Nos. 19-1231 & 19-1241

IN THE
# Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,
*Petitioners*,

v.

PROMETHEUS RADIO PROJECT, *ET AL.*,
*Respondents*.

NATIONAL ASSOCIATION OF BROADCASTERS, *ET AL.*,
*Petitioners*,

v.

PROMETHEUS RADIO PROJECT, *ET AL.*,
*Respondents*.

**On Writs Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## OPENING BRIEF FOR INDUSTRY PETITIONERS


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## QUESTION PRESENTED

Section 202(h) of the Telecommunications Act of 1996 directs the Federal Communications Commission to review its media ownership rules every four years and to "repeal" or "modify" any rule that is no longer "necessary in the public interest as the result of competition." In the Commission's most recent review, the agency modified or eliminated several decades-old ownership rules that substantial competitive changes in the media marketplace rendered unnecessary. No party challenged the Commission's statutorily mandated competition analysis, nor did the Third Circuit question it on the merits. Yet the Third Circuit concluded that the Commission inadequately considered the effect of those changes on minority and female ownership—even though Section 202(h) says nothing about that issue. On that ground alone, the Third Circuit vacated all the Commission's rule changes (as well as other agency actions in these consolidated cases) and ordered the agency to collect additional statistics on ownership diversity. The same divided Third Circuit panel has repeatedly elevated its policy concerns over the statutory text and purported to retain jurisdiction over the FCC's Section 202(h) orders, effectively blocking review by any other court for more than 15 years.

The question presented is:

Whether under Section 202(h) the Commission must produce and consider statistical evidence or conduct an in-depth theoretical analysis regarding effects on minority and female ownership before repealing or modifying media ownership rules that it determines are no longer "necessary in the public interest as the result of competition."

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are the Federal Communications Commission, the United States of America, Bonneville International Corporation, Connoisseur Media LLC, Fox Corporation, the National Association of Broadcasters, News Corporation, News Media Alliance, Nexstar Inc., The Scranton Times L.P., and Sinclair Broadcast Group, Inc.

Respondents that were petitioners in the Third Circuit are Prometheus Radio Project, Media Mobilizing Project, Office of Communication, Inc. of the United Church of Christ, National Association of Broadcast Employees and Technicians-Communications Workers of America, Common Cause, Multicultural Media, Telecom and Internet Council, National Association of Black Owned Broadcasters, Inc., Independent Television Group, and Free Press.

Respondent that was intervenor petitioner in the Third Circuit is Cox Media Group LLC.

Respondents that were intervenor respondents in the Third Circuit are Benton Foundation and National Organization for Women Foundation.

Pursuant to this Court's Rule 29.6, Petitioners state that:

Bonneville International Corporation is a privately held Utah corporation. Bonneville's sole shareholder is Deseret Management Corporation, which, in turn, is privately held by the DMC Reserve Trust. There are three individual trustees, who are appointed by The First Presidency of The Church of Jesus Christ of Latter-day Saints.

Connoisseur Media LLC is a limited liability company organized in the State of Delaware. Connoisseur is owned by Connoisseur Media Holdings, LLC, which is in turn controlled by CM Broadcast Management, LLC.

Fox Corporation, a Delaware publicly held corporation, is a news, sports, and entertainment company that produces and delivers content through its primary brands, including FOX News Media, FOX Sports, FOX Entertainment, and FOX Television Stations. Based upon a review of Schedule 13D and Schedule 13G filings with the Securities and Exchange Commission, Fox Corporation is not aware of any publicly held company owning 10 percent or more of its total stock, i.e., Class A and Class B on a combined basis.

National Association of Broadcasters is a nonprofit, incorporated association of radio and television stations and broadcast networks. It has no parent company, and has not issued any shares or debt securities to the public; thus, no publicly held company owns ten percent or more of its stock.

News Corporation is a publicly held company consisting of businesses across a range of media, including news and information services, book publishing, and digital real estate services. It has no parent company, and no publicly held company owns ten percent or more of News Corporation's stock.

News Media Alliance is a not-for-profit trade association representing nearly 2,000 companies engaged in all aspects of the news media industry in the United States and Canada. Alliance members account for nearly 90 percent of the daily newspaper circulation in the United States, as well as a range of online, mobile and non-daily publications. News

Media Alliance was known as the Newspaper Association of America until September 2016. News Media Alliance has no parent company, and no publicly held company has a ten percent or greater ownership interest in the News Media Alliance.

Nexstar Inc., formerly known as Nexstar Broadcasting, Inc., is a media corporation that owns and operates commercial broadcast television stations. Nexstar is wholly owned by Nexstar Media Group, Inc., which is a publicly held corporation. No publicly held corporation has a ten percent or greater ownership interest in the stock of Nexstar Media Group, Inc.

The Scranton Times L.P. is controlled by its general partner, The Times Partner, L.L.C., a Pennsylvania limited liability company, which is in turn privately held and controlled by its four individual members.

Sinclair Broadcast Group, Inc. is a media corporation that owns, operates, and provides programming and sales services to television stations in various cities across the country. Sinclair has no parent company and no publicly traded company owns more than ten percent of Sinclair's stock.

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## BRIEF FOR INDUSTRY PETITIONERS

Petitioners the National Association of Broadcasters, Bonneville International Corporation, Connoisseur Media LLC, Fox Corporation, News Corporation, News Media Alliance, Nexstar Inc., The Scranton Times L.P., and Sinclair Broadcast Group, Inc. (collectively, "Industry Petitioners") respectfully submit that the judgment of the United States Court of Appeals for the Third Circuit should be reversed.

## OPINIONS BELOW

The opinion of the Third Circuit (Pet.App.1a-63a) is reported at 939 F.3d 567.[1] The order of the Third Circuit denying rehearing (Pet.App.311a-14a) is unreported. The orders of the Federal Communications Commission under review in this Court (JA101-576; Pet.App.64a-310a; JA577-704) are reported at 31 FCC Rcd. 9864, 32 FCC Rcd. 9802, and 33 FCC Rcd. 7911.

## JURISDICTION

The Third Circuit entered judgment on September 23, 2019, and denied a timely petition for rehearing on November 20, 2019. On February 12, 2020, Justice Alito extended the time for filing a petition for a writ of certiorari to and including March 19, 2020. On March 12, 2020, Justice Alito further extended the time for filing a petition for a writ of certiorari to and including April 18, 2020. On March 19, 2020, this Court issued a standing order that also extended the time for filing a petition for a writ of certiorari to and including April 18, 2020. The petition for a writ of

[1] "Pet.App." refers to the petition appendix in No. 19-1241.

certiorari was filed on April 17, 2020, and granted on October 2, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996), *as amended by* Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004), provides:

**SEC. 202. BROADCAST OWNERSHIP.**

* * *

(h) FURTHER COMMISSION REVIEW.—The Commission shall review its rules adopted pursuant to this section and all of its ownership rules quadrennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.[2]

## STATEMENT

In 1996, Congress enacted Section 202(h) to achieve "regulatory reform" of the rules limiting the ownership of our nation's broadcast outlets and newspapers—rules that trace back to the 1940s, when black-and-white television sets were a novelty. To that end, Congress required the Federal Communications Commission ("FCC" or

[2] The Act originally required biennial review but was later amended to mandate quadrennial review. *See* Pub. L. No. 108-199, § 629(3), 118 Stat. at 100.

"Commission") to regularly review its rules restricting ownership of television stations, radio stations, and newspapers, and to "repeal" or "modify" any regulation that is no longer "necessary in the public interest as the result of competition." Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996) ("1996 Act"). Despite Congress' clear command that the FCC modernize its ownership rules by eliminating outdated restrictions, a single panel of the Third Circuit has blocked the FCC's efforts to fulfill its statutory duty for more than 15 years.

As a result, the media ownership rules have remained stuck in the past. When Congress enacted Section 202(h), the rules were already relics from a time when traditional television and radio broadcasts dominated video and audio entertainment and, along with print newspapers, were virtually the only means by which Americans received news. By 1996, revolutionary technological changes had sparked an "explosion of video distribution technologies and subscription-based programming sources that gave consumers new media options, including cable and satellite television, and challenged the dominance of newspapers and "free over-the-air broadcasting." H.R. Rep. No. 104-204, at 55 (1995). Congress instructed the FCC to implement periodic "regulatory reform reviews" to ensure that its rules keep pace with these significant competitive changes. Since then, the Internet has dramatically increased the public's information and entertainment options, and competition in the media marketplace only continues to grow.

Despite Congress' mandate and the ever-evolving media landscape, the FCC's long-outdated rules are still in force because the same divided panel of the

Third Circuit has—time and again—prevented the FCC from implementing the reforms Section 202(h) requires. *See* Pet.App.46a (Scirica, J., dissenting).[3] In the *Reconsideration Order* under review, the FCC made critical adjustments to its 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." Pet.App.67a (alteration omitted). The Third Circuit, however, vacated the *Reconsideration Order* in its entirety, thus reinstating *all* the prior rules. Pet.App.41a.

The Third Circuit's decision was not based on the rules' perceived merits or any defect in the competition analysis Congress directed the FCC to perform; in fact, no party disputed any aspect of that analysis or the FCC's overarching conclusion that the rules no longer served the public interest in light of competition. Instead, the Third Circuit's decision was based solely on atextual policy concerns about the gender and racial makeup of broadcast station owners.

Specifically, the Third Circuit faulted the Commission for failing to produce more robust statistical or in-depth theoretical analysis of how the *Reconsideration Order*'s rule changes would affect minority and female ownership. That holding finds no support in Section 202(h) or any principle of administrative law. Congress explicitly directed the

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[3] *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).

Commission to consider *competition*, not minority and female ownership, in conducting Section 202(h) reviews. Congress knows how to direct the Commission to consider minority and female diversity, and did so elsewhere in the Communications Act, but not in Section 202(h).

Citing no statutory authority, the Third Circuit elevated policy preferences about ownership diversity above Congress' express competition-based command. The panel majority transformed minority and female ownership into not just a *mandatory* consideration in the FCC's Section 202(h) reviews, which was itself error under the statute, but a *dispositive* threshold requirement in such reviews, which was further error. Under the Third Circuit's decision, no matter what the Commission concludes about the necessity of its rules in light of competition, it cannot change those rules without sufficiently compelling empirical evidence or in-depth theoretical analysis about the prospective effect of the changes on minority and female ownership.

In vacating the *Reconsideration Order* on that basis, the Third Circuit once again prevented the FCC from bringing its archaic ownership rules into the modern age, obstructing the ability of newspapers and local broadcasters to compete in today's media marketplace. Industry Petitioners support the goal of advancing minority and female ownership of broadcast stations, and some have advocated for programs to do just that. But that goal was not one Congress required the Commission to consider in Section 202(h), and it thus cannot be invoked as the sole reason to prevent the Commission from updating ossified rules that harm the newspaper and broadcast industries—and ultimately the American public.

This Court should reverse the judgment below, instruct the Third Circuit to deny Respondents' petitions for review, and allow the Commission's rule changes finally to take effect.

### A. Congress Mandates Periodic "Regulatory Reform Review" Of Media Ownership Rules.

The Commission's rules restrict ownership of multiple television or radio stations, as well as "cross-ownership" of different types of media outlets, in local markets. *See* 47 C.F.R. § 73.3555. Section 202(h) requires the FCC to assess those rules every four years "as part of . . . regulatory reform review" to determine whether they "are necessary in the public interest as the result of competition," and provides that the agency "shall repeal or modify any regulation it determines to be no longer in the public interest." 1996 Act, § 202(h).

Despite seismic shifts in the competitive landscape of the media industry, these FCC ownership rules have remained virtually unchanged for decades. Today, they exist as relics from a time when Americans had access to a very limited number of sources of information, and ownership regulations were designed to manage the perceived scarcity of radio spectrum, *see Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 376 (1969), by preventing undue economic concentration and promoting viewpoint diversity. The FCC first adopted structural ownership rules in the 1940s. *See Nat'l Broad. Co.* v. *United States*, 319 U.S. 190, 194-96 (1943). And it promulgated the Newspaper/Broadcast Cross-Ownership Rule, 47 C.F.R. § 73.3555(d), which prohibits an entity from owning a daily newspaper and a single full-power radio or television station in the same geographic

market, in 1975. *See In re Amend. 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 innovation had rendered that regulatory approach obsolete. "On the cusp of an unprecedented revolution in communication technologies, Congress set in motion [a] statutorily-prescribed process of media deregulation based on the conviction that increased competition in the media marketplace would best serve the public interest." *Prometheus I*, 373 F.3d at 438 (Scirica, C.J., dissenting). Congress recognized that 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." H.R. Rep. No. 104-204, at 55.

The solution, Congress determined, was to adopt a plan for regulatory reform compelling the FCC "to depart from the traditional notions of broadcast regulation and to rely more on competitive market forces." H.R. Rep. No. 104-204, at 55. Congress kicked off this process by specifically directing the relaxation or elimination of several media ownership rules. *See* 1996 Act, § 202(a), (b), (c)(1), (e), (f)(1), (i). And it enacted Section 202(h) to ensure that the FCC would continue to update its rules to reflect ongoing technological change and increased competition. In sum, Congress enacted a deregulatory provision designed to free broadcast stations and newspapers from regulatory burdens that hindered their ability to compete in the modern media marketplace. *See Fox*

*TV Stations, Inc.* v. *FCC*, 280 F.3d 1027, 1044 (D.C. Cir.) (likening the "deregulation . . . mandate" of § 202(h) "to Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.')"), *opinion modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); *Cellco P'ship* v. *FCC*, 357 F.3d 88, 89-99 (D.C. Cir. 2004) (explaining that the parallel provision in Section 11 of the 1996 Act establishes a "deregulatory presumption").

Despite Congress' mandate that the FCC's structural ownership rules accurately reflect the *current* media marketplace—and not the marketplace that existed decades ago when the rules were adopted—many antiquated restrictions remain in place today. The Newspaper/Broadcast Cross-Ownership Rule, for example, remains exactly the same as when it was first promulgated more than *45 years ago*. Similarly, local television ownership limits from the last century remain in force, despite vastly greater competition from other video services. *See* Pet.App.146a-47a. The FCC has repeatedly acknowledged that the media landscape has rapidly and radically evolved, most recently because "the Internet has transformed the American people's consumption of news and information." *E.g.*, Pet.App.92a-98a.

These outdated restrictions harm the newspaper and broadcast industries—and the American public. For example, broadcast stations and newspapers face significant online competition for audiences and advertising dollars, competition that did not exist when the rules were adopted. *See*, *e.g.*, Pet.App.98a-100a & n.80; *cf.* Pet.App.152a. As a result of that competition, "print 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. Pet.App.99a; *see also* Pet.App.94a-97a. This revenue drop has hampered newspapers' ability to invest in their newsrooms. *See* Pet.App.99a ("newsroom employees were one-third fewer than at their peak in 1989"); *cf.* Pet.App.152a (noting that small and mid-sized markets in particular have "less advertising revenue to fund local [television] programming"). Moreover, 175 newspapers ceased publication between 2007 and 2010, with another 152 closures in 2012, and 114 closures in 2013. Pet.App.100a. 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 ancient rules that still apply in a marketplace for which they are entirely unsuited.

### B. The Third Circuit Blocks Much-Needed Regulatory Reform For More Than Fifteen Years.

Over the last two decades, the FCC has attempted to modernize its broadcast ownership rules through its statutorily mandated regulatory reform reviews. Yet on multiple occasions, starting in 2004, the same divided panel of the Third Circuit has prevented the FCC from doing so. Along the way, the Third Circuit has transformed the non-statutory policy goal of promoting minority and female ownership into the controlling factor in the FCC's reviews.

1. In its 2002 review, for example, the Commission decided to repeal the Newspaper/Broadcast Cross-Ownership Rule and replace it with cross-media limits that varied based on the size of the relevant market. *See Prometheus I*, 373 F.3d at 387, 397-98. That Rule was no longer

necessary, the FCC concluded, because—among other reasons—it "undermines localism by preventing efficient combinations that would allow for the production of high-quality local news." *Id.* at 398. In other words, a newspaper and a broadcast station working together can produce more—and better—local news and programming than either could alone. On review, the Third Circuit *agreed* "that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest." *Id.*

The FCC also modified its Local Television Ownership Rule to permit ownership of more than one station in most markets, with up to three stations in the largest markets. *Prometheus I*, 373 F.3d at 386-87. The Third Circuit again "agree[d] with the Commission's conclusion that broadcast media are not the only media outlets contributing to viewpoint diversity in local markets" and accepted the FCC's determination that common ownership of television stations could benefit localism. *Id.* at 414-16. Nonetheless, the divided panel vacated and remanded the FCC's deregulatory reforms because it identified certain flaws in the analysis underlying the replacement limits. *See id.* at 402-12, 435.

With one exception, the Third Circuit did not address minority and female ownership in its review of the Commission's 2002 actions. That exception concerned the Failed Station Solicitation Rule—a narrow provision applying only to certain rules involving television stations—which the Commission had attempted to repeal. *See Prometheus I*, 373 F.3d

at 420.[4] The FCC originally adopted this Rule "to ensure that qualified minority broadcasters had a fair chance to learn that certain financially troubled—and consequently more affordable—[television] stations were for sale." *Id.* But in repealing the Rule, the Commission "fail[ed] to mention anything about the effect this change would have on potential minority station owners." *Id.* The Third Circuit vacated and remanded based on the general administrative law principle that an agency acts arbitrarily and capriciously when it changes a previously adopted policy position without acknowledging that it is doing so and offering a rational explanation for the change. *See id.* at 421. *But see id.* at 474 n.126 (Scirica, C.J., dissenting). But the Third Circuit did not purport to base its holding that the FCC must consider minority and female ownership diversity before repealing the Failed Station Solicitation Rule on any requirement in Section 202(h) or any other provision of the Communications Act.

The divided panel announced that it would "retain[] jurisdiction" over issues it remanded to the FCC, and stated—in a footnote—that the Commission "should also consider" specific "proposals for enhancing ownership opportunities for women and minorities." *Prometheus I*, 373 F.3d at 435 & n.82.

2. In its 2006 review, the FCC tried again to reform the Newspaper/Broadcast Cross-Ownership Rule, this time amending the Rule to review cross-ownership proposals on a case-by-case basis. *See Prometheus II*, 652 F.3d at 440-41. Once again, the

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[4] The Failed Station Solicitation Rule requires waiver applicants to provide notice to out-of-market buyers before selling failing or failed stations to in-market buyers. *See* 47 C.F.R. § 73.3555 n.7.

same divided Third Circuit panel vacated the Commission's attempted reform, not because it found that the Rule was necessary in light of competition, but because the FCC supposedly failed to provide proper notice of its rule changes. *See id.* at 453. Once again, Judge Scirica dissented from the majority's decision to "preserve[] an outdated and twice-abandoned ban." *Id.* at 472 (Scirica, J., dissenting). And once again, also over Judge Scirica's dissent, the panel declared that it would "retain[] jurisdiction over the remanded issues." *Id.* (majority opinion); *see also id.* at 473 (Scirica, J., dissenting).

At the same time, the Third Circuit also reviewed a separate Commission order—the *Diversity Order*—that had adopted a series of measures to address minority and female ownership issues following the Third Circuit's first remand.[5] Most of those measures were "designed to expand opportunities for 'eligible entities,'" defined to mean small businesses. *Prometheus II*, 652 F.3d at 468. The Commission adopted this race- and gender-neutral definition based on concerns about "how proposals regarding minority and female ownership 'would satisfy constitutional standards' in light of the Supreme Court's ruling in *Adarand Constructors, Inc.* v. *Peña,* 515 U.S. 200 (1995)." *Id.* at 467-68 (citations omitted). But the Third Circuit vacated all measures incorporating that definition because the FCC had "offered no data attempting to show a connection between the definition chosen and the goal of the

[5] *See In re Promoting Diversification of Ownership in the Broadcasting Services*, 23 FCC Rcd. 5922 (Dec. 18, 2007). The Third Circuit had consolidated its review of the *Diversity Order* with review of the FCC order concluding the 2006 ownership review.

measures adopted—increasing ownership of minorities and women." *Id.* at 471.

In reviewing the *Diversity Order*, the panel majority generally criticized the FCC for failing "to consider the effect of its rules on minority and female ownership." *Prometheus II*, 652 F.3d at 471. Although the panel said that "ownership diversity is an important aspect of the overall media ownership regulatory framework," it did not cite any authority for the proposition that the Commission must consider minority and female ownership as part of its Section 202(h) reviews. *Id.* at 472. Instead, the panel stated that its own "prior remand" had directed "the Commission to consider the effect of its rules on minority and female ownership," *id.* at 471, referring back to its remand of the FCC's repeal of the Failed Station Solicitation Rule, *see id.* at 465-66.

3. The Commission failed to complete its 2010 review in a timely fashion. *See Prometheus III*, 824 F.3d at 38. On review of the FCC's inaction, the same Third Circuit panel majority "remind[ed] the Commission of its obligation to complete its Quadrennial Review responsibilities," *id.* at 60, and cited the Newspaper/Broadcast Cross-Ownership Rule as "a telling example of why the delay [wa]s so problematic," *id.* at 51. Because of the court's two prior decisions, it explained, "the 1975 ban remains in effect to this day even though the FCC determined more than a decade ago that it is no longer in the public interest." *Id.* "This has come at significant expense to parties that would" otherwise be able "to engage in profitable combinations." *Id.* at 51-52.

In a footnote, the panel majority "note[d] that, in addition to § 202(h)'s requirement to review the rules to see if they are necessary in light of competition, the

Quadrennial Review must also, per our previous decisions, include a determination about 'the effect of [the] rules on minority and female ownership.'" *Prometheus III*, 824 F.3d at 54 n.13 (second alteration in original). Again, the panel did not cite any authority other than its own prior decisions for this supposed mandate.[6] The panel admonished that "'[a]t some point, we must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough,'" and "[f]or the Commission's stalled efforts to promote diversity in the broadcast industry, that time has come." *Id.* at 37 (first alteration in original; citation omitted). And, for the third time, the "panel retain[ed] jurisdiction over the remanded issues." *Id.* at 60.

### C. The FCC Adopts The *Reconsideration Order*.

In 2016, the FCC concluded its 2010 and 2014 reviews but failed to adopt reforms to address the seismic marketplace changes that had occurred over the past decades. *See* JA101-576 (the "*Second R&O*"). Despite a well-developed record demonstrating the need for deregulation due to increased competition, the FCC maintained several legacy ownership restrictions—including the Newspaper/Broadcast Cross-Ownership Rule—and even *increased* restrictions on local television ownership.[7]

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[6] By contrast, in the panel's separate discussion of the eligible-entity definition, it cited 47 U.S.C. § 309(i) and (j) as imposing "a statutory obligation to promote minority and female broadcast ownership." *Prometheus III*, 824 F.3d at 40-41.

[7] In the *Second R&O*, the Commission also readopted the "eligible entity" definition that the Third Circuit had vacated in *Prometheus II*. JA378. The Commission acknowledged that the definition had not been shown to promote minority and female

Given the still-pressing need for regulatory reform, Petitioners National Association of Broadcasters, Nexstar, and Connoisseur petitioned the FCC for reconsideration. They explained that the record was devoid of studies, serious research, or new arguments showing why the decades-old ownership rules should remain in place; that the Commission's retention of these archaic rules failed to account for the rise of alternative media providers, including cable, satellite, and the Internet; and that the rules as applied fundamentally misunderstood the actual workings of the media marketplace and hampered broadcasters' ability to compete.

The FCC agreed, and granted the reconsideration petitions in part in 2017. The *Reconsideration Order* repealed the Newspaper/Broadcast Cross-Ownership Rule, 47 C.F.R. § 73.3555(d), the Radio/Television Cross-Ownership Rule, *id.* § 73.3555(c),[8] and the TV Joint Sales Agreement Attribution Rule, *id.* § 73.3555 n.2(k)(2).[9] Pet.App.76a-77a, 193a-95a. The FCC also modified the Local Television Ownership Rule, 47 C.F.R. § 73.3555(b), but maintained its prohibition on

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ownership, but explained that the definition would promote ownership by small businesses and new entrants, another FCC policy goal. *See* JA375-76, 378-79.

[8] The Radio/Television Cross-Ownership Rule restricts certain common ownership of radio and television stations in local markets. Pet.App.122a-24a.

[9] A joint sales agreement "is an agreement that authorizes one station (the broker or the brokering station) to sell some or all of the advertising time on another station (the brokered station)." Pet.App.179a. Under the TV Joint Sales Agreement Attribution Rule, a station in a joint-sales-agreement relationship is considered for purposes of the Local Television Ownership Rule to be owned by the party selling the advertising time.

common ownership of higher-rated stations. Pet.App.140a. And the FCC established a modest presumptive waiver of the Local Radio Ownership Rule, 47 C.F.R. § 73.3555(a), for parties seeking approval of a limited number of transactions involving radio stations in markets that contain multiple "embedded" markets (i.e., New York City and Washington, D.C.). Pet.App.175a-78a.

The FCC found that these revisions were necessary to ensure that broadcasters and newspapers have "a greater opportunity to compete and thrive in the vibrant and fast-changing media marketplace." Pet.App.67a. For example, the Commission explained that it had originally adopted the Newspaper/Broadcast Cross-Ownership Rule "primarily to promote viewpoint diversity" in a "marketplace containing a very limited number of speakers." Pet.App.77a-78a. Indeed, promoting viewpoint diversity is now "the sole support for the [R]ule," since it "is not necessary to promote the goals of competition or localism, and may even hinder localism." Pet.App.81a-82a. Yet in "today's competitive media environment"—with an ever-expanding number of speakers—any remaining benefits to viewpoint diversity are minimal. Pet.App.78a. And because the Rule "is not necessary to promote the Commission's policy goals of viewpoint diversity, localism, and competition," it no longer "serve[s] the public interest." Pet.App.86a.

Conforming on remand to the Third Circuit's directive to consider the effect of the ownership rules on minority and female ownership, the FCC specifically determined that none of the changes to its rules would have a material impact on ownership diversity. Pet.App.117a-22a, 138a-40a, 161a-62a.

Moreover, the Commission concluded that it could not "justify retaining" its ownership rules "under Section 202(h) based on the unsubstantiated hope that the rule[s] will promote minority and female ownership." Pet.App.140a; *accord* Pet.App.162a ("Under Section 202(h), however, we cannot continue to subject broadcast television licensees to aspects of the Local Television Ownership Rule that can no longer be justified based on the unsubstantiated hope that these restrictions will promote minority and female ownership.").

In a separate order, and at the urging of certain Industry Petitioners, the Commission adopted a new "incubator program" designed to encourage new entrants, including minorities and women, in acquiring and successfully operating broadcast stations. JA577 (the "*Incubator Order*"). The program provides a waiver of the Local Radio Ownership Rule for established broadcasters who provide financial and operational support to new entrants. JA582-85. To qualify as a "new entrant," an entity must have no or very few broadcast outlets and also be a small business. JA592-612. The Commission noted that similar new entrant criteria had helped increase access for minorities and women in bidding for initial broadcast licenses, while avoiding constitutional concerns by taking a race- and gender-neutral approach. *See* JA598-603, 605 & n.55.

### D. The Third Circuit Again Blocks Critical Regulatory Reform.

On September 23, 2019, the same divided Third Circuit panel vacated the *Reconsideration Order* in its entirety, thereby nullifying the product of the Commission's 2010 and 2014 reviews. *See* Pet.App.41a. The panel did not criticize any aspect of

the FCC's competition analysis; indeed, no party challenged "the FCC's core determination that the ownership rules have ceased to serve the 'public interest.'" Pet.App.55a (Scirica, J., dissenting). Instead, the panel majority faulted the Commission solely for failing to "adequately consider the effect its new rules would have on ownership of broadcast media by women and racial minorities." Pet.App.34a (majority opinion).

The Third Circuit proclaimed that "promoting ownership diversity" is "something the Commission must consider" and is "an important aspect of the problem." Pet.App.41a. Yet the Third Circuit once again cited no authority—other than the panel's own prior statements—in support of the proposition that minority and female ownership is a required, much less a dispositive, factor in the FCC's Section 202(h) reviews. *See* Pet.App.34a (citing *Prometheus III*, 824 F.3d at 54 n.13).

Nonetheless, the panel majority ordered the Commission on remand to "ascertain on record evidence the likely effect of any rule changes it proposes . . . on ownership by women and minorities, whether through new empirical research or an in-depth theoretical analysis." Pet.App.41a. It vacated *all* of the Commission's rule changes, including the embedded radio markets waiver (which no party challenged before the Commission or the Third Circuit) and the TV Joint Sales Agreement Attribution Rule (which no Respondent mentioned in its opening Third Circuit brief). *See id.* It also vacated the *Incubator Order* and the *Second R&O*'s eligible-entity definition without explanation. *Id.* And it again "retain[ed] jurisdiction over the remanded issues." Pet.App.45a.

Once again, Judge Scirica dissented. Pet.App.46a. He explained that "[n]o party identifie[d] any reason to question the FCC's key competitive findings and judgments." Pet.App.55a. And he noted that "neither Section 202(h) nor the [Administrative Procedure Act ('APA')] requires the FCC to quantify the future effects of its new rules as a prerequisite to regulatory action." *Id.* In assessing the public interest under Section 202(h), he reasoned, "the FCC considers five types of diversity, not to mention competition and localism." Pet.App.59a. "The FCC's lack of some data relevant to one of these considerations," he concluded, "should not outweigh its reasonable predictive judgments, particularly in the absence of any contrary information, such that its entire policy update is held up." *Id.*

## SUMMARY OF THE ARGUMENT

The Third Circuit erred by vacating the *Reconsideration Order* based solely on its conclusion that the Commission did not adequately consider the effect of the *Order*'s rule changes on minority and female ownership. Section 202(h) does not require the Commission to consider that factor. Nor does any principle of administrative law support the Third Circuit's judgment. Accordingly, this Court should reverse the judgment below, instruct the Third Circuit to deny the petitions for review of the *Order*, and permit the Commission's changes to its long-outdated ownership rules to take effect.

**I.** The *Reconsideration Order* fulfilled the Commission's statutory duties under Section 202(h). Congress instructed the FCC to review its media ownership rules and to repeal or modify rules that are

no longer necessary in light of competition. That is precisely what the Commission did.

**A.** Section 202(h) requires the Commission to consider competition, not minority and female ownership. The plain text of the statute establishes a deregulatory presumption requiring the FCC to "repeal or modify" any rule that is no longer "necessary in the public interest *as the result of competition*." 1996 Act, § 202(h) (emphasis added). That command is clear on its face and consistent with other pro-competitive, deregulatory provisions of the 1996 Act.

In contrast with the specific requirement to consider competition, Section 202(h) does not expressly instruct the Commission to consider minority and female ownership. Congress knows how to direct the FCC to consider minority and female diversity—as evidenced by other parts of the Communications Act that contain such requirements—but plainly did not do so in Section 202(h).

Nor does Section 202(h) implicitly require the Commission to consider minority and female ownership. Although the statute refers to "the public interest," that phrase must be interpreted "by its context." *Nat'l Broad. Co.*, 319 U.S. at 216. No historical or statutory context suggests that "the public interest," as used in Section 202(h), compels the Commission to consider minority and female ownership. Historically, this Court and the Commission interpreted the public interest—in the specific context of structural ownership rules—to include competition, localism, and viewpoint diversity, *not* minority and female ownership. And

among those factors, Congress selected competition as the primary focus of Section 202(h).

**B.** The Third Circuit contravened Section 202(h) by requiring the Commission to consider minority and female ownership, based solely on language from its own opinions. None of those opinions identified any statute or regulation compelling the Commission to consider minority and female ownership in its Section 202(h) reviews. Indeed, the Third Circuit recognized in *Prometheus III* that its instruction was an "addition to § 202(h)'s requirement." 824 F.3d at 54 n.13.

The Third Circuit thus erred by considering whether the *Reconsideration Order* adequately addressed judge-made policy concerns instead of asking whether the *Order* fulfilled Section 202(h)'s requirements. The *Order* undisputedly complied with the statute. The Commission reviewed its ownership rules, concluded that they were no longer necessary in light of current competitive conditions, and thus repealed or modified them, as it was statutorily bound to do. Because "[n]o party identifie[d] any reason to question the FCC's key competitive findings and judgments" or even challenged its "core determination that the ownership rules have ceased to serve the 'public interest,'" Pet.App.55a (Scirica, J., dissenting), the Third Circuit should have upheld the *Order*.

**II.** Notwithstanding the lack of any statutory requirement to consider minority and female ownership, the Third Circuit declared that factor an "important aspect of the problem" that the Commission must "consider" in Section 202(h) reviews under *Motor Vehicle Manufacturers Ass'n of the United States* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). Pet.App.41a. The Third Circuit then vacated the *Reconsideration*

*Order* because the FCC did not collect sufficient empirical evidence or conduct an in-depth theoretical analysis of the prospective effect of the rule changes on minority and female ownership. No principle of administrative law supports that judgment.

**A.** The Third Circuit's judgment cannot be justified as following from the Commission's policy goals. The Commission has sometimes included minority and female ownership as one policy goal among many that it pursues in the context of media ownership. But it has never treated ownership diversity as a mandatory factor in its Section 202(h) reviews, much less as a dispositive one. Indeed, the Commission generally did not consider minority and female ownership when reviewing its structural ownership rules under Section 202(h) until the Third Circuit ordered it to do so. Nor are agencies required to consider—let alone adopt rules promoting—every policy goal in every context. And the Commission has typically addressed minority and female ownership directly through separate initiatives such as the *Diversity Order* and the *Incubator Order*, not indirectly through its structural ownership restrictions. Thus, the APA's principle of reasoned decisionmaking did not compel the Commission to consider that factor in the *Reconsideration Order*.

**B.** Even if the Commission were required to consider minority and female ownership during its Section 202(h) reviews based on some past invocation of that policy, it fully satisfied any such requirement in the *Reconsideration Order*. The Commission reviewed the record evidence and reasonably predicted based on that evidence that its rule changes were unlikely to affect minority and female ownership. Given the Commission's unchallenged

competitive findings and the lack of record evidence showing that loosening the rules would have any adverse effect on minority and female ownership, the Commission's conclusion that it should repeal or modify the rules was not only rational but required. The Third Circuit erred in refusing to accept that conclusion unless and until the Commission produces additional statistical evidence or theoretical analysis. *See Pension Ben. Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 654 (1990).

**III.** The Third Circuit compounded its errors by issuing an overbroad remedy and purporting once again to retain jurisdiction over the Commission's Section 202(h) reviews.

The Third Circuit's remedy was overbroad because it vacated not only the *Reconsideration Order*, but also the *Incubator Order* and the *Second R&O*'s eligible-entity definition, even though the only flaw the panel majority identified in the Commission's reasoning had nothing to do with those actions. Moreover, the Third Circuit vacated certain of the *Reconsideration Order*'s rule changes even though no party challenged those changes in the Third Circuit or before the Commission.

Even if the Third Circuit were correct on the merits, it should have remanded the *Reconsideration Order* to the Commission without vacatur. The Third Circuit acknowledged that the Commission could adopt the same substantive reforms after undertaking "a meaningful evaluation" of their effect on ownership diversity. Pet.App.41a. By vacating the *Reconsideration Order* and leaving archaic rules in place, the Third Circuit harmed broadcasters, newspapers, and ultimately the public by hindering

the ability of traditional broadcasters and newspapers to thrive in today's media marketplace.

Finally, the Third Circuit has repeatedly overstepped its authority by retaining jurisdiction over successive Section 202(h) reviews. Congress granted subject matter jurisdiction over such reviews to all the courts of appeals (other than the Federal Circuit). 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a). The panel majority's perpetual retention of jurisdiction undermines Congress' judgment and continues to distort the Commission's regulatory reform reviews.

This Court should reverse.

## ARGUMENT

### I. THE THIRD CIRCUIT CONTRAVENED SECTION 202(h) BY ELEVATING POLICY CONCERNS OVER THE COMPETITION ANALYSIS THAT CONGRESS SPECIFICALLY REQUIRED.

The *Reconsideration Order* fulfilled the FCC's statutory duties under Section 202(h). In that *Order*, the FCC properly determined that Section 202(h) required repeal or revision of several ownership rules because they did not reflect the competitive realities of the media marketplace and thus no longer served the public interest. No party challenged the FCC's competition analysis (or even the larger public interest conclusion), and the Third Circuit did not fault it. Instead, the Third Circuit vacated the *Reconsideration Order* solely because the Commission purportedly failed to comply with circuit precedent requiring exacting consideration of minority and female ownership diversity.

The Third Circuit's judgment cannot be squared with the statute. Section 202(h) requires the

Commission to assess its ownership rules in light of one factor and one factor only: "competition," not the effect of its rules on minority and female ownership. And Section 202(h) compels the Commission to eliminate or reform rules that cannot be justified in light of competition. It leaves no room for the Commission to retain ownership rules based on the unsubstantiated hope that those rules might promote minority and female ownership, as the Commission correctly explained, and that is doubly so when the record evidence shows that the rules inflict significant competitive harms on regulated broadcasters and newspapers. Because the Third Circuit replaced the statutory analysis Congress prescribed with its own atextual policy goals, this Court should reverse.

### A. Section 202(h) Requires The FCC To Consider Competition, Not Minority And Female Ownership.

1. The text of Section 202(h) is clear. The FCC must periodically evaluate its broadcast ownership rules and "repeal" or "modify" any such rule that is no longer "in the public interest *as the result of competition*." 1996 Act, § 202(h) (emphasis added). By the statute's plain terms, the FCC's mandate under Section 202(h) is limited to reviewing whether its ownership rules remain necessary in light of competition in the media marketplace.

This text reflects Congress' goals in enacting the 1996 Act: "To *promote competition* and *reduce regulation* in order to secure lower prices and higher quality services" for American consumers. 1996 Act, Preamble, 110 Stat. at 56 (emphasis added). One of the means Congress chose to accomplish these goals was to "deregulate the structure of the broadcast and cable television industries" through the elimination of

unnecessary ownership regulations. *Fox TV Stations, Inc.* v. *FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002).

Congress itself began the process of media ownership deregulation. For example, the 1996 Act "repealed the statutes prohibiting telephone/cable and cable/broadcast cross-ownership," "overrode the few remaining regulatory limits upon cable/network cross-ownership," "eliminated the national and relaxed the local restrictions upon [radio station] ownership, and eased the 'dual network' rule." *Fox TV*, 280 F.3d at 1033 (citations omitted). The 1996 Act also directed the FCC to revise its regulations to "eliminate the [national] cap upon the number of television stations any one entity may own, and to increase to 35 from 25 the maximum percentage of American households a single [television] broadcaster may reach." *Id.* (citations omitted); *see also Prometheus I*, 373 F.3d 372, 383-85 (3d Cir. 2004) (cataloguing changes).

Section 202(h) is the capstone of this deregulatory effort. In recognition of the ever-evolving nature of competition, Congress instructed the FCC "to continue the process of deregulation" by reviewing each of its ownership rules every four years to "'determine whether any of such rules are necessary in the public interest as the result of competition'" and to "'repeal'" or "'modify'" those that are not. *Fox TV*, 280 F.3d at 1033-34 (quoting 1996 Act, § 202(h)). That command is clear on its face. And when read against the backdrop of the ownership changes that Congress itself made or directed in the 1996 Act, it becomes even more evident that these periodic reviews were designed to ensure that deregulatory actions "would keep pace with the competitive changes in the

marketplace." *Prometheus I*, 373 F.3d at 391; *see Prometheus III*, 824 F.3d 33, 50 (3d Cir. 2016).

Further confirming the statute's focus on competition and deregulation, Congress expressly linked the Section 202(h) reviews with the FCC's broader "regulatory reform review under section 11 of the Communications Act." 1996 Act, § 202(h). Section 11 was also added by the 1996 Act to ensure that the FCC reviews periodically its regulations governing telecommunications services to "determine whether any such regulation is no longer necessary in the public interest *as the result of meaningful economic competition*" and to "repeal or modify any regulation it determines to be no longer necessary in the public interest." 47 U.S.C. § 161 (emphasis added). By thus firmly placing Section 202(h) reviews within the context of the 1996 Act's "pro-competitive, de-regulatory national policy framework," S. Rep. No. 104-230, at 1-2 (1996), Congress again confirmed that the statutory text is focused on competition, with an eye toward real, ongoing regulatory reform.

2. In contrast with the explicit statutory requirement that the FCC assess "competition," there is no express textual mandate that the FCC consider minority or female ownership in evaluating whether its media ownership rules must be repealed or modified. Neither Section 202(h) nor any other statutory provision directs the FCC to consider this type of diversity in its Section 202(h) reviews.

The omission of race and gender from Section 202(h) is significant. "It is a fundamental principle of statutory interpretation that 'absent provisions cannot be supplied by the courts.'" *Rotkiske* v. *Klemm*, 140 S. Ct. 355, 360-61 (2019) (brackets and citation omitted); *see also Nichols* v. *United States*, 136 S. Ct.

1113, 1118 (2016) ("To supply omissions transcends the judicial function." (citation omitted)). And that is particularly true where "Congress has shown that it knows how to adopt the omitted language or provision." *Rotkiske*, 140 S. Ct. at 361. Where congressional instruction "to consider" a particular factor "has elsewhere, and so often, been expressly granted," this Court has "refused to find" the existence of the same factor "implicit in ambiguous sections" of the statute. *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 467 (2001).

Congress can and does direct the FCC to consider minority and female ownership diversity when it wishes to do so. For example, when Congress authorized the FCC to auction initial spectrum licenses prior to the 1996 Act, it expressly instructed the agency to "consider the use of . . . bidding preferences" for "minority groups and women." 47 U.S.C. § 309(j)(1), (4)(D); *see* Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387 (1993) (enacting Section 309(j)). But Congress expressly limited those diversity preferences to auctions for initial spectrum licenses, and thus they have no relevance to Section 202(h). *See* 47 U.S.C. § 309(j)(6) ("Nothing in this subsection . . . shall . . . affect the requirements of . . . any other provision of this chapter.").

The lottery system for the provision of certain initial broadcast licenses embodied a similar congressional command. There, Congress instructed the FCC to provide a "significant preference" for applicants "controlled by a member or members of a minority group." 47 U.S.C. § 309(i)(3)(A). Although that authority as related to commercial broadcast licenses terminated in 1997 (and thus before the FCC was obligated to begin its first Section 202(h) review),

*id.* §§ 309(i)(5), 397(6), it provides additional evidence that when Congress wants to require the FCC to take actions related to minority ownership of licenses, Congress says so.[10]

Because Congress plainly knows how to direct the FCC to consider minority and female ownership issues, there is no ground to "enlarge[]" Section 202(h) to encompass "what was omitted" by Congress. *Nichols*, 136 S. Ct. at 1118.

3. Nor can Section 202(h)'s generalized reference to "the public interest" be interpreted as an implicit mandate that the FCC consider minority or female ownership diversity in its regulatory reform reviews.

In upholding Congress' broad delegation of authority to regulate media ownership in "the public interest" against a non-delegation challenge in *National Broadcasting Co.* v. *United States*, this Court explained that the Commission was "not left at large in performing this duty." 319 U.S. 190, 216 (1943). Rather, the statutory "requirement" to regulate in the public interest must "be interpreted by its context." *Id.* Neither the historical context of Section 202(h) nor the immediate statutory context

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[10] The limited applicability of the diversity preferences authorized by Section 309(i) and (j) is confirmed by Sections 309(k) and 310(d), which govern the renewal and transfer, respectively, of broadcast licenses. Those provisions prohibit the FCC, when evaluating license renewal applications and proposed transfers of licenses, from considering whether the public interest would be better served by granting the license to a person other than the renewal applicant or the proposed transferee. 47 U.S.C. §§ 309(k)(4), 310(d). Thus, even where Congress directed the Commission to promote minority and female ownership of licenses, it did so expressly and in a carefully limited fashion.

suggests that the "public interest" as used in that provision requires the Commission to consider minority and female ownership.

The statutory phrase "the public interest" had a well-known legal meaning when Congress enacted Section 202(h) in the 1996 Act. For decades, this Court and the FCC had regularly explained that in the context of broadcast ownership restrictions, the public interest embraces competition, localism, and "diversity of program and service *viewpoints*." *FCC* v. *Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978) (emphasis added; citation omitted); *accord In re 2018 Quadrennial Regulatory Review*, 33 FCC Rcd. 12111, 12127 (2018) ("our traditional policy goals [are] competition, localism, [and] viewpoint diversity"). And less than two years prior to the 1996 Act, this Court stated that access to "diverse and antagonistic" viewpoints had "long been a basic tenet of national communications policy," *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 663 (1994) (collecting cases), without mentioning minority or female ownership diversity. *See also In re Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making*, 10 FCC Rcd. 3524, 3547 (1995) (identifying "viewpoint, outlet and source diversity" as the "three types of diversity" that the FCC's television ownership rules "attempted to foster").

Furthermore, the Commission had made clear that its structural "ownership rules were *not* primarily intended to function as a vehicle for promoting minority ownership in broadcasting." *In re Amend. of Sec. 73.3555*, 100 FCC 2d 74, 94 (1985) (emphasis added). Indeed, the Commission determined that "it would be *inappropriate* to retain

multiple ownership regulations for the sole purpose of promoting minority ownership." *Id.* (emphasis added).

Because Congress "took the term" as the "law found it," *Stewart* v. *Dutra Constr. Co.*, 543 U.S. 481, 487 (2005), it incorporated competition, localism, and viewpoint diversity as potentially relevant public-interest considerations that could justify ownership restrictions. And among those, Congress plainly selected *competition* as the key consideration for the Commission's Section 202(h) reviews. There is no basis in the historical context of Section 202(h) for supposing that Congress, without saying so, required the Commission to consider minority and female ownership diversity.

Statutory context also confirms that the phrase "the public interest," as employed in Section 202(h), does not require the Commission to consider minority and female ownership. As explained above, the Communications Act contains other provisions, unlike Section 202(h), in which Congress expressly required the FCC to address that particular type of diversity. Because courts may not read "a specific concept into general words when precise language in other statutes reveals that Congress knew how to identify that concept," William N. Eskridge Jr., *Interpreting Law* 415 (2016), it would be improper to read such an obligation into "the public interest" in Section 202(h).

In addition to enforcing the non-delegation doctrine's limits on unbounded agency authority by interpreting "the public interest" in light of context, courts must also avoid conflict with other provisions of the Constitution, including the Fifth Amendment's limits on race- and gender-based decisionmaking. *See*, *e.g.*, *Adarand Constructors, Inc.* v. *Peña*, 515 U.S.

200, 235 (1995); *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1690 (2017); *see also Lamprecht* v. *FCC*, 958 F.2d 382, 399 (D.C. Cir. 1992) (Thomas, J.) (concluding that the FCC's "sex-preference policy" in the radio licensing context "violate[d] the Fifth Amendment"). Interpreting the "public interest" as mandating the consideration of minority and female ownership, or the retention of ownership restrictions for the sole purpose of promoting minority and female ownership, would raise serious constitutional concerns.[11]

4. The most natural reading of "the public interest" in light of the surrounding terms in Section 202(h) is that the FCC must examine whether the public-interest grounds upon which it initially based a particular media ownership rule continue to support the rule given current competitive conditions. Under the statute, the FCC must review the ownership rules "*adopted* pursuant to this section and all of its ownership rules" and must repeal or modify any rule that is "*no longer* in the public interest." 1996 Act, § 202(h) (emphasis added). By referring back to the time the rules were "adopted" and instructing the FCC to change rules that are "no longer" necessary, the statute contemplates a retrospective analysis. Thus, the FCC should look to the original rationale for each rule and test that rationale's continued validity against the modern competitive landscape. *See*

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[11] Indeed, in the 2002 review, the Commission questioned whether it had "legal authority to adopt measures to foster th[e] goal" of promoting minority and female ownership. *In re 2002 Biennial Regulatory Review—Review of Commission's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of Telecommunications Act of 1996*, 17 FCC Rcd. 18503, 18521 & n.123 (2002) (citing, among other cases, *Adarand*).

*Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) (because "a word is known by the company it keeps," courts must "avoid ascribing to one word [or phrase] a meaning so broad that it is inconsistent with its accompanying words"); *Nat'l Broad. Co.*, 319 U.S. at 216 ("the public interest" must be "interpreted by its context").

Here, as the FCC explained, the ownership rules were "*not*" adopted to "promote or protect minority and female ownership." Pet.App.117a (emphasis added); *see also*, *e.g.*, Pet.App.122a, 139a-40a, 161a-62a; JA171-72, 293, 309-10. So that factor is not a statutorily relevant "public interest" consideration in the review process under Section 202(h), and the FCC could not have been required to consider that factor when it changed the rules.

To be sure, the FCC has sometimes described "the public interest" more broadly in the Section 202(h) review process. For example, in 2003, the FCC said that "[t]here are five types of diversity pertinent to media ownership policy: viewpoint, outlet, program, source, and minority and female ownership diversity." *In re 2002 Biennial Regulatory Review*, 18 FCC Rcd. 13620, 13627 (2003). *But see In re Promoting Broadcast Internet Innovation Through ATSC 3.0*, 2020 WL 3091142, at *6 (FCC June 9, 2020) ("The Commission's media ownership limits are intended to promote viewpoint diversity, localism, and competition in broadcast services."). While the FCC may be free to *elect* to pursue those policy goals in the area of media ownership—as it has done in adopting measures to promote ownership diversity, such as in the *Diversity Order* and *Incubator Order*—nothing in Section 202(h) *requires* it to do so in reviewing its ownership rules.

### B. The *Reconsideration Order* Fully Complied With Section 202(h).

The Third Circuit contravened Section 202(h) by imposing a mandatory duty on the FCC to consider minority and female ownership in reviewing its ownership rules, based solely on the court's own prior instruction that the Commission's reviews "must 'include a determination about the effect of the rules on minority and female ownership.'" Pet.App.34a (quoting *Prometheus III*, 824 F.3d at 54 n.13).

The Third Circuit never identified any statutory basis for its ruling that the FCC must consider ownership diversity in conducting its Section 202(h) reviews; as explained above, there is none. The panel has cited Section 309(i) and (j) only in the separate context of the eligible-entity definition, but those provisions relate to the initial award of spectrum licenses via auction and lottery and have nothing to do with Section 202(h) or the structural ownership rules. *See supra* 28-29. Nor has the panel ever pointed to any regulation that imposes such a duty.

Rather, the panel insisted here that the FCC was required to consider ownership diversity based on a footnote in the Third Circuit's own opinion in *Prometheus III*. *See* Pet.App.34a (citing *Prometheus III*, 824 F.3d at 54 n.13). That footnote, in turn, quoted 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 (brackets in original) (quoting *Prometheus II*, 652 F.3d 431, 471 (3d Cir. 2011)). And the Third Circuit recognized that this judge-made instruction was an "*addition* to § 202(h)'s requirement." *Id.* (emphasis added).

That is because *Prometheus II*'s direction did not pertain to a Section 202(h) review. It concerned the

"eligible entity definition" the FCC had previously adopted in the *Diversity Order* to promote ownership diversity *separate and apart* from its structural ownership rules. *See* 652 F.3d at 470-72 (citing *Prometheus I*, 373 F.3d at 420-21). And *Prometheus I*, relied upon in *Prometheus II* for the supposed duty to consider ownership diversity, held only that the FCC's repeal of a specific "regulatory provision that promoted minority television station ownership"—the Failed Station Solicitation Rule, *see supra* 10-11—required "discussion of the effect of its decision on minority television station ownership." 373 F.3d at 421 & n.58. It did not hold that the FCC had to take minority and female ownership into account in any, let alone all, of its Section 202(h) decisions.

Nothing in those prior decisions justifies the Third Circuit's purported requirement that the Commission consider minority and female ownership in its Section 202(h) reviews. *See*, *e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2381 (2020) ("a policy concern cannot justify supplanting the text's plain meaning"). The Third Circuit thus erred when it inquired whether the *Reconsideration Order* adequately addressed the panel's judge-made policy concerns, instead of asking whether the *Order* satisfied the requirements imposed in Section 202(h).

The answer to *that* question is clearly "yes." Congress instructed the FCC to consider "the result of competition," and that is exactly what the FCC did. The agency "built a substantial record" regarding competition in the media marketplace and the role of broadcast stations in local communities. JA103. Based on that record, the FCC determined that "dramatic changes in the marketplace" had rendered

several ownership rules unnecessary or ineffective at promoting the public-interest values of competition, localism, and viewpoint diversity upon which the rules were originally based. Pet.App.67a-69a (alteration omitted); *see also* Pet.App.76a-122a (Newspaper/Broadcast Cross-Ownership Rule), 122a-40a (Radio/Television Cross-Ownership Rule), 140a-64a (Local Television Ownership Rule), 164a-78a (Local Radio Ownership Rule), 178a-99a (TV Joint Sales Agreement Attribution Rule). And the FCC expressly concluded—consistent with the plain text of Section 202(h), if not the Third Circuit's conception of the public good—that it could not "justify retaining" its ownership rules "under Section 202(h) based on the unsubstantiated hope that the rule[s] will promote minority and female ownership." Pet.App.140a.

The FCC's analysis tracked the plain, competition-centric language of Section 202(h). "No party identifie[d] any reason to question the FCC's key competitive findings and judgments" or challenged its "core determination that the ownership rules have ceased to serve the 'public interest.'" Pet.App.55a (Scirica, J., dissenting). Because competitive findings and judgments are the only ones Congress specifically instructed the Commission to make, the FCC's competition analysis *required* it to modify or repeal the rules it did in the *Reconsideration Order*. *See* 1996 Act, § 202(h) ("The Commission *shall* repeal or modify any regulation it determines to be no longer in the public interest." (emphasis added)); *Me. Cmty. Health Options* v. *United States*, 140 S. Ct. 1308, 1320 (2020) ("The first sign that the statute imposed an obligation is its mandatory language: 'shall.'"). It would have been unlawful for the FCC to seek to maintain rules based on "reasoning divorced from the statutory text." *Massachusetts* v. *EPA*, 549

U.S. 497, 532-35 (2007). Thus, contrary to the Third Circuit's holding, the Commission was not required to withhold necessary regulatory reform and preserve outdated regulations until it further considered minority and female ownership.

In short, the FCC did everything Congress told it to do in Section 202(h), and its competition-based findings stand unchallenged in this case. Accordingly, the Third Circuit erred in setting aside the FCC's decision to reform rules that it found no longer necessary as a result of competition.

## II. NO PRINCIPLE OF ADMINISTRATIVE LAW SUPPORTS THE THIRD CIRCUIT'S JUDGMENT.

Despite the lack of any statutory requirement to consider minority and female ownership in Section 202(h) reviews, the Third Circuit declared that "ownership diversity" was an "'important aspect of the problem'" in such reviews as a matter of administrative law. Pet.App.41a (quoting *Motor Vehicle Mfrs. Ass'n of U.S.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see* Pet.App.34a ("In *Prometheus III* we stated that . . . [the FCC] must 'include a determination about the effect of the rules on minority and female ownership.'"). The panel majority went on to hold that the Commission was obliged to treat ownership diversity as a potentially dispositive factor, and to produce robust statistical evidence about or in-depth theoretical analysis of the prospective effect of its rule changes on minority and female ownership before it could repeal or modify any rules. Pet.App.34a, 41a.

That holding is not only contrary to the statute, but also unsupported by any principle of administrative law. FCC practice does not support it, because the Commission has never treated minority

and female ownership as a mandatory public-interest factor in reviewing its ownership restrictions—much less a dispositive one. That the Commission has historically sought to promote ownership diversity in some contexts does not make that policy goal an important aspect of every administrative problem the agency faces or prevent the Commission from taking any action without robust statistical (or theoretical) analysis of the prospective effect that its action would have on that goal. But even if the APA required the Commission to consider minority and female ownership in its Section 202(h) reviews, and it does not, the Commission's analysis of the evidence amply satisfied *State Farm*'s requirements for reasoned decisionmaking.

### A. The FCC's Recognition Of Minority And Female Ownership As A Policy Goal In Some Contexts Does Not Convert It Into A Mandatory Factor In Section 202(h) Reviews.

The Third Circuit's declaration that minority and female ownership is an "'important aspect of the problem'" that the FCC must not "'entirely fail[] to consider'" in Section 202(h) reviews cannot be justified as following from the Commission's stated policy goals. Pet.App.37a, 41a (quoting *State Farm*, 463 U.S. at 43). The FCC has *never* determined that minority and female ownership can be a dispositive factor justifying the retention of a rule that is otherwise no longer in the public interest as the result of competition. The Commission has on occasion cited minority and female ownership as one component of diversity, and diversity as one component of the public interest. *See supra* 30, 33. But it has never treated that aspect of its policy goals as a mandatory factor in

Section 202(h) reviews, much less as a dispositive factor.

In its 2002 review, for example, the Commission noted that "[t]here are five types of diversity pertinent to media ownership policy: viewpoint, outlet, program, source, and minority and female ownership diversity," and it stated that "[e]ncouraging minority and female ownership historically has been an important Commission objective." *In re 2002 Biennial Regulatory Review*, 18 FCC Rcd. at 13627, 13634 & n.68.[12] But it addressed minority and female ownership in the 2002 review by issuing a separate notice of proposed rulemaking to consider various

[12] Notably, neither of the historical sources the FCC cited in support of that proposition mentioned female ownership. With respect to minority ownership, both found that increased minority ownership served the public interest in *viewpoint* diversity—and even then, the FCC did not suggest that promoting minority ownership could justify structural ownership restrictions. *See* S*tatement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979, 981 (1978) ("the Commission believes that ownership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming"); *In re Amend. of Sec. 73.3555*, 100 FCC 2d 74, 80-82 (1985) (agreeing with comments arguing "the Commission should take cognizance of the special contributions minorities make to viewpoint diversity"). The foundation for those findings has been called into question by subsequent decisions of this Court "rejecting the 'demeaning notion that members of defined racial groups ascribe to certain "minority views" that must be different from those of other citizens.'" *Schuette* v. *Coal. to Defend Affirmative Action*, 572 U.S. 291, 308 (2014) (quoting *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting)) (ellipses omitted). Moreover, as the Third Circuit acknowledged, the FCC found here that "the evidence did not show a meaningful connection between female or minority ownership and viewpoint diversity." Pet.App.14a.

proposals for promoting ownership diversity. *See id.* at 13635-37. In reviewing whether its ownership rules were necessary in the public interest as the result of competition, however, the Commission did not even *mention* minority and female ownership. *See*, *e.g.*, *id.* at 13760-67 (analyzing whether the Newspaper/Broadcast Cross-Ownership Rule would promote viewpoint diversity).

The Commission continued with that approach until it conformed on remand with the Third Circuit's order to "include a determination about 'the effect of [the] rules on minority and female ownership.'" *Prometheus III*, 824 F.3d at 54 n.13 (alteration in original) (quoting *Prometheus II*, 652 F.3d at 471). Before *Prometheus II*, the Commission sought to promote minority and female ownership directly through separate initiatives like the *Diversity Order*, not indirectly through its structural ownership rules. The Commission generally did not even attempt to assess whether its ownership restrictions were necessary to promote minority and female ownership, much less propose to retain an ownership restriction solely because it might serve that goal. *See Prometheus II*, 652 F.3d at 472 (criticizing the Commission for "side-stepping" minority and female ownership in the 2006 review).

And even after the Third Circuit ordered the FCC to consider minority and female ownership, the Commission *still* did not purport to treat that goal as a dispositive factor. In the *Second R&O*, for example, the Commission concluded that retaining its rules was "*consistent* with [its] goal of promoting minority and female ownership." JA221 (emphasis added). But the Commission made crystal clear that it was "not" retaining those rules "with the *purpose* of

preserving or creating specific amounts of minority and female ownership." JA293 (emphasis added).

Finally, in the *Reconsideration Order*, the FCC expressly declined to treat minority and female ownership as dispositive, explaining, for example, that it could not "continue to subject broadcast television licensees to aspects of the Local Television Ownership Rule that can no longer be justified based on the unsubstantiated hope that these restrictions will promote minority and female ownership." Pet.App.162a. That was consistent with the FCC's longstanding position that "it would be inappropriate to retain multiple ownership regulations for the sole purpose of promoting minority ownership." *In re Amend. of Sec. 73.3555*, 100 FCC 2d at 94.

The mere fact that the FCC has a policy goal of promoting minority and female ownership in some contexts does not make ownership diversity an "'important aspect of the problem'" that the Commission must consider in evaluating its ownership rules under Section 202(h). *See* Pet.App.41a (quoting *State Farm*, 463 U.S. at 43). An agency is not required to consider—let alone adopt rules promoting—all of its policy goals in every proceeding. "Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop." *Massachusetts*, 549 U.S. at 524. For that reason, at least before the Third Circuit transformed policy preferences about minority and female ownership into a be-all and end-all legal requirement, the FCC had addressed measures to promote such ownership diversity in, for example, adopting the *Diversity Order*, but not when reviewing structural ownership restrictions. Nothing in the APA required the Commission to alter that approach.

Thus, the Third Circuit's judgment cannot be justified based on the FCC's recognition of minority and female ownership as an important policy goal. The judgment is grounded only in the panel majority's policy goals.

### B. In Any Event, The FCC Adequately Considered Minority And Female Ownership.

Even if the APA required the Commission to consider minority and female ownership based on some past invocation of that policy, and it does not, the FCC adequately did so in the *Reconsideration Order*. It reviewed the evidence in the record, "reasonably predicted" based on the record that "the regulatory changes dictated by the broadcast markets' competitive dynamics [would] be unlikely to harm ownership diversity," and explained how it reached that conclusion. Pet.App.47a (Scirica, J., dissenting); *see also* Pet.App.57a-58a (canvassing record evidence). "No commenter introduced evidence that contradicted the FCC's prediction that changing the rules would unlikely affect ownership diversity." Pet.App.52a-53a. In reviewing the record evidence, the Commission easily satisfied *State Farm*'s requirements for reasoned decisionmaking.

Take the FCC's analysis of the Newspaper/Broadcast Cross-Ownership Rule. The FCC decided to repeal the Rule because it "is not necessary to promote the Commission's policy goals of viewpoint diversity, localism, and competition, and therefore does not serve the public interest." Pet.App.86a. This action, the FCC explained, reflected "the Commission's longstanding determination that the [R]ule does not advance localism and competition." Pet.App.87a. And in light

of dramatically changed competitive conditions, the Commission found that the Rule "is no longer necessary to promote viewpoint diversity." *Id.*

With respect to minority and female ownership, the Commission specifically concluded that eliminating the Rule would *not* materially harm ownership diversity and might actually increase minority ownership of newspapers and broadcast stations. Pet.App.119a-21a. That conclusion was based on comments received from organizations representing minority media organizations, which argued that eliminating the Rule could "boost the ability of . . . small broadcaster[s] to compete." Pet.App.118a-19a. The Commission also explained that eliminating the Rule was unlikely to have a significant effect on minority and female broadcast ownership, because radio stations are relatively easy to acquire and owners of television stations are more likely to acquire newspapers than vice versa. Pet.App.119a-20a. And the Commission found "no evidence to suggest that eliminating" the Rule would result "in an overall decline in minority and female ownership of broadcast stations." Pet.App.120a. "Thus, fostering minority and female ownership d[id] not provide a basis to retain the [R]ule." Pet.App.122a. The Commission made similar findings with respect to the remainder of the rules that it eliminated or modified. *See* Pet.App.138a-40a (Radio/Television Cross-Ownership Rule), 161a-62a (Local Television Ownership Rule); *see also* Pet.App.194a (in eliminating the TV Joint Sales Agreement Attribution Rule, noting that "certain [TV joint sales agreements] have helped spur minority ownership").

Given the Commission's unchallenged findings that the rules it repealed or modified were no longer necessary in light of competition—and the complete absence of any record evidence showing that changing the rules would have any adverse effect on minority and female ownership—the Commission's conclusion that it should repeal or modify the rules was not only rational, but obvious.

Indeed, if the Commission had retained long-outdated ownership rules that are no longer necessary in the public interest as the result of competition "based on the unsubstantiated hope that" they would "promote minority and female ownership," Pet.App.140a, its action would have been arbitrary and capricious under the APA, as well as contrary to Section 202(h).[13] *Cf. In re Amend. of Sec. 73.3555*, 100 FCC 2d at 94 (concluding "it would be inappropriate to retain multiple ownership regulations for the sole purpose of promoting minority ownership"). As this Court has explained, an agency rule is arbitrary and capricious not only when the agency "entirely fail[s] to consider an important aspect of the problem," but also when the agency "relie[s] on factors which *Congress has not intended it to consider*." *State Farm*, 463 U.S. at 43 (emphasis added); *see*, *e.g.*, *Massachusetts*, 549 U.S. at 532-35 (directing vacatur of agency action for considering factors other than those permitted by statute); *Whitman*, 531 U.S. at 464-71 (same). And there is no plausible argument that Congress required

[13] In fact, a pending petition for review of the *Second R&O* raised exactly this issue. *See* Petition for Review, *News Media All.* v. *FCC*, No. 17-1108 (3d Cir. filed Jan. 18, 2017). The Third Circuit is holding that petition in abeyance pending this Court's decision in this case. Order, No. 17-1108 (3d Cir. Feb. 6, 2020).

the FCC to consider minority and female ownership in its Section 202(h) reviews. *See supra* I.

Thus, the Third Circuit far exceeded its proper role under the APA when it not only rejected the Commission's explanation as irrational but also ordered the FCC to come forward with "new empirical research or an in-depth theoretical analysis" on the effect of rule changes on minority and female ownership. Pet.App.41a. "The APA imposes no general obligation on agencies to produce empirical evidence." *Stilwell* v. *Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.). And "courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA." *Pension Ben. Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 654 (1990) (citing *Vt. Yankee Nuclear Power Corp.* v. *Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978)).

It was the duty of the commenters who wished to retain the Commission's rules to submit empirical research or in-depth theoretical analysis in support of that position. It was not the FCC's job—either as a matter of general administrative law, *see* 5 U.S.C. § 556(d), or under the deregulatory presumption imposed by Section 202(h)—to accomplish that task before the Commission could modify its rules. Otherwise, a commenter could effectively control the outcome of the Section 202(h) process simply by lobbing in an unsupported assertion as a reason to keep a rule and forcing the FCC to do the impossible of proving a negative. Agencies go to final rules with the record they have, i.e., the one made by commenters; they need not build a perfect record to justify repealing rules that *lack* record support, especially in the context of a statute designed to

achieve regulatory reform. Concluding otherwise would be contrary to the entire deregulatory bent of Section 202(h).

For all these reasons, the Third Circuit erred in vacating the *Reconsideration Order*. This Court should reverse.

## III. THE THIRD CIRCUIT'S REMEDY IS VASTLY OVERBROAD, AND THE PANEL IMPROPERLY RETAINED JURISDICTION OVER THE COMMISSION'S SECTION 202(h) REVIEWS.

The Third Circuit compounded the errors discussed above—which warrant reversal on the merits—by issuing a vastly overbroad remedy. The panel majority not only vacated the *Reconsideration Order*, but *also* the *Incubator Order* and the *Second R&O*'s "eligible entity" definition in their entirety. On top of that, the panel purported to retain continuing jurisdiction over these issues, thereby perpetuating its self-proclaimed status as the national media ownership review board.

1. To begin with, the Third Circuit's reasoning provides no basis for vacating the *Incubator Order* or the *Second R&O*'s "eligible entity" definition. The Third Circuit's conclusion that the Commission did not sufficiently consider the impact of the *Reconsideration Order*'s media ownership rule changes on minority and female ownership, even if it were accurate (it is not), has no bearing on the validity of the *Incubator Order*. That separate *Order* adopted independent rules designed to *increase* ownership diversity consistent with constitutional limitations by authorizing special waivers of the Local Radio Ownership Rule for broadcasters providing significant support for new entrants. *See* Pet.App.16a. The Third Circuit's reasoning is

likewise inapplicable to the *Second R&O*'s eligible-entity definition, which identifies the parties eligible for preferences related to tower construction, station licensing, and auction proceedings. *See* JA384-87. Although the Commission adopted that definition in the same overall proceeding that resulted in the *Reconsideration Order*, the media ownership rules do not incorporate or rely on the eligible-entity definition in any way.

A court may "set aside agency action" under the APA only if the action is "found to be" "unlawful." 5 U.S.C. § 706(2). Because the Third Circuit did not identify any legal defects in the *Incubator Order* or the eligible-entity definition (indeed it *rejected* challenges to the *Incubator Order*, *see* Pet.App.30a-34a), it lacked authority to vacate those rules and the judgment below should be reversed with respect to each of them.

For similar reasons, reversal is also warranted regarding the *Reconsideration Order*'s waiver provision for embedded radio markets and its repeal of the TV Joint Sales Agreement Attribution Rule. The embedded radio markets provision created a narrow presumption in favor of allowing certain station acquisitions in "parent" radio markets with multiple embedded sub-markets. Pet.App.175a-78a. The judgment below vacated the embedded radio markets policy along with the rest of the *Reconsideration Order*, even though Respondents did not *mention* it in the underlying rulemaking proceedings or appellate briefing, let alone demonstrate that the policy was unlawful. *Cf. United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). Similarly, Respondents failed to mention the TV Joint Sales Agreement Attribution Rule in their opening briefs in the Third Circuit, and on reply

advanced only the incorrect argument that the FCC's decision to eliminate that rule had been based on the same data as the remainder of the rules. *See* Pet.App.184a-99a (determining that TV joint sales agreements do not provide stations selling advertising time on other stations with sufficient indicia of control to warrant attribution and that non-attribution is otherwise in the public interest). And although Industry Petitioners pointed out that Respondents had offered no argument for vacating the Rule, the Third Circuit ignored the point. Courts have no license to "substitute [their] judgment for that of the agency," *State Farm*, 463 U.S. at 43; all the more where, as here, no party substantively challenged the agency action in the first place.[14]

2. The judgment below is also improper because even if the Third Circuit were correct on the merits, it should have remanded the challenged rules without vacating them, thus providing the Commission an opportunity to provide the purportedly necessary data and analysis. Remand without vacatur is warranted where: (i) the agency "can redress its failure of explanation on remand while reaching the same result," *Black Oak Energy, LLC* v. *FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013); and (ii) vacatur would result in significant "disruptive consequences," *Allied-Signal, Inc.* v. *U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993); *see also* 33 Charles Alan Wright et al., *Federal Practice and Procedure*

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[14] The FCC's decisions regarding the embedded radio markets provision and the TV Joint Sales Agreement Attribution Rule are severable because there is no indication that they could not function independently of the *Reconsideration Order*'s other provisions. *See K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 294 (1988).

§ 8382 (2d ed. supp. 2020) (remand without vacatur is the "'general practice' for remedying an agency's failure to provide adequate reasons for an action" (citation omitted)).

Both of those conditions are satisfied here. *First*, the Third Circuit itself acknowledged that the Commission could adopt the same substantive reforms after undertaking "a meaningful evaluation" of their effect on ownership diversity. Pet.App.41a. *Second*, for the reasons given above, *see supra* 8-9, "the burdens of vacatur on both the regulated parties . . . and the Commission counsel in favor of providing the Commission with an opportunity to rectify [any] errors." *Mozilla Corp.* v. *FCC*, 940 F.3d 1, 86 (D.C. Cir. 2019) (per curiam). Section 202(h) calls for periodic updating of media ownership regulations in light of changes in the marketplace, and no party to the proceedings below "identifie[d] any reason to question the FCC's key competitive findings and judgments," Pet.App.55a (Scirica, J., dissenting), making remand without vacatur particularly appropriate here.

3. Finally, the Third Circuit has repeatedly overstepped its authority in yet another way: by retaining exclusive jurisdiction over the Commission's Section 202(h) reviews. *See*, *e.g.*, Pet.App.45a. Some judicial review statutes—including a provision that governs "[a]ppeals" from other types of Commission proceedings—vest jurisdiction in a single court of appeals. *See*, *e.g.*, 47 U.S.C. § 402(b); 42 U.S.C. § 7607(b)(1); 28 U.S.C. § 1295. In contrast, the statutory scheme applicable here—the Hobbs Administrative Orders Review Act—grants *all* of the federal courts of appeals (save the Federal Circuit) subject matter jurisdiction over challenges to

Commission regulations, *see* 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a), and gives challengers a choice between two venues—the "judicial circuit in which the petitioner resides or has its principal office, or" the D.C. Circuit, 28 U.S.C. § 2343. That approach reflects a conscious choice by Congress *not* to restrict cases like this one to a single tribunal. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original; citation omitted)).

Despite that clear congressional command, the same panel of the Third Circuit has retained jurisdiction over challenges to every one of the Commission's Section 202(h) reviews since 2002. *See Prometheus III*, 824 F.3d at 60; *Prometheus II*, 652 F.3d at 472; *Prometheus I*, 373 F.3d at 435. The Judicial Panel on Multidistrict Litigation selected the D.C. Circuit in 2014 as the venue for the petitions that ultimately resulted in *Prometheus III*. *See* 824 F.3d at 38-39. But that court transferred the fully briefed petitions to the Third Circuit over the objections of several parties (including two of the Petitioners here) based on the Third Circuit's retention of jurisdiction. *See id.* at 39. A similar dynamic played out here: several cases filed in the D.C. Circuit were transferred to the Third Circuit, which once "again retain[ed] jurisdiction over" the Commission's action. Pet.App.17a, 45a.

The Third Circuit's perpetual retention of jurisdiction is inconsistent with the Hobbs Act and will continue to distort the Commission's regulatory

reform reviews unless corrected by this Court. As Judge Williams explained in connection with the *Prometheus III* transfer order, "given the widening circle of interlocked issues, plus the Commission's interminable processes . . . , a vast range of issues may be forever committed to one circuit, contrary to the goals of Congress in authorizing review in 12 different circuits." Order at 3, *Howard Stirk Holdings, LLC* v. *FCC*, No. 14-1090 (D.C. Cir. Nov. 24, 2015) (statement of Williams, J.). Section 202(h) reinforces this conclusion by mandating a new, *separate* review proceeding every four years.

To clear the way for the FCC to implement Section 202(h) as Congress intended, this Court should direct that future challenges to the Commission's proceedings under the statute may be filed in any court authorized by law.

## CONCLUSION

This Court should reverse the decision below and instruct the Third Circuit to deny Respondents' petitions for review.

Respectfully submitted.

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