Nos. 18-3335, 18-2943, 18-1092, 18-1669, 18-1670, 18-1671, 17-1107, 17-1109, 17-1110, 17-1111

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PROMETHEUS RADIO PROJECT, *ET AL.*

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*

Respondents.

On Petitions for Review of Orders of the Federal Communications Commission

PETITION FOR REHEARING OF INDUSTRY INTERVENORS IN SUPPORT OF RESPONDENTS

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RULE 35.1 STATEMENT

We express a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional importance, i.e., whether the panel misinterpreted Section 202(h) of the Telecommunications Act of 1996 by replacing Congress's command to consider competition with non-statutory policy considerations about ownership diversity. This error prevented the FCC from making necessary changes to its media ownership rules and will distort every future quadrennial review of those rules. This appeal also involves an exceptionally important question because the panel's wholesale vacatur of the FCC's *Reconsideration Order*, *Incubator Order*, and *Second R&O*'s "eligible entity" definition conflicts with decisions of seven other circuits, all of which remand without vacatur where, as here, an agency could correct any flaws in its reasoning while reaching the same ultimate result. *See*, *e.g.*, *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993).

BACKGROUND

Congress enacted Section 202(h) more than two decades ago, ordering the FCC to periodically review its rules restricting ownership of television stations, radio stations, and newspapers, and to repeal or modify any regulation that is no longer in the public interest "as the result of competition." Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996); *see* Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100

(2004). Despite Congress's clear command to modernize the FCC's ownership rules and eliminate outdated restrictions, a single panel of this Court has—for more than 15 years—prevented the FCC from fulfilling its duty and blocked any other court (or panel of this Court) from weighing in. Rehearing en banc is warranted to correct the panel's erroneous interpretation of Section 202(h) or, at a minimum, to amend the panel's vastly overbroad vacatur of the FCC's long-overdue efforts to update its ownership rules.

When Congress enacted Section 202(h), the FCC's ownership rules were already relics from a time when traditional television and radio broadcasts and print newspapers were virtually the only means by which Americans received news, as well as the dominant forms of video and audio entertainment. For example, the FCC adopted the Newspaper/Broadcast Cross-Ownership ("NBCO") Rule, which prohibits an entity from owning a daily newspaper and a full-power radio or television station in the same market, in 1975. *See Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 50 FCC 2d 1046, 1075 (1975).

By 1996, technological changes had sparked an "explosion of video distribution technologies and subscription-based programming sources" that gave consumers new media options and challenged the dominance of newspapers and "free over-the-air broadcasting." H.R. Rep. No. 104-204, at 55 (1995).

Accordingly, Congress instructed the FCC "to depart from the traditional notions of broadcast regulation and to rely more on competitive market forces." *Id.* In this newly "competitive environment, arbitrary limitations on broadcast ownership" were "no longer necessary" to protect consumers and instead were harmful to "the industry's ability to compete effectively in a multichannel media market." *Id.* Congress began this process by specifically directing the relaxation or elimination of several ownership rules. *See* Pub. L. No. 104-104, §§ 202(a), (b), (c)(1), (e), (f)(1), (i), 110 Stat. 56, 110-12. And it enacted Section 202(h) to ensure that the FCC would continue to update the ownership rules.

For a decade and a half, however, the same divided panel has prevented the FCC from implementing the reforms Section 202(h) requires. *See* slip op. 1 (Scirica, J., dissenting).[1] As a result, rules fashioned when the Internet and outlets such as satellite television and radio were in their infancy or did not even exist continue to govern the media marketplace. The stark difference between today's landscape and that of 2002, when the FCC began the first rulemaking invalidated by the panel, cannot be overstated. Social media networks, which now account for a significant

[1] *See Prometheus Radio Project v. FCC*, 652 F.3d 431, 472 (3d Cir. 2011) ("*Prometheus II*") (Scirica, J., dissenting); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 435 (3d Cir. 2004) ("*Prometheus I*") (Scirica, C.J., dissenting); *see also Prometheus Radio Project v. FCC*, 824 F.3d 33, 60 (3d Cir. 2016) ("*Prometheus III*") (Scirica, J., dissenting).

share of advertising revenues, hardly existed. Smartphones, which deliver many of today's news and entertainment services, were years from introduction. Streaming video did not exist. Rather than allowing the FCC to account for these new sources of competition as Congress mandated, the panel's decisions lock the law in an era dominated by VHS tapes, CD-ROMs, and pagers—or in the case of the NBCO Rule, the age of rotary telephones.

In the *Reconsideration Order* under review, the FCC made necessary adjustments to long-outdated ownership rules by repealing certain provisions and modifying others that the FCC concluded no longer served the public interest in light of "dramatic changes in the marketplace." *Reconsideration Order* ¶ 1 (JA252). But the panel vacated the *Reconsideration Order* in its entirety based solely on the majority's narrow concerns about ownership diversity, not the rules' merits, thus reinstating *all* the prior rules, including several that *no one* contends are still necessary in the public interest. For example, the panel vacated the FCC's modernization of its waiver policy regarding embedded radio markets, a change that no party opposed *before the agency*, much less in this Court. *See* Intervenors' Br. 63-64. The panel also set aside the FCC's elimination of the TV Joint Sales Agreements ("JSA") Attribution Rule, a rule change the Prometheus Petitioners failed even to mention in their opening brief. *See id.* at 63. And the panel vacated

changes to the NBCO Rule, the Radio/Television Cross-Ownership Rule,[2] and the Local Television Ownership Rule[3] even though no party disputes the FCC's market analysis or its conclusion that these rules no longer serve a useful purpose. The overbreadth of the panel's ruling is particularly striking in its reinstatement of the NBCO Rule, given that the panel itself agreed—*fifteen years ago*—that the Rule was no longer in the public interest. *See Prometheus III*, 824 F.3d at 51-52 (citing *Prometheus I*, 373 F.3d at 400-01).

This court-mandated ossification of the FCC's rules has had a concrete and negative impact on the broadcast and newspaper industries—represented by Intervenors here—by hampering their ability to compete with new and emerging media sources (such as social media networks and online video and audio platforms) that are *not* governed by comparable restrictions. As the FCC recognized, the media landscape is rapidly evolving, largely as a result of increased competition from Internet-based services. *See Reconsideration Order* ¶¶ 19-22 (JA261-64). As a result, broadcast stations and newspapers face significant online competition for

[2] The Radio/Television Cross-Ownership Rule restricts common ownership of radio and television stations in local markets. *Reconsideration Order* ¶ 49 (JA273-74).

[3] The Local Television Ownership Rule limits the number of television stations that an entity may own in a market, and it prevents common ownership of more than one station in mid-sized and small markets. *Id.* ¶¶ 66-67, 77 (JA280-81, 284-85).

audiences and advertising dollars—competition that did not exist when the rules were adopted. *See*, *e.g.*, *id.* ¶ 24 & n.80 (JA264-65).

Newspapers have been especially hard-hit in this changing landscape. "[P]rint newspaper advertising revenue ha[s] decreased more than 50 percent since 2008 and nearly 70 percent since 2003," while digital advertising has failed to compensate for those losses. *Reconsideration Order* ¶ 24 (JA264-65); *see also id.* ¶ 21 (JA262-63). This revenue drop has hampered newspapers' ability to invest in their newsrooms. *Id.* ¶ 24 (JA264-65) ("newsroom employees were one-third fewer than at their peak in 1989"). Moreover, 175 newspapers ceased publication between 2007 and 2010, with another 152 closures in 2012, and 114 closures in 2013. *Id.* The industry might have been able to avert many of these cut-backs and closures through efficiency-maximizing transactions, if those deals were not prohibited by the NBCO Rule that the panel reinstated.

The FCC's modernization of its ownership rules in the *Reconsideration Order* was long overdue. By vacating those changes—along with the *Incubator Order* and the *Second R&O*'s "eligible entity" definition—the panel undermined Congress's goals, harmed the broadcast and newspaper industries, and imposed a remedy that cannot be justified. The panel has frozen in place an obsolete regulatory regime, and the Court should grant rehearing to enable crucial reform.

ARGUMENT

I. The Panel Erroneously Rejected The *Reconsideration Order*'s Reasonable Balancing Of The Statutory Obligation To Consider Competition Against The Policy Of Promoting Ownership Diversity.

Section 202(h) directs the FCC to "repeal" or "modify" any media ownership rule no longer "in the public interest as the result of competition." Although the relevant inquiry is "limited" to "whether ownership rules remain necessary in light of *competition* in the broadcast industry," *Prometheus III*, 824 F.3d at 38 (emphasis added), the panel vacated the *Reconsideration Order* for failure to adequately consider *non*-statutory policy considerations, namely, the potential effect of the FCC's rule changes on minority and female ownership, slip op. 32-39. That approach negates Section 202(h)'s text—which mentions competition and *not* ownership diversity—and frustrates the statute's core deregulatory purpose by once again preventing the FCC from modernizing its ownership rules. Absent en banc review, the panel's erroneous interpretation will continue to harm the broadcast and newspaper industries and distort the FCC's Section 202(h) analysis during every subsequent quadrennial review.

A. The FCC Properly Amended Its Ownership Rules Based Upon Competitive Changes In The Media Marketplace.

The text of Section 202(h) is clear. The FCC must evaluate, every four years, the need for its ownership rules and "repeal" or "modify" any rule no longer "in the public interest as the result of competition." Section 202(h) serves as an "ongoing

mechanism to ensure that the [FCC's] regulatory framework would keep pace with the competitive changes in the marketplace." *Prometheus I*, 373 F.3d at 391.

The *Reconsideration Order* followed that statutory mandate. The FCC "built a substantial record" regarding competition in the media marketplace and the role of traditional media in local communities. *Second R&O* ¶ 1 (JA28). Based on that record, the FCC determined that "dramatic changes in the marketplace" rendered several rules unnecessary or ineffective at promoting the public interest values of localism, competition, and viewpoint diversity. *Reconsideration Order* ¶¶ 1-2 (JA252) (alteration omitted); *see also id.* ¶¶ 8-48 (NBCO Rule) (JA255-73), 49-65 (Radio/TV Rule) (JA273-280), 69-85 (Local TV Rule) (JA281-89), 86-95 (JA290-95) (Local Radio Rule and embedded markets policy), 96-113 (JA295-303) (TV JSA Attribution Rule). Consistent with Section 202(h)'s directive, the FCC eliminated or relaxed the rules that it found no longer served the public interest as a result of competition.

No party to this case disputed that the FCC properly conducted the competition analysis mandated by Section 202(h). Nor, accordingly, did the panel. Because the statutory directive is "limited to a review for whether ownership rules remain necessary in light of competition in the broadcast industry," *Prometheus III*, 824 F.3d at 38, the panel should have accepted the FCC's competition analysis and upheld the much-needed reforms of its ownership rules.

B. The Panel's Ownership Diversity Concerns Cannot Replace The Mandatory Section 202(h) Competition Analysis.

Finding no fault with the competition-based analysis required by Section 202(h), the panel instead concluded that the FCC inadequately considered the panel's prior instruction to "include a determination about the effect of the rules on minority and female ownership." Slip op. 32 (quoting *Prometheus III*, 824 F.3d at 54 n.13); *see also id.* at 34. That analysis is irreconcilable not only with the statute's text, structure, and purpose, but also with the proper role of courts in reviewing agency action.

To begin, a court-created obligation to examine ownership diversity cannot displace Section 202(h)'s specific, competition-based command. That is so even if "the public interest, broadly conceived," slip op. 25, might arguably include race- and gender-based diversity considerations. "[I]t is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines*, 504 U.S. 374, 384 (1992). This principle "has special force when"—as under Section 202(h)—"Congress has targeted specific problems with specific solutions in the context of a general statute." *Ki See Lee v. Ashcroft*, 368 F.3d 218, 223 (3d Cir. 2004) (citation omitted). Here, Congress specifically instructed the FCC to analyze competition—not minority and female ownership—in its Section 202(h) reviews. The panel, therefore, was not free to elevate its own conception of "the public interest" above the clear statutory mandate. As the Supreme Court has "often

admonish[ed], only Congress can rewrite" the Communications Act. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 (1986).

The majority erred in concluding that the FCC's reliance on its competition analysis showed a failure to consider "an important aspect of the problem." Slip op. 38 (citation omitted). In fact, as Judge Scirica explained, the FCC *did* "balance[] competing policy goals," and "reasonably predicted the regulatory changes dictated by the broadcast markets' competitive dynamics will be unlikely to harm ownership diversity." *Id.* at 2 (dissent). The panel believed this examination should have been more rigorous, but the FCC considered available data as one part of its multifaceted analysis. The majority's insistence that the agency do more "adds requirements to the statute not found in the text." *Council Tree Inv'rs v. FCC*, 863 F.3d 237, 241-42 (3d Cir. 2017); *accord Alabama v. North Carolina*, 560 U.S. 330, 352 (2010); *cf. Massachusetts v. EPA*, 549 U.S. 497, 532-35 (2007) (agency may *not* rely on "reasoning divorced from the statutory text").

Fundamentally, the panel erred by overreading its own past directives to the FCC to concoct a general principle that the FCC must always give priority to ownership-diversity concerns. Here, the panel insisted that the FCC was required to consider ownership diversity based on a footnote in *Prometheus III*. *See* slip op. 32 (quoting *Prometheus III*, 824 F.3d at 54 n.13). But *Prometheus III*'s footnote directed the FCC to "consider how" its then-ongoing "*broadcast incentive auction*

affects minority and female ownership." 824 F.3d at 54 n.13 (emphasis added). The FCC's auction authority applies only to the issuance of "any initial license or construction permit," *not* to Section 202(h) reviews or the ownership rules more generally. 47 U.S.C. § 309(j)(1); *see id.* § 309(j)(6) ("Nothing in this subsection … shall … affect the requirements of … any other provision of this chapter.").

That same *Prometheus III* footnote also discussed language from *Prometheus II* directing the FCC to determine "the effect of [the] rules on minority and female ownership." 824 F.3d at 54 n.13 (alteration in original) (quoting *Prometheus II*, 652 F.3d at 471). But that direction pertained only to an "eligible entity" definition that the FCC adopted to promote ownership diversity, *not* a Section 202(h) analysis. *See Prometheus II*, 652 F.3d at 470-72 (citing *Prometheus I*, 373 F.3d at 420-21). And *Prometheus I*, in turn, held that repeal of a specific "regulatory provision that promoted minority television station ownership" required "discussion of the effect of its decision on minority television station ownership." 373 F.3d at 421 & n.58.

Nothing in those prior decisions justifies the panel's elevation of non-statutory policy considerations over Section 202(h)'s specific command to consider competition. Rather, those decisions all applied the basic administrative-law principle that, when considering measures specifically *directed* at ownership diversity, the FCC must rationally consider their effect *on* ownership diversity. That principle is not implicated here, because the media ownership rules were "not"

adopted to "promote or protect minority and female ownership." *Reconsideration Order* ¶ 44 (JA271); *see also*, *e.g.*, *id.* ¶¶ 48, 65, 83 (JA273, 280, 288); *Second R&O* ¶¶ 75, 197, 215 (JA56-57, 107, 114-15) (retaining rules to promote competition or viewpoint diversity and "not with the purpose of preserving or creating specific amounts of minority and female ownership"); Industry Intervenors Br. 25-32.

In sum, the panel failed to identify a statutory basis for the dispositive importance it placed on ownership diversity, and none exists.

The majority's errors affect more than this case. Section 202(h) directs the FCC to conduct a new analysis every four years. Because this panel, by purporting to retain jurisdiction over successive remands, has effectively blocked any other avenue for the FCC or regulated parties to obtain judicial review, its opinions have had and will continue to have outsized importance in defining the contours of that review.[4] Indeed, if history is any indication, the panel's error will dictate the standard applied in Section 202(h) reviews for as long as the FCC must conduct them. En banc rehearing is warranted to avoid that distortion of the statutory scheme.

[4] The panel's purported retention of jurisdiction is "contrary to the goals of Congress in authorizing review in 12 different circuits." *Howard Stirk Holdings, LLC v. FCC*, No. 14-1090 (D.C. Cir. Nov. 24, 2015) (statement of Williams, J.). The panel's assertion of perpetual jurisdiction over the FCC's ownership rules provides all the more reason for fresh consideration of these questions en banc.

II. The Panel Erroneously Vacated The *Reconsideration Order*, The *Incubator Order*, And The *Second R&O*'s "Eligible Entity" Definition.

Rehearing is also warranted because the remedy ordered by the panel is vastly overbroad and unjustified by the panel's own analysis. The panel vacated the *Reconsideration Order* in its entirety. Yet the panel identified only *one* flaw in the FCC's analysis, holding that the FCC failed to adequately consider the *Reconsideration Order*'s effects on minority and female ownership. *See* slip op. 32-39. That supposed flaw had nothing to do with the rules' merits—much less with the *Incubator Order* and the *Second R&O*'s "eligible entity" definition that the panel also vacated. Indeed, the panel *conceded* that the FCC could address the panel's concern on remand and still reach the same ultimate conclusion. *See id.* at 39. Other circuits have held that the proper remedy in these circumstances—where "the [FCC] may well be able to address on remand the issues it failed to adequately consider"—is to remand *without* vacatur. *Mozilla Corp. v. FCC*, 940 F.3d 1, 86 (D.C. Cir. 2019). The panel's wholesale vacatur cannot be squared with the surgical approach taken by those circuits.

"An inadequately supported" agency action, the D.C. Circuit has explained, "need not necessarily be vacated." *Allied-Signal*, 988 F.2d at 150. Before vacating an order, courts must consider "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Id.* at 150-51. When

it is "plausible that [the agency] can redress its failure of explanation on remand while reaching the same result," courts will order remand without vacatur. *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013); *accord Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001).

Eight days after the panel issued its opinion, the D.C. Circuit applied the *Allied-Signal* test in *Mozilla*. There, the court upheld the majority of an FCC order but, as here, criticized the FCC for failing to adequately consider certain effects of that order. *See Mozilla*, 940 F.3d at 86. Yet the court *declined* to vacate the order. *See id.* Instead, the court reasoned that the FCC could address those deficiencies on remand while reaching the same result and recognized that vacatur would have imposed unjustifiable burdens on regulated parties and the FCC. *See id.*

Other "circuits that have considered this question have [also] concluded that" the APA permits "remand without vacatur." *Black Warrior Riverkeeper v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015) (collecting cases).[5] Those circuits have adopted the D.C. Circuit's approach and apply the same factors in determining whether to remand without vacatur. *See id.* (adopting *Allied-Signal*); *Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 584 (2d Cir. 2015) (remanding without vacatur per *Allied-Signal*); *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992,

[5] This Court has not decided whether it may order remand without vacatur under the APA. *See Council Tree Commc'ns v. FCC*, 619 F.3d 235, 258 n.13 (3d Cir. 2010).

994 (9th Cir. 2012) (same); *Nat'l Org. of Veterans' Advocates v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1380 (Fed. Cir. 2001) (same); *Cent. Me. Power*, 252 F.3d at 48 (same); *Cent. & S.W. Servs. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (same).

The panel's remedy in this case is vastly overbroad and inconsistent with the more precise approach taken by other circuits. The panel did not analyze the *Allied-Signal* factors or offer any explanation for vacating the *Reconsideration Order*, *Incubator Order*, and the *Second R&O*'s "eligible entity" definition in their entirety. And under *Allied-Signal*, the only appropriate remedy for the sole error the panel identified would be to remand the *Reconsideration Order* without vacatur.

First, the panel did not find *any* flaws in the *Incubator Order* or the *Second R&O*'s "eligible entity" definition, *see* FCC Rehearing Pet. 16-17, and the only deficiency the panel identified in the *Reconsideration Order*'s reasoning was not a serious one under *Allied-Signal*. The panel did not identify *any* errors with respect to the FCC's competition analysis or the agency's conclusion that dramatic changes in the marketplace rendered several of its rules unnecessary or ineffective. Rather, the panel identified a single flaw in the FCC's reasoning—a supposed failure to adequately show the rule changes would have "minimal effect on female or minority ownership." Slip op. 32. Even if that non-statutory determination were relevant in a Section 202(h) review, the majority expressly acknowledged that the FCC could adopt the same reforms after giving "a meaningful evaluation" of their effect on

ownership diversity and even noted that "a more sophisticated analysis [might] *strengthen*, not weaken, the FCC's position." *Id.* at 38 (emphasis added); *see also id.* at 13 (Scirica, J., dissenting) (questioning whether "the data demanded would alter the FCC's analysis"). Thus, the FCC indisputably "may well be able to address on remand the [single] issu[e] it failed to adequately consider." *Mozilla*, 940 F.3d at 86.

Second, the panel's wholesale vacatur eliminates the FCC's own efforts to increase ownership diversity by aiding new entrants into the broadcast industry, *see* slip op. 14-17 (Scirica, J., dissenting), and leaves in place outdated rules that impose an enormous burden on the broadcast and newspaper industries, *see Mozilla*, 940 F.3d at 86 (second *Allied-Signal* factor addresses burdens of vacatur on regulated entities). Congress recognized more than two decades ago that the FCC's ownership rules required periodic updating in light of fundamental changes in the marketplace. And the FCC's expert determination that those changes render unnecessary the rules it modified or eliminated in the *Reconsideration Order* stands uncontested. Indeed, no one contested the embedded markets policy modification *before the agency*, and Prometheus Petitioners failed even to *mention* that change (or elimination of the TV JSA Attribution Rule) in their opening brief. *See* Intervenors' Br. 63-64. Nor did they dispute the FCC's conclusion that repeal or modification of other rules (*e.g.*, NBCO Rule, Local TV Rule, and Radio/Television Cross-Ownership Rule) serves

the public interest. *See id.* at 65-71. Blanket vacatur of the *Reconsideration Order* overturns policy decisions that no party has ever challenged, undermines Congress's judgment, and imposes unjustifiable burdens on the industries that the panel did not even pause to consider.

Accordingly, even if this Court concludes that the panel did not err on the merits, the Court should grant rehearing en banc to adopt the consensus *Allied-Signal* test and correct the panel's overbroad remedy.

CONCLUSION

This Court should grant rehearing en banc.

Dated: November 7, 2019

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This petition complies with the type-volume limitation of Federal Rules of Appellate Procedure 32, 35, and 40 because, excluding the parts of the petition exempted by Federal Rule of Appellate Procedure 32(f), it contains 3898 words, as determined by the word-count function of Microsoft Word 2016;

2. This petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font; and

3. This petition complies with Third Circuit Rule 31.1(c) because Version 14 of Symantec Endpoint Protection virus detection program has been run on this electronic file and no virus was detected.

Dated: November 7, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2019, I electronically filed the foregoing petition with the Clerk of Court for the United States Court of Appeals for the Third Circuit by using the Court's CM/ECF system. I further certify that service was accomplished on all parties via the Court's CM/ECF system.

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