No. 19-1231

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

PROMETHEUS RADIO PROJECT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The decision below vacated the Federal Communications Commission's (FCC or Commission) comprehensive reforms of outdated media ownership rules, with far-reaching consequences for domestic broadcast markets. The Commission first concluded in 2003 that the ownership rules should be substantially overhauled because they inhibit beneficial combinations between struggling traditional outlets and no longer reflect current market realities. During the ensuing period, the Commission has repeatedly reaffirmed that position, while at the same time adhering to its longstanding view that potential effects on female and minority ownership are among the factors the agency should consider in determining whether particular regulatory changes will serve the public interest. In the Orders under review, after a searching examination of the available evidence, the agency concluded that reform of the ownership

rules is unlikely to affect female and minority ownership and that the bare possibility of an adverse effect on such ownership is an insufficient reason to forgo regulatory changes that are otherwise highly desirable.

For the past *17 years*, however, the same divided Third Circuit panel has repeatedly thwarted the Commission's efforts to reform its ownership rules. In the decision below, it rejected the Commission's reasoned policy judgments and imposed a rigid requirement that the Commission identify the likely effect on female and minority ownership with some unspecified degree of precision before any change can take effect. Respondents' defense of that ruling largely repeats the flawed reasoning of the court below, while ignoring this Court's precedents repeatedly affirming the breadth of the FCC's discretion to regulate in the public interest. See, *e.g.*, *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (*NCCB*). Respondents' efforts to characterize the petition for a writ of certiorari as seeking one-off error correction are similarly unpersuasive. The panel's decisions have distorted the quadrennial-review process, and they will seriously impair the Commission's ability to regulate in the public interest going forward. This Court's review is warranted.

A. Respondents' Defense Of The Decision Below Is Unpersuasive

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This Court has repeatedly affirmed the FCC's broad discretion to regulate in the public interest. See *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582 (1981); *NCCB*, *supra*; *National Broad. Co.*

v. *United States*, 319 U.S. 190 (1943) (*NBC*). In the Orders under review, the agency carefully considered the record evidence, acknowledged gaps in the available data, and reached reasonable policy conclusions in light of both the record and the agency's own extensive experience. Respondents' attacks on those Orders lack merit.

1. The court of appeals erred in treating the possibility of adverse effects on female and minority ownership as a dispositive consideration in all FCC quadrennial-review proceedings. See Pet. App. 34a. Respondents observe that "[t]he FCC has 'historically embraced' ownership diversity as part of its public interest mandate, and continues to do so." Br. in Opp. 23 (citation omitted). But the Commission's longstanding practice of considering female and minority ownership as one factor in its public-interest analysis is vastly different from treating that consideration as an absolute prerequisite in all rulemakings. Respondents do not defend or even address the court of appeals' determination that "the Commission must ascertain on record evidence the likely effect of any rule changes it proposes * * * on ownership by women and minorities." Pet. App. 33a-34a. The court's ruling substantially constrains the FCC's "broad discretion in determining how much weight should be given to" goals like gender and racial diversity, "and what policies should be pursued in promoting" those goals. *WNCN*, 450 U.S. at 600.

2. The court of appeals also disregarded the deferential arbitrary-and-capricious standard by substituting its own judgment for the agency's reasoned policy analysis. See Pet. App. 28a-32a. Respondents fault the Commission for "set[ting] forth *no* data about female ownership" and relying on "a woefully inadequate 'analysis' of faulty data" pertaining to minorities. Br. in Opp.

30-31. But the Commission repeatedly solicited data pertaining to the effects of potential rule changes on female and minority ownership. See Pet. App. 45a. When commenters failed to submit meaningful evidence on the subject, see *id.* at 33a, 45a, the Commission drew reasonable inferences from the available data, while acknowledging the evidentiary gaps that respondents now highlight. See, *e.g.*, *id.* at 73a nn.325-326.

Noting that the FCC here made an affirmative finding of "no harm," respondents argue that, "when agencies do rely on data, they 'do not have free rein to use inaccurate data.'" Br. in Opp. 31, 33 (citation omitted). That argument gives insufficient weight to the agency's factual findings, see *State Farm*, 463 U.S. at 43, and reflects a misunderstanding of the FCC's core rationale here. Although the Commission stated several times that modifications to the ownership rules would not likely reduce female and minority ownership, see, *e.g.*, Pet. App. 195a, its bottom-line conclusion was that it could not "justify retaining the rule[s] * * * based on the unsubstantiated hope that the rule[s] will promote minority and female ownership." *Id.* at 215a; see *id.* at 200a, 236a (similar). The agency thus reasonably concluded that, given the compelling competitive justifications for loosening the ownership rules and the absence of meaningful data suggesting that this step would reduce female and minority ownership, the bare possibility that loosening the rules would have that adverse effect was not a sufficient reason to forgo an otherwise beneficial regulatory change.

This Court's precedents confirm the FCC's discretion to make the policy choices it made here. In advancing the public interest, the Commission may "rely on its judgment, based on experience," "notwithstanding the

inconclusiveness of the rulemaking record"—particularly when the relevant evidence "is difficult to compile" and the potential effects of the rule changes do "'not lend themselves to detailed forecast.'" *NCCB*, 436 U.S. at 796-797 (citation omitted); see *NBC*, 319 U.S. at 224 ("It is not for us to say that the 'public interest' will be furthered or retarded by the [regulations]."); *WNCN*, 450 U.S. at 600; Pet. 17-19. Respondents address *NCCB* only in a parenthetical, see Br. in Opp. 33, and do not address *WNCN* or *NBC* at all. The Third Circuit's methodology was flatly inconsistent with those decisions.

Finally, respondents contend that the Reconsideration Order "was a wholly unexplained about-face from [the FCC's] judgment in the *2016 Order* that precisely the same data did *not* justify relaxing the ownership rules." Br. in Opp. 33; see 32 FCC Rcd 9802 (Reconsideration Order) (excerpted at Pet. App. 153a-242a); 31 FCC Rcd 9864 (2016 Order) (excerpted at Pet. App. 57a-152a). Respondents' argument (see Br. in Opp. 33-34) conflates two distinct conceptions of "ownership diversity."

The 2016 Order retained in significant part the three major ownership rules at issue here—the newspaper/broadcast cross-ownership rule, the radio/television cross-ownership rule, and the local television ownership rule—for the stated purposes of "promot[ing] competition" and "viewpoint diversity," and "not with the purpose of preserving or creating specific amounts of minority and female ownership." Pet. App. 63a-64a; see 31 FCC Rcd at 9944, 9951-9952. In adopting a "modest loosening" of the newspaper/broadcast cross-ownership rule in the 2016 Order, the Commission concluded—citing the same data at issue here—that the record "fails to

demonstrate" that this change was "likely to result in harm to minority and female ownership." 31 FCC Rcd at 9944. Although the 2016 Order also stated that the ownership rules "promote[] opportunities for diversity," Pet. App. 64a; see 31 FCC Rcd at 9944, 9952 (same), the Reconsideration Order explained that this observation "did not indicate a belief that the rule[s] would promote minority and female ownership specifically, but rather that the rule[s] would promote ownership diversity generally by requiring the separation of [media] station ownership." Pet. App. 199a; see *id.* at 215a, 236a (similar).

With respect to the general weighing of the costs and benefits associated with the agency's ownership rules, the Reconsideration Order unquestionably reflected a substantial departure from the analysis in the 2016 Order. But the agency explained in detail its reasons for concluding that, in light of extensive changes to the media landscape, the ownership rules no longer served the public interest. See Pet. 10. The court below did not find that aspect of the FCC's analysis to be deficient. With respect to the specific issue on which the court believed that additional evidence and analysis were required—the presence or absence of any meaningful link between the ownership rules and minority and female ownership—the Reconsideration Order was neither an "about-face" nor "unexplained." Br. in Opp. 33.

3. The Third Circuit compounded its errors on the merits by invalidating the Reconsideration and Incubator Orders in full, as well as the "eligible entity" definition from the 2016 Order, even though the court's reasoning pertained only to discrete aspects of the Reconsideration Order. See Pet. 27; see also 33 FCC Rcd 7911 (Incubator Order) (excerpted at Pet. App. 243a-272a).

Respondents argue (Br. in Opp. 35-37) that the Commission's adoption of a revenue-based eligible-entity definition and eligibility criteria depended on the agency's finding that repeal of the ownership rules would not reduce female and minority ownership levels. The Third Circuit did not endorse this proposition, and respondents cite nothing in the Orders indicating that the eligible-entity definition and eligibility criteria are contingent in this way. In the same vein, respondents suggest (*id.* at 36) that, in light of the FCC's repeal of the ownership rules, the Commission might be required to adopt an eligible-entity definition that is "targeted more directly to race and gender ownership diversity." Respondents do not engage, however, with the Commission's extensive analysis of the constitutional limitations on the use of race- and gender-conscious standards. See Pet. App. 120a-133a, 136a-152a, 264a.

4. In the alternative, respondents contend that the FCC's analysis of ownership diversity "fail[s] for lack of adequate notice." Br. in Opp. 34. The Third Circuit did not address this issue, see *id.* at 35, and the argument lacks merit. The notice of proposed rulemaking was "sufficiently descriptive of the subjects and issues involved so that interested parties [could] offer informed criticism and comments." *Air Transp. Ass'n of Am.* v. *Civil Aeronautics Bd.*, 732 F.2d 219, 224 (D.C. Cir. 1984) (citation and internal quotation marks omitted; brackets in original). And even if the notice could be deemed inadequate, the 2016 Order relied on the same statistical analysis whose use in the Reconsideration Order respondents attack as defective. See Pet. App. 66a-67a (comparing different data sets in rejecting "the claim that tightening the Local Television Ownership Rule will promote increased opportunities for minority

and female ownership"). Respondents therefore had an opportunity to criticize that analysis in conjunction with the reconsideration proceedings. Cf. *WNCN*, 450 U.S. at 591 n.22 (Court did "not consider the action of the Commission, even if a procedural lapse, to be a sufficient ground for reopening the proceedings" where the undisclosed study in question was released before the agency's "denial of reconsideration").

B. This Court's Review Is Warranted

This Court's review is necessary to undo the damage that the decision below inflicts on the Nation's broadcast markets and the Commission's ability to respond to market developments. Respondents characterize the petition for a writ of certiorari as seeking backward-looking error correction. That characterization ignores both the context of this litigation and the court of appeals' actual holding.

1. Section 202(h) of the Telecommunications Act of 1996, as amended, 47 U.S.C. 303 note, establishes an "iterative process" through which the FCC can keep pace with market developments by taking "a fresh look at its rules every four years" and reassessing "how its rules function in the marketplace." Pet. App. 48a (Scirica, J., concurring in part and dissenting in part). The Third Circuit's series of decisions has substantially impeded the proper functioning of that process.

Respondents contend that, in light of the Commission's short-lived 2016 decision to retain the ownership rules in significant part, this case "hardly [presents] a decades-long freezing of rules that the agency has long wanted to jettison." Br. in Opp. 27. But the blanket ban on newspaper/broadcast cross-ownership has remained in place *since 1975*, despite three separate FCC at-

tempts to repeal it. See Pet. 30. The broadcast ownership rule adopted 45 years ago cannot plausibly be thought to reflect current market realities. See *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 398 (3d Cir. 2004), as amended (June 3, 2016) (*Prometheus I*), cert. denied, 545 U.S. 1123 (2005).

In arguing that the ownership rules continue to serve a useful purpose, respondents cite extra-record sources for the proposition that "[b]roadcasting continues to drive local news and content creation." Br. in Opp. 27. But as the Reconsideration Order found, the rules may actually "prevent[] local news outlets from achieving efficiencies by combining resources." Pet. App. 173a, 180a. And by precluding the Commission's revised rules from ever taking effect, the court of appeals' repeated vacaturs have "depriv[ed] both the Commission and Congress [of] the valuable opportunity to evaluate the new rules and the effects of deregulation on the media marketplace," thus "[s]hort-circuiting" the iterative process the statute contemplates. *Prometheus I*, 373 F.3d at 438 (Scirica, J., dissenting in part, concurring in part). Respondents have no answer to this point.

2. If left in place, the Third Circuit's decision will also distort pending and future quadrennial reviews by imposing a blanket requirement that the FCC determine, with some unstated degree of precision, the effect of any change to the ownership rules on female and minority ownership. Pet. App. 34a. Respondents assert that "no court-imposed 'effective requirement' demands a precise finding on ownership diversity before altering ownership rules." Br. in Opp. 25-26 (brackets and citation omitted). That statement cannot be reconciled with the Third Circuit's unambiguous directive: "On remand the Commission must ascertain on record evidence the

likely effect of any rule changes it proposes and whatever 'eligible entity' definition it adopts on ownership by women and minorities, whether through new empirical research or an in-depth theoretical analysis." Pet. App. 34a. Respondents also assert that the court of appeals did not "require the Commission to give any predetermined weight to ownership diversity in balancing competing policies." Br. in Opp. 26. But by rejecting the Commission's conclusion that it could no longer retain the ownership rules "based on the unsubstantiated hope that [they] will promote minority and female ownership," Pet. App. 215a, the court plainly elevated potential effects on female and minority ownership over other considerations.

By requiring additional empirical analysis of ownership diversity, while preventing the regulatory changes that would allow the agency to study the new rules' effects, the Third Circuit's ruling leaves the agency with no apparent path forward. Respondents vaguely suggest that the FCC can "correct any 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." Br. in Opp. 32-33. But respondents do not explain how the tabulation of *actual* female and minority ownership levels—which the FCC was already doing well before the Third Circuit's decision, see, *e.g.*, Pet. App. 78a—will help the FCC to predict the effects of innovative rule changes that it has not been allowed to implement.

Given the Third Circuit's distortion of ongoing and future quadrennial-review proceedings, respondents' plea for the Court to "allow[ ] the agency to move on and get it right" is hard to take seriously. Br. in Opp. 29;

see *id.* at 24-29. Over the past 17 years, the Commission has repeatedly attempted to comply with the panel's judicially imposed standards, and each time the court of appeals has rebuffed the agency's effort. Remitting the Commission to yet another round of administrative review—to be performed in the shadow of the Third Circuit's critical misstatement of the governing legal standard—would merely prolong the FCC's inability to fulfill its obligations under Section 202(h).

3. Finally, the Third Circuit's continued retention of jurisdiction, including in the decision below, see Pet. App. 37a-38a, has effectively prevented (and will continue to prevent) other courts from addressing the questions presented here. Respondents describe the court of appeals' retention of jurisdiction as "routine," Br. in Opp. 21 n.4, but they do not dispute that other circuits have acceded to it and that future legal challenges falling within "the scope of the remand" will be heard by the Third Circuit. *Id.* at 26. Respondents' contention (*id.* at 1) that the absence of a circuit conflict militates against certiorari therefore rings hollow.

Respondents also attempt to leverage the government's opposition to certiorari at earlier stages of this litigation, arguing that a "plea for pure error correction is even less certworthy now." Br. in Opp. 18. But the government's previous restraint simply confirmed its willingness to attempt in good faith to address the panel's concerns. When the government opposed certiorari in 2005 and 2012, it had not yet experienced 17 years of futility in attempting to comply with the Third Circuit's misapprehension of the governing standards. Nor had the court of appeals yet saddled the Commission with a rigid requirement that it ascertain, via "empirical research or an in-depth theoretical analysis,"

Pet. App. 34a, the future effects of any rule changes on female and minority ownership.

The legal and practical significance of the decision below can adequately be appreciated only by considering the cumulative effects of the court of appeals' repeated vacatur orders issued over an extended period of time. This Court's review is necessary to free the Commission from the "revolving-door review" perpetuated by the Third Circuit's legal errors. Br. in Opp. 29. This Court has previously granted review to preserve the Commission's authority to regulate in the public interest, see, *e.g.*, *NCCB*, *supra*; *WNCN*, *supra*, and the same course is warranted here.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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