. § 73.3555(a), (b), and (e).

While broad, the Commission's power to review license applications in the public interest does not "confer an unlimited power. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, [and]

by the scope, character, and quality of services." *NBC*, 319 U.S. at 216 (internal quotation marks and ellipsis omitted). Although the Commission may inquire into "the ability of the licensee to render the best practicable service to the community reached by his broadcasts," "the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control *of the programs*, of business management or of policy." *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) (emphasis added). Indeed, "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations," and "pointedly refrained from divesting broadcasters of their control over the selection of voices." *CBS*, 412 U.S. at 110, 116. Nor does the Communications Act "give authority to the Commission to determine the validity of contracts between licensees and others." *Regents of Univ. Sys. of Ga. v. Carroll*, 338 U.S. 586, 602 (1950). Here, the Commission exceeded the public-interest authority granted in Sections 307(a) and 309(a) of the Act; it simply has no power to bar a station from acquiring the rights to air network programming.

Before the Order, the Commission never suggested that Note 11 would be interpreted to apply to a mere purchase of network programming rights. The text of the regulation bars ownership, operation, or control of two stations in the same DMA accomplished "through the execution" of an agreement or agreements "in which a station (the 'new affiliate') acquires the network affiliation of another

station (the 'previous affiliate')," if the result would be that a person with a cognizable interest in the new affiliate controls two of the top-four stations in the DMA. 47 C.F.R. § 73.3555 Note 11.

The Commission gave the regulation a narrow gloss in the order promulgating it. *See In the Matter of 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Second Report and Order, 31 FCC Rcd 9864 (2016) ("*Second Report and Order*"). The Commission had proposed this rule amendment to address "affiliation swaps," wherein "the stations (though not the licenses) effectively changed hands without prior Commission approval — approval that was not technically required." *In the Matter of 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Further Notice of Proposed Rulemaking, 29 FCC Rcd 4371 ¶ 48 (2014) ("*FNPRM*"). The Commission expressed concern that this type of transaction would evade its authority under section 310(d) of the Act to review station license transfers and enforce its ownership restrictions. *Id.* ¶ 47; *Second Report and Order* ¶ 47 & n.122. Accordingly, the Court invoked its general rulemaking powers under sections 4(i)

and 303(r) of the Act to "clos[e] a potential loophole." *Second Report and Order* ¶ 47 & n.122.

In adopting Note 11, the Commission emphasized the narrowness of the provision, declaring that "[t]he extension of the top-four prohibition that we adopt today merely clarifies that the top-four prohibition applies to agreements that are *the functional equivalent* of a transfer of control or assignment of license from the standpoint of our Local Television Ownership Rule." *Second Report and Order* ¶ 50 (emphasis added). Indeed, the Commission rejected claims that it lacked authority to enact Note 11 by citing its authority to review transfers of control of a license, *id.* ¶ 47 n.122, and likened an affiliation swap to "an ownership transfer or assignment," *id.* ¶ 48. The Commission emphasized the rarity of affiliation swaps, declaring that "the record demonstrates only a single instance of an affiliation swap that would be subject to the rule we adopt herein." *Id.* ¶ 51 & n.137. That instance was a Hawaii transaction where two broadcasters swapped their network affiliations, call signs, and non-network programming that the Commission deemed a *de facto* transfer of the station, although not the license, resulting in a single entity owning two top-four stations in the Honolulu DMA. *See FNPRM* ¶ 48. The industry (not just Gray) reasonably understood that Note 11 applied to affiliation swaps that were the functional equivalent of a station transfer—because the Commission expressly said so. *See Second Report and Order* ¶ 48 & n.142

("Parties that *acquired control over a second in-market top-four station* by engaging in affiliation swaps prior to the release date of this Order will not be subject to divestiture or enforcement action.") (emphasis added).

It is questionable whether even a true affiliation swap is the functional equivalent of a license transfer, and the FCC never properly explained why regulation of such swaps was reasonably ancillary to their delegated powers of reviewing license transfers under section 310(d). But the Commission now gives Note 11 an expansive reading, interpreting Note 11 to apply to one station's purchase of a network affiliation agreement, if the result is that an entity owns or operates two of the top-four rated stations in the market. *See* Order ¶¶ 8, 13-15. The Commission's new interpretation is contrary to the narrow gloss it placed on this provision in the rulemaking; a simple agreement to purchase rights to network programming from another station is not the functional equivalent of a transfer of ownership of a station, and not reasonably deemed within the ambit of Note 11. The Commission's gloss is particularly important since Note 11 directs that parties "refer to the Second Report and Order." *Id.*[2]

[2] Any attempt by the Commission to equate a mere assignment of network affiliation with an ownership transaction is untenable. Network programming only represents a portion of an affiliated station's programming, along with local and syndicated programming. The amount of network programming provided to affiliated stations, moreover, varies widely depending on the network, and affiliated stations differ in the amounts of network-provided programming they air. Furthermore, network affiliation is not a prerequisite for local market leadership.

Indeed, the Commission's interpretation renders Note 11 arbitrary and capricious. In the *Second Report and Order*, the Commission was at pains to point out it was not prohibiting a station from acquiring top-four status by negotiating an affiliation agreement with a network. *Id.* ¶ 48 n.128. But it makes no sense to distinguish between executing an affiliation agreement with the network, and being assigned a network affiliation agreement by another station (especially when network affiliation contracts routinely require that networks consent to assignments). Here, the network offered Gray an affiliation agreement, Order ¶ 16, illustrating the senseless nature of the Commission's interpretation. Further, the Commission says that there would be no problem if a station ascended to top-four status by "acquiring higher quality syndicated programming." *Second Report and Order* ¶ 48 n.128. There should likewise be no objection if a station acquires network programming by contract.

Because Note 11, as construed and applied by the Commission, does not regulate ownership, but programming, it is *ultra vires*. *Sanders Bros.*, 309 U.S. at

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For example, an independent station with no network affiliation is consistently rated among the top-four stations in the Jacksonville, Florida market, in large part due to the strength of its local programming. *See* G. Harrell, *Ratings tell the story: Channel 4 is the most-watched TV station in Jacksonville*, news4jax.com (June 2, 2021), https://www.news4jax.com/features/2021/06/02/ratings-tell-the-story-channel-4-is-most-watched-tv-station-in-jacksonville (citing Nielsen data). Moreover, the popularity of different stations varies depending upon a variety of factors often unique to each market. In DMAs with large Hispanic populations, for instance, Spanish language stations earn higher ratings than in other markets.

475. The Commission lacks statutory power to regulate agreements for the rights to acquire and air programming, and cannot invoke its rulemaking powers to arrogate what Congress has denied.

This case is like *Motion Picture Association of America v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) ("*MPAA*"), where the Commission's video description rules were struck down as unauthorized regulations of program content.[3] In *MPAA*, Congress had not expressly granted the Commission the power to require television programming to be video described, but the Commission promulgated video-description requirements anyway. *Id.* at 798-99.

The Commission attempted to justify its video description rules under its powers granted in sections 1, 4(i), and 303(r) of the Communications Act of 1934. Section 1 of the Act merely declares that the FCC was created to "regulat[e] interstate and foreign commerce in communication by wire and radio" so as to ensure adequate and efficient service, the national defense, and the promotion of the safety of life and property. 47 U.S.C. § 151. The D.C. Circuit held that "where, as in this case, the FCC promulgates regulations that significantly implicate program content, § 1 is not a source of authority." *MPAA*, 309 F.3d at 799. "[Section] 1 merely authorizes the agency to ensure that all people of the

[3] Video description assists the visually impaired by providing aural descriptions of a television program's key visual elements (*e.g.*, the movement of a person in a scene) that are inserted during pauses in the program's dialogue.

United States, without discrimination, have access to wire and radio communication transmissions. Section 1 does not otherwise authorize the FCC to regulate program content, as the video description regulations clearly do." *Id.* at 804. The Court observed, "To avoid potential First Amendment issues, the very general provisions of § 1 have not been construed to go so far as to authorize the FCC to regulate program content," noting that "Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content." *Id.* at 805.[4]

The D.C. Circuit also rejected the claim that the broad rulemaking grants of the Act—the same provisions the FCC invokes as its authority to promulgate Note 11—justified the FCC's regulation of program content. The Commission attempted to rely on § 303(r), which "permits the FCC to regulate in the public interest 'as may be necessary to carry out the provisions of [the] Act.'" *Id.* at 806 (quoting 47 U.S.C. § 303(r)). But, the Court declared,

> The FCC cannot act in the "public interest" if the agency does not otherwise have the authority to promulgate the regulations at issue. An action in the public interest is not necessarily taken to "carry out the provisions of the Act," nor is it necessarily authorized by the Act.

[4] The Court cited specific statutes where Congress permitted content regulation. *See id.* (citing 18 U.S.C. § 1464 ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."); 47 U.S.C. § 315 (governing provision of broadcast time to candidates for public office); 47 U.S.C. § 399 ("No noncommercial educational broadcasting station may support or oppose any candidate for political office."))

> The FCC must act pursuant *to delegated authority* before any "public interest" inquiry is made under § 303(r).

Id. (emphasis in original).

Likewise the general powers of the Commission under section 4(i) did not impart a power to regulate program content. Section 4(i) provides that "[t]he Commission may . . . make such rules and regulations . . . as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). But the D.C. Circuit agreed with the dissenting views of then-Commissioner (and future FCC Chairman) Michael Powell:

> It is important to emphasize that section 4(i) is not a stand-alone basis of authority and cannot be read in isolation. It is more akin to a "necessary and proper" clause. Section 4(i)'s authority must be "reasonably ancillary" to other express provisions. And, by its express terms, our exercise of that authority cannot be "inconsistent" with other provisions of the Act. The reason for these limitations is plain: Were an agency afforded carte blanche under such a broad provision, irrespective of subsequent congressional acts that did not squarely prohibit action, it would be able to expand greatly its regulatory reach.

MPAA, 309 F.3d at 806. No provision of the Communications Act—sections 308, 309, or 310 (as discussed above), or sections 1, 4(i), and 303(r)—authorize the regulation of program content.

Just as in *MPAA*, the Commission's interpretation and application of the network-affiliation regulation here significantly impacts program content without statutory authorization. The Commission bars a licensee from airing certain

programming (network programming) to which it acquired rights from another station if the acquisition results in an entity having two top-four stations in a market. The Commission simply has no power to regulate local broadcast of network programming or contracts assigning programming rights.

II. The Network-Affiliation Regulation, As Interpreted and Applied by the Commission, Violates Section 326 of the Act and the First Amendment

Not only did Congress not delegate to the Commission the power to regulate broadcast programming, but the regulation here also runs afoul of Section 326 of the Act and the First Amendment.

Section 326 of the Act denies the Commission the power of censorship, and further provides that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326. "It is clear from history and the interpretation of the Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the FCC." *McIntire v. Wm. Penn Broad. Co. of Phila.*, 151 F.2d 597, 599 (3d Cir. 1945). "[T]he Government cannot control the content or selection of programs to be broadcast" over commercial or noncommercial television. *Community-Service Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1110 (D.C. Cir. 1978). As former Justice Stewart has commented, "licensees, though regulated by the Commission under a fairly broad 'public interest' standard, have, quite apart from whatever additional

protections the First Amendment may provide, important statutory freedoms in conducting their programming." *CBS*, 412 U.S. at 138 (Stewart, J., concurring). Congress did not intend the Commission to exercise its licensing power, or any ancillary rulemaking power, to regulate broadcast stations' programming.

The regulation also violates the First Amendment. The broadcaster's editorial right to choose programming is protected speech. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 651 (1994). Accordingly, the Supreme Court has "recognized that Government regulation over the content of broadcast programming must be narrow, and that broadcast licensees must retain abundant discretion over programming choices." *Id.* Content-based and speaker-based restrictions to control content are subject to strict scrutiny under the First Amendment. *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 169-70 (2015). "[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 169. Furthermore, "'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.'" *Id.* at 170 (quoting *Turner*, 512 U.S. at 658). Strict scrutiny requires the Government to prove that the regulation "constitutes the least restrictive means of advancing a compelling government interest." *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1258 (11th Cir. 2005). Content-based restrictions, moreover, are subject to strict scrutiny when

imposed on broadcast stations. *See Action for Children's Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc) (applying "strict scrutiny to [content-based] regulations . . . regardless of the medium affected by them").

The network-affiliation regulation is content-based because it applies to a specific type of speech (network programming) and only to a specific type of speaker (top-four local television station). The Commission's claim to the contrary is mistaken. The Commission declared that Note 11 does not regulate content but ownership, Order ¶ 24, but the Order specifically bars the airing of program content (network programming) if it enables the owner to achieve top-four status. Further, even if *arguendo* the regulation's purpose is to prevent market concentration rather than exclude network programming, Order ¶ 24, that would not make the regulation any less content-based. Regardless of the Commission's purpose, the regulation is content-based on its face because it bars the acquisition of network programming rights through affiliation agreements. *See Reed*, 576 U.S. at 166 ("strict scrutiny applies either when a law is content based on its face *or* when the purpose and justification for the law are content based") (emphasis added).

Because the Commission did not recognize that Note 11 is a content-based regulation of speech, it did not determine whether the asserted interest is compelling or whether Note 11 is the least restrictive means of furthering that

interest. A remand is unnecessary because neither is true, and Note 11 cannot survive strict scrutiny. First, there is no compelling state interest. The Commission has no problem with a licensee achieving a second top-four ranking by securing a network affiliation agreement directly from the network (and rightly so). *Supra* at 11. The Commission also correctly does not bar any station (including two commonly owned stations) from achieving a top-four rating by organic growth of viewership. Selective regulation of activities with the same market effects shows that the asserted interest is not compelling.

Furthermore, the network-affiliation regulation serves no market competition interest. Acquiring a new or different network affiliation more popular with viewers does not equate to market power. For example, the Commission's rule would prohibit a licensee from acquiring a network affiliation so that it owned the third and fourth ranked stations in a market, even if together the two stations only amounted to a five, 10, 15 or 20 percent share of local broadcast television viewing.[5] Increasing market share of secondary competitors

[5] A study previously submitted to the FCC found that in 76 markets (out of the 159 with at least four full-power commercial television stations) the audience shares of the third and fourth ranked stations combined were less than the audience share of the top ranked station. *See* BIA Advisory Services, *The Economic Irrationality of the Top-4 Restriction*, at 20-22 & n.22 (Mar. 15, 2019) ("BIA Television Study"), Attachment B to Comments of NAB, MB Docket No. 18-349 (Apr. 29, 2019) (documenting markets where the combined audience shares of the third and fourth ranked stations were extremely small, often in the single or low double digits, and amounting to as little as 4.35 percent of the market).

who lack market power is often economically beneficial or at least neutral.[6] Finally, the Commission has not established that broadcasting forms its own product market for competition purposes; whether the market is for advertising or viewers, television broadcasters compete with cable, satellite, and streaming services, among others. *See Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1246 (11th Cir. 2002) (relevant product market is determined by reasonable substitutes available to consumers).[7] The Commission cannot (and does not) justify its restriction by showing that purchasing a broadcast network affiliation will categorically or even in most cases have anticompetitive effects.

All the network-affiliation regulation does is disadvantage existing station licensees who hold network affiliation agreements but would be better served by selling that asset to another station. Such licensees often may be struggling; having the ability to assign network affiliation agreements may be essential to

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[6] *See* BIA Television Study at 2-3, 37.

[7] *See*, *e.g.*, Nielsen Insights, *An active news cycle provides a back-to-back TV share increase for cable in April* (May 2023) (monthly Nielsen survey again showing that both streaming and cable/satellite options earn a greater share of total time spent using television than the share earned by broadcast stations); J. Eisenach *et al.*, *The Evolution of Competition in Local Broadcast Television Advertising and the Implications for Antitrust and Competition Policy*, NERA Economic Consulting, at 27, 37-38 (Oct. 2020), Attachment A to Comments of NAB, GN Docket No. 22-203 (July 1, 2022) (empirical study concluding that digital platforms compete directly with local television broadcasters for local advertising dollars).

competitiveness or even survival of a station. Further, allowing licensees to purchase network affiliation agreements is healthy for competition, as third-party programming is often necessary for broadcasters to gain significant market share. Acquiring programming, including by a network affiliation process, is part of the organic process of growth. Penalizing broadcasters by foreclosing them from increasing a station's local market share by adding network programming is not a compelling state interest.

Even if limiting one licensee from having two top-four local television stations were a compelling interest, however, Note 11 is also not the least restrictive means of promoting that interest. For example, the Commission can review market concentration issues when licenses are renewed or transferred. *See* 47 C.F.R. § 73.3555(b)(1). Note 11's blanket prohibition on airing acquired network programming on a second top-four station is not permissible.

III. Constraining the Commission's Power Is Important to Other Spheres of the Law

The question of whether the Commission has the power to regulate a local station's acquisition or airing of network programming is a matter of broad importance beyond this case focusing on Note 11. For example, in its pending proceeding examining the broadcast ownership restrictions, the Commission is considering requests from the pay television industry (cable and satellite operators) to tighten the local television ownership rule, 47 C.F.R. § 73.3555(b), in an effort

to weaken broadcast television competitors that offer service to consumers free over-the-air. The pay television industry repeatedly has asked the Commission to amend its rules to prevent any local station from airing the content of more than one of the four traditional "big" broadcast networks (ABC, CBS, Fox, and NBC), even if carried on a station's secondary programming stream or on a commonly owned low power station. *See, e.g.*, Comments of the American Television Alliance ("ATVA"), MB Docket No. 18-349, at 14-17 (Apr. 29, 2019); Further Comments of ATVA, MB Docket No. 18-349, at 2 (Sept. 2, 2021). NAB has strongly opposed this proposal as a clear content-based restriction beyond the FCC's authority to adopt and as harming the interests of local audiences in accessing valued programming. *See, e.g.,* Reply Comments of the National Association of Broadcasters, MB Docket No. 18-349, at 3-5, 44-61 (Oct. 1, 2021).

Given the potential consequences in other regulatory contexts, it is important that this Court in this case enforce the statutory and constitutional limits on the Commission's power to regulate broadcast programming.

CONCLUSION

This Court should grant the relief requested by Petitioner.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this amicus curiae brief complies with the applicable typeface, type style, and type-volume limitations. This petition was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 4,963 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that, on May 31, 2023, I electronically filed the foregoing brief with the Clerk for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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