No. 26-7840

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Writers Guild of America, West, Inc.; Free Press; Future Film Coalition; National Association of Broadcast Employees and Technicians-Communications Workers of America Local 51; Public Knowledge; Reporters Without Borders, Inc.; The NewsGuild-Communications Workers of America; United Church of Christ Media Justice Ministry; and Writers Guild of America East, Inc.,

Petitioners,

v.

Federal Communications Commission; United States of America,

Respondents.

On Petition for Review of
A Final Order of the Federal Communications Commission,
MB Docket No. 17-318

MOTION FOR STAY PENDING JUDICIAL REVIEW

Gigi B. Sohn
G Squared Strategies, LLC
3503 Alton Place, NW
Washington, D.C. 20008

Simon C. Brewer
Bradley Girard
Kali Schellenberg
Jason Brovich
Paul R.Q. Wolfson
Robin F. Thurston
Democracy Forward Foundation
P.O. Box 34553
Washington, D.C. 20043
(202) 448-9090

Counsel for Petitioners

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INTRODUCTION

More than two decades ago, the Federal Communications Commission sought to allow increased consolidation in the television broadcast industry by raising the national ownership limit for broadcast licensees. Congress unequivocally rejected that regulatory change. It swiftly enacted legislation establishing a statutory ceiling on the percentage of the national audience that any one broadcast group could reach, ensuring that the industry would not suffer from excessive consolidation among media companies. To this day, Congress has not amended or repealed that statutory limit.

The Commission has now decided to flout Congress's decision. Over Commissioner Gomez's vigorous dissent, the Commission majority adopted an order abolishing the national ownership cap. The order's stated intent is promoting further consolidation in the television industry—the precise outcome Congress sought to avoid when, in 2004, it rebuked the Commission's prior efforts to raise the cap.

A stay pending judicial review is warranted. The Commission's order is plainly unlawful, as agencies have no power to override Congress's express instructions. And the balance of the equities favors a stay. If the order takes effect, the Commission can approve mega-mergers that will profoundly alter the media ecosystem, causing irreparable harm in the form of layoffs, reduced local news production, and more. These harms will be difficult, if

not impossible, to remediate after the fact. On the other side of the ledger, neither the Commission nor any other parties would suffer irreparable harm from a modest delay in the order's effective date while the Court reviews its lawfulness. Accordingly, this Court should grant a stay pending judicial review pursuant to Federal Rule of Appellate Procedure 18(b) and 28 U.S.C. § 2349(b).

BACKGROUND

A. The national television ownership cap

Federal law requires that television broadcast licensees serve the public interest. *See* 47 U.S.C. §§ 307(a), 309(a). The Commission has traditionally understood the public-interest standard as encompassing considerations of competition, diversity, and localism. *See FCC v. Prometheus Radio Project*, 592 U.S. 414, 418 (2021).

To effectuate those policy goals, since 1941 the Commission has regulated the extent to which television broadcast licensees can control multiple television broadcast stations. *See* Broadcast Services Other Than Standard Broadcast, 6 Fed. Reg. 2282, 2284-85 (May 6, 1941). As the Supreme Court has explained, the Commission adopted these regulations "on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *FCC v.*

Nat'l Citizens Comm. for Broad., 436 U.S. 775, 780 (1978); *see also United States v. Storer Broad. Co.*, 351 U.S. 192, 203 (1956) (explaining that ownership caps "assure fair opportunity for open competition in the use of broadcasting facilities" by preventing excessive concentration of control).

In recent decades, the regulations have included a maximum percentage of the national audience that stations under common ownership, operation, or control can reach. *See* Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C.2d 74, 88-91 (1985) (brackets in original) (adopting limits on both the number of stations and their audience reach); *see also, e.g.*, 47 C.F.R. § 73.3555(e)(2) (1995) (setting a 25% national audience cap).

Starting in 1996, Congress took a more active role in managing the national ownership cap. As part of the Telecommunications Act of 1996, Congress required the Commission to increase the cap established in its regulations to 35%. Pub. L. No. 104-104, § 202(c)(1), 110 Stat. 56, 111; *see* In the Matter of Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations), 11 FCC Rcd. 12374, 12377 (1996) (implementing that change to the regulations). Congress further directed the Commission to periodically review its ownership rules and to "repeal or

modify any regulation it determines to be no longer in the public interest." Telecommunications Act of 1996, § 202(h), 110 Stat. at 112. The D.C. Circuit subsequently concluded that this statutory structure preserved the Commission's ability to adjust the cap. *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1042-43 (D.C. Cir.), *opinion modified on reh'g,* 293 F.3d 537 (D.C. Cir. 2002). But the court specifically noted that Congress could have written the national cap into the statute and thereby precluded further administrative action revisiting it. *Fox Television*, 293 F.3d at 540.

Following that decision, the Commission sought to raise the ownership cap to 45% of the national audience in the required subsequent review of its ownership rules. *See* 2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd. 13620, 13814-15 (2003). The Commission concluded that the public interest favored maintaining an overall national ceiling on broadcast television station ownership, but that the cap ought to be raised for various policy reasons. *See id.* at 13815-45.

Congress quickly rejected the Commission's decision. The Consolidated Appropriations Act of 2004 (CAA) required the Commission to set the national ownership cap at 39%. Pub. L. No. 108-199, div. B, tit. VI, § 629, 118 Stat. 3, 99-100 (codified at 47 U.S.C. § 303 note). In the same statute,

Congress removed the cap from the Commission's mandatory periodic review under Section 202(h). *See id.* ("[The review provision] does not apply to any rules relating to the 39 percent national audience reach limitation . . . ."). Congress required broadcasters that exceed the 39% cap to come into compliance through divesture within two years, and it prohibited the Commission from exercising its authority to forbear from enforcement with respect to the national ownership cap. *Id.*

The Commission conformed its regulations without undertaking notice-and-comment procedures, recognizing that the amendments "d[id] not involve discretionary action on the part of the Commission" because Congress required the agency "to revise its rules according to specific terms." Implementation of Section 629 of the Consolidated Appropriations Act, 2004 (National Broadcast Television Ownership), 22 FCC Rcd. 4245, 4246 (2007).

Congress has never subsequently authorized the Commission to further revise its rules regarding the national ownership cap.

B. The Commission's protracted rulemaking

In 2017, the Commission initiated rulemaking proceedings regarding the national ownership cap, seeking public comment on whether the cap should be retained, modified, or eliminated. *See* National Television Multiple Ownership Rule, 83 Fed. Reg. 3661 (Jan. 26, 2018). The

Commission received numerous comments, including from some of Public Interest Petitioners,[1] explaining that any effort to lift or eliminate the cap would be contrary to law and harmful to competition, diversity, and localism in the broadcast ecosystem.

The rulemaking proceeding then lay dormant for more than seven years. In 2025, the Commission reopened the comment period and invited a refresh of the record. *See* National Television Multiple Ownership Rule, 90 Fed. Reg. 30032 (July 8, 2025). The Commission again received numerous comments, including from various Public Interest Petitioners,[2] explaining

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[1] Comments of Public Interest Commenters, *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 17-318 (Mar. 19, 2018), https://www.fcc.gov/ecfs/document/1032072147719/1; Comments of Writers Guild of America, West, Inc., *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 17-318 (Mar. 19, 2018), https://www.fcc.gov/ecfs/documents/10319733611146/1; Comments of Free Press, *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 17-318 (Mar. 19, 2018), https://www.fcc.gov/ecfs/document/1031945290951/1.

[2] Comments of TNG-CWA et al., *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 17-318 (Aug. 4, 2025), https://www.fcc.gov/ecfs/document/1080447950264/1; Comment of Future Film Coalition, *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 17-318 (July 11, 2025), https://www.fcc.gov/ecfs/document/10711106920257/1; Comments of National Association of Broadcast Employees and Technicians - Communications Workers of America, *Amendment of Section 73.3555(e) of*

that the Commission lacked legal authority to raise or eliminate the cap and that doing so would inflict a variety of harms on them and on the marketplace.

More than a year later, the Commission published a draft order, which it voted to adopt at its August 6, 2026 Open Meeting. Press Release, FCC, *FCC Replaces National Broadcast Ownership Cap* (Aug. 6, 2026), https://docs.fcc.gov/public/attachments/DOC-424076A1.pdf. Some eight weeks later, the Commission publicly released the modified text of the final order under review. *See* Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, Report and Order, MB Docket No. 17-318, FCC 26-53 (released Oct. 1, 2026), https://docs.fcc.gov/public/attachments/FCC-26-53A1.pdf (the Order). On November 12, the Commission published the Order in the Federal Register, just weeks shy of nine years after the rulemaking began. *See* National Television Multiple Ownership Rule, 91 Fed. Reg. 72799 (Nov. 12, 2026).

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the Commission's Rules, National Television Multiple Ownership Rule, MB Docket No. 17-318 (Aug. 4, 2025), https://www.fcc.gov/ecfs/document/1080463821695/1; Ex Parte Letter of NABET-CWA Local 51 and Local 22, *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 17-318 (July 29, 2026), https://www.fcc.gov/ecfs/document/26110068554/1.

C. Public Interest Petitioners

Public Interest Petitioners are unions, nonprofit organizations, and a church ministry that participated in the Commission's rulemaking process. Throughout the process, they have explained to the Commission the importance of the national cap and the predictable harms that would flow from increasing or eliminating the cap.

Following the Order's public release, Public Interest Petitioners promptly sought a stay pending judicial review from the Commission. *See* Fed. R. App. P. 18(a)(1). Petitioners explained the irreparable harms the Order would cause to them and their members, including by undermining union employees' job opportunities, working conditions, and wages; distorting media markets in which Petitioners participate; and diminishing access to critical local news. *See* Add. 12-21. The stay petition filed with the Commission also documents the ways in which the Order undermines—rather than promotes—the Commission's traditional policy goals of promoting competition, localism, and diversity. *Id.* at 3-7. As of this filing, the Commission has not acted on the request for a stay.

STANDARD OF REVIEW

In deciding whether to grant a stay pending appeal, courts consider likelihood of success, irreparable injury to the movant, injury to other parties, and public interest. *Ohio v. EPA*, 603 U.S. 279, 291 (2024). To avoid

undue harm to the parties, a stay "simply suspends . . . alteration of the status quo" while the Court considers the merits of a serious dispute. *Nken v. Holder*, 556 U.S. 418, 434 (2009).

ARGUMENT

A stay is necessary to preserve the decades-long status quo that has existed since Congress fixed the national ownership cap by statute in 2004. Public Interest Petitioners easily satisfy each of the traditional stay factors. The Commission's Order is plainly unlawful because it flouts Congress's decision to set the national ownership cap at 39%.[3] The equities also conclusively favor a stay. If the Order takes effect, Public Interest Petitioners and their members face irreparable harm from increased media consolidation that will be difficult or impossible to reverse after the fact. By contrast, neither the Commission nor any other party faces irreparable harm from a relatively brief stay pending judicial review after a rulemaking process that lasted nearly nine years.

[3] As Public Interest Petitioners' merits briefing will explain, the Order is also arbitrary and capricious and suffers from procedural flaws. The Court need not reach those issues to grant a stay.

I. Public Interest Petitioners are likely to succeed on the merits.

This Court is likely to hold the Order unlawful and vacate it. It contravenes Congress's unambiguous directions. And it is poised to inflict immediate harms on Public Interest Petitioners by authorizing unlawful mergers.

A. Public Interest Petitioners have Article III standing.

Because the Commission's Order will cause irreparable harm to Public Interest Petitioners, they are entitled to judicial review of the Order.[4] Under the familiar three-part test, a party has Article III standing if (1) "she has suffered or likely will suffer an injury in fact," which (2) "was caused or will be caused by the defendant," and (3) "likely would be redressed by the requested judicial relief." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024). The administrative record and the declarations supporting Public Interest Petitioners' stay petition filed with the Commission demonstrate that all three prongs are readily satisfied. As long as any single

[4] Public Interest Petitioners qualify as "part[ies] aggrieved" within the meaning of the Hobbs Act, 28 U.S.C. § 2344, because they submitted comments opposing any effort to raise or eliminate the national ownership cap. *See, e.g.*, *ACA Int'l v. FCC*, 885 F.3d 687, 711 (D.C. Cir. 2018) ("[S]ubmitting comments confers 'party aggrieved' status in the context of a rulemaking (assuming an adverse outcome)." (cleaned up)).

petitioner has standing, the Court can grant the requested relief. *See Biden v. Nebraska*, 600 U.S. 477, 489 (2023).

1. The Order's explicit design and purpose are to promote further consolidation in the broadcast television industry. As Chairman Carr stated when voting to adopt the Order, the Commission's action will result in broadcasters achieving "[i]ncreased scale" and size that would not otherwise be possible. Order at 66 (Statement of Chairman Carr). *Cf. Prometheus Radio Project v. FCC*, 939 F.3d 567, 579 (3d Cir. 2019) (concluding that petitioners had standing because "encouraging consolidation is a primary purpose of the new rules"), *rev'd on other grounds*, 592 U.S. 414 (2021), *and vacated*, 846 F. App'x 88 (3d Cir. 2021). Such media consolidation will inflict immediate harms on those who rely on a competitive, pluralistic broadcast industry.

First, consolidation will reduce employment in the industry, which will directly harm the union petitioners and their members. When media companies merge, the resulting entities routinely and predictably lay off staff, including union members. *See* Add. 34, 50, 58; *see also, e.g.*, *In re Nexstar-TEGNA Merger Litig.*, No. 26-cv-00976, 2026 WL 1049295, at *24 (E.D. Cal. Apr. 17, 2026) (finding "no reason to believe Nexstar will deviate from its historical pattern of newsroom consolidation" after the Commission purported to authorize it to exceed the national ownership cap through its

acquisition of TEGNA), *appeal pending*, No. 26-2490 (9th Cir.). Indeed, the Commission itself recognized that "commenters raise[d] a valid concern that industry consolidation could result in employment reductions." 91 Fed. Reg. at 72811.

Such job losses directly harm union members, which supports the unions' associational standing. *See, e.g.*, *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 50 F.4th 164, 176 (D.C. Cir. 2022) (holding a union had standing to challenge "an action that increases competition for jobs in their labor market"); *see also, e.g.*, *Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 803 (D.C. Cir. 1985) ("loss of employment opportunities"). The unions are also directly harmed by job losses, as they lose revenue when dues-paying members are laid off. *See* Add. 31, 51, 58. The resulting loss of revenue constitutes an injury in fact. *See Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464 (2017). Consolidation also diminishes the unions' bargaining power vis-à-vis employers, which will require the unions to expend additional resources on bargaining and impair their efforts to secure higher wages and other benefits for their members. Add. 29-30, 50, 58-59. That distortion of the bargaining process, too, constitutes an economic injury. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 432-33 & n.22 (1998) (loss of a "bargaining chip . . . inflicted a sufficient likelihood of economic injury to establish standing").

Second, the Order will result in increased retransmission consent fees, which will be passed along to Public Interest Petitioners' members. When broadcasters merge, they gain market power and can demand supracompetitive prices for allowing pay-TV services to retransmit content. *See* Order at 74 (Statement of Commissioner Gomez) (discussing increased retransmission consent fees); *accord* Add. 60. In turn, those pay-TV services pass along increased prices to consumers, including the members of Petitioner TNG-CWA. Add. 60; *see also Nexstar-TEGNA Merger Litig.*, 2026 WL 1049295, at *27 (companies "will pass on higher retransmission consent fees to their consumers, which means higher bills for consumers"). Again, such "[m]onetary costs are of course an injury." *Diamond Alt. Energy, LLC v. EPA*, 606 U.S. 100, 111 (2025) (quotation marks and citation omitted); *see also, e.g.*, *Competitive Enter. Inst. v. FCC*, 970 F.3d 372, 383 (D.C. Cir. 2020).

Third, consolidation will degrade the broadcast media ecosystem in a variety of ways, which in turn will harm Public Interest Petitioners' business activities. Consolidation incentivizes broadcasters to substitute uniform national programming in lieu of high-quality local news, as a jointly owned group of stations can reduce its costs by broadcasting the same content on many stations. *See* Add. 26; *see also* Add. 34, 51. By the same token, it reduces broadcasters' demand to license or acquire locally oriented programming produced by independent producers, production companies,

distributors, sales agents, and other small businesses. Add. 38-39 (describing harms to Future Film Coalition's members). In turn, reductions in quality and quantity of local news production deprive Petitioners of the robust coverage that they rely upon to perform their work or live out their deeply held religious beliefs. Add. 26, 44-46.

2. These harms are traceable to the Order and redressable by a judicial decision setting it aside. Absent the Order, mergers that exceed the 39% national ownership cap would be unlawful.[5] As a result, harms arising from mergers that would take place under the Order's auspices are traceable to the agency's action. *See, e.g.*, *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 440-41 (D.C. Cir. 1998) (en banc) ("[A] plaintiff satisfies the causation prong of constitutional standing by establishing that the challenged agency rule permitted the activity that allegedly injured her, when that activity would allegedly have been illegal otherwise.").

[5] The Commission's Media Bureau recently authorized the merger of Nexstar and TEGNA by purporting to waive the national ownership cap. *See In the Matter of Applications for Consent to the Transfer of Control of TEGNA Inc. to Nexstar Media Inc.*, 41 FCC Rcd. 2099 (2026). Any such waiver also violates the national ownership cap Congress set in statute and is therefore unlawful.

3. A judicial ruling vacating the Order will redress those harms by restoring the prior regulations that Congress mandated and preventing the Commission from unlawfully authorizing such mergers.

B. The Order exceeds the Commission's legal authority.

The Commission has no authority to modify—let alone eliminate—the national ownership cap. In 2004, Congress directed that the Commission "shall modify" its rules to set "the national audience reach limitation for television stations" at "39 percent," and it has never since granted the Commission the authority to modify or eliminate that cap. 47 U.S.C. § 303 note (Broadcast Ownership); *see also* CAA § 629, 118 Stat. at 99-100.[6] Congress's use of the term "'shall' imposes a mandatory duty." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 172 (2016). That plain statutory language alone demonstrates that the Order is likely unlawful. *See, e.g.*, *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 327 (2014) ("An agency . . . may change its own conduct, but it cannot change the law.").

[6] That the cap was codified as a statutory note has no bearing on its validity or effect. *See, e.g.*, *SEC v. Hallam*, 42 F.4th 316, 335 n.76 (5th Cir. 2022). That decision is attributable to the Office of Law Revision Counsel, which has no authority to alter Congress's directions. *See* OLRC, *Frequently Asked Questions & Glossary*, https://perma.cc/KG67-Y67E ("[W]hether a provision is set out as a Code section or as a statutory note is a classification decision made by the editors of the Code," and it "has no effect on the validity or legal force of the provision.").

Even if the statute's plain text were not enough, the statutory context and structure reinforce the same conclusion. Congress created an entire regulatory structure that relies on the 39% cap it selected. It required that broadcasters exceeding the cap must come into compliance through divestiture within two years, but it exempted from the divestiture requirement broadcasters "that exceed the 39 percent national audience reach limitation through population growth." CAA § 629(2), 118 Stat. at 99. That formulation makes clear that Congress wrote the "39% cap percent national audience reach limitation" directly into statute, *id.*, and did not authorize the Commission to repeal it. And it indicates that Congress sought to create an enduring rule by explicitly accounting for future population growth. Such a provision would hardly be necessary if the Commission itself could change the rule in the future.

Even more telling is that Congress barred the Commission from exercising its forbearance authority with respect to the national ownership cap. *See* CAA § 629(2), 118 Stat. at 100. Again, this provision refers to the 39% cap as set by statute—specifically, "paragraph (1)(B)" of section 202(c) of the Telecommunications Act of 1996—not by Commission rule. *Id.* And it would make little sense for Congress to forbid the Commission from exempting *particular* broadcasters from the 39% cap through forbearance while allowing the Commission to exempt *all* broadcasters from the 39% cap

by rule. *See, e.g.*, *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 178 (2020) (rejecting statutory interpretation that would create "a large and obvious loophole" in the regulatory regime).

Despite all that, the Commission believes that it retains the authority to nullify Congress's decision to set the national ownership cap. That atextual conclusion relies on a misreading of *Fox Television*. *See* 91 Fed. Reg. at 72812-13. *Fox Television* arose under the prior statutory regime, where Congress had directed the Commission to set the national ownership cap at 35% but also directed the Commission to revisit the television ownership rules every two years. *See* 280 F.3d at 1033-34 (describing this statutory context). As a result, the D.C. Circuit concluded that the Commission retained authority to modify the cap. *See id.* at 1043 (concluding that the periodic-review requirement "imposed upon the Commission a duty to examine critically the new 35% [national ownership cap] Rule and to retain it only if it continued to be necessary; for the Commission to defer to the Congress's choice of 35% as of 1996 is to default upon this ongoing duty"); *see also Fox Television*, 293 F.3d at 540 (amended opinion emphasizing the court's conclusion that the review requirement required periodic reevaluation of the 35% cap). By contrast, when Congress set the ownership cap at 39% in 2004, it expressly removed the ownership cap from the periodic-review requirement for Commission rules. 47 U.S.C.

§ 303 note ("This subsection [regarding further Commission review] does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B)."). That indicates that Congress did not intend the Commission to revisit the 39% cap absent future legislation.

At bottom, the Commission takes the view that Congress left the agency free to change or eliminate the national ownership cap at any time—including, presumably, the day after conforming its regulations to the new statute. That is not a sensible interpretation of what Congress did. Rather, Congress intended to definitively set the national ownership cap, as the D.C. Circuit had previously affirmed it could do. *See Fox Television*, 293 F.3d at 540.

II. The remaining factors support a stay.

The remaining equitable factors strongly favor a stay pending judicial review. If the Order takes effect, it will irreparably harm Petitioners and the public interest by authorizing illegal and deleterious mergers, which will be difficult or impossible to unwind. But a stay would impose no cognizable harm on either the Commission or third parties. As a result, the balance of the equities decisively favors Petitioners.

A. A stay is necessary to prevent irreparable harm.

Absent a stay, the Order will inflict irreparable harm on Public Interest Petitioners. The Supreme Court has long recognized that when companies

seek to merge, "the 'scrambling' goes fast but the unscrambling is interminable and seldom effectively accomplished." *Baltimore & O. R. Co. v. United States*, 386 U.S. 372, 392 (1967).

As described above (at 11-14), broadcast media consolidation enabled by the Order will result in layoffs, worse benefits, depressed wages, and weakened collective bargaining power for unions and their members. Prior mergers authorized by the Commission, such as the Nexstar-TEGNA merger, have had these effects. *See Nexstar-TEGNA Merger Litig.*, 2026 WL 1049295, at *23-24. And there is every reason to believe that mergers authorized under the Order will lead to the same outcome, in addition to reducing the number of independent decisionmakers, decreasing coverage of local issues, and concentrating gatekeeping authority over access to broadcast audiences. *See supra* pp. 11-14.

Future divestiture of mergers under the Order will be insufficient to remedy Petitioners' harms. After a merger is completed, it is often "impossible to recreate pre-merger competition." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001); *see Nexstar-TEGNA Merger Litig.*, 2026 WL 1049295, at *23 (finding that it would be "difficult to divest TEGNA as a competitive entity and [the merger] will result in newsroom layoffs and shutdowns"). Eliminated jobs do not spring back into existence, laid-off employees cannot automatically return, and lost wages cannot be recovered.

Add. 31, 35, 51. Unions have no way to recoup lost members' dues. Add. 51, 57. Local news consumers will not see their coverage reinstated and will not get refunds for higher subscription prices paid after the merger. *See* Add. 26, 46-47. And independent creators who have lost business opportunities will be out of luck. Add. 39. In short, once broadcasters rush to merge, it will be "extraordinarily difficult to unscramble the egg." *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 353 (3d Cir. 2016) (quotation marks and citation omitted).

Seeking case-by-case review of the Commission's approval of particular mergers under the Order does not provide an adequate means to prevent these harms. *Contra* 91 Fed. Reg. at 72806-07. The Commission's recent actions with respect to the merger of Nexstar and TEGNA demonstrate the inadequacy of that approach. *See Broadband Commc'ns Ass'n of Pa. v. FCC*, No. 26-1062 (D.C. Cir.). After the Commission's Media Bureau approved that transaction—which would result in a combined entity reaching more than 80% of the national audience—and allowed it to take effect, Nexstar and TEGNA consummated the merger within hours. *See* Nexstar Media Grp., *Nexstar Media Group, Inc., Closes Acquisition of TEGNA Inc.* (Mar. 19, 2026), https://perma.cc/4MNW-JMWH. But the Commission successfully forestalled judicial review of its approval. The Commission delayed its own review of the Bureau's approval of the merger (and never

ruled on the objecting parties' request that the merger approval be stayed pending review), while also arguing to the D.C. Circuit that the court lacked jurisdiction to review the agency's action until the full Commission reviewed the Bureau's decision. *See* Mot. to Dismiss, *Broadband Commc'ns Ass'n of Pa. v. FCC*, No. 20-1062 (D.C. Cir. filed May 5, 2026). The result is that the Commission can approve mergers that violate the 39% ownership cap and then forestall judicial review of that agency action until long after the parties consummate the transaction—an untenable result.[7]

B. The balance of equities and public interest favor a stay.

The remaining equitable factors decisively favor a stay. Staying the Order pending judicial review would cause no irreparable harm, so the balance of the equities clearly favors Petitioners. And the public interest favors a stay of agency action that is likely unlawful. *See Nken*, 556 U.S. at 435 (noting that the harms to the government and the public interest "merge").

As an initial matter, the Commission has no legitimate interest in its Order taking effect. Because "our system does not permit agencies to act unlawfully even in pursuit of desirable ends," *Ala. Ass'n of Realtors v. Dep't*

[7] Although the Nexstar-TEGNA merger was subject to antitrust scrutiny, *see Nexstar-TEGNA Merger Litig.*, 2026 WL 1049295, there is no guarantee that similar relief will be available for other mergers.

of Health & Hum. Servs., 594 U.S. 758, 766 (2020), "[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (citations omitted). "To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *Id.* The Commission's failure to adhere to the clear, longstanding statute governing the national ownership cap thus counsels in favor of a stay pending judicial review.

In any event, the Commission has no valid claim to implementation of the Order prior to the completion of judicial review. The Commission initiated this rulemaking nearly *nine years ago*, and it has shown no urgency in concluding proceedings since then. Indeed, it let the rulemaking lie dormant for more than seven years before seeking to refresh the record in 2025. And even after the Commission adopted the Order, it continued its leisurely pace. More than three months elapsed between the Commission's vote to adopt the Order and its publication in the Federal Register. That lack of alacrity undermines any argument that the Order must be permitted to take effect prior to the conclusion of judicial review. *Cf. Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1318 (1983) (Blackmun, J., in chambers) ("[T]he Administrator's failure to act with greater dispatch tends to blunt his claim of urgency . . . .").

Similarly, no broadcaster has a valid interest in the Order's immediate implementation. Broadcasters have complied with the 39% national ownership cap for two decades, and they are undoubtedly aware that the Commission's Order is subject to judicial review. Any costs arising from their efforts to push through an otherwise-prohibited merger while judicial review of the Order remains pending would be mere "self-imposed costs," which do not count as irreparable harm. *Cuomo v. U.S. Nuclear Regul. Comm'n*, 772 F.2d 972, 977 (D.C. Cir. 1985) (per curiam) (holding that companies could not demonstrate irreparable harm when they "took a risk" and incurred costs based on a "license [that] might not be granted or might be delayed").

That is particularly true because a stay would not permanently deprive broadcasters of any interest in completing a merger, even assuming the Order's legality. At most, a stay would delay the Commission's approval of license transfers pending the completion of judicial review. Mere delay of agency approval of such transactions does not constitute irreparable harm. *See, e.g.*, *Downstate Stone Co. v. United States*, 651 F.2d 1234, 1241 (7th Cir. 1981) ("[E]xcept in exceptional circumstances not present here, delay and consequent expenses or loss of profits incurred because necessary government approval is not immediately forthcoming do not constitute irreparable harm."); *see also Monsanto*, 463 U.S. at 1317 (holding that

"delay alone" of regulatory approval of new pesticides "is not, on these facts, irreparable injury").

CONCLUSION

The Court should stay the Commission's Order pending judicial review.

Respectfully submitted,

s/ Simon C. Brewer
Simon C. Brewer
Bradley Girard
Kali Schellenberg
Jason Brovich
Paul R.Q. Wolfson
Robin F. Thurston
Democracy Forward Foundation
P.O. Box 34553
Washington, D.C. 20043
(202) 448-9090

Gigi B. Sohn
G Squared Strategies, LLC
3503 Alton Place, NW
Washington, D.C. 20008

Counsel for Petitioners

November 25, 2026

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g)(1), I certify that this motion:

(i) complies with the type-volume limitation of Rule 27(d)(2)(A) because it contains 4646 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word 365, set in Century Schoolbook font in a size measuring 14 points or larger.

s/ *Simon C. Brewer*
Simon C. Brewer

CERTIFICATE OF SERVICE

I certify that on November 25, 2026 this motion was filed using the Court's ACMS. I further certify that I will serve a file-stamped copy of the motion on respondents at LitigationNotice@fcc.gov.

s/ *Simon C. Brewer*
Simon C. Brewer