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\*\* BREAKING NEWS \*\*

# U.S. Supreme Court Unanimously Sides with FCC

# in *Prometheus* Media Ownership Deregulation Case

The U.S. Supreme Court today released an [opinion](https://www.supremecourt.gov/opinions/20pdf/19-1231_i425.pdf) (the “Opinion”) in which it unanimously held that the FCC acted properly and within its discretion when it relaxed several of its local media ownership rules in 2017. The Supreme Court Opinion breaks the nearly 20-year-long stranglehold of a divided panel of the United States Court of Appeals for the Third Circuit, which panel has retained jurisdiction over the FCC’s quadrennial review proceedings (and attendant attempts to deregulate the media ownership rules) since 2003.

*Background*. As you likely recall, in November 2017 the Commission adopted an [Order on Reconsideration](https://docs.fcc.gov/public/attachments/FCC-17-156A1.pdf) (the “2017 Order”) that modernized a number of local media ownership rules, finding them no longer justified in light of competitive conditions in the rapidly changing media marketplace. Among other rule changes—and as relevant to the *Prometheus* litigation that is the subject of today’s Supreme Court Opinion—the 2017 Order repealed the Newspaper/Broadcast Cross-Ownership Rule and the Radio/Television Cross-Ownership Rule; the 2017 Order also significantly relaxed the Local Television Ownership Rule by eliminating the “eight voices” test (and, while the 2017 Order retained the prohibition on “top-four” combinations, the Order did adopt a new standard for waiving the two “top-four” prohibition).

However, in September 2019 a divided three-judge panel of the Third Circuit Court of Appeals vacated the 2017 Order’s rule changes. The Third Circuit panel majority found no fault with the FCC’s analysis of competitive marketplace conditions, but the appeals court concluded that the Commission had failed to “adequately consider the effect its new rules would have on ownership of broadcast media by women and racial minorities.” One of the three judges on the panel dissented from that decision, reasoning that the Commission is not required “to quantify the future effects of its new rules as a prerequisite to regulatory action.”

Both the FCC and NAB then filed petitions for certiorari (or “cert petitions,” in legal shorthand) asking the Supreme Court to intervene and correct errors in the Third Circuit’s reasoning—errors that, if allowed to stand, could have far-reaching consequences for the broadcast industry. The Supreme Court granted those cert petitions in late 2020, heard oral arguments in early 2021, and today issued its unanimous Opinion reversing the Third Circuit’s decision and upholding the legality of the FCC’s 2017 Order.

*Today’s Supreme Court Opinion*. In a unanimous Opinion authored by Justice Brett Kavanaugh (the “Opinion”), the Court upheld the FCC’s 2017 Order as “reasonable and reasonably explained” under the statutory standard governing agency decision-making under the Administrative Procedure Act (“APA”); that is, the Supreme Court found that the FCC’s decision-making was not “arbitrary and capricious.” (Justice Clarence Thomas authored a concurrence.)

The Opinion emphasizes that the FCC has “broad statutory authority to regulate broadcast media” as public convenience, interest, or necessity requires, and that a court reviewing regulatory action taken by the FCC must be “deferential” and “may not substitute its own policy judgment for that of the agency.” The Opinion further notes—as a factual matter—that the ownership rules at issue were each adopted during the period from 1964–1975, “in an early-cable and pre-Internet age when media sources were more limited.” And although the FCC “did not have perfect empirical or statistical data” regarding the effects of its proposed ownership relaxation on minority and female ownership” when it adopted its 2017 Order, the FCC requested, but did not receive, such data. As stated in the Opinion, the law does not impose any “general obligation on agencies to conduct or commission their own empirical or statistical studies.”

Against that legal and factual backdrop, the Opinion held that the Commission’s 2017 decision to deregulate various of its local ownership rules was within the legal scope of the FCC’s authority to calibrate those rules to serve “the public interest as the result of competition.”

As the Opinion succinctly states:

“The FCC reasoned that the historical justifications for those ownership rules no longer apply in today’s media market, and that permitting efficient combinations among radio stations, television stations, and newspapers would benefit consumers. The Commission further explained that its best estimate, based on the sparse record evidence, was that repealing or modifying the three rules at issue here was not likely to harm minority and female ownership. The APA requires no more.”

*What’s Next?* Although this is an extremely positive development on the local media ownership front, there are still some procedural hurdles that must be cleared before the FCC can act on the Supreme Court’s Opinion. (Recall that as of this writing the pre-2017 ownership rules remain in effect; i.e., the Newspaper/Broadcast and Radio/Television Cross-Ownership Rules are in play, the Local Television Ownership Rule test for a permissible television duopoly includes both the “top-four” prohibition and the “eight-voices” test, and certain television Joint Sales Agreements are “attributable,” subject to specified grandfathering relief.) The case will return to the Third Circuit for certain procedural steps before it ultimately returns to the FCC. Only then will broadcasters’ lingering questions about exactly how and when the FCC will take action in light of the Supreme Court’s Opinion likely be answered, given that the pre-2017 ownership rules are currently in effect and the Commission recently adjusted many of its forms to account for those pre-2017 ownership rules.

Further, the FCC’s 2018 Quadrennial Review docket remains open pursuant to a [Notice of Proposed Rulemaking](https://docs.fcc.gov/public/attachments/FCC-18-179A1.pdf) initiating that review in December 2018. To some extent, the Commission’s Notice in the 2018 Quadrennial Review was designed to pick up where the FCC’s 2017 Order left off; the rules under review in the 2018 Quadrennial Review proceeding are (1) the Local Television Ownership Rule, (2) the Local Radio Ownership Rule, and (3) the Dual Network Rule. Accordingly, it is currently uncertain what effect today’s Supreme Court Opinion might have on the FCC’s decision-making process in the 2018 Quadrennial Review proceeding, particularly under the Biden Administration and an FCC that is very different from the one that adopted the 2017 Order.

We will be keeping a close eye on these issues, both regarding the implementation of the Supreme Court’s *Prometheus* Opinion and as events develop in the 2018 Quadrennial Review proceeding.

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*Tim Nelson, Editor*

[BROOKS, PIERCE, McLENDON,](http://www.brookspierce.com/)

[HUMPHREY & LEONARD, L.L.P.](http://www.brookspierce.com/)

[Mark J. Prak](mailto:mprak@brookspierce.com)   
[Marcus W. Trathen](mailto:mtrathen@brookspierce.com)  
[David Kushner](mailto:dkushner@brookspierce.com)  
[Coe W. Ramsey](mailto:cramsey@brookspierce.com)  
[Stephen Hartzell](mailto:shartzell@brookspierce.com)

[Julia C. Ambrose](mailto:jambrose@brookspierce.com)

[Elizabeth E. Spainhour](mailto:espainhour@brookspierce.com)

[J. Benjamin Davis](mailto:bdavis@brookspierce.com)

[Timothy G. Nelson](mailto:tnelson@brookspierce.com)

[Patrick Cross](mailto:pcross@brookspierce.com)

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