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 Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Third Circuit correctly applied long-settled standards of administrative law—the same standards that Petitioners ask this Court to apply—to hold that the Federal Communications Commission acted arbitrarily and capriciously in promulgating its media-ownership rules after the agency failed to adequately consider what it has long recognized to be an important aspect of the public interest served by those rules.

PARTIES TO THE PROCEEDINGS

Respondents here are the Prometheus Radio Project, the Movement Alliance Project (formerly known as the Media Mobilizing Project); Common Cause; the National Association of Broadcast Employees and Technicians–Communications Workers of America (NABET-CWA); Free Press; and the Office of Communication, Inc. of the United Church of Christ (petitioners below); together with the Benton Institute for Broadband & Society (formerly known as the Benton Foundation); the National Hispanic Media Coalition; the National Organization for Women Foundation; Media Alliance; and Media Counsel Hawai'i (respondents-intervenors below).

All other parties to the proceedings are correctly described in the Petition of the National Association of Broadcasters, et al., No. 19-1241 (at ii–iv).

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The petition in No. 19-1241 omitted two of the orders under review: *2014 Quadrennial Regulatory Review, Second Report and Order*, reported at 31 FCC Rcd. 9864 (2016) ("*2016 Order*"), and *Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*, reported at 33 FCC Rcd. 7911 (2018) ("*Incubator Order*"). Excerpts from those orders are included in the Petition Appendix in No. 19-1231. The third order under review, *2014 Quadrennial Regulatory Review, Reconsideration Order*, is reported at 32 FCC Rcd. 9802 (2017) ("*Reconsideration Order*") and included in full in the Petition Appendix in No. 19-1241.[1]

STATEMENT

The Third Circuit correctly applied settled principles of administrative law to a particular administrative record and held that the Federal Communications Commission did not adequately explain or support its conclusions about how its rule changes would impact its own long-standing policy goal. That fact-bound, splitless, unremarkable application of administrative law raises no question worthy of this Court's review. The petitions here should be denied, just as this Court has done twice before in earlier iterations of this case.

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[1] All appendix citations are to the Appendix in No. 19-1231.

1. Since its origin, the FCC has been entrusted with regulating broadcasting in the public interest, *e.g.,* 47 U.S.C. §§ 303, 310(d), pursuing three "longstanding policy goals of competition, localism, and diversity," *e.g.*, *2016 Order*, 31 FCC Rcd. at 9870; *see also Broadcast Localism*, 19 FCC Rcd. 12425, 12425 (2004).

"[T]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). The FCC has long regarded diversity as critical to the public interest and, for decades, has judged ownership diversity, specifically, to be an "important Commission objective," based on "a positive correlation between viewpoints expressed and ownership of an outlet." *2002 Biennial Regulatory Review*, 18 FCC Rcd. 13620, 13627–28, 13634 (2003) ("*2002 Review*"); *see FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978). Throughout the rulemakings at issue here, and consistent with its statutory mandate to make communications available "without discrimination on the basis of race, color, religion, national origin, or sex," 47 U.S.C. § 151, every quadrennial review has reaffirmed these policies. *See, e.g.*, *2006 Quadrennial Regulatory Review*, *Report and Order*, 23 FCC Rcd. 2010, 2016–17 (2008) ("*2006 Review*") ("reaffirm[ing]" the "longstanding policies" set out in the *2002 Review*); SG Pet. 5. *See also* DANA A. SCHERER, CONG. RESEARCH SERV., R43936, THE FCC'S RULES AND POLICIES REGARDING MEDIA OWNERSHIP, ATTRIBUTION, AND OWNERSHIP DIVERSITY 1–2 (2016) (describing the

Commission's historic commitment to ownership diversity as part of the public interest).

2. The FCC has modified its broadcast ownership rules many times over the years. While the Commission imposes limits at both the national and local levels, only local ownership rules are at issue here. Some rules apply to ownership of multiple stations within a single service (such as television or radio). Others restrict "cross-ownership," *e.g.*, prohibit common ownership of a newspaper and broadcast station within a local market. The FCC also grants benefits or exceptions to certain licensees (sometimes called "eligible entities").

In the 1996 Telecommunications Act, Congress significantly liberalized many broadcast ownership rules, including limits on local radio station ownership and TV/radio cross-ownership in the largest local markets. Pub. L. No. 104-104, § 202(a)–(f), 110 Stat. 56, 110–11. In § 202(h), Congress also required the Commission to review "all of its [broadcast] ownership rules quadrennially," "determine whether any of such rules are necessary in the public interest as the result of competition," and "repeal or modify any regulation it determines to be no longer in the public interest." 47 U.S.C. § 303 note (Broadcast Ownership).

3.a. In 2002, the D.C. Circuit reviewed the FCC's *1998 Biennial Regulatory Review Report*, 15 FCC Rcd. 11058 (2000). In that first review, the FCC retained its national audience-reach TV ownership limit and a rule that effectively prohibited TV-cable cross-ownership in the same local market. *Fox Television Stations., Inc. v. FCC*, 280 F.3d 1027, 1034–35 (D.C. Cir. 2002) ("*Fox*

I"), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002) ("*Fox II*"). Consistent with § 202(h), the FCC could retain rules to promote diversity, the D.C. Circuit held, and "nothing in § 202(h) signals a departure" from the "historic scope" of the public interest inquiry's "historical[] embrace[] of diversity (as well as localism)." *Fox I*, 280 F.3d at 1042. But the FCC's retention of those rules was arbitrary because the FCC's explanations were "woefully inadequate" and "merely listed" numbers. *Id.* at 1044.

The D.C. Circuit separately reviewed under § 202(h) the FCC's decision to modify local TV ownership rules to permit common ownership of two local stations if one of the stations is not among the top four and if eight independent stations remain. *Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). That court remanded the rule, holding that the eight-voices test was arbitrary because the FCC did not explain why it counted fewer outlets in its local television rule than it did in a similar cross-ownership rule. *Id.* at 162, 164. Notwithstanding deference, the court held, "the Commission cannot escape the requirements that its action not 'run[] counter to the evidence before it' and that it provide a reasoned explanation for its action." *Id.* at 162 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

b. In its 2002 Review, the FCC reaffirmed that local ownership rules are necessary to promote diversity. *2002 Review*, 18 FCC Rcd. at 13793. The Commission thus retained, with some modification, the pre-existing local TV and radio limits. *Prometheus*

Radio Project v. FCC, 373 F.3d 372, 386–87 (3d Cir. 2004) ("*Prometheus I*"). But it took a new approach to setting cross-ownership rules. The FCC used a "Diversity Index," modeled on a commonly used antitrust market concentration index, to construct a new set of cross-media limits. It prohibited all newspaper/broadcast and TV/radio combinations in the smallest markets (with three or fewer TV stations), adopted some limits in medium-sized markets (with between four and eight TV stations), and imposed no restrictions in the largest markets (more than eight TV stations). *Id.* at 388. The FCC also permitted "eligible entitles" to engage in otherwise prohibited transactions, defining "eligible entities" based on the Small Business Administration's annual revenue standards. *2002 Review*, 18 FCC Rcd. at 13811–12.

Upon review, the Third Circuit upheld the Commission's decisions to partially repeal the newspaper/broadcast ban; adopt a revenue-based eligible entity definition; modify the definition of local radio markets; and retain the local TV rule. *Prometheus I*, 373 F.3d at 397–435, 445–63.

The Third Circuit concluded, however, that the Commission did not sufficiently explain its replacement limits for cross-ownership and local-market restrictions. For example, the FCC did not adequately justify its decision to exclude cable television from the Diversity Index while including the internet, or its assumption that all local TV stations have equal market shares. *Id.* at 406–07, 418–19. The court therefore remanded these rules because the new

limits "all have the same essential flaw: an unjustified assumption that media outlets of the same type make an equal contribution to diversity and competition in local markets." *Id.* at 435.

In the same decision, the Third Circuit reviewed the FCC's repeal of the failed station solicitation rule, which required an applicant to solicit an out-of-market buyer before it could sell a failing station to an in-market buyer. *Id.* at 420. The court noted that "preserving minority ownership was the purpose of the" rule and, therefore, repealing it "without any discussion of the effect of its decision on minority television station ownership" did not provide the "reasoned analysis" necessary to support a policy change. *Id.* at 420–21. Noting that the FCC had deferred consideration of other proposals to promote minority broadcast ownership, the court directed it to consider them on remand. *Id.* at 421 n.59.

c. The FCC took almost four years to resolve the issues remanded in *Prometheus I,* addressing them only in its *2006 Review*. There, it abandoned the Diversity Index and largely returned to the pre-existing rules with minor adjustments. *2006 Review, supra*. The Commission also modified the newspaper/broadcast rule, establishing presumptions in favor of newspaper/radio combinations and, under certain conditions, newspaper/television combinations in the top twenty markets, but otherwise presuming such combinations were not in the public interest. *Id.,* 23 FCC Rcd. at 2018–19. It re-adopted the pre-*2002-Review* radio/television cross-ownership rule, local

radio and television limits, and failed station solicitation rule. *Id.* at 2058, 2068–69.

In a separate contemporaneous order, the FCC adopted thirteen proposals to "expand[] opportunities for new entrants and small businesses, including minority- and women-owned businesses, to own broadcasting outlets" to "strengthen the diverse and robust marketplace of ideas." *Promoting Diversification of Ownership in the Broadcasting Services*, 23 FCC Rcd. 5922, 5924 (2008) ("*Diversity Order*"). The additional opportunities were available to "eligible entities," as defined using the same revenue-based definition of eligible entity adopted in the *2002 Review*.

On review, the Third Circuit unanimously upheld the FCC's decisions on the local television and radio rules. *Prometheus Radio Project v. FCC*, 652 F.3d 431, 458–64 (3d Cir. 2011) ("*Prometheus II*"). The panel majority found, however, that the Commission failed to provide adequate notice of changes to the newspaper/broadcast rule. *Id.* at 445–46, 453.

Given the FCC's avowed purpose for the *Diversity Order*—"increasing broadcast ownership by minorities and women," *id.* at 469—the court held that the FCC had not reasonably explained how the revenue-based eligible entity definition would further that goal. *Id.* at 471 (finding the FCC "offered no data attempting to show a connection between the definition chosen and the goal of the measures"). The court noted that "the Commission referenced *no* data on television ownership by minorities or women and *no* data regarding commercial radio ownership by women"

because, "as the Commission has since conceded, it has no accurate data to cite." *Id.* at 470 (emphasis in original). Because "[p]romoting broadcast ownership by minorities and women is, in the FCC's own words, 'a long-standing policy goal of the Commission,' " the Third Circuit urged the Commission to "gather[] the information required to address these challenges." *Id.* at 472.

d. The FCC failed to produce a decision on remand in the 2010 Quadrennial Review. Instead, in 2014, the FCC issued a *2010/2014 Quadrennial Review, Further Notice of Proposed Rulemaking and Order*, 29 FCC Rcd. 4371 (2014), announcing tentative conclusions and requesting further comment. Review of this order was originally assigned to the D.C. Circuit under 28 U.S.C. § 2112(a)(3). After reviewing the briefs, and with the Government's support, the D.C. Circuit transferred the case to the Third Circuit. *Prometheus Radio Project v. FCC*, 824 F.3d 33, 39 (3d Cir. 2016) ("*Prometheus III*"); *see* Resp. of FCC to Motion to Transfer Cases to the Third Circuit, *Howard Stirk Holdings. v. FCC*, No. 14-1090 (2015).

The Third Circuit unanimously agreed that the Commission's delay in adopting an eligible entity standard was "agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1). *Prometheus III*, 824 F.3d at 48. The court remanded with directions "to act promptly to bring the eligible entity definition to a close," *id.* at 49, instructed the FCC to "make a final determination as to whether to adopt a new definition," and stated "[i]f it needs more data to

do so, it must get it," *id.* (citing *In re Core Commc'ns, Inc.*, 531 F.3d 849 (D.C. Cir. 2008)).

4.a. Two months later, the FCC issued the first of the three orders under review, the *2016 Order*. There, the FCC found that "the public interest is best served by retaining [the] existing rules, with some minor modifications." App. 60a. The Commission expressly concluded that each of the rules was consistent with long-standing goals to promote race/gender ownership diversity. *See* App. 63a (top-four and eight-voices local TV limits are "consistent with the Commission's goal to promote minority and female ownership"); App. 72a (same for local radio ownership limits); *2016 Order*, 31 FCC Rcd. at 9913, 9944 (modified newspaper/ broadcast cross ownership ban); *id.* at 9945 (existing radio/TV cross-ownership limits).[2]

In rejecting a request to tighten rather than merely retain its ownership rules, the Commission attempted to examine how previous ownership rule relaxation had affected ownership diversity. For TV ownership, the Commission used a National Telecommunications and Information Administration (NTIA) ownership report which identified 32 "minority-owned" full power TV stations in 1998. App. 66a. After the FCC relaxed local TV ownership rules, NTIA's report showed a decline to 23 stations in 1999-2000. *Id.* at 67a. The Commission's separate dataset from nearly a decade later, however, reflected higher

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[2] Portions of the *2016 Order* not excerpted in the Government's appendix are cited to the FCC Record.

minority ownership of 60 stations in 2009, 70 stations in 2011, and 83 stations in 2013. *Id.*

For radio, the FCC reported that, in 1995, the year before national radio limits were eliminated, NTIA data showed 312 minority-owned stations compared with 284 and 305 stations in 1996-97 and 1998, respectively. App. 73a. The FCC's separate data reflected 644 such stations in 2009; 756 in 2011; and 768 in 2013. *Id.*

The FCC recognized both comparisons were flawed because they did not necessarily reflect "actual changes in the marketplace," *id.* at 66a n.211; NTIA's entirely different methodology produced incomplete counts, *id.* at 67a n.212; and there was no "data on female ownership," *id.*; *see also id.* at 73a nn.325–26.

The FCC concluded this data served to reject requests to tighten the rules to promote greater ownership diversity, yet did *not* justify loosening the rules, because there was "no evidence in the record that would permit [it] to infer causation." *Id.* at 67a–68a; *see also id.* at 72a–74a. Recognizing the flaws in its data, the FCC described outreach efforts that it posited would "improve the quality of its broadcast ownership data" going forward. *Id.* at 83a–89a.

After largely retaining the ownership rules, the FCC also re-adopted the same revenue-based eligible entity definition previously remanded twice by the Third Circuit. *Id.* at 77a.

b. Fifteen months later, in November 2017, the FCC issued the *Reconsideration Order*, using the "same facts used by this Commission just over a year ago to reach the exact opposite conclusions." 32 FCC

Rcd. at 9890 (Commissioner Clyburn, dissenting). The *Reconsideration Order* eliminated the newspaper/broadcast and television/radio cross-ownership rules and rescinded the local television ownership rules except for the top-four restriction and prohibition on owning more than two stations in a local market. App. 156a–157a.

While reaching diametrically opposite conclusions from the *2016 Order*, the FCC did not alter its view that diversity, including ownership diversity, remained an important aspect of the analysis. *See, e.g.*, *id.* at 167a–68a & n.49 (describing the Commission's policy goals of "viewpoint diversity, localism, and competition," and declining to consider "arguments that ownership does not influence viewpoint"). Instead, it concluded that the very same race/gender ownership data and analysis that the *2016 Order* found insufficient to justify loosening the rules now did justify loosening them. *See id.* at 195a; *id.* at 198a (citing the same data discussed in the *2016 Order*).

Finally, the Commission announced its intent to adopt an "incubator program" that would "provide an ownership rule waiver or similar benefits to a company that establishes a program to help facilitate station ownership for a certain class of new owners," leaving formal implementation—including the definition of which entities would be eligible for that program—to a subsequent order. *Id.* at 239a, 242a.

c. Thereafter, the FCC adopted a radio-only incubator program. In the *Incubator Order*, the FCC developed a new definition of eligible entities, combining its previous revenue-based criterion with a

new-entrant criterion. *Id.* at 255a, 262a–264a. The FCC also permitted established broadcasters to obtain waivers of local ownership caps in large markets after helping new broadcasters in much smaller markets. App. 10a.

5. Petitions for Review of the *Reconsideration Order* and the *Incubator Order* were initially assigned to the D.C. Circuit, but that court granted a motion—unopposed by Industry Petitioners and the Government—to transfer the cases to the Third Circuit. See Order, *News Media Alliance v. FCC*, No. 16-1395 (D.C. Cir. Jan. 11, 2017). The Third Circuit then consolidated the cases with petitions for review of the *2016 Order*.

The Third Circuit unanimously affirmed substantial elements of the agency's decisions. After rejecting FCC and industry intervenor claims that Respondents lacked standing, it upheld the top-four restriction in local TV ownership, because the Commission had engaged in "exactly the kind of line-drawing … to which courts are the most deferential." App. 22a. It affirmed the *Incubator Order*'s decision about which markets qualified incumbents for benefits as adequately noticed and not arbitrary. *Id.* at 23a–27a. And it found that the FCC did not unreasonably delay action on a proposed procurement rule to improve broadcaster vendor diversity. *Id.* at 35a–36a.

The court found, however, that relaxation of the ownership rules was fatally flawed because the FCC "did not adequately consider the effect its sweeping rule changes will have on ownership of broadcast media by women and racial minorities." *Id.* at 4a.

Specifically, the FCC's statistical analysis was "so insubstantial that it would receive a failing grade in any introductory statistics class." *Id.* at 30a–31a. The court identified two main problems.

First, "any ostensible conclusion as to female ownership was not based on *any* record evidence" at all. *Id.* at 30a (emphasis in original). This represented a complete failure "to consider an important aspect of the problem," because the "only 'consideration' the FCC gave to the question" was its *ipse dixit* conclusion. *Id.*

Second, the FCC's analysis of minority ownership data was "insubstantial." *Id.* at 31a. The agency compared two data sets "created using entirely different methodologies," an "exercise in comparing apples to oranges," which it did not "recognize[] . . . or take[] any effort to fix." *Id.* Further, even if the data were taken at face value, the FCC reached "woefully simplistic" conclusions based on raw station counts and not percentages, thus failing to control for increases in the total number of licensees over time. *Id.* The FCC "did not actually make any estimate" of the impact of past deregulation because it failed to even "attempt to assess … how many minority-owned stations there would have been in 2009 had there been no deregulation." *Id.* at 31a–32a. The FCC thus made no attempt to control for these or other "possible confounding variables." *Id.* at 31a. The court explained that because the FCC relied on data rather than "its general expertise" or (with limited exceptions) "support from commenters," it could not rest its decision on "faulty and insubstantial data." *Id.* at 33a.

The court found the Commission's own historical embrace of ownership diversity as an essential component of the public interest made it "an important aspect of the problem." *Id.* at 33a (quoting *State Farm*, 463 U.S. at 43). Still, the Third Circuit recognized that the Commission "might well be within its rights to adopt a new deregulatory framework (even if the rule changes would have some adverse effect on ownership diversity) if it gave a meaningful evaluation of that effect and then explained why it believed the trade-off was justified for other policy reasons." *Id.* at 34a. But because the Commission rested the rule on the premise that "consolidation will not harm ownership diversity," the court held, the Commission could not rely on facially inadequate analysis to support that premise. *Id.*

Because the FCCs insufficient analysis of the effect of the rule changes on ownership diversity permeated the *2016 Order*, *Reconsideration Order*, and *Incubator Order* alike, the Third Circuit vacated those orders and retained jurisdiction.

Judge Scirica dissented in part. He agreed that ownership diversity was a component of the "values that guide the FCC's 'public interest' analysis under Section 202(h)." *Id.* at 42a. But he would have concluded that the "FCC reasonably predicted on the record before it that the new rules would not diminish or harm minority and women ownership." *Id.* at 49a. He posited that recent changes to encourage better data submission might "make the FCC's data more reliable, benefiting future quadrennial reviews." *Id.* at 52a. Rather than delaying or vacating the rules, he

would have directed the FCC to follow through on its announced intent "to take up a variety of diversity-related proposals in its 2018 quadrennial review" and to "study the effects of the latest rules on ownership diversity." *Id.*

6. While the Third Circuit's decision was pending, the FCC initiated the next quadrennial review. *2018 Quadrennial Regulatory Review Notice*, 33 FCC Rcd. 12111 (2018) ("*2018 Review Notice*"). It sought extensive comment on every aspect of the local radio and television rules and the rule governing TV network affiliation but made no tentative conclusions. The agency repeatedly affirmed the Commission's goal of ownership diversity but did not propose any major initiatives for improving its data on ownership diversity. *Id.* at 12116–17, 12127, 12138–39.

REASONS FOR DENYING THE PETITION

Petitioners seek error correction of the Third Circuit's application of settled administrative law standards to an agency record that is already being supplanted. That sort of fact-bound question does not warrant this Court's review, as the Government has emphasized when twice successfully opposing certiorari in earlier iterations of this case.

No question of statutory interpretation is raised here, much less one on which the courts of appeals disagree. Every court to have considered the question agrees that diversity is not an "atextual" consideration in § 202(h) reviews as Industry Petitioners would have it, but part of the statutorily mandated public interest

analysis; as does the Government here. The Commission has long agreed, too. Its own consistent interpretation of the statutory "public interest" standard requires it to consider race and gender ownership diversity when evaluating broadcast ownership regulations.

Industry Petitioners' statutory arguments about the scope of § 202(h) are thus *post hoc* rationales not invoked or relied upon by the agency (even now), and may not be used to sustain the Commission's actions. Should the Commission change its mind or choose to weigh various public interest considerations differently, the Third Circuit's decision would not stand in its way—as that court expressly recognized.

What the Commission cannot do, however, is expressly embrace ownership diversity as an important policy goal yet fail to reasonably consider how its repeal of major broadcast-ownership restrictions would affect that goal. The Third Circuit correctly held the Commission could not rest its factual conclusions on an analysis "so insubstantial that it would receive a failing grade in any introductory statistics class." App. 30a–31a. Requiring the agency to articulate a reasonable connection between the evidence before it and the conclusions reached is an administrative law commonplace.

There is no need for the Court to comb through this already-stale administrative record in a redux of the appeal. Because the Commission did not complete its 2010 or 2014 review until 2017, the 2018 Quadrennial Review was already underway when the Third Circuit was considering this case. The

Commission has all the tools it needs to consider the issue afresh on a new administrative record in that review.

I. The Third Circuit's Fact-Bound Application Of Settled Administrative Law Standards Presents No Legal Question Warranting Review.

This mine-run administrative law case presents no certworthy question. The Government makes a naked plea for error correction, asking only for reapplication of the same settled standards applied by the Third Circuit. For their part, Industry Petitioners present a question about the scope of § 202(h) which the Government does not endorse and which the FCC did not adopt below—meaning the Industry's reasoning could not serve as a basis for upholding the orders—and which is admittedly not subject to any circuit split. At the Government's urging, this Court has twice denied petitions for review in earlier iterations of this case—petitions which, unlike the current ones, at least raised legal questions. Because this case involves only a claim of "misapplication of a properly stated rule of law," S. Ct. R. 10, review should again be denied.

A. This Case Is Even Less Worthy of Certiorari than Its Predecessors.

The long history of this case includes the Government twice successfully opposing this Court's review of the Third Circuit's prior § 202(h) rulings

applying the same settled standards. The Government's plea for pure error correction is even less certworthy now.

In 2005, the Government opposed industry petitions (Nos. 04-1020; 04-1033; 04-1036; 04-1045; and 04-1177) raising relatively more weighty constitutional challenges to ownership regulations; arguing that § 202(h) prohibited the tightening of ownership rules; and seeking reversal of the Third Circuit's decision in *Prometheus I*. *See* Brief for the Federal Respondents in Opposition at 12, *Media Gen., Inc. v. FCC*, No. 04-1020 et al. (2005). The Government explained that the "Third Circuit correctly articulated the deferential standard of review that courts must apply in examining the Commission's ownership rules" and opposed granting review of the "factbound question whether the Commission adequately provided sufficient justification for its new rules." *Id.* at 14–15. Noting that the Third Circuit's interpretation of § 202(h) dovetailed with the D.C. Circuit's, the Government sought a conditional writ only if the Court granted review on this splitless legal question. Conditional Cross-Petition for a Writ of Certiorari at 16, 19–20, *FCC v. Prometheus Radio Project*, No. 04-1168 (2005). All petitions were denied.

The Government again opposed review following *Prometheus II*, reiterating that the Third Circuit's interpretation of the scope of § 202(h) posed no circuit conflict. *See* Brief for Federal Respondents in Opposition at 10–11, *Nat'l Ass'n of Broads. v. FCC*, No. 11-698 et al. (2012) ("SG 2012 BIO"). The Government urged denial because the Third Circuit's "fact-bound

resolution of a garden-variety issue of administrative law, regarding an ownership rule that the FCC is currently reevaluating, is correct and does not warrant this Court's review." *Id.* at 9. This Court agreed.

This time, there is no claimed constitutional error (as there was in 2005), and again no conflict on the meaning of the statute—only disagreement with the result of the Third Circuit's application of properly stated legal standards. That the Government (for now) is unhappy with the Third Circuit's application of long settled standards—standards that the Government itself has repeatedly endorsed—makes this case no less "garden variety" than it was twice before, particularly because the Third Circuit left the door wide open for the Commission to fix problems of the agency's own creation by providing the requisite reasoned analysis.

B. As the Government Acknowledges, No Question of Statutory Interpretation Is Presented.

The Government candidly seeks only error correction, requesting no adjustment of legal standards, and urging principally that "the decision below is wrong." SG Pet. 15. Industry Petitioners, in contrast, contend this case raises questions about the scope of § 202(h). Yet this case presents no question about either the well-established and conflict-free scope of § 202(h), or the agency's authority to weigh ownership diversity as part of the requisite "public interest" inquiry.

1. There is no circuit conflict, and none is alleged here. Both courts of appeals to have considered the question agree that § 202(h) requires the Commission to adequately explain how its decision serves the public interest—including the long-recognized public interest in ownership diversity—when the FCC decides whether to retain or repeal an ownership rule. App. 13a (quoting *Prometheus I*, 373 F.3d at 395); *Fox I*, 280 F.3d at 1042 ("In the context of the regulation of broadcasting, 'the public interest' has historically embraced diversity (as well as localism) and nothing in § 202(h) signals a departure from that historic scope.") (citation omitted).[3]

The Third Circuit has taken pains to reasonably accommodate the Commission despite its years of delay and fundamental errors unrelated to ownership diversity. In *Prometheus III*, for example, the Third Circuit bemoaned the fact that "nearly a decade ha[d] passed since the Commission last completed a review of its broadcast ownership rules," 824 F.3d at 37, yet agreed with the Government that the "mass vacatur" some industry petitioners requested then was inappropriate given the likelihood that the Commission would be able to "justify at least some restrictions on broadcast ownership." *Id.* at 52. This is precisely what happened in 2016, when the

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[3] The *Fox I* panel initially interpreted the phrase "necessary in the public interest" to mean that a "regulation should be retained only insofar as it is necessary in, and not merely consonant with, the public interest." *Id.* at 1050. That narrow reading was rescinded on rehearing, with the en banc D.C. Circuit leaving that question open. *Fox II*, 293 F.3d at 540.

Commission opted to retain many of the existing local ownership limitations.

Neither petition contends that another circuit would apply different legal standards. And given the Commission's pattern of lengthy quadrennial review delays, *see* pp. 8–9, *supra*—the 2018 quadrennial review is still in process—the Government can hardly blame the Third Circuit's case management for delays in executing policy choices that the FCC itself rejected as recently as 2016.[4]

2. This latest round of review by the Third Circuit did not alter the settled legal standards governing § 202(h) reviews, nor elevate "atextual" concerns (NAB Pet. 14) above textual ones. Nowhere in the three orders under review does the Commission even hint at endorsing the primary contention of Industry Petitioners (NAB Pet. 18–20): that § 202(h) mandates an analysis of competition alone and that consideration of ownership diversity is a requirement wrongly created by the Third Circuit and used to displace the statutorily mandated analysis. On the contrary, in both the *2016 Order*, 31 FCC Rcd. at 9870 and the *Reconsideration Order*, App. 167a–68a & n.49, the Commission expressly endorsed the goal of

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[4] No party claims the Third Circuit's routine retention of jurisdiction over its remand orders is legal error, much less error that warrants an exercise of this Court's supervisory powers. Sup. Ct. R. 10. Nor could they. The judicial housekeeping in this case accords with established practice. The D.C. Circuit recognized as much when it transferred *Prometheus III* back to the Third Circuit, *Prometheus III*, 824 F.3d at 39 & n.3, as it did for the two orders under review here that first landed in the D.C. Circuit. *See* p. 8, *supra*.

ownership diversity, accepted it as a well-established part of the § 202(h) "public interest" analysis, and did so entirely apart from the agency's recognition of its independent obligation to comply with the Third Circuit's remand instructions.

Section 202(h) implements—not replaces—the public interest standard. It directs the FCC to determine whether "as a result" of competition its ownership rules are still necessary to serve the same public interest standard the FCC has implemented since 1934. As the Commission has long acknowledged, including in its petition here, "[i]n applying the public-interest criterion, the FCC has historically considered the values of localism and five different types of diversity," including "viewpoint, outlet, program, source, and minority and female ownership diversity," SG Pet. 5 (quoting *2002 Review*, 18 FCC Rcd. at 13627). An unbroken line of agency rulings, reaffirmed by judicial decisions, confirms that diversity is an entrenched part of the "public interest" analysis under § 202(h).

3. Industry Petitioners' argument that the agency should be free to reweigh the public interest factors or reverse its long-standing approach to ownership diversity by refusing to consider the issue at all is beside the point. The agency did not do so. And this *post hoc* rationale–especially when presented by a regulated party, not by the agency itself—cannot salvage an agency action that *did* consider ownership diversity important but analyzed it in a woefully inadequate manner. *See Dep't of Homeland Sec. v.*

Regents of Univ. of Cal., 140 S. Ct. 1891, 1907 (2020) ("*DHS*").

A "reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). This is a "foundational principle of administrative law": a court may uphold agency action only on "the grounds that the agency invoked when it took the action." *DHS,* 140 S. Ct. at 1907 (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)).

The FCC has "historically embraced" ownership diversity as part of its public interest mandate, *see Fox I*, 280 F.3d at 1042, and continues to do so. If the Industry Petitioners wish to upend this settled interpretation of the public interest, they must first convince the FCC to grapple with the issue. As always, the Commission remains "free to change" its existing policies, as long as it provides a "reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016).[5] Nothing in the Third Circuit's opinion

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[5] The Commission continues to espouse race and gender ownership diversity as an important part of its quadrennial review considerations. *See, e.g.*, *2018 Review Notice*, 33 FCC Rcd. at 12116 (recognizing that the local radio ownership rule "helps to promote viewpoint diversity and localism and is consistent with its policy goal of promoting minority and female ownership"); *id.* at 12145–55 (seeking comments on a range of diversity-related proposals).

holds otherwise. App. 34a (expressly acknowledging the Commission's authority to weigh policy goals differently).

Industry Petitioners' proper forum is the Commission, not this Court. Because the Commission did not rest its decisions on the unprecedented theory that § 202(h) requires it to consider only (or even primarily) competition, its orders cannot be upheld based on that straightjacketed analysis. And whether the orders' actual articulated basis was reasonable is a garden-variety administrative law question that does not merit this Court's review.

II. This Court's Intervention Is Unnecessary Because The Agency Has All The Tools It Needs To Fix Problems Of Its Own Making.

Because the 2018 Quadrennial Review is already underway, and because the Third Circuit has asked only that the Commission keep its word and show its work, this Court should not intervene in an ongoing process that is fully within the Commission's control.

A. The 2018 Quadrennial Review Now Underway Is Not "Distorted" by the Third Circuit's Decision.

In December 2018, the Commission initiated its latest Quadrennial Review, seeking comment on whether local ownership restrictions continue to serve the public interest or whether they should be modified or eliminated given changes in the media marketplace.

The FCC also sought comment on three proposals relevant to promoting diversity in the broadcast industry. As mandated by Congress, the Commission will take a "fresh look" at its media ownership rules. *2018 Review Notice*, 33 FCC Rcd. at 12114.

As the Government has previously recognized, this ongoing quadrennial review process makes review of the Third Circuit's backward-looking decision "particularly unwarranted" because Petitioners and others "have the opportunity to create a new record … that could support a regulatory approach other than the one adopted in the order at issue here." SG 2012 BIO at 15. Comments filed in the 2018 Review before the Third Circuit's decision have urged as much.[6] And whatever the FCC finally determines "will be judicially reviewable on the new administrative record, under the applicable standards." SG 2012 BIO at 15.

No statutory interpretation "distorts" this process, NAB Pet. 25, because, as explained, *see* p. 14, *supra*, the Third Circuit did not interpret the statute in a new or different way here. And no court-imposed "effective[] require[ment]," SG Pet. 32, demands a precise finding on ownership diversity before altering

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[6] *See, e.g.*, The Leadership Conference on Civil and Human Rights, Comment on 2018 Quadrennial Regulatory Review (Apr. 29, 2019), https://www.fcc.gov/ecfs/filing/10429280917704 ("Leadership Conference 2018 Comments"); Free Press, Comment on 2018 Quadrennial Regulatory Review (Apr. 29, 2019), https://www.fcc.gov/ecfs/filing/10429735619589; Multicultural Media, Telecom and Internet Council, Comment on 2018 Quadrennial Regulatory Review (Apr. 28, 2019), https://www.fcc.gov/ecfs/filing/1042987748822.

ownership rules. Contrary to Petitioners' assertions, the Third Circuit did not invent or inject ownership diversity into the proceedings, nor does its decision require the Commission to give any predetermined weight to ownership diversity in balancing competing policies. App. 33a–34a.

The Third Circuit's retention of jurisdiction over its remand orders—which no party argues was legal error—does not distort future quadrennial reviews, either. First, the standards would be identical in any court of appeals, and Petitioners have not argued otherwise. Nothing in the remand here "deter[s]" other courts of appeals from rendering decisions in cases properly before them, SG Pet. 33, or "effectively block[s]" other courts from reviewing anything other than the remand itself, NAB Pet. 25. If a case filed in the D.C. (or another) Circuit did not fall within the scope of the remand, no court would transfer it only for the sake of "conce[ding] to the panel's asserted power." NAB Pet. 27.

B. Further Backward-Looking Judicial Review Is Unnecessary.

The sky will not fall if this Court allows the Commission to do its job without weighing in. Broadcasters are operating under rules that the FCC approved in 2016. There is no harm done—and much benefit—in requiring the agency to show its work and reasonably address (with proper notice) all aspects of its interpretation of the public interest if it opts to change those rules.

The industry is always evolving—as are the agency's views—and the quadrennial review process is designed to account for that evolution. As recently as 2016—long after the explosion of the internet and the other technological developments discussed by Petitioners—the FCC concluded local ownership limits remain necessary to preserve competition. That the FCC reached the contrary conclusion in 2017 is hardly a decades-long freezing of rules that the agency has long wanted to jettison, as the Government would have it. SG Pet. 29–30.

Broadcasting continues to drive local news and content creation. Eighty-six percent of Americans get local news from local TV stations and 79 percent from radio stations.[7] And although cable, broadband, and internet access have changed the national media landscape, those changes have not resulted in more local content in equal measure in local markets across the country.[8] Many households lack access to reliable, high-speed internet—particularly lower-income households, households in rural areas, and households with people of color—so any local content available online is

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[7] *For Local News, Americans Embrace Digital but Still Want Strong Community Connection*, PEW RES. CTR. 14 (Mar. 26, 2019), https://tinyurl.com/y8xb7bya.

[8] *See* Christopher Terry, *Localism as a Solution to Market Failure: Helping the FCC Comply with the Telecommunications Act*, 71 FED. COMM. L. J. 327, 348 & n.150 (2019) (recognizing that "[l]ocalism was the loser" in the 2017 reconsideration order and that the "satellite, cable, and web-based outlets that provide so much competition and viewpoint diversity on national and international subjects provide very little content about local communities outside of the largest metropolitan areas").

unavailable to them, while broadcast content remains freely available over the air.[9] What's more, the interaction between new media and traditional media within the market is constantly evolving in ways that might affect the competition analysis. As the Commission has recognized, much of what most Americans consume online consists of uploaded video of television broadcast news.[10] And the rise in news consumption via the internet and social media only makes independent, trusted local broadcast sources more important, not less.[11]

The 2018 Quadrennial Review can address such evolution—as well as accommodate any shifting views of the regulators.[12] This Court's review of a reviewing court's application of settled standards to a closed record from over four years ago cannot. In fact, by

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[9] Leadership Conference 2018 Comments, *supra*.

[10] *2018 Review Notice*, 33 FCC Rcd. at 12113.

[11] *E.g.* John Eggerton, *Local TV Tops Pandemic News Sources*, MULTICHANNEL NEWS (June 3, 2020), https://tinyurl.com/yafc985l; Dominik A. Stecula et al., *How Trust in Experts and Media Use Affect Acceptance of Common Anti-vaccination Claims*, HARV. KENNEDY SCH. MISINFORMATION REV. (Jan. 14, 2020), https://tinyurl.com/y9a6abjf; John Sands, *Local News Is More Trusted than National News—But That Could Change*, KNIGHT FOUND. (Oct. 29, 2019), https://tinyurl.com/y8dfyo7c.

[12] Shifts are not uncommon. In 2009, for example, the Commission requested the Third Circuit to retain its stay of the 2006 Review because that order no longer incorporated the views of a majority of the Commissioners. *See* Status Report of the Federal Communications Commission, *Prometheus Radio Project v. FCC*, No. 08-3078 et al. (3d Cir. Oct. 1, 2009), *available at* https://tinyurl.com/ybkgn8lt.

looking in the rearview mirror and focusing on whether the Third Circuit did anything wrong—rather than allowing the agency to move on and get it right—further judicial review might only make matters worse.

Ultimately, the Commission has all the tools it needs to free itself from this revolving-door review of its own making. As would be the case before any reviewing court, all the agency need do to break free is provide a reasoned explanation about how its rules meet its own clearly stated goals.

III. The Third Circuit's Decision Is Correct.

Shorn of Industry Petitioners' strained attempt at statutory window dressing, the decision below boils down to a straightforward arbitrary-and-capricious holding requiring "a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. The Third Circuit correctly held that a few conclusory paragraphs across three orders, using simplistic numerical tabulation and citing unreliable data (or no data at all), is not a reasoned basis for concluding that a radical change would not harm a policy goal that the agency itself has always held, and still embraces.

1. The Third Circuit's determination reflects the well-established administrative review principle long applied in § 202(h) cases: "notwithstanding the substantial deference to be accorded to the Commission's line drawing, the Commission cannot escape the requirements that its action not 'run[] counter to the evidence before it' and that it provide a

reasoned explanation for its action." *Sinclair*, 284 F.3d at 162 (quoting *State Farm*, 463 U.S. at 43).

a. The FCC asserted below that the 2017 rule changes would not harm female ownership of broadcast stations. *E.g.*, App. 195a. This conclusion was wholly speculative. As the Third Circuit held, *id.* at 30a, and Petitioners do not dispute, the FCC set forth *no* data about female ownership. That fails basic requirements of administrative decisionmaking; "deference cannot fill the lack of an evidentiary foundation" for agency action. *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 (1986). To be sure, when "available data do not settle a regulatory issue," an agency "must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion." *State Farm*, 463 U.S. at 52.

But a conclusory statement that female ownership will not be harmed—with no explanation as to why or how the agency reached that judgment in the absence of any data—is hardly an "exercise [of] judgment." *Id.* Rather, it is an impermissible agency abdication of reasoning. *See id.* (deeming it insufficient to "recite the terms 'substantial uncertainty' as a justification" for rescinding a rule). And although the Government argues that the FCC could permissibly extrapolate from data on ownership by race, SG Pet. 24–25, because the agency did not do so below, its actions cannot be affirmed on that ground. *DHS*, 140 S. Ct. at 1909.

Wholly apart from the dispositive *Chenery* problem, the Government does not explain why it might be reasonable for the FCC to so extrapolate—

much less why it would be reasonable to do so from *this* data, which the FCC acknowledged was faulty and incomplete. An agency might be permitted to make predictions about apples from data about oranges, but only if it explains why apples and oranges are similar, and why its data on oranges is sound. The FCC showed neither.

In sum, the Third Circuit's conclusion that the FCC "failed to consider [an] important aspect[] of the problem," *DHS*, 140 S. Ct. at 1910—an aspect of the problem that the Commission stated was important, *e.g.*, App. 167a–68a & n.49—was eminently reasonable.

b. The Third Circuit also rightly held that the FCC could not reasonably rest its no-harm-to-ownership-diversity finding on a woefully inadequate "analysis" of faulty data. First, the FCC found no harm even though ownership by minorities *decreased* after past relaxation of ownership rules. App. 28a. Data from an entirely separate data set—which the Commission admitted could produce different numbers based on methodological differences rather than true market characteristics, *id.* at 66a–67a nn.211–12—showed an increase about a decade later.

Even if (counterfactually) the two datasets could reasonably be compared, a statistics degree is not required to understand that an increase in the absolute number of minority-owned stations years later is meaningless without comparison to the total number of stations during the same period. Under the FCC's theory, the Great Depression did not reduce employment levels, so long as many years later there

are more jobs, measured by a different metric, and with no accounting for the size of the population seeking those jobs. *See* App. 31a–32a. Seeing the flaws in such reasoning does not require a "regression analysis," SG Pet. 27; simple logic proves the point.

The Government argues that, because the data were so incomplete, "a more precise statistical analysis would have been futile." SG Pet. 27. But that the underlying data were known to be faulty only makes the situation worse. The APA does not permit an agency to skip reasoned analysis because its data is faulty; on the contrary, known faulty data requires the agency to do more analysis to correct for known errors. *See New Orleans v. SEC,* 969 F.2d 1163, 1167 (D.C. Cir. 1992) ("[A]n agency's reliance on a report or study without ascertaining the accuracy of the data contained in the study or the methodology used to collect the data is arbitrary.") (internal quotation omitted). The Third Circuit correctly found that the agency failed to attempt such corrections here, App. 31a—even though commenters submitted analyses demonstrating how the data could be corrected to provide a more meaningful evaluation, *see id.* at 67a.[13]

Nothing in the Third Circuit's ruling precludes the Commission from getting useful data, *contra* SG Pet. 31–32. The FCC can, for example, correct any

[13] Respondents explained below how the Commission mischaracterized the findings of Free Press studies that chronicled multiple data problems and concluded after simple but necessary adjustments to the data that increased industry consolidation would harm ownership diversity. Citizen Petitioners Opening Brief at 28–29, *Prometheus Radio Project v. FCC*, No. 17-1107 (3d Cir. May 3, 2019).

unreliable ownership data filed, cross reference its existing comprehensive transaction data with ownership filings to fill in gaps and improve comparisons over time, and ensure complete reporting by broadcast licensees. Leadership Conference 2018 Comments, *supra*.

And even if "perfect data," SG Pet. 23–25, prove unavailable, the Third Circuit acknowledged that the Commission might be able to rest its conclusions on its experience or valid information provided in comments. App. 33a; *see Nat'l Citizens Comm. for Broad.*, 436 U.S. at 797 (permitting the FCC to rely on its "judgment, based on experience" instead of data that was "difficult to compile"). But the Commission did nothing like that here. Instead, the agency stated that it *had* analyzed data and then relied exclusively on that faulty analysis to draw conclusions about its own stated policy goal. The Third Circuit acknowledged, App. 33a, that the APA "imposes no general obligation on agencies to produce empirical evidence." *Stillwell v. OTS (Office of Thrift Supervision)*, 569 F.3d 514, 519 (D.C. Cir. 2009). But when agencies do rely on data, they "do not have free rein to use inaccurate data," *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 56 (D.C. Cir. 2015) (emphasis omitted), which is what the Commission did here.

What's worse, the FCC's conclusion in the *Reconsideration Order* that this faulty data justified relaxing the ownership rules was a wholly unexplained about-face from its judgment in the *2016 Order* that precisely the same data did *not* justify relaxing the ownership rules. *See, e.g.*, App. 67a. With

no change in the administrative record, the Commission abandoned its finding that ownership restrictions promote ownership diversity and that the data do not justify loosening them, *e.g.*, App. 64a, 68a. Without explaining why or how, it concluded the opposite: the rules have no effect on ownership diversity, and the data support relaxing them, *e.g.*, App. 195a, 198a. This unexplained administrative reversal is yet another reason the Commission's decision fails basic tests of arbitrariness. When an agency changes positions, it "must … show that there are good reasons for the new policy." *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009)).

The Third Circuit's ruling leaves the Commission free to set policy as it wants. But "[i]f [the FCC] finds that a proposed rule change would likely have an adverse effect on ownership diversity but nonetheless believes that rule is in the public interest all things considered, it must say so and explain its reasoning." *See* App. 34a. This holding neither impermissibly usurps the agency's policy-weighing role, nor requires the FCC to give "priority" to ownership-diversity concerns despite Industry Petitioners' insistence otherwise, NAB Pet. 21–22. Rather, the Third Circuit held only that if the FCC wished to weigh ownership diversity differently, it needed to do so forthrightly and provide a reasoned explanation. App. 34a.

2. Besides being arbitrary, the FCC's "analysis" of ownership diversity would fail for lack of adequate notice. To comply with the APA's procedural requirements, an agency must subject the "most

critical factual material" used by the agency to "informed comment" in order "to afford affected parties an opportunity to present comment and evidence to support their positions." *Chamber of Commerce v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006); *see also Prometheus II*, 652 F.3d at 445–46. Such notice of the grounds of agency action fosters transparency and dialogue, and serves "important values of administrative law," by allowing the public to "respond fully and in a timely manner to an agency's exercise of authority." *DHS*, 140 S Ct. at 1909.

The FCC gave no hint of its intent to rely on or compare the NTIA's 1990s-era data and the FCC's more recent ownership data. Perhaps if the Commission had done so, commenters could have helped raise its Statistics grade by "point[ing] out where that information is erroneous or where the agency may be drawing improper conclusions." *NARUC v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984). Respondents raised this lack-of-notice issue in the Third Circuit, Op. Br. at 33, but the court did not need to reach it after vacating the rules on other grounds.

Because the Third Circuit never addressed the Commission's failure to provide adequate notice, even if this Court were to decide the Third Circuit erred in its analysis of the agency's reasoning, the case would need to be remanded for consideration of the notice issue—precisely the sort of procedural defect that nearly always demands vacatur, *see Chamber of Commerce*, 443 F.3d at 904.

3. The Third Circuit's vacatur properly encompassed all aspects of the FCC's decisionmaking

touching on ownership diversity. When the Commission adopted a revenue-based "eligible entity" definition in the *2016 Order*, it did so alongside the decision to maintain ownership restrictions that it found promoted ownership diversity. In that context, the FCC might have been able to justify its decision to adopt a revenue-based "eligible entity" definition rather than something targeted more directly to race and gender ownership diversity, because the ownership restrictions could operate to make stations available for purchase by new owners rather than allowing further consolidation of stations in existing owners' hands. But the Third Circuit never reached that issue, given the agency's own flip-flop on its ownership rules. Similarly, the Commission adopted revenue-based criteria in the *Incubator Order* only after it concluded (unreasonably) that its relaxation of the rules would not harm ownership diversity. With that premise vacated by the Third Circuit's decision, the Third Circuit reasonably returned all these programs to the Commission for reconsideration. App. 34a.

Stated another way, as the Government acknowledges, SG Pet. 28, the "eligible entity" definition alone does not expressly promote race and gender ownership diversity; neither does the *Incubator Order*'s definition (and that order applies only to radio). The Commission—which continues to espouse such ownership diversity as a policy goal, *2018 Review Notice*, 33 FCC Rcd. at 12116—apparently was comfortable with the scope of those programs after concluding that its ownership-restriction repeal would not harm race and gender

ownership diversity. But after rightly rejecting that no-harm finding, the Third Circuit reasonably returned the entire regulatory scheme to the agency for it to decide how best to use the mix of tools at its disposal—including ownership restrictions, exceptions for "eligible entities," and incubator programs—to best promote the longstanding ownership diversity goals which remain as important today as when first announced over half a century ago.

As required by Congress, in its statutorily mandated review, the Commission is already in the process of taking a "fresh look" at its media ownership rules. 33 FCC Rcd. at 12114. In so "deal[ing] with the problem afresh," *Chenery*, 332 U.S. at 201, all the Commission need do is "comply with the procedural requirements for new agency action." *DHS*, 140 S. Ct. at 1908. Nothing in the Third Circuit's opinion holds otherwise.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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