



International Center
for Law & Economics

ICLE Amicus Brief in *NAB v. Prometheus*

May 26, 2020

[Geoffrey A. Manne](#), [Gus Hurwitz](#) and [Ben Sperry](#)

This proceeding is fast becoming the *Jarndyce v. Jarndyce* of administrative law. For nearly two decades, a three-judge panel in the Third Circuit has blocked the FCC's efforts to comply with its statutory obligation under the 1996 Act to review its media ownership rules periodically and repeal or modify any rules that are no longer necessary because of increased competition in local media markets.

The order in *Prometheus IV* is the most recent and extreme example of the Third Circuit panel's improper interference with the FCC's efforts to comply with this statutory obligation. In it, the panel vacated an FCC order that would have repealed or modified media ownership regulations that even the panel did not dispute are no longer needed to achieve their original purpose of promoting competition, localism, and diversity of viewpoints. See *Prometheus IV*, 939 F.3d at 584-588 (disputing the FCC's analysis and conclusions as to female and minority ownership diversity, but not as to promotion of competition, localism or diversity of viewpoints).

The Third Circuit panel instead vacated the FCC's order because two judges on the panel believed those regulations might serve another, altogether different objective—promoting minority and female ownership—that is nowhere mentioned in either the Communications Act of 1934, 47 U.S.C. § 151 et seq., or the 1996 Act. See *Prometheus IV*, 939 F.3d at 584-588. In so doing, the panel exceeded the limits of judicial review authorized by the Administrative Procedure Act, 5 U.S.C. § 551 et seq., by substituting its judgment for that of the agency to which Congress had expressly delegated authority to determine whether these media ownership regulations were still both necessary and in the public interest, and by placing burdens on the agency beyond those established by Congress.

In overstepping these limits, the Third Circuit panel will further delay the elimination of regulations that are not only no longer necessary, but that are also limiting the ability of local newspapers and broadcasters to compete with increasingly important digital media platforms. These outdated regulations have already contributed to an "extinction-level crisis" in the newspaper industry, and the spread of that crisis to local broadcasters in smaller markets is imminent. Consequently, the panel's order will cause serious and immediate injury to the public's First Amendment interest in preserving a strong local free press. See *Associated Press v. United States*, 326 U.S. 1, 28 (1945) (a "free press is indispensable to the workings of our democratic society") (Frankfurter, J., concurring).

[View Article](#)