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In the Matter of		
Office of Economics and Analytics Seeks Comment on the State of Competition in the Communications Marketplace		**GN Docket No. 20-60**

COMMENTS OF THE
AMERICAN ECONOMIC LIBERTIES PROJECT
AND
OPEN MARKETS INSTITUTE

via electronic filing

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Introduction & Summary

The American Economic Liberties Project (AELP) works to ensure America's system of commerce is structured to advance, rather than undermine, economic liberty, fair commerce, and a secure, inclusive democracy. AELP believes true economic liberty means entrepreneurs and businesses large and small succeed on the merits of their ideas and hard work; commerce empowers consumers, workers, farmers, and engineers instead of subjecting them to discrimination and abuse from financiers and monopolists; foreign trade arrangements support domestic security and democracy; and wealth is broadly distributed to support equitable political power.

The Open Markets Institute (OMI) is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. The vigorous enforcement of the antitrust laws against corporate restraints of trade and exclusionary practices is essential to protecting the U.S. economy and democracy from monopoly and oligopoly. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and other members of the public.

The Federal Communications Commission (FCC) is charged with oversight over the radio, television, wire, satellite, and cable industries. The FCC has an essential role in ensuring a competitive marketplace that facilitates a diversity of opinions and viewpoints and ensures that all have access to the benefits of communications technologies.

We write this comment to argue that the FCC should incorporate at least two principles into any marketplace study.

First, deconcentration and dispersed markets are valuable in and of themselves and the FCC should seek to measure and describe market structures, specifically the size and practices of corporations. Second, that rising digital audio and video service users does not obviate the need for deconcentrated media ownership rules.

We also highlight episodes in the FCC's long antimonopoly history and encourage the agency to use its authority to shape markets for the public good.

Deconcentration In and Of Itself Should be a Goal of FCC Antimonopoly Policy

Telecommunications markets today are concentrated. In radio, television broadcasting, cellular telecommunications, and cable industries, only a handful of giant companies govern access to information, communications, entertainment, for millions of people in the U.S. In the radio industry alone, the top four broadcasters have over 50% market share.[1]

Despite the FCC's commendable decision to block Sinclair's combination with Tribune Media,[2] the fact remains that the top four broadcast television stations have a combined national market share of 40%.[3]

And T-Mobile's recent blockbuster acquisition of Sprint has consolidated power over telecommunications services into three corporations: AT&T, Verizon, and T-Mobile. These three corporations have a combined market share of almost 70% in the US.[4] Wired

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[1] Devin McGinley, Radio Broadcasting in the US, IBIS WORLD 8 (Nov. 2019); *see also* Eli Noam, *Media Concentration in the United States, in* WHO OWNS THE WORLD'S MEDIA: MEDIA CONCENTRATION AND OWNERSHIP AROUND THE WORLD 512-13 (Eli M. Noam et al. eds., 2016).
[2] Harper Neidig, *FCC Chair Rejects Sinclair-Tribune Merger*, THE HILL, July 16, 2018, https://thehill.com/policy/technology/397194-fcc-chairman-rejects-sinclair-tribune-merger.
[3] Sriya Pradhan, *Television Broadcasting in the US*, IBIS WORLD 8 (Apr. 2020).
[4] Jeremy Moses, *Wireless Telecommunications Carriers in the US*, IBIS WORLD 8 (May 2020).

telecommunications is similarly concentrated with the top four corporations having over a 50% market share.[5]

The cable industry is also highly concentrated. The top four cable networks have almost 60% of the national market share.[6] The top three cable providers have almost 50% market share.[7]

Even in newer communications industries, like podcasts, concentration and outsize corporate power present potential problems. Over the past year and a half, Spotify, one of the dominant music streaming providers, has acquired podcasting networks The Ringer and Gimlet Media, and Spotify has also acquired podcast recording company Anchor and signed an exclusive deal with podcast superstar Joe Rogan.[8] From 2014-2020, Spotify has bought 15 companies in total. Though the podcast market is far younger than telecommunications, television, and radio, Spotify's aggressive acquisition strategy and subsequent advertising ecosystem developments demonstrate the importance of maintaining dispersed markets for all forms of media. By buying up podcast makers and networks, and developing their own software to facilitate targeted advertising, Spotify threatens to close and manage what had been a relatively open market for ideas and information.[9]

An Extensive Body of Studies Support Deconcentrated Markets

Even beyond communications markets specifically, an expansive literature of studies has emphasized the importance and benefits of many competitors to a healthy marketplace. A focus on end consumers - and consumer prices - as well as a belief that enforcers can finetune mergers for purportedly competitive outcomes has led to rampant consolidation across the U.S. economy. Unregulated concentrated markets are endemic not just to communications industries, but across the American economy. From Intravenous (IV) Solution to smartphone operating systems and cell phone providers, fewer and fewer corporations control greater shares of the country's markets.[10] Such extreme and nationwide corporate concentration hurts Americans in the goods that they buy, the services they receive, and the ability that they possess to participate in democratic life.

Mergers and the concentrated markets they produce have often led to harmful economic results for consumers. Retrospective studies of mergers, coming most notably from Northeastern University economist John Kwoka, have found that enforcers frequently permit mergers that lead to higher prices.[11] Kwoka has pointed out that the "structural presumption," i.e. a presumption of illegality for large mergers of competitors, accurately screens out mergers that hurt consumers,

[5] Jeremy Moses, *Wired Telecommunications Carriers in the US*, IBIS WORLD 8 (Feb. 2020).
[6] Arnez Rodriguez, *Cable Networks in the US*, IBIS WORLD 8 (Mar. 2020).
[7] Devin McGinley, *Cable Providers in the US*, IBIS WORLD 7 (Dec. 2019).
[8] Variety, *Spotify acquires Bill Simmons' The Ringer as part of podcast push*, CNBC, Feb. 5, 2020, https://www.nbcnews.com/news/all/spotify-acquires-bill-simmons-ringer-part-podcast-push-n1130586.
[9] Matt Stoller, *Will Spotify Ruin Podcasting?*, BIG (Feb 8, 2020), https://mattstoller.substack.com/p/will-spotify-ruin-podcasting.
[10] Open Markets Institute, "America's Concentration Crisis," https://concentrationcrisis.openmarketsinstitute.org/.
[11] *See* John E. Kwoka, Jr., *Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes*, 78 ANTITRUST L.J. 619; *see also* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS ON U.S. POLICY (2015).

as do straightforward firm counts; mergers are very often harmful to consumers when five or fewer competitors are left in a market.[12] Other studies have tied increased market power and market concentration to rising prices and declining labor (and capital) income shares.[13]

Various other measures of economic performance also suggest that citizens generally would benefit from deconcentration. One economic study from Mico Mao found that a merger between two of the country's four largest shampoo makers led to increased prices and fewer choices of products afterwards.[14] Germán Gutiérrez and Thomas Philippon have tied "decreasing competition" in the U.S. business sector to about half of the gap between where business investment should be, relative to various benchmarks.[15] Other economists in a *Review of Finance* article argue that U.S. markets have become more concentrated, and that they "find no evidence for a significant increase in operational efficiency."[16] Peter Carstensen and Robert Lande meanwhile have argued that competition policy today has inadequately respected the "incipiency" standard in antitrust law and has therefore underestimated the need for "resilient redundancy" in markets.[17] This resilient redundancy better serves consumers and also bolsters productive resiliency in the case of contingent events like earthquakes or other emergencies.[18]

Other studies have found negative relationships between *employer* concentration and worker outcomes.[19] José Azar, Ioana Marinescu, and Marshall Steinbaum looked at more than 8,000 local labor markets in the United States and found that the average labor market in the U.S. is "highly concentrated" and that when there were fewer employers, workers tended to earn less.[20] And a new job market paper from David Arnold finds that mergers that cause "significant increases in local labor market concentration result in a 2.1% decline in M&A workers' earnings

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[12] John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?*, 81 ANTITRUST L.J. 837, 859-64, 863 (2017).
[13] Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q. J. ECON. 561 (2020); Simcha Barkai, *Declining Labor and Capital Shares*, J. FIN. (forthcoming).
[14] *See* Open Markets Institute, The Corner *Newsletter, June 12, 2019: New Study Shows How Mergers, Merger Enforcement Can Hurt Consumer Choice* (June 12, 2019), https://openmarketsinstitute.org/newsletters/corner-newsletter-june-12-2019-new-study-shows-mergers-merger-enforcement-can-hurt-consumer-choice/.
[15] Germán Gutiérrez & Thomas Philippon, *Ownership, Concentration, and Investment*, 108 AM. ECON. ASSOC. PAPERS & PROCEEDINGS 432 (2018); *see also* Germán Gutiérrez & Thomas Philippon, *Declining Competition and Investment in the U.S.* (working paper, Nov. 2017) ("[W]e find that more (less) competition causes more (less) investment, particularly in intangible assets by industry leaders."), http://germangutierrezg.com/GutierrezPhilippon_IKComp_2018.pdf.
[16] Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are US Industries Becoming More Concentrated?*, 23 REV. FIN. 697 (July 2019); *id.* at 700 ("We also find that increased profits are driven primarily by wider operating margins rather than by higher operational efficiency, in line with the increased market-power explanation."); on a similar finding using plant-level data, *see* Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* (Nat'l Bureau of Econ. Research, Working Paper No. 22750, 2016), https://www.nber.org/papers/w22750; *see also generally* Melissa A. Schilling, *Potential Sources of Value from Mergers and Their Indicators*, 63 ANTITRUST BULL. 183 (2018) ("A considerable body of research concludes that most mergers do not create value for anyone, except perhaps the investment bankers that negotiated the deal.").
[17] Peter C. Carstensen & Robert H. Lande, *The Merger Incipiency Doctrine and the Importance of "Redundant" Competitors*, 2018 WIS. L. REV. 783.
[18] *Id.* at 826-842 (Reviewing instances that illustrate the need for "redundant" competitors.).
[19] Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014*, 83 AM. SOC. REV. 213 (2018).
[20] José Azar, Ioana Marinescu & Marshall I. Steinbaum, *Labor Market Concentration*, J. HUMAN RESOURCES at 16 (May 12, 2020), http://jhr.uwpress.org/content/early/2020/05/04/jhr.monopsony.1218-9914R1.full.pdf.

relative to [a] matched control, with larger declines in already concentrated markets."[21] Efraim Benmelech, Nittai Begman, and Hyunseob Kim also found a negative relationship between employer concentration and wages and that, among other findings, wages tend to more closely follow productivity growth in less concentrated labor markets.[22]

Given the expansive body of evidence that points to the economic benefits that follow from having multiple competitors and dispersed market structures, the specific mission of the FCC augments this case for deconcentration. Having many distinct owners of various types of media bolsters a resilient, free society. As a past comment has illustrated to the FCC, concentrated ownership of radio stations poses the danger of stifling media diversity and exacerbating the marginalization of women and queer artists.[23]

Competition from Digital Services and Digital Advertising Demands Public Rules for the Digital World, Not Removing Local Ownership Rules

Many people use digital audio and video services, which function in different market segments than regulated broadcasting channels. Local media ownership rules provide crucial protections for the public interest, and promote competitive broadcast markets, localism, and diversity. These distinctions are analogous to intermodal competition in transportation. For example, taxis, trains, and airlines all operate in the transportation sector, but each of these modes of transit is subject to different rules and often do not compete against one another in the same markets. Due to limited intermodal competition, Congress and policymakers have recognized the importance of maintaining decentralized market structures and promoting fair business practices within each mode of transportation.

New types of digital services do not always operate in the same market as traditional broadcasters and newspapers. Over 248 million Americans listen to the radio each week and is the most widely adopted communications medium reaching 92% of Americans.[24] But some 42 million to 162 million Americans do not have broadband access, meaning that those Americans likely use digital media less frequently than those who have broadband access.[25]

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[21] David Arnold, *Mergers and Acquisitions, Labor Market Concentration, and Worker Outcomes* at 2 (Jan. 13, 2020) (job market paper), https://scholar.princeton.edu/sites/default/files/dharnold/files/jmp.pdf.

[22] Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* (Nat'l Bureau of Econ. Research, Working Paper No. 24307, Feb. 2018), https://www.nber.org/papers/w24307.pdf.

[23] Reply Comment, Marshall Steinbaum, Open Markets Institute et al., In re 2018 Quadrennial Regulatory Review at 2 (May 30, 2019) ("[I]f [music] boycotts can be dictated by single shareholders or executives, then musicians and labels have no choice but to play to their tastes and note the public's. Such examples are clear instances in which economic power is translated directly into political, social, and cultural power."), https://ecfsapi.fcc.gov/file/105291454029282/FCC%20Radio%20Ownership%20Reply%20Comment%20-%20Coalition%20(5-29-19).pdf.

[24] *Radio Facts*, RADIO ADVERTISING BUREAU, http://www.rab.com/whyradio.cfm.

[25] Jessica Rosenworcel, Opinion, *FCC Commissioner: Our Agency Says All Americans are Gaining Advanced Internet Access. It's Wrong*, CNNBUSINESS (Apr. 29, 2020), https://www.cnn.com/2020/04/29/perspectives/fcc-broadband-access/index.html; *see also* Comment, Musicfirst Coalition & Future of Music Coalition, In re Office of Economics and Analytics Seeks Comment on the State of Competition in the Communications Marketplace at 12-24 (explaining additional distinctions between intermodal radio competition and arguing for maintaining limitations on local radio ownership) (Apr. 27, 2020),

Digital platforms offer different services than local broadcasters. Facebook, for instance, connects friends and family, but offers limited or no local news-gathering function in the many communities where it is a dominant social communications network. Polls show Americans trust local news above other forms of news, thus revealing that, for audiences, local news markets are distinct.[26] In some cases, tech platforms themselves acknowledge market segmentation; Google's creation of the Google News search engine is a product design choice predicated upon the notion that Google's services do not replace, but supplement, news gathering.

In many settings, antimonopoly voices have expressed deep concern about the troubling power of a handful of large technology firms, including Google and Facebook, and about the failure of federal regulators to exercise appropriate authority and oversight.[27] These concerns supplement but not supplant concerns about media and communications ownership rules. The appropriate way to address problems of monopoly power and corporate concentration in one sector is not to allow additional concentration in other sectors that foster more monopolists, but to seek to break unchecked corporate power where it arises.

A communications marketplace study should document closely how users, viewers, and listeners engage with traditional television and radio as well as digital audio and video. A critical part of such a study would be to offer recommendations on how to regulate the digital sector to ensure localism and diversity, not use intermodal competition to argue for relaxing limits on media ownership rules.

Studying Concentration, Market Structure, and Corporate Power Tracks with the FCC's Mission

By design, American antitrust enforcement is broad. Enforcement encompasses private parties, state governments, and multiple federal agencies.[28] The diverse enforcement landscape was meant to ensure that American industries would remain deconcentrated and diverse so that "free and unfettered competit[ive]" markets could be preserved.[29]

However, since the 1970s, conservative scholars have asserted that the antitrust laws should only protect "consumer welfare," which overwhelmingly focuses on price increases or reduced

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https://ecfsapi.fcc.gov/file/10428070860991/Consolodated%20mF%20FMC%20Initial%20Comments%202020%20%2020-60.pdf.

[26] Press Release, John Sands, Knight Foundation, *Local News is More Trusted than National News - But That Could Change* (Oct. 29, 2019), https://knightfoundation.org/articles/local-news-is-more-trusted-than-national-news-but-that-could-change.

[27] *See e.g.,* MATT STOLLER, SARAH MILLER & ZEPHYR TEACHOUT, AMERICAN ECONOMIC LIBERTIES PROJECT, ADDRESSING FACEBOOK AND GOOGLE'S HARMS THROUGH A REGULATED COMPETITION APPROACH (Apr. 2020), http://aelp.wideeyeclient.com/wp-content/uploads/2020/04/Working-Paper-Series-on-Corporate-Power_2.pdf; Matt Stoller, *Democrats Need to Tame the Facebook Monster They Helped Create*, POLITICO (May 18, 2019), https://www.politico.com/magazine/story/2019/05/18/democrats-facebook-stoller-226930; Barry Lynn, *Google and Facebook are Strangling the Free Press to Death. Democracy is the Loser*, THE GUARDIAN (July 26, 2018), https://www.theguardian.com/commentisfree/2018/jul/26/google-and-facebook-are-strangling-the-free-press-to-death-democracy-is-the-loser.

[28] 15 U.S.C §§ 12(a), 15, 18, 26.

[29] Northern Pacific R. Co. v. United States, 356 U.S. 1, 4 (1958).

output.[30] Consumer welfare advocates make several claims that are contrary to well-established evidence. First, their position ignores the explicit text of the statutes,[31] the numerous statutory amendments that sought to expand antitrust enforcement,[32] and the copious legislative history that justifies the purposefully broad language.[33]

But strong rules limiting the concentration of power over news and information has been a historical priority of America's antimonopoly approach to communications policy for economic and political reasons. Specifically, U.S. policymakers sought to decentralize control over information to promote a "free flow of ideas." In the aftermath of World War I, unlike European countries, which sought "to centralize communications and news under the control of the government[,] … Americans took a directly opposite path, working to ensure that the new wireless networks would be as decentralized and democratic as possible, composed of thousands of local stations that would be locally owned, locally directed, and locally funded…"[34] The Supreme Court's 1945 decision in *Associated Press v. United States* said that "a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom."[35]

Around the same period as the *Associated Press* decision, Congress also granted the FCC rulemaking authority "under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination of the broadcast field."[36]

In pursuit of these principles, the FCC enacted policies to prohibit dominant corporations from leveraging themselves into other industries to destroy nascent industries; promote viewpoint, program, source, and ownership diversity; ensure regulatory certainty; and foster local control.[37] "[A]ssuring that the public has access to a multiplicity of information sources," the Supreme

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[30] *See generally* Herbert J. Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 101 (2019), https://scholarship.law.upenn.edu/faculty_scholarship/1985.

[31] Robert Lande & Richard Zerbe, *The Sherman Act Is a No-Fault Monopolization Statute: A Textualist Demonstration*, 70 AM. U. L. REV. (forthcoming 2020).

[32] *See e.g.*, Robinson-Patman Act of 1936, Pub. L. No. 74-692, 49 Stat. 1526 (codified as amended at 15 U.S.C. § 13); Wheeler-Lea Amendment of 1938, 52 Stat. 111 (1938) (codified at 15 U.S.C. § 45(a)(1)); Celler-Kefauver Antimerger Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950), amending Clayton Act § 7; Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383, amending Clayton Act § 7A; Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974).

[33] *See generally,* Robert Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust*, 34 HASTINGS L.J. 65 (1982); Neil Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227 (1980); Neil Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L. J. 225 (1981); Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645 (2017).

[34] Open Markets Institute, "America's Free Press and Monopoly: The Historical Role of Competition Policy in Protecting Independent Journalism in America," Discussion Paper for "Breaking the News: Free Speech & Democracy in the Age of Platform Monopoly," June 12, 2018, 6, https://openmarketsinstitute.org/academic-articles-and-papers/americas-free-press-monopoly/.

[35] Associated Press v. United States, 326 U.S. 1, 20 (1945).

[36] FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940).

[37] In re 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, 13627-48 (2003).

Court said, "is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[38]

One of the most profound rules included the Financial Interest and Syndication (Fin-Syn) rules in the 1970s. The Fin-Syn rules instituted two policies. First, the rules both structurally separated the largest television network from television studios that produced broadcast content.[39] Second, the rules prohibited the television networks from obtaining or acquiring financial interest or syndication rights in broadcast programs that the network had not produced.[40]

Other measures also served to decentralize ownership of key media companies. For much of the years between World War II and the 1980s, the FCC instituted a number of other structural regimes including cross-ownership prohibitions between the owners of radio and television stations as well as between owners of newspapers and broadcast stations. The FCC also enacted strict market share limits on communications companies. For example, the National Television Ownership Rules limited the total number of broadcast stations a single corporation could own to five.[41] The National Television Ownership Rules were explicitly enacted to prevent any one corporation from obtaining a dominant influence over viewers.[42]

Nevertheless, the FCC since the 1990s has slowly repealed and weakened many of its policies. In 1993, the Fin-Syn rules were repealed.[43] In 2017 structural separations between radio and television stations as well as between newspapers and broadcast stations were themselves repealed.[44] As a consequence, the United States has seen massive industry consolidation throughout the entire telecommunications sector.[45]

Conclusion

The FCC should consider how any marketplace report could document and study market structures and business practices throughout the country. In particular, the study of local media markets can inform future communications policy choices. These choices should vigorously enforce limitations on concentrated ownership. The FCC's communications marketplace study should also show how decentralized media markets are struggling.

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[38] Turner Broadcasting Sys., Inc. v. F.C.C., 512 U.S. 622, 663 (1994).
[39] In re Evaluation of the Syndication & Fin. Interest Rules, 7 FCC Rcd. 345 ¶ 2 (1991).
[40] *Id*.
[41] In re Amendment of Sections 3.35, 3.240 & 3.636 of the Rules & Regulations Relating to Multiple Ownership of AM, FM & Television Broad. Stations, 18 F.C.C. 288, 295 ("[W]e believe that the policy of diversification [of broadcast station ownership] requires the adoption of the 5 station limitation.") (internal citation omitted) (1953). *See also id* at 291 ("It is our view that the operation of broadcast stations by a large group of diversified licensees will better serve the public interest than the operation of broadcast stations by a small and limited group of licensees.").
[42] *Id.*
[43] In re Evaluation of the Syndication & Fin. Interest Rules, 8 FCC Rcd. 3282 (1993).
[44] Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd. 9802, 9806, 9875 (2017).
[45] See *supra* notes 1-7. Within a few years after the repeal of the Fin-Syn rules, the Walt Disney Company approved the purchase of ABC in 1996. *See* Marc L. Herskovitz, *The Repeal of the Financial Interest and Syndication Rules: The Demise of Program Diversity and Television Network Competition?*, 15 CARDOZO ARTS & ENT. L.J. 177, 177 (1997).

There are tools available to the FCC that can be used to foster local control, diversity, and competition in communications markets. Past leadership has demonstrated that FCC authority and rulemaking could be used to foster beneficial competition. Under the chairmanship of Tom Wheeler in 2016, the FCC proposed removing pay-TV providers' control over the physical set-top boxes that people needed to watch television. While we do not necessarily agree with the specifics of the rule, the rule would have allowed viewers to subscribe and watch programs through applications that would reach the set-top boxes of their - not their providers' - choice while also reducing unnecessary set top box fees. It also would have improved viewer choice since owning viewers' set-top boxes allowed cable providers to present their preferred programming to viewers at the expense of "independent and diverse voices" as Chairman Wheeler argued.[46] Black Entertainment Television founder Robert L. Johnson noted in an op-ed for *The Hill* in January 2016 that the rule was also important for black and other underrepresented producers and programming: "Increasing the accessibility of streaming content would provide minority programmers assistance in overcoming the barriers such as access to capital and carriage on cable, which has historically kept them from entering the marketplace."[47] Rather than seeking to improve the rule, Chairman Ajit Pai has since effectively removed the proposed rule from consideration.[48]

The FCC has tools that it can use to deconcentrate media and communications markets. Besides documenting market structure and business practices, the FCC's marketplace study should also investigate whether the FCC's existing legal tools are sufficient for this goal. If they are not, then the FCC should inform Congress so that it can give the FCC and, if necessary, the Federal Trade Commission the power to structure a dispersed information ecosystem for a democratic society.

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[46] Tom Wheeler, Opinion, *FCC Chairman: Here are the New Proposed Rules for Set-top Boxes,* L.A. TIMES (Sept. 8, 2016), https://www.latimes.com/opinion/op-ed/la-oe-wheeler-set-top-box-rules-20160908-snap-story.html.

[47] Robert L. Johnson, Opinion, *Consumers Deserve Choice and Minority Programmers Deserve Opportunity*, THE HILL (Jan. 22, 2016), https://thehill.com/blogs/congress-blog/technology/266653-consumers-deserve-choice-and-minority-programmers-deserve.

[48] Jon Brodkin, *FCC Chairman Pai Takes Wheeler's Set-top Box Plan Off the Table*, ARSTECHNICA (Jan. 30, 2017), https://arstechnica.com/information-technology/2017/01/fcc-chairman-pai-takes-wheelers-set-top-box-plan-off-the-table/.